

# **Guide for Patent Attorneys Concerning Protection of New Graphic Image Design**

Japan Patent Attorneys Association Design Committee

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## **[Summary]**

By the 2019 revision of the Design Act, a design consisting only of images which is independent of an article (graphic image design) became eligible for design protection. Such design includes, for example, a design of a graphic icon itself and a design of a website. This paper discusses the background and important points relating to the particulars of this revision, as well as consequences for businesses of patent attorneys in general.

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## **1. Introduction: Effect of the 2019 Revision of the Design Act**

In the past, a design within the meaning of the Design Act was limited to the shape, patterns or colors, or any combination thereof, of an article (Article 2 (1) of the former Design Act), and therefore a design not relating to a specific article was out of the scope of protection under the Act.

By the 2019 Revision, a design consisting only of images that is not related to a specific article (graphic image design) was added to subject matters of design protection (Article 2(1) of the revised Design Act). **For this new type of subject matter, this revision lifted a requirement whereby only a design relating to an article could be protected.** As a result, a design of graphic images including a website image which present only a weak connection with an article and therefore were excluded from the scope of protection became eligible for design right.

The most important consequence of this revision may be **the surge in the number of stakeholders of the design protection system.** In today's world, in which IT technology is advancing, it is hard to imagine a business without a company website. This revision implies that **most businesses with a company website will have an opportunity to obtain a design right but at the same time will face the risk of being held liable for infringement of a third party's right of design.**

This is not an issue of concern only for patent attorneys specialized in designs. Can all patent attorneys give appropriate consultation and assistance to their clients asking for advice about the potential risk that their website infringes a third party's right of design?

## **2. History of protection of design relating to graphic images**

The following is a brief explanation of the history of protection of a design relating to graphic images in Japan.

### **(1) 1998 Revision**

The 1998 Revision of the Design Act introduced a framework whereby a partial design could be protected under the Act, making it easier for a design applicant to obtain a right concerning a design relating to graphic images.<sup>1</sup> However, as this revision presupposed that the design system protects the outer appearance, shape, etc. of an article that is a tangible object, the scope of designs relating to graphic images eligible for this framework was strictly limited so as to avoid unrestricted expansion of the scope of an article.<sup>2</sup> The designs that came to be protected by this revision include, for example, a design of an image which is essential for an article, such as the time display of an LCD

clock (a so-called graphic image for display) and a design of an image essential for activating a device, such as a start-up screen for a cellular phone.

## **(2) 2006 Revision**

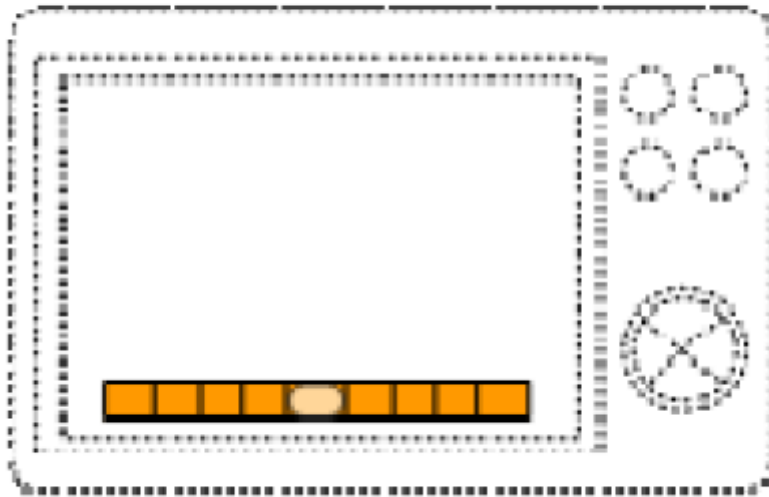
Over time, physical push buttons for operating home electronic appliances and IT devices have been replaced by electronic user interfaces. For a graphic design of a user interface, user-friendliness, usability and aesthetic impression were improved in light of the use of devices, making such design an important determinant for the quality of devices and customers' choice. In addition, in spite of the increased importance for companies to invest in designs of graphic images, the existing framework could not protect new types of designs relating to graphic images created for guiding the operation of devices.<sup>3</sup> Against this backdrop, the 2006 Revision of the Design Act enabled the protection of a design relating to a graphic image for operation, in addition to a design relating to a graphic image for display or a start-up screen essential for the functioning an article (the former Article 2(2) of the Design Act), and also a design for a graphic image for operation of a DVD player that is displayed on a separate article that is used in an integrated manner (e.g., a television set).

