

January 2016

# TIPS<sup>®</sup>

Taiwan Intellectual Property Special

Inside  
This  
Issue

Global Vision

## Taiwan and China IP Experts

page/02

Luggage Design is Recognized as a Well-Known Trade Dress

page/03

Exclusive License Patentee Receiving No Royalties Found to Have No Standing in Patent Infringement Case

page/06

Infringement Not Found If Claims Were Invalid

page/08

Binding and Enforceable: Foreign Arbitration Awards are as Both Binding and Enforceable as Domestic Judgments

page/10

Understanding Utility Model Patent And Design Patent Protection

# TIPS

Taiwan Intellectual Property Special

## Luggage design is recognized as a well-known trade dress

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**The** Taiwan IP Court rendered an interlocutory judgement in December of 2015 confirming that the signature groove design applied on RIMOWA's suitcases is a well-known representation of goods (commonly known as "trade dress") protectable under the Fair Trade Act ("FTC").

This is the first time the outer appearance of a suitcase has been recognized as being well-known, and is also one of the few claimed trade dress cases being protected by the Fair Trade Act. In fact, in recent history, only "SUBWAY" and "PRIME BLUE" whisky bottle were ever recognized as well-known trade dress in Taiwan. Pursuant to the Fair Trade Act, no entity shall, with respect to the goods or services it supplies, "[use] in the same or similar manner the [...] symbol that represents [another's] goods commonly known to relevant industry or the consumers so as to cause confusion with another's goods; or selling [...] goods bearing such representation." Defendant Asia Pacific Automotive Inc., changed its company name to Deseno, and online marketed its "DESENO Occa Time Traveler" line of products which are deemed strikingly similar to the design of RIMOWA products by brand consumers and fans. RIMOWA company sued Deseno for use of a similar groove design on travel accessories, especially those in the same product line as RIMOWA's business. The court firstly analyzed the degree of fame of RIMOWA's signature groove design and found it to be serving as an indication of the origin of products and being widely known among the relevant consumers. Although the distinctiveness of such a groove design per se in Taiwan is not high as there exists other products sharing similar features, RIMOWA had been insisting on putting grooves on all its luggage products to faithfully communicate to the public the design concept for a long period of time, as campaigned in the advertisements and the press coverages. Besides, in light of the fact that RIMOWA's sales has risen sharply with its accumulated reputation in commerce, the groove design has a preponderant intensity in the market that the relevant enterprises and

consumers have commonly recognized and have associated the same specifically to RIMOWA's products. RIMOWA's groove design has therefore been established as a well-known trade dress under the Fair Trade Act.

The defendant's counter arguments regarding functionality, non-distinctiveness, and failure of origin identification were found to be groundless. Although the groove design strengthens the maximum resistance of the luggage, it is not an indispensable feature dedicated to structure fortification. Therefore, when other options are available, "tolerating other's commercial use of the well-known trade dress that is some way functional is equivalent to encouraging misappropriation of the fruits of intellectual production," was said by the Court. As for the defendant's alleged "commonly used shape" pointed to a lack of distinctiveness, no evidence was sufficiently presented to demonstrate earlier use of the groove design by others before RIMOWA entered the Taiwanese market. Given that many other luggage products bear some longitudinal creases of the like, they were not consistent with the visual esthetic features of RIMOWA's groove design.

By observing as a whole and comparing the main portions, the Court found the design which was made on the defendant's luggage products enabled, among the consumers, an overall visual impression of similarity to the main components of RIMOWA's trade dress. Since the consumers would pay attention to the groove design when shopping for RIMOWA's luggage, they may likely choose instead the defendant's product erroneously because the two competing products are in same category of goods and are similar to each other with respect to main components, features, and prices. The court concluded that there is likelihood of confusion between RIMOWA and Deseno products where the consumers may be unable to identify the correct source of goods.

As an interlocutory judgement, the court will further review RIMOWA's injunction and damage claims based on the foregoing holdings.

