

Tentative Examination of Position of “Reference Views of the State in Use” in the Design Patent Regime in China

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Recently, there have emerged diametrically different ways of determination as to whether “reference views of the state in use” can be used as views to compare with a prior design within the extent of protection of patent (often known as “design being examined” in patent right affirmation cases) in the patent invalidation administrative examination and the follow-up judicial proceedings (patent right affirmation cases for short), which has led to the debate on the position of “reference views of the state in use” within the design patent regime in China. To the question no clear answer has been given in the current patent laws and regulations, including the Patent Law as of 2009, the Implementing Regulations of the Patent Law as of 2010, and the Guidelines for Patent Examination as of 2010. Besides, the concept of “reference views of the state in use” has been explicitly explained to be “reference views” involving broader use in the Guidelines for Patent Examination as of 2010; hence the discussion of the “reference views of the state in use” in the article also applies to the “reference views” as mentioned in the Guidelines for Patent Examination as of 2010.

Typical cases

Case 1 (the sofa-bed case), in which the Patent Reexamination Board (PRB) of the State Intellectual Property Office (SIPO) and the courts took the view that “reference views of the state in use” were not views defining the extent of protection of a design patent:

The Beijing Innovation Furniture Co., Ltd. filed, on 29 November 2002, an application for, and was granted a patent for the design of a sofa-bed (Pushi) (the sofa-bed patent).

The Beijing Banri Commerce and Trade Co., Ltd. filed a request with the PRB for invalidation of said design patent, and furnished many pieces of evidence, including, among other things, a copy of the Japanese registered design (No. 1070161) disclosed on 15 May 2000 (the prior design), arguing that the design of the sofa-bed patent was similar to the prior design published and used before the filing date of the sofa-bed patent in suit.

Some views of the two designs are compared as follows:

Design patent in suit



Main view

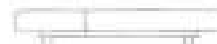


Bird's-eye view



Reference views of the state in use 2

Prior design



Main view



Bird's-eye view



Three-dimensional view showing the standing position

Upon examination, the PRB took the view that in the patent invalidation examination proceedings, a “reference view of the state in use” was used merely for construction of the way and purpose of a design being examined to determine its class of products, and should not be used as the basis for determining whether it was identical with or similar to a prior design. While as the name and “reference views of the state in use” of the sofa-bed patent in suit showed that it could be used both as a sofa and a bed, the view showing it as a sofa was seen only in the “reference view of the state in use”. Therefore, it should be understood that when filing the application for the patent, the applicant did not claim the design incorporated in the product used as a sofa. Correspondingly, after the sofa-bed patent was granted, the design of it as a sofa should not be the basis for finding design identical with or similar to the prior design. Accordingly, only the bed design of the patent in suit as shown in the main view, bird’s-eye view, left view and bottom view was compared with the prior design for identicalness or similarity. Finally, the PRB found the bed design of the sofa-bed patent in suit was similar to the prior design, which was contrary to Article 23 of the Patent Law as of 2001, and declared the sofa-bed patent in suit invalid. Dissatisfied with the Decision, the patentee sued in the first-instance court, which upheld the Decision, and the patentee then appealed to the second-instance court, which maintained the first-instance judgment.¹

Case 2 (the blender ice machine case), in which the PRB and the first-instance court determined that the “reference views of the state in use” were views for determining the extent of protection of the design patent in suit; the second-instance court treated the determination in a fuzzy manner, without clearly denying it though.

