Trial and Appeal Practitioner Study Group

$\underset{(Summary)}{REPORT} 2023$





Trial and Appeal Department (TAD) Japan Patent Office

Trial and Appeal Practitioner Study Group

REPORT 2023

(Summary)

Trial and Appeal Department Japan Patent Office

Preface

The chief administrative judges and administrative judges of the Japan Patent Office (JPO) conduct proceedings on the appropriateness of examination results and the validity of rights for patents, utility models, designs and trademarks, and make final decisions as the administrative agency concerned. For conducting trial and appeal proceedings more appropriately, it is important to review actual trial and appeal decisions and court decisions, and to provide feedback of the results to future trial and appeal practice in order to objectify or clarify the criteria for determination. In addition, it would allow us to share the understanding of trial and appeal practices with users of the trial and appeal system by disseminating the results.

Based on this understanding, since 2006, the Trial and Appeal Department of the JPO has held the "Trial and Appeal Practitioner Study Group" (originally called the "Case Studies on Inventive Step"), where corporate intellectual property professionals, patent attorneys, attorneys at law, as well as chief administrative judges and administrative judges of the JPO gather to study trial and appeal decisions and court decisions, and by this fiscal year, a total of 795 study members have studied 231 cases. Since 2016, judges of the Intellectual Property High Court and the Tokyo District Court have participated in the Study Group as observers, resulting in adding judicial perspectives to the study and enriching its activities.

At this fiscal year's Study Group, the members discussed the following topics; as for the four patent fields (Machinery, Chemistry 1, Chemistry 2, and Electricity) and



Trial court of the JPO

the design field, general issues (determination of inventive step of inventions defined by a numerical limitation; new matter; fulfillment of support requirements; determination of inventive step for software-related inventions; and determination of the "article to which the design is applied") as well as one individual case in each, and as for the trademark field, general issues (distinctiveness (Article 3(1)(iii) of the Trademark Act); and determination of similarity).

Through in-depth discussions on specific cases, the Study Group provides a very valuable opportunity for the participants to gain a deeper understanding of the perspectives from different positions, including corporate intellectual property professionals, patent attorneys, attorneys at law, administrative judges, and court judges, as well as the points of view of those with conflicting interests, such as a right holder and a demandant for invalidation trial. The results of the discussions are based on a multifaceted consideration of issues and points of contention that are important in practice and lead to objectification or clarification of the criteria for determination, and therefore are used not only by administrative judges but also by examiners and other officials at the JPO. In addition, the results of the discussions have been widely disseminated to users of the trial and appeal system in the form of reports, and therefore are used as a reference to learn more about the perspectives from the different positions mentioned above and the points of view of those with conflicting interests. For overseas persons concerned, the results of the study group are widely disseminated through the publication of English translations of the summary version of the reports. We expect that these efforts will promote the understanding of domestic and foreign users of the system of Japan's trial and appeal practice and further enhance their confidence in Japan's IP system.

Lastly, we would like to express our gratitude to the members of the Japan Intellectual Property Association, the Japan Patent Attorneys Association, the Japan Federation of Bar Associations, the Intellectual Property High Court, and the Tokyo District Court that give us cooperation in organizing the Study Group, as well as the members and observers who participated in the Study Group.

March, 2024

TAMURA Kiyoko

Chairperson, Trial and Appeal Practitioner Study Group Executive Chief Administrative Judge Trial and Appeal Department, Japan Patent Office

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Demandant's and Demandee's nameplates in the trial court of the JPO

Outline of Study

I. Study Framework

Studies were conducted by each of the six groups (Patent – Machinery, Patent – Chemistry 1 (General Chemistry), Patent – Chemistry 2 (Pharmaceuticals and Biotechnology), Patent – Electricity, Design, and Trademark) on determinations made by the JPO and the Intellectual Property High Court focusing on specific cases as a reference or a subject.

Each group consists of corporate IP personnel, patent attorneys, attorneys as well as a chief administrative judge and administrative judges of the JPO. In addition, judges of the Intellectual Property High Court and the Tokyo District Court have participated as observers.

The study group was led by Chairperson, Executive Chief Administrative Judge at the Trial and Appeal Department of the JPO, and administered by Secretariat, the Trial and Appeal Policy Planning Office, the Trial and Appeal Division, the Trial and Appeal Department of the JPO.

II. Study Cases

Each group has selected 2 cases (the first case and the second case) for examination (the details are shown in the following pages).

The first cases, Cases 1-6,12, were selected based on a general topic (determination of inventive step of inventions defined by a numerical limitation; new matter; fulfillment of support requirements; determination of inventive step for software-related inventions; determination of the "article to which the design is applied"; distinctiveness (Article 3(1)(iii) of the Trademark Act); and determination of similarity) considered important for the trial and appeal practices by reference to the point at issue in the recent trial/appeal decisions or court decisions.

The second cases, Cases 7-11, were selected from cases considered important for trial and appeal practices among those that met the following two criteria: (1) cases for an appeal against examiner's decision of refusal, a trial for invalidation, a trial for rescission of registered trademark not in use, an opposition to grant of patent or an opposition to registration of trademark, where their trial/appeal decisions or court decisions were already concluded; and (2) rights in dispute do not exist in the end.

III. Study Method

The study of each case was separately conducted by each group.

The members from the JPO have prepared the discussion points in advance, and at the first session, they explained outline, issues to be discussed etc. of the case. Following the first session, each member prepared an opinion on issues to be discussed, added new discussion points, and conducted further research and review as necessary.

At the second session, each member presented an opinion on issues to be discussed and the result of research, etc. The members discussed cases while giving consideration to such matters as background of the case, description of the specification, etc., evidence submitted, allegation made by the parties, previous court decisions, the members' own experience.



* Patent - Chemistry 1: General Chemistry

Patent - Chemistry 2: Pharmaceuticals and Biotechnology

Organization chart of the Trial and Appeal Practitioner Study Group 2023

Study Cases (the First Study Cases)

Field	No.	Topic	Point at Issue
Patent - Machinery	1	Determination of inventive step of inventions defined by a numerical limitation	Issue 1: Determination of inventive step regarding different features relating to a numerical limitation in numerical limitation inventionsIssue 2: How should an applicant prepare a specification to avoid an invention defined by a numerical limitation being rejected or invalidated?
Patent - Chemistry 1	2	New matter	Issue 1: As a general statement, to what extent should an amendment (or a correction) to a claim be allowed that adds matter not explicitly described in the specification, etc.? Issue 2: In particular, how should introduction of new matter be examined with respect to an amendment (or a correction) to a numerical range in a claim reciting an invention characterized by a numerical limitation in a case where the boundary value is not clearly described in the specification, etc.? Issue 3: In particular, regarding a "disclaimer (amendment introducing a negative limitation)", which cases can be considered as introduction of new matter by excluding matter recited in a claim?
Patent - Chemistry 2	3	How should the fulfilment of the support requirement be determined?	Issue 1: To what extent should examples be described in the specification? Issue 2: What are cases where an invention defined by a numerical limitation is recognized as solving the problem of the invention over the entire numerical range?
Patent - Electricity	4	Determination of inventive step for software- related inventions. Study with a particular	Issue 1: What should be taken into account in identifying the functionally expressed features of information and information processing in order to find the gist of the invention claimed in a patent application and to find the corresponding/different features in determining the inventive step of software-related inventions?

		focus on the functionally expressed features of information and information processing.	Issue 2: What should be taken into account in finding different features, including the specification of cited inventions and the state of the art other than the cited inventions (the well-known art and the common technical knowledge), for the functionally expressed features of information and information processing related to software-related inventions?
Design	5	Finding of the "article embodying	Issue 1: For what purpose should the "article embodying the design" in the design application be found?
		the design"	Issue 2: What information should be the basis for the finding of the "article embodying the design" in the design application?
			Issue 3: How should the "article embodying the design" in the design application be found?
			Issue 4: What determination standards should be used to determine "identical or similar articles" in determining similarity of designs?
Trademark	6	6 Trademark Act, Article 3(1)(iii) Distinctiveness	Issue 1-1: Cases where no example of use is required to determine the applicability of the Trademark Act Article 3(1)(iii)
			Issue 1-2: Trademarks that will be generally recognized in the future as an indication of the quality of goods and services
			Issue 2: Pertinence of recognizing exclusive adaptability for trademarks that have no example of use by others
			Issue 3: Effect of the existence of examples of use by the applicant/right holder on the determination of distinctiveness and the evaluation of evidence
			Issue 4: Directness and concreteness necessary for the indication of the quality of goods and services

* Patent – Chemistry 1: General Chemistry

Patent – Chemistry 2: Pharmaceuticals and Biotechnology

Study Cases (the Second Study Cases)

