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<tr><td rowspan="2">Unfair Competition</td><td>Date</td><td>January 29, 2020</td><td rowspan="2">Court</td><td rowspan="2">Intellectual Property High Court, Second Division</td></tr>
<tr><td>Case number</td><td>2018 (Ne) 10081 (Principal Action)
2018 (Ne) 10091 (Counterclaim)</td></tr>
<tr><td colspan="5">A case in which the court ruled as follows:
- In the case of calculating the damage according to Article 5, paragraph (3) of the Unfair Competition Prevention Act, the rate which should have been entitled to receive for the use by a person who performed an act of unfair competition, as determined after the fact, should inevitably become higher than the ordinary rate, and [i] the rate for said indication of goods or business as stipulated in an actual licensing agreement should be taken into consideration, and if such rate is unclear, then the market value of the rate in the industry should be taken into consideration, and furthermore, the following factors should be comprehensively taken into consideration in order to determine a reasonable rate: [ii] the level of customer attracting power of said indication of goods or business, [iii] the manner of the act of unfair competition, as well as the degree of contribution made on sales and profits, by the person who performed an act of unfair competition involving said indication of goods or business, or a similar indication, and [iv] the relationship between the entity shown by said indication of goods or business and the person who performed an act of unfair competition, as well as other circumstances shown in a lawsuit; and
- When consideration is given to [i] the rate as stipulated in the actual License Agreement by the first instance plaintiff, [ii] the fact that "MARIO KART" as well as Mario and other characters are famous and have high customer attracting power, and [iii] the fact that it is acknowledged that the degree of contribution made on sales by the first instance defendant company, which has performed an act of unfair competition with the intent to unlawfully use the above customer attracting power, is considerably great, along with other circumstances of the judgment, it is reasonable to determine that the rate for the sales at the shops that use the Domain Names shall be 15%, and the rate for the sales at the shops that do not use the Domain Names shall be 12%.</td></tr>
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Case type: Injunction, etc.

Result: Partial modification of the prior instance judgment; Additional claims granted in this court

References: Articles 3 and 4, Article 5, paragraph (3) of the Unfair Competition Prevention Act

Summary of the Judgment

1. The principal claim of the present case is one in which the first instance plaintiff sought for injunctions and compensation for damage and the like by asserting the following: [i] the use, by the first instance defendant company, of the marks, "マリカー", "MariCar", "MARICAR", and "maricar" (hereinafter referred

to as "Defendant's Marks"), which are similar to the first instance plaintiff's well-known or famous indications of goods or business; namely, the plaintiff's letter indications ("マリオカート", "マリカー") and the indication of "MARIO KART", in business and as a trade name constitutes an act of unfair competition as stipulated in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act; [ii] a series of acts, by the first instance defendant company, consisting of uploading on Internet websites photographs and videos containing parts that are similar to the plaintiff's representations (Mario, Luigi, Yoshi, Bowser), which are the first instance plaintiff's well-known or famous indications of goods or business, and the act by employees of wearing costumes of Mario, Luigi, Yoshi, and Bowser, and the act of installing Mario's figure at a shop as well as the act of renting the aforementioned costumes to customers fall under an act of unfair competition as stipulated in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act; [iii] the use, by the first instance defendant company, of the plaintiff's letter indications, which are the first instance plaintiff's specific indications of goods or business, and the domain names that are similar to the indication of "MARIO KART" ("maricar.jp", "maricar.co.jp", "fuji-maricar.jp", "maricar.com"; hereinafter referred to as "Domain Names") falls under an act of unfair competition as stipulated in Article 2, paragraph (1), item (xiii) (currently item (xix)) of the Unfair Competition Prevention Act, respectively; and [iv] there is wrongful intent or gross negligence on the part of the president of the first instance defendant company on the grounds of default of duties.

2. In the prior instance judgment (Tokyo District Court 2017 (Wa) 6293, judgment rendered on September 27, 2018), the court ruled that an act of using the Defendant's Mark in relation with the consumers who do not understand Japanese does not fall under an act of unfair competition, and that using the Domain Names on websites that are written only in foreign languages does not constitute infringement of business interests, and approved the first instance plaintiff's claims within the extent of an injunction against the use of Defendant's Marks and deletion of the same (except for those on websites and leaflets that are written only in foreign languages), an injunction against the use of Mario's costumes, etc., an injunction against the use of Domain Names (except for the cases of use for websites that are written only in foreign languages), and payment by the first instance defendant company of damages in the amount of 10,000,000 yen along with relevant delay damages, and dismissed all other claims.

