

Date	January 28, 2004	Court	Tokyo District Court, 29th Civil Division
Case number	2002 (Wa) 18628		
<p>– A case in which, with regard to the defendant's act of notifying the plaintiff's business partners that the sale of the plaintiff's product constitutes infringement of the defendant's trademark right, the court ruled that, although the sale of the plaintiff's product does not constitute infringement of the defendant's trademark right, the defendant's act of making an allegation to that effect can be deemed to be legitimate enforcement of rights based on the trademark right, in light of the content, targets and other circumstances of the allegation, and therefore the defendant's act does not constitute either an act of unfair competition under Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act (act of making or circulating a false allegation) or an act of tort.</p>			

References: Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act

Number of related rights, etc.: Trademark Registration No. 4554771

Summary of the Judgment

1. (1) The defendant holds a trademark right for the trademark, "常時接楽" (written in standard characters and pronounced as "jōji setsuraku"; Trademark Registration No. 4554771, for Class 9, magnetic disks, etc. recorded with computer programs; the "Trademark" and the "Trademark Right").

The plaintiff commissioned a company, which is not a party to the case (the "Non-Party Company"), to develop personal computer software with the editing function for cell phone memory, etc. The Non-Party Company produced Plaintiff's Product 1. The plaintiff notified wholesalers and retailers that it would release Plaintiff's Product 1 under the product name "携帯接楽 7" (pronounced as "keitai setsuraku 7"; the "plaintiff's mark").

The defendant sent the plaintiff a notice (the "Notice") to notify it that the sale of Plaintiff's Product 1 would infringe the Trademark Right and request it to suspend the release of Plaintiff's Product 1. The defendant met with employees of major distribution wholesalers of computer software products and explained that it had sent the Notice to the plaintiff. The plaintiff notified its business partners of its suspension of the lease of Plaintiff's Product 1.

(2) The defendant commissioned the Non-Party Company to develop personal computer software with the editing function for cell phone data, etc. The Non-Party Company produced the product, and the defendant released it under the product name "

携快電話 6 " (pronounced as "keikai denwa 6").

The plaintiff released a new product ("Plaintiff's Product 2"), which was created by modifying Plaintiff's Product 1, under the product name "携帯万能 8 " (pronounced as "keitai bannō 8").

The Non-Party Company created Plaintiff's Product 2 by improving the source code of the programs for "携快電話 6 " and using data files used in "携快電話 6 " without modification or with partial modification.

The defendant notified a retailer that Plaintiff's Product 2 infringes the defendant's copyrights for "携快電話 6 ," and requested the plaintiff to suspend the sale of Plaintiff's Product 2 immediately because it infringes the defendant's copyrights for the programs of "携快電話 6 ."

(3) The plaintiff alleged that the defendant's acts of making the allegations as described in (1) and (2) above constitute an act of unfair competition prescribed in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act or an act of tort, and demanded payment of damages.

2. In this judgment, the court, making the findings and determination[s] as follows, ruled that the defendant's act of making the allegations as described in (1) above does not constitute either an act of unfair competition or an act of tort, but its act of making the allegations as described in (2) above constitutes an act of unfair competition, and partially upheld the plaintiff's claim.

(1) Defendant's act described in 1.(1)

A. The Trademark "常時接楽" is regarded as a unified coined word and associated with the pronunciation "jōji setsuraku," whereas the essential feature of the plaintiff's mark is associated with the pronunciation "keitai setsuraku." Therefore, the two differ from each other in terms of pronunciation.

Since the Trademark is associated with the idiom "常時接続," the Trademark can be associated with the concept "happy to be always connected." On the other hand, in consideration of the nature, usage, etc. of the plaintiff's product, the plaintiff's mark is associated with the concept "happy to be connected with a cell phone" or "convenient to be connected with a cell phone." Thus, the two differ from each other in terms of concept.

Furthermore, since the Trademark and the plaintiff's mark share only two of the four characters, they differ from each other in terms of appearance.

As described above, since the essential feature of the Trademark and that of the plaintiff's mark differ from each other in terms of pronunciation, concept, and appearance, the plaintiff's mark cannot be considered to be similar to the Trademark.

B. On these grounds, the plaintiff's act of selling Plaintiff's Product 1 does not constitute infringement of the Trademark Right. Therefore, the defendant is deemed to have made a false allegation as to whether the Trademark Right was infringed or not.

