

Trial and Appeal
Practitioner Study Group

REPORT 2024

(Summary)

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Trial and Appeal Department
Japan Patent Office

Preface

The panel for trial and appeal of the Japan Patent Office (JPO) examines the soundness of examination results and the validity of rights for patents, utility models, designs and trademarks, and renders final determinations in the form of trial and appeal decisions as an administrative agency. In addition, the Intellectual Property High Court examines the propriety of trial and appeal decisions and renders court decisions. In order for the panel for trial and appeal of the JPO to conduct more appropriate trial and appeal examinations, it is important to discuss actual trial and appeal decisions and court decisions, aim to objectify or clarify the criteria for determination, and apply the results to future trial and appeal practices. Furthermore, it will be possible to enhance the predictability of trials and appeals by widely disseminating the results and by sharing an understanding of trial and appeal practices with users of the trial and appeal system.

Based on this understanding, since 2006, the Trial and Appeal Department of the JPO has been holding the “Trial and Appeal Practitioner Study Group” (originally named the “Case Studies on Inventive Step”), where corporate intellectual property representatives, patent attorneys, attorneys, as well as chief administrative judges and administrative judges of the JPO come together to study trial and appeal decisions and court decisions. Additionally, since 2016, this Study Group has been further enriched by the participation of judges from the Intellectual Property High Court and the Tokyo District Court as observers.



Trial court of the JPO

The members of this year's Study Group discussed general issues in six fields: publicly worked inventions and determination of inventive step, determination of inventive step for parameter and numerical limitation inventions, acceptability of supplemental results submitted after filing in determination of inventive step, eligibility for patent (mental activities of humans, arbitrary arrangements), determination of similarity between designs (determining entity), and determination of similarity of composite trademark, as well as one individual case in each field.

This report summarizes the results of a lively discussion on the above issues (themes) and cases from the different viewpoints of corporate intellectual property representatives, patent attorneys, attorneys, administrative judges and judges, examining the important issues and points of contention in practice from a variety of perspectives. In addition, an English translation of the summary of this report is to be published, thereby facilitating the wider dissemination of the Study Group's results overseas. We sincerely hope that this report will be useful not only to the administrative judges, but also to the examiners of the JPO in making their determinations, and that it will further serve the users of the trial and appeal system both in Japan and overseas. Through these efforts, we hope to foster a deeper understanding of Japan's trial and appeal practices among system users both domestically and internationally, and to further enhance confidence in Japan's intellectual property system.

Finally, we would like to express our deepest gratitude to 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 for their cooperation in organizing the Study Group, as well as to the members and observers who participated in and discussed the issues in the Study Group.

March 2025

MORIFUJI Atsushi

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 one theme and one case for examination (the details are shown in the following pages).

The First Study Cases (one theme) were selected based on a general topic (publicly worked inventions and determination of inventive step; determination of inventive step for parameter and numerical limitation inventions; acceptability of supplemental results submitted after filing in determination of inventive step; eligibility for patent (mental activities of humans, arbitrary arrangements); determination of similarity between designs (determining entity); Trademark Act, Article 4(1)(xi) determination of similarity of composite trademark) 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 Study Cases (one case) 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

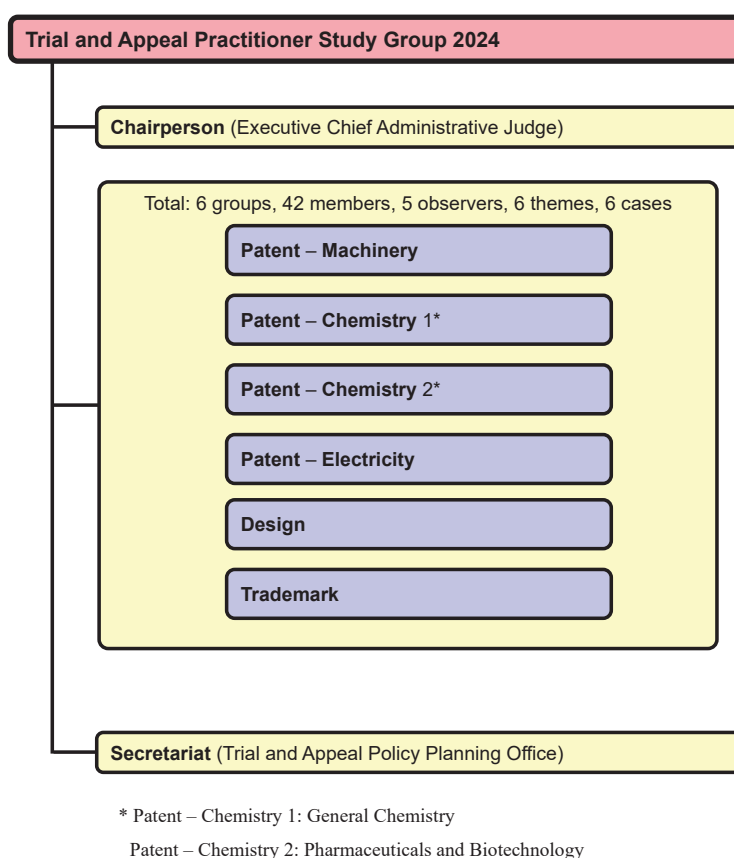
opposition to registration of trademark, where their trial/appeal decisions or court decisions were already concluded; and (2) rights in dispute do not exist in the end.

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.



Organization chart of the Trial and Appeal Practitioner Study Group 2024

Study Cases (the First Study Cases)

Field	No.	Topic	Point at Issue
Patent - Machinery	1	Publicly worked inventions and determination of inventive step	<p>Issue 1: Method of finding of a publicly worked invention</p> <p>Issue 2: When determining inventive step on the basis of a publicly worked invention, how should the problem to be solved inherent in the publicly worked invention and the technical significance thereof be found?</p>
Patent - Chemistry 1	2	Determination of inventive step for parameter and numerical limitation inventions (Article 29(2) of the Patent Act)	<p>Issue 1: In what cases can a numerical range not explicitly stated in the cited document be determined to be easily conceived?</p> <p>Issue 2: How should the inconsistency of the technical field and the problems to be solved by the invention between the claimed invention and a primary cited invention be taken into account?</p>
Patent - Chemistry 2	3	Acceptability of supplemental results submitted after filing in determination of inventive step	<p>Issue 1: On what basis are supplemental results submitted after the application permitted to be considered?</p> <p>Issue 2: Compared with what should the unpredictability and remarkableness of the effect of the claimed invention be evaluated?</p> <p>Issue 3: In the case of medical-use inventions characterized by dosage regimen, what should be described in the specification on the filing date, so that unpredictable and remarkable effects on the basis of supplemental results submitted after filing could be deduced?</p>
Patent - Electricity	4	Eligibility for patent (mental activities of humans, arbitrary arrangements)	<p>Issue 1: In the light of recent court decisions, what is the description of the claims and related elements that leads inventions relating to mental activities of humans and arbitrary arrangements to eligibility for patent like?</p> <p>Issue 2: How could the correspondence between the determination methods in recent court decisions and the provisions of the Examination Guidelines for Patent and Utility Model be understood?</p>

Design	5	Determination of similarity between designs (Determining entity)	<p>Issue 1: What factors should be used to determine the determining entity in the determination of similarity?</p> <p>Issue 2: What should be kept in mind regarding the characteristics of the determining entity in the determination of similarity?</p>
Trademark	6	Trademark Act, Article 4(1)(xi) Determination of similarity of composite trademark	<p>Issue 1: Extraction of a primary part where separate observation is possible</p> <p>Issue 2: Cases where one of the constituent parts is not a primary part</p> <p>Issue 3: Influence of elements on extraction of a primary part</p> <p>Issue 4: Trademark consisting of an already registered trademark and added characters, etc.</p>

* Patent – Chemistry 1: General Chemistry

Patent – Chemistry 2: Pharmaceuticals and Biotechnology

Study Cases (the Second Study Cases)

Field	No.	Title of the Invention/ Article to which the design is applied/ Trademark in the Application	Trial Number (Trial/ Appeal Decision)	Date of Trial/ Appeal Decision	Conclusion of Trial/Appeal Decision	Major Issue
			Case Number (Court Decision)	Date of Court Decision	Main Text of Court Decision	
Patent-Machinery	1	Heat transfer system	Appeal No. 2020-012722	Sep. 10, 2021	Decision to maintain the examiner's decision of refusal	Patent Act, Article 29(2) (Inventive step)
			2022 (Gyo-Ke) 10007	Jan. 18, 2023	Dismissal of a request	
Patent-Chemistry 1	2	Flat nonaqueous electrolyte secondary battery	Invalidation No. 2013-800022	Dec. 11, 2013	Trial decision to maintain the patent	Patent Act, Article 29bis (Secret prior art)
			2014 (Gyo-Ke) 10097	Nov. 26, 2014	Revocation of the first trial decision	
			Invalidation No. 2013-800022	Dec. 27, 2016	Trial decision to maintain the patent	
Patent-Chemistry 2	3	Isobutyl GABA or its derivatives for the treatment of pain	Invalidation No. 2017-800003	July 14, 2020	Trial decision to partially invalidate the patent	Patent Act, Article 126(5) (Requirements for Correction: Addition of new matter), Patent Act, Article 36(4)(i) (Enablement requirements), and Patent Act, Article 36(6)(i) (Support requirements)
			2020 (Gyo-Ke) 10135	Mar. 7, 2022	Dismissal of a request	

