

Design Right	Date	April 11, 2019	Court	Intellectual Property High Court, Fourth Division
	Case number	2018 (Gyo-Ke) 10152		
<p>A case in which, with regard to the design according to a body of an electric toothbrush, the constitution of the entirety and the constitution of the shaft portion create a common aesthetic impression as a whole, in which an impression received from the different point that two buttons for controlling operation are disposed vertically on a front surface of the body grasping portion in the design of the present application, whereas in the cited design, one is disposed, does not exceed the impression received from the common point, and it is judged that the design of the present application is similar to the cited design.</p>				

Case type: Rescission of Appeal Decision of Refusal

Result: Dismissed

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

Number of related rights, etc.: Design Application No. 2016-501017, Appeal against Examiner's Decision of Refusal No. 2017-18949

Summary of the Judgment

1 This case is a suit against trial decision made by the JPO which dismissed the request for appeal against the examiner's decision of refusal on the design of the present application of the article according to the design to be "Handle for electric toothbrush" filed by the plaintiff.

As the reason for rescission, the plaintiff alleged that the judgment of similarity between the design of the present application and the cited design was wrong.

2 The judgment maintained the JPO decision by finding as follows in outline:

The article according to the designs of the design of the present application and the cited design is a body (grasping portion) of an electric toothbrush, and major consumers are general consumers using the electric toothbrush. When such a consumer uses the electric toothbrush, the consumer takes up the body of the electric toothbrush in which a brush head is attached to the shaft portion by hand, puts the brush head with toothpaste thereon into the mouth, and starts the electric toothbrush by pressing an operation control button on the body, and then places the brush head on the teeth for tooth-brushing while grasping the body in general and thus, it is found that ease of holding the body grasping portion and simplicity of an operation are emphasized, and the overall shape of the body grasping portion attracts attention.

In view that the two designs have common points that the constitution of the entirety (Common Point 1) and the constitution of the shaft portion (Common Point 2) are in common, in which Common Point 1 is related to the overall shape of the body

grasping portion slightly biased to a front surface side with respect to a bottom surface, which gives a large influence on the ease of holding the body grasping portion and simplicity of operation, and Common Point 2 is related to the shape of the shaft portion slightly inclined to the front surface side along the eccentricity of the body grasping portion, which gives an influence to an angle of the brush head touching the teeth in combination with the biased shape of the body grasping portion, it is found that Common Point 1 and Common Point 2 create a common aesthetic impression to the consumers who see it as a whole.

The two designs are different in Different Point 1 (in the design of the present application, two substantially circular buttons for controlling the electric toothbrush operation, each forming a slightly recessed portion, are disposed vertically at a spot at approximately one-third of the entire length from the upper end and at a spot at approximately one-half on the front surface of the body grasping portion, while in the cited design, one button is disposed at a spot at approximately one-third of the entire length from the upper end), but an impression received from the different points does not exceed the impression received from the common points. It is found that the design of the present application and the cited design are found to be in common in creating the overall aesthetic impression through the eye of the consumer, and the design of the present application is similar to the cited design.

Judgment rendered on April 11, 2019

2018 (Gyo-ke) 10152 A case of seeking rescission of the JPO decision

Date of conclusion of oral argument: February 7, 2019

Judgment

Plaintiff: Koninklijke Philips N.V.

Defendant: Commissioner of the Japan Patent Office

Main text

1. The plaintiff's claim is dismissed.
2. The plaintiff shall bear the court costs.
3. The additional period for filing a final appeal and a petition for acceptance of final appeal against this judgment shall be 30 days.

Facts and reasons

No. 1 Claim

The court shall rescind the decision made by the Japan Patent Office on June 18, 2018 with regard to the Trial against Examiner's Decision No. 2017-18949.

No. 2 Outline of the case

1. Outline of procedures at the JPO

(1) The plaintiff filed an international application for design registration (Design Application No. 2016-501017, date of priority claimed under the Paris Convention: February 22 of the same year, hereinafter, referred to as the "present application") on an article to the design as "Handle for electric toothbrush" on July 14, 2016 with regard to a design having a design form as in Attachment 1 (hereinafter, referred to as the "design of the present application").

