

Appeal decision

Appeal No. 2020-361

Appellant Leica Biosystems Imaging, Inc.

Patent Attorney Felix-Reinhard, Einsel

Patent Attorney YAMAZAKI, Wakako

Patent Attorney MAEKAWA, Saori

The case of appeal against the examiner's decision of refusal of Japanese Design Application No. 2018-14375 entitled "Digital Pathology Apparatus" has resulted in the following appeal decision.

Conclusion

The examiner's decision is revoked.

The design in the application shall be registered.

Reason

No. 1 History of the procedures

The present application is an application for design registration filed on June 29, 2018, claiming priority under the Paris Convention (the first filing: US, December 29, 2017), and the history of the main procedures is as follow.

Dated May 27, 2019	Notice of reasons for refusal
August 30, 2019	Submission of written opinion
Dated October 3, 2019	Examiner's decision of refusal
January 10, 2020	Appeal against the examiner's decision of refusal

No. 2 The design in the application

The present application is an application for design registration to request a design registration of a part of an article, and according to the description of the application of the present application, an article to the design of the design in the application is "Digital Pathology Apparatus," and the shape, patterns or colors, or any combination thereof (hereinafter, "the shape, patterns or colors, or any combination

thereof" are referred to as "the form") is as described in the application and the drawings attached to the application (see Appendix 1).

No. 3 Reasons for refusal stated in the examiner's decision

The reasons for refusal stated in the examiner's decision are that since it is recognized that the design in the application could have been easily created by a person who has ordinary skill in the field of the design (hereinafter, referred to as "a person skilled in the art") based on the shape, patterns or colors, or any combination thereof that were publicly known in Japan or a foreign country prior to the filing of the application, it falls under the provisions of Article 3(2) of the Design Act. Concretely, the reasons for refusal are as follows.

"Not limited to the field of 'Digital Pathology Apparatus' that is the article to the design of the application for design registration, in the article having a function indicating an image, a plurality of fan-shaped display frames arranged in a circular shape as a whole were very generally known, such as image 1, even before the filing of the present application.

Also, one provided with wide gaps in a part of the plurality of fan-shaped display frames arranged in a circular shape had been publicly known before the filing of the present application, as shown in Image 2. Further, since it had been very generally known before the filing of the present application to make the gaps of the adjacent fan-shaped display frames parallel, as shown in Image 1 and Image 2, it cannot be recognized that a person skilled in the art is required to have particular creativity to provide wide gaps in parallel.

Therefore, the design in the application merely makes the image be the part for which the design registration, by providing wide gaps in parallel in a part of a plurality of fan-shaped display frames arranged in a circular shape that had been a common form before the filing of the present application by a method that had been publicly known before the filing of the present application, and could have been easily created by a person skilled in the art.

(Omitted)

Image 1

Type of electric telecommunication line

Internet

Posting confirmation date (publication date)

December 15, 2016

Acceptance date accepted by Design Division of Japan Patent Office

December 26, 2016

Poster

Golf Web Academy

Title Golf Boost by Jim McLean
at App Store

Address of posted page An image of "Video
function of software for smartphones" posted in <https://itunes.apple.com/jp/app/golf-boost-by-jim-mclean/id839535487?mt=8> (Publicly Known Information in Design
Division of Japan Patent Office No. HJ28138887)

Image 2
US Patent and Trademark Gazette January 24, 2017
Image for display screens (Registration Number No. US D777173S)
(Publicly Known Information in Design Division of Japan Patent Office No.
HH29301076)"

No. 4 Judgment by the body

Hereinafter, the applicability to Article 3(2) of the Design Act of the design in the application; that is, whether or not the design in the application could have been easily created by a person skilled in the art, will be examined and judged.

1 Recognition of the design in the application

In the body, the design in the application is recognized as follows (see Appendix 1).

(1) Article to the design

The article to the design of the design in the application (hereinafter, referred to as "the article in the application") is "Digital Pathology Apparatus," and in "Description of the article to the design" of the application, it is described as follows.