The first instance plaintiff and the first instance defendant company appealed

the prior instance judgment, and the first instance plaintiff increased the amount of claim for the compensation for damage to 50,000,000 yen from 10,000,000 yen.

3. The judgment of this court is the final judgment following the interlocutory judgment dated May 30, 2019. Based on the interlocutory judgment which determined that the grounds for the claim for compensation for damage, which is made by the first instance plaintiff against the first instance defendants on the grounds of violation of the Unfair Competition Prevention Act (excluding the part that concerns monetary amount) concerning the use of Defendant's Marks, and costumes and a figure of Mario and other characters, as well as the use of Domain Names by the first instance defendant company and at shops are reasonable, the judgment of this court approved [i] an injunction against the use of Defendant's Marks and Mario costumes, etc. in business facilities and activities, including such use on websites that are written in foreign languages, as well as deletion of Defendant's Marks, and [ii] an injunction against the use of Domain Names, including such use on websites that are written only in foreign languages, and deletion of registration of Domain Names, and furthermore, approved a claim for compensation for damage in the full amount of 50,000,000 yen, which was expanded in the appeal stage. Of the issues of the present case, the reasons for injunctions and the amount of damages are as outlined below.

(1) Regarding injunctions

The "use" as stipulated in Article 2, paragraph (1), item (ii) of the Unfair Competition Prevention Act refers to the use of an indication of goods or business, which is identical or similar to a famous indication of goods or business, for business in relation to goods or business. As such, while various manners of use may be possible, it is not the case that an injunction against use cannot be ordered unless each of all individual manners of use included therein is acknowledged to constitute an act of unfair competition, and even if an injunction against "use" in "business facilities and activities" is approved, it cannot be said that such injunction is excessive or unspecific.

(2) Regarding the amount of damages

A. In the case of calculating the damages pursuant to Article 5, paragraph (3) of the Unfair Competition Prevention Act, it is not necessarily the case that the calculation must always be based on a rate that is stipulated in a licensing agreement for the relevant indication of goods or business. Rather, the rate which should have been entitled to receive for the use by the person who performed an act of unfair competition, as determined after

the fact, should inevitably be higher than the ordinary rate.

The rate, which is used for calculating the damage pursuant to Article 5, paragraph (3) of the Unfair Competition Prevention Act, and which should have been entitled to receive for the use, is such that [i] the rate for said indication of goods or business as stipulated in an actual licensing agreement should be taken into consideration, and if such rate is unclear, then the market value of the rate in the industry should be taken into consideration, and furthermore, the following factors should be comprehensively taken into consideration in order to determine a reasonable rate: [ii] the level of the customer attracting power of said indication of goods or business, [iii] the manner of the act of unfair competition, as well as the degree of contribution made on sales and profits, by the person who performed an act of unfair competition involving said indication of goods or business or a similar indication, and [iv] the relationship between the entity shown by said indication of goods or business and the person who performed an act of unfair competition, as well as other circumstances shown in a lawsuit.

In light of the foregoing, the present case shall be considered next. When consideration is given to [i] the rate, which the first instance plaintiff has used so far in the license agreements that were executed for the first instance plaintiff's copyrights and trademarks, [ii] the fact that the indications of "MARIO KART" and "マリオカート" as well as the plaintiff's representations are famous and have high customer attracting power, and [iii] the fact that it is acknowledged that the degree of contribution made on sales by the first instance defendant company, which has performed an act of unfair competition with the intent to unlawfully use the customer attracting power of the indication of "MARIO KART" and the like, is considerably great, and other circumstances of the judgment, it is reasonable to determine that the rate for the sales at the shops that use the Domain Names shall be 15%, and the rate for the sales at the shops that do not use the Domain Names shall be 12%.

B. The amount of damages, 92,399,253 yen, which is equivalent to the royalties that are calculated by multiplying the sales of each shop, as established by evidence, by the aforementioned rate, added to the amount of money that is equivalent to attorneys' fees, 10,000,000 yen, brings the total to 102,399,253 yen. Accordingly, the claim for compensation for

damage, which is made by the first instance plaintiff against the first instance defendants, is reasonable in the full amount of 50,000,000 yen.