C. However, based on a comprehensive evaluation of the following facts, it would be reasonable to interpret that the defendant's act of making the aforementioned allegation was conducted for the purpose of exercising the Trademark Right. [i] "常時接樂" (the Trademark) and "攜帶接樂" (the plaintiff's mark) share the "接樂" part, which is a coined word, and differ in "常時" and "攜帶," which are common nouns. Therefore, there were reasonable grounds for the defendant's determination that the plaintiff's mark is similar to the Trademark and that the act of releasing Plaintiff's Product 1 constitutes infringement of the Trademark Right. [ii] In light of the fact that, after the Notice was sent to the plaintiff, the defendant's act of making the aforementioned allegation was conducted in order to explain the details of the Notice to certain business partners and that the content of the allegation was limited to roughly explaining the situation, i.e., explaining that the defendant holds the Trademark Right and that the Trademark and the plaintiff's mark, which are described in the allegation in detail, have similarities, the defendant's act of making the aforementioned allegation cannot be interpreted to be extremely unreasonable in terms of the manner and content thereof in light of common sense. [iii] The defendant made the aforementioned allegation not to a large number of retailers, but only to two major distribution wholesalers. [iv] Since both of the two companies are major distribution wholesalers of computer software products, a lawsuit could have been filed against them with regard to the infringement of the trademark right mentioned in the aforementioned allegation.

Consequently, the defendant's act of making the aforementioned allegation cannot be regarded as an act of unfair competition specified in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act, and it also does not constitute an act of tort.

(2) Defendant's act described in 1.(2)

A. Under the agreement with the Non-Party Company, the defendant obtained by succession from that company the copyrights for the programs and data files for "携快電話 6 ." In this agreement, the defendant and the Non-Party Company agreed that the Non-Party Company is entitled to further develop the source code for the programs for "携快電話 6 " at its own discretion and disclose it to other parties.

The programs for Plaintiff's Product 2 were created by the Non-Party Company by modifying the source code of the programs for "携快電話 6 ." Thus, it cannot be said

that Plaintiff's Product 2 was created in violation of the defendant's copyrights.

Since the plaintiff sold Plaintiff's Product 2 after obtaining a license from the Non-Party Company, the plaintiff's act of selling Plaintiff's Product 2 does not constitute infringement of the defendant's copyrights for "携快電話 6."

Since the image files used in "携快電話 6" were created by another company, even if some of those image files can be found copyrightable, the copyrights for the image files can be interpreted to be owned by said other company. The defendant does not own copyrights for these image files, and therefore the image files used in Plaintiff's Product 2 do not infringe the defendant's copyrights.

Some of the cell phone information files and sound source files used in Plaintiff's Product 2 are identical with data files used in "携快電話 6." The assignment of those identical files from the Non-Party Company to the defendant and also to the plaintiff can be considered to be so-called double assignment. Thus, the defendant cannot assert against the plaintiff that the defendant obtained by succession the copyrights and neighboring rights for these data files from the Non-Party Company unless the defendant has registered a transfer of those rights under Article 77, item (i) of the Copyright Act.

However, since the defendant failed to register such transfer, the plaintiff's act of selling Plaintiff's Product 2 does not constitute infringement of said copyrights and neighboring rights even if some of said other data files can be found to be protected by copyrights or neighboring rights.

Furthermore, there are no grounds to prove that the plaintiff had knowingly engaged in a treacherous act.

B. On these grounds, the plaintiff's act of selling Plaintiff's Product 2 does not constitute infringement of the defendant's copyrights for "携快電話 6."

C. Since the plaintiff and the defendant are competing sellers of personal computer software products, the defendant's act of notifying the retailers that have business relationship with the plaintiff to the effect that Plaintiff's Product 2 infringes the defendant's copyrights for "携快電話 6" should be considered to be an act of unfair competition specified in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act based on a comprehensive evaluation of the content, manner, etc. of the aforementioned notification.

Judgment rendered on January 28,2004

2002 (Wa) 18628 Case of Demanding Payment of Damages

Date of conclusion of oral argument: November 17, 2003

Judgment

Plaintiff: SSI Tristar Corporation

Defendant: Sourcenext Corporation

Main text

1. The defendant shall pay the plaintiff six million yen and delay damages accrued thereon at a rate of 5% per annum from September 3, 2002 until the date of full payment.
2. Any other claims of the plaintiff shall be dismissed.
3. The court costs shall be divided into 20 portions, one of which shall be borne by the defendant, while the remaining 19 shall be borne by the plaintiff.
4. The first paragraph of this judgment may be provisionally executed.

Facts and reasons

No. 1 Claims

The defendant shall pay the plaintiff 499,157,373 yen and delay damages accrued thereon at a rate of 5% per annum from September 3, 2002, until the date of full payment.

