

# A Study on Domestic Priority Rules

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## I. The Issue

Article 29 of the China's Patent Law reads:

"Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a priority."

Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the Patent Administration Department under the State Council an application for a patent for the same subject matter, he or it may enjoy a priority."

In the above article, the first paragraph relates to foreign priority and the second paragraph to domestic priority. Although they are directed to the same subject matter, i.e., priority right, and come from the same article of law, there are substantial differences between them.

### **First, difference in the benefits they enjoy.**

Although foreign priority and domestic priority are similar in that they both can enjoy the filing date of an earlier application, there is a fundamental difference in the benefits they enjoy. Patent territoriality and the first-to-file system determine that the date on which an application is filed in a country will be the filing date to be enjoyed by the application, thereby establishing its legal status relative to the prior art. Hence, in the case of a foreign priority, the entitlement of a subsequent application in China to the filing date of an earlier application filed in another country is a substantive

privilege transcending territorial boundary.

In contrast, the earlier application on which a domestic priority is based actually covers the same contents of the application filed by the applicant with the Chinese Patent Office on an earlier filing date. The applicant's entitlement to the priority date of an earlier application in respect of such contents merely satisfies the principle of first-to-file system in the country by inheriting the existing contents, but does not enjoy any privilege of a cross-regional first-to-file system.

In other words, where an earlier application and a subsequent application are exactly the same, foreign priority still brings significant benefits, that is, the filing date of an earlier application filed in a foreign country is deemed as the filing date of a subsequent application filed in China, whereas domestic priority provides no true sense of priority since the earlier application is originally entitled to that earlier filing date in China. As such, the benefits accorded to the foreign priority have no substantive meaning for the domestic priority. The common advantage enjoyed by both the foreign and domestic priorities lies in the opportunities for the applicant to improve or integrate the contents of the earlier application or to amend the application type of the earlier application through subsequent filing. This, however, is not the principal merit to be sought after in establishing a foreign priority system. In particular, considering the rule in leveraging the priority for contents integration and the general inadequacy of a 12-month time period to weigh the pros and cons of changing the application type, domestic priority is far from being equal with foreign priority in terms of the benefits they enjoy.

### **Second, difference in the cost paid.**

Another important difference between domestic priority and foreign priority lies in the disposal of the earlier application. While the entitlement of an application to the right of a foreign priority will not affect its earlier application, in the

case of a domestic priority, it is stipulated in the Implementing Regulations of the China's Patent Law that "where the domestic priority is claimed, the earlier application shall be deemed to be withdrawn from the date on which the subsequent application is filed." This means that the applicant must pay the price of losing the earlier filed application irrespective of whether the subsequent application can ultimately enjoy the priority of the earlier application or whether the earlier and subsequent applications seek to protect identical claims.

The judgment on whether a priority is established involves not only the comparison and analysis of technical solutions, but also the understanding of some statutory conditions. As far as the applicants are concerned, it is certain that the earlier application will be deemed to be withdrawn, but what is unclear is whether the subsequent application can ultimately enjoy a priority or not. Thus, after the earlier application's being deemed to be withdrawn, the denial of the claim for the domestic priority in the examination stage or even in invalidation proceedings is not only a theoretical, imagined risk, but an actual occurrence in practice.

In brief, domestic priority in China, compared with foreign priority, brings insufficient benefits at a high cost, and it is unfair to regard such cost as the fee for a lesson that should be learnt by the applicant. After all, the judgment on the eligibility of a priority is not simply a matter of formalities. In some cases, even seasoned professionals may not find himself so sure about the outcome. And if an earlier application is lost because of this kind of misjudgment, it is obviously not in line with the principle of proportionality in law.

In the opinions of the author, the core of the above problem should be understood in the light that China's domestic priority system was designed *a priori* by modelling after the foreign priority system. In a time when on the one hand there was no practical basis for domestic priority and on the other hand cases relating to foreign priority were limited, it was hard to be perceptive about the essential differences between domestic priority and foreign priority and insightful about the design of corresponding rules. These are historical limitations, but they are not limitations that cannot be transcended.