Judgment rendered on January 29, 2020
2018 (Ne) 10081 Appeal case of seeking injunction against act of unfair competition, etc.
2018 (Ne) 10091 Counterclaim case of seeking confirmation of absence of right to demand injunction against copyright infringement
(Judgment of the prior instance Tokyo District Court 2017 (Wa) 6293 Case of seeking injunction against act of unfair competition, etc.)
Date of conclusion of oral argument: November 28, 2019

Judgment

Appellant / Appellee/ Counter-Defendant (First Instance Plaintiff)
Nintendo Co., Ltd.
(hereinafter referred to as "First Instance Plaintiff")

Appellant / Appellee / Counter-Plaintiff (First Instance Defendant)
Mari Mobility Development Inc.
(hereinafter referred to as "First Instance Defendant Company")

Appellee (First Instance Defendant)
Y (hereinafter referred to as "First Instance Defendant Y"

Main text

1. Based on the changes made by First Instance Plaintiff to the statement of appeal and to the claims, Paragraphs 1, 2, and 5 to 7 of the main text of the judgment in prior instance shall be changed as follows.
   (1) First Instance Defendant Company shall not use Marks 1 to 4, which are indicated on the List of Defendant's Marks attached to the judgment in prior instance, at its business facilities and for its business activities.
   (2) First Instance Defendant Company shall delete the marks described in the preceding paragraph from its business facilities, advertising materials, and go-kart vehicles described in the preceding paragraph.
   (3) First Instance Defendant Company shall not use Domain Names 1 to 4, which are indicated on the List of Domain Names attached to the judgment in

prior instance.

(4) First Instance Defendant Company shall delete registration of Domain Name 2, which is indicated on the List of Domain Names attached to the judgment in prior instance.

(5) First Instance Defendants shall jointly pay to First Instance Plaintiff a sum of 50,000,000 yen along with delay damages accruing therefrom at the rate of 5% per annum for the period from October 31, 2018 until full payment.

(6) Other claims made by First Instance Plaintiff shall be dismissed.

2. The appeal filed by the First Instance Defendant Company shall be dismissed.

3. The claims made by First Instance Defendant Company in a counterclaim shall be dismissed.

4. Court costs throughout the first and second instances as well as the principal action and the counterclaim shall be divided into ten parts, one of which shall be borne by First Instance Plaintiff, and the remainder of which shall be borne by First Instance Defendants.

5. Paragraphs 1 (1), (3), and (5) of this judgment may be provisionally executed.

Fact and reasons

Abbreviations of terms and their meanings, other than what is added herein, shall be as used in the judgment in prior instance and in the interlocutory judgment that was issued on May 30, 2019 in this trial (hereinafter referred to as "Interlocutory Judgment").

No. 1 Trials requested by the parties

1. First Instance Plaintiff

Same as the purport of Paragraphs 1 to 3 of the main text.

2. First Instance Defendant Company

(1) From among the judgment in prior instance, the parts in which First Instance Defendant Company lost shall be reversed.

(2) In regards to the aforementioned parts, the claims made by First Instance Plaintiff shall be dismissed entirely.

(3) The claims which were expanded in this trial by First Instance Plaintiff shall be dismissed.

(4) The appeal filed by First Instance Plaintiff shall be dismissed.

(5) First Instance Plaintiff shall confirm, based on the right of reproduction and the right to transmit to the public for Representations 1 to 4 on the attached List of Counter-Defendant's Representations, that First Instance Plaintiff does

not have the right to demand an injunction against the act by First Instance Defendant Company of publicly transmitting the photographs or images of persons wearing Costumes 1 to 4 of the attached List of Costumes.

