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Analysis of the concept of ‘person skilled in the art’

The concept of “person skilled in the art” is used in numerous aspects of patent examinations, so accurately understanding this concept is of great significance to both patent examiners and agents.

Definition of concept

According to the definition in the examination guidelines, a “person skilled in the art” is a hypothetical person who is presumed to be familiar with all of the ordinary technical knowledge, in the technical field to which the invention belongs, that exists before the filing date or priority date. This person can access all prior art in the field and has the capability of applying the conventional experimental methods available before that date, but has no capacity of creativity. If the technical problem to be resolved can cause the person skilled in the art to seek technical means in another technical field, he or she should also have the capacity to access the relevant prior art, ordinary technical knowledge and conventional experimental methods in that other technical field existing before the filing date or priority date.

Some people understand “person skilled in the art” as someone who knows all of the prior art existing before the filing date or priority date, but this is a misunderstanding. In fact, pursuant to the definition above, what a “person skilled in the art” is familiar with is limited to the ordinary technical knowledge in the art. As for other knowledge of the prior art, including the information contained in patent documents, this person only has the capacity to access it.

Application of concept

Determination of novelty/inventiveness. Pursuant to relevant provisions of the Patent Law and examination guidelines, novelty needs to satisfy two conditions: no identical technical solution existing in the prior art and no identical technical solution that could constitute a conflict with the application exist. “Identical” here does not simply mean completely identical content. As long as two technical solutions are essentially identical, and a person skilled in the art could, based on these technical solutions, determine that they could be applied in the same technical



field, resolve the same technical problem and have the same anticipated effect, the two are deemed to be identical technical solutions. Accordingly, the capabilities of a person skilled in the art serve as the standard in a determination of novelty.

The word “inventiveness” means that, as compared to the prior art, the invention has prominent substantive features and represents notable progress; or the utility model has substantive features and represents progress. From this it can be seen that the requirements in respect of the inventiveness of utility models is somewhat lower than that for inventions. The person skilled in the art likewise serves as the standard for determining inventiveness.

Prominent substantive features

With respect to inventions, the phrase “has prominent substantive features” means that, for the person skilled in the art, the invention is non-obvious as compared to the prior art. If an invention can be derived by a person skilled in the art solely through logical analysis, deduction or limited experimentation conducted on the basis of the prior art, it is obvious and does not have prominent substantive features. It should be noted that notwithstanding the fact that the person skilled in the art has the capability for conventional experimental methods, he or she does not have any capacity for creativity. Having a grasp of this point is particularly important in judging inventiveness.

Determining whether the description achieves sufficient disclosure. The third paragraph of article 26 of the Patent Law provides for sufficient disclosure in a patent application. This means that the description is required to clearly and completely describe the invention or utility model, such that a person skilled in the art could realise it.

From this it can be seen that the person skilled in the art is again the standard for determining whether a patent application satisfies the requirement of sufficient disclosure. Accordingly, when drafting the application documents, while ensuring completeness, the information that is common knowledge in the field can be gone over briefly, but the portion of the invention/creation that is an improvement over the prior art must be described in detail such that a person skilled in the art could implement the technical solution based on the information provided in the description.

Determining whether the claims are supported by the description. The scope of protection of a patent is delimited by the claims, and the claims are usually the technical solution derived by



generalising the embodiments described in the description. However, such generalisation must be supported by the description, in other words “the claims shall be based on the description” as specified in the fourth paragraph of article 26 of the Patent Law.

In this regard, the examination guidelines provide the relevant explanation, i.e. the technical solution – the protection of which is required by each claim – should be such that a person skilled in the art could derive or generalise from the information sufficiently disclosed in the description, and the same may not exceed the scope disclosed in the description.

The standard

From this it can be seen that the person skilled in the art is likewise the standard for determining whether the claims are supported by the description. If the generalisation of the claims gives a person skilled in the art reason to doubt that use of one or more subordinate concepts covered by the higher level generalisation could resolve the technical problem that the invention or utility model is meant to resolve, and achieve the anticipated technical effect, then the generalisation will be deemed not to be supported by the description.

The concept of a “person skilled in the art” will likewise be used in other aspects. However, in the actual course of work, patent examiners may, with respect to different aspects, set different criteria for this concept when rendering their examination opinions in cases. One must be on the alert for and pay attention to these in patent examination and agency work.

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