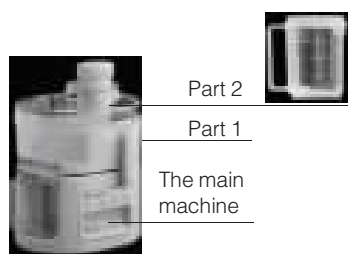
The Guangzhou Shenchang Electric Appliances Co., Ltd. filed, with the SIPO on 1 December 1998, an application for, and was granted a patent for the design of a multi-func-

tional blender ice machine (the blender ice machine).²

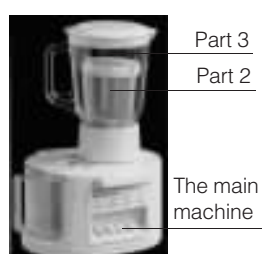
The Zhongshan City Teli Electric Appliances Co., Ltd. (Teli) filed a request with the PRB for invalidation of the blender ice machine patent, and furnished several pieces of evidence, including, among other things, the Gazette of the Japanese Design (No. 489931) (the prior design) and the Chinese translation thereof, arguing that the blender ice machine design patent in suit was globally similar to the prior design published and used before the filing date.

Upon examination, the PRB took the view that the main machine and parts 1-4 of the blender ice machine design patent in suit could not be used in isolation, and the main machine and parts 1 and 2, the main machine and part 3, and the main machine and part 4 constituted three independently-used products, which are also known as products in set as they were usually sold together. As a comparison of the “reference views of the state in use of parts 1 and 2”³ of the blender ice machine patent with the prior design showed, they were similar designs; separate comparison of that of part 3⁴ of the blender ice machine patent and that of part 4⁵ with the prior design showed that the designs incorporated in the products respectively comprising part 3 and the main machine, and part 4 and the main machine were not identical with or similar to the prior design. In the end, the PRB declared the blender ice machine patent partially invalid, that is, the patent for the design comprising the main machine and parts 1 and 2 was invalidated, and held valid the two patents for the design comprising the main machine and part 3 and the main machine and part 4.

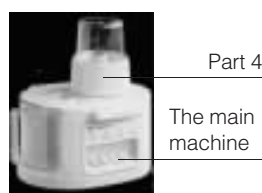
Dissatisfied with the decision, the invalidation requester Teli sued in the first-instance court, which upheld the Decision; it then appealed to the second-instance court, which held that the products in set usually referred to products consisting of two or more independent products, each of which was independent of the other, and could be used



Reference views of the state in use of parts 1 and 2



Reference views of the state in use of part 3



Reference views of the state in use of part 4



the prior design

alone, and combination of the products also embodied the its use in set. It was obviously undue for the PRB to believe, on the one hand, that the main machine and parts 1-4 could not be used in isolation, namely, they could not be separately used, and found, on the other, it was a product in set. It was also undue for the first-instance court to have supported the PRB's conclusion that the patent related to products in set. Teli's argument stood that the patent did not relate to products in set, but its grounds on which and claims for which it appealed the case did not. The second-instance court upheld the first-instance judgment.⁶

Role of “reference views of the state in use” in patent right affirmation

In the above two cases, diametrically different, and contradictory decisions are made in respect of the role of “reference views of the state in use” in patent right affirmation. Since in a patent right affirmation case, determination of the extent of protection of the patent and involved steps of the infringement case are the two parts of one issue, the above contradiction will inevitably have direct impact on the determination of the judge hearing an infringement case. The contradiction is rooted in the unclear position of the “reference views of the state in use” within the framework of the patent law in China. It is provided in the Patent Law as of 2001 and 2009 that the extent of protection of the patent right for design shall be determined by the product incorporating the patented design (the design for the product) as shown in the drawings or photographs, that is, the drawings or photographs in the granted design shown in Design Patent Gazette may be the base for determining the extent of protection of a design patent. But in the provision is not mentioned the “reference views of the state in use” or “reference views”.

Besides setting forth specific requirements on views shown in Design Patent Gazette, the SIPO's Guidelines for Patent Examination as of 2006⁷ additionally provides that “the applicant may also submit, when necessary, the exploded view, cutaway view, sectional view, enlarged view, view of state of variation, and reference view showing the state in use of the product incorporating the design,” which is not amended in a material way in the Guidelines for Patent Examination as of 2010.⁸ While “reference view of the state in use” is mentioned therein, the two likely confused legal concepts of “reference views of the state in use” and “views of

state in use”, are not defined, nor clearly distinguished from each other.