Patent-Electricity	4	Reservation support method, reservation support program, and reservation support device	Appeal No. 2021-000170	Mar. 24, 2022	Decision to maintain the examiner's decision of refusal	Patent Act, Article 29(2) (Inventive Step)
			2022 (Gyo-Ke) 10039	Dec. 21, 2022	Dismissal of a request	
Design	5	Bag	Invalidation No. 2023-880003	Sep. 4, 2023	Trial decision to invalidate the design	Design Act, Article 5(ii) (A design which has a risk of creating confusion with an article pertaining to another person's business)
			2023 (Gyo-Ke) 10113	Feb. 19, 2024	Dismissal of a request	
Trademark	6	池上製麺所 (Ikegami Seimenjyo) (Standard characters)	Appeal No. 2022-010063	Feb. 21, 2023	Decision to maintain the examiner's decision of refusal	Trademark Act, Article 3(1)(iv) (Trademark consists solely of a mark indicating a common surname name or name)
			2023 (Gyo-Ke) 10031	Sep. 7, 2023	Dismissal of a request	

The First Study Cases

Theme 1: Patent – Machinery

Publicly worked inventions and determination of inventive step

Issues	Issue 1: Method of finding of a publicly worked invention
	Issue 2: When determining inventive step on the basis of a publicly worked invention, how should the problem to be solved inherent in the publicly worked invention and the technical significance thereof be found?
Major JPO/ Court Decisions for Reference	<ul style="list-style-type: none">• IP High Court Case No. 2021 (Gyo-Ke) 10137, Aug. 23, 2022, “Work machine” Case (Invalidation Trial No. 2018-800039) (hereinafter “Court Decision (1)”) • IP High Court Case No. 2019 (Gyo-Ke) 10022, Dec. 18, 2019, “Optical information reading device” Case (Invalidation Trial No. 2017-800103) (hereinafter “Court Decision (2)”) • IP High Court Case No. 2014 (Gyo-Ke) 10230, June 24, 2015, “A method and an apparatus for provision of projection nuts” Case (Invalidation Trial No. 2013-800145) (hereinafter “Court Decision (3)”) • IP High Court Case No. 2010 (Gyo-Ke) 10400, July 27, 2011, “Handle mount structure of hand truck” Case (Invalidation Trial No. 2010-800002) (hereinafter “Court Decision (4)”) • IP High Court Case No. 2022 (Gyo-Ke) 10037, Feb. 7, 2023, “Air-discharge port adjusting mechanism for air-conditioning clothes, clothes main body of air-conditioning clothes, and air-conditioning clothes” Case (Invalidation Trial No. 2020-800103) (hereinafter “Court Decision (5)”)

Issues and discussion results

In general, searching for the fact that an invention is being publicly worked is, by its very nature, often considered to be more difficult than searching patent documents and other documents. Therefore, in the hope of helping practitioners with little experience in dealing with publicly worked inventions make appropriate arguments and determinations, opinions were exchanged and examined as to how evidence should be evaluated in cases where a publicly worked invention is used as a cited invention, the method of finding the problem to be solved inherent in a publicly worked invention and the technical significance thereof, and a motivation for combination and determination of obstructive factors.

(1) Issue 1

• Publicly worked inventions in determining novelty

The practical difficulty in proving a publicly worked invention lies in the availability of a publicly worked product and in proving matters specifying the invention that cannot be ascertained from the appearance of the product itself, such as the function of the product. In particular, in order to find a product, such as an exhibited item which cannot be freely analyzed or disassembled as a publicly worked invention, other evidence is required for elements that are difficult to prove (inside structure, control, specific feature, etc. other than appearance). It is generally more difficult to prove that exhibited items are “reproducible” than transferred items because they cannot be freely disassembled and analyzed. Regarding the identity of the evidence with the publicly worked product, it seems essential to construct a reasonable logic and to make an allegation from evidence that can be obtained and presented. Because the allegation of evidence tends to be determined individually and specifically based on whether or not the allegation can be considered reasonable in courts.

• Use of indirect (auxiliary) evidence

When trying to prove a publicly worked invention by indirect evidence, the evidence can be based on various kinds of evidence, such as different products, mold drawings, catalogs, and testimony of witness. However, there is an issue with the identity of these pieces of evidence. In general, identity of evidence is difficult to prove rigorously, but if a reasonable level of evidence can be presented in court, identity is likely to be established in many cases. Even in cases where each piece of evidence is not sufficient to prove the fact of a publicly worked invention, there is a significant possibility that the fact will be recognized by using multiple pieces of evidence and providing a reasonable explanation.

• Comparison with an invention described in a publication

Publicly worked inventions can be used as strong evidence by understanding their technical features. In particular, a worked product makes it easier to prove matters that are not clearly described in cited documents (e.g., constitutions and dimensions that are considered technically obvious and intentionally not described in the text) and can be recognized in accordance with the claim wording, making it an advantageous aspect for denying novelty.

(2) Issue 2

• Publicly worked inventions in determining inventive step

In practice, many comments were received on the difficulty of finding the problem to be solved in a publicly worked invention and the difficulty of constructing the logic of how to conceive the patented invention from the publicly worked invention.

In terms of motivation, since a publicly worked invention is complete at the level of being sold, partially modifying its constitution cannot be easily achieved, so it is difficult to gather evidence to support the logic that the invention could easily have been conceived. Furthermore, in many cases the problem to be solved cannot be extracted from the publicly worked invention itself, and if novelty cannot be denied, it will be difficult to construct a logic to deny inventive step.

• Inherent problems

When using a publicly worked invention to deny inventive step, it is necessary to find the problem to be solved from the invention. However, as mentioned above, the difficulty of not clearly stating the problem to be solved makes it necessary to gather evidence to prove it. On the other hand, since there are no allegations of obstructive factors, such as a contradiction to the description in the cited document, unlike in cases of use of a published publicly-known invention, it can be said that publicly worked inventions have an advantageous aspect as evidence to deny inventive step.

• Proof of the problem to be solved

What evidence is needed to say that the “problem to be solved” inherent in a publicly worked invention can be recognized? In order to establish that the publicly worked invention has the well-known and obvious problem to be solved, presenting a lot of publicly known literature in the same or neighboring fields will help to increase the persuasiveness; however, a small number of references does not necessarily mean that the problem to be solved cannot be recognized as well-known, and providing a thorough and logical explanation can increase the usefulness as evidence of a publicly worked invention. It can also be said that publicly worked inventions have a degree of freedom in identifying the problem to be solved because the problem is not specified.

• Comparison with a published publicly-known invention

If proof of the period and content of the publicly worked invention, and the motivation and the supplementary evidence of identification of the problem to be solved in determining inventive step, publicly worked inventions are sufficiently

useful as evidence of lack of inventive step even compared to published publicly-known inventions, since there is a degree of freedom in finding the invention and the problem to be solved.

Theme 2: Patent – Chemistry 1

Determination of inventive step for parameter and numerical limitation inventions (Article 29(2) of the Patent Act)

Issues	Issue 1: In what cases can a numerical range not explicitly stated in the cited document be determined to be easily conceived?
	Issue 2: How should the inconsistency of the technical field and the problems to be solved by the invention between the claimed invention and a primary cited invention be taken into account?
Major JPO/ Court Decisions for Reference	<ul style="list-style-type: none"> • IP High Court Case No. 2020 (Gyo-Ke) 10001, Feb. 8, 2021, “(Meth)acrylic acid ester copolymer” Case (Opposition No. 2019-700313) (hereinafter “Court Decision (1)”) • IP High Court Case No. 2019 (Gyo-Ke) 10096, June 3, 2020, “Resin composition, polyimide resin film using the same, display substrate and production method for said display substrate” Case (Opposition No. 2018-700095) (hereinafter “Court Decision (2)”) • IP High Court Case No. 2017 (Gyo-Ke) 10029, Dec. 26, 2017, “Ethylene-vinyl acetate copolymer saponified product pellet group and application thereof” Case (Invalidation Trial No. 2016-800013) (hereinafter “Court Decision (3)”) • IP High Court Case No. 2017 (Gyo-Ke) 10096, May 15, 2018, “Non-magnetic material particle dispersed ferromagnetic material sputtering target” Case (Invalidation Trial No. 2014-800157) (hereinafter “Court Decision (4)”) • IP High Court Case No. 2011 (Gyo-Ke) 10186, Apr. 11, 2012, “Hard vinyl chloride resin pipe” Case (Invalidation Trial No. 2010-800143) (hereinafter “Court Decision (5)”)

Issues and discussion results

(1) Parameter and numerical limitation inventions

In the discussion on parameter and numerical limitation inventions, “numerical limitation inventions” were examined as “inventions with a description specifying the invention by the use of a numerical limitation in a claim” as defined in the Examination Guidelines. As for “parameter inventions,” inventions with the characteristics of “applicant’s original type” and “aggregation type” were mainly

included in the study.

The practical problems recognized by the members of the Study Group with respect to parameter and numerical limitation inventions were as follows:

- Determination of novelty (degree of technical basis for determining the probability of identical parameters and numerical range, and counterarguments in cases where it is not possible to convert into numerical values and where measurement conditions are different)
- Determination of inventive step (determining the motivation, novelty of the problem to be solved, and consideration of advantageous effects)
- Public-domain issues (including cases where the numerical value is too obvious to find references, etc., hereinafter referred to as the “obvious numerical value problem”)

Of these problems, the issue of the determination of inventive step was focused for examination in this report.

Prior to the discussion, a summary was made of the positioning of the evidence, such as cited documents describing (or suggesting, inferring, etc.) the relevant parameters and numerical limitations in determining inventive step.

