

# SOEI VOICE

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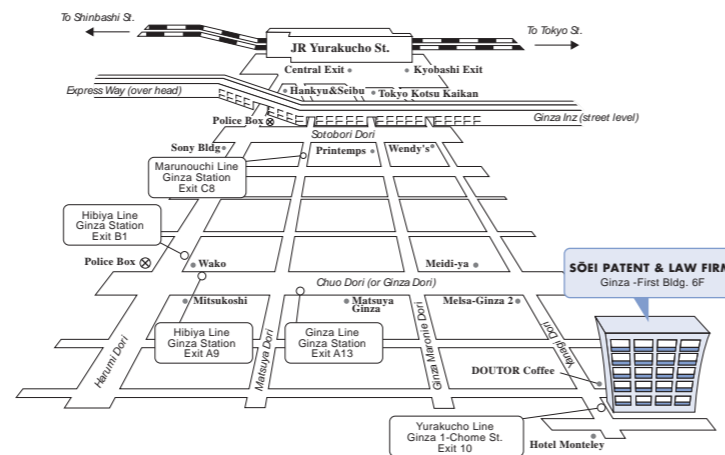
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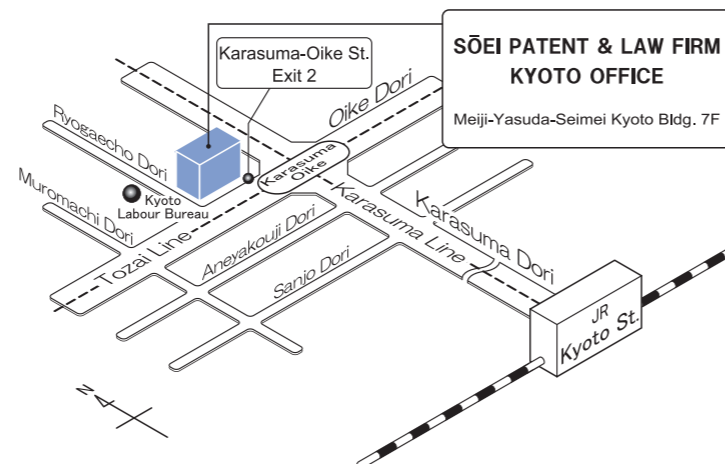
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▲ Yoshiki Hasegawa

## Early Birds in Kyoto

by Yoshiki Hasegawa

Have you ever visited Kyoto? Kyoto was the capital of Japan for 1100 years until the capital moved to Tokyo 140 years ago. Although now a modern city of 1.5 million inhabitants, Kyoto remains a center of traditional Japanese arts, crafts, culture and cuisine. This August in the center of this celebrated city, we have opened a second branch office, supplementing our office in Silicon Valley. Five people from the Tokyo main office and two local employees are now working together to set up a branch operation as well as a new work rule.

One of the unique work rules at the Kyoto branch is the Early Bird shift. They start work at 8:30 am, 1 hour earlier than we do in the Tokyo office. In Japan there is a proverb "The early riser profits by THREE Mon (an old unit of Japanese currency)," which means "The early bird gets THREE worms."

<The first Mon>

Kyoto boasts thousands of historic temples and shrines as well as some of Japan's most beautiful gardens and palaces, some of which have been designated World Heritage sites. Kyoto is beautiful in spring with cherry blossoms and in autumn with colored leaves, but early morning is especially beautiful with river fog creating a scene of serenity. Soei's early birds in Kyoto can commute on foot or bike in the fresh morning air through some of the renowned temples and gardens without getting caught in the morning rush hour.

The early birds in Kyoto can start the day feeling fresh, so they can provide good quality work effectively. This is the first Mon that the early birds get in the morning.

<The second Mon>

The early birds in the Kyoto office, who worked hard, have lunch break of 1 hour and 15 minutes, which is 15 minutes longer than we have in the Tokyo main office. Of course, their lunch menus are healthy Kyoto specialties, which are rich in vitamins and minerals and provide a balanced diet.