Then, are “views of state in use” and “reference views of the state in use” are more or less the same, or do they function differently? The conceptual difference of the “views of state in use” and “reference views of the state in use” should first be identified. The former has its origin in the provision in the section of “Products of Variable State” in Chapter 5 (Determination of Identical or Similar Designs) of Part 4 of the Guidelines for Patent Examination as of 2006 that “the design as shown in the views of state in use shall be compared with the prior design”. The “views of state in use”, as a concept in the section of “Products of Variable State”, should be a simple form of “views of the state in use of a products of variable state”, and is an identical concept of “varied-state view” mentioned in the section of “Drawings or Photographs of Designs” in Chapter 3 of Part 1 of the Guidelines for Patent Examination as of 2006.

The “reference view of the state in use” has its origin in the provision in the section of “Determination of Design Being Examined” in Chapter 5 (Determination of Identical or Similar Designs) of Part 4 of the Guidelines for Patent Examination as of 2006 that “the design being examined shall be identified⁹ according to the drawings or photographs in the granted design document. The brief explanation is an explanation of or definition to the drawings or photographs of the product. The reference views (for example, reference views of the state in use) are usually used to facilitate understanding of the fields, methods of use, places of use or purposes of use of the design being examined. Similar provisions are also set forth in Chapter 3 (Drawings or Photographs of designs) of Part 1 of the Guidelines for Patent Examination of 2010. While it does not clearly state that “reference views of the state in use” shall not be used for determining the designs being examined, as the context shows, the provision, which is set forth as “proviso” for “determining designs being examined”, has logically excluded the “reference views of the state in use” from the factors for determining “designs being examined”. In other words, the “reference views of the state in use”, as the most representative views of all the reference views, have their true function to show the state of the surroundings of something in use, its relation with people and other things, and the way it is used¹⁰. It is not for determining the extent of protection of design patent.

For that matter, if the practice of bringing “reference views of the state in use” into comparison in the blender ice

machine case is accepted, the different positions of the “views of state in use” and “reference views of the state in use” in the framework of design patent system will be confused, and play havoc with the preliminary examination of design patent:

i) The redundancy, such as the shade lines, dotted lines, indicating lines, lexical indications/notes and other environment and article, other than the claimed design, present in the “reference views of the state in use” will render the extent of protection unclear. In the current patent preliminary examination practice, the examiners are not strict in their examination of “reference views of the state in use”; the standard they follow in the examination is that it will do if the design is shown in the “reference views of the state in use”. For example, in the “reference views of the state in use”, things installed inside which are allowed not in other views, can be shown for explaining and construing other products of said design. Once a “reference view of the state in use” is used as the view to determine the extent of protection of the design patent, should we consider all the redundancies in connection with the extent of protection?

ii) The non-correspondence between the claimed design *per se* in the “reference views of the state in use” and other views will render the views uncertain. In the current patent preliminary examination practice, no strict examination is made of the correspondence between the “reference views of the state in use” and other views. It will do if the “reference view of the state in use” does not clearly show any other products incorporating the design. Therefore, if “reference view of the state in use” is put in the extent of protection of a design, which view is the extent of protection should be based on where the “reference view of the state in use” is not correspondent with the hexahedron front projection view?

As far as the public are concerned, said fuzzy definition of right and uncertain views are likely to cause a rightholder “to use ambiguous language” in the right-affirmation and infringement cases, make a narrow construction of the extent of protection in the right affirmation case to prevent prior design blow, and broaden it in the infringement case, so as to cover the allegedly infringing product. In case like this, the public would be at a loss.

As for patentees, not using the “reference view of the state in use” as the view to define the extent of protection of patent right will not affect grant, affirmation and enforcement of the patent for a product of variable states. A patentee may

as well make use of the “reference views of the state in use” to bring all the states of the product having variable states into the extent of protection of a design patent (or the design being examined).

Now that a “reference view” is not put into the extent of protection of a design patent, then does it has any other value within the design patent system? The answer is yes.