Since the plaintiff received the decision of refusal (Exhibit Ko 10) as of October 18, 2017, the plaintiff requested an appeal against the examiner's decision of refusal on December 21 of the same year (Exhibit Ko 11).

The Japan Patent Office examined the request as the Appeal against Examiner's Decision of Refusal No. 2017-18949 and rendered the decision that "the request for the present appeal is dismissed" (hereinafter, referred

to as the "present JPO decision") on June 18, 2018, and a certified copy was delivered to the plaintiff on 28 of the same month.

(2) The plaintiff instituted the present lawsuit seeking rescission of the present JPO decision on October 26, 2018.

2. Gist of reasons of the present JPO decision

(1) The reasons for the present JPO decision are as in the attached written decision (copy). The gist thereof is that the design of the present application and the design of the Design Registration No. 1432629 (article to the design, "electric toothbrush body") described in the Design Gazette (Exhibit Ko 1), which is publication distributed prior to the priority date of the present application (hereinafter, referred to as the "cited design", see Attachment 2) are common in the article to the design, and in view of the form or different points as a whole, the effect generated by the common points is greater than the design effects appealing to the visual senses and the overall design creates a common aesthetic impression in consumers, and since the two designs are similar to each other, the design of the present application is applicable to the design provided for in Article 3, paragraph (1), item (iii) of the Design Act and may not be granted design registration.

(2) Each form of the design of the present application and the cited design found in the present JPO decision and the common points and differences between the design of the present application and the cited design are as follows. The present JPO decision found that "1.2" in Attachment 1 according to the design of the present application to be a front view, "1.3" to be a rear view, "1.4" to be a left side view, "1.5" to be a right side view, "1.6" to be a plan view, and "1.7" to be a bottom view for comparison between the two designs.

A. Forms of the design of the present application

(A) The entirety is constituted by an electric toothbrush body grasping portion having a substantially columnar shape slightly biased to a front surface side from a bottom part with a rounded rectangular shape and narrowed on a rear surface side on a side view toward an upper surface of a circular shape and a substantially columnar shaped base portion provided on an upper surface of the body grasping portion and having a length of substantially a radius of the upper

surface as a diameter and a shaft provided thereon and having a vertically long plate shape disposed thereon (hereinafter referred to as the "shaft portion"), and;

- (B) with regard to the shaft, a step slightly inclined to the front surface side along the eccentricity of the body grasping portion and crossing a center part on a front view is provided, and a recess portion having a substantially vertically long rectangular shape is provided on the rear surface side;
- (C) on the front of the body grasping portion, two substantially circular buttons for controlling the electric toothbrush operation, each forming a slightly recessed portion, are disposed vertically at a spot at approximately one-third of the entire length from an upper end and at a spot at approximately one-half the entire length;
- (D) an annular thin line is disposed close to the upper end of the body grasping portion so as to be in parallel with the upper surface;
- (E) a switching line is provided on a lower part of the body grasping portion so as to be in parallel with a lower surface, and the lower part from the switching line is narrowed extremely slightly; and
- (F) with regard to the base portion of the shaft portion, a slightly gentle step is provided at the center on a peripheral side surface of the base portion, and a diameter of a lower part thereof is expanded.

B. Form of the cited design

(A) The entirety is constituted by an electric toothbrush body grasping portion having a substantially columnar shape slightly biased to a front surface side from a bottom part with a rounded rectangular shape and narrowed on a rear surface side on a side view toward an upper surface of a circular shape and a substantially columnar shaped base portion provided on an upper surface of the body grasping portion and having a length of substantially a radius of the upper surface as a diameter and a shaft having a substantially vertically long plate shape disposed thereon (hereinafter referred to as the "shaft portion");

(B) with regard to the shaft, a step slightly inclined to the front surface side along the eccentricity of the body grasping portion and crossing a center part on a front view is provided, and a recess portion having a vertically long rectangular shape is provided on the rear surface side;

(C) on the front of the body grasping portion, a substantially circular button for controlling the electric toothbrush operation forming a slightly recessed portion and having a double outer shape line is disposed at a spot at approximately one-third of the entire length from an upper end;

(D) an annular thin line is disposed at a spot at approximately one-22nd of the entire length from the upper end so as to be in parallel with the upper surface of the body grasping portion; and

(E) with regard to the base portion of the shaft portion, a lower portion corresponding to approximately two-thirds of the entire base portion has a columnar shape, while an upper end part forming approximately one-third has a disk shape slightly thicker than the lower part, and a threaded shape with a diameter slightly reduced toward the upper end is further provided.

