

## Appeal Decision

Appeal No. 2020-14403

Appellant NAMIHIRA, Susumu

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Patent Attorney NOMURA, Akiyo

The case of appeal against the examiner's decision of refusal of Japanese Design Application No. 2019-29147, entitled " INSTRUMENT FOR PREVENTION OR TREATMENT OF CERVICAL CANCER" 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 December 27, 2019, and the main history of the procedures is as follows.

Dated May 19, 2020 Notification of reasons for refusal

July 6, 2020 Submission of Written opinion

Dated July 13, 2020 Examiner's decision of refusal

October 14, 2020 Demand for appeal against the examiner's

decision of refusal

#### No. 2 The design in the application

The present application was filed to request a design registration of a part of an article. According to the description of the application of the present application, the article to design of the design in the application is " INSTRUMENT FOR PREVENTION OR TREATMENT OF CERVICAL CANCER," 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") are as described in the application and the drawings attached to the application. "A part represented by a solid line (Note by the body: hereinafter, referred to as 'the part in the application')" is a part for which the design registration is requested as a partial design (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 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 based on shapes that were publicly known in Japan or a foreign country prior to the filing of the application, and thus it falls under the provisions of Article 3(2) of the Design Act, and specifically, as follows.

"Since it is very common to make the shape of the part of the article into a well-known simple geometric shape, beyond the field of the article, even before the filing of the present application, the design in the application in which the flat portion 1 of FIG. 2A of Design 1 mentioned below is merely made to be a substantially equilateral triangular shape, which is a well-known simple geometric shape, could have been easily created by a person skilled in the art.

Design 1

United States Patent No. 5259391 Specification issued by the trademark retrieval site of the USPTO, on November 9, 1993, before the filing of the present application for design registration"

#### No. 4 Judgment by the body

Hereinafter, we will examine and determine the applicability of Article (3)(2) of the Design Act to the design in the application; that is, whether or not 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") before the filing of the application of the design in the application.

#### 1 Recognition of the design in the application

##### (1) Article to the design in the application

The article to the design of the design in the application is "INSTRUMENT FOR PREVENTION OR TREATMENT OF CERVICAL CANCER".

##### (2) Usage and function of the part in the application

The part in the application has a function of scraping epithelial cells in or around a cervix, and is used for removing cells.

##### (3) Position, size, and scope of the part in the application

Of "INSTRUMENT FOR PREVENTION OR TREATMENT OF CERVICAL CANCER," the part in the application, is a platy body at a tip end part, which occupies about one-seventh of the total height, and a large number of protrusions arranged in a

staggered pattern over almost the entire surface on a front side is excluded from a part for which the design registration is requested.

(4) Form of the part in the application

A Overall

The part in the application is a substantially equilateral triangle platy body in which each side has a slightly convex arc shape in a front view, having the thickness of the platy body that is about a quarter of its height. Further, a front surface side and a back surface side are flat surfaces, and it is connected to a shaft portion (the shaft portion is not a part for which the design registration is requested) at a back surface center.

B Contour shape in a front view of the platy body

In the contour shape in a front view of the platy body, each side has the same convex arc shape, and the bulge width of these convex arc-shaped sides is about a half of the bulge width of an arc of a sector centered on one vertex with a radius equal to the distance between one vertex and another adjacent vertex.

2 Recognition of publicly known design cited in the reasons for refusal of the original examination

Design 1 cited in the reasons for refusal of the original examination is recognized as follows.

Further, the Cited Design is recognized according to the orientation of the drawings of the design in the application.

(1) Article to the design

The article to the design of Design 1 is "CELL COLLECTING DEVICE".

(2) Usage and function of a part of Design 1 corresponding to the part in the application (hereinafter, referred to as "Cited Part 1")

Cited Part 1 has a function of pasting cells of a female genital tract to a flat portion, and is used for collecting the pasted cells.

(3) Position, size, and scope of Cited Part 1

Cited Part 1 is a tip end portion of a part of the cell collecting device, the part to be inserted in a body, which occupies about a quarter of the total height, and about one-tenth of depth in a front view of the flat portion.

(4) Form of Cited Part 1

Cited Part 1 has a form that is a substantially disc shape and has a thickness of about one-sixth of a diameter.