No. 2 Outline of the case

1. The plaintiff alleged that the following acts of the defendant constitute [i] an act of unfair competition specified in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act or [ii] an act of tort (Articles 709 and 710 of the Civil Code), selectively presented the grounds for each act, and demanded payment of damages.

(1) The defendant's act of making or circulating an allegation among the plaintiff's business partners to the effect that the plaintiff's act of selling Plaintiff's Product 1 mentioned below constitutes infringement of the defendant's trademark right.

(2) The defendant's act of making or circulating an allegation among the plaintiff's business partners to the effect that the plaintiff's act of selling Plaintiff's Product 2 mentioned below constitutes infringement of the defendant's copyrights.

2. Facts undisputed by the parties

(1) Parties concerned

Both the plaintiff and the defendant are companies engaging in the development and sale of computer software and the sale, etc. of computer equipment and peripheral devices.

(2) Facts related to the alleged trademark right infringement

A. The defendant holds the following trademark right (the "Trademark Right": The registered trademark shall be hereinafter referred to as the "Trademark")

Registration No. 4554771

Registration date: March 22, 2002

Classification of goods: Class 9

Designated Goods: Magnetic disks, CD-ROMs, DVD-ROMs, other storage media recorded with computer programs, and other electronic machines, any parts thereof, telecommunication machines and apparatus, and computers

Registered trademark: 常時接楽 (Jōji Setsuraku) (standard characters)

B. The plaintiff planned to sell a personal computer software product ("Plaintiff's Product 1") with the computer editing function for cell phone data under the product name "携帯接楽 7" (Keitai Setsuraku 7) (the "plaintiff's mark") on June 21, 2002. However, on June 20, 2002, which was immediately before the scheduled release date, the plaintiff decided to cancel the release of Plaintiff's Product 1 (Exhibit Ko 4 and the entire import of the oral argument).

(3) Facts related to the alleged copyright infringement

A. On January 31, 2001, the defendant concluded a product development commission agreement (the "Development Commission Agreement") with American Megatrends Incorporated ("AMI") to commission AMI to develop personal computer software with the computer editing function for cell phone data. The Development Commission Agreement (Exhibit Ko 26) has a provision (Article 17, paragraph (1)) specifying that, upon completion of the payment of the commission fee, "X (defendant) shall obtain copyrights, ownership right, and any other rights for the specifications, the developed product and the accompanying documents created by Y (AMI), and any other programs, documents, drawings, information, and other materials prepared in the course of the task of product development (the "Works) (the "Article 17 agreement").

B. Subsequently, on April 5, 2002, the defendant prepared a memorandum of agreement (the "Memorandum") based on the premise that the defendant and AMI will terminate the Development Commission Agreement. In paragraph (3) of the Memorandum, the defendant agreed as follows concerning Article 17 of the Development Commission Agreement (Exhibit Ko 19; However, there is a dispute as described below with regard

to how to interpret the content of the Memorandum).

"The 'works' mentioned in Article 17, paragraph (1) of the Development Commission Agreement concluded between X (defendant) and Y (AMI) on January 31, 2001, which specifies that "the copyrights, ownership right, and any other rights for the specifications, the developed product and the accompanying documents created by Y (AMI), and any other programs, documents, drawings, information, and other materials prepared in the course of the task of product development (the "Works)," does not include "source code." The parties concerned hereby confirm that Y has the rights for "source code" and is entitled to further develop the source code at its own discretion and disclose it to other parties."

In around July 2002, the defendant released personal computer software with the computer editing function for cell phone data under the product name "携快電話 6" (Keikai Denwa 6) (the product name shall be hereinafter referred to as "Keikai Denwa 6"). Keikai Denwa 6 is a product developed by AMI under commission from the defendant.

C. On July 27, 2002, the plaintiff released a new product ("Plaintiff's Product 2") produced by modifying Plaintiff's Product 1. Plaintiff's Product 2 was sold under the product name "携帯万能 8" (Keitai Bannou 8). Both Plaintiff's Product 1 and Plaintiff's Product 2 are software products developed by AMI under commission from the plaintiff. AMI granted a license to the plaintiff for both products.

D. On August 10, 2002, the defendant filed a complaint with the Metropolitan Police Department ("MPD") to the effect that the act of the representatives of the plaintiff of reproducing and distributing Plaintiff's Product 2 constitutes infringement of the defendant's copyrights for the programs for "携快電話" (Keikai Denwa). The defendant's complaint was accepted by the MPD.

