A Comparative Study of Stability of Invention Patent and Utility Model Patent

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The utility model patent has long been known as a "petty invention", but it has not been attached importance as sufficient as the invention patent. In recent years, with the emergence of some important cases involving utility model patents, such as the Chint case, the practice and academic communities have begun, once more, to look into the utility model patent, and been making more and more researches on it. By virtue of a comparative study of invention and utility model patents and based on the courts decisions, this article is meant to look into the issue of the stability of the right of utility model patent, especially the differences between the two categories of patents in terms of the standard of inventiveness.

I. An overview of cases

The Beijing Higher People's Court is the final court to adjudicate cases involving validity of patents in China. In 2012, the Beijing Higher People's Court terminated 391 cases reviewing patent reexamination and invalidation decisions. Of these, 80 were cases involving reexamination decisions and 311 cases involving invalidation decisions.[1] This article is a preliminary study of the final decisions that are available for general public in cases involving invalidation of invention and utility model patents.[2]

1. Interested parties

Table 1: Distribution of patentees[3]

	Foreign-related enterprises	Domestic enterprises	Domestic individual persons	Mixed*	Total
Invention	31	27	11	1	70
%	44.3	38.6	15.7	1.4	100
Utility model	2	43(30)	49	2	96(83**)
%	2.1(2.4)	44.8(36.1)	51(59)	2.1(2.4)	100

Table 2: Distribution of invalidation requesters[4]

	Foreign-related enterprises	Domestic enterprises	individual persons*	Mixed	Total
Invention	9	39	18	4**	70
%	12.9	55.7	25.7	5.7	100
Utility model	17(4)	56	22	1***	96(83)
%	17.7(4.8)	58.3(67.5)	22.9(26.5)	1.1(1.2)	100

As the preceding tables show, in patent invalidation cases, the patentees of the invention patents in suit are mostly enterprises, especially foreign-related ones; while the utility model patentees are mostly domestic enterprises and individual persons, with slightly more patentees being domestic individual persons. As for invalidation requesters, both the

invention and utility model patents are challenged mainly by domestic enterprises, then by individual persons and finally by foreign-related enterprises. The percentage of the invalidation requesters of the two categories of patents is slightly different, but the difference is minor on the whole as the two categories of patents are challenged by similar challengers.

It needs to be explained that in patent invalidation cases, "straw man" is a rather common strategy, that is, the real requesters do not file invalidation requests in their own name, but do so by letting non-interested third-parties to file the request, for the purpose of hiding themselves. In practice, these third-party "straw man" are often individual persons. For this reason, it is probable that some individual requesters are also "straw men" in the statistics.

2. Rate of successful invalidation

An invention patent is issued upon substantive prosecution, so it should be more stable than a utility model patent issued only upon formal examination. Following is a study of the validity of invention and utility model patents after two-instance hearings to see the rate of success of requests filed for invalidation of such patents. Besides, it is generally believed that enterprises, having, at their disposal, more resources and experience on matters of relevant technology and law, should be at certain advantage both as patentees and as invalidation requesters. Foreign-related enterprises, in an advantageous position in terms of technology, experience and money, are often considered as holders of better quality patents. For some other people, however, in China, being a foreign-related enterprise is possibly not a favourable factor. Therefore, besides the general success rate, the impact of foreign-related factors and enterprise background on the successful invalidation rate are respectively looked into.

Table 3: Patent validity after two-instance hearings[5]

	Wholly invalidated	Partially invalidated	Kept valid	Others*	Total
Invention	33	10	15	12	70
%	47.1	14.3	21.4	17.1	100
Utility model	38	8	34(21)	16	96(83)
%	39.6(45.8)	8.3(9.6)	35.4(25.3)	16.7(19.3)	100

Table 4: Relationship between patentees' foreign-related factors and successful invalidation rate[6]