## **(3) 2011 Revision of Examination Guidelines**

This revision further clarified the requirements for protection of a design relating to a graphic image for display that was introduced by the 2006 Revision.<sup>4</sup> In other words, it was clearly stipulated in the Examination Guidelines that an image shown on the display part of the article must be a "graphic image for making necessary indications for performing the functions of an article, etc." The Examination Guidelines also exemplified that even a graphic image for display related to an accessory function of an article "digital camera" other than its recording function (e.g., a leveling function that captures the tilt of camera) can be protected as long as it is closely connected to the device.

## 【意匠に係る物品】デジタルカメラ

### 【正面図】



### 撮影支援情報表示（水準器表示）

Article to the Design: Digital camera

[Front view]

Display of recording assisting information (display of a level function)

Figure 1 Example from the Examination Guidelines (2011 Revision)

However, even in such case, a graphic image for display needed to be an image initially embedded in the article.<sup>5</sup> In other words, a program for representing images must be initially installed in an internal memory of the device so as to be protected under the Design Act.

#### (4) 2016 Revision of Examination Guidelines

Due to the rapid development of information technology, many devices were developed which are capable of updating functions after the purchase. Mobile devices such as smartphones and tablet computers are information processing devices that can be used as a calculator or music player by installing additional applications.

Considering this situation, by the 2016 Revision of Examination Guidelines, an additionally installed image became eligible for an element of design.<sup>6</sup> That being said, a "mobile device" is extremely versatile and functions are not specific, so an applicant

needed to file an application as a "computer with XX functionalities."

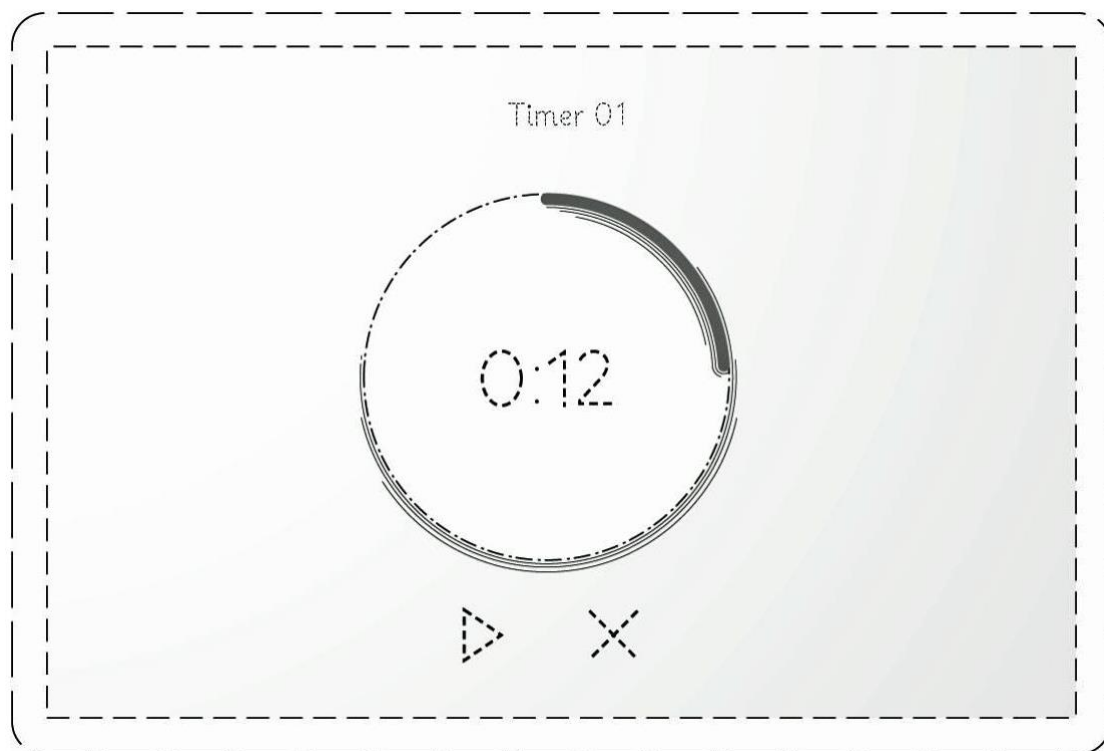


Figure 2: Design registration No. 1639305

A computer with a clock-timer function

#### **(5) Requirements for protection of design relating to images before the 2019 Revision**

##### **(a) Requirements for protection of design relating to a graphic image for display<sup>7</sup>**

- An article relating to the design containing the image in question must qualify as an article within the meaning of the Design Act.
- The image in question must be a graphic image making necessary indications for performing the functions of an article, etc.
- The image in question must be an image recorded on the article.