An overview of the provisions and historical origin of domestic priority in various countries leads to the finding of two models of domestic priority systems. One is a creature of the era after the inception of the Paris Convention for the Protection of Industrial Property ("Paris Convention"), with

its domestic priority system designed by reference to foreign priority, a prototype of which is the German system; the other is created during the pre-Paris Convention era, whose domestic priority system is not related to foreign priority in terms of terminology, conception, and rules. These two types of domestic priority systems differ in the form and strictness of rules, reflecting the backgrounds against which the respective rules were generated. Nevertheless, in countries like Germany whose domestic priority system models after foreign priority, the requirements for the eligibility of an earlier application for domestic priority are more lenient than the corresponding requirements for foreign priority, and judicial remedies are available where an earlier application is deemed to be withdrawn. In this article, the author will focus on the comparison between the domestic priority of Germany and that of the United States in terms of rules and origins, and would make some suggestions toward the improvement of China's domestic priority rules.

## II. Comparison of German and U.S. domestic priority rules

### 1. Different starting points

Domestic priority rules of Germany and the United States were created under different backgrounds and for different reasons.

The German provisions on domestic priority, originating from the Community Patent Convention, were introduced into the German Patent Act on 1 January 1981. As Georg Benkard states in Patent Law and Utility Model Law, "before the implementation of the Community Patent Convention, a patent application filed in Germany could only obtain a priority from a first filing in a foreign country (i.e. foreign priority), and the right of priority cannot be obtained based on an application filed earlier in Germany. If the applicant who further improves the invention that has been submitted within an allowed priority period [author's note: a foreign priority period] would like to integrate the improvement into the application originally filed in Germany, it will only be possible if he has submitted the first filing abroad. This, as noted by Begrdg in On Community Patent, is considered unsatisfactory."<sup>1</sup>

Different from the German Patent Act, section 120 of the U.S. Patent Law did not originate from comparison with foreign priority, but from domestic administrative and judicial practices that had existed before the inception of the

Paris Convention. As Chisum on Patents notes, “section 120 appeared in the statutes for the first time in the Patent Act of 1952. Prior to 1952, continuing application practice was a creature of patent office practice and case law, and section 120 merely codified the procedural rights of an applicant with respect to this practice”; “before section 120 was enacted, the Supreme Court noted that a continuing application and the application on which it is based are considered part of the same transaction constituting one continuous application. *Godfrey v. Eames*, 68 U.S. 317, 325-26 (1864).”<sup>2</sup>

“‘Continuation’ and ‘divisional’ applications are alike in that they are both continuing applications based on the same disclosure as an earlier application. They differ, however, in what they claim. A ‘continuation’ application claims the same invention claimed in an earlier application, although there may be some variation in the scope of the subject matter claimed. A ‘divisional’ application, on the other hand, is one carved out of an earlier application which disclosed and claimed more than one independent invention, the result being that the divisional application claims only one or more, but not all, of the independent inventions of the earlier application.”<sup>3</sup>

“The PTO has noted that the expressions ‘continuation’, ‘divisional’, and ‘continuation-in-part’ are merely terms used for administrative convenience. The bottom line is that, no matter what term is used to describe a continuing application, that application is entitled to the benefit of the filing date of an earlier application only as to common subject matter.”<sup>4</sup>

## 2. Different systems

### • Relevant provisions in German Patent Act

With its origin from referencing foreign priority, the German provisions on domestic priority are structurally similar to foreign priority rules, as detailed in Section 40 of the German Patent Act<sup>5</sup>:

“(1) Within a period of twelve months from the date of filing of an earlier patent or utility model application with the German Patent and Trade Mark Office, the applicant shall enjoy the right of priority in respect of the application for a patent for the same invention, unless a domestic or foreign priority has already been claimed for the earlier application.

(2) The priority of several applications for patents or utility models filed with the German Patent and Trade Mark Office may be claimed for the patent application.

(3) Priority may only be claimed for such elements of

the application which are specifically disclosed in the application documents of the earlier application as a whole.

