

Section 2 Creative Difficulty

1. Outline

Article 3, paragraph (2) of the Design Act provides that a design registration shall not be granted for a filed design where a person ordinarily skilled in the art of the design (hereinafter referred to as a “person skilled in the art”) would have been able to easily create the design.

This is because granting exclusive rights to designs that can be easily created by a person skilled in the art would not help the development of industry but rather prevent it.

The examiner should make a determination on this requirement only where no reason for refusal about novelty is found.

This Section describes how the examiner determines the creative difficulty of filed designs.

2. Entity for determining creative difficulty

The examiner should examine and determine the creative difficulty of the filed design, from the viewpoint of a person skilled in the art.

A person skilled in the art refers to a person who, as of the time of the filing of the application for design registration, had ordinary skills concerning designs in the industry in which the article to the design is manufactured or sold.

3. Basic concept in determining creative difficulty

Article 3, paragraph (2) of the Design Act provides that if, prior to the filing of the application for design registration, a person skilled in the art would have been able to easily create the design based on the shape, patterns, or colors, or any combination thereof (shape, etc.) or graphic images that were publicly known (Note), a design registration shall not be granted for such a design.

Therefore, where the filed design is based on constituent elements and specific modes that were publicly known prior to filing and was merely created using ordinary techniques, etc. in the art, such as simply aggregating or replacing these, for example, the examiner should determine that the filed design is one that would have been easily created.

Furthermore, with regard to the above determination, in addition to cases where constituent elements and specific modes that were publicly known prior to filing have been represented in the filed design almost as they are, where modifications have been made but they are only minor modifications in the art of the design, the examiner should still determine that the filed design is one that would have been

easily created (see 4.2 “Ordinary techniques and minor modifications” in this Section).

However, where novelty or original design ideas from the viewpoint of a person skilled in the art are found, the examiner should also take this into consideration when making a determination (see 4.3 “Novelty and originality of design ideas from the viewpoint of a person skilled in the art” in this Section).

Furthermore, in cases where the filed design is a design for which the design registration is requested for a part of an article, etc., in determining creative difficulty, in addition to taking into consideration the shape, patterns, or colors, or any combination thereof of the “part for which the design registration is requested” as well as its usage and function, the examiner should also take into consideration whether it is easy for a person skilled in the art to determine the position, size, and scope of the “part for which the design registration is requested” within the shape, patterns, or colors, or any combination thereof of the entire article, etc.

(Note) Here, “publicly known” means “publicly known, described in a distributed publication or made publicly available through an electric telecommunication line in Japan or a foreign country.”

(With regard to graphic image designs, see Part IV, Chapter I “Design Including a Graphic Image,” with regard to building designs, see Part IV, Chapter II “Building Design,” and with regard to interior designs, see Part IV, Chapter IV “Interior Design.”)

4. Specific determination of creative difficulty

4.1 Information that serves as the basis for determination of creative difficulty

The examiner may determine creative difficulty based on the following information.

Shapes, patterns, or colors, or any combination thereof (shape, etc.) or graphic images that were publicly known, described in a distributed publication, or made publicly available through an electric telecommunication line in Japan or a foreign country

In cases where shapes, patterns, or colors, or any combination thereof are described in a publication, etc., they are often represented as an integrated part of an article, etc.; they are rarely represented by themselves. When determining creative difficulty, even in such cases, where the shape, etc. or the graphic image can be specifically identified, the examiner may determine creative difficulty based on these constituent elements.

The above information also includes designs where the shape, etc. or graphic image is integrated with the article, etc.

Furthermore, information that the examiner uses as the basis for determining creative difficulty is not limited to identical or similar fields as the filed design.

4.2 Ordinary techniques and minor modifications

4.2.1 Examples of ordinary techniques

If it is determined that the filed design was created based on constituent elements and specific modes that were publicly known prior to filing, the examiner should examine whether it was created by an “ordinary technique” in the art of the design.

Although examples of the main “ordinary techniques” common to many articles, etc. are as shown below, the examiner should examine the filed design in light of the actual conditions of creation in the art of the design.

- (a) Replacement (→ see 6.1)
Refers to replacing some constituent elements of the design with those of other designs, etc.
- (b) Aggregation (→ see 6.2)
Refers to constituting a single design by combining multiple existing designs, etc.
- (c) Mere deletion of a constituent part (→ see 6.3)
Refers to simply deleting a part that is recognized as an individual unit of creation of a design.
- (d) Change of layout (→ see 6.4)
Refers to merely changing the layout of the constituent elements of a design.
- (e) Change of component ratio (→ see 6.5)
Refers to changing the aspect ratio or other proportion, such as by increasing or decreasing the size, while maintaining the features of the design.
- (f) Change in number of units of a continuous constituent element (→ see 6.6)
Refers to increasing or decreasing the number of an individual unit of creation of a design which is represented repeatedly.
- (g) Use or diversion of a constituent element beyond the framework of the article, etc. (→ see 6.7)
Refers to adopting a variety of existing elements as a motif, and using in or diverting to various articles without hardly changing their shape, etc.

4.2.2 Examples of minor modification

With regard to the determination described in 4.2.1 above, rather than constituent elements and specific modes that were publicly known prior to filing being represented by ordinary techniques, etc. without change, if the filed design is represented with modifications having been added to those constituent elements and specific modes, the examiner should examine whether those modifications are nothing more than “minor modifications” in the art of the design.

Although examples of “minor modification” are as shown below, the examiner should examine the filed design in light of the actual conditions of creation in the art of the design.

- (a) Simple rounding or chamfering of corners and edges
- (b) Simple deletion of a pattern, etc.
- (c) Simple change in colors, simple coloring in each compartment, standard coloring based on required functions
- (d) Change in shape, etc. caused by a simple change of material

4.3 Novelty and originality of design ideas from the viewpoint of a person skilled in the art

When examining the creative difficulty of a filed design, where a visual feature of the design appears, such as the aesthetic impression presented by the entire design or the mode of each part, and where novelty or original design ideas from the viewpoint of a person skilled in the art are recognized which are based on original ingenuity, the examiner should also take this into consideration.

However, in making this determination, where statements in the feature statement or written opinion are taken into account, the examiner should only take them into consideration to the extent that they can be derived from the statement in the application and drawings, etc. as originally filed.

5. Presentation of information that serves as the basis for determination of creative difficulty

5.1 Presentation of constituent elements, specific modes, etc. that were publicly known prior to filing

Where using (1) a shape, etc., graphic image or design that is publicly known, or (2) a shape, etc., graphic image or design that is described in a distributed publication or was made publicly available through an electric telecommunication line, as information that serves as the basis for determining creative difficulty, the examiner must present the said design to the applicant for design registration by stating in the notification of reasons for refusal matters including the bibliographic matters concerning the publication in which the said design is described and the page number on which the said design is described.

However, when using widely known shapes, etc., graphic images or designs as information that serves as the basis for determination of creative difficulty, evidence does not need to be presented.

5.2 Presentation of the fact that the technique is an ordinary technique, etc. in the art

When notifying reasons for refusal pursuant to the provisions of Article 3, paragraph (2) of the Design Act, in principle, the examiner must present specific facts to the applicant showing that the technique of creation in the filed design is an ordinary technique in the art or nothing more than a minor modification, etc.

However, where the examiner finds it to be evident that the technique used is ordinary in the art or is nothing more than a minor modification, etc., such as the technique in the field of toys of transferring the shape, etc. of a real car to the design of a toy car almost as it is, the specific facts do not necessarily need to be presented.