(2) Issue 1: In what cases can a numerical range not explicitly stated in the cited document be determined to be easily conceived?

From the discussion based on the reference court decisions, the factors to be considered in determining inventive step were divided into the following A. and B. for discussion.

A. Easily conceived property of numerical range in parameter and numerical limitation inventions

Regarding the question of whether or not the parameters and numerical limitations are easily conceivable on the basis of the primary cited document, the secondary cited document and the well-known art, the observations of the members were consistent in the perception that the following three factors are interrelated.

- The technical significance of the parameters and numerical limitations and the novelty of the problem to be solved and consideration of advantageous effects as matters to be examined with respect to the claimed invention
- The commonality of the technical field and the problem to be solved between the primary cited invention and the secondary cited invention, and the commonality of

the problem to be solved between the claimed invention and the primary cited invention, as matters to be considered for the cited invention

- The following matters should be considered with respect to the technical field: common general technical knowledge at the time of filing, technical difficulty, and public-domain (including the “obvious numerical value problem”)

Although there were no clearly consistent observations among the members regarding the order of consideration and priority of each of the above factors in determining easily conceived property, many of the comments focused on the technical significance of the parameters and numerical limitations. Therefore, in order to make the determination of easily conceived property highly convincing to practitioners, it is essential to accurately grasp the technical idea expressed in the parameters and numerical limitations of the claimed invention, and to comprehensively determine whether or not the invention exceeds the hurdle of easily conceived property based on the cited invention/secondary cited invention or the well-known art, while considering each determining factor.

B. Consideration of effect in parameter and numerical limitation inventions

Chemical and parameter/numerical limitation inventions are in a technical field where the effect cannot be expected immediately from the composition, so that the consideration of the effect has a great influence on the determination of inventive step. Therefore, (i) an advantageous effect, (ii) an effect of a different nature or an effect of the same nature but remarkable effect, and (iii) an effect which a person skilled in the art could not expect on the basis of the state of the art at the time of filing, were discussed from three perspectives: “critical significance,” “description of embodiment” and the “independence requirement approach and secondary consideration approach.” As a result, we obtained opinions on cases where it is appropriate to consider a case as affirming inventive step, etc.

(3) Issue 2: How should the inconsistency of the technical field and the problems to be solved by the invention between the claimed invention and a primary cited invention be taken into account?

Focusing on the problem to be solved by the parameters and numerical limitations, the following two perspectives were discussed.

- Commonality of the technical field and the problem to be solved between the

claimed invention and the primary cited invention

- Finding the problem to be solved from the claimed invention and the primary cited invention

As a result of the discussion, the members perceived that in the process of considering the technical significance and advantageous effects of the parameters and numerical limitations in determining inventive step, it is undeniable that whether the problem to be solved is identical or not between the claimed invention and the primary cited invention has an overall effect.

After discussing how the problem to be solved should be found from the claimed invention and the primary cited invention, opinions were expressed such as “Although it is acceptable for some cases to be specified throughout the entire specification, it is not desirable for either an applicant, a patentee or third parties to specify matters that differ significantly from those described in the [problems to be solved by the invention] field.”

Theme 3: Patent – Chemistry 2

Acceptability of supplemental results submitted after filing in determination of inventive step

Issues	In what cases could supplemental results submitted after filing be taken into consideration?
	Issue 1: On what basis are supplemental results submitted after the application permitted to be considered?
	Issue 2: Compared with what should the unpredictability and remarkableness of the effect of the claimed invention be evaluated?
	Issue 3: In the case of medical-use inventions characterized by dosage regimen, what should be described in the specification on the filing date, so that unpredictable and remarkable effects on the basis of supplemental results submitted after filing could be deduced?
Major JPO/ Court Decisions for Reference	<ul style="list-style-type: none"> • IP High Court Case No. 2020 (Gyo-Ke) 10004, Aug. 31, 2021, “Therapeutic or prophylactic agent for osteoporosis” Case (Invalidation Trial No. 2018-800076) (hereinafter “Court Decision (1)”) • IP High Court Case No. 2009 (Gyo-Ke) 10238, July 15, 2010, “Sunscreen compositions” Case (Appeal against examiner’s decision of refusal No. 2007-005283) (hereinafter “Court Decision (2)”) • IP High Court Case No. 2010 (Gyo-Ke) 10203, May 28, 2012, “Method and composition for inducing tumor-specific cytotoxicity” Case (Appeal against examiner’s decision of refusal No. 2006-007782) (hereinafter “Court Decision (3)”) • IP High Court Case No. 2012 (Gyo-Ke) 10252, Mar. 18, 2013, “Thermostable ribonuclease H” Case (Appeal against examiner’s decision of refusal No. 2009-017666) (hereinafter “Court Decision (4)”) • IP High Court Case No. 2013 (Gyo-Ke) 10014, Oct. 10, 2013, “Cancer treatment drug containing eMIP as an active ingredient” Case (Appeal against examiner’s decision of refusal No. 2010-008649) (hereinafter “Court Decision (5)”)

Issues and discussion results

Regarding consideration of experimental results, etc. submitted after filing of the application (hereinafter referred to as “ex-post data”) in determining inventive step, the case of Court Decision (2) is well known. And as shown in the “Examination Guidelines for Patent and Utility Model,” there is the practice that it can be considered if a person skilled in the art can deduce it from the descriptions in the specification, etc. Under these circumstances, from August 2021 to June 2022, there were eight related decisions, including Court Decision (1), concerning the determination of inventive step of medical-use inventions specified by its dosage and administration, and in these decisions the ex-post data were not taken into consideration.

With regard to consideration of ex-post data, the members of the Study Group examined Issues 1 to 3 concerning what should be written in the specification in order to say that a person skilled in the art could deduce the alleged matter based on the ex-post data from the descriptions, etc., from the viewpoint of the technical significance of the claimed invention as understood from the specification, etc., keeping in mind where the dividing line of acceptance or rejection of the consideration of ex-post data lies in Court Decisions (1) and (2).

(1) Issue 1: On what basis are supplemental results submitted after the application permitted to be considered?

The members confirmed that the consideration may be related to how the “problem to be solved and means of solution,” which are inseparably linked to “effects of the invention,” are described in the original specification, and what is the technical significance of the claimed invention as understood from the descriptions, in other words, in what background art the claimed invention has, what problem to be solved the invention has, and what is the solution used to solve it.

(2) Issue 2: Compared with what should the unpredictability and remarkableness of the effect of the claimed invention be evaluated?

The method of determining the existence of an “unpredictable and remarkable effect” in relation to “effect” in determining inventive step includes the approach of comparison with the main cited invention, the approach of comparison with the constitution of the invention and the approach of comparison with the state of the art;

however, it appears that the Supreme Court in Case No. 2018 (Gyo-Hi) 69 of Aug. 27, 2019, rendered the decision on the premise that the approach of comparison with the claimed invention should be applied. In Court Decision (1), after quoting the same Supreme Court decision, it was stated: “However, as it is difficult to determine whether or not it has an unpredictable and remarkable effect solely from the constitution of the invention, it is understood that the effect of a cited invention selected as having a constitution similar to that of the invention or the same type of effects achieved in the state of the art may be taken into consideration.” By clarifying the method of determination more specifically, the members confirmed that court decisions made prior to this Supreme Court decision also tended to take the approach of comparison with the claimed invention.

(3) Issue 3: In the case of medical-use inventions characterized by dosage regimen, what should be described in the specification on the filing date, so that unpredictable and remarkable effects on the basis of supplemental results submitted after filing could be deduced?

The invention in Court Decision (1) is a medical-use invention that has technical significance in that it applies conventionally known active ingredients to “a medical use in which it is applied to a specific disease at a specific dosage or administration.” However, the original specification did not clearly state the “problem to be solved and solution,” which are inseparably linked to the effect alleged by the ex-post data; on the contrary, a cited invention was listed as prior art, which was identical including dosage and administration, except that the group of osteoporosis patients was not further limited. There were circumstances in which, when considering the effect of the closely related cited invention and the same type of effects achieved in the state of the art, the unpredictable and remarkable effect to be alleged by the ex-post data could not be taken into consideration. The discussion was concluded that Court Decision (1) was a case of comprehensive determination of these circumstances, and that there was no change in the concept of dealing with an ex-post data as determined by Court Decision (2), etc., which states that if a person skilled in the art can infer it from the specification, etc., the data should be considered as long as it does not exceed the scope of the descriptions.

When aiming to obtain a patent for a medical-use invention specified by dosage and administration, disclosure of technical ideas such as the “problem to be solved and

solution” and the technical significance are more required, bearing in mind that the relationship between the active ingredients and the intended use is publicly known and that there are closely related cited inventions, and anticipating how the unpredictability and remarkableness of the effects will be alleged in the future.