First, the “reference view of the state in use” serves as the basis of classification. An applicant may use “reference views of the state in use” to explain the field, use, method of use or place of use of a design. Often, the information of one “reference view of the state in use” is so extensive/enumous that hundreds of words cannot explicitly and completely express under the circumstance that words used in a brief explanation are limited, a classification examiner may also require the applicant to file a “reference view of the state in use” if the latter’s verbal presentation is unclear. Accordingly, the “reference view of the state in use” is a necessary means of communication between the applicant, the classification examiner and the public.

Next, the “reference view of the state in use” helps an applicant clearly present his design. In the presence of loose requirement of the “reference views of the state in use” in the examination standards, an applicant may use a “reference view of the state in use” to demonstrate the environment of use, method of use and main point of design of his design. For example, drawing a window and its frame in the “reference view of the state in use” to demonstrate the way a connection part is used in the design allows more direct presentation of the design. For another example, an applicant may use, in the “reference view of the state in use”, solid lines to indicate the main point of design, and dotted lines the non-point of design to avoid incorrect verbal description. Thus, the “reference view of the state in use” gives an applicant an alternative mean to describe a design.

As for the above-mentioned sofa-bed and blender ice machine cases, the “reference views of the state in use” obviously did not play the role it should play. In the former case, the applicant seemed to have used a wrong name for the view in the patent application in that it had not used the “views of state in use” showing the state of the change from “bed” into “sofa”, but had wrongly used the “reference view of the state in use”. The latter case involved a very complex circumstance of the design patent, and it was hard to say whether it was an error or something the applicant did on purpose.

“Reference views of the state in use” and determination of design incorporated in products in set or combination products

The blender ice machine case involves two special types of design patents: design incorporated in product in set and that in combination product. Article 31, paragraph one, of the Patent Law as of 2001 provides: “an application for a patent for design shall be limited to one design incorporated in one product. Two or more designs which are incorporated in products belonging to the same class and are sold or used in sets may be filed as one application.” The provision has two meanings: first, the principle that one design patent is granted to one design incorporated in one product; and second, the design incorporated in product in set is an exception to the principle, that is, one design patent may comprise two or more designs. But, it is clearly specified in the Guidelines for Patent Examination as of 2006 that a combination product is not one in set, namely “a product consisting of a number of component parts, each of which has no independent value of use and all of which combined together can produce an independent value of use, is a combination product. For example, poker cards, building blocks, and plug-in units toy shall be regarded as one product, and can be filed only as one application. They are not a set of products”.

Accordingly, within the framework of above provisions of the Patent Law as of 2001:

A combination product is deemed to be one product, and is granted one design patent, claiming the entire or whole design or the design of all single parts of the combination product.

A product in set is deemed to be multiple designs of multiple products and granted one design patent claiming not only the design of said product in set, but also the design incorporated in each product of the product in set.

As a rule, while both the combination product and the product in set are a complicated class of design patent comprising multiple design concepts, they are distinct from, and rarely confused or conflict with, each other under the law provisions. But, if the publication of the grant of the blender ice machine patent had all the views, including the “reference views of the state in use”, in the extent of protection (or the patentee changed the “reference views of the state in

use” into a “views of state in use” or a “view showing the combination”), it is then a design patent of a type much more complex than a combination product or product in set, adding something new to the understanding of “a combination product is not one in set”, namely “while a combination product is not one in set, a combination product may constitute a product in set”. The writer will be presenting an in-depth analysis of the four stages of the patent grant, administrative right affirmation at a request for invalidation, the first-instance and the second-instance court trial.