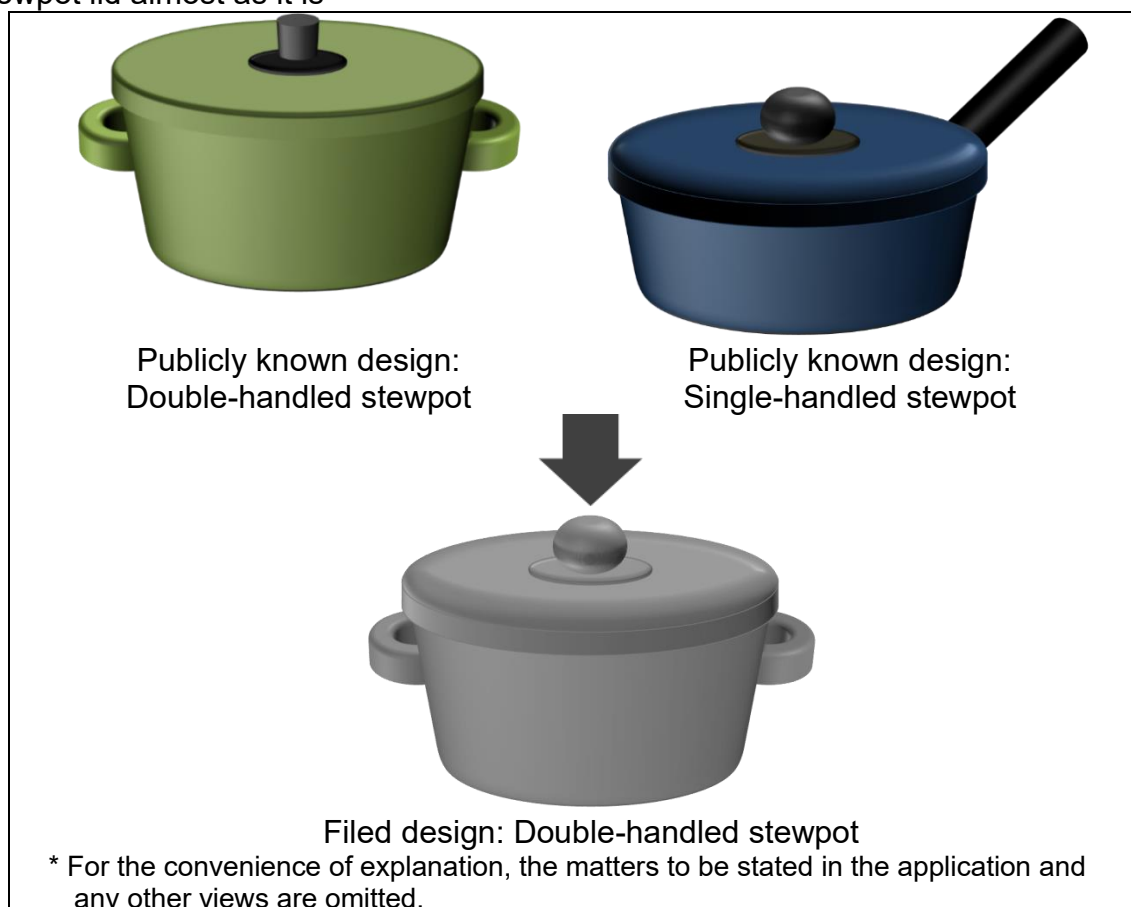
6. Examples of easily created designs

All of the examples shown below are typical representations of the method for determining creative difficulty in cases where the filed design is assumed to be novel.

6.1 Design through replacement

[Case example 1] “Stewpot”

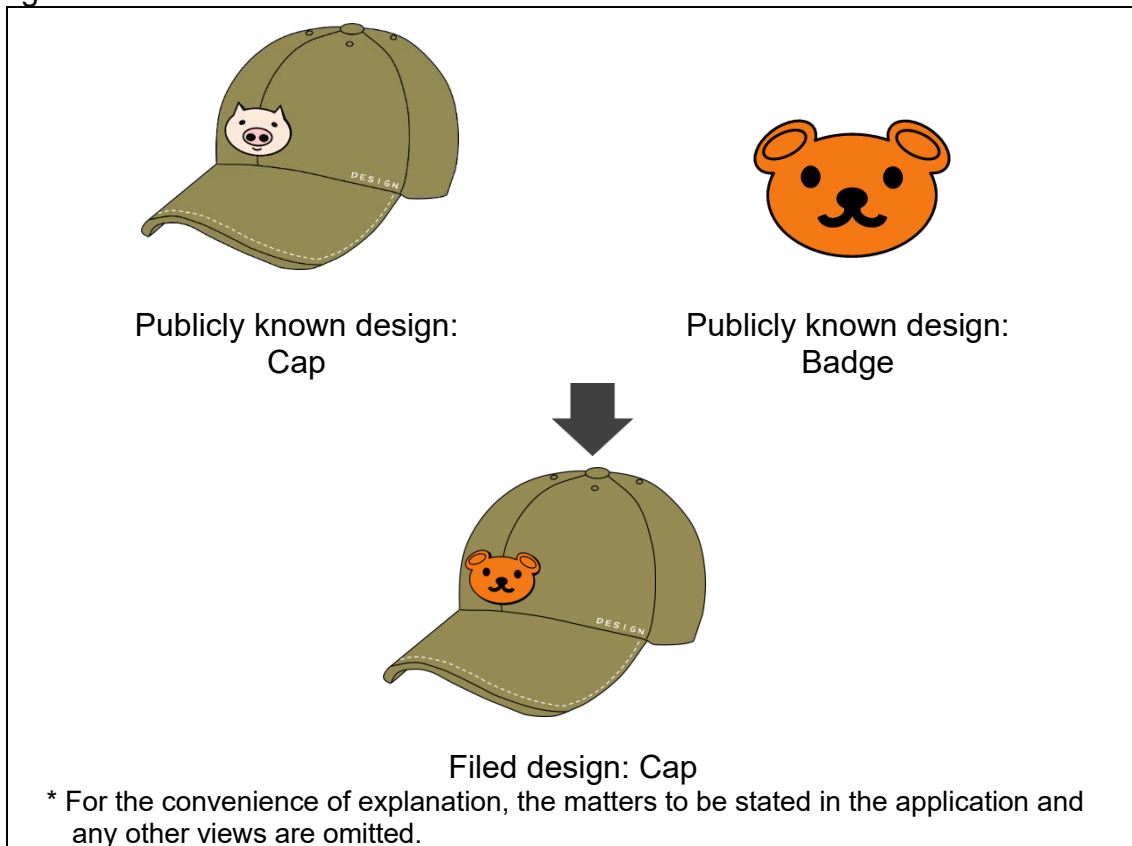
A design which merely replaced the lid of a publicly known stewpot with another stewpot lid almost as it is



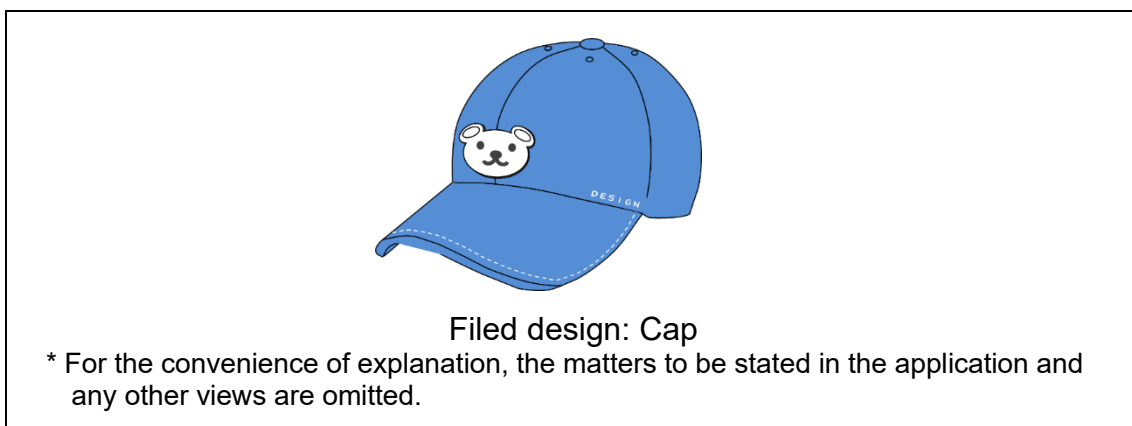
(Note) In this case example, it is assumed that replacing the lid part with another stewpot lid is an ordinary technique in the field of stewpot, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 2] “Cap”