"This article is digital pathology apparatus which converts a pathology specimen (glass slide) into a digital slide which can be displayed, managed, shared, and analyzed by a monitor. An image expressed to a graphic image view is an image provided for use in the operation carried out to perform a function concerning the digital pathology apparatus. The image expressed to the graphic image view is displayed on the article or an article used simultaneously with the article. The image expressed to the graphic image view shows a state of the glass slide placed on a slide rotary shelf in the digital pathology apparatus".

Further, in "Description of the design" of the application, it is described as follows.

"A part drawn with solid lines; i.e., a part expressed to the graphic image view, is the part for which the design registration is requested as a partial design. A set of

drawings showing the form of the whole article to the design is omitted, since the part for which the design registration is requested does not appear".

According to these descriptions of the application, the article in the application is "Digital Pathology Apparatus" for displaying, managing, sharing, and analyzing a pathology specimen (glass slide) by a monitor, and an image provided for use in the operation carried out to perform a function thereof is expressed as a "graphic image view".

(2) Image expressed to the "graphic image view"

As described in (1) above, since it is explained that "a set of drawings showing the form of the whole article to the design is omitted since the part for which the design registration is requested does not appear," and the image expressed to the "graphic image view" (hereinafter, referred to as "the image in the application") is provided for use in the operation carried out to perform a function concerning the "digital pathology apparatus," it is recognized that the image in the application is an image displayed in "an article used in an integrated manner" with the article in the application, which is stipulated in Article 2 (2) of the Design Act. That is, it is recognized that the image in the application falls under the image provided for use of the operation of the article stipulated in Article 2 (2) of the Design Act.

The part for which the design registration is requested as a partial design in the design in the application is "a part drawn with solid lines" (hereinafter, referred to as "the image part in the application") in the image in the application.

(3) Usage and function of the image part in the application

According to the description of the application in (1) above, it is assumed that the article in the application includes a slide rotary shelf on which a pathology specimen (glass slide) is placed. Further, the image part in the application is divided into 15 pieces and is arranged in a generally circular shape, and number portions 1 to 15 (drawn with broken lines and do not configure the image part in the application) are indicated in the respective sections. According to the description of "the image expressed to the graphic image view shows a state of the glass slide placed on a slide rotary shelf ..." of the application of (1) above, it is recognized that the image part in the application arranged in the generally circular shape corresponds to a position or kind of the slide rotary shelf, and that the usage and function of the image part in the application indicates information on the state of the glass slide of the specific rotary shelf.

(4) Position, size, and range of the image part in the application in the image in the application

The image part in the application drawn with solid lines in the image in the

application is annularly positioned slightly to the lower left in the center in the horizontally rectangular image in the application (an aspect ratio is about 1:1.6), and the maximum diameter of the annular portion occupies a size and range of about 1/1.3 of the vertical width and about 1/2.1 of the horizontal width of the image in the present application.

(5) Form of the image part in the application

A Generally donut-shaped ring

The image part in the application is disposed so that 15 generally fan surface-shaped sections are aligned and disposed to form a generally donut-shaped ring as a whole, and 15 parallel gaps are formed between the respective sections. The 15 generally fan surface-shaped sections and the 15 gaps are symmetrically expressed.

B Shape of the generally fan surface-shaped section

Each generally fan surface-shaped section is of almost the same shape and size as the others, and is expressed so as to be line-symmetrical in a circumferential direction (generally symmetrical about a generally radial direction). The length (length in a generally radial direction) of the straight-line portion of the generally fan surface-shaped section is about 1/2.8 of the radius of the entire generally donut-shaped ring.

C Gaps

The fifth gap from the top on the right side (the gap between the section indicated as 7 and the section indicated as 8 by block lines) is formed to be wide, and a position of the gap is a position that internally divides the right half of the generally donut-shaped ring into about 3/5 arc and about 2/5 arc. The fifth gap from the top on the left side (the gap between the section indicated as 13 and the section indicated as 14 by broken lines) is also formed to be wide in the same way, and the other gaps except for the left and right wide gaps are of almost the same shape and the same size, and are formed to be very narrow.