1. The application grant proceedings

The tens of views in the Gazette publishing the granted patent for the design of the blender ice machine are of 6 parts showing the main machine, part 1, part 2, part 3, part 4 and combination of all the parts and the main machine. When filing the application, the patentee meant to claim each and every parts of the blender ice machine, and the three combinations of the different parts. The patentee was faced with the following choices:

i) Applying for three design patents for the three combinations. But it would cost a lot of money, so would the annuity in the future, and the patents are likely to be invalidated at the request of another party on the ground that what was common to the three design patents (the main machine and part 2) would render them repeated patenting.

ii) Applying five patents by taking the main machine and parts 1-4 as separate products. Besides being much costly than choice 1, the main machine and a part are likely to be deemed to be “a part or part of design that should not be separated, and used alone incorporated in a product excluded from patentability in the Guidelines for Patent Examination as of 2006, and should not be patentable.

iii) Applying for a patent as a product in set. But it is required that each product in the patent for a product in set have its own value of use. Therefore, it is impossible for the designs of the main machine and parts 1-4 to be patentable alone.

iv) Applying for a patent for a combination product. But given the special nature of the combination within the product, it is impossible for the applicant to file one view of state in use showing the combination of the main machine and the four parts. But filing three different “views of state in uses” is equal to coming into being of three products having their own value of use in the combination product, which is contrary to the provision that a patent right is granted to a combination product as a single product.

In the dilemma, the applicant could do nothing but find a completely new way to apply for his patent by putting the three combinations of the main machine and the parts in the “reference views of the state in use”. The writer has a hunch that the applicant probably wanted to take advantage of the loose examination of the “reference views of the state in use” by the examiner to try his luck to seek patent grant. However directed to the “special case” of patent granted after all the risks were overcome, Teli company happened to have filed a request for invalidation of it, putting the complicated relations between the views and the resultant issue of more complexity in determining the design being examined before the examiner who was faced with the right-affirmation case.

2. Administrative right affirmation proceedings on request for invalidation

As a matter of fact, if the applicant had filed its application for a patent for the blender ice machine after 1 July 2006, the above four models would have been acceptable. It is specified in the Guidelines for Patent Examination as of 2006 that a product of blender ice machine using one base is a combination product having a single relation of combination¹¹. But when the PRB was examining the blender ice machine case, the Guidelines for Patent Examination as of 2006 was yet to be worked out. Besides, combining with the specific facts of the case, what the examiner tried to avoid to do was exactly to determine the blender ice machine as a combination product.

Why did he try to avoid it? It is because the prior design provided by the invalidation requester was similar to the combination of the main machine and part 2 and part 1 of the blender ice machine patent, and the combination of part 3 and part 4 with the main machine were dissimilar. The most reasonable conclusion was that: the former combination was declared invalid and the latter kept valid. But within the patent framework in China, a combination product is granted a design patent as a single product, claiming the whole product of the parts or the design of each and every single part. Meanwhile, the patent system in China does not protect a design of a part of product. Therefore, the partial invalidation system applies only to a product in set wherein multiple independent products co-exist in one design patent, but does not apply to a design incorporated in a combination product as a single product. If a blender ice machine patent is determined as a combination product, then the three combinations cannot be partially invalidated, as it is deemed to be a single product which can be kept valid or declared in-

valid as a whole. If so, it is unfair to the requester and the general public; if it is declared invalid as a whole, it is unfair to the patentee.

In a right affirmation case, the examiner, to maximumly balancing the interests of the patentee and those of the requester (the public), has to determine the blender ice machine patent as a patent for a design incorporated in a product in set that can be partially invalidated. A “product in set” and a “combination product” are materially different in whether each part thereof has its own independent value of use. To prove the “independent value of use”, the three “reference views of the state in use” are determined as factors of the design being examined, so as to identify the blender ice machine patent as that for a “product in set”. Then, it is possible to reasonably conclude that said patent was partially invalid. The examiner in a right affirmation case thus has made a breakthrough of the legislative aim that the “reference views of the state in use” should not be incorporated in a design being examined (the extent of protection) in his pursuit of due treatment of a case.