A design which merely replaced the badge part on a publicly known cap with another badge



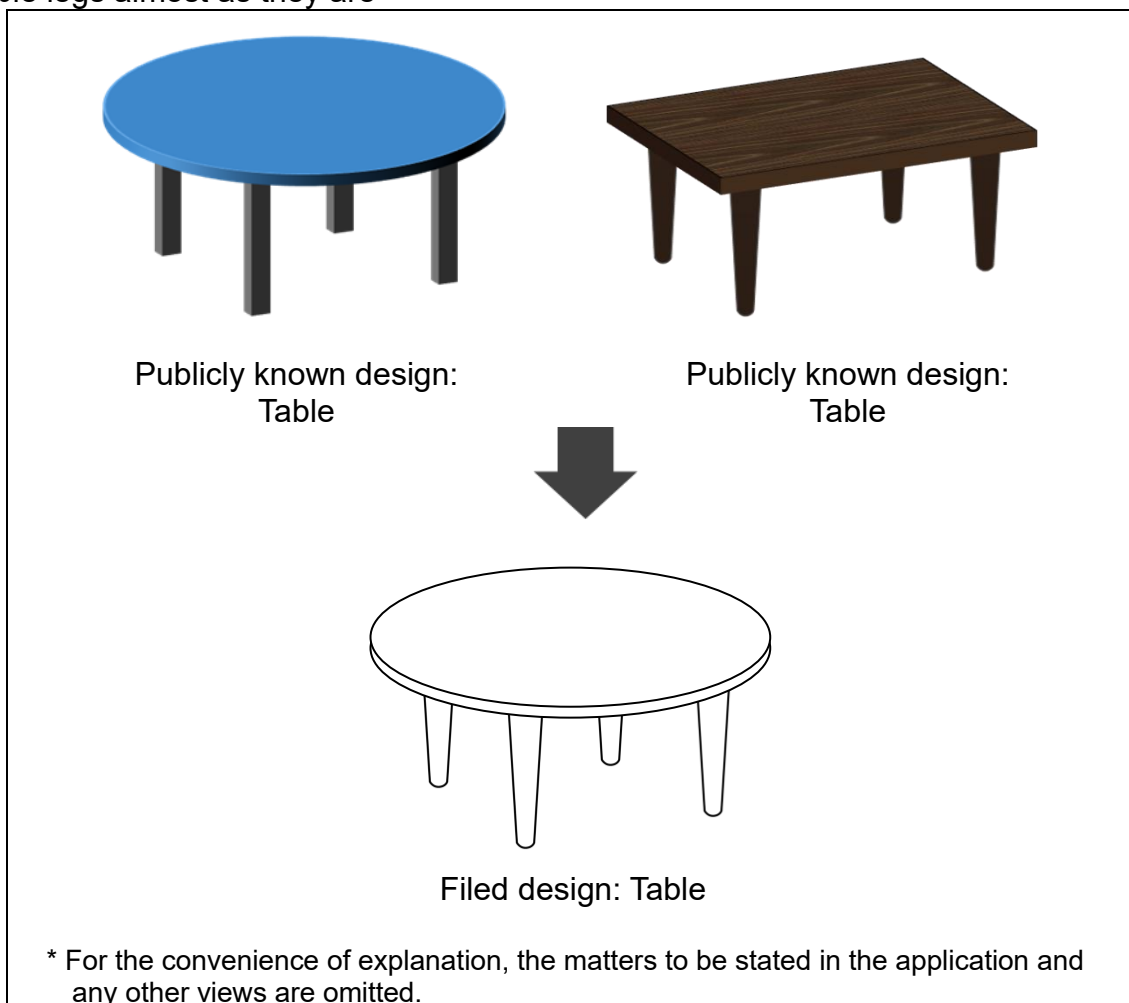
With regard to the case example above, as in the example below, even where the colors of the main part and badge of the cap are changed in the filed design, if the change is found to be a minor modification in the field of caps, the examiner should not evaluate the change of color in determining creative difficulty, and should determine that the filed design is one that would have been easily created.



(Note) In both of the case examples above, it is assumed that replacing the badge part with another badge is an ordinary technique in the field of caps, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 3] “Table”

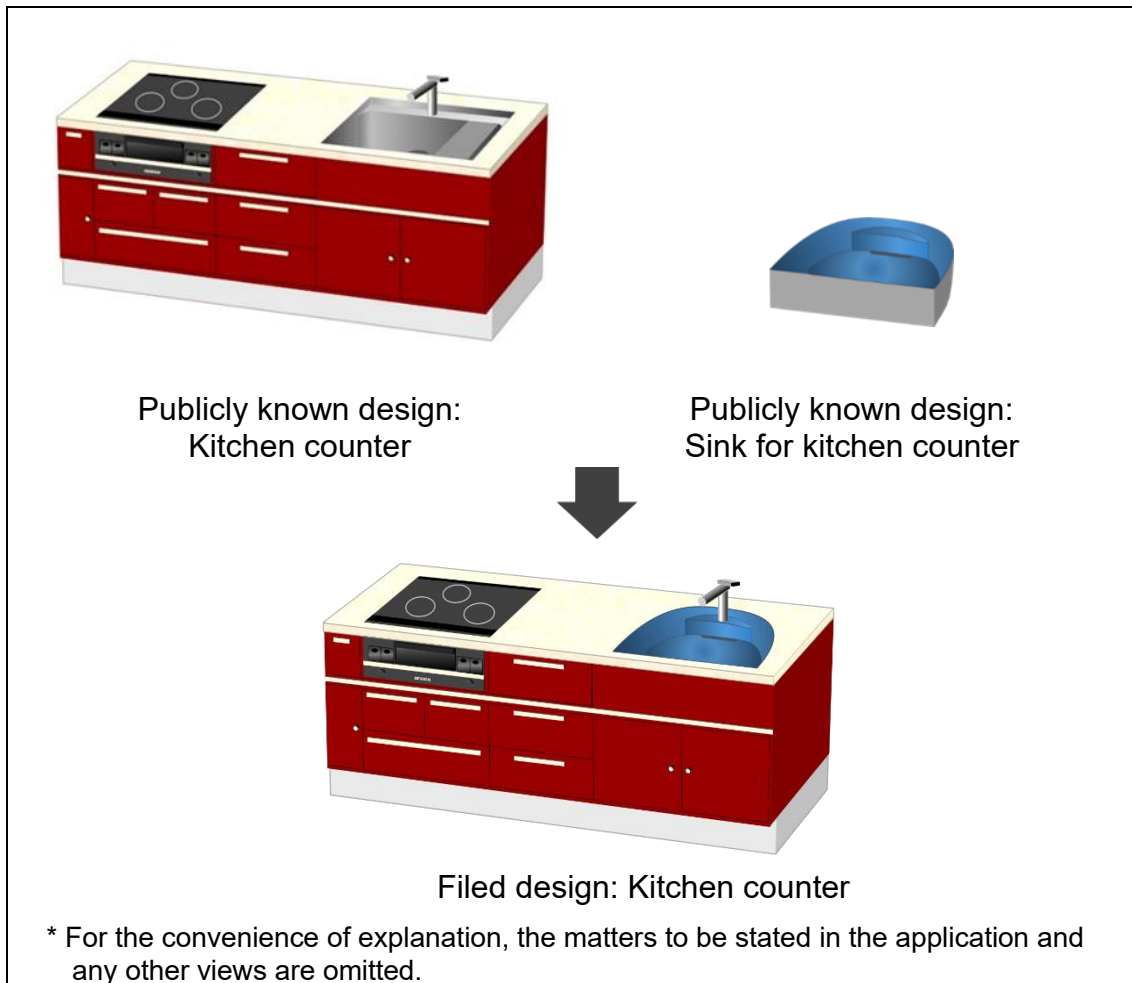
A design which merely replaced the leg parts of a publicly known table with other table legs almost as they are



(Note) In the case example above, it is assumed that replacing legs with other legs is an ordinary technique in the field of tables, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 4] “Kitchen counter”

A design which merely replaced the sink part of a publicly known kitchen counter with another sink



With regard to the case example above, as in the example below, even where the color of the door part is changed in the filed design, if the change in color is found to be a minor modification in the field of kitchen counters, the examiner should not evaluate the change of color in determining creative difficulty, and should determine that the filed design is one that would have been easily created.



