

Appeal decision

Appeal No. 2018-2886

Appellant The Procter & Gamble Company

Patent Attorney NAGAI, Hiroshi

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The case of appeal against the examiner's decision of refusal of Trademark Application No. 2015-107820 has resulted in the following appeal decision:

Conclusion

The appeal of the case was groundless.

Reasons

1 The trademark in the Application

The trademark in the Application is configured as indicated in Attachment 1, and the application for its registration was filed as a motion mark on November 5, 2015 with designated goods of Classes 3 and 5 which are as specified in the application. Thereafter, designated goods in the application were finally amended by Written Amendments dated April 3, 2017 in the original examination and dated April 9, 2018 in the body as Class 3 "Laundry and bleaching preparations; soaps and detergents; laundry preparations for processing of fabrics and for beauty; incenses; oil for perfumery and perfumes; perfumes for home; fragrance for fabrics; scented wood; aromatics [essential oils]; essential oil; fumigation preparations released as smoke, mist, or gas into air, atmosphere, or on fabrics; and fragrance for air and fabrics." and Class 5 "Air cleaner; air purifying preparations;

room air cleaner; deodorizers for fabrics and rooms; and deodorizers (except for deodorizers for industry, bodies, and animals and breath fresheners)".

2 Gist of reasons for refusal stated in the examiner's decision

The examiner's decision acknowledged and determined that "the trademark in the Application is recognized as expressing a state where a plurality of bubbles absorb green cloud-like or smoke-like substances, and all the substances finally disappear. In the business field of the designated goods in the present application, regarding a product having the feature such as deodorization or removal of pollution, for example, actual circumstances were acknowledged in which an image diagram representing a mechanism in which a cause (bacteria or the like) of an odor, pollution, or the like is broken or eliminated by decomposing materials is usually used for easy understanding of information regarding the features, applications, and efficacies of the product. Therefore, even if the trademark in the Application is used for the product that has the feature such as deodorization or removal of pollution among the designated goods, for example, "Laundry preparations; fragrance for air and fabrics; air cleaner; air purifying preparations; room air cleaner; and deodorizers for fabrics and rooms", it should be said that traders and consumers coming into contact with the trademark in the Application only recognize this as one type of an image representing the mechanism in which the cause (bacteria or the like) of the odor, the pollution, or the like is broken or eliminated by the decomposing materials. Then, it is reasonable to determine that the trademark in the Application simply displays the efficacy of the product in a common manner. Therefore, the trademark in the Application falls under Article 3(1)(iii) of the Trademark Act", and refused the present application.

3 Examination of evidence by the body

The chief administrative judge found the fact as indicated in Attachment 2 as a result of the ex officio examination of evidence regarding whether or not the trademark in the Application falls under Article 3(1)(iii) of the Trademark Act. Therefore, the chief administrative judge notified the Appellant of the result of the examination of evidence in accordance with Article 150(5) of the Patent Act which is applied mutatis mutandis pursuant to Article 56(1) of the Trademark Act on February 12, 2019 and gave an opportunity to state the opinion within a reasonable period of time.

4 Gist of Appellant's opinion with respect to the notification regarding the examination of evidence

The Appellant summarized the opinion as follows with respect to the notification regarding the examination of evidence in 3.

(1) The trademark in the Application cannot be assumed to be the same as one type of motions as in the moving images exemplified in the notification. In the light of recognition of general consumers described below, in combination with the fact that deodorant components are invisible, it is obvious that, although the trademark in the Application can indicate that the bubbles are deodorant components in relation with the designated goods, it is not possible for consumers to directly recognize the efficacy of the product, and the trademark in the Application does not fall under one type of simple display of the quality or the like and may be a mark identifying the source of goods used to identify one's business from business of another person.

(2) The moving images exemplified in the notification can be divided into three categories. In the first category "a video that includes characters, indicating the efficacy of the product, from which the efficacy of the product can be clearly recognized", a video or the like is classified in which the characters of "deodorant" are displayed in the video when the efficacy is indicated and the efficacy of the product is recognized by eliminating characters of "urine odor" which are assumed as pollution.

Whereas, because characters and captions are not displayed in the trademark in the Application, it is obvious that the trademark in the Application does not belong to this category. Furthermore, it cannot be considered that even consumers who see the video that belongs to this category immediately recognize the efficacy same as the efficacy that may be perceived from the video belonging to this category, from the motion of the trademark in the Application in which the characters and the captions are not displayed.

(3) In the second category "a case where a target or a place whose odor is eliminated or a target or a place to be cleaned is displayed together", a video is classified that makes the efficacy of the product to be recognized by also displaying an "object" such as cloth or shoes or a "place" such as a restroom or an entire room to be a target to which the efficacy is applied when the efficacy is displayed.