Field No.	No. Title of Invention	JPO Docket No. (Trial/ Appeal Decision)	Date of Trial/ Appeal Decision	Conclusion of Trial/Appeal Decision	Major Issue	
			Court Docket No. (Court Decision)	Date of Court Decision	Main Text of Court Decision	
Patent- Machinery	7	Pressure- sensitive adhesive	Opposition No. 2020- 700417	Jul. 7, 2021	Trial decision to revoke the patent	Patent Act, Article 29(2) (Inventive
	tap pro me the	tape and production method therefor	2021(Gyo- Ke) 10091	May 11, 2022	Dismissal of a request	Step)
Patent- 8 Chemistry 1	8	8 Tomato- containing beverage, method for producing the same and method for suppressing acidity of tomato- containing beverage	Invalidation No. 2015- 800008	May 19, 2016	Trial decision to accept correction	Patent Act, Article 36(6) (i) (Support Requirement)
					Trial decision to maintain the patent	
			2016 (Gyo- Ke) 10147	Jun. 8, 2017	Revocation of the first trial decision	
			beverage	beverage	Invalidation No. 2015- 800008	Nov. 6, 2018
					Trial decision to invalidate the patent	
Patent- 9 Chemistry 2	9	9 Agent for preventing forearm bone fracture which comprises eldecalcitol	Invalidation No. 2019- 800112	Apr. 15, 2021	Trial decision to accept correction	Patent Act, Article 29(1) (iii) (Novelty)
					Trial decision to invalidate the patent	
			2021(Gyo- Ke) 10066	Dec. 13, 2022	Dismissal of a request	

Patent- Electricity	Patent- Electricity	10 Game Program, Game Processing Method, and Information Processing Device	Appeal No. 2020-007563	Aug. 3, 2021	Decision to maintain the examiner's decision of refusal	Patent Act, Article 29(2) (Inventive Step)
			2021(Gyo- Ke) 10116	Jun. 27, 2022	Dismissal of a request	
Design	11	Cord for preventing tools from falling	Appeal No. 2020-16016	Oct. 20, 2021	Decision to maintain the examiner's decision of refusal	Design Act, Article 3(2) (Creative Difficulty)
			2021 (Gyo- Ke) 10158	Jun. 28, 2022	Dismissal of a request	

Field	No.	Topic	Point at Issue
Trademark	12	Determination of similarity of combined trademarks	Issue 1: In a case where some of the constituent characters are characters indicating the quality of goods or the quality of services, even if the trademark was presented with the same font, the same size, as well as equal spaces, had not many syllables, and could be observed as a unity of a series, how should we consider extracting characters other than those indicating the quality of goods or the quality of services, as an essential part of the trademark?
			Issue 2: In a case where a trademark consists of figures and characters, and some of the constituent characters are characters indicating the quality of goods or the quality of services, how should we consider extracting characters other than those indicating the quality of goods or the quality of services, as an essential part?

The First Study Cases

Case 1: Patent - Machinery

Topic	Determination of inventive step of inventions defined by a numerical limitation
Issues	Issue 1: Determination of inventive step regarding different features relating to a numerical limitation in numerical limitation inventions
	Issue 2: How should an applicant prepare a specification to avoid an invention defined by a numerical limitation being rejected or invalidated?
Major JPO/ Court Decisions for Reference	 IP High Court Case No. 2021 (Gyo-Ke) 10053, Mar. 1, 2022, "Container for heated food using microwave oven" Case (Opposition No. 2019-701049) IP High Court Case No. 2019 (Gyo-Ke) 10043, Feb. 20, 2020, "High contrast tyre pattern and method for producing same" Case (Invalidation Trial No. 2016-800115) IP High Court Case No. 2017 (Gyo-Ke) 10146, May 22, 2018, "Light-directing film" Case (Appeal against examiner's decision of refusal No. 2016-6672) IP High Court Case No. 2015 (Gyo-Ke) 10080, Mar. 10, 2016, "Slope protection method and reverse winding slope protection method" Case (Invalidation Trial No. 2013-800157) IP High Court Case No. 2021 (Gyo-Ke) 10136, Aug. 31, 2022, "Soldering device, soldering method, manufacturing method of printed circuit board, and manufacturing method of products" Case (Invalidation Trial No. 2019-800094)

Issues and discussion results

(1) Issue 1: Determination of inventive step regarding different features relating to a numerical limitation in numerical limitation inventions

Since the enforcement of the revised Patent Act in 1994, due to the rapid increase of patent inventions defined by a numerical limitation, problems have been pointed out, such as the establishment of a patent right that is an exclusive right in the form of including technology in the public domain, and the effective restriction of the working of a pioneer invention by the patentee, and more.

In determining inventive step regarding different features relating to a numerical limitation, in the case of an invention in the mechanical field whose effects are highly predictable, inventive step tends to be denied due to design choices, etc., but it is not clear how much evidence or motivation is specifically required to deny inventive step, even taking into account the Examination Guidelines.

Therefore, we examined the determination of inventive step regarding different features relating to a numerical limitation in the mechanical field.

A. The trend in the determination of inventive step in different features relating to a numerical limitation.

In determining inventive step regarding different features relating to a numerical limitation in the mechanical field, the trend can be read as follows (see table in the main text).

 In cases where the technical significance¹ of the numerical limitation is low, inventive step is likely to be denied in general.

And a rejection due to design choices is understandable, according to the majority of the members.

- (2) In cases where the technical significance of the numerical limitation is high², if there is no motivation to apply the numerical limitation of the secondary cited document to the primary cited invention, inventive step is likely to be affirmed.
- B. Specific methods for determining inventive step regarding different features relating to a numerical limitation

While the overall trend can be understood from A. above, we examined more specific methods for determining inventive step in order to improve the predictability of the determination of inventive step. As a result, <u>it is</u> <u>considered important to conduct "the evaluation of the level of technical</u> <u>significance of a numerical limitation" (see (A) below) and then to take into</u> <u>account "the determination of inventive step in each case according to the</u> <u>high or low level of technical significance of a numerical limitation" (see (B)</u> <u>below).</u>

¹ In general, it refers to the operation and effect as a means for solving the problems of the present invention.

² Cases where the numerical limitation of the present invention is directly related to the solution of the problems of the present invention (Viewpoint A) and the problem or the operation and effect corresponding to the numerical limitation is not publicly known or can be inferred (Viewpoint B).

(A) The evaluation of the level of technical significance of an invention defined by a numerical limitation

It is considered that the level of technical significance of the numerical limitation of the present invention can be evaluated by a comprehensive evaluation of the following Viewpoints A and B.

<u>Viewpoint A The Viewpoint of the description of the present</u> specification: Direction to enhance the technical significance of a numerical limitation

Example) Whether the numerical limitation of the present invention is directly related to solving the problems of the present invention, etc.

<u>Viewpoint B The Viewpoint of the publicly known literature, common</u> technical knowledge, etc.: Direction to reduce the technical significance of <u>a numerical limitation</u>

Example) Whether the numerical range of the numerical limitation in the present invention is publicly known or can be inferred, etc.

(B) Determination of inventive step in each case according to the high or low of technical significance of a numerical limitation

<The case where the technical significance of the numerical limitation of the present invention is high>

<u>The motivation for applying the numerical limitation of the secondary</u> <u>cited document to the primary cited invention is important.</u> Furthermore, if there is no description of numerical values in the cited documents, it is important to explain why the probability of satisfying the numerical limitation is high based on the secondary cited document or other documents showing common technical knowledge, etc.

<The case where the technical significance of the numerical limitation of the present invention is low>

<u>Generally, the majority opinion was that the inventive step would be</u> <u>denied due to design choices.</u> Furthermore, even if there is no description of numerical values, if the reason why the technical significance of the numerical limitation is low and the reason for focusing on the range of the numerical limitation are presented together with the evidence, it could be more persuasive for determining inventive step. (2) Issue 2: How should an applicant prepare a description to avoid an invention defined by a numerical limitation being rejected or invalidated?

In order to avoid the invention defined by a numerical limitation being rejected or invalidated, <u>it is most important that the specification should state what kind</u> <u>of operation/effect is achieved by defining the numerical range of a numerical</u> <u>limitation as a means for solving the problems of the present invention</u>, and for the numerical range not supported by the examples, the specification should state the range in which the effect of the invention can be demonstrated, taking into account the principles and mechanisms, etc., for solving the problem by the numerical limitation.

Case 2: Patent – Chemistry 1

Торіс	New matter (Patent Act, Articles 17-2(3), 126(5))
Issues	Issue 1: As a general statement, to what extent should an amendment (or a correction) to a claim be allowed that adds matter not explicitly described in the specification, etc.?
	Issue 2: In particular, how should introduction of new matter be examined with respect to an amendment (or a correction) to a numerical range in a claim reciting an invention characterized by a numerical limitation in a case where the boundary value is not clearly described in the specification, etc.?
	Issue 3: In particular, regarding a "disclaimer (amendment introducing a negative limitation)", which cases can be considered as introduction of new matter by excluding matter recited in a claim?
Major JPO/ Court Decisions for Reference	 IP High Court Case No. 2019 (Gyo-Ke) 10165, Nov. 5, 2020, "Heat-retaining sheet" Case (Appeal against examiner's decision of refusal No. 2018-014256) (hereinafter "Court Decision (1)") IP High Court Case No. 2017 (Gyo-Ke) 10032, Nov. 7, 2017, "Method for producing conductive material, conductive material obtained by the method, electronic device containing the conductive material, light-emitting device, and method for manufacturing light-emitting device" Case (Invalidation Trial No. 2015-800073) (hereinafter "Court Decision (2)") IP High Court Case No. 2016 (Gyo-Ke) 10157, July 19, 2017, "Method for masking acidity" Case (Invalidation Trial No. 2014-800118) (hereinafter "Court Decision (3)") IP High Court Case No. 2012 (Gyo-Ke) 10094, Dec. 25, 2012, "Nonaqueous electrolyte secondary battery and plane-like collectors for nonaqueous electrolyte secondary battery" Case (Invalidation Trial No. 2010-800119) (hereinafter "Court Decision (4)") IP High Court Case No. 2014 (Ne) 10080, 2015 (Ne) 10027, Mar. 30, 2016, "Process for producing spineltype lithium manganate" Case (hereinafter "Court Decision (5)")

Issues and discussion results

(1) Issue 1

If the forms of amendments are classified as follows, based on the rules of the Solder Resist Grand Panel Decision (2006 (Gyo-Ke) 10563) regarding new matter, Class 3 below is an area where determinations are likely to be divided as commented by some members. In response, the members generally agreed that the boundary as to whether or not an amendment is permitted as matter obvious from the specification or drawings is considered to be around Class 3.