No. 2 Outline of the case

1. Details of the case

(1) The present case is one in which First Instance Plaintiff asserted that [i] the use by First Instance Defendant Company of Defendant's Mark 1, which is similar to Plaintiff's Character Indications (Plaintiff's Character Indications of "マリオカート" and "マリカー"), which are First Instance Plaintiff's well-known or famous indications of goods or business, in business and as a trade name, constitutes an act of unfair competition as prescribed in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act, and that [ii] the Posting Activity of creating Photographs and Videos, which are partly similar to Plaintiff's Representations over which First Instance Plaintiff has copyrights, and uploading them on the Internet infringes on First Instance Plaintiff's copyrights (the right of reproduction or the right of adaptation, the right of automatic public transmission, and the right to make transmittable), and that [iii] the Advertising Activity (consisting of the Posting Activity, the act by employees of wearing costumes, and the act of installing a doll at a shop) that involves the use of Defendant's Mark 2, which is an indication of goods or business that is similar to Plaintiff's Representation or Plaintiff's Three-Dimensional Figure, which is First Instance Plaintiff's well-known or famous indication of goods or business, falls under an act of unfair competition as prescribed in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act, and that [iv] the act of using Domain Names that are similar to Plaintiff's Character Indications, which are First Instance Plaintiff's Specific Indications of Goods or Business, falls under an act of unfair competition as prescribed in Article 2, paragraph (1), item (xiii) (item (xix) under the current Unfair Competition Prevention Act; hereinafter referred to as "item (xiii)" in this judgment) of the Unfair Competition Prevention Act prior to the amendment of Act No. 33 of 2018 (the Unfair Competition Prevention Act prior to the amendment as well as after the amendment are hereinafter simply referred to as "Unfair Competition Prevention Act" without any distinction from the current Unfair Competition Prevention Act), and that [v] the Rental Activity of Costumes, which are reproductions or adaptations of Plaintiff's Representations, to customers, constitutes infringement of First

Instance Plaintiff's copyright (right of rental), and made the following claims against First Instance Defendants.

A. Claims made against First Instance Defendant Company

(A) Pursuant to Article 3, paragraphs (1) and (2) of the Unfair Competition Prevention Act, an injunction against the act of using Defendant's Mark 1, deletion of the same mark, and a procedure for deleting the registration of a trade name, in connection with the above [i], an injunction against the use of Defendant's Mark 2 as well as deletion of Photographs and Videos and discarding of data, in connection with the above [iii], and an injunction against the use of Domain Names and the deletion of registration of Domain Names 2 and 4, in connection with the above [iv].

(B) Pursuant to Article 112, paragraphs (1) and (2) of the Copyright Act, injunctions against the act of reproducing or adapting Plaintiff's Representations, and against automatic public transmission of the reproductions or adaptations, and against making the reproductions or adaptations transmittable, and deletion of Photographs and Videos and discarding of data, in connection with the above [ii], and an injunction against the Rental Activity, in connection with the above [v].

B. Claims made against First Instance Defendants

Joint payment of part of the compensation for damage claimed against First Instance Defendant Company on the basis of Article 4 and Article 5, paragraph (3), items (i) and (iv) (item (v) under the current Unfair Competition Prevention Act; hereinafter referred to as "item (iv)" in this judgment) of the Unfair Competition Prevention Act, or on the basis of Article 709 of the Civil Code and Article 114, paragraph (3) of the Copyright Act, and claimed against First Instance Defendant Y on the basis of Article 429, paragraph (1) of the Companies Act, a sum of 10,000,000 yen along with delay damages accruing therefrom at the rate of 5% per annum as prescribed by the Civil Code for the period from March 18, 2017, which is the day after the tort, until full payment.

(2) The judgment in prior instance determined as summarized below in A to G, approving the claims that are described above in (1) to the extent of an injunction against the use of Defendant's Mark 1 and deletion of the same (except for those used on websites and in leaflets that are written in foreign languages only), an injunction against the use of Defendant's Mark 2, discarding of data of Videos, and an injunction against the use of Domain Names (except for use thereof on websites that are written in foreign languages

only), as well as to the extent of damages payable by First Instance Defendant Company in the amount of 10,000,000 yen along with delay damages accruing therefrom at the rate of 5% per annum for the period from March 31, 2018, which is the final day of the act of unfair competition, until full payment, and dismissed other claims.

A. Regarding the act of using defendant's Mark 1 by First Instance Defendant Company, since it cannot be acknowledged that Plaintiff's Character Indication "マリカー" was well-known among those who do not understand Japanese, the claim for an injunction against the use of Defendant's Mark 1 on websites and in leaflets that are written only in foreign languages as well as the claim for deletion of the same are not reasonable, but as for other acts, they fall under acts of unfair competition as prescribed in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act, so that the claim for an injunction against the use and the claim for deletion are reasonable (although the claim for deletion of Defendant's Mark 1 from cars other than go-karts and from bicycles and light road vehicles is not reasonable). Since First Instance Defendant Company changed its trade name, the claim for a procedure for deleting the registration of a trade name is not reasonable.