Whereas, because an object or a place for which the product is used and which can be immediately recognized by consumers at a glance is not displayed in the trademark in the Application, it is obvious that the trademark in the Application does not belong to this category. Furthermore, it cannot be considered that consumers who see the video belonging to this category immediately recognize the efficacy to be the same as the efficacy that may be perceived from the video belonging to this category, from the motion of the trademark in the Application in which the object or the place to which the product is used is not displayed.

(4) In the third category "a video in which the efficacy of the product can be recognized only from an entire moving image", a video is classified that includes only an abstract image diagram, and in which, although the efficacy and the application of the product cannot be immediately recognized from a motion for eliminating an odor or cleaning, the video can be recognized as an image in which an odor is eliminated or cleaning is performed as a result of comprehensive consideration of the configuration, the sound, the characters, or the like in the moving image in a case where the entire moving image is viewed.

On the other hand, the trademark in the Application is a trademark consisting only of bubbles and smoke-like substances similarly to the motion belonging to this category. Only by viewing the video, it cannot be immediately recognized that the video indicates the efficacy and the application of the product. In addition, because the moving images exemplified in the notification do not include a video in which bubbles absorb smoke or the like and implode, it can be said that the motion of the trademark in the Application itself is very original.

5 Judgment by the body

(1) Applicability of Article 3(1)(iii) of the Trademark Act

As indicated in Attachment 1, the trademark in the Application can be said to be a motion mark that expresses a series of changes (process) in which a plurality of blue bubble-like figures absorb dark green or deep green cloud-like or smoke-like figures, and thereafter, the bubble-like figures disappear. In the "Detailed Description of Trademark", it is described that "A trademark for which registration is sought (hereinafter, referred to as 'trademark') is a motion mark including 16 figures each indicating a state of a change of a mark with time. The present trademark changes at intervals of about 0.125 seconds in order from FIG. 1 to FIG. 16 and consists of a motion mark of about two seconds as a whole. In other words, from FIG. 1 to FIG. 9, the plurality of bubbles expressed in the drawings absorb green cloud-like or smoke-like substances and are gradually filled with the substances. Thereafter, from FIG. 10 to FIG. 15, each bubble implodes, and all the bubbles disappear in FIG. 16 while background remains. Note that the number displayed at the center on the lower end in each drawing indicates an order of the drawing and is not an element configuring the trademark". Then, the designated goods in the application are Class 3 "Laundry and bleaching preparations; soaps and detergents; laundry preparations for processing of fabrics and for beauty; incenses and fragrances; oil for perfumery and perfumes; perfumes for home; fragrance for fabrics; scented wood; aromatics [essential oils]; essential oil; fumigation preparations released

as smoke, mist, or gas into air, atmosphere, or on fabrics; and fragrance for air and fabrics." and Class 5 "Air cleaner; air purifying preparations; room air cleaner; deodorizers for fabrics and rooms; and deodorizers (except for deodorizers for industry, bodies, and animals and breath fresheners).".

Incidentally, in the designated goods in the application, for example, Class 3 "Laundry and bleaching preparations" and Class 5 "Air cleaner, air purifying preparations, room air cleaner, deodorizers for fabrics and rooms, and deodorizers (except for deodorizers for industry, bodies, and animals and breath fresheners)" include products that insist "deodorant" as the efficacy of the product or the like. However, the "odor" related to the efficacy cannot be essentially recognized visually. Therefore, in the business field handling these products, in the advertisement of the product or the like, creation and use of an image that is obtained by visualizing a series of processes (including moving images) such as how the efficacy of "deodorant" caused by the use of the product works are widely performed in general. Furthermore, in such an image, an uncomfortable impression before the product is used is generally expressed by a dark cloud or a smoke-like figure or a pointed figure. On the other hand, a comfortable impression after the product has been used is often expressed by a transparent, or white, or light blue figure, background, or the like. In addition, a subtitle, a picture, or the like expressing a more specific efficacy of the product along the image is added at the same time or before or after the image with not a little frequency (Attachment 2).

Then, when the trademark in the Application that is a motion mark represented by the constitution as described above is used for the designated goods thereof including Class 3 "Laundry and bleaching preparations" and Class 5 "Air cleaner; air purifying preparations; room air cleaner; deodorizers for fabrics and rooms; and deodorizers (except for deodorizers for industry, bodies, and animals and breath fresheners)", traders and consumers coming into contact with this only perceive and understand that the trademark in the Application displays one type of the images, obtained by visualizing the series of processes, regarding the efficacy of the product that is widely used in the advertisement of the product or the like in general even in consideration of the difference from the example indicated in Attachment 2, and it should be said that consumers and traders do not recognize the trademark in the Application as a mark indicating the source of the product or a mark for distinguishing relevant products from others.