Filed design: Kitchen counter

* For the convenience of explanation, the matters to be stated in the application and any other views are omitted.

(Note) In both of the case examples above, it is assumed that replacing the sink part with another kitchen counter sink is an ordinary technique in the field of kitchen counters, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 5] “Packaging container”

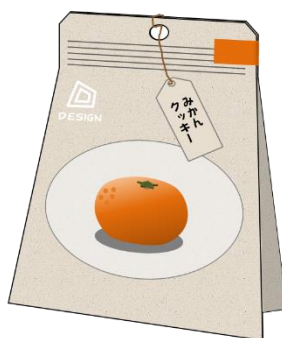
A design which merely replaced the patterned part of a publicly known packaging container with another pattern



Publicly known design:
Packaging container



Publicly known pattern



Filed design: Packaging container

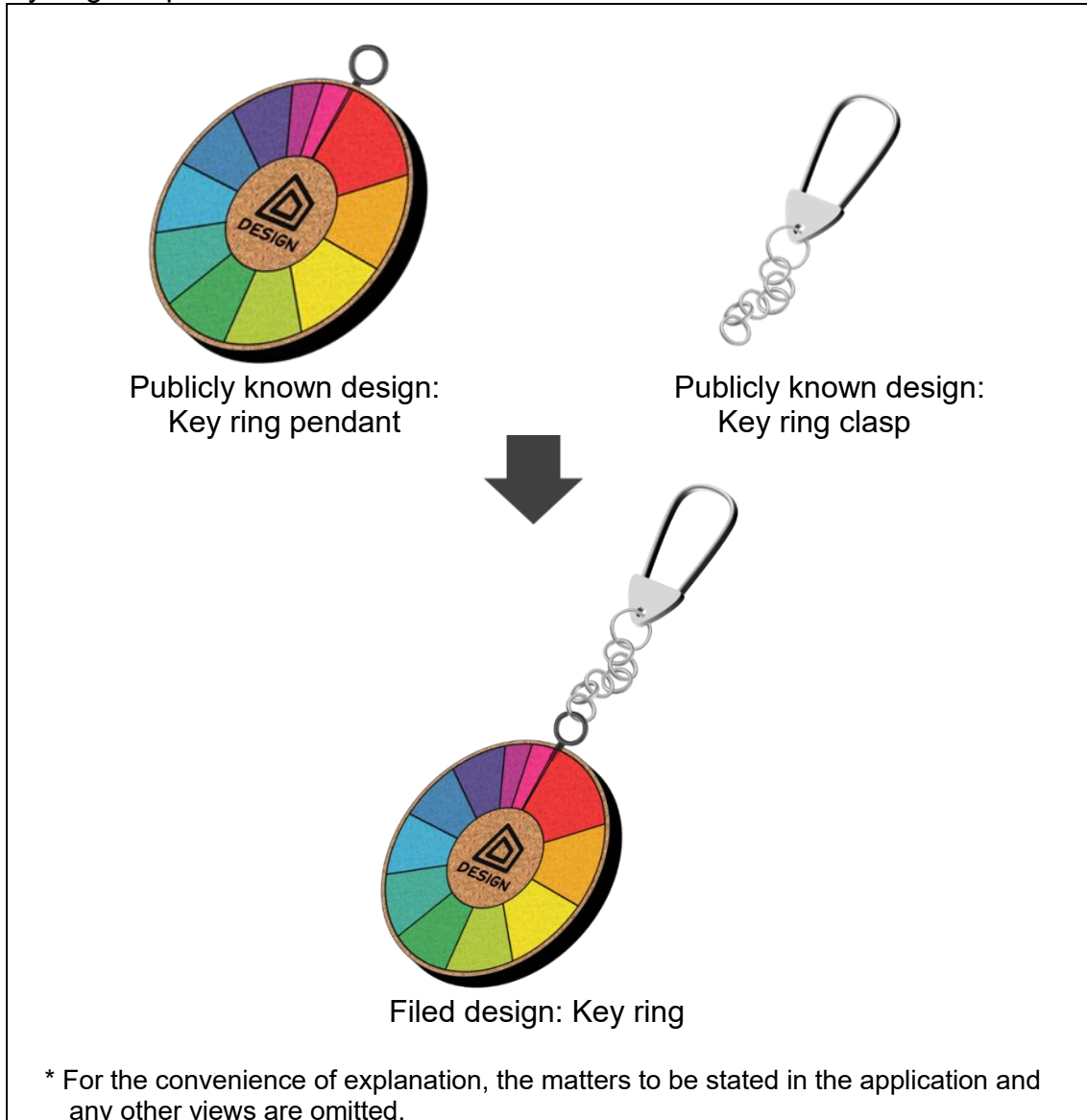
* For the convenience of explanation, the matters to be stated in the application and any other views are omitted.

(Note) In the case example above, it is assumed that replacing the patterned part on the front face with another pattern is an ordinary technique in the field of packaging containers, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

6.2 Design through aggregation

[Case example 1] “Key ring”