3. First-instance trial

The first-instance court specially discussed why “reference views of the state in use” should be incorporated in a design being examined in the reasoning part of its judgment. The court took the view that “as the provision of Article 56, paragraph two, of the Patent Law as of 2001 shows, the circumstance of use of (reference) view of the state in use is not completely ruled out, and the Guidelines for Patent Examination as of 2001 gives an example of view of the state in use as a subject matter in the identical or similar design determination.”¹² Please specially note that in the first-instance judgment was used the paradoxical new phrase “(reference) view of the state in use”, which has combined together the “views of state in use” and “reference views of the state in use” that have their own specific role and independent value in the Guidelines for Patent Examination as of 2006, and confused one with the other. Since a view of state in use falls within the extent of protection of a design patent, it is all nature for a “reference view of the state in use” to do so.

4. Second-instance trial

The second-instance court made its ruling in the case from a perspective entirely different from that of the PRB and the first-instance court, and affirmed the reasonable conclusion drawn in the former administrative decision and the first-instance judgment, and, as well, avoided making a ruling on the issue of whether the “reference views of the state in use”

should be brought in the extent of protection of the patent right.

Following is the second-instance court's reasoning and adjudication¹³:

First, it rectified the error in the former administrative decision and the first-instance judgment that the patented blender ice machine was a product in set (if the “reference views of the state in use” should be brought in the extent of protection of the patent right, the determination that said product was a product in set would stand, which, reversely proved that the second-instance court did not mean to incorporate the “reference views of the state in use” in the extent of protection of the patent right).

Second, it realised, in a timely manner, that the Guidelines for Patent Examination as of 2006 has already allow a product of different parts in one design patent right, and correspondingly decided that the product of the patent should actually be three products comprising the three combinations, but not the main machine, part 1, part 2, part 3, and part 4, shown in the drawings of the patent¹⁴.

Third, it identified the three combinations as falling within the extent of protection of said patent (note not the three “reference views of the state in use”).

Forth, it decided that “since the designs of the three combinations corresponded with the three “reference views of the state in use” in the drawings of the patent, it is not undue for the PRB to have decided on the subject matter being examined”.

The above reasoning ended with a ruling made that the products of the three combinations were products of different combinations. In the absence of the corresponding views of state in use, the examiner and judge may identify, on the basis of their own experience, the three “reference views of the state in use”, the outer appearance of the state of combinations between the main machine and the parts of the blender ice machine patent, were nothing but something that exactly “correspond with the three states of combinations. The second-instance court's ruling is one of the best decisions made in the complicated cases within the current framework of the patent system in China.

Conclusion

The article has examined the above circumstance where an applicant has, by virtue of error or out of some consideration, put in the “reference views of the state in use”

the state of use of a product incorporating a design that could otherwise be used to determine the extent of protection of the design patent, and, in doing so, has rendered it difficult to determine the design being examined and the extent of protection of the patent in the right affirmation and infringement case. But as for the system for the grant, right affirmation and enforcement of the design patent, the “reference views” including the “reference views of the state in use”, have their special value, which should not be obliterated owing to any errors or misunderstanding on the part of a very few applicants. To address the contradiction revealed in the article, the writer would like to suggest that in future amendment to the relevant laws and regulations the “reference views” be kept that are examined in a relatively loose manner for the applicants for design patents to choose, and, the relevant laws and regulations, meanwhile, clearly provide that the “reference views” should not be used to determine the extent of protection of a design patent. In the absence of express law provisions now, use should be made of the case law to harmonise the views of the patent attorneys, lawyers, examiners and IP judges and allow them to work in such a way that same lawsuits do not end up with different decisions made therein. ■

The author: Jiang Yu, Examiner of the Design Examination Department of the Patent Office of the State Intellectual Property Office; and Jiang Shuwei, Judge of the Beijing No.1 Intermediate People's Court

¹ For detail see the PRB's Invalidation Request Examination Decision (No. 8897), the Beijing No.1 Intermediate People's Court's Administrative Judgment No. Yizhongxingchuzi 96/2007; and the Beijing Higher People's Court's Administrative Judgment No. Gaoxingzhongzi 9/2008.

² The authors have taken a careful look at all the views of the blender ice machine patent, and found the “reference view of the state in use” of Part 3 should be that of part 2.