3 Determination of creative difficulty of the design in the application

The determination regarding the application of the provisions of Article 3(2) of the Design Act is performed by determining whether or not the entire form of "a part for which the design registration is requested" could have been easily created by a person skilled in the art based on a publicly known form prior to the filing of the application for design registration, and considering the usage and function of the part, determining whether or not it is an ordinary technique for a person skilled in the art to make "a part

for which the design registration is requested" have such a position, such a size, and such a scope, in the form of the entire article.

Considering the creation of the shape of the part in the application, it can be said that a person skilled in the art performs the creation from the viewpoint of whether to cause unnecessary pain when the device is inserted into a body or whether it is possible to perform the intended operation without causing bleeding in the body while considering hygiene and safety and to collect cells at a required site in an appropriate state.

Then, the form of the part in the application is as shown in No. 4 1 (4) above, in the field of cell collecting devices including "INSTRUMENT FOR PREVENTION OR TREATMENT OF CERVICAL CANCER," those provided with a substantially geometrically shaped thin plate-shaped cell collecting portion at a tip end of a handle have been seen since before the filing of the present application.

However, in the substantially equilateral triangular contour shape in a front view of the platy body of the part in the application, each side has the same convex arc shape, and the bulge width of these convex arc-shaped sides is about a half of the bulge width of an arc of a sector centered on one vertex with a radius equal to the distance between one vertex and another adjacent vertex. Since the bulge width is small, it is hard to say that it is a well-known simple geometric shape (for example, a Reuleaux triangle), and although the part in the application excludes a large number of protrusions arranged in a staggered pattern on a front side, protrusions corresponding to these protrusions are not shown in Cited Part 1, and furthermore, it is not shown in Cited Part 1 that the thickness of the platy body is about a quarter of its height.

Accordingly, it cannot be said that the form of the part in the application is

merely a well-known simple geometric shape, and since those corresponding to the protrusions of the design in the application are not shown in Cited Part 1 and there is no evidence that a structural ratio of height and thickness of the part in the application could have been easily conceived, it cannot be said that a person skilled in the art could have easily created the part in the application based on Cited Part 1.

Therefore, it cannot be said that a person skilled in the art could have easily created the design in the application based on the design cited in the reasons for refusal 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 which were publicly known in Japan or a foreign country, prior to the filing of the application for design registration, under Article 3(2) of the Design Act, it cannot be judged that the design in the application shall be rejected by the reasons for refusal stated in the examiner's decision.

In addition, as the result of the further body's examination, no reasons for refusal were found.

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

April 14, 2021

Chief administrative judge: KOBAYASHI, Hirokazu  
Administrative judge: HAMAMOTO, Fumiko  
Administrative judge: WATANABE, Kumi

