

Date	November 30, 2016	Court	Intellectual Property High Court Fourth Division
Case number	2016 (Gyo-Ke) 10121		
<p>– A case in which the court determined that the design in question ("Design") for an inhaler cannot be found to be similar to the cited design based on the following findings made in determining their similarity: The consumers of inhalers are patients who need to aspirate medications and medical personnel. The basic constitution of the overall inhaler attracts the attention of consumers in terms of ease of holding and use, while the configuration of the edge of the mouthpiece part, which would be used by the patients to aspirate medications, attracts the consumers' attention the most in terms of the function of inhalers, i.e. aspiration of medications. The Design and the cited design share the basic constitution but such constitution is commonplace and does not strongly attract the attention of consumers. However, the difference in the form of the edge of the mouthpiece part strongly attracts the attention of consumers and has a major impact on the aesthetic impression created through the eyes, and thus would not be buried in the impressions created from other common appearance.</p>			

References: Article 3, paragraph (1), item (iii) of the Design Act

Number of related rights, etc.: Design Application No. 2014-7570, Trial against Examiner's Decision of Refusal No. 2015-15459, Publication of Unexamined Patent Application No. 2007-289716

Summary of the Judgment

1. With respect to a request for a trial against the examiner's decision of refusal filed with respect to the design in question ("Design"), the JPO determined in its decision ("JPO Decision") that the Design is similar to the cited design and thus falls under Article 3, paragraph (1), item (iii) of the Design Act.

2. In this judgment, the court determined as summarized below that the determination made in the JPO Decision is erroneous by finding that the Design cannot be considered to be similar to the cited design and thus does not fall under Article 3, paragraph (1), item (iii) of the Design Act.

(1) All of the articles to the design are related to inhalers created for the users to hold the main body part and to aspirate medications from the mouthpiece part, and the consumers thereof are patients who need to aspirate medications and medical personnel.

Patients, who are consumers of inhalers and use them when medications are required, will hold the main body part and aspirate the medications by holding the mouthpiece part in their mouth upon its use. Thus, the patients will observe

the articles to the two designs based on such state of use. Meanwhile, medical personnel, who are also consumers of inhalers, will observe and select the articles to the two designs from the following standpoints: [i] whether or not the relevant inhaler has the function of enabling patients to appropriately aspirate medications according to the character of the relevant medications; and [ii] whether or not the relevant inhaler can be used in a manner appropriate for the symptoms and attributes of respective patients.

As the patients and medical personnel, who are consumers of inhalers, would observe and select them as described above, it can be said that while the basic constitution of the overall inhaler will attract the attention of consumers in terms of ease of holding and use, the form of the edge of the mouthpiece part from which the patients aspirate medications will attract the attention of the consumers the most in terms of the function of the inhaler such as enabling patients to aspirate medications.

(2) The article to the design is created for the users to hold the main body part and aspirate medications from the mouthpiece part and thus its basic structure would by necessity be limited to enable the users to hold it in one hand and easily aspirate medications. Moreover, inhalers having the same constitution as the basic constitution of the inhaler in question exist as commonplace products. As such, the basic constitution of the Design cannot be found to strongly attract the attention of patients and medical personnel, who are the consumers of inhalers.

(3) At the edge of the mouthpiece part of the Design, an end wall is established and a circular vent is formed in the center thereof. Since the circular vent affects the speed and direction, etc. of ejecting the medications stored in the main body part to patients, this part can be found to give a strong impression to medical personnel who especially value the function, and the same finding can be made with respect to patients. In contrast, the edge of the mouthpiece part of the cited design has no end wall and is simply and largely open in a cylindrical shape without any change. Inhalers with such constitution were found in the past and are commonplace products. Therefore, the point that an end wall is established in the edge of the mouthpiece part and a circular vent is formed in the center thereof in the Design is, along with the fact that the mouthpiece cover part is transparent, the part that attracts most strongly the attention of consumers. Thus, it is appropriate to consider that this point in the Design has a major impact on the aesthetic impression created through the eyes of the

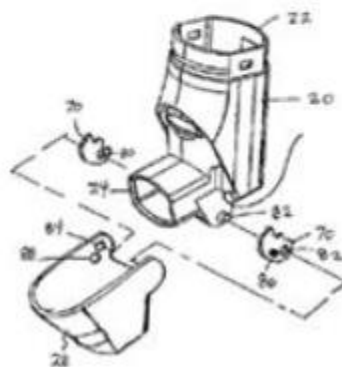
patients and medical personnel, who are the consumers of inhalers.

(4) Taking into consideration in a comprehensive manner, the nature, intended use and mode of use of the articles to the two designs as well as the relationship with publicly known designs, the Design and the cited design share the basic constitution, but such constitution is commonplace and cannot be found to strongly attract the attention of consumers. In contrast, the difference in the form of the edge of the mouthpiece part strongly attracts the attention of patients and medical personnel, who are the consumers of inhalers, and has a major impact on the aesthetic impression created through the eyes.

Accordingly, the difference between the Design and the cited design found in the edge of the mouthpiece part can be found to strongly attract the attention of patients and medical personnel, who are consumers of inhalers, and to create a different aesthetic impression, and it should be found that it would not be buried in the impressions created from other common appearance.



Design
(diagonal perspective view 1)



Cited design
(Figure 9)