B. The Advertising Activity (except for that which pertains to Photograph 1) falls under an act of unfair competition as prescribed in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act, so that the claim for an injunction against the use of Defendant's Mark 2 is reasonable. Since Photographs and Videos are already deleted, the claim for deletion is not reasonable, and as for the data of Photographs, there are usages that do not constitute acts of unfair competition, so that the claim for discarding them is unreasonable. However, the claim for discarding the data of Videos is reasonable.

C. Although the use of Domain Names falls under an act of unfair competition as prescribed in Article 2, paragraph (1), item (xiii) of the Unfair Competition Prevention Act, the act of using Domain Names on websites that are written only in foreign languages does not infringe on the business interests of First Instance Plaintiff. In addition, First Instance Defendant Company has deleted registration of Domain Name 4. Accordingly, while the claim for an injunction against the use of Domain Names on websites that are written only in foreign languages is not

reasonable, other claims for injunction against use of Domain Names are reasonable. Given the possibility of there being cases in which injunction may not be granted, as described above, the claim for deleting registration of Domain Name 2 is unreasonable, and the claim for deleting registration of Domain Name 4 is unreasonable.

D. Concerning the claims for injunctions against the act of reproducing or adapting Plaintiff's Representations, and against automatic public transmission of the reproductions or adaptations of Plaintiff's Representations, and against making the reproductions or adaptations of Plaintiff's Representations transmittable, the activities against which injunctions are requested are not specified, so that the injunction covers all extensive and various activities. As such, since there is not enough evidence to acknowledge the need for injunctions, the claims are not reasonable.

E. The costumes bearing Defendant's Marks 2-2, 2-3, 2-5, 2-6, 2-8, and 2-10 are the same as the Costumes, and since the injunction against the use of Defendant's Mark 2 pursuant to the Unfair Competition Prevention Act includes the prohibition against Rental Activity, there is no need to make a decision concerning the claim for an injunction against the Rental Activity, which is based on copyrights and which is in a relationship of elective joinder with the above injunction claim.

F. Concerning First Instance Defendant Y, since it cannot be acknowledged that First Instance Defendant Y acted in bad faith or was grossly negligent upon carrying out its duties for First Instance Defendant Company, the claim made against First Instance Defendant Y pursuant to Article 429, paragraph (1) of the Companies Act is not reasonable.

G. The claim for the compensation for damage made against First Instance Defendant Company is reasonable in regards to the full amount (10,000,000 yen). The delay damages shall accrue from March 31, 2018, which is the last day of the act of unfair competition.

(3) From among the judgment in prior instance, First Instance Plaintiff was dissatisfied with the following parts; namely: [i] the part in which the court dismissed the claim for an injunction against the use of Defendant's Mark 1 on websites and in leaflets that are written only in foreign languages as well as the claim for deleting Defendant's Mark 1 from websites and in leaflets that are written only in foreign languages, [ii] the part in which the court dismissed the

claim for an injunction against the use of Domain Names on websites that are written only in foreign languages as well as the claim for deleting registration of Domain Name 2, and [iii] the part in which the court dismissed the claim for the compensation for damage which was made against First Instance Defendant Y, and appealed the case. In doing so, the amount sought for compensation was increased from 10,000,000 yen to 50,000,000 yen, and the start date for calculating the delay damages was moved to October 31, 2018.

On the other hand, First Instance Defendant Company, which was dissatisfied with the parts of the judgment in prior instance in which First Instance Defendant Company lost, appealed the case in addition to filing a counterclaim, seeking confirmation that First Instance Plaintiff does not have the right to demand for an injunction against the act by First Instance Defendant Company of publicly transmitting photographs or videos of persons wearing costumes that are indicated on the attached List of Costumes pursuant to the right of reproduction and the right of public transmission for Representations 1 to 4 on the attached List of Counter-Defendant's Representations. In response, First Instance Plaintiff stated its intention not to give its consent to the filing of the counterclaim.