	Domestic patentees					Foreign-related patentees				
	Wholly invalidated	Partially invalidated	Kept valid	Others	Total	Wholly invalidated	Partially invalidated	Kept valid	Others	Total
Invention	17	4	11	7	39	16	6	4	5	31
%	43.6	10.3	28.2	17.9	100	51.6	19.4	12.9	16.1	100
Utility model	38	7	34 (21)	15	94 (81)	0	1	0	1	2
%	40.4 (46.9)	7.4 (8.6)	36.2 (25.9)	16 (19.8)	100	0	50	0	50	100

Table 5: Relationship between invalidation requesters' foreign-related factors and successful invalidation rate[7]

	Domestic requesters					Foreign-related requesters				
	Wholly invalidated	Partially invalidated	Kept valid	Others	Total	Wholly invalidated	Partially invalidated	Kept valid	Others	Total
Invention	28	8	12	12	60	5	2	3	0	10
%	46.7	13.3	20	20	100	50	20	30	0	100
Utility model	35	8	21	15	79	3	0	13(0)	1	17(4)
%	44.3	10.1	26.6	19	100	17.6 (75)	0	76.5 (0)	5.9 (25)	100

Table 6: Relationship between patentees' enterprise background and successful invalidation rate[8]

	Enterprise patentees					Individual patentees				
	Wholly invalidated	Partially invalidated	Kept valid	Others	Total	Wholly invalidated	Partially invalidated	Kept valid	Others	Total
Invention	30	8	12	9	59	3	2	3	3	11
%	50.8	13.6	21.3	15.3	100	27.3	18.1	27.3	27.3	100
Utility model	15	5	18 (5)	9	47 (34)	23	3	16	7	49
%	31.9 (44.1)	10.6 (14.7)	38.3 (14.7)	19.1 (26.5)	100	46.9	6.1	32.7	14.3	100

Table 7: Relationship between invalidation requesters' enterprise background and successful invalidation rate

	Enterprise requesters					Individual requesters				
	Wholly invalidated	Partially invalidated	Kept valid	Others	Total	Wholly invalidated	Partially invalidated	Kept valid	Others	Total
Invention	24	7	12	9	52	9	3	3	3	18
%	46.2	13.5	23.1	17.3	100	50	16.7	16.7	16.7	100
Utility model	24	8	27 (14)	15	74 (61)	14	0	7	1	22
%	32.4 (39.3)	10.8 (13.1)	36.5 (23)	20.3 (24.6)	100	63.6	0	31.8	4.5	100

For above cases, more invention patents are wholly or partially invalidated than utility model patents. Not accounting the 13 cases involving utility model patents kept valid wholly, more or less the same number of invention and utility model patents are invalidated, but fewer invention patents are kept valid than utility model patents.

Regarding the foreign-related factor, of the above cases, more invention patents of foreign-related patentees are wholly or partially invalidated than the corresponding categories of patents owned by domestic patentees, and the rate of those that are kept valid is notably lower. While cases involving foreign-related patentees' utility model patents are too few to give valid data for the comparison, on the whole, foreign-related patentees' patents are not advantageous in terms of right stability. Besides, foreign-related invalidation requesters are so few that there is hardly any valid data available for the comparison.

As for the enterprise background, while it is generally believed that enterprises are holders of better quality patents, the rate of utility model patents owned by both individual and enterprise patentees are more or less the same; the rate of invention patents owned by enterprise patentees that are wholly invalidated is the highest, and that of those kept valid the lowest, and such patents are even less stable than utility model patents owned by individual patentees. While cases involving individual persons as patentees of invention patents are not many, and cannot give valid data for the comparison, on the whole, enterprise patentees do not have obvious advantage over individual patentees. Likewise, with regard to both invention patents and utility model patents, enterprise invalidation requesters almost have no advantage over individual requesters. Of course, as aforementioned, some individual requesters, in fact, are "straw men" with enterprises staying behind.

3. Causes of action

What are the causes of action involved in the second-instance court procedure of invalidation cases? Is there any difference with the two categories of patents? What are the causes of action involved in cases where patents in suit are wholly invalidated and will these causes of action become the most effective weapons to invalidate patents? Following is a study on these questions.

