

Patent 10 Million



Experts across Asia and the Pacific take **Johnny Chan** to see the latest in patent work in their jurisdictions – and whether they are close to matching the 10 million patents issued by the USPTO earlier this year.

While the US Patent and Trademark Office issued patent number 10 million patent on June 19, other jurisdictions still have a long way to go to reach that number, even if they are among the world's most developed economies.

New Zealand receives around 7,000 patent applications annually, which is about one percent of what is filed in the US. "It will take some time for us to reach 10 million," says Anton Blijlevens, principal at AJ Park in Auckland. "A second-tier patent system is being proposed, akin to the Australian Innovation patent system, to help accelerate grants."

When compared to the US, Singapore's patent landscape is still young, given that it has only been 24 years since the country passed its Patents Act in 1994. However, the number of applications has risen rapidly in the last decade. In 2006, the number of patents filed by local companies was just 626, a number which had jumped to 1,601 by 2016. In total, the number of patents registered by local and foreign companies was 10,980 in 2016, says Andy Leck, managing principal at Baker McKenzie Wong & Leow in Singapore.

Statistics show that 4,466 patents were granted from 1995 to 2017 in Sri Lanka. "Despite the relatively few applications filed annually, the National Intellectual Property Office should recruit more patent examiners to expedite

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Despite the relatively few **applications filed annually, the National Intellectual Property Office should recruit more patent examiners to expedite examination. The procedure requiring all grant certificates to be personally signed by the Director General of Intellectual Property should be changed.**

- *John Wilson, managing partner,
John Wilson Partners, Colombo*

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examination,” says John Wilson, managing partner at John Wilson Partners in Colombo. “The procedure requiring all grant

important to note that it files more patents per capita than any other jurisdiction worldwide, says John Eastwood, a partner at Eiger in Taipei. “With only 23 million people, Taiwan has consistently been No. 5 globally for patent applications into the USPTO each year.”

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We do think there are many bad patents among those 10 million in the US. The more patents granted, the more bad patents occur. This is a linear relationship. The publication of a huge number of grants induces ‘award-oriented’ desire.

- Pham Vu Khanh Toan, managing partner, Pham & Associates, Hanoi

Similarly, the 10 million milestone is far off for Vietnam. From 1981 to 2016, only 15,000 patents were granted, says Pham Vu Khanh Toan, managing partner at Pham & Associates in Hanoi. “Vietnam has never set a specific target such as, for example, when it will issue its one millionth patent, but with its current capacity of issuing about 4,500 patents annually and increasing by 10 percent per year, Vietnam needs about 40 years to issue its one millionth patent.”

Stale Apples in the Basket

The US may have many patents, but critics suggest that not all of those patents are fresh.

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Taiwan has granted nowhere near 10 million patents, but it is

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The US has a different examination system, and while that increases upfront costs, it helps keep the system cleaner, Eastwood says. "In Taiwan, there was a time when there were

local versions of foreign patents filed in which the translations of claim language were terrible. Litigating those was a huge pain in the neck! The quality [of patents in Taiwan] has gotten much better over the past 10 to 15 years, though."

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- John Eastwood, partner,
Eiger, Taipei

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Many patents that are filed may never be commercialized. "This may make them look bad, but the reality is that most that are filed are serving a purpose for their owner. Some patents may be filed merely to secure new investment or as part of an exit strategy to build value in a startup," Blijlevens says. "New owners may not see the same value in the patent position or the technology may move on very quickly, making some patents obsolete not long after grant."

As the majority of patents in Singapore are granted by way of supplementary examination, one can say that the quality of such patents are as good as the quality of the corresponding foreign allowed or granted patents used in such supplementary examination," says Abe Sun, local principal at Baker McKenzie Wong & Leow. "We do believe, however, that the quality of Singapore patents will

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become better and more certain in the near future as IPOS has announced that supplementary examination will no longer be available as of January 1, 2020, and that all patent applications must undergo substantive search and examination.”