# Exclusive License Patentee Receiving No Royalties Found to Have No Standing in Patent Infringement Case

On June 13, 2015, the Taiwan Intellectual Property Court rendered judgement No. 101-CPL-112 holding the patentee in an exclusive license who was receiving no royalties to have no standing to sue for patent infringement.

Pfizer Ireland Pharmaceuticals (the plaintiff) launched an action against a Taiwanese drug store alleging infringement of its Viagra patent, or invention patent No. 083372 ('372 patent), by selling generic drugs for curing erectile dysfunction. The '372 patent supposedly expired on May 12, 2014, but was extended to July 2, 2016. The plaintiff claimed for injunctions on sales of allegedly infringing drugs as well as monetary damages. The respondent argued mainly that the plaintiff did not have standing to sue and that the term of '372 patent was illegally extended. In the judgement, the court ruled to dismiss plaintiff's claims.

The court first explained the fundamental requirements for claiming damages. According to the principle of indemnity, a claim for damage resulting from infringement act is to indemnify a plaintiff's actual loss instead of awarding any additional gains. Thus, damages will usually be granted when an actual loss is to be found. This is deeply rooted in the Taiwan Civil Code under the principle of indemnity and is also provided for in the Patent Act. Although the law provides several methods of calculation, these are merely to serve as a convenient approach to reach a proper amount of damages. In other words, the law does not create an exception to the patentee's burden of proof proving his/her own loss and the principle of indemnity. Therefore, in the event where no actual losses are to be found or where the patentee fails to prove the same, the patentee's damages claim will not be supported by the court.

Subsequently, the court analyzed the plaintiff's legal standing to sue for infringement. The plaintiff claimed only for damages incurred since the initiation of the action on February 7, 2012. However, the Plaintiff had granted the exclusive license to Pfizer Taiwan on January 1, 2012, without receiving any royalties as considerations. That is, the plaintiff had given away the entire scope of the patent right to another entity before raising the issues at court. The plaintiff apparently had no power to practice the patent during the rest of the patent term since then. Most importantly, since its licensee did not promise for any considerations in return for the patent license, the plaintiff's income of royalty, which remained nothing, was therefore not influenced by any changes of the sales numbers of the patented drug. Even though no damages had been incurred, those damages would have been incurred by the licensee rather than the plaintiff. The causation between the plaintiff's alleged losses



and the infringement had therefore failed to have been established. In short, the plaintiff was found to have no actual loss.

In relation to the patent term extension that the plaintiff claimed to enjoy, the court also found errors in the calculations of the term. As previously indicated, the '372 patent was supposedly to have been expired on May 12, 2014. With a granted application, the plaintiff, or the patentee, extended the term of another two years plus about 1.5 months, which was as well the duration required for obtaining the regulatory approval demonstrated by the plaintiff. According to the 1994 Patent Act, the threshold for a patent term extension for pharmaceuticals was set as that the applicant would spend at least two years for obtaining the necessary regulatory approval after the patent is granted. If the time spent for obtaining the approval is less than two years, the extension would not be granted. The court found that some foreign clinical trials had been done before the grant of the '372 patent. Thus such period before patent grant should not be accounted for in the calculation of the time to meet the two-year threshold. The extension was therefore revoked and the patent term should be deemed as expired on May 12, 2014.

In summary, because the plaintiff had exclusively licensed the right of patent to Pfizer Taiwan, another entity, where no royalty agreement had been reached between the two parties, the plaintiff suffered no actual loss. In view of this, the court opined that the plaintiff had no ground to claim for damages in this case. On the other hand, the two-year minimal time for obtaining a patent term extension stipulated in the 1994 Patent Act no longer existed. The current Patent Act has no time threshold for applying for a patent term extension.

## Infringement Not Found If Claims Were Invalid

**Toshiba** Corporation owns Taiwanese Patent Certificate No. I315588 titled “semiconductor light emitting device and method of manufacturing same and semiconductor light emitting apparatus” (the ‘588 patent). Toshiba, after sending warning letters, sued Arima Optoelectric Corporation (“AOC”) for patent infringement for continuous engagement in selling and using the accused products, an array of models of LED. The ‘588 patent was amended post-grant twice in 2013 and in 2014 respectively. Whilst the 2013 Amendment was approved, the 2014 amendment was pending at the time the judgment was rendered.