Theme 4: Patent – Electricity

Eligibility for patent (mental activities of humans, arbitrary arrangements)

Issues	Issue 1: In the light of recent court decisions, what is the description of the claims and related elements that leads inventions relating to mental activities of humans and arbitrary arrangements to eligibility for patent like?
	Issue 2: How could the correspondence between the determination methods in recent court decisions and the provisions of the Examination Guidelines for Patent and Utility Model be understood?
Major JPO/ Court Decisions for Reference	<ul style="list-style-type: none"> • IP High Court Case No. 2023 (Gyo-Ke) 10059, Nov. 22, 2023, “One system for dosage day count calculation including prescription provided with patient possession item and patient-possession medical product” Case (Appeal against examiner’s decision of refusal No. 2022-021414) (hereinafter “Court Decision (1)”) • IP High Court Case No. 2021 (Gyo-Ke) 10052, Dec. 20, 2021, “Analysis method of haircut techniques” Case (Appeal against examiner’s decision of refusal No. 2020-012930) (hereinafter “Court Decision (2)”) • IP High Court Case No. 2019 (Gyo-Ke) 10110, June 18, 2020, “Method for settling electronically recorded monetary claims and monetary claims management server” Case (Appeal against examiner’s decision of refusal No. 2019-001157) (hereinafter “Court Decision (3)”) • IP High Court Case No. 2017 (Gyo-Ke) 10232, Oct. 17, 2018, “Steak providing system” Case (Opposition No. 2016-701090) (hereinafter “Court Decision (4)”) • IP High Court Case No. 2015 (Gyo-Ke) 10130, Feb. 24, 2016, “Energy saving action sheet” Case (Appeal against examiner’s decision of refusal No. 2014-018064) (hereinafter “Court Decision (5)”)

Issues and discussion results

(1) Issue 1: In the light of recent court decisions, what is the description of the claims and related elements that leads inventions relating to mental activities of humans and arbitrary arrangements to eligibility for patent like?

On the basis of Court Decisions (1) to (5), the members of the Study Group discussed the description of the claims, etc. that leads inventions relating to mental activities for humans and arbitrary arrangements to eligibility for patent.

A. Points to note when drafting the claims and specification, etc.

If the invention can be claimed as a computer-software-related invention, it should be included in the claims.

However, it is not enough to simply state in the claims that a computer is used. It is important to include devices used as means to solve the problem, communication between devices, and the specific operation of signal processing in the claims while keeping in mind the description of the specification where the problem to be solved by the invention and its effect should be directed to something other than mental activity of humans or arbitrary arrangements.

If the invention is not a computer-software-related invention, it is essential to describe the specific technical means in the claims, and the description of the specification should be understandable that the specific technical means contribute to solving the problem of the invention.

Regarding Court Decision (4), when discussing whether a system that does not use a computer should be treated as an invention of a product, there were opinions that a combination of several elements could be a system, given the dictionary meaning of the word “system.”

B. What allegations should an applicant/patentee make if eligibility for patent becomes an issue in court (and in the examination or trial and appeal)?

It should be alleged that the technical significance of the invention is not directed solely to arbitrary arrangements or mental activities of humans and that the structure of the technical means to solve the problem or to achieve the effect and the mechanism for solving the problem are specifically described in the claims; even if the purpose of the invention is directed to arbitrary arrangements or mental activities of humans, it should be alleged that a new problem to be solved has been established and that the specific technical means for solving the problem are described in the claims.

C. Relationship between eligibility for patent and other reasons for refusal

When eligibility for patent is at issue, novelty and inventive step, as well as description requirements such as support, clarity and enablement requirements, may become an issue simultaneously.

For novelty and inventive step, reasons for refusal can be resolved by defining the invention as a computer-software-related invention as far as possible and by adding a means other than arbitrary arrangements in the claims.

For description requirements, reasons for refusal can be resolved by specifying the medium as the invented product and by describing the mechanism for solving the problem using technical means such as computers and hardware in the claims, specification, etc.

D. Specific content of “as a whole”

The following specific factors can be found from the “as a whole” criteria for determining eligibility for patent on the basis of Court Decisions (1) to (5): (i) whether the claims describe arbitrary arrangements or mental activities of humans itself, (ii) whether a system defined in the invention is specified as the technical means for solving the problem, and (iii) whether the technical significance of the invention is directed to arbitrary arrangements or mental activities of humans itself.

(2) Issue 2: How could the correspondence between the determination methods in the Reference Court Decisions and the provisions of the Examination Guidelines for Patent and Utility Model be understood? Are there any points of difference that affect practice?

Although the Examination Guidelines do not state that technical significance should be looked at, the conclusion on eligibility for patent might be the same under both determination methods.

In the determination process, the Examination Guidelines focus on the description of the claims, while the court decisions look at the description of the claims and specification to consider the technical significance for determination.

However, the Examination Guidelines also state, “the characteristic of the technology is to be considered in determining whether a claimed invention as a whole utilizes the laws of nature” and there were opinions that the examiner could also consider eligibility for patent on the basis of technical significance.

Theme 5: Design

Determination of similarity between designs (Determining entity)

Issues	Issue 1: What factors should be used to determine the determining entity in the determination of similarity?
	Issue 2: What should be kept in mind regarding the characteristics of the determining entity in the determination of similarity?
Major JPO/ Court Decisions for Reference	<ul style="list-style-type: none"> • IP High Court Case No. 2023 (Gyo-Ke) 10008, June 12, 2023, “Roof tile” Case (Invalidation Trial No. 2021-880006) (hereinafter “Court Decision (1)”) • IP High Court Case No. 2023 (Gyo-Ke) 10066, Dec. 21, 2023, “Roof tile” Case (Invalidation Trial No. 2022-880001) (hereinafter “Court Decision (2)”) • Tokyo High Court Case No. 2002 (Gyo-Ke) 626, June 30, 2003, “Protective cover for wiring” Case (Appeal against examiner’s decision of refusal No. 2001-003328) (hereinafter “Court Decision (3)”) • IP High Court Case No. 2005 (Gyo-Ke) 10643, Jan. 18, 2006, “Construction wall panel” Case (Appeal against examiner’s decision of refusal No. 2004-012949) (hereinafter “Court Decision (4)”) • IP High Court Case No. 2006 (Gyo-Ke) 10023, July 13, 2006, “Horizontally laid roof panel” Case (Appeal against examiner’s decision of refusal No. 2004-002760) (hereinafter “Court Decision (5)”) • IP High Court Case No. 2012 (Gyo-Ke) 10105-10110, Nov. 26, 2012, “Artificial tooth” Case (Appeal against examiner’s decision of refusal No. 2011-003122, 003123, 003125-003127, 003129) (hereinafter “Court Decision (6)”)

Issues and discussion results

(1) Issue 1

The determining entity for the determination of similarity between designs is stipulated in Article 24(2) of the Design Act (scope of a registered design, etc.) as “consumers.” In practice, “consumers” are understood to include “traders,” and the same applies to the determination of similarity under Article 3(1)(iii) of the Design Act

(novelty). However, it depends on the individual case as to which type of consumer is considered to be the determining entity.

In the determination of similarity between designs under Article 3(1)(iii) of the Design Act, we examined what factors should be used to determine the determining entity, through discussions on each of the following specific issues.

A. Determining entity for the determination of similarity in Court Decisions (1) and (2) (hereinafter referred to as the “Roof tile Cases”)

In the court decisions of the Roof tile Cases, it was found that the primary consumer was the client who ordered the construction of the roof of a building, etc. and who should be the owner, although the builders, etc. who constructed the roof tile roofs were also considered consumers. As for the background of the finding, the opinion was expressed that this was due to the facts that roof tiles are an article where the aesthetic impression of the visible external form after construction is important, and that the client has the authority to decide on the selection of roof tiles. The majority of opinions held that the finding of the determining entity and the reasoning behind the decision in the Roof tile Cases were appropriate. However, there was also an opinion suggesting that the viewpoint of the builder should be considered important, as the article is one that requires stability and safety after construction.

B. What background factors generally influence the finding of the determining entity?

There was an opinion that the finding of the determining entity is based on a consideration of the nature, purpose and modes of use of a target article to which the design is applied, and that if the appearance of the article influences the purchasing decisions of the end users, the determining entity is the general consumers, but if the shape of the article, which is derived from its function, influences the purchasing decisions, the determining entity could be “experts” in addition to the general consumers.

The opinion was expressed that focusing on consumer’s demand action, whether or not persons other than end users (such as experts) are involved in the selection or construction of the product will influence the finding of the determining entity. There was also an opinion that differences in the finding of the determining entity could arise depending on a whole design and a partial design, or depending on which part

to focus on when the purpose or function of each part of the article is different.

The following issues were also discussed: “the determining entity for the determination of similarity in Court Decisions (3) to (6),” “the category of ‘consumers,’” “cases where the determining entity is not specified,” among others.

In addition, the members reviewed and discussed the provisions and concepts concerning the determining entity after the “Flexible elastic hose” case (Supreme Court decision of Mar. 19, 1974, Case No. 1970 (Gyo-Tsu) 45).

(2) Issue 2

In determining the similarity between designs under Article 3(1)(iii) of the Design Act, we examined how the characteristics of the determining entity influence the determination of similarity, among others, through discussions on each of the following issues.

A. How did the fact that the client was found to be an important consumer in the Roof tile Case influence the determination of similarity?

In the two Roof tile Case decisions, the court determined the designs to be similar, based on the fact that the client was found to be an important consumer, and by focusing on the common features in the external form visible after construction. Therefore, there was an opinion that the fact that the client was mainly found to be the important consumer influenced the determination of similarity in the court decisions. However, there were also opinions that, while the factors of the determining entity also had some influence, other reasons such as the fact that the roof tile’s inverted U-shaped pattern was new and unusual, also influenced the determination.

B. In general, how does the finding of the determining entity influence the determination of similarity?

There was an opinion that the general consumers tend to emphasize the overall composition, and even more they tend to emphasize the parts that are easily noticeable at a glance and also the shape of the parts that are important when making a purchase decision (the parts prioritized when selecting a design). On the other hand, there was an opinion that experts tend to observe details, and in particular, rather than observing the whole in detail, they are thought to observe

details related to functions, important functional parts, improved parts, etc.

