

Date	July 3, 2007	Court	Osaka District Court, 21st Civil Division
Case number	2006 (Wa) 10470		
<p>– A case in which the court dismissed all of the claims made, under Article 3 of the Unfair Competition Prevention Act (Article 2, paragraph (1), item (i) or (ii) of said Act) or Article 709 of the Civil Code, by the plaintiff, who uses an indication consisting of the characters "ごはんや まいどおおきに XX 食堂" ("XX" indicates the location of the store) (the plaintiff's indication) for the store that the plaintiff manages (the plaintiff's store), against the defendant, who uses an indication consisting of the characters "めしや食堂" for the store that the defendant manages (the defendant's store) for damages and an injunction against the use of the defendant's indication.</p>			

In this case, the plaintiff engaged in the management of a restaurant as a business alleged as follows: (1)(A) As a primary claim, the plaintiff alleged that the defendant's act of using the defendant's indication (the indication consisting of the characters "めしや食堂," which is similar to the plaintiff's indication (the indication consisting of the characters "ごはんや まいどおおきに XX 食堂" ("XX" indicates the location of the store)) constitutes an act of unfair competition specified in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act. Based on this allegation, the plaintiff sought an injunction against the use of the indication "食堂" in the defendant's indication and a sign, etc. in which the defendant's indication is stated, as well as destruction thereof, etc. (B) As a secondary claim, the plaintiff alleged that the defendant's act of using, for the appearance of the defendant's store using the defendant's indication (the appearance of the defendant's store), a style similar to that of the plaintiff's store using the plaintiff's indication (the appearance of the plaintiff's store) constitutes (a) an act of unfair competition specified in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act and (b) an act of tort under the Civil Code. Based on this allegation, the plaintiff sought an injunction against the use of the indication "食堂" in the defendant's indication and signs, etc. in which the defendant's indication is stated, as well as destruction thereof, etc., under Article 3 of the Unfair Competition Prevention Act for a primary claim (a) above, and based on the right to recover damage specified in Article 709 of the Civil Code for a secondary claim (b) above. (2) At the same time, the plaintiff sought damages under Article 4 of the Competition Prevention Act and Article 709 of the Civil Code.

The issues disputed in this court case are [i] whether the defendant's indication is similar to the plaintiff's indication, [ii] whether the appearance of the plaintiff's store may be regarded as an indication of business, and [iii] whether the appearance of the

defendant's store is similar to that of the plaintiff's store.

In this judgment, the court held that, regarding Issue [i], the plaintiff's indication ("ごはんや まいどおおきに食堂 XX 食堂," which has been actually used by the plaintiff, and "ごはんや まいどおおきに XX 食堂" are collectively referred to as the "plaintiff's indication") may be associated with the pronunciation "gohan'ya maidookini(shokudou) XX shokudou" or "maidookini(shokudou)," whereas the defendant's indication may be associated with the pronunciation "meshiya shokudou" or "meshiya," which is clearly not similar to the pronunciation of the plaintiff's indication.

Regarding Issue [ii], this judgment stated that, while the appearance of a store itself is not chosen as an identifier of a business entity, the long-term use of the distinctive appearance of a store, etc. could secondarily result in the situation where the appearance of a store as a whole functions as an indication of business that identifies a specific business entity and therefore that it may not be denied that the appearance of the plaintiff could start functioning as an indication of business.

Regarding Issue [iii], this judgment states that, first of all, as a general theory, when the similarity or dissimilarity between two stores in terms of store appearance as a whole is determined, it would not suffice to find that the two stores are similar in terms of the overall impression and atmosphere of store appearance or in terms of the concept of store appearance. This judgment further states that it should be interpreted that the two stores are, at least, required to be identical or very similar in terms of the distinctive or major constituent features that attract the attention of consumers and, consequently, that there is an objective risk of misleading consumers, namely, customers of restaurants in this case, into believing that the business entities of the two stores are the same or causing confusion among them. As a result,, the court found that the appearance of the plaintiff's store is not similar to that of the defendant's store by holding as follows.

Regarding the appearance of the plaintiff's store and that of the defendant's store, the most distinctive and major constituent features that attract attention of consumers are the store signs and pole signs of both stores. However, the store sign and pole sign of the plaintiff's store are not similar to those of the defendant's store. The difference between the two stores in this respect has a great effect on the overall impression, atmosphere, etc. of the appearance of the plaintiff's store and that of the defendant's store. Furthermore, there are non-negligible differences in other constituent features (wood-grain menu board, board-type menu board, exterior colors) as well, which have made the two stores look very different in terms of overall impression and atmosphere. Therefore, even if there are common features between the appearance of the plaintiff's store and that of the defendant's store in terms of any other constituent features as

alleged by the plaintiff, the appearance of the defendant's store as a whole may not be considered to be similar to that of the plaintiff's store. Thus, it may not be found that there is a risk of misleading and causing confusion among consumers about the respective identities of the business entities of the defendant's store and the plaintiff's store.