I. Introduction

Over the past several years, the Japanese court system has witnessed a number of major changes. Some of the biggest changes have in fact taken place in the area of intellectual property law. This presents a challenge for all of us, for as the system changes, we must keep abreast of the change and adapt our practice accordingly.

Though there have been a number of developments in IP litigation in Japan, I confine my comments to two areas. The first topic is the ongoing efforts in Japan to expedite trial procedures in lawsuits involving intellectual property, and the second topic is the change in Japanese courts' attitude toward the award of large damage compensation.

In the past, Japanese courts were criticized as being both too slow in rendering judgments and for failing to award significant damages in IP cases. In recent years, however, Japanese courts have made remarkable progress in expediting trial procedures and in awarding reasonable damage compensation. In fact, Japanese courts now have the reputation as ranking among the world's top courts in terms of rendering speedy judgments and providing strong relief.

The efforts by the courts to expedite trial procedures will be discussed first, with a focus on the new trial model implemented by the 4th IP section of the Tokyo High Court, which is illustrative of the new measures demanding more cooperation from the trial parties.

On the second topic of the award of damages, some cases in which the court awarded large damages for infringement will be briefly introduced.
II. Average trial period for IP lawsuits

Fig. 1 shows the length of time needed to conclude an IP lawsuit in Japan, illustrating changes in average trial length from 1991 to 2003. The different lawsuits represented in Fig. 1 are infringement suits, temporary injunctions, and appeals to overturn the decisions of the Japan Patent Office.

In all three types of suits, the average length of time in which the court renders a decision has declined over the last decade. For example, 10 years ago it took the courts an average of more than 30 months to render a first decision in an infringement suit, while today the length of time has been halved to around 15 months. At the Tokyo District Court, where comprehensive efforts have been made to expedite trials, the average length of an infringement trial is but 10 months. In the past decade, therefore, there has already been a significant shortening of the average time in which the courts are rendering decisions. But to improve the system even further, and make the trial process even more expeditious, the court system continues to experiment with new measures.

III. Measures to expedite IP trials

These new measures can be divided into two basic groups: First, measures to increase the capabilities of the courts, and second, measures to increase cooperation from the parties involved in a lawsuit.

The most evident measure to improve the capabilities of the court is the increase in the number of judges. The number of judges in the IP sections of Japanese courts has doubled compared with 10 years ago. In addition, the courts have added full-time court clerks with technical backgrounds.

As for measures to increase cooperation from the parties involved in the lawsuit, judges have tightened their control over trials and have become stricter in enforcing procedures. For example, the deadlines for submission of briefs and evidence have become tighter, and the courts have also limited the ability of parties to make new claims after the trial has progressed.
IV. Traditional trial model for IP lawsuits in Japan

The conventional trial model in Japan should be explained before outlining the new trial model. Fig. 2 shows a flowchart of a typical IP trial model under the conventional system.

In the conventional system in Japan, about two to three weeks after a lawsuit is filed, the parties are contacted by a court secretary, and the date for the first hearing is set after consultation between the secretary and the parties. The secretary also sets a separate deadline about one to two weeks before the first hearing, by which the plaintiff must submit a brief detailing the claims and evidence. This is in the case of a suit for overturning a decision of the JPO. In an infringement suit, the conventional trial model requires the plaintiff to submit detailed claims and evidence at the time of filing the original petition. Therefore, in this case, the defendant will be the first to submit a brief with evidence in response to the original petition.

At the first oral hearing in the conventional system, the judge and the parties confirm the briefs and the evidence submitted to the court thus far. The judge in this case will ask only basic questions regarding the briefs and evidence. The parties can respond to the questions in front of the judge, but in most cases the parties submit briefs at a later date in response to the judge's questions. Then, in the same first oral hearing, the judge will confirm with each party whether there are any further counterarguments or new claims to be made in the case. In the case where the parties choose to make further counterarguments or claims, the judge will set deadlines for the submission of additional briefs. The judge then sets the date for the second oral hearing and the procedures for the first oral hearing are concluded.

The procedures may sound lengthy, but in fact the first oral hearing usually lasts only about five minutes. Typically, the second oral hearing is scheduled to take place one to two months after the first. The deadline for the submission of additional briefs and evidence is usually about one to two weeks before the date of the next oral hearing.

