國立臺北科技大學102學年度碩士班招生考試

系所組別：6300 智慧財產權研究所

第一節　智慧財產權概論　試題

注意事項：

1. 本試題共 4 題，配分共 100 分。
2. 請標明大題、子題編號作答，不必抄題。
3. 全部答案均須在答案卷之答案欄內作答，否則不予計分。

一、美商蘋果電腦公司擬於台灣行銷其新產品 i-TV，並申請商標註冊，試簡要分析下列議題：

1. i-TV 得申請那些種類之非傳統商標？(5%)
2.該商標應符合那些商標申請基本要件？(5%)
3.註冊後取得何權利？期間若干(5%)
4.如該商標已遭他廠商註冊登記，蘋果公司應如何處理？(5%)
5.如蘋果公司登記商標後，遭其他廠商冒用於資訊產品，應如何處理？(5%)

二、1.依我國現行著作權法規定不受著作權法保護之標的有哪些？請一一列出並簡要說明。(15%)

2.A 日報揭露某國會議員外遇事件並同時刊登出由其記者所偷拍到之外遇對象照片作爲頭條新聞，B 晚報於同日晚間亦將該事件列爲報導主題，並使用 A 報記者所拍外遇對象照片出刊，請依著作權法相關規定簡要分析 B 晚報的報導作爲有無侵害著作權。(10%)

三、本題爲閱讀測驗。以下文字節錄自智慧財產法院行政判決 101 年度行專訴字第 36 號(資料來源：司法院法學資料檢索系統)：

『一、程序方面：

本件原告已於民國 101 年 5 月 1 日與 Schering Corporation（中譯名為「美商先靈公司」，紐澤西州公司編號 0000000000）合併，並以 Schering Corporation 為存續公司，Schering Corporation 於同年 5 月 2 日申請更名為 MERCK SHARP & DOHME CORP，嗣因原專利權人 MERCK SHARP &DOHME CORP.（紐澤西州公司統一編號 0000000000）之法人格已消滅，其權利義務（包含本件在內之專利權）均由合併後存續並更名之 MERCK SHARP & DOHME CORP.（紐澤西州公司統一編號 0000000000）概括承受，經原告於同年 7 月 26 日具狀聲明承受訴訟，並提出 MERCK SHARP & DOHME CORP.與 Schering Corporation 申請合併之文件、Schering Corporation 申請更名之文件、委任狀（見本院卷第 60 至 67 頁），經核無不合，應予准許。

二、事實概要：

原告（更名前為美商默克大藥廠）前於 87 年 10 月 13 日以「抑制骨質再吸收之方法」向被告申請發明專利，嗣經修正其發明名稱為「抑制骨質吸除作用之醫藥組合物」，經被告編為第 87116964 號審查，准予專利，並於公告期滿後，發給發明第 I226833 號專利證書（下稱系爭專利）。嗣參加人於 98 年 9 月 2 日以系爭專利有違專利法第 22 條第 1 項及第 4 項之規定，對之提起舉發，原告則於 98 年 12 月 8 日提出系爭專利申請專利範圍更正本，經被告審查，認系爭專利前揭更正本應准予更正，惟更正後系爭專利仍有違專利法第 22 條第 4 項規定，以 100 年 6 月 13 日（100）智專三（四）02021 字第 10020498200 號專利舉發審定書為「舉發成立，應撤銷專利權」之處分。原告不服，提起訴願，經經濟部 101 年 3 月 6 日經訴字第 10106102000 號為「訴願駁回」之決定，原告不服，遂向本院提起行政訴訟，聲明訴願決定及原處分均應撤銷。本院認本件判決之結果，若撤銷訴願決定及原處分，將影響參加人之權利或法律上之利益，爰依職權命參加人獨立參加本件訴訟。

三、原告聲明求為判決撤銷訴願決定及原處分，並主張：

(一)所屬技術領域中具有通常知識者縱然結合引證 1 與引證 2，亦不會推論出系爭專利之技術特徵：

…

六、本件之爭點即審理範圍：

參加人原以舉發引證 1 至 3 分別或組合，主張系爭專利申請專利範圍第 1 至 4 項不具新穎性或進步性，惟被告審定理由僅認定舉發引證 1、2 之組合可證明系爭專利申請專利範圍第 1 至 4 項不具進步性，原告提起本件行政訴訟僅針對被告所為引證 1 及引證 2 之組合可證明系爭專利申請專利範圍第 1 至 4 項不具進步性之理由表示不服，故參加人於本件主張引證 1 可證明系爭專利申請專利範圍第 1 至 4 項不具新穎性及引證 1 與引證 3 之組合可證明系爭專利申請專利範圍第 1 至 4 項不具進步性等語，因非原告之爭執所在，故本件不予審究。 …