Therefore, the trademark in the Application consists solely of a mark indicating, that displays the efficacy of the product by the usually used method in relation with the designated goods thereof, and the trademark in the Application falls under Article 3(1)(iii) of the Trademark Act.

(2) The Appellant's allegation

A The Appellant alleges that it cannot be considered that consumers immediately recognize the trademark in the Application as a mark indicating the efficacy of the product because the characters and the captions such as "deodorant" indicating the efficacy of the product are not displayed and the target and the place to which the efficacy of the product is applied is not displayed.

However, in the business field handling the product insisting "deodorant" as the efficacy of the product or the like among the designated goods in the application, actual circumstances were acknowledged in which the series of processes regarding the efficacy "deodorant" of the product is expressed by a substantially common image (including moving images) in general when the product is advertised or the like. In such a circumstance, it should be said that there is a case where the characters of "deodorant", the picture representing the target, and the like are added in order to specifically express the efficacy of the product along the image as described in (1). Therefore, even if the constitution of the trademark in the Application does not include the characters of "deodorant" or the like, it cannot be said that traders and consumers coming into contact with the trademark in the Application do not recognize that the trademark in the Application displays the efficacy of the product according to the fact that the constitution of the trademark in the Application does not include the characters of "deodorant".

Therefore, the Appellant's allegation cannot be accepted.

B The Appellant alleges that the example indicated in Attachment 2 can be recognized such that the moving image is an image of eliminating an odor or cleaning according to the configuration, the sound, the characters, or the like only when the entire moving image is viewed, the trademark in the Application is a trademark consisting only of bubbles and smoke-like substances, and it cannot be immediately recognized that the video represents the efficacy and the application of the product by only viewing the video, and in addition, the example does not include a video, in which the bubbles absorb the smoke or the like and implode, included in the trademark in the Application, and accordingly, the motion of the trademark in the Application itself is very original.

However, as described in (1), it can be said that the trademark in the Application is the motion mark that expresses the series of changes (process) in which the plurality of blue bubble-like figures absorb the dark green or deep green cloud-like or smoke-like figures, and thereafter, the bubble-like figures disappear. In a case where the entire constitution is compared with a part recognized by traders and consumers as the image that expresses the series of processes regarding the efficacy "deodorant" of the product in the example indicated in Attachment 2, details of the expression in the images and

whether or not there are the characters of "deodorant" and the picture indicating the target that are added to more specifically express the efficacy of the product are different. However, the above images have in common an essence of an image obtained by visualizing the series of processes from the uncomfortable impression before the product is used to the comfortable impression after the product has been used. It should be said that this is not reversed by the differences.

Therefore, the Appellant's allegation cannot be accepted.

(3) Summary

As described above, when the trademark in the Application is used for its designated goods, the trademark in the Application falls under Article 3(1)(iii) of the Trademark Act. Therefore, the trademark in the Application cannot be registered.

Therefore, the appeal decision shall be made as described in the conclusion.

January 21, 2020

Chief administrative judge: TANAKA, Takanori

Administrative judge: KANEKO, Naohito

Administrative judge: ISHIZUKA, Rie

Attachment

1 The trademark in the Application

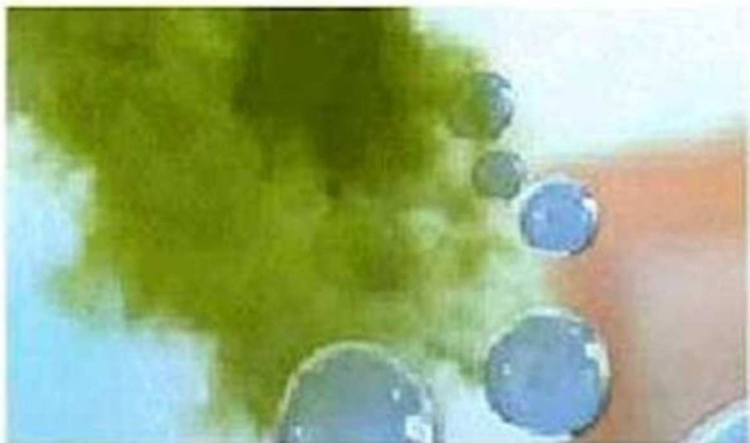
(1) trademark for which registration is sought