AOC, the Defendant, responded to Toshiba’s asserted counts countering that the Amendments were made beyond the disclosure of the ‘588 patent, that patent claims did not read on its products, that the AOC was entitled to prior user’s right, and that the ‘588 patent is lack of novelty and inventive steps.

The Defendant first argued that the Amendments to the ‘588 patent are invalid because of the illegal expansion made beyond the disclosure of the specification. The court opined to the otherwise. Despite the 2014 Amendment was not granted during the trial, the 2014 version was only different from the 2013 counterpart by its narrowing of the claim scope and the clarification of ambiguous claim language.<sup>1</sup> The Amendment did not substantially enlarge the scope of claims as granted or went beyond the original disclosure of the specification as filed. The amended claims in 2014 version were therefore permitted by and admissible to the court.

Next, before claim construction, the court reasoned the scope of patent protection that the examples described in the specification only purport to illustrate the embodiments of the given invention. Examples shall not expand beyond or narrow the claims. Otherwise, it is no less than introducing the matters or limitations that are originally not included in the claims or substantially changing the scope of patent protection.

Furthermore, to interpret patent claims, one shall recite the claim wordings literally rather than reading into the specification or the abstract or removing any sections of the claim sentences, as the court emphasized. In the event where there exists any ambiguity or unclear use of languages, the descriptions and the drawings of the invention may be employed as reference to determine the definition or meaning that are understandable by a person having ordinary skills in the art. The claims shall be interpreted in an “objective and reasonable” perspective instead of the personal acknowledgement of the applicant. Unless the applicant “acts as his own lexicographer” to re-shape specifically a term in a unique and distinct definition from its commonly

acknowledged meaning, the term will be identified as its conventional definition as perceived by an ordinarily skilled artisan.

After a series of claim construction and infringement analysis, the court determined that the products fall into seven (7) claims of the permitted 2014 Amendment.

The court also rejects Defendant’s prior art defense argument. Prior art defense, as explained, will be admissible when the allegedly infringing products are identical to a certain prior art or, if not identical, is the simple combination of a certain prior art and the common knowledge in the technical field. In other words, prior art defense will not be established based on the combination of a plurality of references. Since Defendant’s proposed scientific literature was concerning the morphology and growth of semiconductor materials but not substantially related with the invention of the ‘588 patent that centered at the semiconductor LED, the court held that such a single reference is inapplicable to defend the subject patent claims.

After all the foregoing, the court analyzed Defendant’s last defense challenging the validity of the claims and found that the claims in the 2014 Amendment are either not novel or lack of inventiveness under the evidenced prior art references. Namely, even though Defendant’s products infringed upon some of ‘588 patent’s claims, those claims were invalid. The patentee was not entitled to an enforceable patent right against the Defendant acts. The court ruled to dismiss the case.

<sup>1</sup> Patent Act §67(1)(1) and §67(1)(2)

## Binding and Enforceable : foreign arbitration awards are as both binding and enforceable as domestic judgments

On November 13th of 2015, Taiwan’s Legislative Yuan passed a bill of the Amendment to Article 47(2) of the Arbitration Law (“the Law”). Statutorily, foreign arbitral awards will be both binding and enforceable in Taiwan since the passage of this amendment.