D Constitution of the generally fan surface-shaped section

The generally fan surface-shaped sections on the upper side sandwiched between the left and right wide gaps are 9 pieces, and the generally fan surface-shaped sections on the lower side are 6 pieces. A virtual intersection point that extends and connects the straight line portion of each of the upper side 9 generally fan surface-shaped sections is located at a slightly upper position from the center point of the entire generally donut-shaped ring, and a virtual intersection point that extends and connects the straight line portion of each of the lower side 6 generally fan surface-shaped sections is located at a slightly lower position from the center point of the entire generally donut-shaped ring. That is, all of the straight-line portions of the generally fan surface-shaped sections are

not located at radial positions from the center point of the entire generally donut-shaped ring, and the upper side 9 generally fan surface-shaped sections and the lower side 6 generally fan surface-shaped sections are slightly translated up and down, and the translation forms the left and right wide gaps.

2 Recognition of Cited Image

The image cited in the reasons for refusal stated in the examiner's decision is recognized as follows.

(1) Image 1 (see Appendix 2)

A Usage and function of Image 1

Since Image 1 is an image of a "video function of software for smartphones," and it is described that "Boost your Swing!" below a button indicated as "REC," it can be assumed that the usage and function is recording golf swing and the like.

B Position, size, and range of a part corresponding to the image part in the application

A part corresponding to the image part in the application is located at the generally center position in a vertically rectangular Image 1 (an aspect ratio is about 4:3), and the maximum diameter of the generally donut-shaped ring occupies a size and range of about 3/4 of the vertical width and almost all of the horizontal width of Image 1.

C Form of the part corresponding to the image part in the application

(A) Generally donut-shaped ring

7 generally fan surface-shaped sections are aligned and disposed to form a generally donut-shaped ring as a whole, and 7 gaps are formed between the respective sections. The 7 generally fan surface-shaped sections and the 7 gaps are symmetrically expressed.

(B) Shape of the generally fan surface-shaped section

Each generally fan surface-shaped section is of almost the same shape and size as the others, and is expressed so as to be line-symmetrical in a circumferential direction (generally symmetrical about a generally radial direction). The length (length in a generally radial direction) of the straight-line portion of the generally fan surface-shaped section is about a half of the radius of the entire generally donut-shaped ring.

(C) Gaps

The gaps are all of the same shape and size, and are formed to be very narrow, and are expressed in a tapered shape toward the outside.

(D) Constitution of the generally fan surface-shaped section

All of the generally fan surface-shaped sections are located at radial positions from the center point of the entire generally donut-shaped ring; that is, a virtual intersection point that extends and connects the straight-line portions of the generally fan surface-shaped sections matches with the center point of the entire generally donut-shaped ring.

(2) Image 2 (see Appendix 3)

A Usage and function of Image 2

Since Image 2 is "an image for a display screen," and there are words "Mobile Nursing System," "Physical Sign Collection," and "Temperature °C," it is assumed to have usage and functions relating to body temperature measurement for nursing.

Further, Image 2 shows two figures of FIG. 1 and FIG. 2 that are posted, and since the position, size, range, and form of the part corresponding to the image part in the present application shown in both figures are the same, these are recognized on the basis of FIG. 1.

B Position, size, and range of a part corresponding to the image part in the application

A part corresponding to the image part in the application located at the generally right half center in a horizontally rectangular Image 2 (an aspect ratio is about 3:5), and a diameter in a vertical direction of the generally donut-shaped ring occupies a size and range of about half of the vertical width of Image 2 and a horizontal diameter occupies about 1/2.2 of the horizontal width of Image 2.

C Form of the part corresponding to the image part in the application

(A) Generally donut-shaped ring

Seven generally fan surface-shaped sections are aligned on the left side, and 12 generally fan surface-shaped sections are aligned on the right side. Even through gaps exist between the left side and the right side, those are arranged so as to form a generally donut-shaped ring as a whole. Six gaps are formed between the respective sections on the left side, and 12 gaps are formed between the respective sections on the right side. The 7 generally fan surface-shaped section and the 6 gaps on the left side are expressed vertically symmetrically.