(4) The priority may only be claimed within two months of the date of filing of the later application; the declaration of priority shall be deemed not to have been made until the file number of the earlier application has been indicated.

(5) If the earlier application is still pending with the German Patent and Trade Mark Office, it shall be deemed to be withdrawn when the declaration of priority is made in accordance with subsection (4). This shall not apply where the earlier application refers to a utility model.

(6) If a request is filed to inspect the file of a later application (section 31) which claims the priority of an earlier patent and utility model application, the German Patent and Trade Mark Office shall add a copy of the earlier patent or utility model application to the files of the later application.”

In accordance with the above, the essential conditions for entitlement to the right of domestic priority in Germany include:

First, time limit: a subsequent application must be made within 12 months from the date of filing of an earlier application and a priority claim be made within 2 months from the date of filing of the subsequent application;

Second, eligibility of the earlier application: the earlier application must not have previously enjoyed a domestic or foreign priority;

Third, contents of the earlier application: the elements claimed for the priority must have been clearly disclosed in the application documents of the earlier application as a whole; and

Fourth, disposal of the earlier application: the earlier application will be deemed to be withdrawn when the declaration of priority is made, unless the earlier application is a utility model application.

### • Relevant provisions in the U.S. Patent Law

For historical reasons, section 120 of the U.S. Patent Law<sup>6</sup> does not use the term “domestic priority”, the equivalent of which in the law is “benefit of earlier filing date in the United States”. The section reads as follows:

“section 120: Benefit of earlier filing date in the United States

An application for patent for an invention disclosed in the manner provided by section 112(a) in an application previously filed in the United States, or as provided by section 363 of this title, which is filed by an inventor or inventors named in the previously filed application shall have the

same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and if it contains or is amended to contain a specific reference to the earlier filed application. No application shall be entitled to the benefit of an earlier filed application under this section unless an amendment containing the specific reference to the earlier filed application is submitted at such time during the pendency of the application as required by the Director. The Director may consider the failure to submit such an amendment within that time period as a waiver of any benefit under this section. The Director may establish procedures, including the payment of a surcharge, to accept an unintentionally delayed submission of an amendment under this section.”

In accordance with the above, there are four substantive conditions for an invention patent application to be entitled to the benefit of an earlier filing date:

First, the application contains the same contents as those disclosed in the earlier application;

Second, the application is filed by the same inventor(s) as named in the earlier application;

Third, the earlier application is pending; and

Fourth, the application contains a reference to the earlier application.

### 3. Similarities and differences

Comparison of the German and U.S. provisions on domestic priority finds the following similarities between them: first, a subsequent application enjoys the benefit of the filing date of its earlier application, and second, the earlier application has disclosed the contents of the subsequent application for which a priority is claimed; whereas their differences are mainly embodied in three aspects: first, Germany imposes a time limit (within 12 months) for filing an earlier application, and the U.S. has no such requirement; second, in Germany, as an eligibility requirement, the earlier application must not have any previous entitlement to domestic or foreign priority, while the U.S. only requires that the earlier application is pending; and third, in respect of the disposal of the earlier application, Germany requires that the earlier application be deemed to be withdrawn, while the U.S. has no such requirement.

As a summary of the characteristic of the above similarities and differences, although both the German and U.S.

domestic priorities entitle an application to the benefit of the filing date of an earlier application in respect of the same contents, Germany regards the subsequent application as a right similar to a foreign priority, while the U.S. considers it merely as a continuation of the earlier application.

The German domestic priority system, despite its modelling after the foreign priority system, still demonstrates some characteristics of domestic priority in two key issues.

First, there is no requirement for the earlier application to be the first application, which is different from the requirement under section 41 of the German Patent Act that the foreign priority be “comparable as regards the terms and conditions and content to the right of priority in accordance with the Paris Convention”. The Paris Convention requires that the earlier application must be the first application.

Second, although section 40 of the German Patent Act clearly stipulates that the earlier application shall be deemed to be withdrawn when the declaration of priority is made, the grounds and conditions for such withdrawal are further expounded in later judicial case laws.