The following issues were also discussed: “how did the determining entity influence the determination of similarity in Court Decisions (3) to (6),” “how should shapes and other aspects that attract technical interest be evaluated,” “the differences between a litigation rescinding a trial decision (Article 3(1)(iii) of the Design Act) and an infringement litigation (Article 24 of the Design Act),” “what should be considered when determining similarity between designs with and without color differences,” among others.

Theme 6: Trademark

Trademark Act, Article 4(1)(xi) Determination of similarity of composite trademark

Issues	Issue 1: Extraction of a primary part where separate observation is possible
	Issue 2: Cases where one of the constituent parts is not a primary part
	Issue 3: Influence of elements on extraction of a primary part
	Issue 4: Trademark consisting of an already registered trademark and added characters, etc.
Major JPO/ Court Decisions for Reference	<ul style="list-style-type: none"> • IP High Court Case No. 2023 (Gyo-Ke) 10063, Nov. 30, 2023, “遊 \VENTURE” Case (Appeal against examiner’s decision of refusal No.2022-008509) (hereinafter “Court Decision (1)”) • IP High Court Case No. 2020 (Gyo-Ke) 10088, Feb. 22, 2021, “Homes-kun” Case (Appeal against examiner’s decision of refusal No. 2020-001579) (hereinafter “Court Decision (2)”) • IP High Court Case No. 2020 (Gyo-Ke) 10104, Feb. 22, 2021, “旬 JAPAN \SHuN” Case (Appeal against examiner’s decision of refusal No. 2019-016373) (hereinafter “Court Decision (3)”) • IP High Court Case No. 2019 (Gyo-Ke) 10020, Sept. 12, 2019, “SIGNATURE” Case (Appeal against examiner’s decision of refusal No. 2018-002007) (hereinafter “Court Decision (4)”) • IP High Court Case No. 2015 (Gyo-Ke) 10171, Jan. 28, 2016, “エ リ エール \:ina \ イーナ” Case (Appeal against examiner’s decision of refusal No. 2014-022457) (hereinafter “Court Decision (5)”)

Issues and discussion results

(1) Issue 1: Extraction of a primary part where separate observation is possible

The members of the Study Group discussed based on whether each constituent part becomes in principle a primary part if there is no difference in distinctiveness between the constituent parts and they are separately observable.

In this regard, from the point of view that, in principle, each part is a primary part, there was a view that, if not so interpreted, it might allow the registration of a subsequent application which is a kind of side-taking of another person’s registered trademark, and there were indications that the Supreme Court decision in the

“LYRATAKARAZUKA” case was based on the principle that each constituent part can be extracted separately. It was also noted that the judgment of Court Decision (1) embodies the permissible conditions of separate observation indicated by the “LYRATAKARAZUKA” decision from the perspective of the unity of the trademark’s appearance although it includes the point that not everything is necessarily a primary part of the trademark.

On the other hand, the viewpoint that each constituent part does not immediately become a primary part was mainly based on the idea that the relevance to a primary part is determined on the basis of differences in distinctiveness, although there were some ideas that focused on the appearance of the constituent parts (“LYRATAKARAZUKA” decision) and the unity of the constitution parts (Court Decision (1)). However, there was also a view that, if each constituent part has strong distinctiveness, each could be extracted.

(2) Issue 2: Cases where one of the constituent parts is not a primary part

With regard to the case where one of the constituent parts is not a primary part, while some members considered that the question was whether there was distinctiveness or not, others considered aspects other than distinctiveness. Among the observations that emphasize appearance, there are those that refer to the framework shown in the “LYRATAKARAZUKA” decision and Court Decision (1), as well as those that argue that a portion described in relatively small characters within a constitution with a conspicuous figure cannot be a primary part, regardless of its distinctiveness in terms of appearance.

The observations that emphasize factors other than appearance indicate a case where the existence of a part with relatively weak distinctiveness is accepted because of the actual trade condition (for example, when a company name trademark (house mark) is used with a family name, the trademark is pronounced and meant only by the family name by omission of the company name trademark), as well as a case where there is a conceptual unity. It was also argued that the appearance, pronunciation and concept of a trademark are unlikely to be perceived individually and should be determined in a comprehensive manner.

(3) Issue 3: Influence of elements on extraction of a primary part

The influence of a constituent element other than a primary part on extraction of a

primary part was discussed. The following cases were mentioned: the case where there is a constituent element that stands alone and attracts the viewer's attention in terms of appearance ("LYRATAKARAZUKA" decision, and Court Decisions (1) and (3)), the case where one of the constitutions is extremely small and is recognized as an additional element, can be influential, and the case where significant differences in appearance are considered important (Court Decision (5)) if the appearance of the trademark can be seen primarily in the course of the ordinary trade condition.

(4) Issue 4: Trademark consisting of an already registered trademark and added characters, etc.

Regarding a trademark of the aforementioned constitution, the members discussed about the way in which a primary part should be extracted, and the merits and demerits of determining to be dissimilar to an already registered trademark by observing the whole of the trademark.

The extraction of a primary part is influenced by the publicity of the already registered trademark, whether it is a coined word or an existing word, and the meaning and usage of the trademark in the actual trade condition. There was the view that added characters, etc. should be extracted separately even if they are highly distinctive, since the already registered part has been registered because of its distinctiveness; and another view was that the one with the relatively more distinctive part is extracted as the primary part if there is an actual trade condition in which only one of the two constituent parts is pronounced abbreviated (Court Decision (2) and (4)).

With regard to the merits and demerits of determining the dissimilarity of a trademark from an already registered trademark by observing the trademark as a whole, several opinions were presented. The members pointed out that there is a risk of concurrent registration of trademarks having the same primary part, and that it would be detrimental to the benefit of the right holder of an already registered trademark under the interest of those who choose to register a new trademark. A determination that a trademark could be found to be dissimilar is unavoidable only when it should be observed as a whole and it should be the case that the trademark is unlikely to be misled and confused over the source as a whole based on the constitution or the like of the trademark. On the other hand, there was another view that if both the already registered trademark and the added characters, etc. are not

very distinctive, the trademark may become a coined word and be recognized and remembered as an inseparable trademark, and therefore it may be considered dissimilar and registered unless the already registered trademark is a well-known and famous trademark. It was also pointed out that the interest of those who choose to register a new trademark is the need to choose such a trademark, and that whether the already registered trademark is a coined word or a word describing quality, etc. should be taken into consideration.

The Second Study Cases

Case 1: Patent – Machinery

Finding of Claimed Invention and Prior art, Concept of Design Variations and Related Matters

Trial Number	Appeal No. 2020-012722 (Patent Application No. 2019-525638) (Unsuccessful) (Sep. 10, 2021: Appeal decision to maintain an examiner's decision of refusal → decision on the appeal becomes final and binding)
Date of Court Decision Case Number	IP High Court Case, Jan. 18, 2023 2022 (Gyo-Ke) 10007 (Dismissal of a request)
Title of the Invention	Heat transfer system
Major Issue	Patent Act, Article 29(2) (Inventive step)

1. Outline of the case

In this case, the presence or absence of inventive step was disputed in the appeal against the examiner's decision of refusal for the invention titled "Heat transfer system."

The appeal decision denied the inventive step of the claimed invention, determining that, in the light of the well-known matters, it would have been easy for a person skilled in the art to conceive of adopting the configuration of the claimed invention, which relates to the differences between the claimed invention and the cited prior art, into the cited prior art.

The plaintiff asserted the following as grounds for revocation of the appeal decision: (i) errors in the finding of the prior art and in the finding of the corresponding features and different features, (ii) an error in the determination of the well-known art, and (iii) an error in the determination of the inventive step. However, the plaintiff's assertions were not accepted and the appeal decision was upheld.

2. Issues to be discussed

(1) Issue 1: Finding of the gist of the claimed invention

We agreed that the determination in the court decision was appropriate because the gist of the invention was properly found based on the configuration described in the scope of the claims of the claimed invention.

Based on this case, we discussed how the finding of the gist of the claimed invention, in particular its limited interpretation, should be taken into account in determining inventive step, without being constrained by this case. Given the possibility of limiting the matters used to define the invention through amendment, the burden of monitoring by third parties, and so on, we reached a consensus that, in principle, the finding of the gist should be made based on the description in the claims. In this respect, it can be said that the determination is made without any discomfort among the practitioners. However, if an interpretation cannot be clearly deduced from the wording of the claims themselves, it is appropriate to be able to consider the detailed description and drawings of the invention in order to interpret them.

(2) Issue 2: Finding of cited prior art

A. Examination of the limits necessary for comparison

Since the purpose of finding of cited prior art is to compare it with the claimed invention, it is not appropriate to complicate the comparison and determination by finding cited prior art with more limited constitution than necessary. In this regard, we agreed that the determination in the court decision was appropriate, as it was easy to understand that considering whether or not it was essential for solving the problem served as one of the indicators when formulating a general concept. In finding the cited prior art, care should be taken to ensure that it does not result in the arbitrary omission of composition apart from the common general technical knowledge or the purposes and problems disclosed in the prior art, while maintaining an awareness of the comparison with the technical idea presented in the claimed invention.

B. Examination of extraction from multiple options

Although we agreed that the court decision in this case was appropriate, there was an opinion that, in practice, it is difficult to determine whether or not it can be said to be “actually described in parallel.” There was also an opinion that, considering the state of art, it may be acceptable to extract one of the elements included in the general formula in the cited document.