Table 8: Causes of action involved in second-instance court decisions[9]

	Invention	%	Utility model	%
Invalidation proceedings	16	22.9	5	5.2
First-instance procedure	1	1.4	/	/
Evidence	7	10	10	10.4
Application of law	1	1.4	1	1
Novelty	7	10	23	24
Inventiveness	45	64.3	65	67.7
Practical applicability	5	7.1	/	/
Subject matter	/	/	2	2.1
Art. 33	5	7.1	1	1
Rule 68	1	1.4	/	/
Rule 20.1	5	7.1	12	12.5
Art. 26.3	10	14.3	18	18.8
Art. 26.4	13	18.6	14	14.6
Rule 21.2	4	5.7	12	12.5
Average causes of action of each case	1.71		1.70	

Table 9: Causes of action involved in cases where patents are wholly invalidated[10]

	Novelty	Inventiveness	Art. 33	Art. 26.3	Art. 26.4	Rule 20.1	Total
Invention	5(2***)	24	2	1	2	1	35* (32)
%	14.3 (6.25)	68.6 (75)	5.7 (6.25)	2.9 (3.1)	5.7 (6.25)	2.9 (3.1)	100
Utility model	8	29	1	2	1	2	43**
%	18.6	67.4	2.3	4.7	2.3	4.7	100

As these tables show, the inventiveness of each category of patents is the focal issue in patent invalidation cases, which supports the conclusion that "considerable patent administrative cases involve inventiveness assessment"[11] as drawn in the Supreme People's Court's Annual Report on IP Cases (2012). There is no notable difference between the two categories of patents in terms of the range of causes of

action and in the number of causes of action in each case.

As for the most powerful weapon in patent invalidation, cases involving the two categories of patents wholly invalidated are more or less the same in terms of kind and percentage of causes of actions involved, of which inventiveness is the most common reason to have a patent invalidated. As to the difference, the rate of cases involving the novelty of utility model patents is higher, which is possibly due to the fact that utility model patents are issued without substantive prosecution.

II. Difference in standards regarding inventiveness of invention and utility model patents

1. Relevant law provisions

"Inventiveness means that, compared with the existing technology, the invention has prominent substantive features and represents a notable progress and that the utility model has substantive features and represents progress."[12] The difference in standards regarding inventiveness of invention and utility model patents remains unchanged since 1984 when the first Patent Law was promulgated in China.

Provisions in relation to the difference in standards regarding inventiveness of invention and utility model patents was first set forth in the Guidelines for Examination (2001), namely that "the standard of inventiveness of utility model is lower than that of inventions"[13], with the differences mainly embodied in the determination of presence of "technical motivation" in assessing inventiveness with the "problem-solution" approach, specifically in the fields and number of prior arts:

"As for an invention, what should be considered are not only its technical field, but also the similar and proximate or related field, as well as any other technical field in which the technical problem the invention solves enables a person in the art to seek a technical means. As for a utility model, what should be specially considered are its technical field and its similar and proximate or related field."

"As for an application for the invention patent, one, two or even more prior arts may be cited to assess its inventiveness; as for a utility model, generally one or two prior arts may be cited to assess its inventiveness; as for a utility model made by juxtaposing prior arts, more prior arts may be cited to assess its inventiveness depending on the facts of the case."[14]

Amendments have been made to these provisions in the Guidelines for Examination (2006), and incorporated in the current Guidelines for Patent Examination (2010). Specifically, the amendments are mainly embodied in the consideration of the field of prior art when utility model patents are involved: "As for a utility model, the examiner will normally focus on the technical field to which the utility model belongs. Where there is a clear technical teaching, for example, where there is an explicit description in the prior art to motivate a person skilled in the art to look for technical means in a proximate or relevant technical field, the proximate or relevant technical field may be considered."[15] Amendment with regard to the number of prior arts is in the form of expression, namely "for a utility model, normally one or two prior art references may be cited to assess its inventiveness. Where the utility model is made just by juxtaposing some prior art means, the examiner may, according to the circumstance of the case, cite more than two prior art references to assess its inventiveness."[16]

2. An overview of researches

To date, researches focused on the differences in the standards regarding inventiveness of invention and utility model patents are relatively few; especially those on the issue of varied standards followed in practice are rare.