##### **(b) Requirements for protection of design relating to a graphic image for operation<sup>8</sup>**

- An article relating to the design containing the image in question must qualify as an article within the meaning of the Design Act.
- The image in question must be an image provided for use in the operation of the article in order to enable the article that displays the graphic image to perform its function.
- The image in question must be an image that is displayed on an article itself or

- on an article that is used with the article in an integrated manner.
- The image in question must be an image recorded on the article.

In short, the Design Act before the 2019 Revision did not protect any design relating to a graphic image unless it satisfied all of these requirements.

## (6) Issues<sup>9</sup>

(i) **As the Act before the 2019 Revision required an image to be recorded on an article so as to be protected**, images displayed via the Internet, such as images of a website, were not eligible for protection. As the design relates to the shape, patterns or colors, or any combination thereof, of an article, images could not be protected unless they presented a strong connection with a specific article.

The screenshot shows the NAVITIME Japan website interface. At the top, there is a green header with the NAVITIME logo and navigation links: 電車 / 時刻表 (Train / Timetable), 自動車 (Car), タクシー / 運転代行 (Taxi / Driving Service), 自転車 / バイク (Bicycle / Motorcycle), and 飛行機 (Airplane). Below these are more links: バス / 時刻表 (Bus / Timetable), 旅行 / レジャー (Travel / Leisure), 地図 / スポット (Map / Spot), and 生活 / お役立ち (Life / Useful). A search bar contains the text '駅/店舗/住所/〒/TEL' and a magnifying glass icon. To the right of the search bar are links for '急昇' (Emergency), 'ワークマン' (Workman), '郵便局' (Post Office), and a gear icon. Below the search bar, there is a 'Topics' section with links: '新型コロナの影響による運休・減便の各社状況' (Status of suspensions and reduced services due to the impact of the new coronavirus), 'ナビタイムでは電車の混雑度情報を提供中です' (NAVITIME provides train congestion information), and '[オンラ' (Online). The main content area has a navigation bar with icons and labels: 'トータルナビ' (Total Navigation), '乗換案内' (Transfer Information), '車ルート' (Car Route), 'バス乗換' (Bus Transfer), '自転車ルート' (Bicycle Route), and '飛行機' (Airplane). Below this, there is a form for route search. It includes a '出発駅' (Departure Station) and '到着駅' (Arrival Station) input field with a double-headed arrow between them. Below the input fields are date and time selectors: '2020年6' (Year), '月' (Month), '17' (Day), '日' (Day), '11' (Hour), '時' (Hour), '32' (Minute), '分' (Minute), and '現在時刻' (Current Time). There are also buttons for '出発' (Departure), '到着' (Arrival), '始発' (First Departure), and '終電' (Last Train). Below the date and time selectors are links for '詳細条件設定+' (Detailed Condition Setting+) and '▶経由駅を設定' (Set Via Station). At the bottom of the form is a large orange button labeled '検索' (Search).

Figure 3 An abstract from the website of NAVITIME JAPAN

Meanwhile, (ii) **the U.S., Europe, China and Korea do not have such requirements and protect designs of images not recorded on any article.**

In addition, as only images presenting a strong connection with the article were protected, (iii) **graphic images had to be those displayed on an article so as to be protected by a design right.** As a consequence, images projected on an object which is

not an "article," such as walls and human bodies, were out of the scope of protection.



Figure 4 Sony's AnySurface

The U.S. and Europe protect images projected on an object which is not within the scope of an "article."

The 2019 Design Act revision took place in order to address these issues.

### 3. Revisions of the Design Act and Examination Guidelines

#### (1) Subject matter of protection

##### (a) Overview

By the 2019 Revision of the Design Act, the definition of "design" under the Design Act was changed as follows:

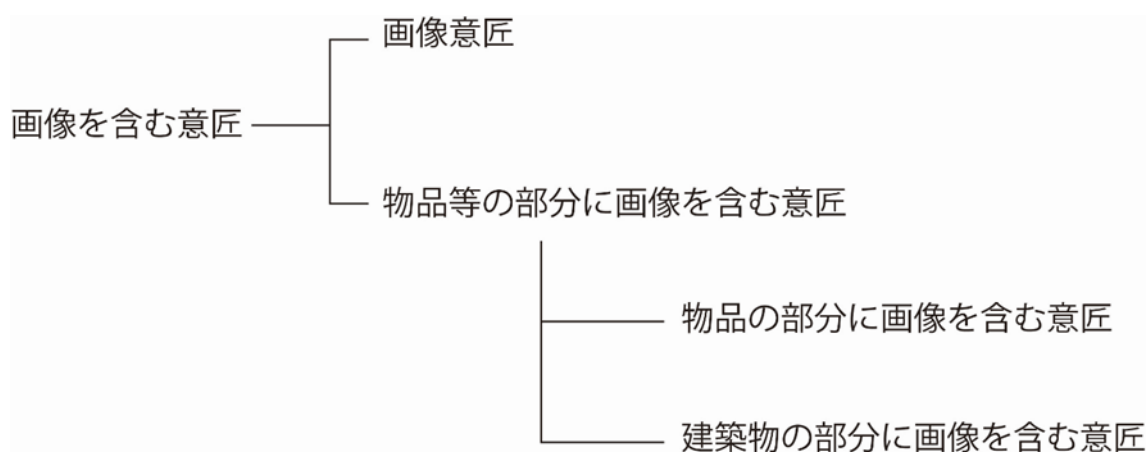
"Design" in this Act shall mean (i) the shape, patterns or colors, or any combination thereof (hereinafter referred to as the "shape, etc."), of an article ..., (ii) the shape, etc. of a building (including a part of a building, the same shall apply hereinafter), or (iii) a graphic image (limited to those provided for use in the operation of the device or those displayed as a result of the device performing its function, and including a part of a graphic image, ...), which creates an aesthetic impression through the eye.

By the revision, **in addition to a (i) traditional type of design related to an article, (ii) a design relating to a building, and (iii) a graphic image design became eligible for protection.** A graphic image design can be protected even it is an image independent

of an article. However, as was the case with the former Act, the parentheses were added to **limit the scope of protection to a graphic image for operation and a graphic image for display.**<sup>10</sup>

Importantly, with respect to a design containing a graphic image, **an applicant has options to obtain a right for (i) a design relating to an article by displaying the image on a screen, like the case of a usual design, or to obtain a right for (iii) a design relating to the graphic image apart from the image displayed on a screen.**

The Examination Guidelines defines **(i) as a design including a graphic image on a part of an article etc. and (iii) as a "graphic image design."**<sup>11</sup> The reason for using the phrase "article, etc." was that, as a result of the addition of a building to the scope of protected design, a new type of design combining a building and image was introduced in addition to a design combining an article and image.



Design containing a graphic image

Graphic image design

Design including a graphic image on a part of an article, etc.

Design including a graphic image on a part of an article

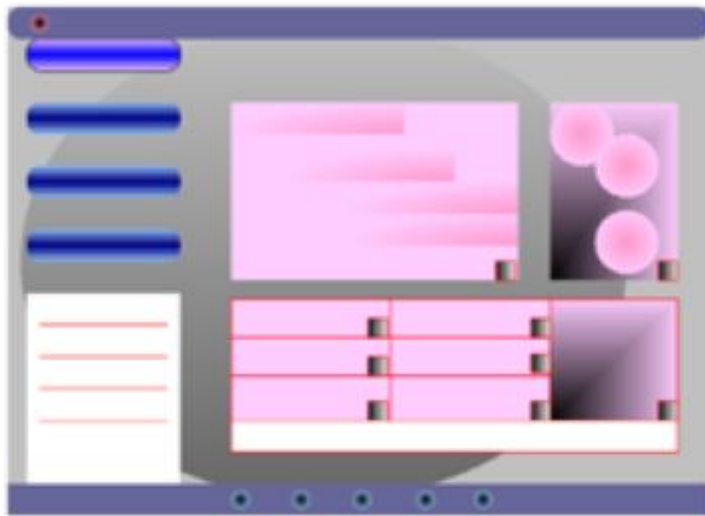
Design including a graphic image on a part of a building

Figure 5 Classification of definitions

## (2) Examples of protectable images

### (i) Graphic image design





## 「商品購入用画像」 (ウェブサイトの画像)

Image for purchasing products  
(Image of a website)

Figure 6 Example 1 of an image that is a graphic image for operation (Examination Guidelines Part IV, Chapter 1, 3.1)



「アイコン用画像」  
(クリックするとソフトウェアが立ち上がる操作ボタン)

Image for an icon

(A button that activates software when clicked)

Figure 7 Example 2 of an image that is a graphic image for operation (Examination Guidelines Part IV, Chapter 1, 3.1)

Importantly, **an image of a website and icon that are not connected to a specific article became eligible for protection.**