The second oral hearing in the conventional system is not much different than the first. If the parties plan to submit further briefs and evidence,
then deadlines are set once again and the date for the third oral hearing is also decided. This process generally continues until the parties have completed presentation of all their arguments.

The drawback of this conventional trial model is that as long as the parties have arguments to present, it is difficult to bring the trial to a close. In addition, argument does not take place during the oral hearing. Therefore, even if the party has a minor issue to address, a new brief must be filed and this takes up another oral hearing just to confirm it.

V. New trial model practiced by the 4th IP section of Tokyo High Court

The 4th IP section of the Tokyo High Court has instituted a new trial model. Fig. 3 shows a flowchart of the new trial model.

This new trial model was developed primarily to handle patent cases in which a party wishes to overturn a trial decision issued by the JPO. In this new model, the court clerk and the parties agree on the deadlines for the filing of the plaintiff's initial complaint and evidence, the defendant's counterargument and evidence, and the plaintiff's response to the counterargument, along with the date of the first oral hearing. These deadlines are decided just after the filing of the lawsuit. In addition, in this new system, after a party receives a copy of the other party's brief, they have one month to respond with a counterargument.

The court also strongly requests the parties to submit all their arguments and evidence at an early stage so as to prevent the introduction of new arguments and evidence after the trial has progressed.

Unlike the conventional trial in which arguments do not take place in the oral hearing, in the new system, the parties must present their technical arguments during the first oral hearing. This technical presentation can be made by an attorney or an expert from a company involved in the case. At this time, the parties argue the technical and legal points before the court. This oral hearing lasts 1-2 hours. In principle, the arguments for the cases are fully presented during this first hearing and the trial comes to a close, as far as presenting arguments is concerned.
The new model aims to prevent the trial from being dragged out by the submission of new arguments, while expediting the trial process by clearing up any questions and issues in the case quickly at the hearing. Finally, the trial process aims to be comprehensive by allowing the two parties to argue the facts of the case directly before the court.

VI. Comments about the new trial model

I have found the following in my experience with this new system.

First, with respect to the one month court deadline for responding to the other party's briefs, in actuality, the court will set the deadline depending on the circumstances of the case, if one of the parties makes a request for an extension. For example, in cases involving complex technology or where there are a large number of claims, the parties will be given a longer period of time to submit a brief. Also, in cases where one of the parties is a foreign entity, the court will also extend the deadline. But, it will be difficult to receive more than two months from the court in which to reply.

Second, the first oral hearing is very comprehensive when compared with the conventional model in which the hearing lasts only 5 minutes. In the new model, the debate is comprehensive and the judge will actively ask questions in order to clear up any uncertainties. In principle, the parties must respond to the judge's questions at the hearing. The parties therefore must be prepared and anticipate the kinds of questions the judge will ask. It's effective to have a technical expert present at the hearing to help with the explanations to the judge.

If a party is a foreign entity, they may have no choice but to leave the explanation to the attorney, and of course this means that the foreign company should choose an attorney well-versed in the technology pertaining to the case. It's also preferable to have not just an attorney at law, but also a patent attorney present at the hearing.

Third, on the aspect of closing the arguments at an early stage, it's practically very difficult to break off the arguments. The reason is that it's common for the parties involved to want to add new arguments, supplement points, and argue against points made by the opponent. In addition, there
are many cases in which it is difficult for the judge to declare that supplementary arguments and counterarguments are no longer necessary. On the other hand, one of the premises of this system is finalizing the suit claims and verification of the claims by the end of the first oral hearing. It is implicit in this process that the court wants to limit the holding of second and subsequent hearings. There is also a risk that if a party makes an excessive number of arguments and counterarguments, the judge will view the party as being uncooperative to the progress of the trial.

It's difficult to predict at this point whether the trial model being used by the 4th IP section of the Tokyo High Court will be adopted by other sections and other courts in Japan. But even if the trial models and systems among courts in Japan vary somewhat, all judges are increasingly demanding faster trials, with stricter deadlines for the submission of briefs and substantial argument during the court hearings.