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Bad Patent Prevention

The best approach to prevent bad patents from being filed or granted would be quality control over the whole procedure, which involves the applicant, the patent attorney and the patent office, says Xiaoling Duan, senior partner at Wanhuida Peksung IP Group in Beijing. “Patent drafting is the cornerstone of quality, considering the importance of initial disclosure cited in the application documents. During the examination procedure, both the examiner and the attorney play a vital role in prosecution so as to grant a stable and enforceable right.”

China’s SIPO has taken measures to improve examination quality. Among the three types of application, the invention patent applications shall be subject to substantive examination. The examiner is required to focus on full prior art search as well as substantive matters. “In general, the public seldom questions the quality of invention patents. Criticism about low quality issue generally arises from the utility model patents, because they only undergo preliminary examination

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before allowance,” Duan says. “SIPO is under huge pressure with the surging of utility model applications in recent years,

so from 2018, SIPO has applied stricter criteria in utility model examination, including checking obvious novelty deficiency and unusual number of applications filed by one applicant. SIPO has also extended the related granting period to seven to 14 months.”

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“Improvement of the professionalism of the filing agents would be good, and I’d like to see Taiwan move towards more of a US-style system where persons with engineering or other scientific degrees attend law school and then pass the bar,” Eastwood says. “However, the bar passage rate is currently so low in Taiwan (about six to eight percent) that the engineers don’t want to bother with the bar exam, and the attorneys who’ve passed don’t want to bother with going to engineering school.”

Encouraging inventors who are inexperienced in writing patents to use a patent attorney who is familiar with their technology is a way to go, says Blijlevens.

New Zealand inventors do self-file their applications and make the mistake in following the guidelines provided by the

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IP office thinking that that is all they need to know about preparing a quality patent specification, Blijlevens adds. "In my 25 years in IP, I have only seen one self-filed patent specification stand up

during examination. It is also important to educate clients that a provisional application should not be a quick and dirty filing. It is likely to form the basis for a priority claim in other countries and can therefore not afford to be a one- to three-page document with no support or claim-style language."

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AJ Park, Auckland

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In Pakistan, the patent office has recently been equipped with an advanced patent search system. The system enables the examiners to undertake a worldwide search to determine the novelty of the invention.

For the purpose of patents in Pakistan, novelty is no longer considered with reference to what is publicly *known* in the territories of Pakistan and what is publicly *used* in the territories of Pakistan, says Erum Rasheed, an associate at Vellani & Vellani in Karachi. "The public use or knowledge of an invention anywhere in the world before the date of the application would prejudice the novelty of the invention."

The Patent Ordinance 2000 also considers the "useful improvements" of a product or process, but not every improvement qualifies for a patent.



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“The improvements on the prior art so long as it satisfies the prerequisites of patentability, i.e. novelty, inventive step and non-obviousness, can qualify as a patentable invention,” Rasheed says. “Trivial changes and improvements, devoid of ingenuity, won’t qualify.”

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Under Section 24 of the Ordinance, any person may make observations in writing (with evidence) to the controller on the novelty of the invention, and the controller shall judge the claim before grant. Pre- and post-grant oppositions are available. The pre-grant provision is available whereby a patent may be opposed by any person within four months from the date of publication of the acceptance of the patent application. Any time within 12 months after the sealing of a patent, any person interested who did not oppose the grant may apply to the controller for a revoking order. And, under Section 46(1) a patent may, on the petition of any interested person, the federal government or on a counter-claim in an infringement suit, be revoked in part or whole by the High Court.

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“Many patent lawyers are motivated or even encouraged to obtain a granted patent for their clients as quickly as possible, which reduces costs for the client and makes the client happy,” Sun says. “However, quickly obtaining a patent oftentimes results in unduly narrowing of

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claims – making it easier for competitors to ‘design around’ such patents.”

conducted by each examiner is over 200 annually, and on average, 8.7 hours are spent for each examination, Kim adds.

“KIPO plans to increase the hours spent for each examination up to 13 hours in 2018, 17.4 hours in 2020, and 20.0 hours in 2022, in order to make it on par with the other IP5 offices.”