(omitted)

No. 4 Court decision

1. Issue of whether the defendant's act constitutes an act of making and circulating a false allegation concerning infringement of a trademark right

The following section examines whether the defendant's act of explaining that the plaintiff's act of selling Plaintiff's Product 1 constitutes infringement of the Trademark Right constitutes an act of unfair competition specified in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act or an act of tort.

(1) Facts found by the court

Based on a comprehensive evaluation of the facts stated in the section titled "Facts undisputed by the parties" above, the evidence (Exhibits Ko 1, 4 to 6, 8, 11, Otsu 1 and 2), and the entire import of the oral argument, the following facts can be found. There is no sufficient evidence to prove otherwise.

A. In around April 2002, the plaintiff commissioned AMI to develop personal computer software with the editing function for cell phone memory. AMI produced Plaintiff's Product 1. The plaintiff planned to release Plaintiff's Product 1 on June 21, 2002 and notified wholesalers and retailers to that effect.

B. On June 15, 2002, the defendant sent the plaintiff the Notice, requesting suspension of the release of Plaintiff's Product 1. The Notice was delivered to the plaintiff on June 17, 2002 (Exhibit Ko 1). The Notice stated as follows, among other things: [i] the defendant has the Trademark Right; [ii] Plaintiff's Product 1 is identical with the designated goods registered for the Trademark Right; [iii] the product name of Plaintiff's Product 1, "携帯接楽 7" (the "plaintiff's mark"), is similar to the Trademark; [iv] the act of selling Plaintiff's Product 1 constitutes infringement of the Trademark Right; and [v] the defendant demands that the plaintiff suspend the release of Plaintiff's Product 1.

C. On June 17, 2002, the defendant met with employees of SOFTBANK Commerce Corporation and Computer Wave Inc., which were both major distribution wholesalers of computer software products. The defendant showed a copy of the Notice to them and explained that, since the plaintiff's mark is similar to the Trademark, the act of selling Plaintiff's Product 1 constitutes infringement of the Trademark Right and that the defendant sent a notice to the plaintiff to request suspension of the release of Plaintiff's Product 1.

D. On June 19, 2002, the plaintiff sent a notice to the defendant to the effect that the release of Plaintiff's Product 1 was suspended (Exhibit Otsu 1). On June 20, 2002, the plaintiff sent business partners a notice titled "Announcement and Apologies for the Suspension of the Release of '携帯接楽 7,'" explaining that the release of Plaintiff's Product 1 was suspended due to a notice from the defendant to the effect that the release of Plaintiff's Product 1 would infringe the Trademark Right (Exhibit Ko 4).

(2) Judgment

A. Issue of whether an act of making a false allegation (trademark infringement) has been committed

First, the following section examines whether the plaintiff's act of selling Plaintiff's Product 1 constitutes infringement of the Trademark Right.

(A) Essential feature of the Trademark

The Trademark consists of four horizontally-written Chinese characters "常時接楽."

In consideration of the facts that the type, characteristics, etc. of the designated goods of the Trademark suggest that most of the consumers are Internet users and that the word "常時接続" (Jōji Setsuzoku) is widely known among Internet users as a word meaning 24-hour Internet connection, if the Trademark is used for any of the designated goods, consumers would recognize the Trademark "常時接楽" as a coined idiom created by replacing the Chinese character "続" in "常時接続" with "楽." Therefore, the Trademark, "常時接続" as a whole, can be interpreted to attract attention from consumers.

(B) Essential feature of the plaintiff's mark

The plaintiff's mark "携帯接楽 7" consists of four Chinese characters and one Arabic number. In consideration of the facts that the "携帯接楽" part is relatively short because it consists of only four characters and can be easily read in one breath, that "接楽" is a coined word and cannot be easily associated with a clear concept, and that "7" is a mere number, "携帯接楽" of the plaintiff's mark can be considered to be a part that attracts consumers' attention.

(C) Comparison

Based on the aforementioned understanding, the following section makes a comparison between the essential feature of the Trademark and the essential feature of the plaintiff's mark. As found above, the Trademark "常時接楽" is regarded as an idiom and associated with the pronunciation "jōji setsuraku," whereas the essential feature of the plaintiff's mark is associated with the pronunciation "keitai setsuraku." Therefore, the two differ from each other in terms of pronunciation. Since the Trademark is associated with the idiom "常時接続," the Trademark can be associated with the concept "happy to be always connected." On the other hand, in consideration of the nature, usage, etc. of the plaintiff's product, since the plaintiff's mark is associated with the concept "happy to be connected with a cell phone" or "convenient to be connected with a cell phone," the two differ from each other in terms of concept. Furthermore, since the Trademark and the mark share only two of the four characters, they differ from each other in terms of appearance.