From among the judgment in prior instance, this trial does not cover the part in which the court held that the creation and uploading of Photograph 1 does not fall under an act of unfair competition or infringement of copyrights (the right of reproduction, the right of adaptation, the right of automatic public transmission, the right to make transmittable), the part in which the court dismissed the claim for deleting Defendant's Mark 1 from cars other than go-karts and from bicycles and light road vehicles, the part in which the court dismissed the claim for a procedure to delete registration of First Instance Defendant Company's trade name, the part in which the court dismissed the claims for deleting Photographs and Videos as well as for discarding the data of Photographs, the part in which the court dismissed the claims for deleting registration of Domain Name 4, and the part in which the court dismissed the claims for injunctions against the act of reproducing or adapting Plaintiff's Representations, and against automatic public transmission of the reproductions or adaptations, and against making the reproductions or adaptations transmittable.

(4) On May 30, 2019, this court rendered the Interlocutory Judgment which held that [i] the grounds for the claim made by First Instance Plaintiff against

First Instance Defendants for compensation for damage on the basis of violation of the Unfair Competition Prevention Act concerning the act of using the Mark 1 indicated on the List of Defendant's Marks attached to the judgment in prior instance, and Costume 2 on the List of Defendant's Marks and the doll indicated on the List of Defendant's Marks attached to the same judgment, by First Instance Defendant Company and at the Shop, and the act of using the domain names indicated on the List of Domain Names attached to the same judgment are reasonable (except in regards to the monetary amount), and which ruled that the counterclaim filed by First Instance Defendant Company is unlawful.

2. Basic facts (the facts over which the parties are not in dispute, and the facts which are supported by the evidence shown below and by the entire import of the oral argument)

(1) Parties

A. First Instance Plaintiff is a corporation engaged in the manufacture and sale of articles used for relaxation, sporting goods, audio equipment, and ride-on toys, and in the creation, manufacture, and sale of the content for games, videos, and music, and in the planning, manufacture, and sale of character goods, and in the licensing of intellectual property rights (Exhibit Ko 1).

B. First Instance Defendant Company is a corporation engaged in the purchase and sale, lease, and rental of automobiles, and was established on June 4, 2015 (Exhibit Ko 2).

C. First Instance Defendant Y is the Representative Director of First Instance Defendant Company (Exhibit Ko 2).

(2) Development and sale of the software games, "Mario Kart" series, by First Instance Plaintiff.

A. On August 27, 1992, First Instance Plaintiff sold the software game, "Super Mario Kart", for a game machine called "Super Family Computer", and by April 28, 2017, sold a total of nine titles of software games for "Mario Kart" series (Exhibits Ko 7, Ko 8-1 to 8-9).

"Mario Kart" is a game series featuring "Mario", "Luigi", "Yoshi", "King Bowser Koopa", and other characters who drive around in go-karts on various courses, racing each other (Exhibits Ko 8-1 to 8-9).

B. Plaintiff's Representation Mario, Plaintiff's Representation Luigi, Plaintiff's Representation Yoshi, and Plaintiff's Representation King

Bowser Koopa are illustrations of humans or animals, and are picture works over which First Instance Plaintiff has copyrights. Plaintiff's Representations appear in the "Mario" series, which are First Instance Plaintiff's game series that include "Super Mario Brothers", and it can be said that they represent the human or animal characteristics expressed by Mario, Luigi, Yoshi, and King Bowser Koopa, who are also characters appearing in the "Mario Kart" series as go-kart drivers (Exhibits Ko 7, Ko 8-1 to 8-9, Ko 94-1 to 94-4).

(3) Rental business of public road go-karts, etc. by First Instance Defendant Company, etc.

A First Instance Defendant Company has operated the Rental Business, consisting of rental of public road go-karts which can run on public roads, including the Rental Activity, and other businesses associated with the foregoing, since June 4, 2015, which is the date of foundation, until June 23, 2016, if not earlier, which is the day before the effective date of a partnership contract with Shinagawa Kumiai, by using the shop name of "MariCAR" (Exhibit Ko 62-1, entire import of the oral argument).