“The Federal Court of Justice of Germany (Bundesgerichtshof, BGH) also rightly stated that the essential purpose of the provision could not be to avoid possible double patenting, but to avoid multiple examinations on substantially the same applications by the patent office.”<sup>7</sup>

“The provision leads to a relief of the examination activities of the patent office and protects the applicants from payment of double fees, while bringing no disadvantages to the applicant since the legal status obtained by the earlier application can be fully brought to the subsequent application.”<sup>8</sup>

A statement especially worthy of mention is: “there is no inducement to punish the applicant for the failed attempt to gain the priority of an earlier application with the loss of the earlier application”.<sup>9</sup> This statement reflects the rationality of law, which aims to mitigate the damage to a legitimate right with the utmost prudence.

A crucial point in the above-mentioned judicial precedent is, the earlier application’s being deemed to be withdrawn is not to avoid double patenting, but to reduce repeated examination. This provides ample flexibility for the command of the rules. As in the case of unity and inventive step clauses, although both are statutory provisions, their impacts on administrative counterparts are substantially different. The unity clause is related to the effective utilization of administrative resources only and has no direct impact

on the administrative counterparts, whereas the strict or loose application of the inventive step clause may affect the legitimate interests of the applicants or the public. For this reason, it is acceptable to adopt a more lenient approach in the application of the unity clause relative to the inventive step clause.

### III. Overview of domestic priority provisions in other countries

Domestic priority provisions close to those of the U.S. can be found in the U.K. Patents Act.

Section 15.1(9) of the U.K. Patents Act<sup>10</sup> reads as follows:

“(9) Where, after an application for a patent has been filed and before the patent is granted —

(a) a new application is filed by the original applicant or his successor in title in accordance with rules in respect of any part of the matter contained in the earlier application, and

(b) the conditions mentioned in subsection (1) above are satisfied in relation to the new application (without the new application contravening section 76 below),

the new application shall be treated as having, as its date of filing, the date of filing the earlier application.”

Japan and Korea have domestic priority provisions similar to those in the German Patent Act.

The Japanese Patent Act prescribes a time limit of one year for both domestic priority and foreign priority, and premises the entitlement to a domestic priority on the withdrawal of the earlier application (including the application for a patent for invention or for utility model). In addition, a divisional application or a decided application cannot serve as the basis for entitlement to a priority (i.e., it cannot be used as an earlier application for a priority claim).

As for the qualification of an earlier application, the Japanese Patent Act uses different expressions in the provisions on domestic priority and those on foreign priority respectively. The term “earlier application” is employed in Article 41 relating to domestic priority, while the term “first application” is used in Article 43 relating to foreign priority. As such, although the Japanese Patent Act has stipulated the time limit for claiming a priority, as regards the starting point of the time limit, the domestic priority does not require an earlier application to be a first filing one, which is its main difference from the foreign priority.

The Korean Patent Act is very close to the Japanese Patent Act in priority-related provisions, with domestic priority being “priority claim based on patent application, etc.” (Article 55 of the Korean Patent Act) and foreign priority as “priority claim under treaty” (Article 54 of the Korean Patent Act), in which the former requires merely “an earlier application” while the latter has the requirement of “the first application”.

### IV. Suggestions on improvement of China’s domestic priority rules

Rules on domestic priority were introduced into the China’s Patent Law in 1992. “The rules were added mainly for the following three reasons:

First, a foreign applicant when filing a patent application in China was allowed to claim the priority of the first patent application submitted in another country in accordance with the first paragraph of this article [Article 29] and accordingly entitled to some preferential treatment of a priority; however, a Chinese applicant who files a patent application for the same subject matter in China was not allowed to claim the priority of its first application and accordingly could not enjoy similar benefits. The Chinese applicants were obviously in a disadvantageous position.

Second, in 1992 when the China’s Patent Law was revised, China’s entry into the Patent Cooperation Treaty (PCT) had been placed on the agenda. Once China becomes a member state of the PCT, where an applicant first files an application in China and subsequently files an international application for the same subject matter, he or it may claim the priority of the first application filed in China. If the international application designates China and subsequently enters the national phase in China, the applicant may use this application to replace its original application in China according to the provisions of the PCT. This equates to the applicant’s entitlement to the priority of the first application filed in China. Given such a circumstance, if the second paragraph of this article [Article 29] were not added, an unreasonable situation would arise where different routes of application lead to diverse outcomes as regards whether the applicant may enjoy domestic priority.