Hard work in the morning makes lunch taste more delicious. After the healthy Kyoto-style lunch, they have a short siesta and then go briskly into the second half. This is the

second Mon that they get in the afternoon.

<The third Mon>

As a reward for the early start, the early birds in the Kyoto office can wrap up their job earlier and pour into downtown. There are hundreds of festivals in Kyoto throughout the year, the most famous being the Gion Festival that spans the entire month of July. Besides joining festivals after work, they can enjoy gathering under illuminated cherry blossoms or having a date in illuminated parks and gardens.

After work the early birds can refresh themselves in the ancient city so they are ready for tomorrow. They work hard at the same time they can enjoy their private lives. This is the third Mon that they get in the evening.

SOEI has its main office in Tokyo and branches in Silicon Valley and Kyoto. Each place has its own forte. With these three offices our firm aims to become the best patent firm in Japan. We will continue to provide our superior intellectual property services to our clients all over the world.



## Patent

### Utilization of Certified Experimental Results

by Yoshinori Shimizu



▲ Yoshinori Shimizu

In areas of chemistry, pharmaceuticals and biotechnology, Examiners often issue Notices of Reasons for Rejection citing lack of enablement and insufficient support if there are only a few working examples or they are not sufficiently detailed. One way to overcome such objections is to submit certified experimental results (additional experimental data). Because the way in which these additional experimental data are handled in Japan is different from that in other countries, we have prepared the following guide to the use of certified experimental results in Japan.

#### 1. Increasing the scope of the claims

According to the Examination Guidelines "it is necessary to describe at least one mode of working the invention set forth in claims; however, the mode of working need not be described for all the subordinate concepts or all the options contained in the invention set forth in claims." Consequently, the invention set forth in claims may contain portions not described in the embodiments or working examples in the specification.

Here, whether or not the working examples in the specification provide appropriate support for the claimed invention should be evaluated based on "whether the content disclosed in the detailed description of the invention can be expanded or generalized, by taking into consideration common technological knowledge at the time of the filing." Claims that do not satisfy this requirement contain grounds for refusal or invalidation.

#### 2. The effective date for fulfilling the descriptive requirements

In a dispute over whether the support requirement for a parameter-defined invention had been adequately fulfilled (Gyo-ke No. 10042, 2005), the Intellectual Property High Court ruled that it is not allowable

To supplement the content of the detailed description of the invention beyond that provided in the original application by submitting experimental data after the application has been filed in order to conform to the support requirement and to expand or generalize the detailed description to match the scope of the claims violates the principle that the patent is issued on the basis of the published invention.

The court found that the description requirements should be satisfied at the time of filing of the application and data (certified experimental results) that is submitted subsequently and separately from the specification cannot cure a failure to fulfill the descriptive requirements.

This decision had a substantial impact on the Japanese patent practice, and an increasing number of Notices of Reasons for Rejection have cited only failure to satisfy the description requirements, without any objection to novelty or inventive step.

#### 3. Effective utilization of certified experimental results

##### (1) Utilization during Examination, Trial and Litigation

As stated in the foregoing, the use of certified experimental results to supplement insufficient working examples is not permitted. Also, certified experimental results describing effects that were not described in the specification as originally filed cannot be used to assert an inventive step. However, comparative tests with cited references can be used to assert that the effect described in the specification or a benefit unambiguously derived therefrom is striking and qualitatively different from the prior art. Also, suitable experimental results that take into consideration the common technological knowledge as of the filing date can be a useful counterargument against a Notice of Reasons for Rejection that alleges the invention is not reproducible or is not applicable to other organisms. Further, a

Notice that states the invention lacks novelty because the claimed invention is identical to a chemical compound disclosed in published documents may be overcome by synthesizing experiments that demonstrate differences in the crystal system, molecular construction and so on.

(2) Submissions as part of Third Party Observations

After the opposition system was abolished in 2004, Third Party Observations that allow third parties to provide information to the JPO have become increasingly important for blocking the establishment of rights by competitors. Because it is not easy in Japan to invalidate a right once it has been established, it is necessary to prevent the allowance or at least to narrow the scope of patents belonging to competitors by providing information to the JPO during the examination phase.