## 「医療用測定結果表示画像」

Image for displaying medical examination results

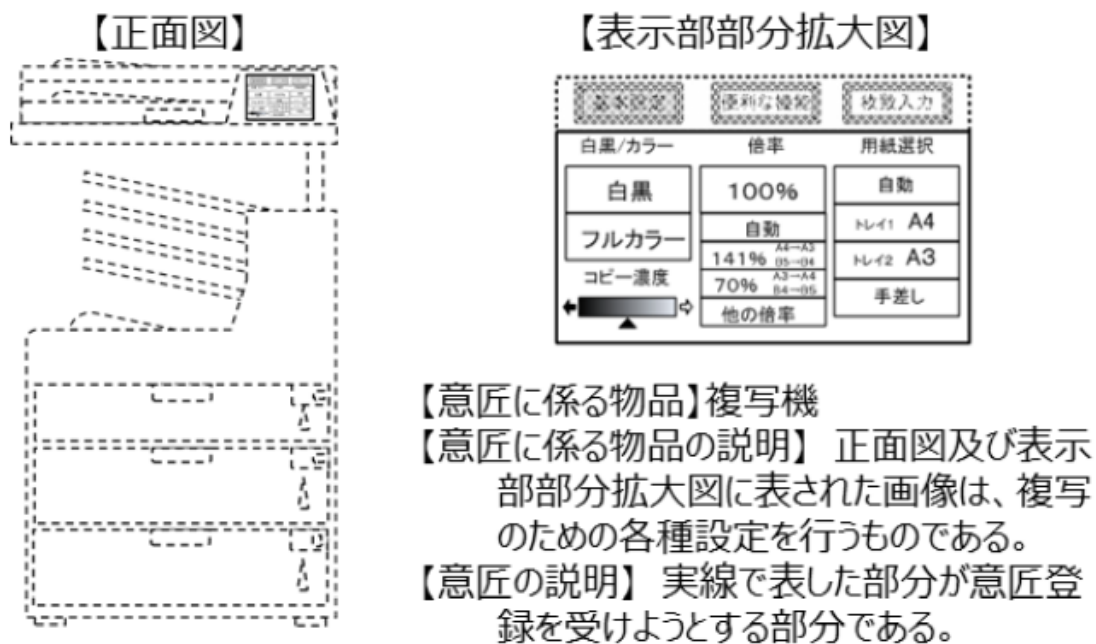
Figure 8 Example of an image that is a graphic image for display (Examination Guidelines Part IV, Chapter 1, 3.1)

Images shown in this example can be protected as graphic images for display as these images are necessary for the performance of a function to indicate the medical examination results.

On the contrary, an image that is neither a graphic image for operation nor a graphic image for display, for example an image of content, is not considered as a design defined in the Design Act. **The former Act also did not protect an image of content.**

(ii) Design including a graphic image on a part of an article, etc.

This image can be basically considered as the same as the traditional definition of design. An applicant still may choose to file an application as a design for a calculator with certain functions.



※説明の都合上、願書の記載事項及びその他の図は省略した。

[Front view]

[Partially enlarged view of the display part]

[Article to the Design] Copying machine

[Description of the Article to Design] The graphic images represented in the front view and the partial enlarged view of the display part are for carrying out various settings for the copying.

[Description of the Design] The part represented by the solid line is the part for which the design registration is requested.

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

Figure 9. Example of a design including a graphic image on a part of an article (Examination Guidelines Part IV, Chapter 1, 3.2)

It should be noted that, by the 2019 Revision of the Design Act, an applicant can no longer file a design including an graphic image for operation of an article (e.g., a DVD recorder) if the image is displayed on another article that is used with the article in an integrated manner (e.g., a television set), **as the former Article 2(2) addressing this type of image was deleted**. Consequently, an applicant who desires to protect a graphic

image for operation displayed on an article used as an integral part of another article needs to file an application of a graphic image design independent of any article.

## **(2) Application**

### **(a) Graphic image design**

#### **(i) Article to the Design**

In the column of article to the design, the usage of an image needs to be described (Article 6(1)(iii) of the Design Act). According to the Examination Guidelines,<sup>12</sup> even an abstract description is sufficient as long as the usage can be specified. For example, "image for displaying information," "graphic image for trading," "graphic image for inputting numerical values," "graphic image for icons" and "GIU for xx" are acceptable.

#### **(ii) Description of article to the design**

If the description in the column of the article to the design is not sufficient to clarify the usage of the image, an applicant needs to provide an explanation in this column that would help understanding the usage.