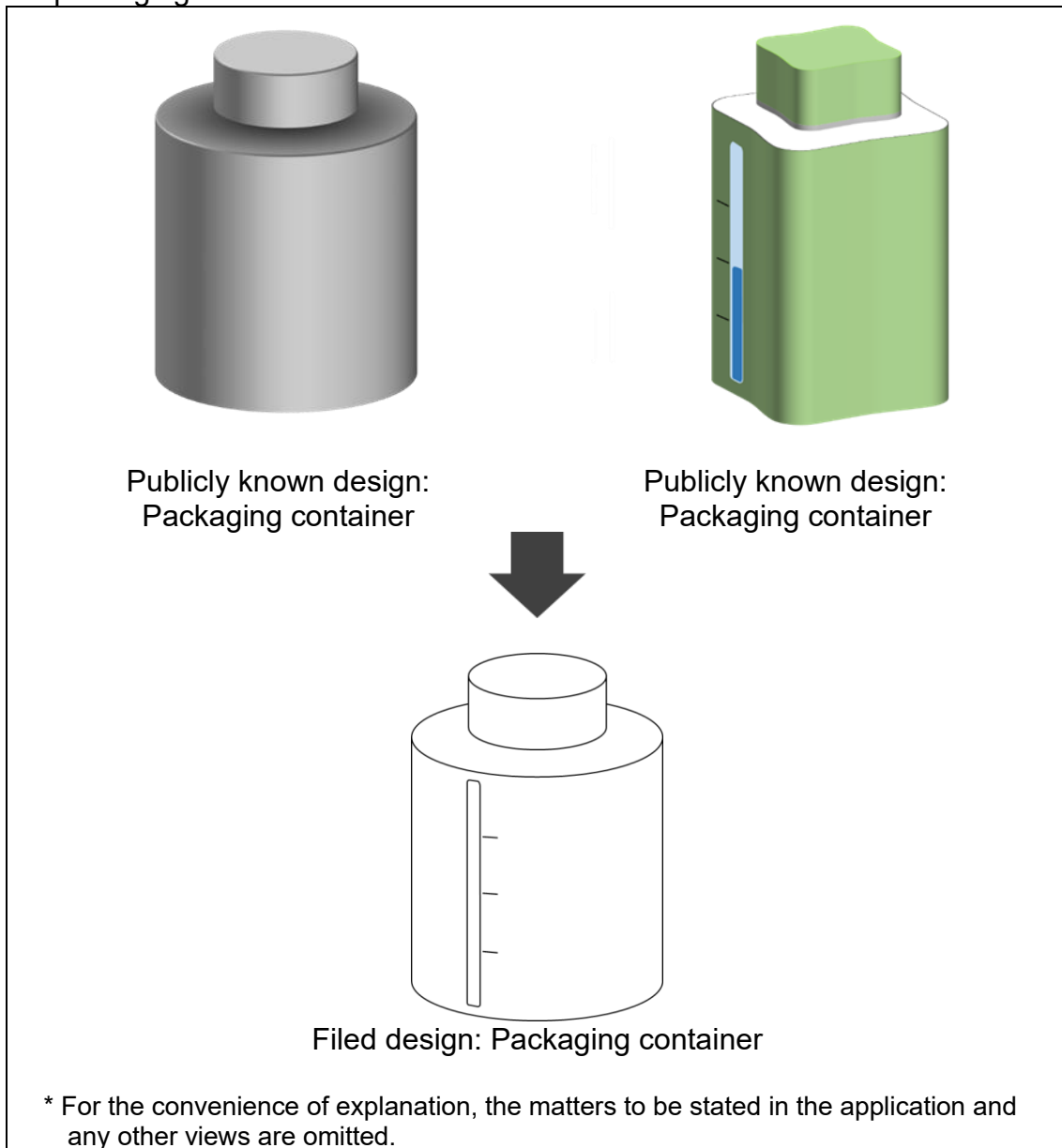
A design which merely aggregated publicly known designs for a key ring pendant and a key ring clasp



(Note) In the case example above, it is assumed that aggregating a key ring pendant and a key ring clasp is an ordinary technique in the field of key rings, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 2] “Packaging container”

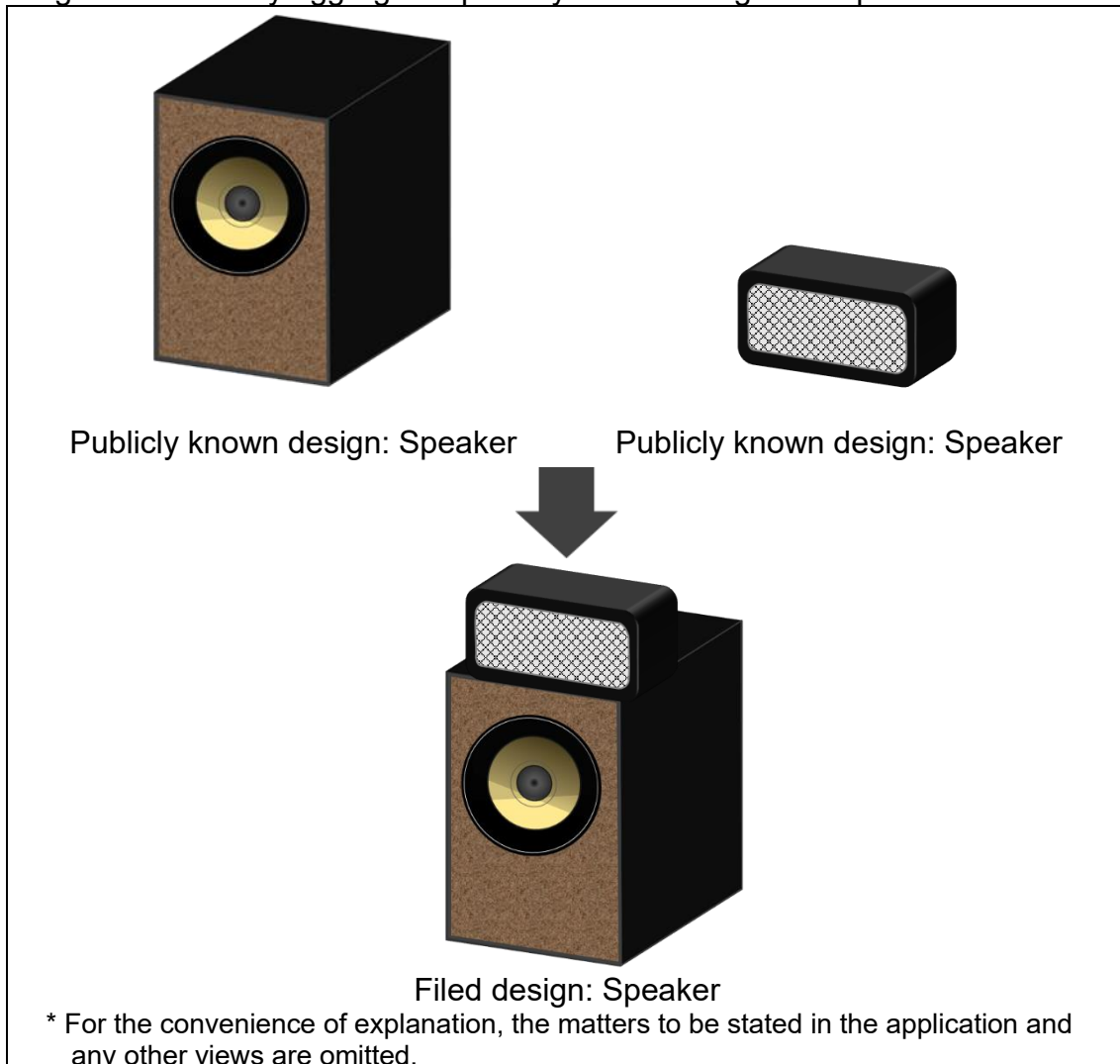
A design which merely aggregated publicly known designs for a packaging container and a packaging container visible window



(Note) In the case example above, it is assumed that aggregating a packaging container and a packaging container visible window is an ordinary technique in the field of packaging containers, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 3] “Speaker”

A design which merely aggregated publicly known designs for speakers

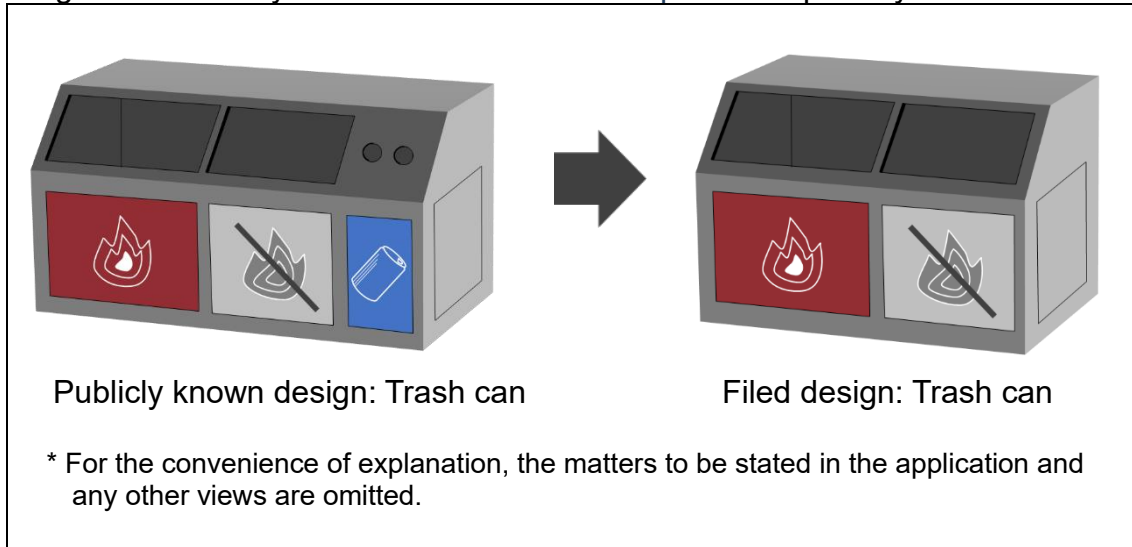


(Note) In the case example above, it is assumed that aggregating multiple speakers together to make a single speaker is an ordinary technique in the field of speakers; that placing speakers of the same width on top of each other near the front of the top of a substantially rectangular parallelepiped speaker is also commonly seen in the field of speakers; and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