As described above, since the essential feature of the Trademark and that of the plaintiff's mark differ from each other in terms of pronunciation, concept, and appearance, the plaintiff's mark cannot be considered to be similar to the Trademark.

(D) On these grounds, the plaintiff's act of selling Plaintiff's Product 1 does not constitute infringement of the Trademark Right. Thus, the defendant's act of explaining to the employees of SOFTBANK Commerce Corporation, etc. that the plaintiff's act of selling Plaintiff's Product 1 constitutes infringement of the Trademark Right constitutes

an act of making a false allegation as to whether a trademark right was infringed or not.

B. Issue of whether an act of unfair competition, etc. was committed or not

(A) Issue of whether an act of unfair competition was committed or not

The following section examines whether the defendant's act of making the aforementioned allegation constitutes an act of unfair competition specified in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act. This court found the defendant's act of making the aforementioned allegation does not constitute an act of unfair competition on the following grounds.

[i] As mentioned above, while the plaintiff's mark and the Trademark are not similar, "常時接楽" (the Trademark) and "携帯接楽" (the plaintiff's mark) share the "接楽" part, which is a coined word, and differ in "常時" and "携帯," which are common nouns. Therefore, there were reasonable grounds for the defendant's determination that the plaintiff's mark is similar to the Trademark and that the act of releasing Plaintiff's Product 1 constitutes infringement of the Trademark Right. [ii] In light of the fact that, after the Notice was sent to the plaintiff, the defendant's act of making the aforementioned allegation was conducted in order to explain the details of the Notice to certain business partners and that the content of the allegation was limited to roughly explaining the situation, i.e., explaining that the defendant holds the Trademark Right and that the Trademark and the plaintiff's mark, which are described in the allegation in detail, have similarities, the defendant's act of making the aforementioned allegation cannot be interpreted to be extremely unreasonable in terms of the manner and content thereof in light of common sense. [iii] The defendant made the aforementioned allegation not to a large number of retailers, but only to two major distribution wholesalers including SOFTBANK Commerce Corporation. [iv] Since both of the two companies are major distribution wholesalers of computer software products, a lawsuit could have been filed against them with regard to the infringement of the trademark right mentioned in the aforementioned allegation. Based on a comprehensive evaluation of the aforementioned facts, it would be reasonable to interpret that the defendant's act of making the aforementioned allegation was conducted for the purpose of exercising the Trademark Right. Therefore, the defendant's act of making the aforementioned allegation cannot be regarded as an act of unfair competition specified in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act.

(B) The issue of whether the defendant's act constitutes an act of tort

The plaintiff alleged that the defendant's act of making the aforementioned allegation constitutes a general act of tort. However, as found in (A) above, since the defendant's act can be considered to be a legitimate act of exercising the Trademark

Right, the defendant's act does not constitute an act of tort.

(3) Summary

As described above, the plaintiff's claim for payment of damages for Act of Making an Allegation 1 can be found to be groundless without needing to examine other factors.

2. Issue of whether the defendant committed an act of making and circulating a false allegation concerning copyright infringement

The following section examines whether the defendant's act of notifying that an act of selling Plaintiff's Product 2 constitutes infringement of the defendant's copyrights for Keikai Denwa 6 constitutes an act of unfair competition specified in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act or an act of tort.

(1) Facts found by the court

Based on a comprehensive evaluation of the facts stated in the section titled "Facts undisputed by the parties" above, the evidence (Exhibits Ko 5, 8, 19, 23 to 28; any branch numbers thereof are omitted; hereinafter the same), and the entire import of the oral argument, the following facts can be found. There is no sufficient evidence to prove otherwise.

A. On January 31, 2001, the defendant concluded the Product Development Commission Agreement with AMI to have AMI develop personal computer software with the computer editing function for cell phone data. Keikai Denwa 6 is a product produced by AMI under commission of the defendant based on the Product Development Commission Agreement.

B. The Product Development Commission Agreement specifies that "upon completion of the payment of the commission fee, the defendant shall obtain the copyrights, ownership right, and any other rights for the specifications, the developed product and the accompanying documents created by AMI, and any other programs, documents, drawings, information, and other materials prepared in the course of the task of development" (the "Article 17 agreement"). The defendant paid AMI the commission fee in full for the development of Keikai Denwa 6.