Results of additional testing of working

examples disclosed in publications (certified experimental results) may be attached to the publications submitted to the JPO by third parties.

Therefore, one can assert that the patent application in question fails to comply with the enablement or support requirements by demonstrating that the invention as claimed in the application cannot obtain the effect as described or that it is not possible to conduct appropriate experiments because essential conditions are not adequately described.

Further, since the examiner sometimes has difficulty identifying prior art to cite against a competitor's patent application containing parameter-defined claims, product-by-process claims or other special claim forms, it can be effective to submit certified experimental results to show that a claimed invention lacks novelty or an inventive step because it is identical to or similar to the prior art.

## Due Date on Appeals by Foreign Applicants

by Yosuke Totsu



▲ Yosuke Totsu

### 1. Revised patent law

The bill to amend patent law passed the Japanese Diet on April 18, 2008. The revised law increases to three months the period during which an applicant can file an appeal against rejection before the Japanese Patent Office (JPO). The revision also requires amendments to be filed together with the appeal. The date on which this revision will come into effect has not yet been decided, but it will be sometime prior to April 18, 2009.

Article 4 of patent law grants the JPO authority to determine the length of extensions to the time limits for those residing in remote locations, which, in practice, means foreign applicants. The JPO published the following proposal for the extension due date for filing appeals. The JPO collected comments from the public comments until September 4, 2008.

### 2. Proposed extension term for foreign applicants

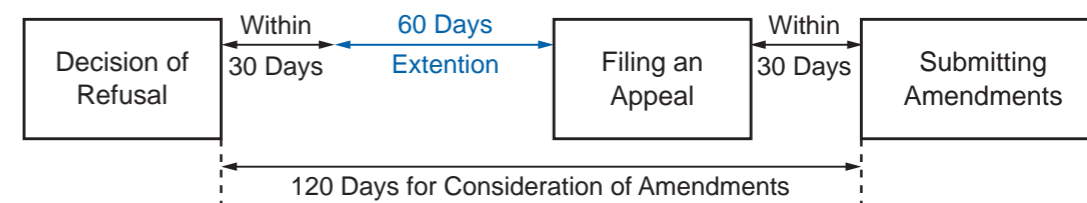
As shown in the following charts, the current extension is 60 days while the proposed extension is one month.

Under the proposal, Japanese applicants will have three months to file an appeal and amendments. Foreign applicants will automatically receive an additional month.

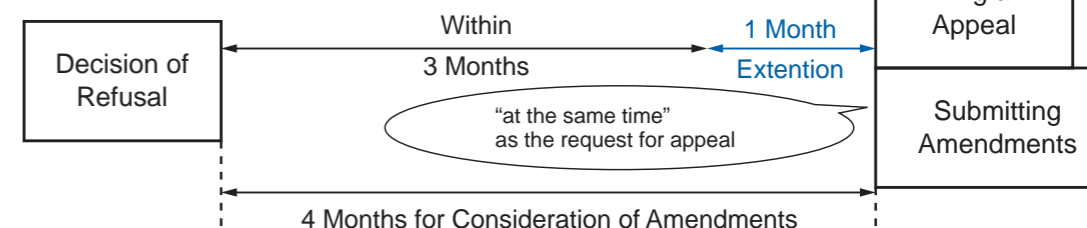
### 3. Strategy for filing an appeal after revision

Although the JPO proposal allows foreign applicants to have an additional month before they must file their appeal, they will have to submit any amendments simultaneously with the appeal. Accordingly, please prepare amendments early enough.

Current



After Revision



Source: JPO website. ([http://www.jpo.go.jp/iken\\_e/iken\\_e\\_zaigaisya\\_toriatukai\\_2.htm](http://www.jpo.go.jp/iken_e/iken_e_zaigaisya_toriatukai_2.htm))

## Trademark

### Recent Developments in the Protection of 3D Trademarks in Japan The Coca Cola Company vs. The Japan Patent Office Intellectual Property High Court Decision H19 (Gyo-ke) 10215 (May 29, 2008)

by Tomoya Kurokawa



▲ Tomoya Kurokawa



In previous issues of the Soei Voice International, we reported two important court decisions on the registrability of the shape of a product as a three-dimensional trademark, the "Hiyoko" case in Vol. 4, No. 1 (April 2007) and the "Maglite" case in Vol. 4, No. 2 (October 2007). Now, we have another important decision to report.