As a summary, I believe it's important to note that today, the winner and loser of an IP trial in Japan will basically be decided within three months after the lawsuit is filed. In addition, now more than ever, it is important to select an attorney who can handle technical argument.

**IV. Patent infringement cases in which huge damages were awarded**

The second topic of damage awards will be discussed with reference to actual cases of higher damages awarded by the courts in recent years.

In the past, Japanese courts were harshly criticized for not awarding enough damages in IP lawsuits. One of the main reasons for the award of small damages was the high level of proof the courts required of the plaintiff in the damages phase of the trial, along with the narrow interpretation of what constituted damages resulting from patent infringement.

In recent years, however, the courts have shifted their position, and now seem to hold the stance that if the plaintiff can prove a given amount of damages, the defendant must provide counter-proof in order to reduce the claimed damages. In addition, the court appears to be taking a wider interpretation of what constitutes damages resulting from patent infringement.
This change of thinking by the courts has led to higher damages awards in recent years, and cases in which huge damages are awarded are increasing.

Fig. 4 shows a few such cases. In Japan, the largest amount of damages awarded in a patent infringement lawsuit was in the case of Aruze Corp. vs. Sammy Corp. decided in March 2002. In this case, the Tokyo District Court awarded Aruze Corp. about 7.4 billion yen in damages. This case involved technology used in Japanese-style game slot machines. Aruze Corp. used this judgment to lodge another suit against the company Net Corp. and won an additional award of about 990 million yen, for a total award in these cases of about 8.4 billion yen.

In a separate case, the Tokyo District Court awarded SmithKline & Beecham French Laboratories Ltd. about 3 billion yen in its lawsuit against Fujimoto Pharmaceutical Co., Ltd. over infringement of one of its drug patents. More recently, in March 2003, the Tokyo District Court awarded damages of 1.5 billion yen in a case involving a massage chair patent.

III. Conclusion

It can no longer be said that the Japanese courts will not recognize claims for large damage compensation. Instead, Japanese courts have come to be recognized globally in recent years for expediting judgments and providing strong relief.
Fig. 1 Average trial period for IP lawsuits

![Graph showing the average trial period for IP lawsuits in Japan]

- Infringement case (district courts in Japan)
- Patent infringement case (Tokyo District Court)
- Case to overturn trial decision by JPO (Tokyo High Court)
- Preliminary injunction case (district courts in Japan)

Fig. 2 Traditional trial model for IP lawsuits in Japan

Time
- Plaintiff: file a petition (2-3 weeks)
- Contact from the court clerk (1-2 months)
- Plaintiff/Defendant: submit briefs and evidence (1 week)
- The first oral hearing (5 minutes) (1-2 months)
- Defendant/Plaintiff submit briefs and evidence (1 week)
- The second oral hearing (5 minutes) (1-2 months)
- Plaintiff/Defendant submit briefs and evidence (1 week)
- The third oral hearing (5 minutes)
Fig. 3 New trial model practiced by the 4th IP section of Tokyo High Court

Time

Plaintiff: file a petition
(1-2 weeks)

Contact from the court clerk
The date of the first oral hearing and all the deadlines for briefs and evidence are decided.
(1 month)

Plaintiff: submit brief (1) and evidence
All necessary evidence should be submitted.
(1 month)

Defendant: submit the counterstatement and evidence
All necessary evidence should be submitted.
(1 month)

Plaintiff: submit brief (2)
Counterargument against Defendant’s brief and supplemental argument
(1-2 weeks)

The first oral hearing (1-2 hours)
Explanation related to technical matters (from both parties)
Arguments

→ End of the oral hearings

Fig. 4 Patent infringement cases in which huge damages were awarded

-2002/03/19 Tokyo District Court
  Aruze Corp. vs. Sammy Corp. 7.4 billion yen (67.2 million US$)
  Aruze Corp. vs. Net Corp. 1.0 billion yen (9.1 million US$)

-1998/10/12 Tokyo District Court
  SmithKline & Beecham French Laboratories Ltd.
  vs. Fujimoto Pharmaceutical Co., Ltd.
  3.0 billion yen (27.3 million US$)

-2003/03/26 Tokyo District Court
  Toshiba Tec Corp. vs. Family Corp. 1.5 billion yen (13.6 million US$)