Third, domestic priority system is common in the patent law of many countries.”<sup>11</sup>

Obviously, similar to the way domestic priority was introduced into the German Patent Act, China also designed

its domestic priority system by reference to foreign priority on theoretical presupposition basis. As a result, some rules on domestic priority and the understanding of these rules saw plentiful reference to foreign priority at the cost of insufficient practical considerations. Having said that, by the time when domestic priority was introduced into China, the China's Patent Law was in force for seven years only, and the existence of some limitations was inevitable.

Currently, with China's top ranking in terms of the number of patent applications, its encouragement of innovation to meet development need, and the practical foundation from accumulation of cases, conditions are ripe for China to review its rules on domestic priority. Whether China's domestic priority rules need to be further improved at the appropriate legal regulation level is worthy of consideration within the industry. In respect of this, the author has the following three suggestions.

First, relax the eligibility requirements for the earlier application.

How should we understand the requirement that "any applicant first filed in China an application" in the second paragraph of Article 29 of the China's Patent Law? Does it imply that the application is further required to be first filed on a worldwide scope as well? Views are divided in the understanding of such implication.

The author is of the opinion that if interpreting from the perspective of legislative history, it is not unreasonable to take the positive view that the application should also be first filed on a worldwide scope, which is actually the current mainstream viewpoint. However, the author, from a practical standpoint, is inclined to support the negative view.

First of all, in view of the balance between rights and obligations, the benefits from domestic priority are originally the benefits that the earlier application should be entitled to. It would be overly stringent to impose further restriction. On the other hand, the applicant would not be unjustly enriched if the earlier application is only required to be first filed in China.

People often discuss such a situation: an applicant first files an application in a foreign country, and then files an application for the same subject matter for the second time in China, and subsequently for the third time again in China. Suppose the first application has exceeded the time limit for a foreign priority claim but is published between the second application and the third application, the publication of the

first application will not affect the patentability of the third application if the third application is allowed to claim a priority on the basis of the second application. That is, the third application is accordingly benefited, as a result of the *de facto* extension of the statutory time limit for priority claim.<sup>12</sup>

The questions to ask are, whether the benefits thus obtained are unjust, and the time limit for a priority claim is extended in relation to what? These may be easily answered by shifting only one condition, which is, by replacing the applicant who first files the application with another party. Under such circumstances, the third application can undoubtedly claim a priority based on the second application, and the first application will surely not affect the patentability of the third application. In those two scenarios, the priority dates are the same, and there is no change in the impact on the interests of the applicants and the public. Actually, the "unjustness" merely results from the fact that the applicant who files the first application in a foreign country is the same party who files the subsequent applications.

In fact, if free from the constraint of foreign priority rules and the need to take into account non-domestic applications, the unjustness will disappear. As for the thinking that anchors such constraint, its historical origin can be traced to the modelling after foreign priority rules.

It needs to be especially pointed out that "modelling after a convention" and "abiding by a convention" are essentially different. "Modelling after a convention" is to learn from the experiences of a convention by selectively adopting available device therefrom to address problems of one's own, whereas abiding by a convention is to assume the obligation imposed on all signatory countries with no choice.

The basis of a foreign priority is the Paris Convention. As a convention, every clause therein is the result of negotiations over the balance of interests of respective countries. As far as foreign priority rules are concerned, at one end of the scale is the cross-border benefits of the earlier filing date of a foreign application, and at the other end is the confinement of such benefits to an appropriate scope. And the result of this balance is a 12 month priority period and the starting point of the priority period, i.e., the first application on a worldwide scope. That explains why the said requirements for foreign priority are clearly stated in the patent law of all signatory countries without exception.