#### 1. Background

The Coca Cola Company filed a trademark application before the Japan Patent Office for the specific shape of a bottle without any logo (see picture) designating beer, refreshing beverages, etc. (Later restricted to cola drinks.) The JPO rejected the application because the mark merely indicated the common shape of the product (a bottle) and therefore lacked distinctiveness. The Coca Cola Company appealed to the Appeal board and argued that the shape of the bottle has acquired distinctiveness as a result of use, but the Appeal Board rejected the application

again. The Coca Cola Company then appealed to the IP High Court.

#### 2. The IP High Court Decision

The IP High Court overturned the JPO's decision. The Court set out the following general rule on how to determine whether a three-dimensional shape has acquired distinctiveness as a result of use:

(1) In determining whether a mark consisting of a three-dimensional shape of a product has acquired distinctiveness as a result of use, the following should be considered: (a) the shape of the mark (and the shape of the product at the same time), (b) period and geographical area in which the mark has been used, (c) sales volume of the product, (d) period, geographical area and volume of advertisement for the product and (e) whether there are other products having a similar shape.

(2) When products are sold, other word marks and/or company name are usually attached. However, even though other word marks or the company name is attached to the

three-dimensional shape of the product, it should not always be assumed that the three dimensional shape itself cannot acquire distinctiveness as a result of use. Rather, it is necessary to determine whether the three-dimensional shape itself has acquired distinctiveness as a result of use by considering whether the three-dimensional shape itself catches consumer's eye or makes a strong impression on consumers.

Applying this general rule to the case, the Court found as follows:

(i) The Coca Cola Company started to use the shape for its bottles in 1916 in the US and in 1957 in Japan and continues to use the same shape bottle now.

(ii) The Coca Cola Company sold 2.38 billion units in bottles in Japan in 1971 and, recently, continues to sell 96 million units in bottles per year.

(iii) The Coca Cola Company has used advertisements emphasizing the shape of bottle since 1997 in various media including TV, newspapers, magazines etc. with an average budget of USD 30 million per year.

(iv) In consumer research, 60% to 80% of consumers recognize the product when they see only the shape of bottle without the "Coca Cola" logo.

(v) The history of the bottle, featuring the bottle shape, has been described in many books.

(vi) The Coca Cola Company has made great efforts to eliminate competitors' bottles having a similar shape from the market, and, as a result, there are no other bottles with a similar shape on the market.

In view of facts (i) to (vi) above, the shape of the bottle has acquired distinctiveness.

### 3. Comments

In the "Maglite" case, the court determined that the word marks "MINI MAGLITE" and "MAG INSTRUMENT" put on the product were relatively small compared to the overall dimensions of the goods and then concluded that the shape of product itself has acquired distinctiveness. However, in the "Coca Cola" case, the negative influence of an attached word mark was not included in the evaluation. As a result, it may become easier to obtain a 3D trademark for the shape of the product in the future.



## Design

### Streamlined Accelerated Examination for Designs in Response to Counterfeit Goods

by Yu Noma



▲ Yu Noma

#### 1. Introduction

Because designs rely primarily on the visual sense and because they come to the market fairly quickly, imitation is a serious problem. On the other hand, substantive examination is indispensable for stability and reliability of rights. As the examination requires a certain length of time, a problem arises when the design right has not yet come into effect and there are a lot of imitations in the market place. At times like this the design registration system cannot sufficiently protect the design.

One way to overcome this problem would be to examine the application as quickly and accurately as possible to shorten the period from the application to registration of the right. The 2005 revision of the Design Law contained measures to streamline accelerated examination system for applications directed to designs being counterfeited.