³ The error with the “reference view showing the state of use”: that of part 4 should be one of parts 2 and 4. Part 2, as a container imbedded in the main machine for taking and retaining the juice, appeared in the view in three states of use, and they are all indispensable, while parts 1, 3, and 4 are mutually replaceable parts in the upper part of the main machine. The error of the name of the “reference view showing the state of use” is irrelevant to the discussion of the article. For the sake of convenience, in the views of the blender ice machine patent are still used the “reference view showing the state of use of part 3” and “reference view showing the state of use of part 4”.

⁴ The readers are advised to note that the concept of “views of state in use” used in the PRB’s Invalidation Request Examination Decision No. 8490 did not appear in the views of the published grant of the blender ice machine patent. The authors have a hunch that the PRB used, by mistake, the “views of state in use” rather than the “reference views of the state in use” in the views of the blender ice machine patent. The word “reference” was not omitted due to negligence, nor did it substitute the concepts. This is a purposeful fuzzy treatment, a method which was also used in the first-instance judgment.

⁵ Ibid. note 3.

⁶ Ibid. note 3.

⁷ For detail see the PRB’s Invalidation Request Examination Decision No. 8490; the Beijing No.1 Intermediate People’s Court’s Administrative Judgment No. Yizhongxingchuzi 81/2007; and the Beijing Higher People’s Court’s Administrative Judgment No. Gaoxingzhongzi 222/2008.

⁸ It needs to be explained that in the sofa-bed case, the filing date of the patent was 29 November 2002; the PRB made the administrative decision on 5 December 2006, when the Guidelines for Patent Examination effective were those as of 2001 and 2006. In the blender ice machine case, the filing date of the patent was 1 December 1988, the PRB made the administrative decision on 19 November 2005, when the Guidelines for Patent Examination effective were those as of 1993 and 2001, in which no clear provisions were set forth concerning the “views of state in use” and “reference views of the state in use”. Given that the judicial proceedings of the two lawsuits commenced after the Guidelines for Patent Examination as of 2006 went into effect, the discussion of the article does not involve the matter of application of the two versions of the Guidelines for Patent Examination, but is based on the Guidelines for Patent Examination as of 2006, we try to address the issue that has occurred, and seek a solution to it on the basis of the Guidelines for Patent Examination as of 2006 and 2010.

⁹ The term “reference view” in the Guidelines for Patent Examination as of 2010, adopted from the section on “Determination of Design Being Examined”, Chapter 5 of Part 4 of the Guidelines for Patent Examination as of 2006, is not different, in any material manner, from the “reference views of the state in use” in the Guidelines for Patent Examination as of 2006.

¹⁰ “Determination of design being examined” in the design patent right affirmation case is the same concept as “determination of the extent of protection of the design patent” in the infringement cases. They are just referred to in a different way in different cases though.

¹¹ The Design Patent Examination Department of the Patent Office of SIPO (ed.), Standards for Filing Design Patent Views, the Intellectual Property Publishing House, 2008, P.32.

¹² The Chapter on “Determination of Identical or Similar Designs” of the

Guidelines for Patent Examination as of 2006 gives exactly the only example of “a product of blender ice machine comprising a juice cup and a ice cup and a base as a combination product showing the combination of parts in the product. The authors are not clear whether said content was added to the Guidelines for Patent Examination as of 2006 under the influence of the case law from the “blender ice machine case”. But in the said Guidelines for Patent Examination, a definition is given that is quite opposite to the PRB’s decision. The first-instance court made its decision in the case on 13 September 2007, more than a year after the Guidelines for Patent Examination as of 2006 went into effect. But the court panel insisted on deeming the blender ice machine product as “a product in set” without being influenced by the guidance given in the Guidelines for Patent Examination as of 2006.

¹³ Beijing No.1 Intermediate People’s Court’s Administrative Judgment No. Yizhongxingchuzi 81/2007.

¹⁴ Ibid. note 13.