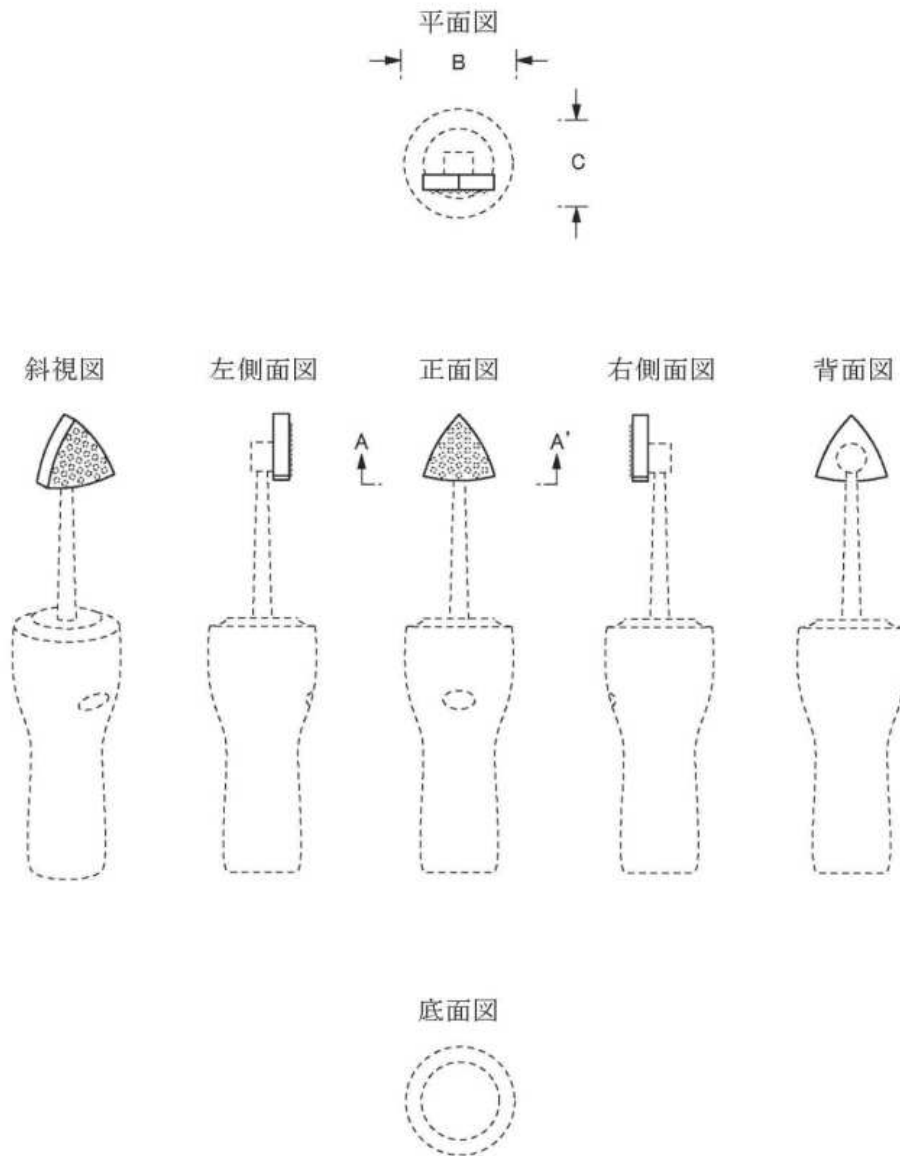


別紙第1 本願意匠（意願2019-029147）

【意匠に係る物品】子宮頸癌の予防用又は治療用器具

【意匠に係る物品の説明】本物品は、子宮頸癌の予防用又は治療用の器具であり、先端部を子宮頸部又はその周辺部に接触させ、当該部位の上皮細胞を擦り取ることにより、上皮細胞に含まれる癌細胞又は前癌病変の細胞を除去することで、子宮頸癌の予防又は治療を行う。

【意匠の説明】図面中、実線で表した部分が、意匠登録を受けようとする部分である。

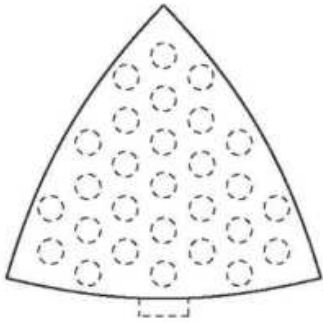


別紙第1 本願意匠（意願2019-029147）

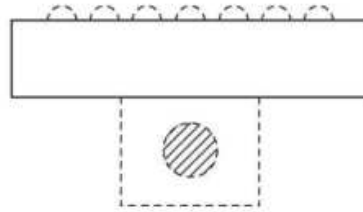
Appendix 1 The

design in the application (Japanese Design Application No. 2019-029147)