#### **(iii) Drawing**

Generally, a drawing that captures an object in a two-dimensional way will be generally used, but due to the development of recent image technology, an image that allows a three-dimensional view has emerged and this image also can be submitted as part of an application. An image that gives a two-dimensional view should be submitted as a "graphic image view" and an image that gives a three-dimensional view as a "front/top/left-side/right-side graphic image view." In the following example, the white part looks like a pillar.

【画像左側面図】



【画像正面図】



【画像右側面図】



[Left-side graphic image view]

[Front graphic image view]

[Right-side graphic image view]

Figure 10. Example of an application for a three-dimensional graphic image (Examination Guidelines Part IV, Chapter 1, 4.1.4)

(i) Design including an image as part of an article, etc.

For this kind of design, the traditional formalities for application apply so please see J-PlatPat; however, as mentioned above, note that the former Article 2, paragraph (2) has been deleted. In addition, for a traditional type of application, the figures "graphic image view" or "front/top/left-side/right-side graphic image view" should not be used. **"graphic image view" can be used only for an application of a graphic image design.**<sup>13</sup>

### (3) Principle of one application per design<sup>14</sup>

Basically, the approach to this principle has not changed.

#### (a) Graphic image design

- General principle: An application containing two or more usages of an image is considered to contain two or more designs.
- Exception: An application containing two or more usages of a single image **to be displayed and used at the same time** is considered to contain a single design.

**(b) Design containing a graphic image as part of an article, etc.**

- An application containing two or more usages of an article or building is considered to contain two or more designs.
- In the case of a "calculator with specific functions," **if two or more specific functions relate to a single image to be displayed and used at the same time**, the application is considered to contain a single design.

**(4) Judgment of similarity of designs**

**(a) Similar designs**

Two designs are considered similar if all of the following conditions are met:

- The overall usage and functions of the two designs are identical or similar;
- The usage and functions of the graphic image in the two designs are identical or similar; and
- The appearances, etc. of the two designs are identical or similar.

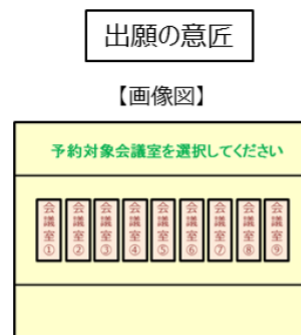
**(b) Determination of similarity of usages and functions**

By the law revisions, a graphic image design was added as a subject matter of protection, eliminating the requirement that a design must be related to an article. However, the framework under which the Design Act protects the useful and functional appearance has not changed. Accordingly, when determining the similarity of designs containing images, usages and functionalities are taken into account. As the similarity of appearances could depend on the individual cases, we would like to explain the similarity of usages and functionalities of designs containing images.<sup>15</sup>

- The usages and functions are considered to be similar if they have a commonality.
- Even if usages and functions are different, these are considered to be similar if the difference is not apparent as features of shapes of articles, etc.
- The usages and functions of a design are considered not similar if there are other usages and functions that should be taken into account, such as that one of the usages of a design is apparently different from that of others.



「商品在庫確認用画像」  
 (説明)  
 複数の縦長四角形状部は、商品の種類を表した**商品選択ボタン**であり、押すことで当該商品の在庫数を表示する画面が表示される。



【意匠に係る物品】会議室予約用画像  
 【意匠に係る物品の説明】(略) 複数の縦長四角形状部は各会議室を表した**会議室を選ぶための図形**であり、**ここをクリックする**ことで当該会議室の予約状況を表示する画面が表示される。  
 ※説明の都合上、願書の記載事項及びその他の図は省略した。

## Publicly known design

### Graphic image for checking stock

#### (Explanation)

The multiple rectangles are product selection buttons that indicate types of products. Pushing a button displays a screen indicating the quantity of that product in stock.

## Filed design

### [Graphic image view]

#### [Article to the Design] Graphic image for booking meeting rooms

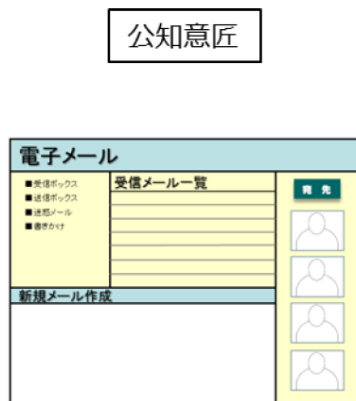
[Description of Article to the Design] (Omitted) The multiple rectangles are figures that indicate each of the meeting rooms and are for selecting meeting rooms. Clicking on a figure displays a screen indicating the booking status of that meeting room.