1



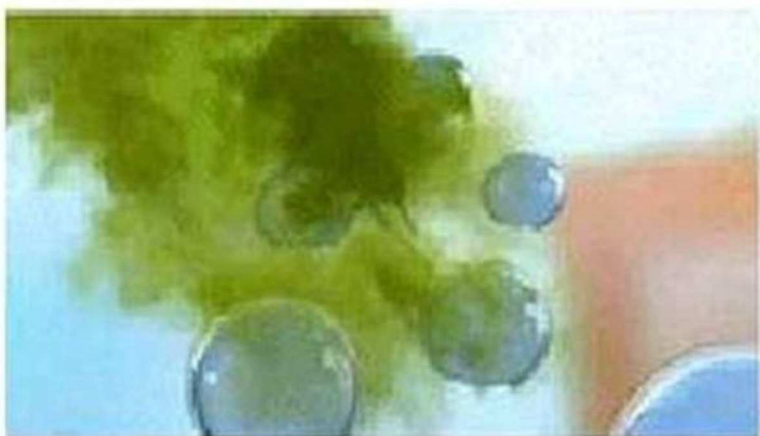
2



3



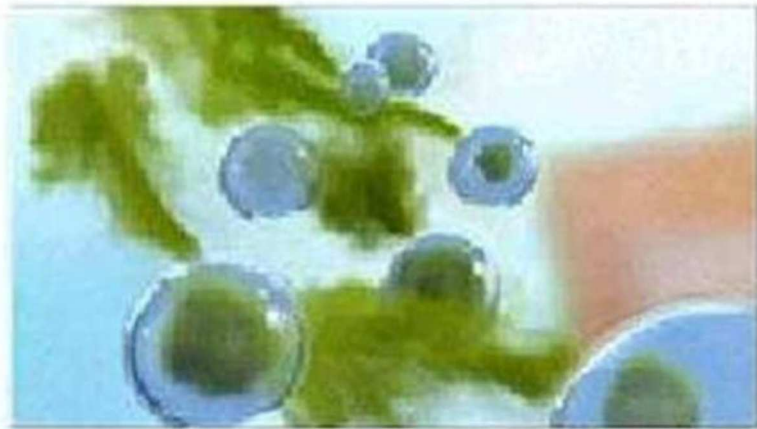
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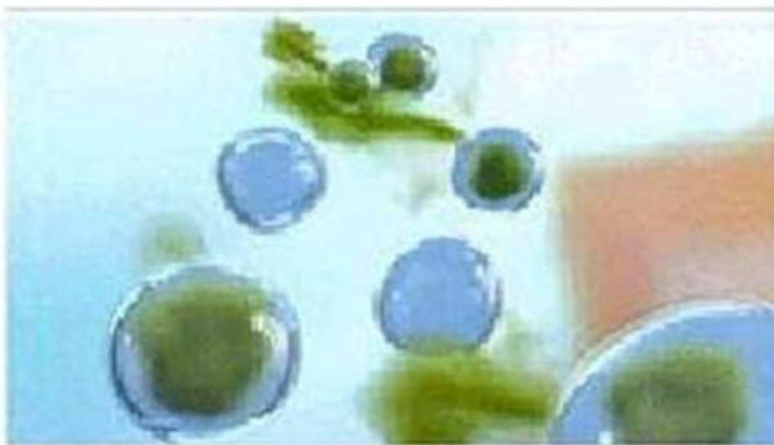
5