C. Common points

(Common point 1)

The point that the entirety is constituted by an electric toothbrush body grasping portion having a substantially columnar shape slightly biased to a front surface side from a bottom part with a rounded rectangular shape and narrowed on a rear surface side on a side view toward an upper surface portion of a circular shape and a substantially columnar shaped base portion provided on an upper surface of the body grasping portion and having a length of substantially a radius of the upper surface as a diameter and a shaft having a vertically long plate shape disposed thereon (hereinafter referred to as the "shaft portion").

(Common point 2)

With regard to the shaft, the step slightly inclined to the front surface side along the eccentricity of the body grasping portion and crossing the center part on a front view is provided, and the recess portion having the substantially vertically long rectangular shape is provided on the rear surface side.

D. Different points

(Different point 1)

In the design of the present application, two substantially circular buttons for controlling the electric toothbrush operation, each forming a slightly recessed portion, are disposed vertically at a spot at approximately

one-third of the entire length from the upper end and at a spot at approximately one-half of the entire length on the front surface of the body grasping portion, while in the cited design, one button is disposed at a spot at approximately one-third of the entire length from the upper end.

(Different point 2)

In the design of the present application, the outer shape line of the button for controlling the electric toothbrush operation has a single circular shape, while in the cited design, the outer shape line of the button for controlling the operation is a double circular shape.

(Different point 3)

In the design of the present application, the annular thin line is disposed slightly lower from the upper end of the body grasping portion, while in the cited design, the annular thin line is disposed at a spot at approximately one-22nd of the entire length from the upper end.

(Different point 4)

In the design of the present application, the switching line is provided on the lower part of the body grasping portion so as to be in parallel with the lower end surface, and the lower part of the switching line is narrowed slightly, while a switching line is not provided in the cited design, and the lower end of the body grasping portion is not narrowed but suspended as is.

(Different point 5)

In the design of the present application, with regard to the base portion of the shaft portion, the gentle step is provided at the center on the peripheral side surface of the base portion, and a diameter of the lower part thereof is expanded, while in the cited design, the lower portion occupying approximately two-thirds of the entire base portion is formed having a substantially columnar shape, and the upper part forming approximately one-third has a disc shape slightly thicker than the lower part, and the threaded shape with a diameter slightly reduced toward the upper end is formed thereon.

3. Grounds for revocation

Wrong decision in similarity between the design of the present application and the cited design

(omitted)

No. 4 Decision by this court

1. Similarity between the design of the present application and the cited design

(1) There is no dispute between the parties on that the finding of the JPO decision (aforementioned No. 2 2(2)) on each form of the design of the present application (Attachment 1) and the cited design (Attachment 2), and the common points and the different points between the design of the present application and the cited design are not wrong.

The article according to both designs is an electric toothbrush body (grasping portion), and major consumers are general consumers who use the electric toothbrush. In view of the circumstances that, when such consumer uses the electric toothbrush, the consumer takes up the body of the electric toothbrush in which a brush head is attached to the shaft portion by hand, puts the brush head with toothpaste thereon into the mouth and starts the electric toothbrush by pressing an operation control button on the body and then, places the brush head on the tooth while grasping the body in general and thus, it is found that ease of holding the body grasping portion and simplicity of an operation are emphasized, and the overall shape of the body grasping portion attracts attention.

However, the designs have common points that "the entirety is constituted by the electric toothbrush body grasping portion slightly biased to the front surface side from the bottom part with the rounded rectangular shape and having the substantially columnar shape narrowed on the rear surface side on a side view toward the upper surface portion with the circular shape, the substantially columnar shaped base portion provided on the upper surface of the body grasping portion and having the length of substantially a radius of the upper surface as a diameter, and the vertically long plate-shaped shaft disposed thereon (shaft portion)" (common point 1) and "with regard to the shaft, the step slightly inclined to the front surface side along the eccentricity of the body grasping portion and crossing the center part on a front view is provided, and the recess portion having the substantially vertically long rectangular shape is provided on the rear surface side." (common point 2).