As for theoretic research, there is a view that in assessing inventiveness with the "problem-solution" approach, "the subjective factor in the assessment mainly lies in the third step", that is, determining based on the most proximate prior art and other relevant prior arts of whether the technical solution of an invention or a utility model can be easily thought out by a person of ordinary skill in the art when facing the technical problem to be solved". Because such step "covers two relatively abstract concepts: 1) how to determine the technical skill of a person of ordinary skill in the art; and 2) how to determine whether the prior arts have offered teaching or motivation to combine the most proximate prior art and other prior arts or common general knowledge that the person of ordinary skill in the art has reason or is motivated to think out the claimed invention or utility model." "Therefore, these two abstract concepts in the assessment of inventiveness are, in fact, key to adjusting the standard of patentability."[17]

To be specific with respect to the differences in standards regarding inventiveness of invention and utility model patents, some scholars argue that the standards of inven-

tiveness of the two categories of patents are differentiated with the "teaching" in the Guidelines for Examination, specifically, with the varied scope of selected prior arts[18]. For some other scholars, on the one hand, the "'substantial feature' of utility model should be clearly defined to differentiate it from the definition of 'prominent substantial feature' of inventions". On the other hand, since whether there is any teaching in the prior art is determined from the perspective of "a person of ordinary skill in the art", the concept of such a person of ordinary skill in the art should not be the same in assessing the inventiveness of the two categories of patents. That is, the standard of "a person of ordinary skill in the art" used to assess the inventiveness of utility model patent is lower than that of "a person of ordinary skill in the art" used to assess the inventiveness of an invention patent. It is thus suggested to define "a person of ordinary skill in the art" in assessing the inventiveness of a utility model patent again as a "hypothetic person", supposedly having all the common technical knowledge in the relevant art of the utility model before the date of filing or priority, capable of knowing all the prior art in the art, and able to apply the regular experimental means before said date, but not inventively capable. In the presence of clear motivation in the prior art enabling a person of ordinary skill in the art to seek a relevant technical means in the proximate or related art or field, he is also able to acquire the relevant prior art, common technical knowledge and regular experimental means from the proximate or related art before said date of filing or priority."[19]

3. Different inventiveness standards in the practice as viewed from invalidation cases

As the study in relation to the causes of action in Tables 8 and 9 show, the matter of inventiveness assessment is the primary factor in patent invalidation cases. The relevant law in China has set forth different standards with regard to invention and utility model patents. In the following, we shall first look at the general picture related to the inventiveness of two categories of patents, then focus on the difference in the standards of inventiveness shown in practice.

Table 10: Presence of inventiveness[20]

	Involving inventiveness	Not involving inventiveness	Others*	Total
Invention	14	28	3	45
%	31.1	62.2	6.7	100
Utility model	20	38	7	65
%	30.8	58.4	10.8	100

Table 11: Technical Fields of prior art[21]

	Involving inventiveness				Not involving inventiveness			
	In the field	In proximate/ relevant field	In different field	Total	In the field	In proximate/ relevant field	In different field	Total
Invention	9	4	1	14	22	6	/	28
%	64.3	28.6	7.1	100	78.6	21.4	/	100
Utility model	9	4	7	20	37	1	/	38
%	45	20	35	100	97.4	2.6	/	100

Table 12: Nubmer of prior arts [22]

	Involving inventiveness					Not involving inventiveness					
	1	2	3	Total	Average	1	2	3	4	Total	Average
Invention	4	7	3	14	1.93	8	19	1	/	28	1.75
%	28.6	50	21.4	100		28.6	67.9	3.6	/	100	
Utility model	7	12	1	20	1.70	25	11	1	1	38	1.31*
%	35	60	5	100		65.9	28.9	2.6	2.6	100	

In the above cases, where final conclusions on inventiveness are made, the rate of the two categories of patents involving or not involving inventiveness is roughly the same, and the rate of invention patents found lacking inventiveness is slightly higher, which is compatible with the general trend discovered in Table 3, where more invention patents are wholly or partially invalidated, and few invention patents are kept valid than utility model patents.