(B) Shape of the generally fan surface-shaped sections, etc.

The shapes of the generally fan surface-shaped sections on the right side are almost the same except for the section indicated as 37.3 by broken lines. The generally fan surface-shaped sections on the left side are also almost the same in shape, and are about twice the size of the generally fan surface-shaped sections on the right

side. The length (length in a generally radial direction) of the straight line portion of the generally fan surface-shaped section is within a range of about 1/5.6 to about 1/4.3 of the horizontal radius of the entire generally donut-shaped ring, and the length of the straight line portion becomes shorter toward the generally substantially fan-shaped sections on the upper and lower sides.

At the center position in the vertical direction on the right side, a horizontally rectangular section having a generally rounded corner, which is slightly wider than the length of the straight portion of the generally fan surface-shaped section, is provided so as to cover the section indicated as 37. 3 by broken lines.

(C) Intervals and gaps

Intervals are provided between an upper part and a lower part of the generally donut-shaped ring, and the width of the intervals is almost the same as the width of the generally fan surface-shaped section on the right side.

The gaps are of almost the same shape and the same size, and are formed to be very narrow.

(D) Constitution of the generally fan surface-shaped section

All of the generally fan surface-shaped sections are located at radial positions from the center point of the entire generally donut-shaped ring; that is, a virtual intersection point that extends and connects the straight-line portions of the generally fan surface-shaped sections substantially matches with the center point of the entire generally donut-shaped ring.

3 Regarding creative difficulty of the design in the application

It is examined whether or not the design in the application falls under the provisions of Article 3(2) of the Design Act; that is, whether or not it could have been easily created by a person skilled in the art.

First, the usage and function of the image part in the application indicate information on the state and the like of the glass slide of the specific rotary shelf, and the usage and function of recording golf swing and the like (Image 1) or the usage and function relating to body temperature measurement for nursing (Image 2) are different from the usage and function of the image part in the application, and thus it is difficult to say that a person skilled in the art would have been able to easily create the image part in the application base on the images having the different usage and functions. Especially, it is assumed that the article in the application includes the slide rotary shelf on which the pathology specimen (glass slide) is placed, and although the image part in the present application aligned in an almost circular shape corresponds to the position

and kind of the slide rotary shelf, it is not clear whether or not the form of the image having such usage and function had been publicly known before the filing of the present application.

Then, concerning the form of the image part in the application, the Cited Image does not show the constitution of the generally fan surface-shaped section of the image part in the application in which the upper side 9 generally fan surface-shaped sections and the lower side 6 generally fan surface-shaped sections are slightly translated up and down, and the translation forms the left and right wide gaps, and the point that the length of the straight line portion of the generally fan surface-shaped section is about $1/2.8$ of the radius of the entire generally donut-shaped ring is different from the form of Image 1 in which it is about a half, or Image 2 in which it is within a range of about $1/5.6$ to about $1/4.3$. Accordingly, it cannot be said that a person skilled in the art would have been able to easily create the form of the image part in the application based on the form of the Cited Image.

On the other hand, concerning the size and range of the image part in the application, since in the field of articles including images, it is often recognized that figures are displayed at various positions in images in various sizes and ranges, it must be said that a person skilled in the art would have been able to create that the position of the image part in the application is located on a slightly lower left position in the center in the horizontally rectangular image in the application and that the maximum diameter of the image part in the application is within a size and range of about $1/1.3$ of the vertical width and about $1/2.1$ of the horizontal width of the image in the present application.

Therefore, although the creation relating to the position, size, and range of the image part in the application in the image in the application is easy for a person skilled in the art, it is not clear whether or not the form of the image having the same usage and function as the image part in the application had been publicly known before the filing of the present application, and concerning the form of the image part in the application, as described above, it cannot be said that a person skilled in the art would have been able to easily create the form of the image part in the application based on the form of the Cited Image.

Consequently, it cannot be said that a person skilled in the art would have been able to easily create the design in the application based on the design cited in the reasons for refusal stated in the examiner's decision.