However, the Paris Convention does not touch upon domestic priority. Therefore, the signatory countries are not bound by the Paris Convention on issues concerning do-



mestic priority. As stated above, regardless of countries that have established relevant judicial practices before the inception of the Paris Convention or countries that design domestic priority rules by modelling after foreign priority rules after the coming into being of the Paris Convention, their domestic priority rules are not exactly the same. Countries on the lenient side neither require the earlier application to be the first application, nor lays down requirements for “no previous priority entitlement” or a priority period; and for countries on the strict end, they may have the requirements for a priority period and “no previous priority entitlement”, yet most of them do not require the earlier application to be the first application on a worldwide scope.

Although a domestic priority is closer to a continuation application in nature, it is not necessary to make broad-based amendments to China’s current domestic priority rules for the sake of stability and continuity of law. To minimize legislative cost, we may just unify the understanding of “the first application filed in China” at the appropriate legal regulation level, that is, decoupling the requirement of “the first application filed in China” from the requirement of the first application on a worldwide scope.

Second, restrict the conditions for the applicability of “deeming an earlier application to be withdrawn”.

The handling of an earlier application needs to be conceptually different from that of double patenting.

The deprivation of a right merely based on an unexamined “possibility” would be unfair to the right holder, and hence, such decision should be made prudently without causing damage to the innocent. Just as twin sisters should not be deprived of their rights to perform legal acts simply because it is easy for one of them to impersonate the other, the possibility of double patenting should not be used as a justified reason for deeming an earlier application to be withdrawn. If we learn from the experience of Germany in judicial practice, and position the matter as an issue of repeated examination, we will be able to allow ourselves room for more flexible measures that will not undermine the legitimate rights of the applicant. The restraint in the use of “deeming an application to be withdrawn” may be achieved by such means as optimizing the management of application examination or respecting the choice of the applicant. In a word, it is better to be on the lenient side than mistakenly undermine the applicant’s legitimate interests. Even if the lenient approach gives rise to a conflict of rights, there are still procedures for remedy; but once the earlier

application is mistakenly withdrawn, there is no remedy for the harm done.

Third, considering the increasing number of PCT applications filed in China, further studies should be conducted on the overlapping of PCT applications and domestic priority so as to clarify the relationship between them and achieve the expected effect of the domestic priority system. In this regard, some countries, like Germany, have well-established practices and rules. For instance, shall an international application designating multiple countries including Germany and that designating Germany only be handled uniformly according to foreign priority rules or according to domestic priority rules, or shall they be handled differently? Can a priority be claimed where the earlier application has not yet entered China when a subsequent application is filed, given that an international application entering the national phase may sometimes be pending for as long as 30 months from the priority date? For these issues, it is better that we handle with forethought by critically referencing the experiences of other countries.

It is hoped that the foregoing views will be of use in facilitating further discussion on the subject. ■

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<sup>1</sup> Georg Benkard. *Patentgesetz Gebrauchsmustergesetz* (9<sup>th</sup> edition, pp. 864-865): “Bis zum Inkrafttreten des GPatG konnte eine Prioritaet fuer eine beim Deutschen Patentamt angemeldete Erfindung nur aus eine auslaendischen Erstanmeldung ab geleitet werden (sogen. aeussere Prioritaet); aus einer beim Deutschen Patentamt frueher eingereichten Anmeldung konnte ein Prioritaetsrecht nicht hergeleitet werden. Der Anmelder, der innerhalb desm ihm eingeraeumten Prioritaetsjahres die angemeldete Erfindung weiterentwickelt hatte, konnte daher die weiterentwicklung nur dann zusammen mit der urspruinglich angemeldeten Erfindung zum Gegenstand einer Anmeldung beim Deutschen Patentamt machen, wenn er die Erstanmeldung im Ausland eingereicht hatte. Diser Zustand wurde, wie in der Begrdg. Zum GPatG dargelegt wird, als unbefriedigend empfunden.”

<sup>2</sup> Donald S. Chisum, *Chisum on Patents*, Matthew Bender & Company, Inc.

<sup>3</sup> See *ibid.*

<sup>4</sup> See *supra* note 2.