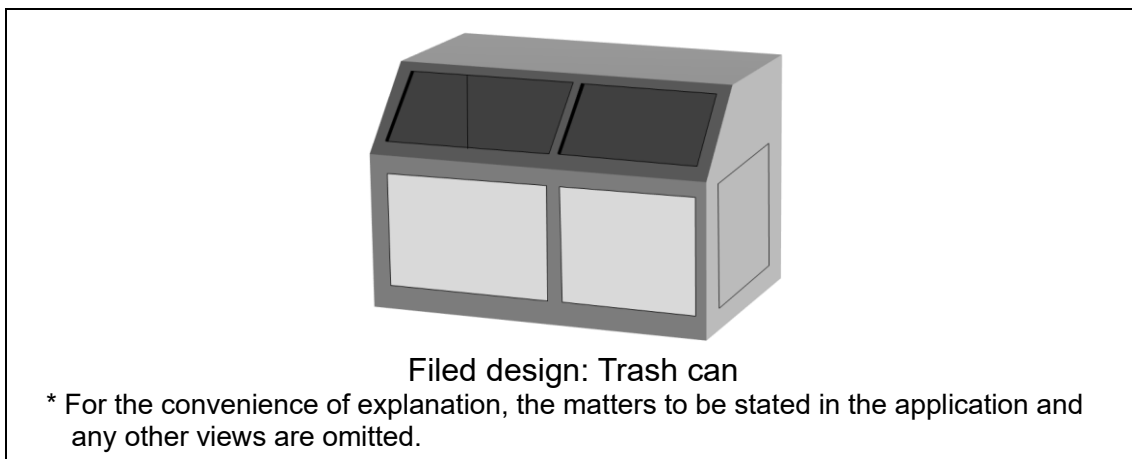
6.3 Design through mere deletion of a constituent part

[Case example] “Trash can”

A design which merely deleted some constituent parts of a publicly known trash can



With regard to the case example above, as in the example below, even where a pattern, etc. is deleted in the filed design, if the modification is found to be a minor modification in the field of trash cans, the examiner should not evaluate the modification in determining creative difficulty, and should determine that the filed design is one that would have been easily created.

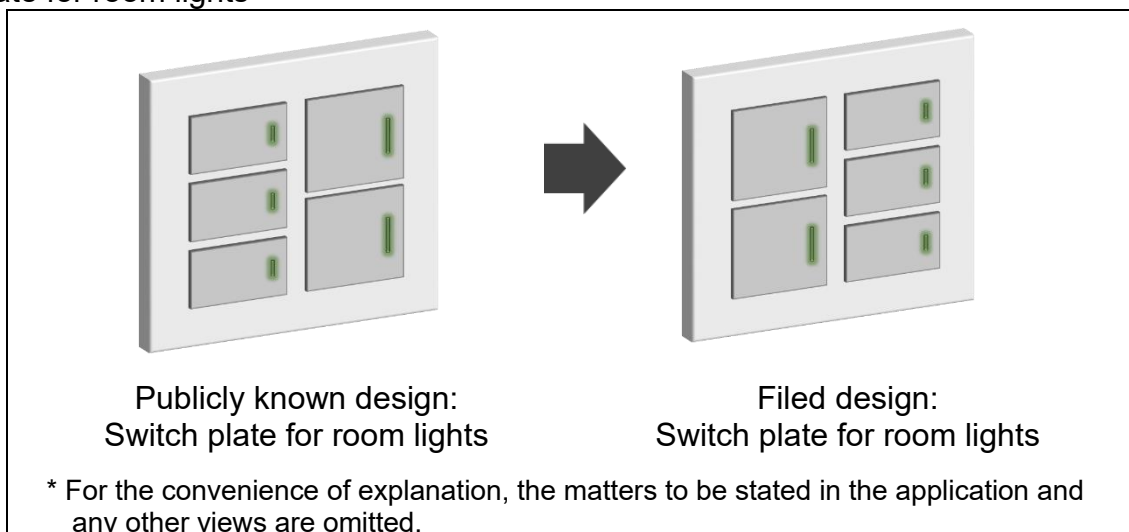


(Note) In both of the case examples above, it is assumed that deleting certain constituent parts is an ordinary technique in the field of trash cans, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

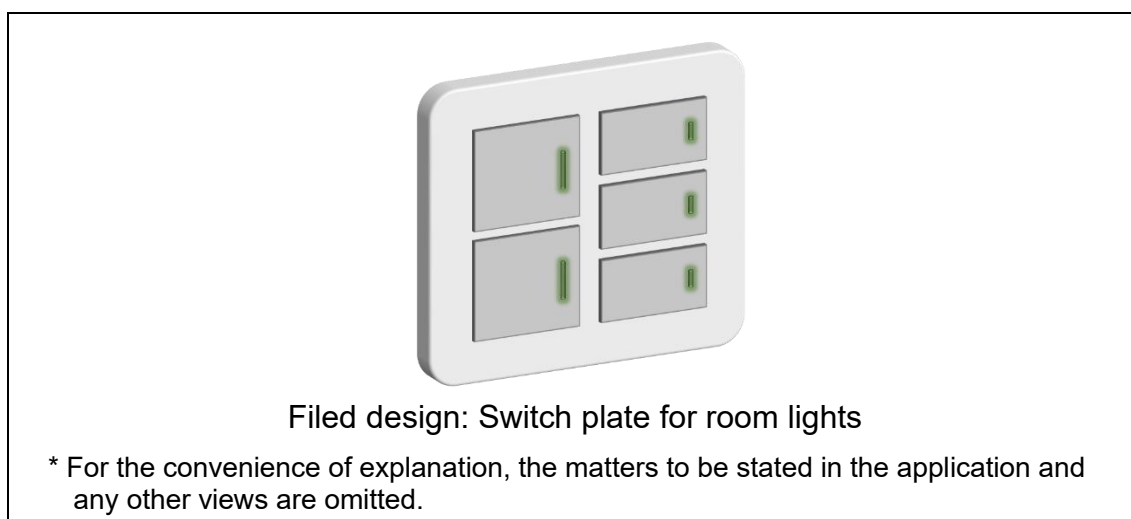
6.4 Design through change of layout

[Case example] “Switch plate for room lights”

A design which merely changed the layout of switches on a publicly known switch plate for room lights



With regard to the case example above, as in the example below, even where the corners have been rounded in the filed design, if the modification is found to be a minor modification in the field of switch plates for room lights, the examiner should not evaluate the modification in determining creative difficulty, and should determine that the filed design is one that would have been easily created.