#### 2. Applications eligible for accelerated examination

Any application may request accelerated examination if it satisfies either condition (1) or (2):

(1) The applicant or licensee is using or has made substantial preparations to use the design and any one of the following conditions makes the establishment of right urgent:

(i) A third party, without obtaining a license, is obviously using or preparing to use a design related to or similar to the design in the application;

(ii) The applicant or the licensee has received a warning letter from a third party connection with use (or preparation of use) of the design;

(iii) A third party has demanded a license to use the design claimed in the application.

(2) The applicant has also filed an application in a foreign country for the design claimed in the Japanese application.

A design that is being counterfeited qualifies under (1)(i)

Applicants must submit a "written explanation of circumstances concerning accelerated examination" setting out the basis of their request.

#### 3. Streamlined Request to Combat Counterfeit Goods

(1) The applicant (or his representative) contacts the JPO by telephone to determine whether the pending design application is eligible for streamlined accelerated examination;

(2) If eligible, the representative prepares the "written explanation of the circumstances concerning accelerated examination" that is required for all requests for accelerated examination. However, a detailed explanation, including evidence, is not necessary at this time.

(3) The applicant and the examiner hold an interview to review the evidence of counterfeiting and any other circumstances that affect the case.

(4) The JPO will notify the applicant whether or not the application will be granted accelerated examination by telephone.

#### 4. Comments

In cases involving counterfeit goods, the JPO will notify the applicant of the result of the primary examination within one month following the request. In 2006, there were 67 applications for the accelerated examination, and, of these, 14 involved counterfeit goods. In the counterfeit cases, the average time from request to first action was half a month (about two weeks), showing that this system is worth using because rights can be established much more quickly when there is a problem with counterfeit goods.

## Disclosure system in Intellectual Property Infringement Litigations of Japan

by Shiro Okazaki



▲ Shiro Okazaki

The discovery system, which is employed in litigations of the United States, has not been introduced into a rule of Japanese civil procedure in consideration of the abuse of this system. However disclosure systems to obtain and submit evidence have been improved especially in intellectual property infringement litigations of Japan.

In 1998 the Code of Civil Procedure took effect as a first step of the improvement. The Code stipulates “proceedings of orders for the production of documents”, which owes the parties a general obligation to produce documents.

And disclosure systems have been further improved by the following amendments of the Patent Law in IP infringement litigations because it is generally difficult to specify infringing processes or methods, especially those used in an alleged infringer’s factory, in IP infringement litigation.

1 The defendant’s obligation to clarify his own acts (Article 104-2, Patent Law)

Under the 1999 Patent Law, the defendant, that is an alleged infringer, shall clarify the specific conditions of his act in order to deny the specific conditions of a product or a process that a patentee claims as one that composed an act of infringement, unless he has reasonable grounds to refuse to do so. This stipulation urges an alleged infringer to disclose the acts of patent infringement.

2 (1) Production of documents for proving acts of patent infringement and calculating damages (Article 105, Patent Law)

The court have more power to order a party to produce documents in IP infringement litigations than in other litigations, so as to make it easier to prove the act of infringement and to calculate the damages arising from the act of infringement. Proceedings of orders for the production of documents are the most powerful and effective disclosure system in Japan. Parties in litigation produce voluntarily documents in usual cases before the order.

(2) In Camera Procedure or non-disclosing trial Procedure (Article 105(2), Patent Law)

The holder of requested documents can refuse such

production if he has a proper reason such as protection of trade secret or privacy (Article 105(1), Patent Law). However, whether the reason is proper can be decided by In Camera Procedure. This is a procedure in which the court examines documents without disclosing to the adverse party. And the court can order the party to present a decisive document, when he believes that an application of the production of documents is reasonable.

(3) Protective Order for Nondisclosure (Article 105-4, Patent Law)

The amendment of the Patent Laws enables the court to grant the protective order to the other party. The other party can not disclose the trade secret for any purpose of use other than the use within the litigation when a party has submitted prima-facie evidence which satisfies the requirements: (a) the briefs or evidence submitted to the court includes a trade secret, and (b) it is necessary to prevent it from being used or disclosed for any purpose other than being used within the proceeding. One that breaches the protective order will be imposed of an imprisonment or a fine.