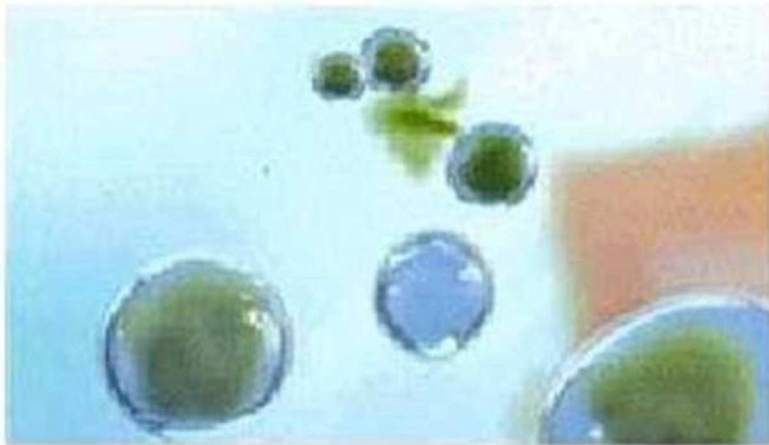
6



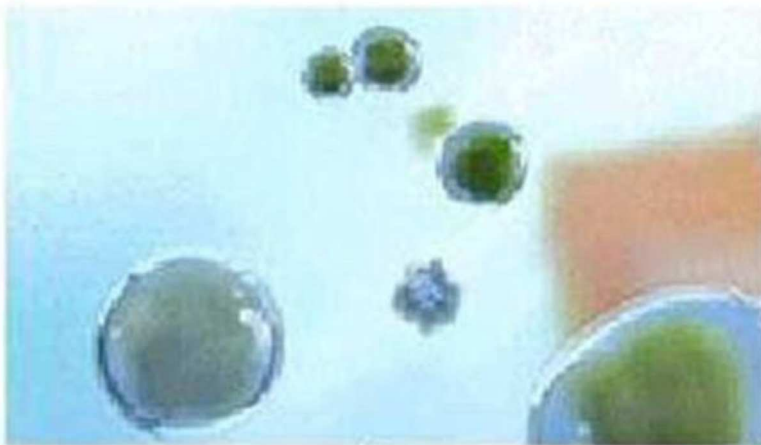
7



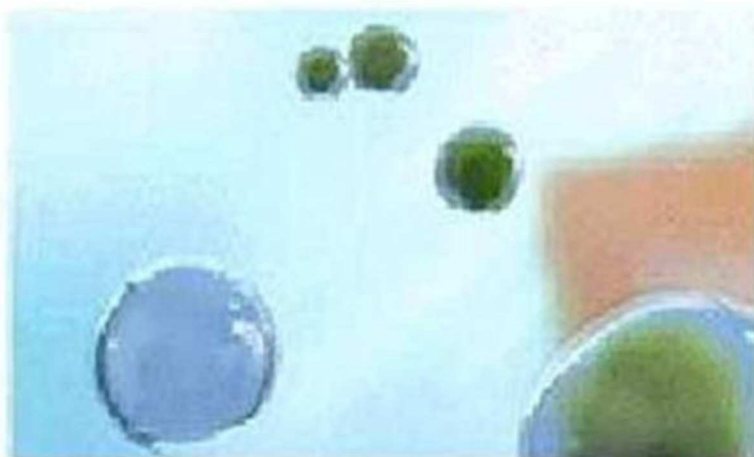
8



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16

(2) Detailed Description of Trademark

A trademark for which registration is sought (hereinafter, referred to as "trademark") is a motion mark including 16 figures each indicating a state of a change of a mark with time. The present trademark changes at intervals of about 0.125 seconds in order from FIG. 1 to FIG. 16 and consists of a motion trademark of about two seconds as a whole. In other words, from FIG. 1 to FIG. 9, the plurality of bubbles in the drawings absorb the green cloud-like or smoke-like substances and are gradually filled with the substances. Thereafter, from FIG. 10 to FIG. 15, each bubble implodes, and all the bubbles disappear in FIG. 16 while the background remains. Note that the number displayed at the center on the lower end in each drawing indicates an order of the drawing and is not an element configuring the trademark.

2 Facts disclosed in the notification of examination of evidence dated on February 12,

2019 (image data are applied by collegial body)

(1) Kobayashi Pharmaceutical Co., Ltd. 無香空間 (Muko kukan; no smell space)

<https://youtu.be/CIQT83GUiK4> "Real talk (Inoue and Suzuki)" version



https://youtu.be/cNTVl_IQONc "Experiment" version

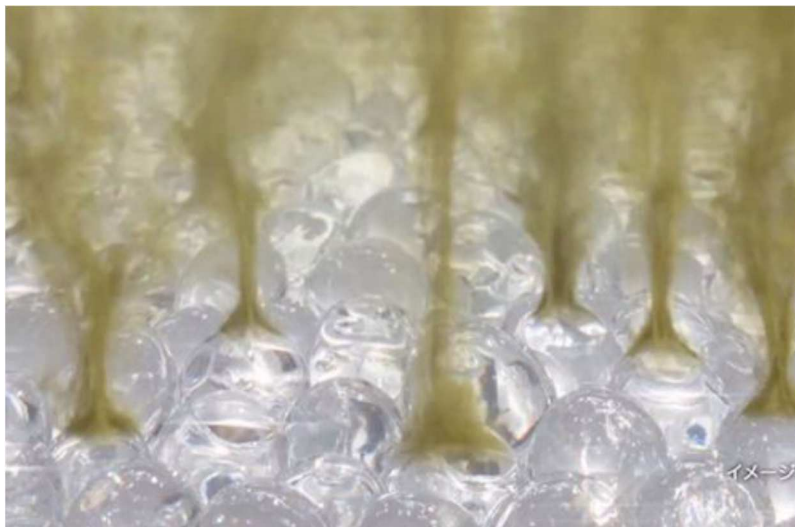


<https://youtu.be/1at-sNvWAuY>





<https://youtu.be/QtDn6MISDpY>





(2) Kobayashi Pharmaceutical Co., Ltd. トイレの消臭元 (Toire no shosyugen; deodorant source in restroom)