B As indicated in the attached List of Shops, there are 13 Shops in total : [i] the five MariCAR shops, namely; Shinagawa Shop 1, Shibuya Shop, Akihabara Shop 1, Osaka Shop, and Okinawa Shop, which operate under the shop name of "MariCAR" (Exhibits Ko 143-1 to 143-5, Exhibits Otsu 134-1, Otsu 134-4, Otsu 134-5, Otsu 134-9, Otsu 134-11); [ii] the STREET KART shops, namely; Shinagawa Shop 2, Akihabara Shop 2, Tokyo Bay BBQ Shop, Yokohama Shop, and Kyoto Shop, which were using the indication, "STREET KART", on their websites and the like (Exhibits Ko 143-6 to 143-8, Ko 143-10, Ko 143-11), and Asakusa Shop (Exhibit Ko 143-9); [iii] Fuji-Kawaguchiko Shop (Exhibit Ko 6-2, Exhibit Otsu 116); and [iv] Roppongi Shop.

C The partnerships and corporations and the like which were involved in the Rental Business pertaining to the claims made by First Instance Defendants are: Shinagawa Kumiai (partnership agreement effective on June 24, 2016, dissolved on December 20, 2017); Shinagawa Kanko LLP (partnership agreement effective on December 20, 2017); Akihabara Kumiai (partnership agreement effective on June 13, 2017); Okinawa Kumiai (partnership agreement effective on June 26, 2017); Shinkiba Kumiai (partnership agreement effective on June 19, 2017); MariCAR

Osaka (founded on October 14, 2016); PLAN-S (founded on June 8, 2016); Eco Kart (founded on January 22, 2015); STREET KART Kyoto LLP (STREET KART); and Samurai Kart Asakusa (Exhibits Ko 121-1 to 121-4, Exhibits Otsu 48-1 to 48-5, Otsu 112, entire import of oral argument; these groups, together with SAMURAI.Nets Inc., whose involvement in the operation of Asakusa Shop is acknowledged as described later, are collectively referred to as "Related Groups").

(4) Use of Defendant's Mark 1, Defendant's Mark 2, and Domain Names by First Instance Defendant Company, and at MariCAR Shops and Fuji-Kawaguchiko Shop

A. First Instance Defendant Company

(A) Since its foundation on June 4, 2015 until March 21, 2018, First Instance Defendant Company used the trade name, "MariCAR Inc.", which contains Defendant's Mark 1-1, but changed its trade name to "MARI Mobility Development Inc." on the 22nd of the same month (Exhibit Otsu 84).

(B) At the time of February 23, 2017, First Instance Defendant Company used Domain Name 2 to run Defendant Company's Site, and made posts on the same site, of [i] indications which contain Defendant's Mark 1-1 and which read, "MariCAR Halloween Event being held" [in Japanese], "MariCAR Amazon store is officially open" [in Japanese], "MariCAR online store is officially open on Yahoo! Japan" [in Japanese], and "Driving MariCAR on streets makes you want to smile" [in Japanese], and [ii] multiple showings of the Logo, which is a combination of the letters, "MARICAR", which is the Defendant's Mark 1-3, and of a person riding a go-kart, and [iii] Defendant's Mark 1-2 along with the photograph of a public road go-kart with the letters, "MariCar.jp", which contain the same mark, indicated in yellow (Exhibit Ko 6-3).

Upon taking into consideration that, in the Logo, the figure part of a go-kart and the letter part of Defendant's Mark 1-3 can be recognized in a clearly distinctive manner, and that the letter part of Defendant's Mark 1-3 is easily noticeable because of the use of letters, the letter part of Defendant's Mark 1-3 is the essential part in the mark, and since ".jp" in "MariCar.jp" lacks distinctiveness or is not very distinctive, the essential part of "MariCar.jp" is "MariCar".

B. MariCAR Shops

(A) Shinagawa Shop 1

a. Use of Defendant's Mark 1 on websites

(a) Previously, Shinagawa Shop 1 used Domain Name 1 to run Shinagawa Shop 1 Website 1, and as of February 23, 2017, the same site had indications such as [i] "What's MariCAR?" [in Japanese], "MariCAR is Japan's largest provider of rental & tour service by public road go-karts" [in Japanese], and "Let's enjoy Japan's best public road go-kart, 'MariCAR'! Please come and visit Japan's largest-scale MariCAR!" [in Japanese], which contained Defendant's Mark 1-1, and [ii] also indicated the Logo (Exhibit Ko 6-1).

(b) Shinagawa Shop 1 also operated Shinagawa Shop 1 Website 2 by using Domain Name 4.