No. 5 Closing

As described above, since it cannot be said that the design in the application could have been easily created by a person who has ordinary skill in the field of the design based on the shape, patterns or colors, or any combination thereof that were publicly known in Japan or a foreign country prior to the filing of the application, under Article 3(2) of the Design Act, it cannot be decided that this application shall be rejected based on the reasons for refusal stated in the examiner's decision.

Further, as a result of the further body's examination, no other reason for rejecting the application concerned is found.

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

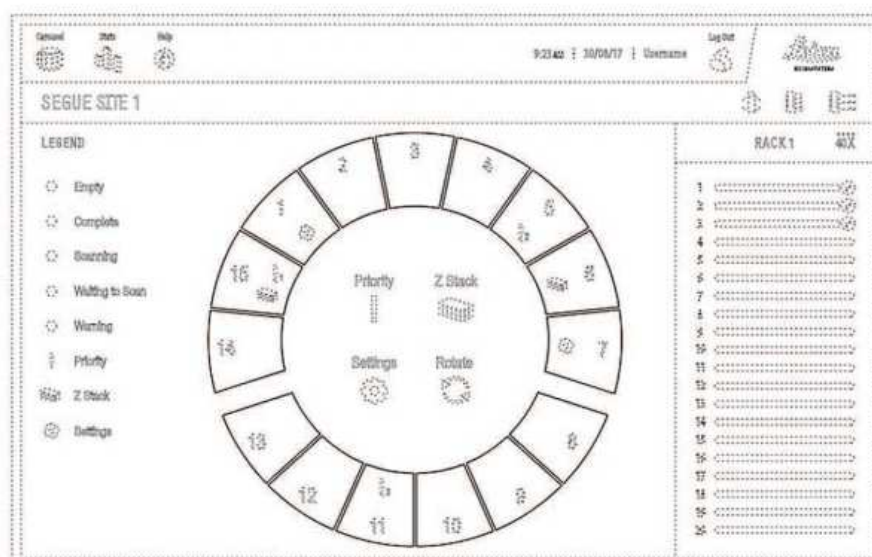
August 12, 2020

Chief administrative judge: KITASHIRO, Shinichi
Administrative judge: KOBAYASHI, Hirokazu
Administrative judge: HAMAMOTO, Fumiko

【意匠に係る物品】 デジタルパソロジー機器

【意匠に係る物品の説明】本物品は、病理標本（ガラススライド）を、モニターで表示、管理、共有及び分析することができるデジタルスライドに変換するデジタルパソロジー機器である。画像図に表された画像は、デジタルパソロジー機器に係る機能を発揮できる状態にするための操作の用に供される画像である。画像図に表された画像は、本物品、又は本物品と同時に使用される物品に表示される。画像図に表された画像は、デジタルパソロジー機器におけるスライド回転棚に戴置されるガラススライドの状態を示している。

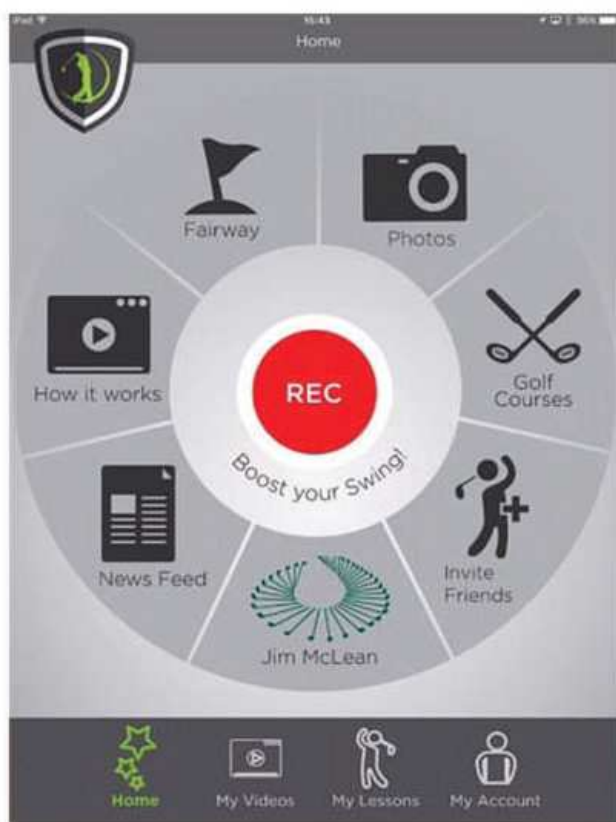
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別紙第2 画像1

