

Date	May 30, 2018	Court	Intellectual Property High Court, Fourth Division
Case number	2018 (Gyo-Ke) 10009		
- In order to fall under the terms "publicly known" as prescribed in Article 3, paragraph (2) of the Design Act, the fact of being actually known to an unspecified or large number of people in Japan or a foreign country prior to the filing of the application for design registration is required.			

References: Article 3, paragraph (2) of the Design Act

Number of related rights, etc.: Appeal against Examiner's Decision (of Refusal) No. 2017-8669 (the appeal), Design Application No. 2016-11102 (the design in the application)

Summary of the Judgment

This is a case in which Plaintiff seeks rescission of an appeal decision made by the Japan Patent Office (JPO) regarding an article to design, "a bolt cover for a hollow steel pipe member," in the design in the application. The JPO made the decision that the demand for an appeal filed by Plaintiff after receiving the decision of rejection with respect to the design in the application shall be dismissed. As a ground for rescission Plaintiff points out an error in the determination that the design in the application could have been easily created.

In the judgment the court dismissed Plaintiff's demand and the following is the outline of the ruling.

Article 3, paragraph (2) of the Design Act provides that where a person ordinarily skilled in the art of the design would have been able to easily create the design based on shape or other features that were publicly known, a design registration shall not be granted for such a design. Judging from the literal meaning of the terms publicly "known," and based on the fact that paragraph (1) of the same article provides the "designs that were publicly known" (paragraph (1), item (i) of the same article) while providing designs that were described in a publication (paragraph (1), item (ii) of the same article) separately from the "designs that were publicly known," it should be understood that in order to fall under the terms "publicly known," the fact of being actually known to an unspecified or large number of people in Japan or a foreign country prior to the filing of the application for design registration is required.

The official gazette that discloses Cited Design 1 (published in 1979) and the official gazette that discloses Cited Design 2 (published in 1988) were in a state in which each of them could have long been publicly known before the filing of the

application for the registration of the design in the application and each of them is found to have been actually provided for public reading of an unspecified or large number of people. Considering the foregoing, it can easily be presumed that the shapes of Cited Designs 1 and 2 disclosed in the official gazettes were actually known to an unspecified or large number of people.

A person ordinarily skilled in the art of building materials could have easily conceived of applying the shape of Cited Design 2 to the bolt cover of Cited Design 1 and could have arrived at the shape of the design in the application. Therefore, it is found that a person ordinarily skilled in the art could have easily created the design in the application by applying Cited Design 2 to Cited Design 1.