In view that common point 1 is related to the overall shape of the body grasping portion slightly biased to the front surface side with respect to the

bottom surface, which gives a large influence on the ease of holding the body grasping portion and simplicity of the operation, and that common point 2 is related to the shape of the shaft portion slightly inclined to the front surface side along the eccentricity of the body grasping portion, which gives an influence to an angle of the brush head touching the tooth in combination with the biased shape of the body grasping portion, it is found that common point 1 and common point 2 create a common aesthetic impression to the consumers who see it as a whole.

On the other hand, the designs are different in different point 1 (in the design of the present application, two substantially circular buttons for controlling the electric toothbrush operation, each forming a slightly recessed portion, are disposed vertically at a spot at approximately one-third of the entire length from the upper end and at a spot at approximately one-half on the front surface of the body grasping portion, while in the cited design, one button is disposed at a spot at approximately one-third of the entire length from the upper end), different point 2 (in the design of the present application, the outer shape line of the button for controlling the electric toothbrush operation has a single circular shape, while in the cited design, the outer shape line of the button for controlling the operation is a double circular shape), different point 3 (position of the annular thin line), different point 4 (shape of the lower part of the body grasping portion and presence of switching), and different point 5 (shape of the base portion of the shaft portion), but an impression received from these different points does not exceed the impression received from the aforementioned common points of the two designs.

Therefore, even when these different points are considered, the design of the present application and the cited design are found to have the overall aesthetic impression created through the eye of the consumer in common, and it is found that the design of the present application is similar to the cited design.

(2)A. On the other hand, the plaintiff alleges that [i] the constitution according to the common point 1 that "the entirety is an electric toothbrush body constituted by a body grasping portion having a substantially columnar shape from a bottom part with a rounded rectangular shape and narrowed on a rear surface side on a side view toward a circular upper part and a substantially columnar shaped base portion and a shaft having a

substantially vertically long plate shape" cannot be considered to be a featured shape; [ii] in common point 1, the point that the "body grasping portion is slightly biased" is not clearly discriminated from the conventional shape in which the rear surface side on a side view is only narrowed toward the upper part from a viewpoint of the impression given to the consumer and thus, it is not a featured shape; and [iii] with regard to the "point that the recess portion having a substantially vertically long rectangular shape is provided on the rear surface side of the shaft portion", since the portion is too small to be a portion attracting the attention of the consumer in combination with provision on the rear surface, that cannot be considered to be a featured shape and thus, the basic constitution of the design of the present application cannot be considered to strongly attract the attention of the user, who is a consumer, and the forms according to common points 1 and 2 cannot create the common aesthetic impression in the consumers.

However, the aforementioned point [i] takes up only a part of the shape in common with the shape of the general electric toothbrush body in common point 1 and is not considered to refer to all the shapes of common point 1.

Moreover, with regard to the aforementioned point [ii], it is found that the shape of the design of the present application in which the body grasping portion is slightly biased can be easily discriminated from the shape in which the rear surface side on a side view is only narrowed toward the upper part with the shaft remaining perpendicular to the bottom surface of the body grasping portion for the consumer (the aforementioned (1)) particularly paying attention to the overall shape of the body grasping portion.

Furthermore, the aforementioned point [iii] takes up only a part of the shape and overlooks the points that the shaft is slightly inclined to the front surface side along the eccentricity of the body grasping portion and a step crossing the center part on a front view of the shaft is provided.

As described above, the plaintiff's allegation pays attention only to a part of the shape in common point 1 and common point 2 and is not based on the visual effects given by the entireties of these common points and thus, may not be employed.