(3) Issue 3: Motivation

With respect to Different Features 1 and 2, we agreed that the determination in the court decision that it was easily conceivable as adopting design changes or design variations even without any particular motivation was appropriate. On the other hand, there was also concern that the predictability was not necessarily high for the determination of design variations themselves.

When using a well-known art as secondary prior art, it is the subject of the application (combination), and the motivation mentioned above is naturally required. On the other hand, when using a well-known art as a basis for design changes, etc., it can be said that the motivation is not necessarily required, based on the standards set by the court decision in this case. In order to understand the assertions made by the other party and to make one's own assertions accordingly, it is crucial to be aware of the positioning of well-known art and design variations.

(4) Issue 4: Commonality of problems to be solved

In the context of the “finding of the gist,” a limited interpretation may be applied, in which case the problem to be solved by the claimed invention may become one of the elements to be considered. In the context of the “comparison” between the claimed invention and the primary prior art, if the problems to be solved by the two are significantly different, it can be said that the constitution of the invention obtained by starting from the primary prior art will have parts different from the one of the claimed invention. When considering design changes and the like based on “reasoning to be easily conceivable,” it can be said that whether or not the target constitution contributes to the principle of solving the problem of the claimed invention will influence whether or not it is a design change. In “consideration of effects,” different effects may be considered from the point of view of different problems to be solved.

As described above, “problems to be solved” are used in various contexts when examining inventive step. Within the framework of a comprehensive consideration, the assertions regarding the problem to be solved by the invention, which is the technical ideas, have a significant influence on the determination of the inventive step. However, as the assertion that the problem to be solved by the claimed invention differs from that of the primary prior art was rejected in this case, it is not sufficient to merely assert a difference in the problems to be solved. It will be crucial to analyze where the difference in the problems to be solved originates and where it influences

before making an assertion.

The concept of determination of inventive step needs to be examined specifically on a case-by-case basis, and it is difficult to generalize it to all cases. However, the above considerations should provide many valuable points of reference in determining inventive step.

Case 2: Patent – Chemistry 1

Matters equivalent or substantially identical to those described in the specification of the prior application

Trial Number	Invalidation No. 2013-800022 (Patent No. 5072123) (Unsuccessful) (Dec. 11, 2013: Trial decision to maintain the patent (First trial decision) → revocation of the first trial decision) (Dec. 27, 2016: Trial decision to maintain the patent (Second trial decision) → decision on the trial becomes final and binding)
Date of Court Decision Case Number	IP High Court Case, Nov. 26, 2014 2014 (Gyo-Ke) 10097 (Revocation of the first trial decision)
Title of the Invention	Flat nonaqueous electrolyte secondary battery
Major Issue	Patent Act, Article 29bis (Secret prior art)

1. Outline of the case

In this case, the point of contention (regarding secret prior art) was whether the invention in this case constituted the invention (hereinafter referred to as the “Evidence A1 Invention”) described in Evidence A1 (the specification, etc. of the prior application). The claimed invention is specified by the number of opposing surfaces of active material-containing layers of positive plates and active material-containing layers of negative plates being five or more in a flat nonaqueous electrolyte secondary battery in which, in order to increase the discharge capacity, the negative plates and the positive plates are laminated through separators so that the opposing surfaces of the active material-containing layers of the positive plates and the active material-containing layers of the negative plates are at least five, thereby ensuring that the opposing surface area of the active material-containing layers of the positive plates and the active material-containing layers of the negative plates is larger than the opening area of the electrode gasket.

In the first trial decision, it was held that although it could be seen from Evidence A1 that there were “three” opposing surfaces of the positive and negative plates through the separators in the laminated plate group, it could not be seen that there were “at least five” surfaces and therefore it could not be considered to be those

described in Evidence A1.

In response to this trial decision, the court decision was as follows: In Evidence A1, the number of opposing surfaces of the positive and negative plates is specifically stated to be three. However, it is evident that the Evidence A1 Invention does not limit the number of opposing surfaces to three, and that the more the positive and negative plates are laminated, the more the opposing surface area of the positive and negative plates simply increases in proportion to the number of layers. For this reason, it can be considered that Evidence A1 does not merely describe three opposing surfaces of the positive and negative plates, but also includes two, four, or more surfaces. Therefore, it is recognized that Evidence A1 effectively describes the presence of at least five opposing surfaces, and the number of laminated layers of the positive and negative plates is considered to be a mere design variation. Consequently, the trial decision was revoked.

2. Issues to be discussed

The following points were examined, along with the case studies and Related Cases 1 and 2¹.

(1) Issue 1: What are “matters equivalent to those described in the specification, etc. of the prior application” in cases where it is determined that there are no substantial differences in the secret prior art?

A. While the final court decision was considered appropriate by all members, many of them expressed discomfort with the determination that the number of opposing surfaces was described (or equivalent to being described [the same applies below]). Some expressed an opinion that since the number of opposing surfaces in the claimed invention is a matter directly related to the solution of the problem, they were reluctant to say that such a specific matter is described in the specification, etc. of the prior application. In addition, the following opinion was also expressed: the court decision is based on the commonality between the problems to be solved and the methods of solving the problems of the claimed invention and those of the

1 Related Case 1: IP High Court Case No. 2017 (Gyo-Ke) 10167, May 30, 2018, “Laminate film” Case.

Related Case 2: IP High Court Case No. 2012 (Gyo-Ke) 10387, Sep. 19, 2013, “Stabilized brominated alkane solvent” Case.

invention described in the specification, etc. of the prior application. However, considering that terms such as “design variations” and “remarkable effects” are used in the latter part of the decision, it seems that a determination of a minor difference has been made in substance.

B. We discussed the possibility of proving a matter equivalent as described by submitting data from additional experiments, if matters relating to physical property parameters are described in the description, etc. of the prior application. For Related Case 1, there was an opinion that although two physical property parameters, relative viscosity and viscometric average molecular weight, are unknown, the approach using additional experimental data would still be effective in determining the secret prior art.

C. When determining a matter equivalent as described, there were different opinions among the members as to whether the fact that the result is as predicted would influence the determination. One opinion was that the scope of a matter equivalent as described could be interpreted more broadly due to the fact that the result is only as predicted. The other opinion was that whether the result is as predicted or not should not be taken into account as a basis for the determination.

(2) Issue 2: What is “substantially identical (differences between the claimed invention and the cited invention are minor in the specific means of solving the problem (these are additions, deletions, conversions, etc. of well-known or conventional art and do not produce any new effects))” in the secret prior art, even if there are different features?

A. All members agreed that the “new effect” in determining the minor difference in the means of embodiment for solving the problem does not require a “remarkable effect” or “advantageous effect” as in determining inventive step, and that it is sufficient if the degree of effect is merely improved.

B. In Related Cases 1 and 2, respectively, it is difficult to define the criteria for determining whether the difference is minor or not, as there was some improvement in effects in mechanical strength and formability, or time to initiate metal corrosion, etc. We concluded that the new effect is not rigidly defined, but is

determined by a comprehensive consideration of various factors, including the statements in the specification of the prior application, the general technical knowledge and the statements in the specification of the claimed invention.

C. Finally, we discussed the application of the “disclaimer” amendment, which is commonly used to ensure novelty, to the secret prior art. Regarding the response to the secret prior art, the following opinion was expressed: even if an amendment is made to exclude a parameter or numerical limitation with a “disclaimer” by excluding any “point,” the excluded “point” does not result in a “new effect.” Therefore, when determining the secret prior art, it should be determined as a minor difference and it is desirable to determine it in this way.

Case 3: Patent – Chemistry 2

Relationship between Requirements for Correction (Addition of New Matter) and Support Requirements in Medical-Use Invention

Trial Number	Invalidation No. 2017-800003 (Patent No. 3693258) (July 14, 2020: Trial decision to partially invalidate the patent → decision on the trial becomes final and binding)
Date of Court Decision Case Number	IP High Court Case, Mar. 7, 2022 2020 (Gyo-Ke) 10135 (Dismissal of a request)
Title of the Invention	Isobutyl GABA or its derivatives for the treatment of pain
Major Issues	Patent Act, Article 126(5) (Requirements for Correction: Addition of new matter), Patent Act, Article 36(4)(i) (Enablement requirements), and Patent Act, Article 36(6)(i) (Support requirements)

1. Outline of the case

In this case, the plaintiff, who is the patentee, received a trial decision in a trial for invalidation that the patent relating to the invention was invalid and therefore sought to have the decision revoked against the defendant of an invalidation trial.

The trial decision rejected the correction of the claims, which sought to correct “analgesic for the treatment of pain” in the claims to “analgesic for the treatment of pain associated with hyperalgesia or contact allodynia caused by neuropathy or fibromyalgia,” on the grounds that it involves the addition of new matter. Consequently, it is determined that the medical-use invention of “analgesic for the treatment of pain” described in the claims before the correction does not satisfy the enablement requirements and the support requirements.

The court decision stated that, in relation to the requirements for correction, “Invention 2 is a so-called medical-use invention that finds a pharmaceutical use as an analgesic for the known substance Compound 2,” and that in order for “an analgesic for the treatment of pain” to qualify as a medical-use invention, it is naturally required that the analgesic be effective in the treatment of pain.” Therefore, “in order for the correction, which requires to specifically identify its use as an analgesic, not to be considered as an addition of new matter, the fact that Compound 2 ‘has an effect’ as

an analgesic in the treatment of pain associated with hyperalgesia or contact allodynia caused by neuropathy or fibromyalgia must exist as a technical matter derived by a person skilled in the art from a combination of all the descriptions in the specification (including the claims before the correction; the same applies below) or drawings, considering the common general technical knowledge at the time of filing the application.” The court further determined that “it cannot be said that the correction is within the scope of the matters described in the specification or drawings attached to the application form.” and rejected the request, concluding that the invention described in the claims before the correction did not satisfy the description requirements under Article 36 of the Patent Act.