Although invalidation trial exists, such trial can be very costly and time-consuming, and thus, relatively easier method of revoking a registered patent is necessary, Kim says. “Upon grant, and for a certain period of time thereafter, the necessity of introducing a system to revoke the registered patent by submitting the grounds for rejection together with the supporting materials thereof has increased, and the Korean Patent Act has reflected such necessity by introducing a system where anyone can apply for the revocation of the registered patent for up to six months

after the registration was published.”

Sri Lanka has an interesting patent landscape as it requires a high standard of inventiveness similar to the developed countries which use advanced technologies. Hence, being a developing country where inventors are yet to benefit from such technologies and support, the high threshold sometimes results in the refusal

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Improving examination quality is also important. The factors that affect examination quality include heavy workload of examiners and little training.

- Un Ho Kim, partner,
Lee & Ko, Seoul

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To prevent bad patents from being filed, prior art searching may be conducted during R&D, says Un Ho Kim, a partner at Lee & Ko in Seoul. “Improving examination quality is also important. The factors that affect examination quality include heavy workload of examiners and little training.”

Based on recent research, the number of examinations



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of applications which would otherwise be granted under a utility model structure, says Sandamali Kottachchi, senior legal associate at Julius & Creasy in Colombo. "Such patents therefore become 'bad patents' for lack of inventive step and low

quality. On the other hand, certain bad patents slip through the net and are granted, blocking not only others but also potential improvements on the products. While a high threshold should remain for patents, a utility model would also benefit small-timers, new inventors and startups that tap the local talent."

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Julius & Creasy, Colombo

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Other suggestions to prevent bad patents include extending the duration of substantive examination (for example, from 42 months currently in Vietnam to 10-15 years with a temporary protection) and raising substantive examination costs to the level that the applicant must consider carefully the benefits that the patent could bring in, says Pham.

The IP Office Situation

Different jurisdictions have different ways of doing things, including the speed to grant, and, to many, patents take far too long to process.

According to Yingying Zhu, a counsel at Dechert in Beijing, in June 2018, China was ranked top in invention patent filings for the seventh consecutive year worldwide, with 751,000 filings in the first half of 2018.



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There are three types of patents in China: invention, utility model and design. Generally, it takes about 22 months for an invention to be granted from the time of entering into the substantive examination, six months to a year for a utility model

from the filing date, and three to eight months for a design from the filing date.

SIPO's processing time is similar to that of other jurisdictions, says Meng Su, a patent counsel at Wanhuida Peksung IP Group. "To accelerate, the applicant may leverage the PPH programme to which SIPO and 27 other jurisdictions agreed."

SIPO has made efforts to shorten examination by resorting to technical means such as artificial intelligence and big data in searching tools, Su says. "SIPO intends to shorten substantive examination to two-thirds of the current timeframe within five years."

Regardless, SIPO's current timeframe does not put off potential patent filers. Statistics indicate that the number of applications is increasing year by year, Su says. "As a strategy, applicants may choose to file utility model and invention applications simultaneously. Given that the utility model stands a far better chance of granting, applicants may rely on such to initiate enforcement. With regard to the double patenting matter, the applicant may address this matter at a later stage."

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Wanhuida Peksung IP Group, Beijing

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In India, a patent can be obtained within four to five years. If it is eligible for expedited examination, the grant can be obtained

But compared to the US, Europe and Japan, the time to obtain a patent grant in India is still long. “Our government aims to

reduce the backlog, so certain changes at the patent office have been made. Now, the examination is not jurisdiction based; an examiner based in any one of the four patent offices can examine an application filed in any jurisdiction as the allotment of applications is centralized and automated. As per the annual report issued by our patent office for the year 2016-2017, examination has been increased by 72.2 percent; grant of patents increased by 55.3 percent, and final disposal of applications increased by 37.7 percent,” Dhawan says. “With the implemented changes, after a few years, the pace and grant of examination in India will be similar to the major jurisdictions.”