<https://youtu.be/Jv03eIVr9AM> "Effect comes back" version



<https://youtu.be/8XMWsuegj4I> "Rossi-kun" version



(3) Kao Corporation Wide heater

<https://youtu.be/A48FunaXspc> "If you have or you don't foul + rose" version





https://youtu.be/j_EZnrIUXVw "This towel stinks..." in 2016



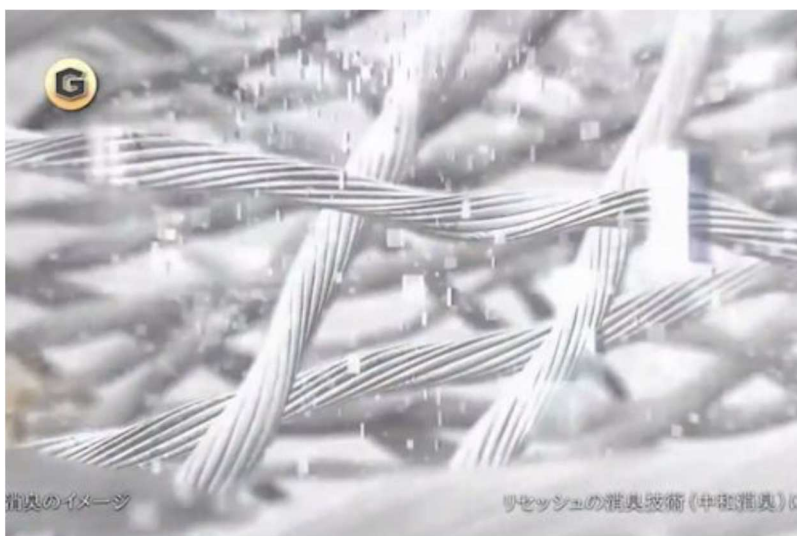


(4) Kao Corporation Resesh antiseptic EX
<https://youtu.be/1spG9v9mjeM> "Morning bus stop"





<https://youtu.be/Nhg48aNC5fg> "Returned smell in the entrance" version



<https://youtu.be/6gVSVfYoR3A> "Smell living dead" version





(5) Kao Corporation Attack deodorant strong

<https://youtu.be/9Izio0lxiCk> "Rely on whatever you can rely on" version





(6) Lion Corporation Top NANOX

<https://youtu.be/WQvdlCTGuOk> "Generation smell on such an occasion" version



(7) Lion Corporation SOFLAN Premium Deodorizer plus
<https://youtu.be/nQ3nnLgLjcw> "Strong" version





<https://youtu.be/usKyq5deWV8> "Encouragement" version

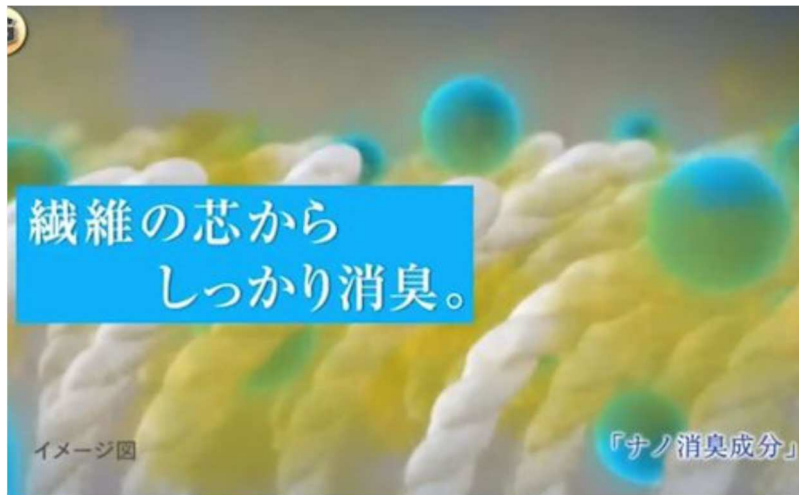




<https://youtu.be/tEzFdaI35f0> [Thoroughly deodorize in winter·Christmas] version



<https://youtu.be/Y5lgD3GHWaQ> "Applique", "Smell for five days"

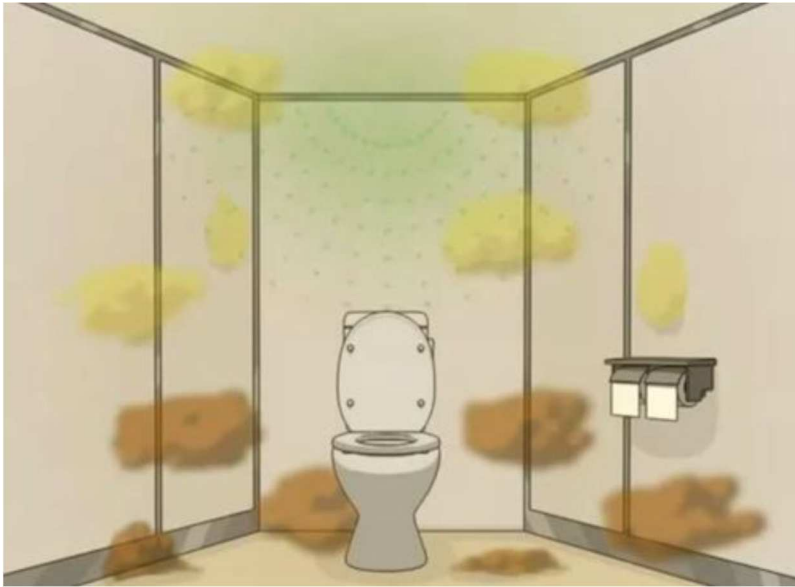




(8) Reckitt Benckiser Japan Ltd. Dr. Scholl shoe spray
<https://youtu.be/uPIQ0yEJuJ0> "Shoes' smell in the entrance" version