B. Subsequently, the plaintiff alleges that [i] from a viewpoint of a function

of the electric toothbrush of brushing the tooth, the position, size, and form of the operation control buttons when the consumer operates the electric toothbrush is a portion which attracts the attention of the consumer the most and is an essential feature; and [ii] since the consumer observes the operation control button portion without fail when using the electric toothbrush, even if the operation control button portion occupies a small range as compared with the entirety, it gives a strong impression to the consumer; and in the case of the two buttons, since the consumer operates the buttons while considering the function of the respective buttons, the consumer directs attention to the two buttons, and as a result, attention is paid more to the form of the button than in the case of the one button and thus, the form (form of the design of the present application according to different point 1) in which the two buttons of the design of the present application are disposed vertically attracts the attention of the consumer strongly in combination with the point that the diameter of the lower button is formed slightly smaller than the diameter of the upper button and provokes an aesthetic impression different from that of the cited design with the form in which the one button is disposed, and since the impression given to the consumer by the operation control button which is the essential feature of the design of the present application is largely different from the cited design, the two designs are not similar to each other as a whole.

However, in view of the ordinary use form of the electric toothbrush found in the aforementioned (1), it is found that the consumer puts an emphasis on the ease of holding the body grasping portion and the simplicity of operation and particularly pays attention to the overall shape of the body grasping portion, and even though the position, size, and form of the operation control buttons attract some attention of the consumer during operation of the electric toothbrush, it is not the portion which attracts the attention of the consumer the most.

Moreover, according to the design of the "electric toothbrush body" (attachment 3) described in Exhibit Ko 2 (the Design Gazette of the Design Registration No. 1478109) and the design of the "electric toothbrush" (attachment 4) described in Exhibit Ko 3 (the Design Gazette of the Design Registration No. 1219080), disposition of the two operation control buttons on the electric toothbrush is found to have been ordinarily performed prior to the priority date of the present application. With regard to the two

operation control buttons of the design of the present application, one is disposed at a spot at approximately one-third of the entire length from the upper end of the body grasping portion, whose position is in common with that of the operation control button of the cited design, while the other one is disposed at a spot at approximately one-half of the entire length from the upper end of the body grasping portion corresponding to the suspension of the operation control button, and that does not give an impression that they are located at unique positions.

In addition, in view that the form of the body grasping portion of the electric toothbrush having the two operation control buttons in which the diameter of the operation control button disposed on the lower part is formed slightly smaller than the diameter of the operation control button disposed on the upper part side of the body grasping portion was well-known prior to the priority date of this application (Exhibit Otsu 1), the point that the two operation control buttons of the design of the present application are disposed vertically, forming a slightly recessed portion, and the diameter of the lower button is formed slightly smaller than the diameter of the upper button cannot be considered to be a featured point or does not particularly attract the attention of the consumer and thus, the difference in the constitution between the operation control button of the design of the present application and the operation control button of the cited design cannot be found to influence the overall aesthetic impression of the two designs created through the eye of the consumer.

Therefore, the aforementioned allegation by the plaintiff may not be employed.

(3) As described above, since it is found that the design of the present application is similar to the cited design, the decision of the present JPO decision with the same gist is not wrong.

2. Conclusion

According to the above, the reason of rescission alleged by the plaintiff is not grounded, and no illegality that should rescind that is found in the present JPO decision.

Therefore, the claim by the plaintiff shall be dismissed.

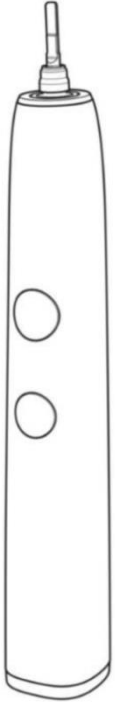
Intellectual Property High Court, Fourth Division

Presiding judge: OTAKA Ichiro
Judge: FURUKAWA Kenichi
Judge: SEKINE Sumiko

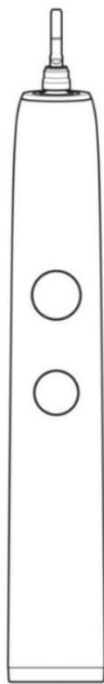
(Attachment 1)