七、本院得心證之理由：

…

(二)系爭專利技術分析：

…

3. 系爭專利申請專利範圍分析：

系爭專利原核准公告之申請專利範圍共有 36 項，原告於 98 年 12 月 8 日向被告提出申請專利範圍更正本，經被告審查認定係符合專利法第 64 條第 1 項第 1 款及第 2 項之規定，應准予更正，且敘明於原處分理由(一)，並於 2011 年 7 月 1 日於專利公報第 38 卷 19 期公告。系爭專利更正後申請專利範圍共計 4 項，其中申請專利範圍第 1 項為獨立項，申請專利範圍第 2 至 4 項為直接或間接依附於申請專利範圍第 1 項之附屬項。 …

…

八、綜上所述，引證 1、2 之組合可證明系爭專利申請專利範圍第 1 至 4 項不具進步性，

注意：背面尚有試題

被告以系爭專利有違審定時專利法第 22 條第 4 項之規定，所為「舉發成立，應撤銷專利權」之處分，於法並無不合；訴願決定予以維持，亦無違誤。是以，本件原告聲請撤銷原處分及訴願決定，為無理由，應予駁回。

九、本件事證已明，兩造及參加人其餘主張或答辯，已與本院判決結果無影響，爰毋庸一一論述，併此敘明。據上論結，本件原告之訴為無理由，爰依智慧財產案件審理法第 1 條，行政訴訟法第 98 條第 1 項前段，判決如主文。』

問題：(皆爲簡答題，各爲 5 分)

1.本件訴訟原告的公司名稱爲何？(5%)

2.本案所針對的行政處分屬於專利法中的哪個程序？(5%)

3.請問法院爲何准許參加人參加訴訟？(5%)

4.請問本案中法院所審查的可專利性議題爲何？(5%)

5.請問本件訴訟的被告是勝訴或敗訴？(5%)

四、Please read the following case and answer the questions. (可英文或中文應答)

『I. BACKGROUND

Avia owns the '420 patent, claiming an ornamental design for an athletic shoe outer sole, and the '301 patent, claiming an ornamental design for an athletic shoe upper, by assignment from the inventor, James Tong. LAG ordered and sold shoes, Model No. 584 "Boy's Thrasher" ("Thrasher") and Model No. 588 "Boy's Thrasher Hi-Top" ("Hi-Top"), designed and manufactured for it by Sheng Chun Chemical Ind. Corp. in Taiwan. Avia filed suit against LAG alleging, inter alia, that both of LAG's models infringed its '420 design patent and that LAG's Hi-Top model also infringed the '301 design...

III. VALIDITY OF '420 AND '301 DESIGN PATENTS

A patent is presumed valid.　35 U.S.C. @ 282 (1982).

...

A. Ornamental versus Functional Designs

We dispose first of LAG's argument that the record shows genuine issues of material fact with respect to whether the subject designs are ornamental within the meaning of section 171. LAG points only to conclusory, conflicting statements in affidavits, which create no genuine issue for trial, and

> to evidence of prior art references, none of which is in dispute. LAG's arguments are, thus, misfocused. Rather than arguing that there is a genuine issue of fact, in substance its arguments are that Avia was not entitled to judgment on the basis of the facts established by the record evidence.

LAG correctly asserts that if a patented design is "primarily functional," rather than primarily ornamental, the patent is invalid. See Power Controls Corp. v. Hybrinetics, Inc., 806 F.2d 234, 238, (Fed. Cir. 1986). When function dictates a design, protection would not promote the decorative arts, a purpose of the design patent statute. There is no dispute that shoes are functional and that certain features of the shoe designs in issue perform functions. However, a distinction exists between the functionality of an article or features thereof and the functionality of the particular design of such article or features thereof that perform a function. Were that not true, it would not be possible to obtain a design patent on a utilitarian article of manufacture, see, e.g., Pacific Furniture Mfg. Co. v. Preview Furniture Corp., 800 F.2d 1111, 231 (Fed.Cir. 1986) (design patent for chairs), or to obtain both design and utility patents on the same article, see, e.g., Carman Indus., Inc.

With respect to functionality of the design of the '301 patent, the court stated:

> "[LAG] has taken each little aspect of the upper and pointed out that many of the aspects or features of the upper have a function. Even if, arguendo, true that would not make the design primarily functional. If the functional aspect or purpose could be accomplished in many other ways that [sic] is involved in this very design, that fact is enough to destroy the claim that this design is primarily functional. There are many things in the ['301] patent on the upper which are clearly ornamental and nonfunctional such as the location of perforations and how they are arranged, and the stitching and how it's arranged, and the coloration of elements between black and white colors.
> The overall aesthetics of the various components and the way they are combined are quite important and are not functional. They are purely aesthetic. . . ."

We agree that the designs in suit have not persuasively been shown to be functional and that no genuine issue of material fact is present with respect.』

Questions: (可英文或中文簡要應答)

1.What are the patented materials and the alleged infringing ones? (5%)

2.What is the issue according to the context of this article? (5%)

3.What is the rule for design patents held by the court? (5%)

4.What is the possible result for Avia' s patents? Please explain your answer. (10%)