Class 1 (No Applicable Court Decision)

Amendment that adds specific matter explicitly stated in the specification or drawings

 \rightarrow Class in which no new technical matter is introduced and the amendment shall be permitted

• Class 2 (Example: Court Decision (3))

Amendment that adds specific matter not explicitly stated but inferred from the numerical values in the specification or drawings

 \rightarrow Class in which no new technical matter is introduced and the amendment shall be permitted

• Class 3 (Example: Court Decisions (1), (2), (4))

Amendment that adds specific matters not explicitly described in the specification or drawings but deducible from common technical knowledge, etc., through linguistic argumentation.

 \rightarrow Class to which boundary cases belong, whether the amendment should be permitted or not

• Class 4 (Example: Court Decision (5))

Amendment that adds specific matter not explicitly described in the description or drawings, and not logically deducible from common technical knowledge, etc.

 \rightarrow Class in which new technical matter are introduced and the amendment should not be permitted

Regarding a case "inferred from the numerical values" in Class 2 and a case "deducible from common technical knowledge, etc. through linguistic argumentation," in Class 3, some members commented that Class 3 is more likely to have divided determinations because linguistic argumentation is more widely interpreted. In addition, some members commented that the reference to the judgement made on the basis of common technical knowledge and explanations of the mechanism of action described in the specification may lead to a more appropriate determination if these matters are more positively considered in practice.

(2) Issue 2

Some members commented that when amending a claim for numerical values that are not stated in the specification at all, some theoretical argumentation is required; in some cases it might be safer to confirm the examiner's view by telephone or interview.

In addition, some members commented that amendments/corrections of limiting a numerical value in a range not explicitly described in the specification, etc. narrow the numerical range as a formality, and could be understood as not adding new matter, but assuming the practice that selection inventions are patented, allowing such amendments/corrections ex-post facto could be said to allow the addition of another invention, and it could entail a risk of circumventing the first-to-file principle.

As a practical measure, the members commented that (1) when a specification is prepared, a set of numerical ranges can be specified as precisely as possible, and (2) limiting a numerical range that is not explicitly described in the specification, etc., is considered to fall under an addition of new matter, unless the claim is a "disclaimer" based on a cited document, or the upper and lower limits set by standards such as JIS are used.

(3) Issue 3

Regarding a "disclaimer," a majority of members commented that they concern the current situation where a "disclaimer" can be used without any restriction as a problem, not only in the case of securing novelty against "the incidental prior art ("an invention which differs significantly in terms of technical idea from the cited invention and which inherently has inventive step, but which happens to overlap with the cited invention" according to Examination Guidelines for Patent and Utility Model)." In addition, some members expressed the view that it is difficult to limit the situation in which a "disclaimer" can be used in terms of new matter.*

On the other hand, some members commented that in terms of other than new matter, (1) the Japan Patent Office should check whether the invention after the deletion has a common effect as a whole and is able to solve the problem based on the support requirements, and (2) the JPO should carefully examine in determining novelty and an inventive step in a notice of reasons for refusal at the examination stage, whether novelty and an inventive step could still be denied by the prior literature used in the original reason for refusal even in the examination after the "disclaimer" amendment has been made. In particular, regarding (2), the members agreed that it is not appropriate to determine that the prior literature used in the original reason for refusal cannot be considered only in view of the "disclaimer" amendment to delete a non-essential constituent feature of the cited invention.

* One of the court decisions related to this perspective is the court decision of the IP High Court on Oct. 5, 2023 (Case No. 2022 (Gyo-Ke) 10125).

Case 3: Patent – Chemistry 2

Topic	How should the fulfilment of the support requirement be determined? (Patent Act, Article 36(6) (i))
Issues	Issue 1: To what extent should examples be described in the specification?
	Issue 2: What are cases where an invention defined by a numerical limitation is recognized as solving the problem of the invention over the entire numerical range?
Major JPO/ Court Decisions for Reference	 IP High Court Case No. 2018 (Gyo-ke) 10110, 10112, 10155, Nov. 14, 2019, "Celecoxib composition" Case (Invalidation Trial No. 2016-800112) (hereinafter "Court Decision (1)") IP High Court Case No. 2017 (Gyo-ke) 10178, Jun. 27, 2018, "Method of marking composition for oral administration" Case (Invalidation Trial No. 2016-800126) (hereinafter "Court Decision (2)") IP High Court Case No. 2020 (Gyo-ke) 10143, Jun. 23, 2022, "Vinylidene chloride resin wrap film and production method thereof" Case (Invalidation Trial No. 2020-800001) (hereinafter "Court Decision (3)") IP High Court Case No. 2011 (Gyo-ke) 10146, 10147, Apr. 11, 2012, "Medicine" Case (Invalidation Trial. No 2010-800088) (hereinafter "Court Decision (4)") IP High Court Case No. 2019 (Gyo-ke) 10160, Nov. 29, 2021, "Cellulose powder" Case (Invalidation Trial No. 2018-800078) (hereinafter "Court Decision (5)")

Issues and discussion results

(1) Issue 1: To what extent should examples be described in the description?

All members agreed that the decision criteria used in the court decision of the Intellectual Property High Court on Nov. 11, 2005 (Case No. 2005 (Gyo-Ke) 10042, "Manufacturing methods of polarizing film" Case), hereinafter referred to as the "decision criteria of the Grand Panel," have been widely used and also applied in the pharmaceutical/biological fields as the decision criteria of the support requirement since the case.

It is extremely important in practice to know the extent to which examples should be described in the specification in order to determine whether the support requirement has been satisfied, especially for inventions in the chemical field or biological/pharmaceutical fields. However, it is difficult to determine the extent directly from the decision criteria of the Grand Panel. On this point, we discussed how to make a determination based on the Court Decisions (1) to (5).

All members agreed that the cases which were determined to satisfy the support requirements (Court Decisions (2) to (5)) could be classified in a and b below as cases after the "Manufacturing methods of polarizing film" Case (the Court Decision (1) was found not to satisfy the support requirement).

- a: Technical meaning type: The case where the technical meaning of achieving the desired effect is explained in the specification and it can be understood by a person skilled in the art. Court Decision (4) applicable.
- b: Complementary type: The intermediate case between the technical meaning type and the concrete example type. Court Decisions (2), (3), and (5) applicable.
- c: Concrete example type: The case where concrete examples are given in the specification, from which a person skilled in the art can understand that the desired effect will be achieved in the specified area according to common technical knowledge.

However, it is not always clear how they identify the problem to be solved by the invention and technical common sense at the time of filing, and it was only agreed that applying such a classification would be effective in analyzing past cases.

In summary, the answer to the question "to what extent should examples be described in the specification" depends on the circumstances of the problem to be solved by the invention, the explanation in the specification and the common technical knowledge, so that the support requirement will be satisfied, if it is fully understandable that the problem to be solved by the invention can be solved from the explanation in the specification and common technical knowledge, even if the concrete examples (examples, comparative examples) in the specification are limited, on the contrary, if it is not understandable that the problem can be solved from the explanation in the description and common technical knowledge, many concrete examples are required to compensate understanding.

On the other hand, for inventions defined by a numerical limitation described later, in cases where the numerical limitation itself has technical significance, or where a desirable numerical range is merely described in the claim, some members commented on what kind of examples should be described in the respective cases.

(2) Issue 2: What are cases where an invention defined by a numerical limitation is recognized as solving the problem of the invention over the entire numerical range?

No member raised any objection to the fact that also for inventions defined by a numerical limitation, i.e. inventions whose claims include a numerical limitation to specify the invention, the basic concept of the support requirement is the same as for inventions other than those defined by a numerical limitation and thus the decision criteria of the Grand Panel would be applied.

Therefore, limited concrete examples described in the specification will be sufficient even in an invention defined by a numerical limitation, if the technical meaning of achieving the desired effect obtained by the numerical limitation is explained in the specification apart from the concrete examples and can be understood by a person skilled in the art.

On the other hand, if the technical meaning cannot be understood by a person skilled in the art from the explanation in the specification apart from the concrete examples or from common technical knowledge, the concrete examples must be fulfilled, so a sufficient number of concrete examples will be required for various parts of numerical limitations (in particular the parts including around the borderline if the numerical range has a technical feature).

The finding of the Court Decision (1) contains the expression "is it understandable or not that the problem of the invention is solved by over the entire numerical range," which differs from the decision criteria of the Grand Panel in that the expression "over the entire numerical range" is explicitly added. Some members commented that if a particular attention is paid to this expression, it seems to require that "concrete examples should be given (without bias and in sufficient numbers) over the entire numerical range."