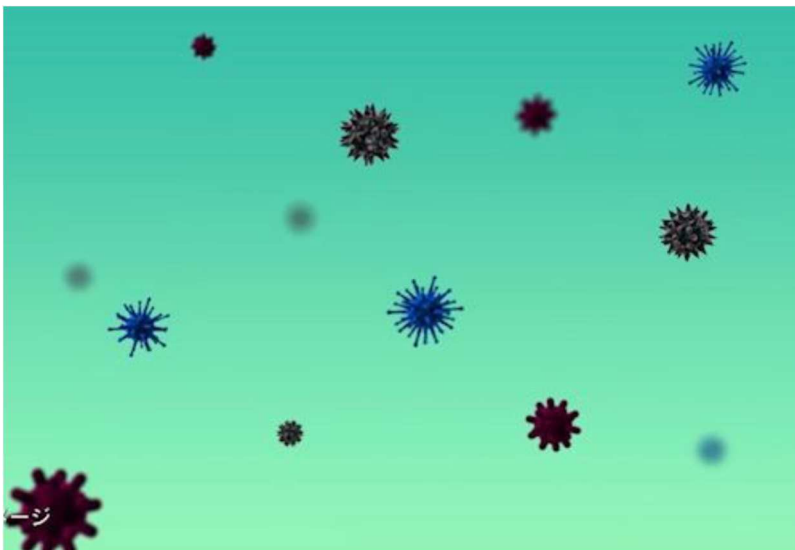


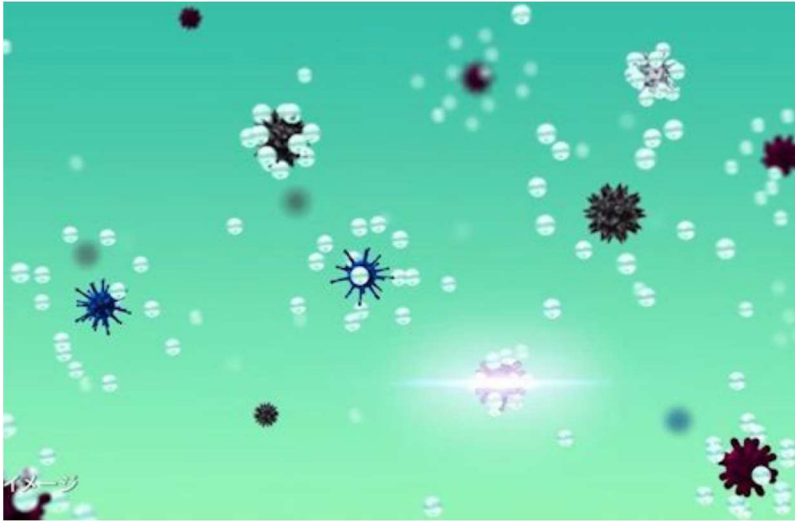
(9) DAINIHON JOCHUGIKU CO., LTD. One-push Toilet Deodorizer Aerosol
<https://youtu.be/b6fDUFugbRM>





(10) OHKI PHARMACEUTICAL CO., LTD. Viruoff aromatic harmony
<https://youtu.be/vhIfM6RBZQ> "Harmony of sterilization, deodorant, and aroma"





(11) Separator System Kogyo God of deodorant and sterilization
<https://youtu.be/PzDgU3o8cIQ> "Entrance" version