The Protective Order affects the construction of the abovementioned ‘proper reason’. As trade secrets are protected by the Protective Order, inclusion of trade secrets in documents does not always constitute the proper reason. The Protective Order is not only the system for the protection of trade secrets, but also the system for disclosure to obtain evidence.

In September, 2006, the first protective order for nondisclosure was issued in a patent infringement case (Docket Number: 2006 (Mo) NO. 9,933). Infringing products are imported medicine. And disclosed item is data attached to an import license application to the Ministry of Health, Labour and Welfare and was treated as trade secrets. The Court decided that the item includes a trade secret but is necessary to be submitted. The court ordered attorneys of the patent owner not to disclose the item, and the item was used for evidence of the infringement for the patent owner.

Japanese disclosure systems have been improved in recent 10 years as abovementioned. And patent owner’s burden of proof has been mitigated in Japanese patent infringement procedure.



One of the best known folk tales

# Come to Japan

## Momotaro (The peach boy)

by Misuzu Nose

“Momotaro (the Peach Boy)” is one of the best known folk tales in Japan. I guess virtually all Japanese people remember listening to the tale or watching it as young children.

Once upon a time there was an old man and his old wife who lived on their own and did not have any children. One day the old man went into the mountains to cut firewood, and the old woman went to the river to wash some clothes. No sooner had the old woman begun her washing than she was very surprised to see a big peach come floating down the river. She pulled the peach out of the river and decided to take it home. As the old man and woman were getting ready to cut the peach in half, the peach split open and a beautiful baby boy jumped out of the peach. They named him Momotaro, which means Peach Boy. They loved Momotaro very much and raised him to be a fine boy. When Momotaro learnt that wicked ogres often came from an island named Ogre Island and did bad things, he decided that he would go and fight them there. The old man and the old woman helped Momotaro get ready for his journey to Ogre Island and fixed him a good lunch of kibi dango (small, flat, round Japanese dumplings made from a mixture of flour from the kibiplant (millet) and glutinous rice flour). As he went along he met a dog, a monkey and a pheasant. He gave each of them a millet dumpling and told them to come along. Momotaro and his three helpers defeated the ogres, and brought back the treasure which the ogres had stolen from people. They returned safely from Ogre Island to the house of the old man and the old woman. They all then lived together very, very happily.

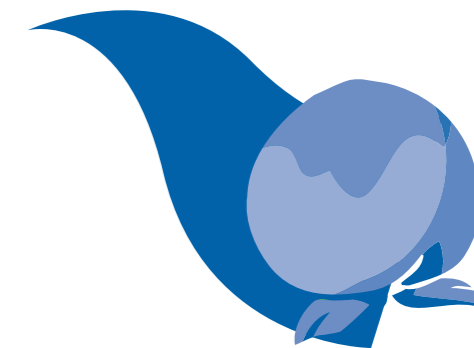
This tale is said to date back to the Muromachi period (1333 – 1573) and to be set in Okayama Prefecture (between Osaka and Hiroshima, in southwestern Japan). Although it is not widely known even in Japan, Okayama Prefecture has a

historic site named Kinojo, which means Ogre Castle, and legend has it that an ogre who was called either Ura or Onra lived there. This is said to be the original inspiration for the story of Momotaro.

This is why the Momotaro legend is closely associated with Okayama Prefecture. For example, kibi dango, that plays an important part in the old tale of Momotaro, is the best known souvenir from Okayama. Today, simple, traditional kibi dangodumplings in chocolate, strawberry and many other flavors are now available across the prefecture. Furthermore, Okayama Prefecture is known to be one of Japan’s best producers of peaches.

Other examples of the prefecture’s association with the old tale of Momotaro include a statue of Momotaro outside Okayama Station, the largest station in the prefecture, and a street named Momotaro-Odōri (Momotaro St) in front of the station. There is also a summer festival called the Okayama Momotaro Festival every year. It starts with a display of fireworks and features many Momotaro-themed programs in the city center, including a dance and a parade performed to the melodies of the Momotaro Dance and the Uraja Dance, in which participants paint their faces to look like ogres.

Please visit Okayama, the home of Momotaro, when you have the chance.