As for the technical field, a point of difference between the standards of inventiveness of an invention patent and utility model patent is pointed out in the Guidelines for Examination, and the practice is very much compatible with the Guidelines for Examination. In cases involving utility model patents that are held not possessing inventiveness, almost all prior arts used are from the same technical field as the patents in suit. By contrast, the prior arts used in invention patent cases, though most are in the same technical field as the patents in suit, are more commonly seen in the proximate or relevant fields. Besides, a reference document held to be from a technical field different from that of the patents in suit should not be used for assessing inventiveness. In about one-third cases involving utility model patents that are held

possessing inventiveness, reference documents are found in different technical field from that of the patents in suit, thus are not relevant to the inventiveness of the patents in suit. The same percentage is found in fewer than 10% invention patent cases. As the comparison shows, with narrower technical field to choose prior art for utility model patents, to introduce prior art of similar or relevant technical field, the prior art must show clearer technical teaching. At least in this point, it is possibly more difficult, in practice, for a utility model patent to be invalidated.

The only case in which a prior art of proximate technical field was used to assess the inventiveness of a utility model patent[23] involved a patent for a utility model of "a thermal knife for sealing mushroom bags". The Beijing Higher People's Court concluded that the most proximate reference 1 related to a sealing knife in a machine for sealing and cutting plastics, whose technical field, technical effect and the solved technical problem were identical with those of the patent in suit. Reference 2 disclosed a bottom-sealing bag for cultivating mushroom in bag material. The patent in suit claimed a thermal knife for processing plastic bags. To make sealing line of the plastic bags in a certain shape, it was ok so long as the thermal knife touching the plastic bags was designed and processed in a relevant shape. Therefore, it was easy for a person of ordinary skill in the art, on seeing the bottom-sealed bag shown in reference 2, to think out the relevant device for making the bottom-sealed bag, and the technical field of reference 2 was proximate to that of the patent in suit. The patent in suit did not possess inventiveness compared with the combination of the most proximate references 1 and 2. This case clearly embodies the provision of the Guidelines for Examination that where a prior art offers clear motivation, it is possible to consider the proximate or relevant technical field.

For another point of difference between the standards of inventiveness of the two categories of patents in the Guidelines for Examination, namely the number of prior arts, the practice is highly compatible with the provisions of the Guidelines for Examination. In assessing the inventiveness of patents in suit, one or two prior arts are used in about 95% cases involving utility model patents, with the percentage of cases using only one prior art being obviously higher than that of invention patents, and the cases in which three or more prior arts are used are all cases involving patents made by juxtaposing prior art means. By contrast, in more than 50% cases involving invention patents are used two prior arts in combination to assess the inventiveness thereof. Further, the average number of prior arts used in each case more clearly shows that it is a tendency to use fewer prior arts to assess the inventiveness of utility model patents in practice.

In assessing inventiveness, whether the technical field is identical or relevant and whether it offers technical motivation are issues of debate between interested parties. By contrast, debates are rare caused by the number of cited prior arts. In the above cases, only one case involves such a matter, in which the patentee contended that the PRB used three references to assess the inventiveness of the utility model patent in suit, which was the point used as the ground for its appeal. The Beijing Higher People's Court found the PRB not using three references, and did not comment on the issue[24]. Besides, the Beijing No. 1 Intermediate People's Court, in its decision on a case, showed its negative attitude towards use of three references to assess the inventiveness of utility models. But in the second-instance hearings of such case, the Beijing Higher People's Court decided that the first instance court decision was baseless, and remanded the case[25]. On the whole, however, the number of prior arts generally would not be an issue in the assessment of inventiveness.

