



一、 法學概論 50%

(一) 政府推動司法改革，近年來已具有具體成果，當然各項制度亦有檢討之處；試以下列兩項具體成果加以介紹其主要內容。(25%)

1、人民觀審試行條例

2、法官法及其法官評鑑制度

(二) 法律的制裁，常因制裁機關、制裁對象，以及制裁行為的不同而有不同類型；其中「刑事制裁」的法定方式有哪些規定，試加介紹其主要內容。(25%)



## 二、文獻評析(50%)

### Microsoft Joins Apple, Calls for Reasonable Patent Rules

ARTICLE DATE : February 8, 2012

By Chloe Albanesius

Microsoft today joined the chorus of those calling for basic rules regarding the licensing of wireless standard patents.

"Industry standards are vitally important to the development of the Internet and to interoperability among mobile devices and other computers," the company said in a statement. "Consumers and the entire industry will suffer if, in disregard of this promise, firms seek to block others from shipping products on the basis of such standard essential patents."

At issue is something known as FRAND (fair, reasonable and non-discriminatory) licensing obligations, which are intended to keep major corporations in check and avoid abusive patent-related behavior. Basically, if a company holds a patent on a technology that is essential to a particular industry, they should make every effort to license that technology, even to major rivals.

Still, patent battles over "essential" patents persist, prompting the call for clear rules.

Earlier today, it was revealed that Apple wrote a letter to the European Telecommunications Standards Institute (ETSI) back in November asking the group to develop FRAND-related standards.

Google, which is in the process of acquiring Motorola Mobility, has also pledged to license license patents on a FRAND basis, according to reports.

It shouldn't be surprising that Microsoft is in favor of standards that support patent licensing. In October, Redmond announced that it had patent deals for a "majority" of Android devices. Microsoft holds patents relating to navigation and how Web sites display content; technology used on the Android platform.

In a followup blog post, Dave Heiner, Microsoft's deputy general counsel, said Microsoft has been in talks with European antitrust enforcers about this issue for several months. Among other things, Redmond is against injunctions, said patent holders should not require other firms to license back their patents, and called on patent sellers to require their sellers to abide by the same rules, Heiner wrote.



He also argued that the development of standards benefits the tech community as a whole.

"Firms benefit from having their ideas included in new standards, and in exchange for this, firms usually make a promise: that if they have any patents they have that are 'essential' to implementing a standard, they will make these patents available to all," he wrote. "That way every firm can build products based upon the standard, secure in the knowledge that it can obtain a license to any essential patents."

Heiner insisted that "this system works really well, almost all of the time." But as we've seen in recent years, some cases end up in lengthy court battles. "These outliers create a lot of trouble for the international standards ecosystem," Heiner wrote.

For its part, Microsoft sued Barnes & Noble in March for patent infringement regarding the retailer's Android-based Nook e-readers.

(PC Magazine <http://www.pcmag.com/article2/0,2817,2400019,00.asp>)

請閱讀上面報導後，以中文回答下列問題(答案請註明所用字數):

1. 請於 150 字內，簡要說明上面報導之內容要旨。(占總分 15%)
2. 請參閱上面報導，於 600 字內，就此一案例簡要提出您個人之評析與看法。(請分點論述，能就正反兩面論點分析，並佐以法律、科技或其他觀點、立法例及實際案例等，說明論點，並援以提出自己之觀點及結論者尤佳)。(占總分 35%)

(本題提示：專利，授權，技術標準，核心技術專利，公平、合理無歧視授權(FRAND licensing)。前揭關鍵字僅供參考。)



本試題共二題，每題 50 分，共計 100 分，請依題號作答並將答案寫在答案卷上，違者不予記分。

壹、最高法院88年台上字第250號判決要旨有謂：「著作權法第三條第一款所稱著作，係指屬於文學、科學、藝術或其他學術範圍之創作而言，色情光碟片不屬之。蓋著作權法之立法目的除在保障個人或法人智慧之著作，使著作物為大眾公正利用外，並注重文化之健全發展，……，且與著作權法之立法目的有違，……，是色情光碟片非屬著作權法所稱之著作，自不受著作權法不得製造或販賣等之保障。」請回答下列之問題：(共50分)

- 一、請您指出上述判決引起哪些爭點？(10分)
- 二、您認為可能涉及到哪些相關法規範之討論？(20分)
- 三、您是否贊成色情光碟片屬於著作權法所稱之著作？試申論之。(20分)

貳、名詞解釋：(共 50 分)

- 一、何謂「推定」？我國民法或其他法律有哪些相關規定？(20 分)
- 二、何謂「視為」？我國民法或其他法律有哪些相關規定？(15 分)
- 三、何謂「準用」？我國民法或其他法律有哪些相關規定？(15 分)