(12) Earth Corporation. Toire no Sukki-ri!
<https://youtu.be/2tGwfmbAQEA>



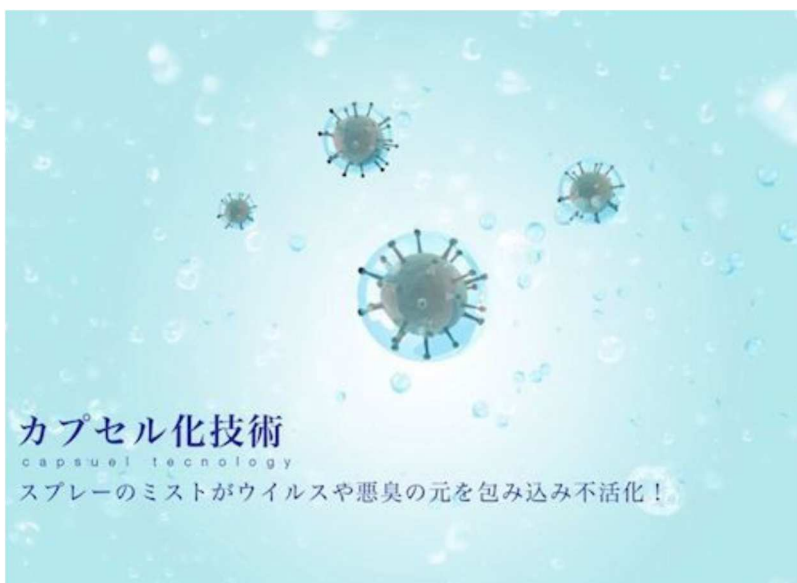


(13) FUMAKILLA LIMITED
<https://youtu.be/YPDnQRdEAxQ> "Shoe's feeling"



(14) Antibacjapan room sterilization and deodorant spray Magic ball in hand
<https://youtu.be/EIG2MxKiDAg>



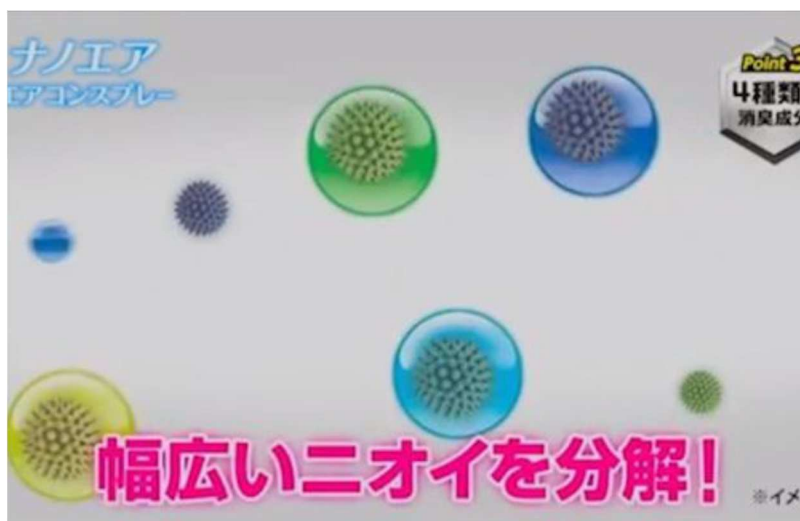


(15) HARUKADO CO., LTD

https://youtu.be/U4_y7yYZNHw "SHOSHU NANO AIR SHANAIKAKUSAN
(Deodorant nano air diffused in vehicle)"



<https://youtu.be/saFrKsTn4Vo> "SHOSHU NANO AIR AIRCON SPRAY (deodorant nano air air-conditioner spray)"





<https://youtu.be/17tn9Xx3Vn0> "AG BLOCK SEAT SHITA (AG block to be placed below seat)"

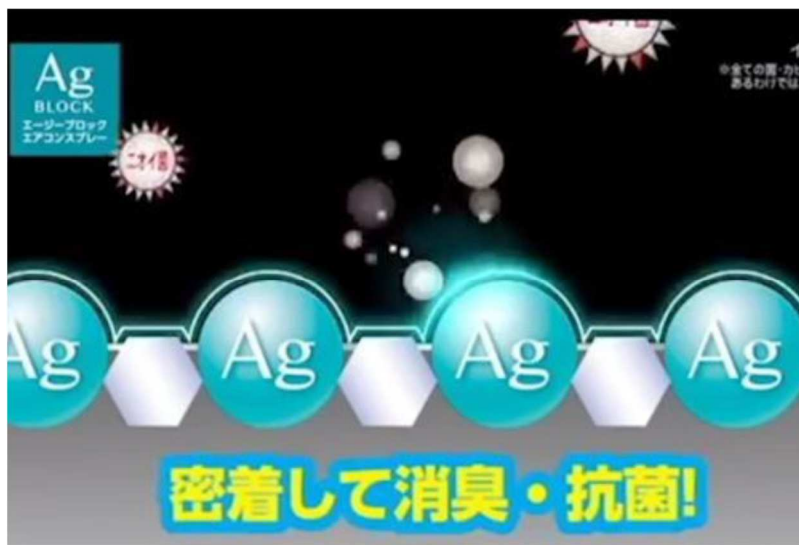
<https://youtu.be/I-WF-WnTJ44> "AG BLOCK OKIGATA (AG block standing type)"

<https://youtu.be/lrO-SNjDs4A> "AG BLOCK MIST"





<https://youtu.be/Ts3uWFj6dgA> "AG BLOCK AIRCON SPRAY (AG block air-conditioner spray)"



<https://youtu.be/aJ5HTs3QfIY> "KAKISHIBU SHOSHU MIST (persimmon tannin deodorant mist)"

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ミスト

消臭イメージ



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