C. After terminating the Product Development Commission Agreement on April 5, 2002, the defendant and AMI signed the Memorandum to specify the legal rights and obligations of both parties. In paragraph (3) of the Memorandum, the two parties agreed that, since "source code" is not included in the "Works" mentioned in Article 17 agreement, i.e., "the copyrights, ownership right, and any other rights for the specifications, the developed product and the accompanying documents created by AMI, and any other programs, documents, drawings, information, and other materials prepared in the course of the task of product development (the "Works)," AMI has the

rights for "source code" and that AMI is entitled to further develop the source code at its own discretion and disclose it to other parties.

D. On July 27, 2002, the plaintiff released Plaintiff's Product 2, which was produced by modifying Plaintiff's Product 1. Plaintiff's Product 2 was sold under the product name "携帯万能 8." Plaintiff's Product 2 is a computer software product consisting of programs and data files. AMI produced Plaintiff's Product 2 by improving the source code of the programs for Keikai Denwa 6. Furthermore, AMI produced Plaintiff's Product 2 by using data files used in Keikai Denwa 6 as the data files for Plaintiff's Product 2 without modification or with partial modification. As a result, the data files for Plaintiff's Product 2 (image files, sound source files, and cell phone information files) contain many files that are identical with data files used in Keikai Denwa 6. AMI gave the plaintiff a license for Plaintiff's Product 2.

E. In around mid-July 2002, the defendant notified Yodobashi Camera that Plaintiff's Product 2 infringes the defendant's copyrights for Keikai Denwa 6. On July 26, 2002, the defendant sent the plaintiff a warning (Exhibit Ko 6) to request immediate suspension of the sale of Plaintiff's Product 2 because it infringes the defendant's copyrights for the programs of Keikai Denwa 6.

F. On August 12, 2002, the plaintiff sent its business partners a document (Exhibit Otsu 2) titled "Circulation of a False Allegation concerning 'Keitai Bannou 8.'" Said document stated, among other things, that the plaintiff recently heard that sales representatives of the defendant were circulating, to their customers, false information concerning Plaintiff's Product 2 and explained that the distributed information that the defendant had filed a criminal complaint against the plaintiff with regard to copyright infringement was false and that, since no such complaint had been accepted by the MPD, no problems existed with regard to the copyrights for Plaintiff's Product 2.

G. From mid to late August 2002, the defendant notified the retailers listed from No. 2 to No. 21 of the attached "List of Interfering Acts of Sourcenext Corporation" to the effect that Plaintiff's Product 2 infringes the defendant's copyrights for Keikai Denwa 6.

(2) Judgment

A. Issue of whether an act of making a false allegation (concerning copyright infringement) was committed or not

(A) Issue of whether copyright infringement of any program occurred or not

a. According to the facts mentioned in (1) above, it can be found that the defendant obtained from AMI by succession copyrights for the programs and data files for Keikai Denwa 6 developed by AMI under Article 17 agreement of the Development Commission Agreement. Subsequently, in paragraph (3) of the Memorandum, the

defendant and AMI agreed that AMI has the rights for "source code" and "is entitled to further develop the source code at its own discretion and disclose it to other parties." In light of the general meaning of "source code" and the wording of paragraph (3) of the Memorandum, it is reasonable to interpret that the term "source code" used in paragraph (3) of the Memorandum means the source code of the programs for Keikai Denwa 6.

On the other hand, the defendant alleged that "source code" means the driver, etc. that had already been developed by AMI. However, according to the evidence submitted to this case, there were no grounds that would justify such interpretation. Therefore, the defendant's allegation is unacceptable.

Thus, AMI owns a copyright for the source code of Keikai Denwa 6. While the defendant alleged that the defendant and AMI jointly own copyrights for Keikai Denwa 6, this allegation of the defendant is unacceptable.

b. As found in (1) above, AMI produced the programs for Plaintiff's Product 2 by modifying the source code of the programs for Keikai Denwa 6. According to paragraph (3) of the Memorandum, AMI owns a copyright for the source code for Keikai Denwa 6 and is entitled to "further develop the source code at its own discretion and disclose it to other parties." Thus, even if the defendant has copyrights for the programs for Keikai Denwa 6 (the object code), it cannot be said that Plaintiff's Product 2 was produced in violation of the defendant's copyrights.

Since the plaintiff sold Plaintiff's Product 2 after obtaining a license from AMI, the plaintiff's act of selling Plaintiff's Product 2 does not constitute infringement of the defendant's copyrights for Keikai Denwa 6.

(B) Issue of whether copyright infringement of image files occurred or not

As found in (1) above, some of the image files used in Plaintiff's Product 2 are identical with image files used in Keikai Denwa 6.

