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This presentation is
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general discussion
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Patent Management – The brutal truth

Patents and Defensive Publishing

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Overview

- **Can defensive publishing be a competitive alternative for SMEs*?**

*Small and medium (mid-size) Enterprise; german: KMU

Overview

- The number of patent applications is rising steadily.
- cf. European Patent Office (EPO)
 - Growth 1997-2007 approx. 6.7 % p.a.
 - 1997: 100,392 applications
 - 2007: 218,219 applications
- Patent flood: The falling quality of searches is currently being lamented.
 - Quantity of new applications Quality and inventive step
 - Old patents

Overview

Trends in patenting 2020

Europe is an **attractive technology market** for European and international companies

Patent applications
at the European Patent Office 2018 - 2020

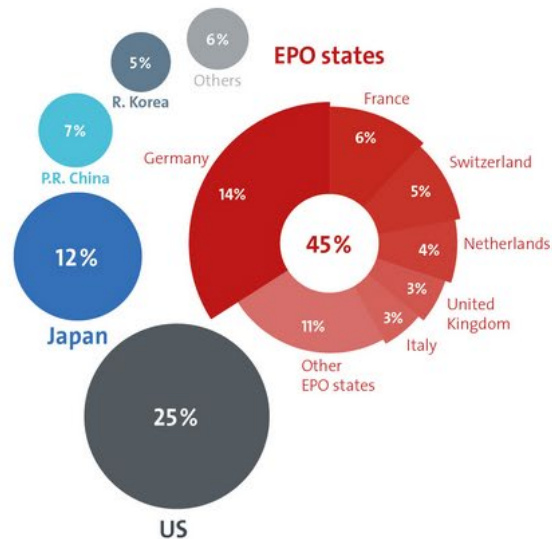


Companies from Europe: Relative growth compared with 2019



EPO states filing more than 1 000 applications; changes in filing volumes greater than +/- 2%

Countries of origin:
The 38 member states of the EPO account for almost half of all European patent applications

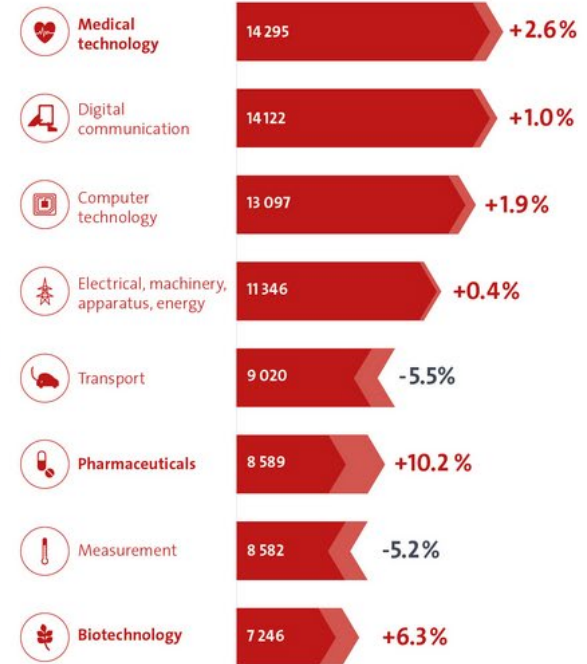


Growth in filings from the five leading patent territories

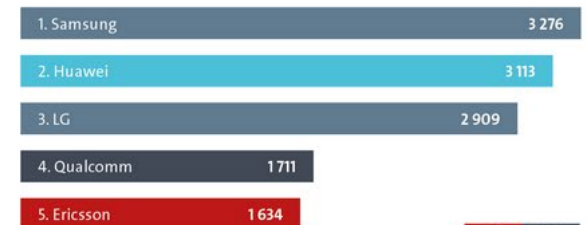


All figures are based on European patent applications. Status: 1.2.2021.
epo.org/patent-index2020

Top technology fields: Strong growth in healthcare



Top applicants for European patents in 2020



The Patent Marketplace

Invention disclosures and patents are usually not only used to:

- To protect one's own prior art.
- To prevent others from using their own knowledge,

but:

- **Using patents as bargaining chips against others (patent infringement) in litigation.**
- **To use disclosures as test balloons in opposition proceedings in order to improve one's own technology via the oppositions, or to circumvent patents.**

The Patent Marketplace

- Obtaining patents is of little use if
 - no patent monitoring is implemented,
 - patent infringements cannot be legally prosecuted.
 - Patents are not applied for in the relevant countries worldwide (an e.g. exclusively German application is often pointless).
- It is not the primary goal of companies
 - **to acquire other people's patents, but to circumvent patents.**
 - E.g. Intellectual Property Forum at the Munich Patent and Trademark Office (DPMA) in early summer 2007+.