In Japan, according to the Japan Patent Office’s 2018 annual report, the average first action pendency in 2016 was 9.4 months, whereas those at the USPTO and EPO were 15.7 months and eight months, respectively. Also, the average total pendency in 2016 at JPO was 14.6 months, whereas those at the USPTO and

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In the case of the pharmaceutical field where product development time is long and a considerable amount of time is needed to place a new product on the market, there is a need for deferring request of examination or grant of a patent.

- Kunimitsu Komatsu, patent attorney,
Nakamura & Partners, Tokyo

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within a year, says Ramesh C. Dhawan, senior partner of patents at Rahul Chaudhry & Partners in Gurgaon.

eight months, respectively. Also, the average total pendency in 2016 at JPO was 14.6 months, whereas those at the USPTO and

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EPO were 25.6 months and 26.5 months, respectively.

Under the JPO's accelerated examination or super-accelerated examination schemes, the first action pendency and the total pendency can be further shortened, says Kunimitsu Komatsu, a

between patent offices, such as the Thailand-Japan PPH also help reduce overlap. It is hoped that more PPH programmes will be established."

Based on Baker McKenzie's research, the average time required to obtain a grant in Thailand is between eight and 10 years from the filing date, depending on the complexity of the invention and the field(s) of technology involved. Applications for pharmaceutical patents and/or those involving life sciences may take more than 10 years on average to obtain a grant, says Sujintaya.

Thailand is therefore slow in grant, says Sukhprem Sachdecha, a partner at Satyapon & Partners in Bangkok. "Steps to improve include providing a fixed publication deadline, reducing provisions and conditions for preliminary examination, especially excluding patentable subject matter examination from preliminary examination, and conducting such examination during the substantive examination stage, as well as removing the step to pay the publication fee. These improvements are currently in

a proposed amendment of the Patent Act."

Vietnam takes about 30 months to grant, Pham says. "Compared to ASEAN countries, it is neither slow nor quick. Yet, NOIP can improve with the following: drafting and amending the

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On average, patents are granted within two to four years in Singapore. This is considered fairly quick compared to Asian countries and the US, which may take between five to 10 years.

- Andy Leck, managing principal,

Baker McKenzie Wong & Leow, Singapore

patent attorney at Nakamura & Partners in Tokyo. "Specifically, in the case of accelerated examination and super-accelerated examination, the average first action pendency in 2017 was 2.3 months and 0.7 month, respectively, and the average total pendency in 2017 was 5.3 months and 2.5 months, respectively."

On the other hand, in some technical fields, it cannot be said that faster is better, Komatsu says. "Of course, a patent associated with a product having a short life cycle needs to be immediately examined and granted. However, in the case of, for example, the pharmaceutical field where product development time is long and a considerable amount of time is needed to place a new product on the market, there is a need for deferring request of examination or grant of a patent. Some jurisdictions have a deferring system, but such is unavailable in Japan. Introduction of that had been discussed in the country, but there were many opposing opinions due to concerns like increased burden of monitoring a competitor's patent applications."

On average, patents are granted within two to four years in Singapore, Leck says. "This is considered fairly quick compared to Asian countries and the US, which may take between five to 10 years."

In Sri Lanka, it takes approximately three years or longer, Wilson says. "Increasing examiners and changing cumbersome administrative practices may help."

Similarly for Thailand, it needs to hire more examiners. "The government has taken steps and, over the past few years, the DIP has been hiring more examiners – 40 in 2015 versus more than 150 in 2018," says Say Sujintaya, a partner at Baker McKenzie in Bangkok. "The implementation of new work-sharing programmes

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The implementation of new work-sharing programmes between patent offices, such as the Thailand-Japan PPH also help reduce overlap. It is hoped that more PPH programmes will be established.

- Say Sujintaya, partner,

Baker McKenzie, Bangkok

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examination guideline, improving the capacity of existing and new examiners, improving search tools, improving the administrative management system regarding prosecution and utilizing the foreign search and examination results." AIP