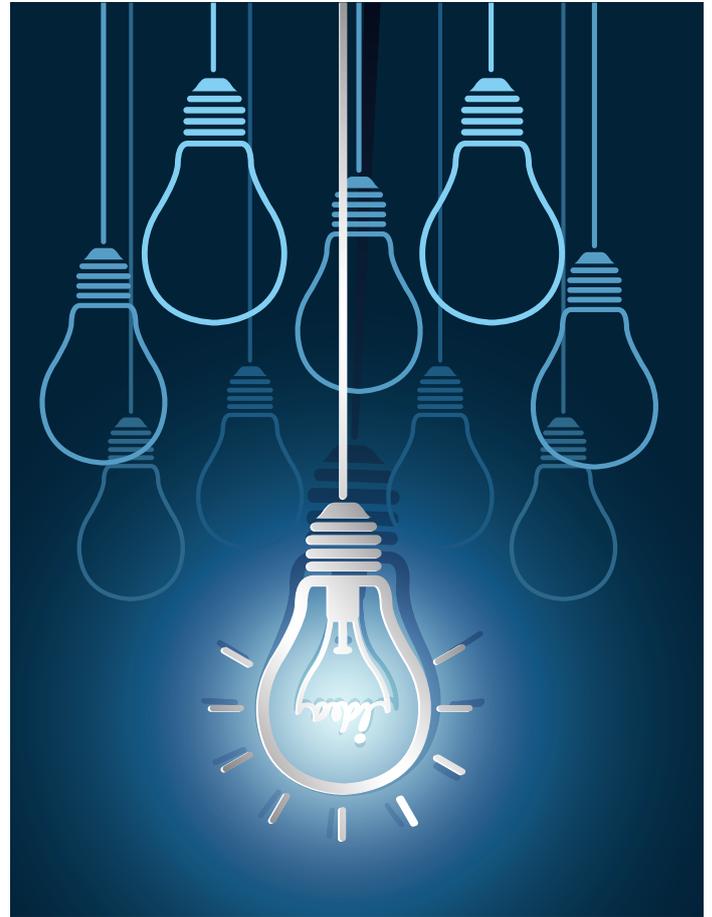
With regards to international collaboration on arbitral awards recognition, The United Nations Commission on International Trade Law (“UNCITRAL”) governs the Convention on the Recognition and Enforcement of Foreign Arbitral Award, or the New York Arbitration Convention (“the Convention”). While about 150 countries are signatories to the Convention, Taiwan is not a contracting member. Nevertheless, based on international reciprocity, Taiwan unilaterally legislated its Arbitration Law of 1982 to incorporate the Convention’s system respect to recognition of foreign arbitral awards.

Pursuant to Article 3 of the Convention, “[e]ach contracting state shall recognize arbitral awards as binding and enforce them.” Accordingly, issues determined in foreign arbitration of one of the contracting states would not be raised or substantially reviewed again in a judicial court of another member jurisdiction, as required by the doctrine of *res judicata*. In other words, an already recognized foreign arbitral award shall be both binding and enforceable.

Interestingly, the Law’s statutory wording for the effect of recognition seems to be different from that in the Convention. The pre-amendment Article 47(2) of the Law required that “[a] foreign arbitral award, after a petition for recognition has been granted by the court, shall be enforceable.” While enforceability of a foreign arbitral award is confirmed by the Law, whether or the extent to which the binding effect of a foreign award exists was however left as a loophole, or by interpretation was deemed ambiguous. Contrary to a foreign arbitral award, the binding effect of a domestic award being the same as a court’s judgement is readily stipulated in Article 37 of the Law.

The post-amendment Article 47(2) of the Arbitration Law now reads “[a] foreign arbitral award, after a petition for recognition has been granted by the court, be binding on the parties and have the same force as a final judgment of a court and may serve as a writ of execution.” The binding effect of a foreign arbitral award is therefore statutorily stipulated in the Law.

One thing to note is that, although a recognized award’s binding effect is now statutorily provided after this amendment, recognition is not granted unconditionally. As required in Article



49 of the Law, upon receiving a petition for recognition, the court is obligated to dismiss the petition when finding either that the recognition or enforcement of the foreign arbitral award is against the public order or good morality of Taiwan or that the dispute involved is not arbitrable pursuant to the laws of Taiwan. Additionally, the court may, with discretion, dismiss the petition for recognition in the event where a foreign country or the laws governing the foreign arbitral award do not reciprocally grant recognitions to Taiwan’s awards.

