

Date	June 24, 2015	Court	Intellectual Property High Court, First Division
Case number	2014 (Ne) 10004		
– A case in which the court found that some baseball player cards of the appellee's game are identical with some of the baseball player cards of the appellant's game in terms of the essential characteristics of expressions and recognized that the appellee infringed the copyright for those cards of the appellant's game and thereby partially modified the judgment in prior instance, which had denied copyright infringement.			

References: Article 21, Article 23, Article 27, and Article 114, paragraph (2) of the Copyright Act

Summary of the Judgment

1 Background

The appellant is a company providing and distributing a game titled "Puroyakyū Dorīmu Nain" (Professional baseball dream nine) (the "appellant's game") through a social networking service (SNS). The appellee is a company providing and distributing a game titled "Dainekkyō!! Puroyakyū Cādo" (Exciting!! Professional baseball card) (the "appellee's game"). This is a case in which the appellant demanded from the appellee, as the primary claim, [i] payment of damages and delay damages accrued thereon for the appellee's act of tort on the grounds that the appellee's act of reproducing or adapting the appellant's game to produce the appellee's game and making an automatic public transmission thereof constitutes infringement of the appellant's copyright, and as a secondary claim, [ii] payment of damages and delay damages accrued thereon for the appellee's act of tort on the grounds that the appellee's act of providing and distributing the appellee's game constitutes an act of general tort, i.e., an act of unlawfully infringing the appellant's business profits generated through provision and distribution of the appellant's game (in the prior instance, additional claims other than [i] and [ii] above were made, but in this appeal, only the claims [i] and [ii] were subject to proceedings).

2. Judgment in prior instance

The judgment in prior instance dismissed all of the claims of the appellant (the plaintiff in the first instance) by holding that, regarding [i], the appellee's game cannot be regarded as a reproduction or an adaptation of the appellant's game and that, regarding [ii], the appellee's act does not constitute an act of tort under the Civil Code.

3. Main issues in this instance

The major issues in this instance are as follows: [i] whether copyright infringement can be recognized or not, [ii] whether the appellee's act of distributing its game constitutes an act of general tort (the secondary claim), and [iii] the amount of damage.

4. Judgment in this instance

[i] Issue of whether copyright infringement can be recognized or not

A. In this instance, the court found that two of the baseball player cards of the appellee's game (the cards of Nakajima and Darvish) infringed the adaptation right and the right to transmit to the public for the corresponding cards of the appellant's game.

"(omitted) The cards featuring Nakajima of these two games are identical in terms of specific expressions, i.e., the posing and layout of the photograph, the existence of the dual part showing an enlarged version of the photograph in a multicolored print, the part shown therein and its position, and the manner of drawing the fire and the radially arranged bright blast of light in the background. These specific expressions convey the dynamism and power of Nakajima's strong swing. These cards of the two games can be considered to be identical in terms of the essential characteristics of the specific expressions and to contain creative expressions of thoughts or sentiments in the parts that share the essential characteristics of the specific expressions.

On the other hand, regarding the aforementioned differences concerning the cards featuring Nakajima, the points mentioned in [i] and [ii] cannot be regarded as the essential characteristics of the specific expressions as mentioned above (omitted). The degree of the difference in the size of the photograph shown in the dual part mentioned in [iii] (omitted) cannot be considered to be a major difference that would affect the overall impression. While there are also differences in the colors in the dual photograph part in [iv] and in the colors of fire in [iv], as well as differences in whether the oval shape that emphasizes the bright blast of light is drawn in the background (omitted), these differences cannot be considered to overwhelm the impression from the aforementioned common features. (omitted)

Therefore, the card featuring Nakajima of the appellee's game (omitted) should be regarded as an adaptation of the corresponding card of the appellant's game."

"Also, regarding the cards featuring Darvish of the two games, (omitted) the two cards are identical in terms of specific expressions, i.e., the posing and layout of the photograph, the existence of the dual part showing an enlarged version of the photograph in a multicolored print, the part shown therein and its position, and the manner of drawing the fire and the radially arranged bright blast of light in the background. These expressions convey the dynamism and power of Darvish's strong pitching motion. These cards of the two games can be considered to be identical in terms of the essential characteristics of the specific expressions and to contain creative expressions of thoughts or sentiments in the parts that share the essential characteristics of the specific expressions.

On the other hand, as is the case with the cards featuring Nakajima, the differences between the two cards featuring Darvish cannot be considered to overwhelm the impression of the aforementioned common features.

Thus, as is the case with the cards featuring Nakajima, the card featuring Darvish of the appellee's game should be considered to be an adaptation of the card featuring Darvish of the appellant's game."

B. In this judgment, the court found that, regarding the other two cards (the cards featuring Sakamoto and Imae) of the appellee's game that allegedly infringed the copyright according to the appellant's detailed comparison, the court did not recognize copyright infringement as it held that these two cards of the appellee's game are different from the corresponding cards of the appellant's game in terms of the essential characteristics of the specific expressions. Furthermore, the court found that none of the cards of the appellee's game and neither the players' *Gacha* (a video shown when a card of a baseball player is provided in the game) nor the other the specific expressions can be considered to be reproductions or adaptations of the appellant's game.

(2) Issue of whether the appellee's act of distributing its game constitutes an act of general tort

In this judgment, the court found that the game system described by the appellant cannot be considered to be an interest that should be protected under general tort law and that there are no grounds for recognizing that the appellee's act went beyond the scope of free competition, and thereby found that an act of general tort cannot be recognized.

(3) Amount of damage caused by the copyright infringement

In this judgment, the court found that the "profit" specified in Article 114, paragraph (2) of the Copyright Act can be considered to mean a certain part of the profits that the appellee gained by selling rare packs, i.e., the profits gained from the sale of the cards of the two baseball players for which copyright infringement has been recognized. Regarding this point, the court found that the appellant shall bear the burden of proof and that said part of the profits accounts for at least 8%. The court also found that the appellee shall bear the burden of proof with regard to the existence or nonexistence of any factors that contributed to generating the aforementioned part of the profits apart from the specific expressions presented in the cards of baseball players in order to determine whether there are grounds for abandoning the presumption made under said paragraph. Then, the court recognized that the proportion of the contributory factors apart from the specific expressions was at least 90% and determined the amount of damage.