According to the evidence (Exhibits Ko 5, 23 to 25) and the entire import of the oral argument, since the image files used in Keikai Denwa 6 were produced by Linako, even if some of those image files can be found copyrightable, the copyrights for the image files can be interpreted to be owned by Linako. In this court case, the defendant presented neither allegation nor proof that the defendant obtained those copyrights by succession. Therefore, it should be found that, since the defendant does not own copyrights for the image files used in Keikai Denwa 6, the image files used in Plaintiff's Product 2 do not infringe the defendant's copyrights.

Furthermore, the defendant alleged that, since the images contained in the image files used in Keikai Denwa 6 can be regarded as a database work, the image files used in Plaintiff's Product 2 infringe the copyright for the database. However, in consideration

of the fact that the image files are a mere collection of images to create portraits that were produced for each part of a face, e.g., eyes, nose, mouth, eyebrows, hair, etc. and stored in a data file folder, the image files cannot be considered to be an "aggregate of data which is systematically constructed so that such data can be searched with a computer" and therefore cannot be regarded as a "database" specified in Article 2, paragraph (1), item (x)-3 of the Copyright Act. Thus, the defendant's allegation regarding this point is unacceptable.

(C) Issue of whether copyright infringement of other data files occurred or not

As found in (1) above, some of the other data files used in Plaintiff's Product 2 (cell phone information files, sound source files) are identical with data files used in Keikai Denwa 6.

As described above, other data files used in Keikai Denwa 6 were produced by AMI. The defendant obtained copyrights, etc. by succession for the files from AMI. On the other hand, other data files used in Plaintiff's Product 2 were sold by the plaintiff as a part of Plaintiff's Product 2 under license from AMI. With regard to some of the other data files used in Plaintiff's Product 2 that are identical with files used in Keikai Denwa 6, the assignment of those identical files from AMI to the defendant and also to the plaintiff can be considered to be so-called double assignment. Thus, the defendant cannot assert against the plaintiff that it is a defendant who obtained, by succession, copyrights and neighboring rights for other data files from AMI unless the defendant has registered a transfer of those rights under Article 77, item (i) of the Copyright Act. However, since the defendant failed to register such transfer, the plaintiff's act of selling Plaintiff's Product 2 does not constitute infringement of said copyrights and neighboring rights even if some of said other data files can be found to be protected by copyrights or neighboring rights.

Regarding this point, the defendant alleged that, since the plaintiff had knowingly engaged in a treacherous act, the defendant should be permitted to assert that the defendant had obtained copyrights, etc. for other data files without registering the transfer of the rights. However, according to all of the evidence submitted to this case, there are no grounds to prove that the plaintiff had knowingly engaged in a treacherous act.

(3) Summary

On these grounds, the plaintiff's act of selling Plaintiff's Product 2 does not constitute infringement of the defendant's copyrights for Keikai Denwa 6. Since the plaintiff and the defendant are competing sellers of personal computer software products, the defendant's act of notifying Yodobashi Camera and the retailers specified

in No. 2 to No. 21 of the attached "List of Interfering Acts of Sourcenext Corporation" to the effect that Plaintiff's Product 2 infringes the defendant's copyrights for Keikai Denwa 6 should be considered to be an act of unfair competition specified in Article 2, paragraph (1), item (xiv) of the Unfair Competition Prevention Act based on a comprehensive evaluation of the content, manner, etc. of the aforementioned notification.

3. Amount of damage

The following section determines the amount of damage suffered by the plaintiff as a result of the aforementioned act of unfair competition committed by the defendant.

(1) Personnel costs

The plaintiff alleged that the defendant's Act of Making an Allegation 2 interfered with the plaintiff's regular business practices and suffered such damages mentioned in 2 (1) to (3) of the attached "Allegation Concerning the Amount of Damage Suffered by the Plaintiff."

According to the evidence (Exhibits Ko 8 and 9) and the entire import of the oral argument, since the defendant notified the plaintiff's business partners, namely, Yodobashi Camera and the retailers specified in No. 2 to No. 21 of the attached "List of Interfering Acts of Sourcenext Corporation" to the effect that Plaintiff's Product 2 infringes the defendant's copyrights for Keikai Denwa 6, the plaintiff had to explain to the aforementioned retailers, etc. that such copyright infringement had not occurred and have its employees visit retailers, etc. and consequently suffered interference with its regular business practices. However, according to all of the evidence submitted to this case, since it is not necessarily clear exactly what kinds of interference were caused to the plaintiff's regular business practices, it is impossible to determine the amount of damage. Thus, the aforementioned damage will be taken into consideration as one of the factors affecting the calculation of the amount of immaterial damage below.