Although Taiwan has been one of the top 20 international trade economies for decades, it is not a signatory to the Convention. Taiwan can only formulate its laws to use the recognition mechanism of the Convention. Nevertheless, in practice, the binding effect of a foreign arbitral award had been subject to questioning. After the amendment where the binding effect is statutorily provided, it can be expected to bring Taiwan’s system even more in alignment with the Convention’s contracting states.

# Understanding utility model patent and design patent protection



**Utility** models and designs are two available categories of patents in China. Utility models are sometimes referred to as small inventions because they have comparatively lower level of inventive step and are less costly than an invention. Subject to preliminary examination, a utility model only takes several months from filing to grant. Therefore utility model protection is worthwhile for some invention-creations that have small technical improvements but are of significant commercial value. As for designs, an application is also preliminarily examined only. A design is an artistic creation which features a decorative or aesthetic exterior appearance of an article, unlike invention or utility model which involve technical solutions.

In 2014, SIPO received approximately 928,000 utility model and 869,000 design applications, respectively accounting for 22% and 21% of the total number of annual patent applications. From 2010 to 2014, the mean annual growth rate of utility model applications filed by domestic applicants is 29%, whereas about 7% of those are filed by foreign nationals. It suggests that utility models are still attracting both domestic and foreign IP holders despite of the high invalidity rate of roughly 65-72% over the past two years according to available commercial statistics. On the other hand, the total number of design filings peaked in 2013 among the past four years but later slightly declined in 2014 with a difference of some 24,000 applications. Nevertheless, design applications filed by foreign applicants have demonstrated a constant increase each year.

## Patentable Subject Matter

PRC Patent Law 2008 (the Patent Law) defines a utility model as any new technical solution relating to the shape, the structure, or their combination, of a product. In other words, a utility model does not protect any methods, processes, or improvements of such. Also, non-technical solutions are not eligible for utility model protection, such as the use of a product or substance with an unfixed shape, and products only featuring decorative designs.

A design patent means any new design of the shape, the pattern, or their combination, or the combination of the color with shape or pattern, of a product which creates an aesthetic feeling.

In principle, one application is limited to only one design. But an exception provides that similar designs for the same product or a plural of similar designs incorporated in products as a set may be filed together in one application including at most 10 designs.

Graphic user interface (GUI) is also a patentable subject matter. The protection of a GUI was affirmed in an administrative litigation in 2014 where the court ruled that a GUI in combination with the installed product presents appealing features complies with the definition of a design. Under SIPO's Order No. 68, by removing restrictions on the product pattern of being permanent and visible rather than flickering or being conditionally visible, the Guidelines were amended to include a GUI as a patentable subject matter for design.

As a universally governing clause, Article 5 of the Patent Law applies to all creations that an application for utility model or design would be rejected if the subject matter is contrary to the laws or social morality or that is detrimental to public interest.

Notably, unlike in some countries, Patent Law does not specifically provide a conversion of application from an invention to utility model and vice versa.

## Acquiring Patent Protection for Utility Models and Designs

### Patentability

**Utility Models:** According to Article 22(1) and (3) of the Patent Law, "An invention or utility model for which a patent is to be granted shall be novel, inventive and practically applicable.....Inventiveness means that,.....the invention has prominent substantive features and represents a notable progress and that the utility model has substantive features and represents progress." Whereas an invention has to represent notable progress in order to meet the inventiveness requirement, a utility model that has progress will suffice. Therefore, a utility model requires comparatively lower level of inventive step than that of invention patents.

**Designs:** Composing of the same elements, a patentable design shall be novel, significantly differing from prior design, and applicable in industry. Notably, a patent will only be granted to a design which is not conflicting with existing and legitimate rights, such as copyrights, trademarks, trade dresses, images, etc.

### *Preliminary examination*

The Patent Law does not require utility models and designs to be examined substantively. The applications are only checked by preliminary examination without conducting any prior art or prior design search before grant. The preliminary examination generally takes from three (3) months to a year.