The Patent Marketplace

- Typical type of action in companies (SMEs)
 - **Secrecy!**

But: Two risks arise

- I. A general secrecy is not realizable (Mansfield 1985)
- II. **Dangerous:** Another person makes an invention again (consciously or unconsciously) and applies for a patent.
 - a. He receives the patent (EPO/PCT: first-to-file)
 - b. The first inventor goes away empty-handed, unless ...

Defensive Publishing (DP)

- The right to use an invention (own R&D) without having patented it, or to obtain freedom of action with regard to own intellectual property (IPR), is the driving force for **defensive publishing**.
- See Merck Gene Index, 1994 in cooperation with the University of Washington.

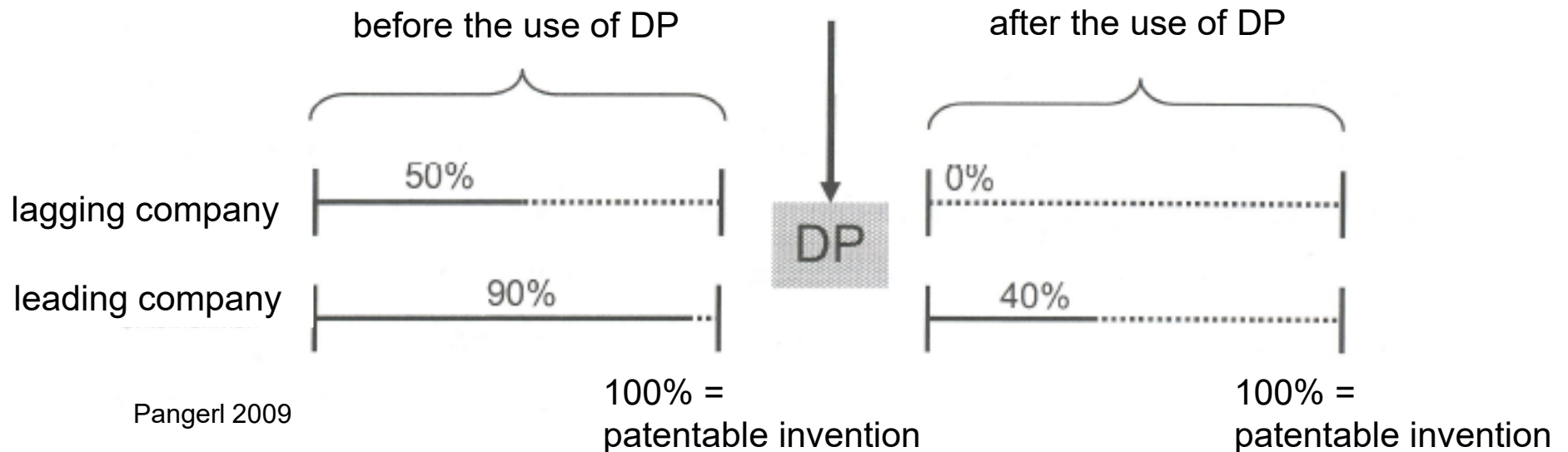
Defensive Publishing

- *"Defensive publishing (DP) refers to the purposeful publication of an invention with the goal of creating "prior art" and thus preventing a right to exclude from being granted on a given invention." (Pangerl 2009)*
 - Defensive publications preserve freedom of action
 - Attractive alternative to patent (if properly applied)
 - Secrecy possible
 - Quick
 - "Braking effect" on the competitor (cf. n. slide).
- Important: find right ways of publication (must be easily accessible to the public).

Defensive Publishing

- Exemplary procedure in competitive situations

Use of defensive publishing in the patent race



Defensive Publishing

- **Publication media**
 - Scientific Journals
 - IEEE
 - SPIE
 - ...
- **Websites for IPRs**
 - IP.com
 - Priorartdatabase.com
 - ...
- **Time and place must be clearly verifiable!**

Summary

- The patent "market" is becoming increasingly confusing.
- The quality of applications is declining worldwide.
- The risk of becoming involved in legal disputes despite having obtained a patent is also increasing.
- Defensive publishing can be an effective means in the competition of innovations without having to take financial or legal risks.