However, all members agreed that based on the purport of the support requirement stated in the court decision in the case of "Manufacturing methods of polarizing film," it could be understood that the explanation including the expression "cannot be recognized that the problem of the invention is solved... over the entire numerical range" in the Court Decision (1) was merely in accordance with the decision criteria of the Grand Panel.

Case 4: Patent – Electricity

Topic	Determination of inventive step for software-related inventions. Study with a particular focus on the functionally expressed features of information and information processing. (Patent Act, Article 29(2))
Issues	Issue 1: What should be taken into account in identifying the functionally expressed features of information and information processing in order to find the gist of the invention claimed in a patent application and to find the corresponding/different features in determining the inventive step of software-related inventions?
	Issue 2: What should be taken into account in finding different features, including the specification of cited inventions and the state of the art other than the cited inventions (the well-known art and the common technical knowledge), for the functionally expressed features of information and information processing related to software-related inventions?
Major JPO/ Court Decisions for Reference	 IP High Court Case No. 2020 (Gyo-Ke) 10128, Jan. 11, 2022, "Safety confirmation system, receiver, safety confirmation method and program" Case (Appeal against examiner's decision of refusal No. 2019-014345) (hereinafter "Court Decision (1)") IP High Court Case No. 2019 (Gyo-Ke) 10049, Dec. 11, 2019, "Method and device for forming and distributing real-time interactive contents on wireless communication network and internet" Case (Invalidation Trial No. 2017-800069) (hereinafter "Court Decision (2)") IP High Court Case No. 2018 (Gyo-Ke) 10131 (the first case), 10126 (the second case), July 22, 2019, "Pharmaceutical mutual action check device" Case (Invalidation Trial No. 2017-800032) (hereinafter "Court Decision (3)") IP High Court Case No. 2016 (Ne) 10027, Nov. 24, 2016, "Electronic shopping mall system" Case (Correction 2016- 390052) (hereinafter "Court Decision (4)") IP High Court Case No. 2016 (Gyo-Ke) 10220, July 4, 2017, "Salary calculation method and salary calculation program" Case (Appeal against examiner's decision of refusal No. 2015- 021527) (hereinafter "Court Decision (5)") IP High Court Case No. 2019 (Gyo-Ke) 10005, Sep. 19, 2019, "Application generation support system and application generation support program" Case (Appeal against examiner's decision of refusal No. 2018-003406) (hereinafter "Court Decision (6)")

Issues and discussion results

(1) Issue 1

A. The ambiguity of wordings indicating the functionally expressed features of information and information processing

Software-related inventions have a high degree of freedom in the choice of terms when verbalizing them as an application document, and the document preparer has a major role to play. On this basis, we examined how the verbalized inventions were interpreted in trial/appeal decisions and court decisions, mainly for the cases of the Court Decisions (1) and (2).

We reaffirmed the fact that it is difficult to identify the functionally expressed features of information and information processing. While most members agreed with the observation in the Court Decision (2), some members commented on the Court Decision (1) that the "ID number related to the installation location" includes the purpose of the location information based on either the wording or the statement in the specification, but others commented that it does not include the processing of the location information based on the statement in the specification and the history of amendments.

B. Lack of public notice function of "scope of claims"

In the software field, rights are often exercised by means of warning letters, and they may cause actual harm by their "restraining force" against third parties, e.g. a refusal to invest due to problems identified during IP due diligence for M&A, etc., even in the case of a warning of an abstract claim, as suggested by some members.

C. Notes for the document preparer

We have summarized various comments on points that should be considered by the document preparer, including improving terminology.

Some members pointed out that based on B above, a document preparer has an incentive to prepare more abstract claims, but the "restraining force" exercised due to ambiguous claims would be absurd, so the document preparer should state clearly for the person warned to understand.

Assuming that the reason for invalidation can be avoided by limited interpretation or correction, it may be better for the wording specifying the features to be more abstract, but on the other hand, corrections may be difficult to make due to ambiguities in the wording. Even if the claims are abstract, it is necessary to reconcile them with what is stated in the specification, e.g. to make them concrete to the extent that corrections are possible.

D. Notes for the examiner/administrative judge

Based on the examination of the Court Decision (2), etc., some members commented that an accurate understanding of the literature is the basis of the trial/appeal examination. It was also pointed out that examiners/ administrative judges have a tendency to overlook differences between the claimed invention and the prior art.

Additionally, some members commented that it would be desirable to have a procedure in the examination/trial and appeal where overly abstract claims are not granted, and that a guidance should be provided so that disputed issues are positively reflected in the claims through amendments. All members agreed that for "function, characteristics, etc." in Examination Guidelines, the interpretation "as <u>all products</u> including such function or characteristics, etc." should be maintained, based on the fact that ambiguous wording is expected to be removed through amendments during the examination process. Trial and appeal are also quasi-judicial procedures, and it is not realistic to adhere to the handling of Examination Guidelines, but it can be said that the Japan Patent Office is required to play a role in clarifying inventions and contributing to ensuring of the public notice function of the "scope of claims."

(2) Issue 2

A. Finding of cited inventions not sufficiently described in the cited references

We examined the pros and cons of finding cited inventions by supplementing statements from a literature, mainly for the cases of the Court Decisions (3) and (4).

Some members commented that the content needed as reasons for making a trial/appeal decision, etc. must be found and that the content could be found in the practical sense of civil trials if there was a certainty of 60-80%, and other members commented that cited inventions should only be found on the basis of statements from a literature. B. Finding of the state of the art and determining whether the invention could have been easily achieved

We examined the finding of the well-known art and motivation mainly for the cases of the Court Decisions (5) and (6), and some members agreed both of the court decisions. On the other hand, members, who had experienced the exercise of the right by way of a warning letter in (1) B above, commented that motivation is unnecessary as long as the well-known art is found.

Continuing from this First Study Case, the members examined the necessity of motivation in the Second Study Case and organized the thoughts.

Case 5: Design

Topic	Finding of the "article embodying the design"
Issues	Issue 1: For what purpose should the "article embodying the design" in the design application be found?
	Issue 2: What information should be the basis for the finding of the "article embodying the design" in the design application?
	Issue 3: How should the "article embodying the design" in the design application be found?
	Issue 4: What determination standards should be used to determine "identical or similar articles" in determining similarity of designs?
Major JPO/ Court Decisions for Reference	 IP High Court Case No. 2021 (Gyo-Ke) 10067, Jan. 12, 2022, "Injector cartridge" Case (Appeal against examiner's decision of refusal No. 2020-11187) Tokyo High Court Case No. 1999 (Gyo-Ke) 174, Mar. 15, 2000, "Egg packaging container" Case (Appeal against examiner's decision of refusal No. 1997-11742) Supreme Court Case No. 1970 (Gyo-Tsu) 45, Mar. 19, 1974, "Flexible elastic hose" Case (Invalidation Trial No. 1964-2489) IP High Court Case No. 2005 (Ne) 10079, Oct. 31, 2005, "Carabiner" Case Osaka High Court Case No. 1980 (Ra) 542, Sep. 28, 1981, "Storage cabinet" Case

Issues and discussion results

(1) Issue 1: For what purpose should the "article embodying the design" in the design application be found?

The purpose of finding the "article embodying the design" is to concretely specify the form shown in the drawing, etc., how the design of the article is created in terms of its usage and function for the design for which the registration is sought by an applicant. The "article embodying the design" thus found will have a direct or indirect effect on the fulfillment of the protection requirement of the design and on the determination of the scope of the design right. However, in actual applications, there are variations in the amount of statements and non-concrete statements can be seen regarding the "article embodying the design," for that reason, all parties involved in the practice of the design system are required to fully understand the characteristics of the Japanese design system, which treats the design as uniformly integrated with the article, and to take appropriate measures.

- (2) Issue 2: What information should be the basis for the finding of the "article embodying the design" in the design application?
 - A. Finding of the "article embodying the design" should be based on a reasonable understanding of the entire description of the application and drawings. Regarding the statement of the application, it is reasonable to give priority to the statement of the "article embodying the design" if the term is already established among those skilled in the art, but in the case of a new article or a multifunctional article for which an unambiguous understanding does not seem to be established, it is reasonable to determine by considering the statement of the "description of the article embodying the design." In addition, even in the absence of a written statement, reference drawings showing the names of each part and the state of use may be helpful in finding the "article embodying the design."
 - B. On the other hand, the matters claimed only in a written opinion or a written demand for trial/appeal do not bind the decision of examination and trial and appeal of the Japan Patent Office, which adopts ex-officio inquisitorial system, but in a design right infringement litigation, it is considered that the estoppel doctrine based on such claim will be applied.
- (3) Issue 3: How should the "article embodying the design" in the design application be found?
 - A. The statement of the "description of the article embodying the design" is for a better understanding of the article, so in principle the statement of the "article embodying the design" and the content of the drawings have priority. Therefore, if there is a contradiction between them, the statement of the description would rather not be considered, but in the case of a new article, for example, the statement of the description that describes the intention to create the design should also be considered.
 - B. If the described "article embodying the design" cannot be recognized by

generic terms and terms customarily used in the field, it is considered appropriate to find it by referring to dictionaries, examples in other registered designs, terms used in the written standard, standards, product names, etc. in the field.