(2) Advertisement costs

The plaintiff alleged that, as a result of the defendant's Act of Making an Allegation 2, the plaintiff had to hold a press conference in order to recover the confidence of business partners in general and also place TV and radio advertisements, and consequently suffered the damage specified in 3 (1) and (2) of the attached "Allegation Concerning the Amount of Damage Suffered by the Plaintiff."

However, there is no clear evidence to prove the legitimacy of the plaintiff's allegation that the plaintiff held the aforementioned press conference and placed TV and radio advertisements. Moreover, even if said allegation is proven, according to all of the evidence submitted to this case, no causation can be found between the defendant's Act

of Making an Allegation 2 and the aforementioned press conference and advertisements. Therefore, the damage due to the advertisement costs alleged by the plaintiff cannot be found.

(3) Lost earnings

The plaintiff alleged that, since Yodobashi Camera refused to sell Plaintiff's Product 2 due to the defendant's Act of Making an Allegation 2, the plaintiff suffered the damage specified in 4 (1) of the attached "Allegation Concerning the Amount of Damage Suffered by the Plaintiff."

However, according to all of the evidence submitted to this case, there seems to be no sufficient grounds to prove the causation between the defendant's Act of Making an Allegation 2 and Yodobashi Camera's refusal to sell Plaintiff's Product 2. Regarding this point, the statement (Exhibit Ko 7) submitted by Mr. Daito Fukuda, who was an employee of the plaintiff, stated that Mr. Fukuda presumed that Yodobashi Camera refused to sell Plaintiff's Product 2 because of the defendant's "action" (page 2) and "pressure to prevent any transactions" (page 3). However, the statement lacks concrete evidence and is unacceptable. Therefore, the plaintiff's allegation concerning the damage due to the aforementioned lost earnings is unacceptable.

(4) Immaterial damage

According to the evidence (Exhibits Ko 9 and 10) and the entire import of the oral argument, it can be found that, after the defendant notified Yodobashi Camera and the retailers specified in No. 2 to No. 21 of the attached "List of Interfering Acts of Sourcenext Corporation" to the effect that Plaintiff's Product 2 infringes the defendant's copyrights for Keikai Denwa 6, TSUKUMO, Ishimaru Denki, DEODEO, and Nojima specified in No. 12, 13, 19, and 21 of the attached "List of Interfering Acts of Sourcenext Corporation" respectively stopped selling Plaintiff's Product 2 (regarding Nojima specified in No. 21, there is no sufficient evidence to prove the period of suspension), but after a few days, resumed selling it and that other business partners, namely the retailers specified in No. 2 to 11, 14 to 18, and 20 of the attached "List of Interfering Acts of Sourcenext Corporation," continued selling Plaintiff's Product 2. While Exhibit Ko 10 states that LAOX THE DIGITAL and DENKODO specified in No. 4 and 9 of the attached "List of Interfering Acts of Sourcenext Corporation" respectively also stopped selling Plaintiff's Product 2, this information, which is provided by Exhibit Ko 10, cannot be adopted because it contradicts the information presented in Exhibit Ko 9 concerning LAOX and DENKODO (pages 14 to 15). As mentioned above, in the case of Yodobashi Camera, causation between the defendant's act and the refusal to sell Plaintiff's Product 2 cannot be found. According to the entire import of the oral

argument, in December 2002, the plaintiff released "携帯万能 9" (Keitai Bannou 9) as a successor product to Plaintiff's Product 2. There are no grounds to believe that Act of Making an Allegation 2 had any particular effect on the release of said successor product.

In consideration of the facts mentioned above, based on a comprehensive evaluation of the manner, frequency, and content of the defendant's Act of Making an Allegation 2, the effect thereof on the plaintiff's business as mentioned in (1) above, and any other matters indicated in the recorded information related to this case, it would be reasonable to find that the immaterial damage suffered by the plaintiff is five million yen.

(5) Attorney's fee

According to the recorded information, it is obvious that the plaintiff commissioned an attorney to carry out the task of filing and proceeding with this lawsuit. In consideration of the nature, the approved amount, the level of difficulty, and any other factors related to this lawsuit, it would be reasonable to determine that the attorney's fee that has proximate causation with the defendant's act is one million yen.

(6) Summary

As mentioned above, the amount of damage suffered by the plaintiff as a result of the defendant's Act of Making an Allegation 2 is six million yen.

4. Conclusion

The plaintiff's claim is acceptable to the extent specified in the main text.

Tokyo District Court, 29th Civil Division

Presiding judge: IIMURA Toshiaki

Judge: ENOKIDO Michinari

Judge: SANO Shin