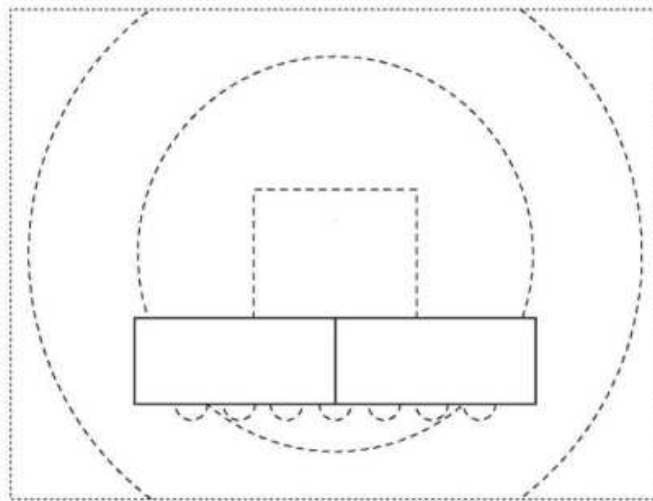
A - A' 部分拡大図



A - A' 線拡大断面図



B - C 部分拡大図



この意匠登録出願前、平成5年11月9日、米国特許商標庁において発行された米国特許第5259391号明細書  
 FIG. 2Aのflat portion 1

**United States Patent** [19]  
 Altshuler et al.

[11] **Patent Number:** 5,259,391  
 [45] **Date of Patent:** Nov. 9, 1993

[54] **METHOD AND DEVICE FOR CELL SAMPLING**

[21] Appl. No.: 709,692

[22] Filed: Jun. 3, 1991

**BRIEF DESCRIPTION OF THE DRAWINGS**

FIG. 1 schematically shows a cell collection device with a conical support member (1) for holding membranes. The angle and diameter of the conical portion can vary, as shown. In FIG. 1A the angle at the base of the conical portion is 60 degrees. In FIG. 1B the angle at the base of the conical support member is 45 degrees. In FIG. 1C the angle at the base of the conical support member is 30 degrees. The optional grasping member (2) is substantially straight, and centered with respect to the conical support member.

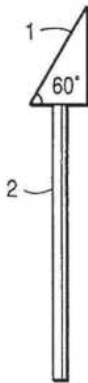
FIG. 2A depicts a side view of a cell collection device which has a flat portion (1) to support membranes. The grasping member (2) is substantially straight with an elbow. FIG. 2B shows a top view of the flat portion (1) to support membranes.

FIG. 3 shows a cell collection device wherein the support member (1) is curved. The support member also serves as a grasping member.

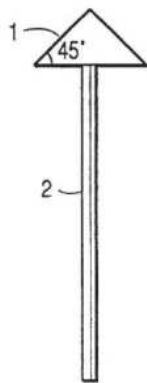
FIG. 4 shows a cell collection device wherein the support member (1) is curved and the grasping member (2) is distinct from the support member.

FIG. 5A depicts a side view of a cell collection device which has a conical support member (1) and a straight grasping means (2). The top view (FIG. 5B) shows the cell collection membrane (3) which is impregnated with six different selective binding agents, a-f. FIG. 5C shows a side view of the cell collection membrane as installed on the conical support member (1).

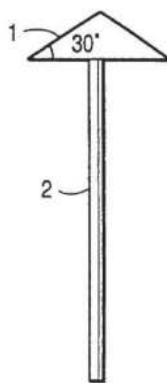
**FIG. 1A**



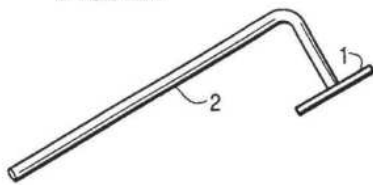
**FIG. 1B**



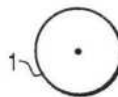
**FIG. 1C**



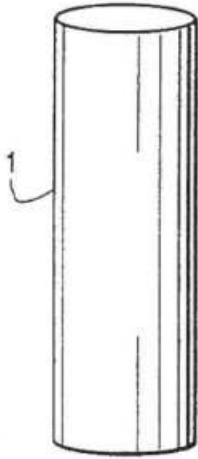
**FIG. 2A**



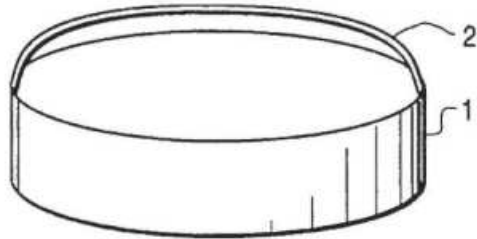
**FIG. 2B**



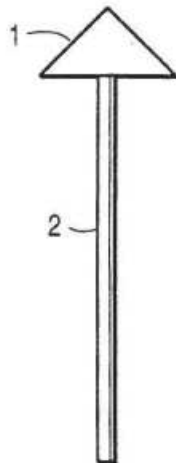
**FIG. 3**



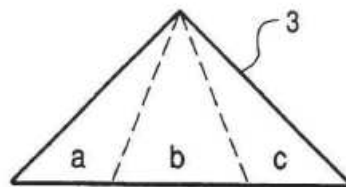
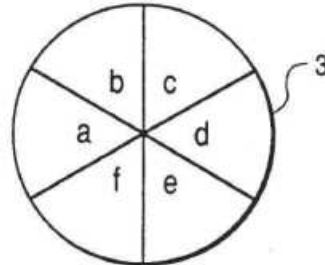
**FIG. 4**



**FIG. 5A**



**FIG. 5B**



**FIG. 5C**