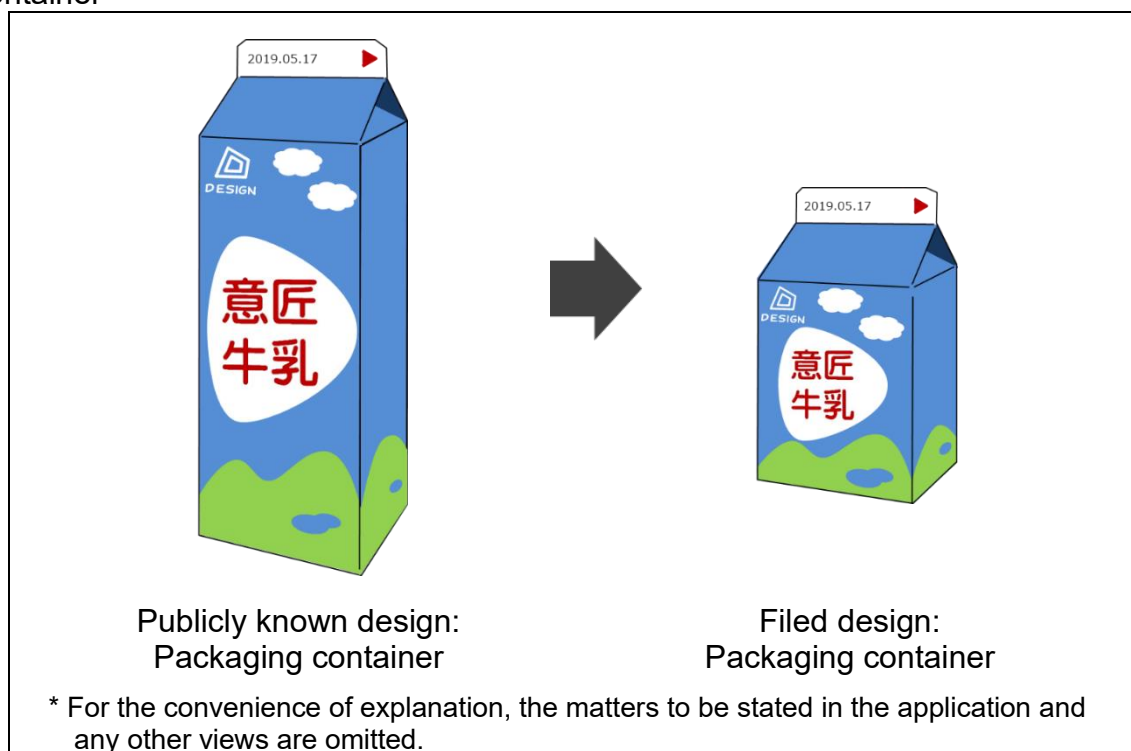


(Note) In both of the case examples above, it is assumed that changing the layout of switches is an ordinary technique in the field of switch plates for room lights, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

6.5 Design through change of component ratio

[Case example] “Packaging container”

A design which merely changed the component ratio of a publicly known packaging container



With regard to the case example above, as in the example below, even where the color of some sections are changed in the filed design, if the change is found to be a minor modification in the field of packaging containers, the examiner should not evaluate the modification in determining creative difficulty, and should determine that the filed design is one that would have been easily created.



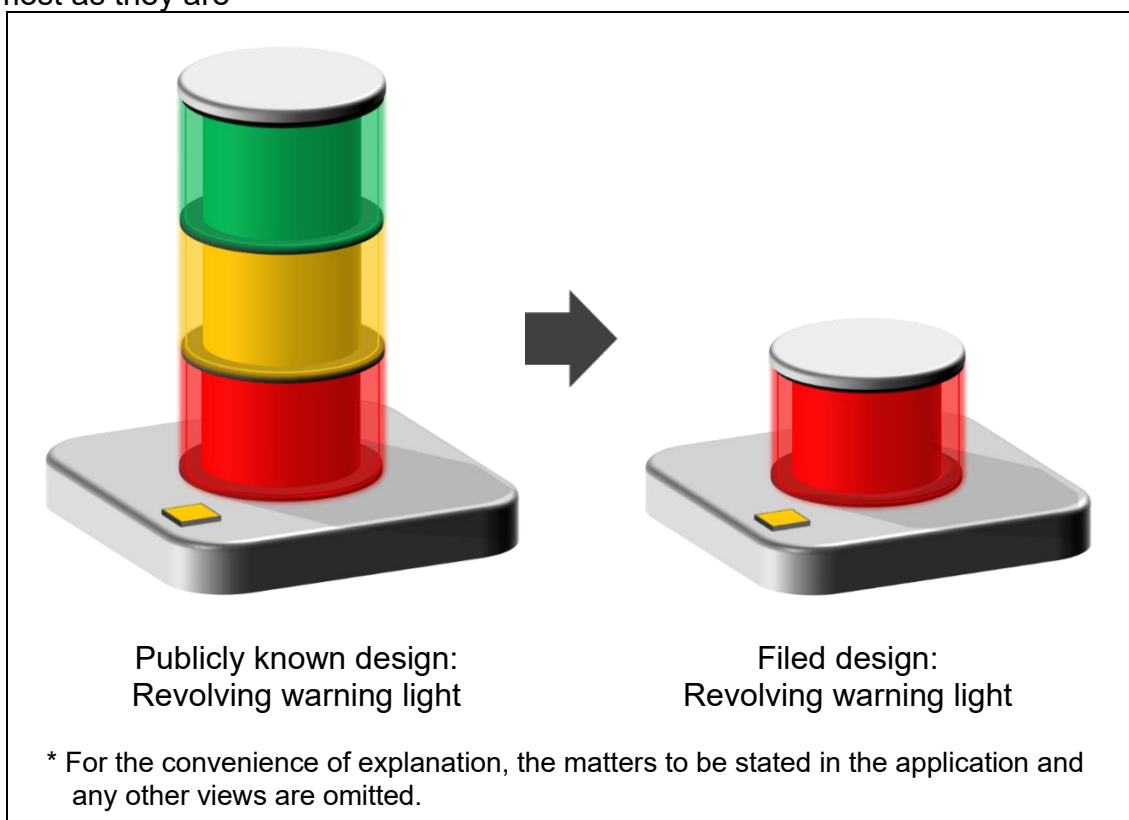
(Note) In both of the case examples above, it is assumed that changing the component ratio is an ordinary technique in the field of packaging containers, and that the

filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

6.6 Design through change in number of units of a continuous constituent element

[Case example] “Revolving warning light”

A design which merely reduced the layers of publicly known revolving warning lights, almost as they are



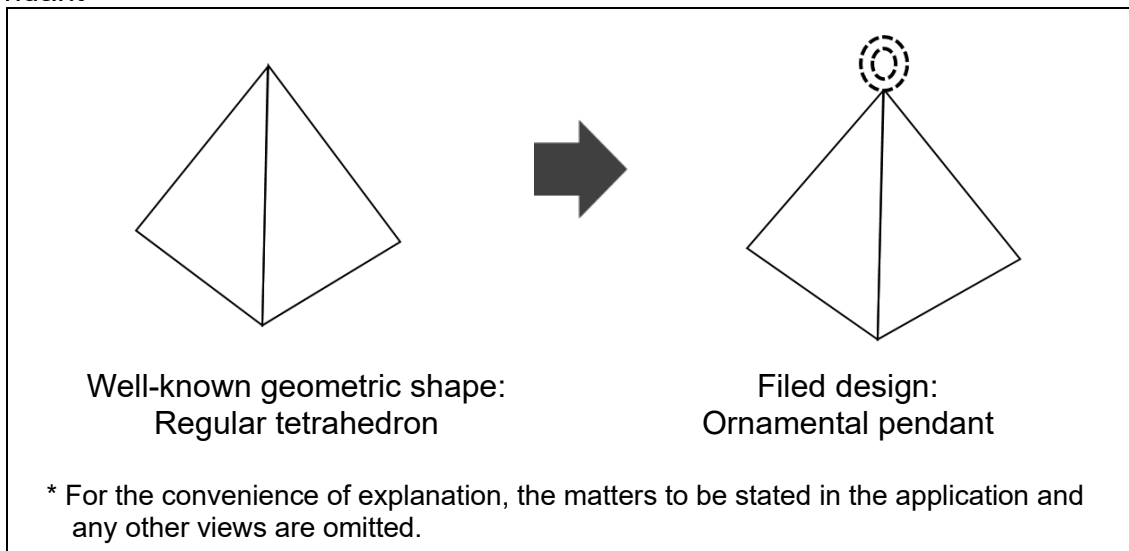
(Note) In the case example above, it is assumed that reducing the layers of lights to one is an ordinary technique in the field of revolving warning lights, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