電気通信回線の種類	インターネット
掲載確認日(公知日)	2016年12月15日
受入日	特許庁意匠課受入2016年12月26日
掲載者	Golf Web Academy
表題	Golf Boost by Jim McLeanをApp Storeで
掲載ページのアドレス	https://itunes.apple.com/jp/app/golf-boost-by-jim-mclean/id839535487?mt=8

に掲載された「スマートフォン用ソフトウェアの動画機能」の画像
(特許庁意匠課公知資料番号第HJ28138887号)



別紙第2 Appendix 2
画像1 Image 1

米国特許商標公報 2017年 1月24日
 ディスプレイスクリーン用画像 (登録番号US D777173S)
 (特許庁意匠課公知資料番号第HH29301076号)

(12) **United States Design Patent** (10) Patent No.: **US D777,173 S**
 Yang et al. (45) Date of Patent: ** Jan. 24, 2017

(54) **GRAPHICAL USER INTERFACE FOR A DISPLAY SCREEN OR PORTION THEREOF**

DESCRIPTION

(21) Appl. No.: 29/475,839
 (22) Filed: Dec. 6, 2013

FIG. 1 is a front view of a graphical user interface for a display screen or portion thereof; and, FIG. 2 is a front view of the graphical user interface for a display screen or portion thereof of FIG. 1 illustrating different unclaimed portions including patient vitals or values. The features shown in broken lines form no part of the claimed design.

(57) **CLAIM**

The ornamental design for a graphical user interface for a display screen or portion thereof, as shown and described.

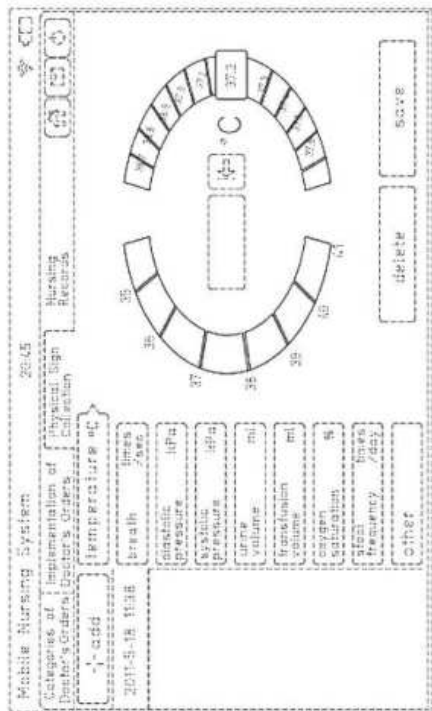


FIG. 1

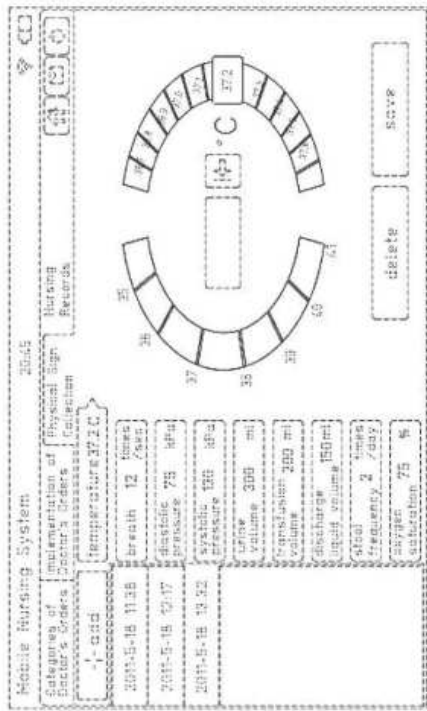


FIG. 2