- C. Foreign words should preferably be allowed only if they are widely used as general or common names of particular articles, and it is considered appropriate to refer to the statements in other general dictionaries such as Kojien.
- D. International applications for design registration (Hague applications), which must be written in English, are found by looking up the meanings of English words in dictionaries, but care must be taken in cases where there is a discrepancy between the original and Japanese meanings, such as in Japanese-made English, or in cases where terms have only a vague meaning.
- E. In an appeal against an examiner's decision of refusal, which is a stage prior to the establishment of rights, there were opinions expecting that the panel should be proactive in making inquiries, etc., so that applicants will take the necessary measures in cases where the "article embodying the design" cannot be clearly derived from the application and drawings.
- (4) Issue 4: What determination standards should be used to determine "identical or similar articles" in determining similarity of designs?
 - A. Regarding the determination of the similarity of the "article embodying the design," all members agreed that it could be widely accepted, if there is a commonality of use and function as well as the possibility that the forms are similar based on the commonality of use and function.
 - B. The "consumer" in Article 24(2) of the Design Act is considered to be the determining entity when considering the focus point and the weighting of the evaluation in the form of the design rather than the article.
 - C. It is considered that the basic concept of determining the similarity of the "article embodying the design" will not change in the future, in which the "article embodying the design" is found by properly understanding the intention of the creator and applicant to state the application and drawing based on the knowledge of a person skilled in the art, regardless of the existence or not of the "classification of articles" under the old act, and the

commonality of the use and function of the article is determined by considering the purpose and state of use, etc.

Case 6: Trademark

Topic	Trademark Act, Article 3(1)(iii) Distinctiveness
	Issue 1-1: Cases where no example of use is required to determine the applicability of the Trademark Act Article 3(1)(iii)
	Issue 1-2: Trademarks that will be generally recognized in the future as an indication of the quality of goods and services
Issues	Issue 2: Pertinence of recognizing exclusive adaptability for trademarks that have no example of use by others
	Issue 3: Effect of the existence of examples of use by the applicant/right holder on the determination of distinctiveness and the evaluation of evidence
	Issue 4: Directness and concreteness necessary for the indication of the quality of goods and services
Major JPO/ Court Decisions for Reference	 (Issues 1-1, 1-2) IP High Court Case No. 2021 (Gyo-Ke) 10100, May 19, 2022, "Scrum Master" Case (Invalidation Trial No. 2019-890057) (hereinafter "Court Decision (1)") (Issues 2, 3) IP High Court Case No. 2022 (Gyo-Ke) 10068, Dec. 14, 2022, "次 世代3Dプリンタ展 (Next Generation 3D Printer Exhibition)" Case (Appeal against examiner's decision of refusal No. 2021- 006565) (hereinafter "Court Decision (2)") (Issues 1-2, 4) IP High Court Case No. 2022 (Gyo-Ke) 10002, Jun. 16, 2022, "お んじゃくきゅう/温石灸 (Onjyaku-kyu; moxibustion with warmed stones)" Case (Appeal against examiner's decision of refusal No. 2020-016917) (hereinafter "Court Decision (3)") (Issue 1-2) IP High Court Case No. 2021 (Gyo-Ke) 10113, Jan. 25, 2022, "睡 眠コンサルタント (Sleep Consultant)" Case (Appeal against examiner's decision of refusal No. 2020-007812) (hereinafter "Court Decision (4)")

Issues and discussion results

 Issue 1-1: Necessity of examples of actual use (example of use) of the trademark for its designated goods or services in determining the applicability of the Trademark Act Article 3(1)(iii) Based on the fact that the Court Decision (1) held that examples of use are not necessarily required, members discussed what kind of cases would fall under Article 3(1)(iii) even in the absence of an example of use.

It was confirmed that the determination should be made on the basis of consumer recognition as a premise for the general determination of distinctiveness, and trademarks that are obviously devoid of distinctiveness, such as trademarks consisting only of a common name of goods, etc., as well as trademarks that are likely to be used in the future as a common name of goods, etc., were mentioned.

- (2) Issue 1-2: Finding trademarks that will be generally recognized in the future as an indication of the quality of goods and services
 - A. The members discussed the court decision of the Court Decision (1) that a trademark that is generally recognized as an indication of the quality of the service "including in the future" is sufficient to be considered as a trademark consisting solely of a mark that indicates the quality of the designated service in a common way, and all agreed that it is not necessary that it is generally recognized as an indication of quality today and that no actual example of use is required.
 - B. The members then discussed what kind of trademarks correspond to those generally recognized as indications of quality "including in the future" and mentioned the words that could be assumed or foreseen to be recognized by consumers in the future as indications of the quality of goods and services, even if the words are unfamiliar or have no example of use today, for example, words that have been used as particular quality indications in other goods and services fields that are shared by some of the users, as well as the case where contents of goods or services could be imagined based on the concept derived from the constituent elements of the trademark.
- (3) Issue 2: Is it appropriate to recognize exclusive adaptability for trademarks that have no examples of use by others based on the existence of such a circumstance?

The members discussed whether there are cases where it should be determined that the trademark does not fall under Article 3(1)(iii), even if the composition of the trademark is understood and recognized as an indication of the quality of the goods, because there is no example of use by others, and a majority of them commented that it should not be immediately determined that the trademark falls under Article 3(1)(iii) just because there is no example of use by others.

(4) Issue 3: If there is an example of use by the applicant/right holder indicating the quality of the goods and services, how does the situation of use by the applicant/ right holder affect the determination of distinctiveness and the evaluation of evidence?

In discussing the possibility that such a situation could affect the determination of the applicability of Article 3(1)(iii), a majority of members commented that there would be no case where the existence of only examples of use by the applicant/right holder could affect the determination of the applicability of Article 3(1)(iii).

- (5) Issue 4: Must the indication be direct and concrete to be recognized as an indication of the quality of goods and services?
 - A. We discussed whether the indication must be "direct and concrete" to be recognized as an indication of the quality of goods and services, and how direct and concrete it must be, and the majority of members commented that directness and concreteness need not to be a criterion. In addition, some members commented that the concept of "direct and concrete" is subjective and cannot be used as a criterion, and other members commented that the trademark should be indicated so that those who come into contact with the trademark have a common image as a recognition related to the quality of the goods and services derived from the trademark.
 - B. The Court Decision (3) that the trademark falls under Article 3(1)(iii) because the quality of the goods and services is "easily understandable" from the trademark, with respect to the plaintiff's claim that the "direct and concrete" quality of the goods and services should be conceivable from the trademark, some members commented that there are almost no cases where a criterion of "direct and concrete" is used and that the Court Decision (3) merely used the phrase "easily understandable" without referring to this criterion.

The Second Study Cases

Case 7: Patent – Machinery

Determination of inventive step of inventions defined by a numerical limitation

JPO Docket Number	Opposition to grant of patent Opposition No. 2020-700417 (Patent No. 6624480) (Jul. 7, 2021: Trial decision to revoke the patent → final and binding)
Date of Court Decision Court Docket Number	IP High Court, May 11, 2022 2021(Gyo-Ke) 10091 (Dismissal of a request)
Title of the Invention	Pressure-sensitive adhesive tape and production method therefor
Major issue	Patent Act, Article 29(2) (Inventive Step)

1. Outline of the case

This invention relates to a pressure-sensitive adhesive tape having a foam layer that can be used, for example, in the production of electronic device and the like.

The plaintiff asserted, as grounds for cancellation of the trial decision, (i) an error in determination concerning inventive step and (ii) an error in determination concerning support requirements, but the plaintiff's assertion was not accepted.

Incidentally, in the court decision, the court found a primary cited invention that differs from the cited invention that was found from multiple documents in the trial decision and made a determination concerning the involvement of inventive step.

2. Major issues discussed

In order to verify the feasibility of the method for determination of inventive step in the numerical limitation discussed in the first theme, the members analyzed the evaluation of the technical significance in the difference related to the numerical limitation and the inventive step determination in the numerical limitation, through opinion exchange and questionnaire survey. In addition, the members discussed in depth points, etc. to note for preparing a specification with high technical significance.

Issue 1: Evaluation of the technical significance of a numerical limitation
 With respect to the four numerical limitations involved in differences β to ε

of this invention, the members examined the technical significance of the numerical limitations for each difference. As a result, <u>the majority of members</u> commented that any numerical limitations have low technical significance in both viewpoints A (the viewpoint of the specification of present invention) and B (the viewpoint of known literature, technical common knowledge, etc.), and the technical significance of both viewpoints as a whole is low.

In particular, in viewpoint A, the members evaluated the technical significance low, for reasons that, for example, there is no description of the mechanism to achieve the operation and effect, and the preferred numerical range is listed in an extremely wide range, although the general effect of the numerical limitation is described in the specification of this invention.

In viewpoint B, the members also evaluated the technical significance low, for reasons that the problem to be solved that was related to the numerical limitation of this invention, the operation and effect of the numerical limitation, and the numerical value of the numerical limitation were described in the cited documents.

(2) Issue 2: Determination of inventive step for numerical limitation

After discussing the determination of inventive step for each of differences, the members reached a consensus on the point that any of the numerical limitations had low technical significance and therefore no inventive step was recognized due to design choices.

In addition, as for the evidence, a majority of members commented that even if there was no evidence of numerical values in publicly known literatures, it could be said design choices with providing a specific reason to explain that the technical significance of the numerical limitation had not recognized.