6.7 Design through use or diversion of a constituent element beyond the framework of the article, etc.

[Case example 1] Example of a design based on a publicly known shape, etc.:

“Ornamental pendant”

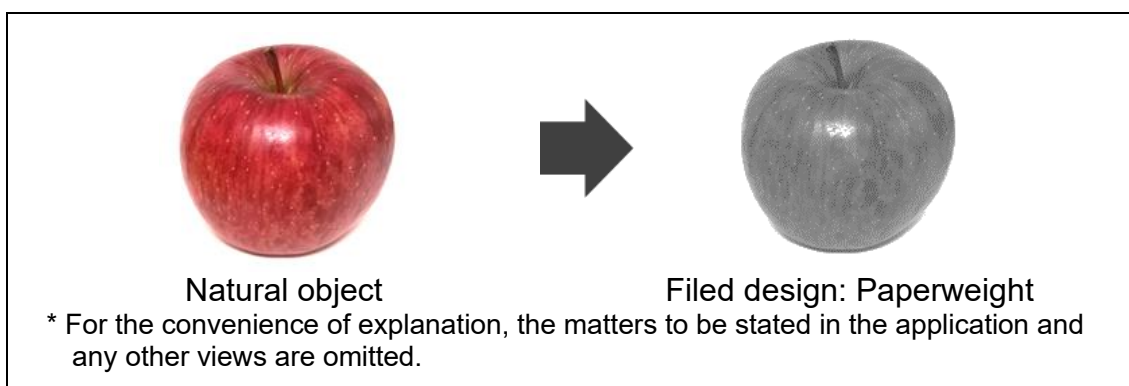
A design which merely represented a well-known geometric shape as an ornamental pendant



(Note) In the case example above, it is assumed that using a well-known geometric shape for the shape, etc. of the article, etc. is an ordinary technique in the field of ornamental pendants; that the arrangement of metal parts is also commonly seen in the field of ornamental pendants; and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 2] Example of a design based on a natural object, etc. (animal, plant, or mineral): “Paperweight”

A design which merely represented a natural object, etc. almost as it is as a paperweight



(Note) In the case example above, it is assumed that using the shape, etc. of a natural object, etc. for the shape, etc. of the article, etc. is an ordinary technique in the field of paperweights, and that the filed design shows no novelty or original

design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 3] Examples of a design based on copyright works

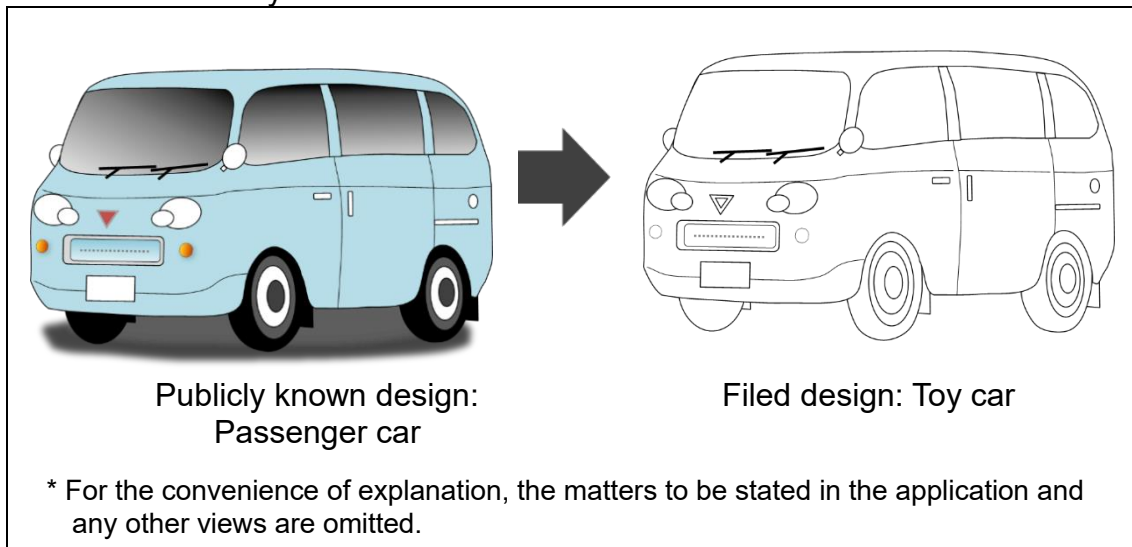
- A design which merely represented the shape of Rodin's "The Thinker" sculpture almost as it is as a figurine
- A design which merely represented Leonardo da Vinci's "Mona Lisa" painting almost as it is as wallpaper

[Case example 4] Examples of a design based on buildings

- A design which merely represented the shape of the "Eiffel Tower" almost as it is as an ornament
- A design which merely represents the shape of the "Phoenix Hall at the Byodoin Temple" almost as it is as an ornament

[Case example 5] "Toy cars"

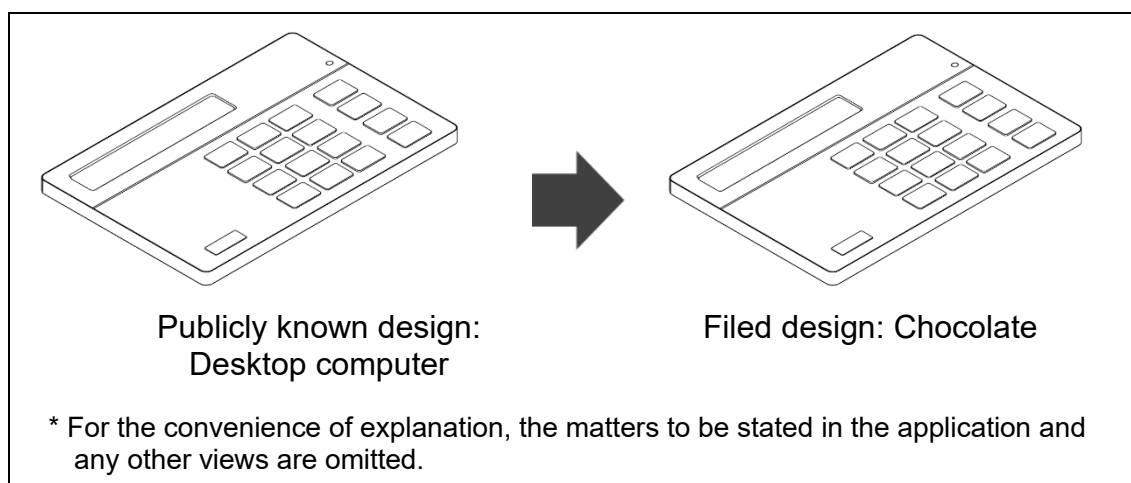
A design which merely represented the shape of a publicly known passenger car almost as it is as a toy car



(Note) In the case example above it is assumed that using the shape of a publicly known passenger car for the shape of the article, etc. is an ordinary technique in the field of toy cars, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.

[Case example 6] “Chocolate”

A design which merely represents the shape of a publicly known desktop computer almost as it is as a chocolate



(Note) In the case example above, it is assumed that using the shape of a publicly known desktop computer for the shape of the article, etc. is an ordinary technique in the field of chocolates, and that the filed design shows no novelty or original design ideas from the viewpoint of a person skilled in the art. The example typically represents a method for determining creative difficulty assuming the filed design is novel.