<sup>5</sup> *Selected Translations of Foreign Patent Laws* (p. 865), compiled and

translated by Treaty and Law Department of the CNIPA. Intellectual Property Publishing House.

<sup>6</sup> See *ibid.*, p. 1601.

<sup>7</sup> See *supra* note 1, p. 868, para. 17: "Der BGH hat im uebrigen auch zutreffend festgestellt, dass wesentlicher Zweck der Vorschrift nicht die Vermeidung von Doppelpatentierungen sein koenne, sondern dass er darum gelte, eine mehrfache Pruefung von im wesentlichen gleichen Anmeldungen durch das Patentamt zu vermeiden."

<sup>8</sup> See *ibid.* "Sie fuehre zu einer Entlastung der Pruefungstaetigkeit des Patentamt und bewahre andererseits den Anmelder vor doppelten Gebuehren und bringe ihm keinerlei Nachteile, da er seine durch die ersrte Patentanmeldung erlangete Rechtspositon voll in die Nachan-

meldung einbringen kann."

<sup>9</sup> See *supra* note 7, para. 18: "es besteht kein Anlass, den Anmelder fuer den fehlgeschlagenen Versuch, die Prioritaet der fruheren Anmeldung zu Erlangen, mit dem Verlust der fruheren Anmeldung zu bestrafen."

<sup>10</sup> See the website of the Intellectual Property Office of the UK.

<sup>11</sup> Yin Xintian. *Introduction to the Patent Law of China* (p. 392). Intellectual Property Publishing House.

<sup>12</sup> Wang Ziyu and Zhou Qian (2016). A Brief Discussion on the Meaning of "First Application in China" in Domestic Priority Right. *China Invention & Patent*, 7.

## WIPO Published World Intellectual Property Indicators Report

On 7 December 2020, the World Intellectual Property Organization (WIPO) published a new version of its benchmark World Intellectual Property Indicators (WIPI) report revealing that worldwide trademark and industrial design-creation activity rose in 2019 even as the number of global patent applications dipped slightly on weaker demand in IP powerhouse China.

Trademark and industrial design filing activity increased by 5.9% and 1.3% respectively. A 3% decline in global patent applications, the first fall in a decade, was driven by a drop in filings by Chinese residents. Excluding China, global patent filings rose 2.3%.

China's IP office received 1.4 million patent applications in 2019, more than twice the amount received by authorities in the second-busiest country, the United States (621,453). Filings in China declined for the first time in 24 years due to a 10.8% drop in resident applications amidst an overall shift in regulations there aimed at optimizing application structures and improving the quality of applications.

Offices located in Asia received close to two-thirds (65%) of all applications filed worldwide in 2019 – a considerable increase from 50.9% in 2009 – primarily driven by long-term growth in China.

Patents in force worldwide grew by 7% to reach around 15 million in 2019. The highest number of patents in force was recorded in the U.S. (3.1 million), followed by China (2.7 million) and Japan (2.1 million).

An estimated 11.5 million trademark applications

covering 15.2 million classes were filed worldwide in 2019.

China's IP office had the highest volume of filing activity with a class count of around 7.8 million; followed by the IP offices of the U.S. (672,681) and Japan (546,244)

Meanwhile, an estimated 1.04 million industrial design applications containing 1.36 million designs were filed worldwide in 2019.

The annual WIPI report collects and analyzes IP data from some 150 national and regional offices to inform policy makers, business leaders, investors, academics and others seeking macro trends in innovation and creativity.

The WIPI's 2019 figures, which pre-date the COVID-19 pandemic, underline the long-building growth in demand for the intellectual property tools that incentivize an increasingly global and digital - focused economy, said WIPO Director General Daren Tang.

"The robust use of intellectual property tools shows high levels of innovation and creativity at the end of 2019, just at the onset of the COVID - 19 pandemic," said Mr. Tang. "The pandemic has accelerated long - building trends by fostering the adoption of new technologies and accelerating the digitization of everyday life. Because IP is so connected to technology, innovation and digitalization, IP will become even more important to a greater number of countries in the post-COVID world."

Source: WIPO