Preliminary examination does not imply that the featured novelty will not be investigated at all. According to SIPO's Order No. 67 and the post-amendment Guidelines for Patent Examination 2010 (the Guidelines), the examiner may look into whether an application for utility model or for design is *prima facie* lack of novelty (namely, an examination on obvious and substantive defects), as well as any facts of double patenting. Without conducting a search, the examiner may use the available technical solutions and information that may conflicts with the application as the prior art, including the search results in other countries.

### *Scope of Protection*

The product or article on which the design applies is an indispensable element that has to be designated or illustrated in the application in order to define the boundary of right. Different from invention patents or utility models, the scope of protection for a design is defined in the drawings or photographs submitted. To interpret a design, the Patent Law requires a brief description in the specification. Furthermore, Article 28 of the Implementing Regulations demands the brief description to indicate the essential features, which is particularly important for distinguishing prior designs.

### *Term of patent*

The term of patent protection for either utility models or designs is 10 years from the filing date.

### *International priority*

To enjoy international priority, the applicant must file in China within twelve (12) months for utility model or six (6) months for a design from the date on which the applicant first filed in a foreign country an application for the same utility model or

design. A priority claim shall be made upon filing and a copy of the priority document shall be submitted within three (3) months from the filing date. Failure to meet either requirement will deem the priority claim to be void.

China allows the national entry of a PCT application as a utility model application. However, the applicant will not be able to take advantage of the “one-invention-creation-two-applications” strategy by filing through the PCT national entry route (please find more information in the “Dual-filing strategy” paragraph). The applicant will need to choose either an invention patent or a utility model application for PCT national entry.

There is a concern whether a foreign partial design can be the priority basis for a Chinese design application, as China does not permit design in part. According to SIPO's current practices, if only the dotted lines or double-dotted lines are modified to solid lines in the drawings submitted to SIPO, the Chinese application may be entitled to a priority claim to a first-filed foreign partial design. Nevertheless, such concern will not be a problem if a partial design is admitted as patentable subject matter by the prospective 4th Amendment of the Patent Act.

### *Dual-filing Strategy*

Article 9 of the Patent Law establishes the principle of double-patenting prohibition, but it allows for a “one-invention-creation-two-applications” filing strategy. Article 41 of the Implementing Regulations prescribes that, where the same applicant files same day applications for both utility model and for invention patent relating to the identical invention-creation, he or she should indicate on the applications that the same invention-creation has also been applied for another patent application. Failure to specify at filing may cause the applications to be rejected according to the principle of double patenting.

Since a utility model does not have a substantive exam, in practice it will be granted much earlier than an invention patent. The applicant can then enjoy utility model right and may then opt to abandon the earlier granted and effective utility model upon the grant of the invention patent. The utility model will

cease from the publication date of invention patent grant. Namely, the later granted invention patent, which enjoys longer term of protection, takes over and continues the patent right from the cessation of the utility model. This patent prosecution strategy implies that utility models can not only be used as a supplementary protection during the pending period of an invention application, but also an alternative protection in lieu of an invention patent if unfortunately the latter is rejected during the substantive examination.

Notably, this route will be available only when both applications are filed in China on the same date, and are based on the same priority date, if any. It can be claiming priority based on the first-filed foreign application according to Paris Convention. If the first-filed application is a PCT application, the applicant needs to file national applications for utility model and invention respectively, claiming priority to the PCT application under the Paris Convention. This means the applicant should not take the route of PCT national entry. If the route of the PCT national entry is desired, the applicant will only be able to choose one type of application between utility model or invention patent, and cannot take advantage from the “one-invention-creation-two-applications” filing strategy from this step forward. It is because the filing date of the second national application for the same invention-creation differs from the filing date of the PCT application which the national entry is based on.