In conclusion, the court decision also concluded that any of the numerical limitations had no inventive step, which was the same conclusion as the result discussed under the determination method based on the technical significance discussed in the first theme, and therefore, the determination method of inventive step based on the technical significance is considered useful in determining the inventive step of differences pertaining to numerical limitations. (3) Issue 3: Preparing a specification with high technical significance

Regarding viewpoint A (the viewpoint of the specification of present invention), after discussing the specification which was determined to have high technical significance, the members agreed that it was important to describe the mechanism of the relationship based on the evidence between the problem to be solved by the invention and operation and effect in the numerical limitation as a means to solve the problem while showing examples as evidence. With respect to the aforementioned relationship, if examples, mechanisms, critical significance of the numerical values, and other factors are not specifically described, it is considered that the technical significance of numerical limitation tends to be evaluated low.

In addition, the following items for preparing a specification were discussed in depth. The results are indicated below.

(a) Listing numerical ranges in a specification

Listing numerical ranges in a specification has advantages such as avoidance of addition of a new matter at the time of correction, grounds for alleging the difference from a cited document, etc. On the other hand, describing too broad a numeral range will not be capable of explaining that the numerical limitation achieves an exceptional effect as means for solving a problem, thereby there is a disadvantage that the technical significance of the numerical limitation may be evaluated low. When preparing a specification using a numerical limitation, it requires to consider in depth the purpose of describing numerical values and the benefits or losses arising from the description of the numerical value.

(b) Effect to defeat later applications of an invention with numerical limitation

In order to verify the effect to defeat later applications for an application with numerical limitation, the members assumed cases in each of which a numerical limitation described document is cited as a well-known document, then classified the numerical limitation into the following three patterns, and considered each pattern as to ease of citation and whether or not being recognized as well-known art.

- (1) In a case where the numerical limitation is a numerical value directly associated (contributing) to the solution of the problem of the invention.
- (2) In a case where the numerical limitation is a numerical value described as

a manufacturing guideline.

(3) In a case where the numerical limitation is a numerical value for which the purpose of description is unknown (or practically meaningless)

As a result, the members agreed that any of the cases (1) to (3) can be cited and applied as a well-known reference based on the motivation such as being in the same technical field as the main cited invention, but since the numerical limitation in (1) is closely related to the problem to be solved, special attention should be paid to an obstructive factor when combining with the primary cited invention. In addition, the members agreed that in any of the cases (1) to (3), if multiple references are available, the numerical limitation can be recognized as well-known art.

Case 8: Patent – Chemistry 1

Support requirement for parameter inventions in the food technology field

JPO Docket Number	Trial for invalidation Invalidation No. 2015-800008 (Patent No. 5189667) (May 19, 2016: Trial decision to maintain the patent (First trial decision) → Revocation of the first trial decision) (Nov. 6, 2018: Trial decision to invalidate the patent (Second trial decision) → Final and binding)
Date of Court Decision Court Docket Number	IP High Court, Jun. 8, 2017 2016 (Gyo-Ke) 10147 (Revocation of the first trial decision)
Title of Invention	Tomato-containing beverage, method for producing the same and method for suppressing acidity of tomato- containing beverage
Major issue	Patent Act, Article 36(6) (i) (Support Requirement)

1. Outline of the case

The issue in this case was the support requirement for an invention relating to tomato-containing beverages, etc., identified by the range indicated by the technical parameters.

The first trial decision stated that: the general tendency could be understood, of which the flavor of a beverage changes depending on three technical parameters which are the characteristic values as the constituent features of the invention (three factors; sugar content, sugar-acid ratio, and total content of glutamic acid and aspartic acid), then it could be expected by a person skilled in the art that a tomato-containing beverage that had solved the problem of this invention would be able to provide; and therefore even if other various conditions such as temperature and viscosity had contributed to the flavor, it did not mean that the invention could not solve the problem.

On the contrary, the court reversed the trial decision on the grounds that, in measuring the relationship between the numerical range of the three factors and the flavor, it is not possible for a person skilled in the art to understand the technical significance of the relationship between the ranges specified for the three factors and the resulting effects obtained, based on the evaluation tests described in the specification and the technical description of the factors that has noticeable effects on the flavor.

2. Major issues discussed

- (1) Issue 1: Discussion on the court decision that it was not of meeting with the support requirements, based on the fact that the technical significance of the relationship between the ranges specified for sugar content, sugar acid ratio as well as total content of glutamic acid and aspartic acid, and the flavor effect could not be immediately understood by a person skilled in the art based on the results of flavor evaluation tests.
 - A. A majority of members commented that the first trial decision, wherein that a person skilled in the art could recognize that the invention could solved the problem only by satisfying the numerical ranges of the three factors, was not well grounded and lacked persuasiveness. As the reasons for that, some members commented that there were not enough supporting examples, and some other members commented that the tendency of "the taste of the beverage changes in the direction that the sweetness becomes stronger relative to the sourness if the sugar acid ratio is increased," which was one of the grounds for the first trial decision, was different from the tendency observed from the graphical representation of the examples, which is prepared in reference to the data of the examples described in the specification.
 - B. A majority of members commented that the determination in the court decision is reasonable. In addition, some members commented that the court decision could be called the "royal road" of research procedures, in that in measuring the relationship between the numerical value ranges of the three factors and the flavors of "sweetness," "acidity," and "richness," it should be necessary to take at least one of following methods; (1) when there are only three factors that have noticeable effects on the flavor, or when there are factors that affect the flavor but the conditions do not have to be aligned, the flavor evaluation test should be conducted with changing the three factors after explaining the technical details of that or (2) when there are other factors that have noticeable effects on the flavor and it cannot be said that it

is not necessary to align the conditions, the flavor evaluation test should be conducted with changing the three factors while keeping the other factors constant. On the other hand, other members commented that when it could be evaluated that a certain tendency was extracted or expected from the examples, it may be acceptable to determine that the support requirement is fulfilled even if the test method does not strictly follow the concept stated in the court decision.

- (2) Issue 2: Discussion on the court decision that it could not be said that a person skilled in the art could understand from the flavor evaluation test in the specification that a flavor with a rich taste, fruit tomato-like sweetness, and reduced tomato acidity has actually been obtained
 - A. A majority of members agreed with the court finding. Many members had critical comments about the evaluation method used in the specification, in which the absolute values of the averages of the scores of the three flavors (acidity, sweetness, and richness) were simply added together for a comprehensive evaluation, and about the fact that the specification had not disclosed few details of the evaluation tests (sensory evaluation).
 - B. On the discussion as to how the details of sensory evaluation should had been described in the specification for not being judged as a violation of the support requirement in this case, some members had propositions of clarification of the criteria for grading, disclosure of the reliability of the panelists for sensory evaluation, and statistical processing to provide objectivity.
 - C. The members also discussed the "low-salt soy sauce" cases (IP High Court Case No. 2011 (Gyo-ke) 10254, 2014 (Gyo-Ke) 10155) which have similarly to this case in that they attempted to evaluate the solution of a problem using sensory evaluation. Regarding the sensory evaluation in those cases, some members commented that comparing to the "tomato-containing beverage" case, the patent specification of the "low-salt soy source" case clarifies the overall evaluation to some extent, since the comparison target for saltiness was presented.

- (3) Issue 3: Discussion, based on the above discussions, on points to note for preparing the specification and other documents
 - A. On the discussion points to particularly note in preparing specifications and other documents for parameter inventions in the food technology field, some members had comments about aligning the experimental conditions and mentioning other factors that affect the problem to be solved by the invention and effects of the invention other than matters specifying the invention.
 - B. Regarding the sensory evaluation, a majority of members had opinions pointing out the importance of test design and some of them commented that it was necessary to ensure substantial objectivity by establishing criteria for comparison, etc.
 - C. On the discussions on arrangements in preparing specifications and claims, some members commented that it would be ideal to find tendencies from experimental results, select experimental results so that "tendencies found," "claims," "problems to be solved," as well as "examples" establish consistent, and add one or more examples as necessary. In addition, from the viewpoint of reducing the risk of violation of the support requirement, there was an opinion that it is effective to try not to excessively describe the problem to be solved by the invention recited in a claim, and to describe the specification so as to clarify that a specific "example" corresponds to the solution of a specific "problem to be solved" in case the claim needs to be amended in the future.

Case 9: Patent - Chemistry 2

Determination of novelty of use invention

JPO Docket Number	Trial for invalidation Invalidation No. 2019-800112 (Patent No. 5969161) (April 15, 2021: Trial decision to invalidate the patent → Final and binding)
Date of Court Decision Court Docket Number	IP High Court, Dec. 13, 2022 2021(Gyo-Ke) 10066 (Dismissal of a request)
Title of Invention	Agent for preventing forearm bone fracture which comprises eldecalcitol
Major Issues	Patent Act, Article 29(1) (iii) (Novelty) (Identifying common features and differences)

1. Outline of the case

In this case, the existence of novelty. was disputed in a trial for invalidation regarding a patent invention titled "Agent for preventing forearm bone fracture which comprises eldecalcitol."

This invention uses eldecalcitol (ED -71), a publicly known therapeutic agent for osteoporosis, as a pharmaceutical composition "for preventing non-traumatic forearm fractures."

Regarding the fact that the pharmaceutical composition is identified as being "for preventing non-traumatic forearm fractures" in this invention, the trial decision found that there was a prima facie difference in that it was identified as a "therapeutic agent for osteoporosis" in the invention described in Exhibit A No. 1 (cited invention) (Difference 1). The trial decision then has made that Difference 1 was not a substantial difference, because a person skilled in the art could recognize that the "therapeutic agent for osteoporosis" of the Exhibit A No. 1 invention was a pharmaceutical composition for preventing "distal radius fractures" (non-traumatic forearm fractures) (lack of novelty).