4. Standard of inventiveness of utility model patents as viewed from a typical case decided by the Supreme People's Court

In its Annual Report on IP Cases 2012, the Supreme People's Court released a case of prevalent guidance on the issue of standard of inventiveness of utility model patents[26]. The case involved a utility model patent (97216613.0) relating to a "gripe dynamometer". The most proximate reference evidence 7 disclosed a body force analyser, and evidence 2, a reference disclosed a portable digital display electronic scale.

In the invalidation phase, the PRB concluded that evidence 2 disclosed all the two distinguishing technical features shown in the comparison between claim 1 of the patent in suit and evidence 7. The patent in suit and evidence 2 and 7 were in the technical field of force measuring device, and weight in evidence 2 and gripe force in evidence 7 differed only in subject of application of force, which had no substantial impact on the force measuring. That was, they were substantially the same in the measuring principle; hence a person of ordinary skill in the art was motivated to combine evidence 2 with evidence 7. Accordingly, claim 1 of the patent in suit did not possess inventiveness compared with the

combination of evidence 7 and 2. The first-instance decision upheld the PRB's invalidation decision.

In the second instance hearing, the Beijing Higher People's Court concluded that the issue of the appeal was whether the patent in suit and evidence 2 belonged to the same technical field, and whether evidence 2 and evidence 7 could be combined to render the patent in suit void of inventiveness. The Beijing Higher People's Court pointed out that reference 2 disclosed a portable digital display electronic scale, a device for measuring weight and different from the patent in suit in terms of object of invention and the direction of force of the sensor, so in different technical field; a person of ordinary skill in the art could not easily contemplate applying a sensor in another technical field in the present technical field. In addition, the PRB's another invalidation decision found that the patent in suit and evidence 2 were in different technical fields. Accordingly the first-instance decision and the PRB's invalidation decision were reversed , and the case was remanded for a new trail.[27]

Dissatisfied with the second-instance decision, the PRB requested the Supreme People's Court for review. The Supreme People's Court first elaborated, in its decision, the legislative aim and made clear the meaning of the different inventiveness standards, concluding that "the standards of inventiveness of the invention patent and utility model patent are different, so should be in the technical field of the prior art considered in the comparison of the relevant technologies, which embodies one of the important aspects of the different standards of inventiveness of invention patents and utility model patents".[28] As for the determination of the technical field, the Supreme People's Court pointed out: "Since the division of the scope of technical field is closely related to the height of the required inventiveness of a patent, considering the lower standard of inventiveness of utility model patents, a narrower scope of technical field should be considered in assessing the inventiveness of a utility model patent, generally focusing on the comparison of a utility model patent with a prior art in the same technical field. However, if the prior art has already offered a clear technical motivation for a person of ordinary skill in the art to see the relevant technical means in a proximate or relevant technical field, the prior art of a proximate or relevant technical field may also be taken into consideration. By the clear technical motivation is meant motivation that is clearly presented in the prior art or one that a person of ordinary skill in the art can directly and undoubtedly derive from the prior art."[29]

Specifically with the present case, the Supreme People's Court concluded that the electronic scale disclosed in the patent in suit and evidence 2 were both force-measuring devices, but different in specific usage. Besides, weight and human gripe force applied to different subject matter and in different direction of the force application, so they did not belong to the same technical field. Meanwhile, the two were identical in function and similar in usage, and substantially the same in the force measuring principle of a sensor; it was possible to deem them to be of proximate technical fields. But since the prior art did not offer clear technical motivation, the PRB erred in application of the law when considering evidence 2 for assessing the inventiveness of the patent in suit. Accordingly, the Supreme People's Court rejected the PRB's review request.

In the case, the Supreme People's Court has clarified the difference in the standards of inventiveness of invention patents and utility model patents, which mainly lies in the technical field of the cited prior art. Particularly, if, in assessing the inventiveness of a utility model patent, it is necessary to cite a prior art of a proximate or relevant technical field, the requirement for the presence of clear technical motivation is quite stringent.