Drawings of design of the present application

1. 1



1. 2



1. 3



1. 4



1. 5



1. 6



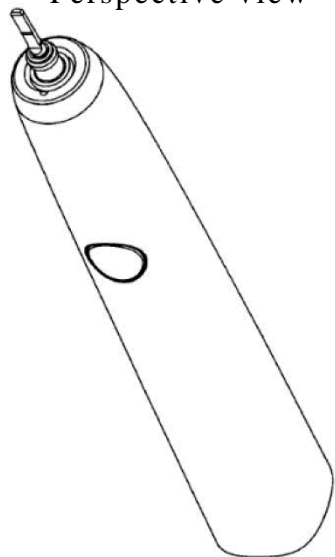
1. 7



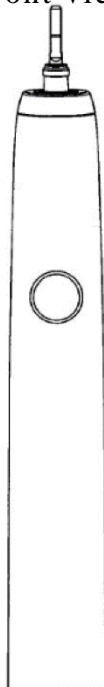
(Attachment 2)

Drawings of cited design

Perspective view



Front view



Rear view



Left side view



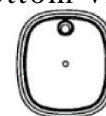
Right side view



Plan view

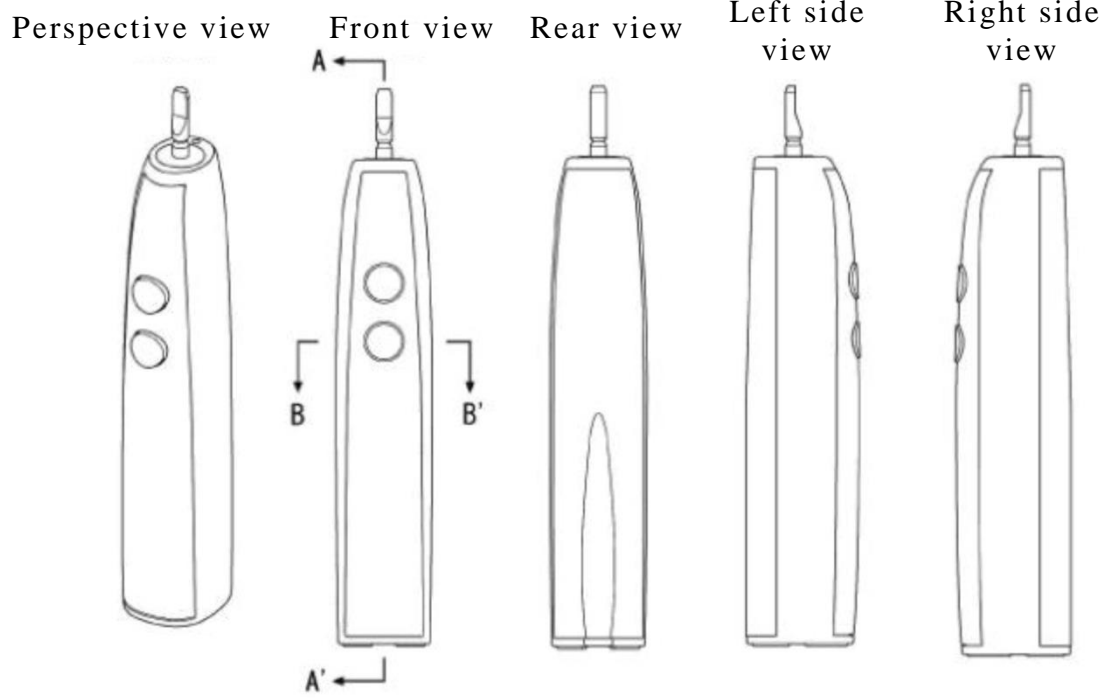


Bottom view



(Attachment 3)

Drawings of Exhibit Ko 2



Plan view



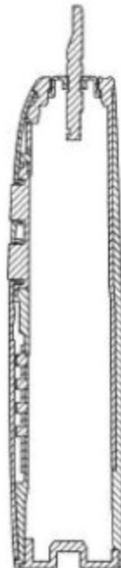
Bottom view



B-B' end surface view
omitting internal structure



A-A' end surface view
omitting internal structure



Reference view
illustrating use state



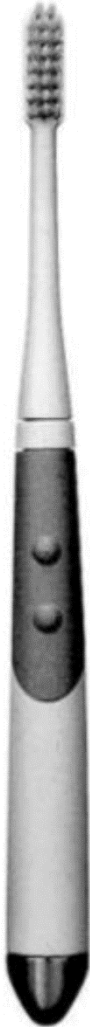
(Attachment 4)

Drawings of Exhibit Ko 3

Perspective view



Front view



Rear view



Right side view



Plan view



Bottom view