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

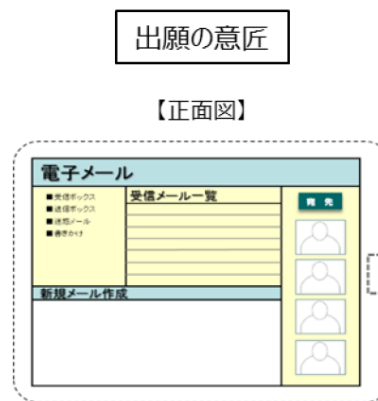
Figure 11. Example of similar usage and function (Examination Guidelines Part IV, Chapter 1, 6.2.2.1)

This is an example of similarity between two graphic image designs. In a general sense, a function to select a product seems somewhat different from a function to choose a meeting room, but for the purpose of design examination, these are considered to be similar **in that they both relate to a function to make a choice from several options.** This seems more abstract and broader compared with common sense.





「電子メール送受信画面像」



【意匠に係る物品】電子メール送受信機能付き電子計算機  
※説明の都合上、願書の記載事項及びその他の図は省略した。

Publicly known design

Graphic image for email transmission

Filed design

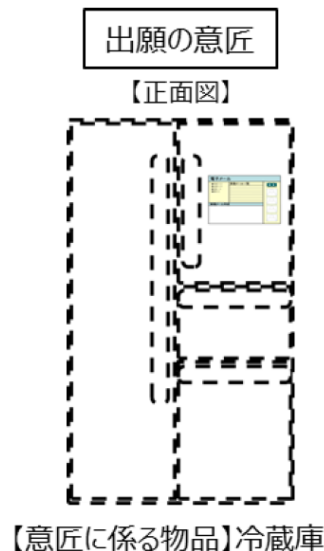
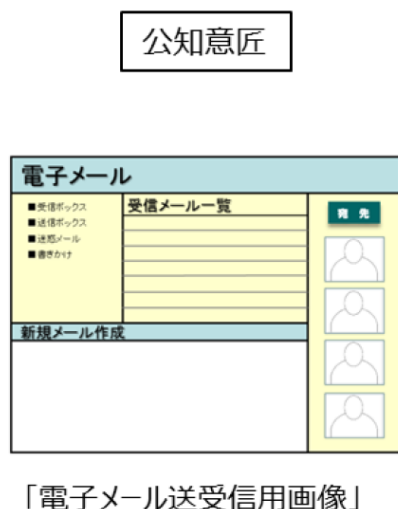
[Front view]

[Article to the Design] Computer with email transmission function

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

Figure 12. Example of similar usage and function (Examination Guidelines Part IV, Chapter 1, 6.2.2.1)

A similarity is not an issue only between graphic image designs. It is also a point in issue for a graphic image design on one hand, and a design containing an image as part of an article, etc. on the other hand. **If the usages and functions of an image (e.g., email transmission function) are identical or similar, the image itself and a computer containing the same image are considered to be similar in terms of usages and functions**, as a computer has information processing functions, but these are general functions that can be added to various articles and are not apparent from the outer appearance of an article. As such, the differences in usages and functions are considered less important in the similarity judgment.



※説明の都合上、願書の記載事項及びその他の図は省略した。

Publicly known design

Graphic image for email transmission

Filed design

[Front view]

[Article to the Design] Refrigerator

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

Figure 13. Example of non-similar usage and function (Examination Guidelines Part IV, Chapter 1, 6.2.2.1)

On the other hand, **an image and a refrigerator containing the same image are considered not similar in terms of usages and functions**, as usages and functions to store and chill foodstuff based on a hardware specific to a refrigerator can have a significant impact on the assessment of designs.

#### 4. Points that patent attorneys should bear in mind

As mentioned above, we presented a quick overview of the history of law revisions and points of attention relating to the revised Act and Examination Guidelines. We would like to provide guidance for patent attorneys as to the points that they should bear in mind.

**(1) A design right can be granted for a single icon.**

When the author talked with a patent attorney specialized in trademarks about the law revision, the patent attorney commented with some sense of perplexity that clearance procedures for an icon would be necessary in relation to designs in addition to trademarks. It is true that this situation may increase burdensome works for clearance.

However, by obtaining a single design right, there may be cases where a right holder may be able to block third parties without the need to obtain trademarks covering various categories of goods and products.

**By the law revision, even a patent attorney specialized in trademarks may need to have expertise relating to design.** That being said, prior design search is different from prior trademark search. For example, for trademark search, similarity between designated goods/services is determined with reference to the similar group codes. On the other hand, for design search, a patent attorney needs to identify search categories that may be similar in terms of usages and functions by himself/herself. Although a detailed explanation is omitted for brevity, we recommend that readers consult with E-learning provided by the patent attorney training system.