The court decision upheld the conclusion of the above trial decision. While the plaintiff asserted that the use of this invention pertaining to Difference 1 was differentiated from the use of the cited invention, the court <u>presented criteria for</u> determining novelty as a use invention and referred to the common technical

knowledge of forearm fracture identified in addition to the common technical knowledge in the trial decision. In the court decision, as a person skilled in the art would recognize based on the referenced common technical knowledge it is pointed out that in osteoporosis, the disease state of the forearm bone and the fracture risk caused by the disease are common to the fracture risk in other parts prone to fracture. Then, the court rejected the plaintiff's assertion, on the ground that a person skilled in the art would not recognize that the forearm bone of osteoporosis patients differed from the bones of other parts of the body in terms of **disease state** and **fracture risk**, or **the purpose and effects** of administering eldecalcitol.

2. Major issues discussed

(1) Issue 1: Consideration of common technical knowledge

The members discussed that there was a partial difference in common technical knowledge between the trial decision and the court decision for determining whether or not Difference 1 is a substantial difference.

As a result of the discussion, the members agreed that such difference in common technical knowledge did not affect the conclusion whether Difference 1 is a substantial difference or not, but only affected the logic of determining as will be described later.

(2) Issue 2: Logic of Determining Use Invention

As both the trial decision and the court decision were examined on Difference 1 relating to the use, the members confirmed the logic of how to determine each of the "unknown attribute" and "new use" by applying to the decision criteria of the use invention. As a result, the members did not raise any objection on the conclusions of both the trial decision and the court decision, but they had different opinions on the logic of determination.

(3) Issue 3: Determining the effect achieved by the claimed invention

The trial decision found that the effect of the invention was not directly relevant to determining novelty, and the effect of the invention was not exceptionally remarkable nor beyond the scope of predictability compared to the prior art in determining inventive step.

On this respect, as for the above determining of the court decision, some

members commented that it was interesting the decision adopts whether there were room to adopt a framework to affirm novelty similar to that of selective invention when the invention has an unforeseeable and remarkable effect, even if it seemed that there was no novelty in the "use," or there were no room to adopt such a framework, but merely to deny novelty in response to a party's assertion.

(4) Issue 4: Allegation and proof by the patentee

The patentee asserted that (1) this invention was objectively distinguishable from the use of Exhibit A No. 1 invention, and (2) this invention achieved remarkable and unexpected effects, but both assertions have been rejected in the court decision.

The members agreed that the rejection of these assertions was reasonable due to the fact that based on this specification and common technical knowledge, it is impossible to distinguish between a forearm fracture and a fracture in other parts of the body.

(5) Issue 5: Comparison with cases in which the use invention is affirmed

The court decision denied "unknown attribute" and "new use" for this invention on the ground that a person skilled in the art would recognize that the "disease state," "purpose and effects," and "operation" are not different from those of Exhibit A No. 1 invention. In this regard, the members discussed the comparison with the cases in which the use invention is affirmed.

In common with all the cases, some members commented that while the affirmation of a use invention had significance in encouraging research and development, it was difficult to distinguish the invention from a conventional product, so-called public domains.

In particular, some members commented that unlike inventions of pharmaceutical use whose uses were limited by package inserts or doctor's prescriptions, use inventions in the fields of cosmetics and food products could not be clearly distinguished between uses in the scene of use, and thus would erode the public domain or discourage the manufacturers.

Case 10: Patent - Electricity

Handling of business practices in software-related inventions

JPO Docket Number	Appeal against an examiner's decision of refusal Appeal No. 2020-007563 (Patent Application No. 2017- 031023) (Aug. 3, 2021: Appeal decision to maintain the examiner's decision of refusal → final and binding)
Date of Court Decision Court Docket Number	IP High Court, Jun. 27, 2022 2021(Gyo-Ke) 10116 (Dismissal of a request)
Title of Invention	Game Program, Game Processing Method, and Information Processing Device
Major issue	Patent Act, Article 29(2) (Inventive step) (Finding of differences, application of well-known matters)

1. Outline of the case

The appeal decision found Differences 1 and 2, and denied the inventive step: Difference 1 was not a substantial difference and Difference 2 could be appropriately achieved by a person skilled in the art from well-known matters.

The court decision upheld the comparison and difference findings in the appeal decision, and also upheld the appeal decision by rejecting the plaintiff's assertion of procedural violation. The present invention is a fourth-generation divisional application.

2. Major issues discussed

(1) Issue 1: Technical significance of the present amended invention

A majority of the members regarded "giving dormant users a chance to resume playing games" that the applicant asserted at the examination stage, as the problem to be solved by the present amended invention, then concluded that the limited interpretation by the statement in the specification relating to "interactions among users" was unnecessary, and commented that the court had also substantially considered said problem to be solved by the invention. On the other hand, some members commented that the technical significance of the invention was to solve the problem of "activating interactions among users" found by the court decision, and the claims concerned were superordinate concepts of the statement in the specification, and therefore the objective statement in the specification should be given priority over the applicant's assertions at the examination stage.

(2) Issue 2: Finding and application of well-known art

The members discussed the terms "widely and generally known matters" and "business practices," etc., as well as the necessity of motivation, by using the subject of the determination on Difference 2 of the court decision. A member pointed out that it was preferable to employ textbooks, etc. or multiple pieces of evidence, rather than a single web article in order to prove "widely and generally known matters." A majority of members commented that the treatment of "business practices" was also not different from those of ordinary "well-known art" or "common technical knowledge," and there is an opinion that it would be easier to understand if the term "state of the art" was used. Some members commented if it is proven that it was well-known, no motivation was necessary, and other members commented that although motivation was necessary, if it was proven that it was more well-known, motivation could be substantially inferred.

A majority of members commented that in this case the primary cited invention was in the field of "games" and thus could not be said that "business practices" in the industry of product sales and marketing would be immediately applicable without motivation, and there is a opinion that it would have been more convincing if the well-known art of the game industry had been found, rather than "business practices" of the product sales and marketing industries had been found.

However, there were also opinions at the discussion that it is inevitable to consider marketing in online games, if business practices which were presumed to be cross-industry applicable in general terms had been indicated, the applicant should assert that such business practices could not be applied. In addition, some members commented that if this invention was not directed to a game but, for example, a business system, system changes considering cross-industry business practices would be a "design choice." (3) Issue 3: Replacement of evidence indicating well-known art

Some members pointed out that regarding the fact that the appeal decision had indicated Exhibit A No. 2 instead of the cited document 2 (Exhibit B No. 5) that was indicated at the time of decision of examination, it might have been more convincing to have indicated Exhibit A No. 2 together with Exhibit B No. 5 as a supplement thereto.

In addition, there was an opinion on whether or not the violation of the procedures occurred should be determined based on whether or not there was a surprise attack, including whether the logic of the counterargument changes as the evidence changes, and there was another opinion that there was no problem in replacing a well-known example with a more appropriate well-known example.

(4) Issue 4: Determination of "message sending function" as a corresponding feature in comparison with Exhibit A No. 1

Some members commented that Exhibit A No. 1 did not specify that the transmission means for sending information mails were a game program, and therefore there was an error in finding of the appeal decision that the "message sending function" realized by the game program was a corresponding feature. On the other hand, there was also an opinion that it was reasonable that the appeal decision found it as a corresponding feature because it could be read that the information mail was sent by a program from the description of Exhibit A No. 1.

(5) Issue 5: Determination of ease of arriving at Difference 1 (means for granting a reward to "one user who has received" a message)

Many members agreed with the court decision that determined to be easily arriving because "it was reasonable to understand that the word "receive" was simply used against the word "send."

(6) Issue 6: Reasonable interpretation of terms that are not clearly defined Some members commented that they generally consented to the interpretation of the court decision for both terms "one user who has received" and "login." (7) Issue 7: Description of the problem to be solved in a divisional application Based on the discussion of (1) above, especially the finding of the problem to be solved in the court decision, the attention of the members was attracted on the description of the problem to be solved when filing a divisional application.

Case 11: Design

Scope of knowledge of a person skilled in the art and materials in determining creative easiness

JPO Docket Number	Appeal against examiner's decision of refusal Appeal No. 2020-16016 (Design Registration Application No. 2019-017943) (Oct. 20, 2021: Appeal decision to maintain the examiner's decision of refusal → final and binding)
Date of Court Decision Court Docket Number	IP High Court, Jun. 28, 2022 2021 (Gyo-Ke) 10158 (Dismissal of a request)
Article to the design	Cord for preventing tools from falling
Major issue	Design Act, Article 3(2) (Creative Difficulty)

1. Outline of the case

This is a case in which an appeal decision was upheld in the litigation rescinding the appeal decision. The appeal decision had concluded that the design in the application, which was a partial design of the article embodying the design was a "cord for preventing tools from falling," could not be registered under Article 3, paragraph (2) of the Design Act, on the ground that the design in the application could have been easily created by a person skilled in the art based on a design of "fall prevention cord" for tools (cited design 1) and a design of "harness line" for yachts (cited design 2), which are both known designs in the same field of safety cords.