2. Issues to be discussed

The following is a discussion of what is meant by “matters stated in the specification, claims or drawings” in medical-use inventions, as well as the consistency between the determination of the correction requirements and the determination of the description requirements made in this court decision based on the finding of those matters.

(1) Issue 1: Relationship between requirements for correction (addition of new matter) and support requirements

As a result of reviewing the decisions of past court cases, including the Grand Panel decision of the IP High Court in the “Solder Resist” case, it was found that “a technical matter derived by a person skilled in the art by combining all the descriptions in the specification or drawings” pertaining to the requirements for correction (addition of new matter) “relate to the technical ideas disclosed in the specification or drawings”, and this finding aligns with the determination under the support requirements that “when comparing the description in the claims with the description in the specification, the invention described in the claims is stated in the detailed description of the invention.” As for whether or not it is “substantially disclosed,” it was understood that this should be determined as a distinct area from the determination under the support requirements, which examines “whether the description in the detailed description of the invention falls within the scope that enables a person skilled in the art to recognize that the problem addressed by the invention can be solved.”

(2) Issue 2: What is the disclosure required in the specification or drawings for a medical-use invention as a technical idea?

The specification, claims, or drawings attached to this application include “neuropathy” and “fibromyalgia” as pain disorders and “hyperalgesia” and “contact allodynia” as pain, for the pharmaceutical use of Compound 2, an analgesic selected from specific substituents of Formula I. However, there is no explicit description in the specification regarding an analgesic for the treatment of “pain associated with hyperalgesia or contact allodynia caused by neuropathy or fibromyalgia,” which is a combined concept of these elements. In examining whether or not there is a disclosure as a technical idea, the following basic approach to determining the common general technical knowledge at the time of filing and the enablement requirements was reviewed once again.

- Determination of enablement requirements based on the difficulty of predicting the effectiveness of a medical-use invention based solely on the indication of the substance name, chemical structure, and the like.

(3) Issue 3: Determination of requirements for correction (addition of new matter), enablement requirements, and support requirements in this case, and the relationship among these determinations

Since the technical idea of the invention with the correction in this case is a medical-use invention that applies a known substance to a new use, it is understood that “matters described in the specification or drawings” are also required to be disclosed as the said technical idea. In addition, the fact that “it is generally difficult to predict the effectiveness of a medical-use invention based solely on the indication of the substance name, chemical structure, and the like” is a common premise regardless of the applicable provision. Therefore, in this court decision, it is believed that the medical-use invention was required to disclose the technical idea that the active ingredient is useful when applied to a specific use, that is, “it has an effect.” We reached a consensus that this was consistent with the finding of “matters described in the specification or drawings” as a premise for determining enablement and support requirements, and the decision in the case was made in accordance with the interpretation of the claims, the determination of inventive step and the determination of description requirements, in line with the wording in the provisions of the Patent Act, from the perspectives of appropriate protection and utilization of the patent

based on the common facts.

Case 4: Patent – Electricity

Concept of Inventive Step in Business-Related Invention

Trial Number	Appeal No. 2021-000170 (Patent Application No. 2016-148644) (Unsuccessful) (Mar. 24, 2022: Appeal decision to maintain an examiner's decision of refusal → decision on the appeal becomes final and binding)
Date of Court Decision Case Number	IP High Court Case, Dec. 21, 2022 2022 (Gyo-Ke) 10039 (Dismissal of a request)
Title of the Invention	Reservation support method, reservation support program, and reservation support device
Major Issue	Patent Act, Article 29(2) (Inventive step)

1. Outline of the case

The invention in this case relates to a reservation support method, a reservation support program, and a reservation support device.

The plaintiff asserted, as grounds for revocation of the appeal decision, errors in the determination of the requirement of independent patentability, particularly with respect to the determination concerning the easily-conceivable property of Different Feature 3, the finding of the technology described in Cited Document 2, etc. However, the plaintiff's assertions were not accepted.

2. Issues to be discussed

First, we discussed the appropriateness of the court decision to find “intrinsic demands” that neither party concerned had asserted, followed by a discussion on motivations for business patents and software-related inventions. Based on these discussions, we further examined how problems to be solved and effects should be described in the specifications for business patents and software-related inventions.

Finally, we discussed the approach to determining inventive step in light of the court decision.

(1) Issue 1: Appropriateness of the court decision to find “intrinsic demands”

The members agreed that the court decision was appropriate in finding the

“intrinsic demands” on the reservation of the facility, despite the absence of specific evidence.

In addition, we discussed whether it was necessary to find the “intrinsic demands” in this case in the first place, and whether it would have been possible to find the timeout processing from the description in Cited Document 1. As a result of this discussion, we reached a consensus that the logic of the court decision, which found the “intrinsic demands” and determined the motivation, was understandable, because attempts to find the timeout processing from the description in Cited Document 1 would have resulted in a more technical explanation.

(2) Issue 2: Motivations for business patents and software-related inventions

Regarding business patents and software-related inventions, we discussed whether motivations can be found even if elements for considering motivation, such as the problem to be solved, are not explicitly stated in the cited documents.

In this respect, in the case of software, the problem to be solved and the effect of the invention are sometimes not very specifically described in the specification. If emphasis is placed on whether the problem to be solved, etc. is described in the cited documents, there is a risk that motivations could be denied on the grounds that such descriptions are absent, potentially allowing even simple technologies to be patented. Therefore, for software-related inventions, there were opinions that, as in the court decision, it may be acceptable to affirm motivations by finding intrinsic demands and common general knowledge.

(3) Issue 3: Should business and technical aspects be considered separately in the determination of inventive step?

We discussed the extent to which business effects should be considered in addition to technical effects with respect to the effects of business patents. Given the difficulty of clearly separating business aspects from technical aspects, we concluded that, as it pertains to patents, the inventive step should be determined by considering not only the business problem to be solved and the effect, but also the effect achieved by the technical means that realize it.

(4) Issue 4: How to describe the problem to be solved and the effect in the specification

When we discussed how the problem to be solved and the effect should be described in the specification for business patents and software-related inventions, the opinions listed in the main text of the Report (Case 4, in Japanese) were presented.

(5) Issue 5: “Predictability” and “sound uncertainty” in the determination of inventive step

Finally, when we discussed the approach to determining inventive step, the members’ opinions were generally aligned on the following points:

- While it is not a bad thing that the predictability pertaining to inventive step in the trial examination has been increased through quality control and other measures, it is undesirable in cases where there is reluctance to recognize common general knowledge, etc. simply because it is not stated in the literature, or in cases where excessive emphasis is placed on the lack of explicit description of elements for considering motivations, such as the problem to be solved, leading to a denial of motivation.
- In such cases, as seen in the court decision, we should not be reluctant to affirm motivations by finding elements for considering motivations, such as common general knowledge and the problem to be solved, based on the state of the art at the time of filing.
- The purpose of examination and trial/appeal is to grant rights to inventions that are socially appropriate under the Patent Act. It inherently involves a certain degree of uncertainty, and an appropriate conclusion can be reached through repeated consideration in examination, trial/appeal, and litigation. For this uncertainty to be a “sound uncertainty” in the trial/appeal, it may be important to clearly state the determination and grounds in the trial decision, etc.
- Even in this court decision, although the conclusion of the trial decision and the court decision are the same, the logic behind each decision is different. The assertions of the parties concerned in a trial and in a court may differ, and thus it is not necessarily sound for the logic of each decision to be the same. A point of sound compromise may only be found when there is some degree of fluctuation (sound uncertainty).

Case 5: Design

Method for Determination of Article 5(ii) of Design Act (Comparison of Design and Trademark, Consideration of Trademark Famousness and Relevance of Field of Articles)

Trial Number	Invalidation No. 2023-880003 (Design No. 1606558) (Establishment of invalidity) (Sep. 4, 2023: Trial decision to invalidate the design →decision on the trial becomes final and binding)
Date of Court Decision Case Number	IP High Court Case, Feb. 19, 2024 2023 (Gyo-Ke) 10113 (Dismissal of a request)
Article to which the design is applied	Bag
Major Issue	Design Act, Article 5(ii) (A design which has a risk of creating confusion with an article pertaining to another person's business)

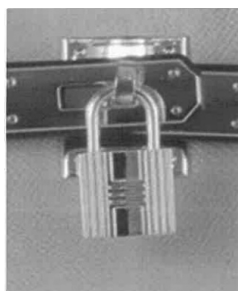
1. Design of the case

The design constitutes a “bag” as the article to which the design is applied, and its overall structure includes a generally box-shaped body with a bottom and an open top, to which a pair of handles are attached at the front and at the back, a belt is provided from the back to the front and a padlock is added to fasten the belt.

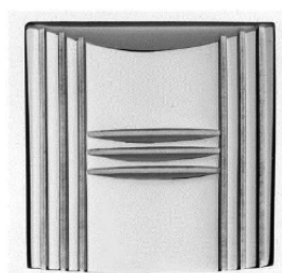
The overall shape of the padlock, with the exception of the hook part, which consists of a generally inverted U-shaped curved round bar, is that of a slightly thin, generally rectangular parallelepiped, and a generally H-shaped concave-convex pattern is formed on its front side.