**(2) Risk of being unable to fully respond to clients' needs**

As mentioned in the introduction, enabling the protection of an image of a website may lead to a surge in the number of stakeholders of the Design Act. The same can be said for a building and interior design that were also added to subject matters of protection under the Design Act. In the future, if the importance of design is correctly perceived by society and the number of users of the design protection system significantly increases, this situation may not be coped with by patent attorneys specialized only in designs, **as such patent attorneys are small in number and, therefore, conflicts of interest among clients would often arise.** There may be cases where a patent attorney has to refuse a referred client seeking advice due to a conflict of interest with existing clients. This is a problem for all patent attorneys. Even a patent attorney engaged in patent and trademark cases would need to be prepared to work on design cases. Without a correct understanding of the revised Design Act, patent attorneys would not be able to respond to clients' needs in an appropriate way.

**(3) Risk of increased chance of warning of infringement**

The legal framework for the design system was amended to recognize graphic image designs as subject matters of protection. However, it would be extremely unlikely that all stakeholders of a graphic image design would conduct clearance search or file a

design application. It is unrealistic to assume that all website creators conduct a clearance search or file a design application with a high level of awareness of legal compliance. **Then, there may be more cases where patent or trademark clients receive an abrupt warning from a holder of a design right.** If you are a patent attorney specialized in patent and trademark cases, and if you are consulted by your client about this infringement warning but cannot find a patent attorney specialized in designs due to the issue of conflict of interest, can you handle this case in an appropriate manner? A patent attorney should be prepared in advance even he/she is not a specialist in design.

## 5. Conclusion

The 2019 Revision of the Design Act contained a broad scope of revisions, covering the entirety of the Act, such as a graphic image design. Coming into effect from April 1, 2020, it will take some time before a new type of design right emerges, and the situation still remains unforeseeable. However, the impact that these revisions may have on all patent attorneys in common will not be negligible. This issue should be recognized as a challenge calling for the attention of all patent attorneys.

### 【Cooperation】

Momoko OKUDA  
Shuya KOHHARA  
Asuka GOMI  
Mitsuhiro OKADA  
Akihiro HOZAKI  
Kazuko ONUMA  
Naoharu TAKEYAMA  
Tomokazu IWATA  
Takefumi SUGIURA  
Satoshi AOKI

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<sup>1</sup> For the Japan Patent Office's practices for the protection of design relating to graphic images before the 1998 Revision, see the Examination Guidelines for Design (by Article) of March 1986, "2. Examination Guidelines for Designs relating to Figures, etc. Displayed on Displaying Parts of Articles" and "3. Examination Guidelines for Designs related to Image Elements of LCD" as well as the Basic Guidelines Concerning Description of Design Registration Applications and Drawings

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(Supplement 1) of March 1993, Guidelines Concerning LCD, etc. Although these guidelines used the phrase "design relating to graphic images," the framework before the 2019 Revision of Design Act only protected a graphic image as part of the shape of an article.

<sup>2</sup> Basic Guidelines on Description of Design Registration Applications and Drawings (Guidelines concerning LCD, etc.) (Supplement for Partial Design) of February 2002 (Japan Patent Office)

<sup>3</sup> Commentary Related to 2006 Law Revision (Act No. 55 of 2006), pp13-14

<sup>4</sup> 2011 Revised Examination Guidelines 74.1.1

<sup>5</sup> 2011 Revised Examination Guidelines 74.1.2

<sup>6</sup> 2016 Revised Examination Guidelines 74.4.1.1.1.2.3

<sup>7</sup> 2016 Revised Examination Guidelines 74.4.1.1.1.1

<sup>8</sup> 2016 Revised Examination Guidelines 74.4.1.1.1.2

<sup>9</sup> Commentary Related to 2019 Law Revision (Act No. 3 of 2019), pp74-76

<sup>10</sup> 2020 Revised Examination Guidelines, Part IV, Chapter 1, 3.1 and 3.2.1

<sup>11</sup> 2020 Revised Examination Guidelines, Part IV, Chapter 1, 1

<sup>12</sup> 2020 Revised Examination Guidelines, Part IV, Chapter 1, 4.1.1

<sup>13</sup> 2020 Revised Examination Guidelines, Part IV, Chapter 1, 4.2.4

<sup>14</sup> 2020 Revised Examination Guidelines, Part IV, Chapter 1, 5

<sup>15</sup> 2020 Revised Examination Guidelines, Part IV, Chapter 1, 6.2.2