The design in the application (Perspective View)

Cited design 1

Cited design 2

2. Major issues discussed

(1) Issue 1: Finding the part for which the design registration is requested

As for finding a part for which a design registration is requested, the members agreed that although there was no statement that directly meant the comparison with the whole article in finding of the appeal decision in which only "from one end of the cord to the root of the branch" was stated. However, the appeal decision could be considered to substantially find a position, size and scope of the part for which the design registration was requested against the whole article embodying the design by comprehensively taking into account the description of the finding in the appeal decision.

(2) Issue 2: Appropriateness of cited designs

A. Is it reasonable to have found and determined that the "harness line" embodying to the cited design 2 was an article belonging to the same field as the "cord for preventing tools from falling" embodying to the design in the application?

Although some members commented that the field was different between equipment to prevent falling of tools and equipment to prevent falling of people for yachts because the modes of use were significantly different. However, in conclusion, the members generally agreed that it was reasonable in this case in which the cited design 2 was determined to fall under "the ordinary skilled in the art of the design": this conclusion was reached on the ground of the purport of Article 3 (2) of the Design Act establishing the determination of the creative easiness of the design, which shall be "It is not a design that can be easily created by a person skilled in the art based on abstract motif that have no relation to the article," and on the ground of each of the facts found in this case including the manufacturing and marketing situations.

B. In drawing the conclusion that the cited design 2 belongs to the same field as the design of this application, is it reasonable to use the fact that there was a situation where a person skilled in the art would "see (the shape, etc. of the cited design) naturally" as the criteria of determination?

There is a basic idea if there is a situation that a person skilled in the art would naturally see, it is considered to create something based on what to be seen., Against this idea, one of the members pointed out that just because of such situation where the person would see naturally, it did not mean that replacement or aggregation would immediately become a common method. However, the members agreed conclusively that it was considered reasonable to assume that a person skilled in the art of an article embodying the design was in situation where the person would "see naturally" when selecting evidence materials for determining the creative easiness of the design.

C. Is it reasonable to find the identity of the field by considering the identity of the function in addition to the sales situation on the specialty store website?

On this respect, one of the members stated the opinion that it was easy to think of repurposing or using the motif if the functions are the same, while there was another opinion that the degree of granularity and commonality required for the "functions" in the above case and the necessity of proving the sales situations of the article embodying the cited design in this case could change depending on the individual case.

As finding in the court decision of this case, "even if an article was not exactly identical as the article embodying the design in the application, if the article has the same purpose or function and the same manufacturer or distributor, etc. as the article embodying the design in the application, it is presumed that the shape, etc. of the article would be naturally seen by a person skilled in the art of the article embodying the design in the application. Therefore, it should be understood that the article is regarded as materials for determining the creative easiness due to belonging to the same field of the article embodying the design in the application.," this idea was confirmed that there was room for applying to other cases, but it was not appropriate to understand it as the general principle concerning the determination of creative easiness.

(3) Issue 3: Determination of Creative Easiness

The members generally agreed that a configuration of the design in the application had used well-known general-purpose parts, considered to be specialized in functionality as a whole, and thus the features leading to evaluation from the viewpoint of design creation such as individuality and originality were difficult to be recognized. From this point the conclusion of the court decision was acceptable that the design in the application determined to be a design easily created by replacement or aggression of publicly known designs.

In determining the creative easiness of a design, it was important to make appropriate decisions according to each case based on the purpose of Article 3 (2) of the Design Act. It was simultaneously confirmed if the design of the application, which is a partial design, had a characteristic shape, etc., more careful responses and determinations would be required with regard to the finding of the position, size and scope of the part for which the design registration was requested, the clarity required for the cited designs, as well as the evaluation of a sense of beauty resulting from the replacement, etc.

Case 12: Trademark

Торіс	Determination of similarity of combined trademarks
Issues	Issue 1: In a case where some of the constituent characters are characters indicating the quality of goods or the quality of services, even if the trademark was presented with the same font, the same size, as well as equal spaces, had not many syllables, and could be observed as a unity of a series, how should we consider extracting characters other than those indicating the quality of goods or the quality of services, as an essential part of the trademark?
	Issue 2: In a case where a trademark consists of figures and characters, and some of the constituent characters are characters indicating the quality of goods or the quality of services, how should we consider extracting characters other than those indicating the quality of goods or the quality of services, as an essential part?
Major JPO/ Court Decisions for Reference	 IP High Court Case No. 2021 (Gyo-Ke) 10093, Feb. 22, 2023 "ハートデンキサポート (Heart Electric Support)" Case (Appeal against examiner's decision of refusal No. 2021-012334) (hereinafter "Court Decision (1)") IP High Court Case No. 2018 (Gyo-Ke) 10121, Mar. 12, 2019 "キ リンコーン (Kirin Corn)" Case (Invalidation Trial No. 2017- 890075) (hereinafter "Court Decision (2)") IP High Court Case No. 2019 (Gyo-Ke) 10104, Dec. 26, 2019 "EMPIRE STEAK HOUSE" Case (Appeal against examiner's decision of refusal No. 2018-650052) (hereinafter "Court Decision (3)") IP High Court Case No. 2022 (Gyo-Ke) 10087, Jan. 17, 2023 "EMPIRE STEAK HOUSE" Case (Appeal against examiner's decision of refusal No. 2021-007251) (hereinafter "Court Decision (4)")

Issues and discussion results

(1) Issue 1: In a case where some of the constituent characters are characters indicating the quality of goods or the quality of services, even if the trademark could be observed as a unity of a series, to extract characters other than those above mentioned, as an essential part A. With regard to Court Decisions (1) and (2), the members discussed the relationship between the cited Supreme Court decisions, and the future of citations in practice. Some members commented that the court decision on "つ つみのおひなっこや (Tsutsumi-no-Ohinakkoya; Tsutsumi's Doll shop)" held that separate observation was not allowed in principle, while the court decision on "リ ラ 宝 塚(LYRATAKARAZUKA; Lyre Takarazuka)" was not interpreted as explicitly stating that, and thus the criteria of both decisions were understood to be different from each other. Other members commented that the court decision on "つつみのおひなっこや (Tsutsumi-no-Ohinakkoya; Tsutsumi's Doll shop)" held that separate observation was not allowed in principle, but it seemed that it was cited as the basis for allowing separate observation in the later court precedent.

Regarding application of the rules to cases, the members agreed that the principle is to observe combined trademarks as a unity and the viewpoint of determining a unity could vary, thus it was important to make a determination logically based on the rules appropriate to each case.

In addition, one of the members commented that the circumstances should be considered when finding the essential parts, whether the constituent parts of the trademark are common nouns or words that are commonly used and desired to be used by any person, etc.

- B. The members discussed whether a part of the composition of a trademark embodying services can be omitted and abbreviated the trademark with the rest of parts. There was an opinion that it was understood that there were actual situations that the omission was not made when the loss of distinctiveness of the services by omitting the element indicating the quality of services, etc., and the omission was made in other cases, and there was another opinion that although whether they can be abbreviated or not could be used as a basis for determining whether or not separate observation is possible, these should be distinguished from each other.
- C. The members discussed the finding in Court Decision (4) in which "Since the "STEAK HOUSE" part did not provide any necessary information when consumers selected a restaurant for a steak dish, it could be considered that consumers focused on the "EMPIRE," and one of the members commented that whether or not the appellation was continuous could not be absolute in

determining whether separate observation is possible, other member commented that for a trademark recognized as a unity in terms of appearance such as "EMPIRE STEAK HOUSE," the entire trademark including the word "STEAK HOUSE" would be a function as a distinctive mark, and furthermore another member commented that a different conclusion could have been reached if the trademark in Court Decision (4) had been filed before the trademark in Court Decision (3).

- D. In addition, the members discussed whether or not it was normal to view a trademark as one unit depends on the field of services, and some members commented that in cases where there was the actual situation of transactions such as multiple elements constituting a trademark being seen a trade name as one unit, or where there was a situation where services were identified by a trademark combining words with weak distinctiveness, it was possible to state that these circumstances could be grounds for an integral trademark.
- (2) Issue 2: In a case where a trademark consists of figures and characters, and some of the constituent characters are characters indicating the quality of goods or the quality of services, to extract the characters other than those characters as the essential part
 - A. The members discussed whether the actual situation of transactions affected to determining whether a combined trademark can be observed separately, and then one of the members commented that well-knowledge was rather floating than the actual situation of general and constant transactions, another member commented that if there was a fact that the outstanding notability has continued, it could be considered as the actual situation of general and constant transactions, and furthermore another member commented that if a cited trademark was well-known, it was understood that a slight modification, such as simply adding figures, was unlikely to avoid a determination of similarity, but it may not actually be determined as such. In addition, there was an opinion that it was not to be convinced the fact that the Court Decision (2) did not take into account the defendant's assertion regarding the mode of use, such as " \neq " \vee \neg \neg (Kirin Corn)" sales locations, etc., as the actual situation of general and constant transactions without any particular reason, and another member pointed out the court decision

referred to the information communication power of figures.

B. The members discussed that the Court Decision (4) added remarks about a comparison the word "BURGER HOUSE" which was an element of the registered trademark to the word "STEAK HOUSE." One of the members commented that also in the JPO, cases similar to those in the past should be decided in the same way as in the past, but the decision would differ unless the trademarks were not completely identical, and another member commented that the above additional remarks had made because the plaintiff's assertion could not be ignored.

Trial and Appeal Practitioner Study Group REPORT 2023 (Summary)

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