## Famous tourist destination

Have you ever been to Kyoto? Kyoto is a popular destination with tourists of all ages. About 50 million people visit this world famous tourist destination each year, and the number of overseas visitors continues to rise. Since I was born in Kyoto and lived there for 25 years, let me give you some suggestions about where to visit in Kyoto.

Kyoto provides interesting sightseeing experiences throughout the year. Spring is the season of cherry blossoms. Among the many popular places for cherry blossom viewing in Kyoto, my recommendation would be Maruyama Koen (Maruyama Park), where there are nearly 1,000 cherry blossom trees, mainly mountain cherry blossom trees and someiyoshino cherry blossom trees, that all bloom at once. The most famous of all these trees is the shidare zakura (weeping cherry tree) that stands at the center of the park. Its long delicate branches hang elegantly towards the ground and fascinate many viewers, especially at night, when it is lit up to show a different kind of beauty than during the day.

Summer is the season of festivals: many festivals, including the Gion Festival, one of Japan's largest festivals, and the Gozan Fire Festival, are held every summer in Kyoto. The Gion Festival, which originated in 869 as part of a purification ritual to drive a pandemic away from Kyoto, spans the entire month of July, from the 1st through the 31st. The festival is crowned by parades performed on the nights of the 15th and 16th, in which 32 floats are pulled around the streets, while enormous numbers of people take to the pedestrian lanes of downtown Kyoto to watch. This is followed by the festival's climactic event, the Yamaboko Junkō, the largest float parade, which is staged on the morning of the 17th and is broadcast live on television. The Gozan Fire Festival is another major event that brings people in Kyoto a real feeling of summer. At the culmination of the O-Bon festival on August 16th, five giant bonfires, each in a distinctive shape like a giant kanji character, a boat or a torii shrine

## Kyoto

by Yukako Endo

gate, are lit on mountains surrounding the city and burn for one hour starting at 8 p.m. to signify the moment when the spirits of deceased family members, who are said to visit this world during O-Bon, return to the spirit world. One of the iconic events of Kyoto, the Gozan Fire Festival is the last of the big summer events of Kyoto, and many people in Kyoto feel that the festival is their traditional farewell to summer.

Autumn is the season of colored leaves and the season when Kyoto receives more tourists than in any other season of the year. The most popular route for autumn leaf viewers is the one up from Saga Arashiyama to Kameoka on the Sagano Romantic Train (Sagano Torokko Ressha) with spectacular views of red maple leaves followed by a boat trip down the Hozu River to Arashiyama in a traditional row boat. Propelled by two boatmen, the trip takes two hours to travel 16 km through wonderful natural scenery. It is a breathtaking experience to see the exquisite reflections of red and yellow autumn leaves on the surface of the river. If you are lucky, you may be able to see wild deer.

It is very cold in winter in Kyoto; it may be too cold to enjoy sightseeing. However, it is worth trying, because Kyoto looks different in winter. Particularly, I would like to recommend that everyone visit Kinkakuji Temple (Temple of the Golden Pavilion) on a snowy day. The temple shines beautifully due to the reflected light from the white snow.

There is more to Kyoto than sightseeing spots; the streetscape of the city is beautiful in its own right. Kyoto still retains many traditional townhouses known as machiya. The typical Kyoto machiya is a long wooden home with narrow street frontage. This design gives it its nickname, unagi no nedoko, or bed for eels. These machiya townhouses have become very popular in recent years, and some are even available for lodging. I hope that you will have the opportunity to visit Kyoto, stay in a lovely machiya house and enjoy going around the city.

## Staff News

### Patent Department



Toshimichi YAMANISHI

Mr. Yamanishi received his M.S. in environmental chemistry from Hiroshima University in 1997. After graduation, he worked in incorporated administrative agency for 11 years as a chief of energy and environmental technology R&D such as fuel cell. He is qualified as a patent attorney in 2007 and joined SOEI in 2008.

He has been handling prosecutions in the fields of chemical, electrochemicals, nanotechnology and organic and polymer materials.

He is a member of the Japan Patent Attorneys Association (JPAA).