Front view of the design



The padlock²



H Trademark 2

2. Issues to be discussed

(1) Issue 1: Consideration of the holdings in the court decision

The members expressed the opinion that the findings A through D below were generally considered appropriate.

- A. Rejection of the plaintiff's argument that the padlock is not a primary part of the design.
- B. The amendment to delete the padlock or the shape of the front of the padlock in the attached drawings, etc., is not acceptable as it changes the gist of the design.
- C. Even if the reasons for refusal under Article 5(ii) of the Design Act are not raised at the examination stage and no opportunity is given for an amendment, this does not affect the substantive determination of whether it falls under Article 5(ii) of the Design Act.
- D. Rejection of the plaintiff's argument that, since the plaintiff does not sell the bag with the padlock, it is not liable to create confusion with the articles pertaining to another person's business.

(2) Issue 2: Consideration of the explanations in the trial decision

We considered the explanations stated in the reasons 1-3 for invalidation. Regarding Reason 3 for invalidation, it was determined that the design falls under Article 5(ii) of the Design Act in connection with "H Trademark 2." In this respect, many opinions were expressed that the explanation of the similarity of form between the design in the case and the trademark was generally appropriate. Regarding the well-known and the famousness of the trademark, while several opinions were expressed that the method of determination was appropriate and that the grounds for the determination were sufficient, there were also opinions that more detailed evidence would be needed to recognize famousness.

In addition, many members considered the determination of likelihood of confusion to be generally appropriate. Furthermore, the relevance between the field of articles pertaining to the design and pertaining to the demandant's business, the fact that the padlock constitutes a small proportion of the entire bag, and the attachment position of the padlock on the bag were also considered.

2 Enlarged image of the padlock at the upper center of the front of the design. It was shown in the attached sheet of the court decision "The padlock and H Trademark 2," but it was not published in the design gazette.

(3) Issue 3: Famousness of the trademark, relevance of the field of the articles, and related matters

A. The famousness of the trademark

Many members expressed the opinion that the famousness of the trademark pertaining to another person's business significantly affects the determination of the likelihood of confusion and that the higher the degree of fame, the more likely it is that there will be a likelihood of confusion with designs bearing the same or similar trademarks.

Members suggested that the finding of the famousness of the trademark pertaining to another person's business should be based on a comprehensive consideration of a variety of factors, such as: the number of products manufactured and sold; the period and area of use; the methods, period, area and scale of advertising; and surveys investigating the degree of recognition of the trademark. In addition, there was an opinion that even in the case of registered trademarks, it is easier to find the famousness of three-dimensional trademarks for which a certain degree of recognition has been proven at the examination stage, whereas in the case of figure trademarks, it is difficult to evaluate the famousness of the shape or pattern itself, as the famousness of such trademarks is not usually required to be proven at the examination stage. Furthermore, there was a difference of opinion regarding whether there is a difference in the level of fame between the Design Act and the Trademark Act.

B. Relevance of the field of the article

Many members expressed the opinion that the relevance between the field of the designated goods of the trademark pertaining to another person's business and the field of the article of the design significantly affects the determination of whether there is a likelihood of confusion, and that, generally, the stronger the relevance between the two, the more likely it is that a likelihood of confusion will arise.

There was also an opinion that a likelihood of confusion could arise even if an article to which the design is applied and the designated goods of the trademark belong to different fields, due to the fact that they are parts or components of articles. Additionally, an opinion was expressed that the method for finding the relevance of the field of the articles will be a comprehensive consideration based on the strength

of the relevance between the two from the field and nature of the article, consumer recognition of the article and other relevant factors.

Case 6: Trademark

Applicability under Article 3(1)(iv) of Trademark Act for Trademark Formed by Combining Commonplace Surname with Customary Name

Trial Number	Appeal No. 2022-010063 (Trademark Application No. 2020-117387) (Unsuccessful) (Feb. 21, 2023: Appeal decision to maintain an examiner's decision of refusal → decision on the appeal becomes final and binding)
Date of Court Decision Case Number	IP High Court Case, Sep. 7, 2023 2023 (Gyo-Ke) 10031 (Dismissal of a request)
Trademark in the Application	池上製麺所 (Ikegami Seimenjyo) (Standard characters) Designated service: Class 43 "Providing foods and beverages"
Major Issue	Trademark Act, Article 3(1)(iv) (Trademark consists solely of a mark indicating a common surname name or name)

1. Outline of the case

This case concerned a trial decision that the above trademark in the Application fell under Article 3(1)(iv) of the Trademark Act, and this trial decision was upheld in the court decision.

2. Issues to be discussed

(1) Issue 1: "Commonplace name"

- A. We discussed the significance of the determination in this court decision that the trademark in the Application was considered a "commonplace name" on the grounds that it was a combination of a "commonplace surname" and a "name customarily used to indicate a restaurant serving noodles."
- B. Regarding the appropriateness of the framework for determining the trademark's composition by dividing it into the "surname" and additional parts, the opinions of the members were divided as follows: one opinion argued that, the analysis should have emphasized the wording of the provisions and maintained an integrated understanding of the composition as a whole, examining whether the entire composition was commonplace existence as it is; and the other opinion did not

oppose the approach of analyzing the composition in separate parts.

The latter opinion emphasizes that both the “surname” and the remainder of the trademark are commonplace (or lack of distinctiveness) and considers that the combination of such commonplace elements constitutes a “commonplace name,” thereby affirming its applicability under the Trademark Act, Article 3(1)(iv).

In response to these opinions, while some questioned the framework for determination in this court decision, criticizing it as being too technical to find something that is not equivalent to the “surname” in Item (iv) to fall under the “commonplace name” in the same Item (iv), there was also an opinion that affirmed this framework in conclusion to avoid the inconvenience of leaving no room to apply Article 3(2) of the Trademark Act to the trademark falling under Item (vi).

(2) Issue 2: “Commonplace surname”

- A. In determining the applicability of a “commonplace surname,” the impact of the word corresponding to the surname being polysemous was discussed. Many opinions basically agreed with the court decision in this case, which denied the impact of polysemy, on the grounds that it is possible for a word to be commonplace as a surname and also to be polysemous. However, in cases where the meaning of the word other than surname is more widely known and the word is usually recognized by that meaning, there was a majority view, regardless of agreement with the court decision, that this could affect the determination of the applicability of a “commonplace surname.”
- B. In determining the applicability of a “commonplace surname,” regarding how the number of people with the relevant surname should be taken into account, the majority considered that while it would be difficult to clearly define a limit based on a specific number of people, it would be reasonable to establish a specific numerical standard in order to ensure the objectivity of the determination.
- C. Even if the number of people with the surname corresponding to the word forming the trademark is not large, it can still be considered a “commonplace surname” in the following cases: (i) if it is the surname of a historical or fictional character, (ii) if the surname is geographically concentrated. For each of these cases, divergences were observed that reflected differences in viewpoints regarding the interpretation of the meaning of “commonplace.”

In other words, from the viewpoint of considering “commonplace” as a matter of

consumer recognition, there were opinions that it could apply if the surname was widely recognized nationwide, even if it was not used by many people as for (i), and that it was likely to be deemed non-applicable if the surname was not widely known nationwide as for (ii). On the other hand, from the viewpoint of considering “commonplace” as a matter of objective actual existence, there were opinions that there was no rational reason to treat it in the same way as a commonplace, actual surname as for (i), and that it could be understood as a “commonplace surname” in regions where the surname in question is geographically concentrated as for (ii).

(3) Issue 3: Applicable provision

In light of the existence of a court decision (“田中箸店 (TANAKA HASHI TEN)” case) which states that Item (vi) of the Trademark Act, Article 3(1) should be applied in a refusal of registration of a composite trademark consisting of a “commonplace surname” combined with a business name or similar term used in a customary manner, we discussed the distinction between the application of Items (iv) and (vi), and related issues.

- A. In this regard, some expressed the view that the trademark in the Application should have been determined as having applicability under Item (iv) also in this case (“TANAKA HASHI TEN” case) from the viewpoint of emphasizing consistency with the Examination Guidelines for Trademarks, while others expressed the view that the judgment in the above case was appropriate from the viewpoint of emphasizing the importance of maintaining an integrated understanding of the overall composition of the trademark when determining its applicability under Item (iv).
- B. There was also an opinion that, on the premise that both the applicability of Item (iv) and the applicability of Item (vi) could be subject to examination, a distinction should be made in the strictness of the applicability determination.
 - (a) In this respect, from the viewpoint of emphasizing the inconvenience that there is no room for applying Article 3(2) to the trademark falling under Item (vi), there was an opinion that the applicability of Item (iv) should be recognized relatively broadly, while the applicability of Item (vi) should be strictly determined for the trademark for which there is no room for recognizing the applicability of Item (iv).
 - (b) On the other hand, from the viewpoint premised on the understanding that,

even in determining the applicability of Item (vi), there is a situation where an operation similar to the application of Article 3(2) is effectively applied, the following opinions were expressed: (i) regarding the “commonplace surname,” in light of the fact that applicants have little room for choice, the applicability of Item (iv) should be broadly recognized, and (ii) regarding the “commonplace name” (in this opinion, referring to “one formed by combining a commonplace surname with a business name or similar term used in a customary manner” as seen in the decision in this case), given the broad range of options available, the freedom of choice should be recognized in accordance with this breadth, and the scope of cases falling under Item (iv) should be strictly limited.

Trial and Appeal Practitioner Study Group REPORT 2024 (Summary)

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