### *Enforcement of Patent Rights*

According to the statistics available at a commercial database, the patent validity rate during 2014 for utility models is about 28% and the same rate for invention patent is roughly 30%. However, while the validity rate during 2015 for utility models increases to around 36%, the same rate for invention patent plunges to only 8%. Since a utility model requires only a comparatively lower level of inventive step, a utility model's stability against an invention patent is quite competitive. It is also shown that an utility model patentees' winning rate in infringement cases during 2014 to 2015, again according to available commercial data, is about 61-72%, while the same rate

for invention patentees is approximately 59-69%. As our interpretation, acquiring an invention patent, which takes a lengthy and expensive procedure relative to the investment for a utility model does not guarantee the patentee a more confident winning rate in infringement law suits. However, a suitable patenting strategy still depends on the kind of invention-creation the patentee would like to protect and the length of protection desired.

### *Patent Evaluation Report*

The Law requires a special burden of proof on the patentees of utility models and designs in the event of infringement litigations. Article 61(2) reads, “[...] the people's court [...] may ask the patentee or any interested party to furnish an evaluation report of patent made by [SIPO] after having conducted a search, analysis and evaluation of the relevant utility model or design, and use it as evidence for hearing or handling the patent infringement dispute.” Since utility models and designs are only subject to preliminary examination before being granted, their validity may be vulnerable during the trial. However, an evaluation report is neither an administrative decision regarding patent validity nor a prerequisite for initiation of a legal action. The report only serves as a preliminary reference for the court, which has full discretion, to determine and order whether or not to suspend the pending proceeding. Only the Patent Reexamination Board has the authority to confirm or invalidate the patent in dispute. Moreover, whether the report is appealable may invite some criticism. SIPO's standpoint poses that the report is not an agency's decision and therefore the patentee is unable to file an administrative litigation against the same.

### Highlights: the 4th Amendment Proposal relating to utility models and designs

According to the latest version of the Draft of the 4th Amendment to the Patent Act published in December of 2015 (the Draft), several new provisions concerning utility model and design will be introduced, as explained below.

#### *Partial design*

The currently effective Patent Act 2008 does not expressly rule out the patentability of partial designs. Instead, its ineligibility for protection is listed as an example in the Guidelines for Patent Examination 2010. Additionally, the Guidelines require the entire appearance of the article to be delineated by solid lines, precluding the use of dotted lines.

In the Draft, now the Article 2(4) defines designs as new designs of “the whole or partial” shape, pattern, of the combination thereof [...]. Therefore, by legislation, partial designs will be available for patent protection. The Guidelines and relevant regulations are expected to also be modified accordingly.

#### *Extension of Term for Design Patent*

In line with the U.S. system, a design's term of protection will be extended to 15 years from the filing date, while that for utility model may remain the same as 10 years.

#### *Punitive damage and Elevated Statutory Damage*

The change in the amount of monetary damages attracts lots of attention. The first three methods of calculation, namely the actual loss of patentee, the profits obtained by the infringer, and the reasonable multiples of royalty, remain as they are. What is surprising is that the court may weigh the circumstances, scale, and consequences of patentee/licensee's injuries to award up to triple damages calculated via one of the aforementioned methods. The damages may include patentee/licensee's rational expense in the effort to cease infringement. Most importantly, the statutory damage is considerably elevated to a range of RMB¥ 0.1 to 5 million.

### *Indirect Infringement*

In the new Law, contributory and induced infringements are two types of liable offenses. Contributory infringement is constituted when “[t]he parties who knowing the raw materials, intermediates, components, equipment are specifically designed for implementing the patents, in the purpose of business, provide the products above to the other parties infringing patents.” And an act is deemed as induced infringement when “[t]he parties who knowing the relevant products or methods are patented, in the purpose of business, induce the other parties to infringe the patents.” Note that a fundamental prerequisite for indirect infringement is the presence of a direct infringer. It requires an inducer or a contributor's knowledge of infringing acts as well. In other words, the patentee has to prove that an inducer or a contributor's intent is willful. Once infringement is found, the inducer or contributor shall be jointly liable with the direct infringer for damages.



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TIPS | Taiwan Intellectual Property Special | Jan 2016

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