III. Conclusion

This article has presented a p reliminary comparative study of the cases involving invalidation of invention and utility model patents based on the court decisions available in the database of Chinalawinfo. As far as the cases discussed in the article are concerned, while an invention patent is issued upon substantive examination, it does not show higher stability in the phase of invalidation. As for the most important matter of inventiveness in patentability cases, in law and in practice, utility model patents are more difficult to be invalidated than invention patents due to lower standard of inventiveness imposed on it.

As for a patentee, his ultimate goal of applying for a patent is to enforce his right. While invention and utility model patents are considerably different during patent prosecution, the patents of the two categories, in enforcement, are, in principle, by no means treated differently in law. When enforcing his right, patentee's right is not affected due to the different category of the patent. Besides, in patent infringement practice, it is quite common that a request for invalidation is filed against the patent involved. A patent hard to be

invalidated and more stable is an obvious advantage for the successful enforcement of the patent right. Considering the fact that it takes shorter time and less money to apply for a utility model patent, a patentee should attach more importance to it in his or its patenting strategy, and the academic and practice communities should also pay constant attention to, and carry on in-depth study on, the utility model patent system.

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[1] The State Intellectual Property Office's Annual Report 2012, Chapter 4, P.37. at http://www.sipo.gov.cn/gk/ndbg/2012/201305/t20130530_800986.html, last visited on 27 June 2013.

[2] Considering the effect of court decisions and the amount of data to be analysed when deciding on the subject matter for this study, the present study is mainly based on the final decisions made by the Beijing Higher People's Court in patent invalidation cases involving invention and utility model patents.

All the cases discussed in this article are available in the database of Chinalawinfo, and were browsed on 17 March 2013. When making the search, the title of the case must includes the keyword "patent", type of the cases were limited to "administrative"; the dates of terminating the cases were between 20120101 and 20121231, and "Beijing Higher People's Court" was set as the court hearing the cases.

In the search, 244 court decisions were found, including 31 decisions involving design patents, 116 decisions involving invention patents, of which 46 are reexamination cases, and 70 invalidation cases, 97 decisions involving utility model patents, of which one is reexamination case, and 96 invalidation.

[3] Following is an explanation of the Table.

In very few cases, the patent rights involved were transferred during the court proceedings. In the Table, these cases are categorised according to the patentees in the second-instance decisions.

* "Mixed" in the table refers to domestic enterprises and individual persons as joint patentees.

** In 13 of the cases, one requester requested for invalidation of 13 patents belong to one patentee in the same technical field. As the series of cases take up 13.5% of all the utility model patent invalidation cases, a relatively high percentage, they are not calculated in the tables, and the percentage of all the other cases is put in parentheses for reference. In the following relevant tables, these series of cases is treated and marked in the same way.

[4] Following is an explanation of the Table.

* For individual persons as requesters, as the court decisions do not reveal detailed information about the interested parties, it is impossible to find whether they are foreign-related parties, so they are not distinguished as domestic or foreign interested parties.

**In one of the cases, a foreign-related enterprise and individual person are joint requesters; in three cases, a domestic enterprise and individual person are joint requesters.

*** In one case, a domestic enterprise and individual person are joint requesters.

[5] Following is an explanation of the Table.

* "Others" refers to cases where after the two instances of the court procedures, the PRB's invalidation decisions were reversed, the cases were remanded to the PRB, and the validity of the patent in suit remained undecided.

[6] To make the results more clear, enterprise and individual person factors are not distinguished in this Table, and what are listed as mixed in Table 2 are countered as foreign-related interested parties if foreign-related factor is involved.

[7] For individual persons as requesters, as the court decisions do not reveal detailed information about the interested parties, it is impossible to find whether they are foreign-related parties. They are presumed to be domestic interested parties due to their names.

[8] To make the results more clear, enterprise and individual person factors are not distinguished in the statistics in this Table, and what are listed as mixed in the statistics in Tables 1 and 2 are countered as enterprises if enterprise factor is involved.

[9] As the Table shows, a total of 70 invention patent invalidation cases and 96 utility model patent invalidation cases are involved in the statistics of the cases. In the series of 13 cases, one requester requested for invalidation of 13 patents of one patentee in the same technical field. Since the causes of action of these cases are different, they are not specially treated as above.

The causes of action may not be the same during the invalidation phase and first and second instances; this Table only covers the causes of action mentioned in the court's holding part in the second-instance decisions made by the Beijing Higher People's Court.

The citation of provisions in the Table are those of the Articles used in the Patent Law (2000) and those of the Rules of the Implementing Regulations of the Patent Law (2002).

[10] Following is an explanation of the Table.

* There are 33 cases where invention patents are wholly invalidated, in 2 of which the independent claims are invalidated on varied grounds; hence there are 35 causes of action in total.

** There are 38 cases where the utility model patents are wholly invalidated, in 5 of which the independent claims are invalidated on varied grounds; hence there are 43 causes of action in total.

*** Which includes a series of 4 cases in which different re-

questers with the same attorney filed requests for invalidation of the same patent. As this series of cases takes up 11.4% of all the causes of action, all the 4 cases are calculated as one and put in parentheses for reference.

[11] The Supreme People's Court, General Situation of Judicial Protection of Intellectual Property Right by Court in China (2012), http://www.chinacourt.org/article/detail/2013/04/id/949794.shtml, last visited on 29 September 2013.

[12] Article 22.3, the Patent Law of the People's Republic of China.

[13] Section 2.2, Chapter 6 of Part IV, the Guidelines for Examination (2001).

[14] Ibid.

[15] Section 4 (1), Chapter 6 of Part IV, the Guidelines for Examination (2006).

[16] Section 4 (2), Chapter 6 of Part IV, the Guidelines for Examination (2006).

[17] Yin Xintian, Introduction to the Patent Law of China, the Intellectual Property Publishing House, 2011, Pp.264-266.

[18] Li Yonghong, How to Define the Height of Inventiveness of Utility Model: Thoughts Arising from a Recent Judgment Made by the German Federal Court, carried in the China Patents & Trademarks, 2008, Issue 1, Pp.26-31.

[19] Fang Ting, Liu Yanping, Zhang Fan and Pen Liang, Brief Analysis of Difference of Standards of Inventiveness of Utility Model Patents and Invention Patents, carried in the China Inventions and Patents, 2012 Issue 1, P.101.

[20] Following is an explanation of the Table.

The causes of action are not the same in the invalidation phase and first and second instances; the Table only covers the causes of action of inventiveness mentioned in the court's holding part in the second instance decisions made by the Beijing Higher People's Court. There are 45 such cases involving invention patent invalidation, and 64 utility model patent invalidation.

* "Others" refer to cases where the court did not draw conclusion on inventiveness, specifically including cases in which the references and the way of combination thereof filed by the requesters were different from those in the invalidation phase, and the court did not review them; cases in which the court only made determination in relation to claim construction without comparing the claimed technical solution with prior art; and cases in which the court only held that the PRB's decision that the patents in suit did not possess inventiveness is wrong without giving its own conclusion.

[21] The study of the technical fields and number of prior arts are based only on the cases in which the Beijing Higher People's Court made clear conclusion in respect of inventiveness in its second instance decisions.

[22] Following is an explanation of the Table.

In a case, where the different way of combination of the prior arts results in different number of such documents used, the ways of combination of the most references used are counted in the Table.

* Two cases involving patents made by juxtaposing prior art means are not counted.

[23] The Beijing Higher People's Court's Administrative Judgment No. Gaoxingzhongzi 410/2012.

[24] The Beijing Higher People's Court's Administrative Judgment No. Gaoxingzhongzi 345/2012.

[25] Chen Yong, Issue of Patent Inventiveness, presented at the Symposium on Legal Issues in Administrative Cases of Disputes over Patent Right Grant and Affirmation, held on 3 July 2013.

[26] The Supreme People's Court's Administrative Judgment No. Zhixingzi 19/2011.

[27] Qin Yuanming, Determination of Technical Field of Utility Model Patents, carried in the People Judiciary, 2012, Issue 12, P.5.

[28] Supra No.26.

[29] Ibid.