As of August 10, 2017, and November 14 of the same year, Shinagawa Shop 1 Website 2 had indications such as [i] "We at MariCar are providing our service as usual every day. MariCar is fully compliant with local governing laws in Japan and will continue to operate in accordance with the law" [in Japanese], and "We have all the optional gear to make your private or group karting a tailored one" [in Japanese], which contain Defendant's Mark 1-1, and [ii] indicated the Logo (Exhibit Ko 74, Exhibit Ko 102-1).

(c) After the judgment in prior instance, Shinagawa Shop 1 Websites 1 and 2 no longer have writings in Japanese, and these websites now consist of writings in foreign languages such as English and Chinese, but as of November 12, 2018 and November 29 of the same year, the Logo was indicated at the beginning (Exhibit Ko 143-1, Exhibit Otsu 93-1, entire import of the oral argument).

b. Use of Defendant's Mark 1 in Leaflets

The Leaflets which were distributed at Shinagawa Shop 1 as of November 15, 2016 were available in two versions, Japanese and English, and the Japanese version indicated [i] "MariCAR is a provider of rental & tour service by one-person public road go-karts, and you can drive it with your driver's license" [in Japanese],

"MariCAR is an activity that requires a driver's license (AT driver's license OK)!" [in Japanese], and contained Defendant's Mark 1-1, and both the Japanese and English versions had [ii] the Logo indicated in the upper left corner, and [iii] there was an indication, "maricar.com", in the upper right corner (Exhibits Ko 3, 4).

Since ".com" of "maricar.com" lacks distinctiveness or is not very distinctive, the essential part of "maricar.com" is "maricar".

c. Use of Defendant's Mark 1 in Business Cards

At Shinagawa Shop 1, at the time of November 15, 2016, Business Cards on which the Logo was printed were distributed (Exhibits Ko 4, 57).

d. Rental Activity

Shinagawa Shop 1 has carried out Rental Activity since around January 11, 2016, if not earlier, and the same was true as of March 12, 2019, which is the time of conclusion of oral argument for the Interlocutory Judgment (Exhibits Ko 6-1, Ko 6-4, Ko 39, Ko 42-13, Ko 43-13, Ko 75-1, Ko 105-1, Ko 106-5, Ko 106-8, Exhibit Otsu 92-1, entire import of the oral argument).

e. Act of using Mario Doll (Defendant's Mark 2-11)

At Shinagawa Shop 1, from around June 4, 2016, if not earlier, until around February 24, 2017, Mario Doll, which is about 120 cm tall, was placed near the Shop's entrance, with its back facing the entrance (Exhibits Ko 4, Ko 84, Ko 108-1, Ko 108-2), but Mario Doll was removed by June 16 of the same year, if not earlier (entire import of the oral argument).

(B) Akihabara Shop 1

a. Use of Defendant's Mark 1 on websites

(a) Previously, Akihabara Shop 1 used Domain Names 1 and 4 to run two websites, and at the time of October 2, 2017, Akihabara Shop 1 Website 2 had indications which are the same as the indications on Shinagawa Shop 1 Website 2, as described in the above (A) a (b), and at the time of May 7, 2018, Akihabara Shop 1 Websites 1 and 2 had the same indications (Exhibits Ko 132-1, Ko 132-2, Exhibit Otsu 41-6).

(b) After the judgment in prior instance, Akihabara Shop 1 Website 2 no longer had writings in Japanese, as was the case

with Shinagawa Shop 1 Website 2 of the aforementioned (A) a (c), but at the time of October 10, 2018, and at the time of November 12 and November 29 of the same year, the Logo was indicated on Akihabara Shop 1 Website 2 (Exhibits Ko 143-2, Ko 144-1, Exhibit Otsu 93-2, entire import of the oral argument).

b. Rental Activity

At Akihabara Shop 1, Rental Activity was still being carried out as of March 12, 2019, which is the time of conclusion of oral argument for the Interlocutory Judgment (Exhibit Ko 137, Exhibit Otsu 92-1, entire import of the oral argument).

(C) Shibuya Shop

a. Use of Defendant's Mark 1 on websites

Shibuya Shop used Domain Name 4 to run Shibuya Shop Website, and at the time of October 2, 2017, the website had the same indications as Shinagawa Shop 1 Website 2 as described above in (A) a (b) (Exhibit Otsu 41-7).

After the judgment in prior instance, Shibuya Shop Website no longer used writings in Japanese, as was the case with Shinagawa Shop 1 Website 2, as described in the above (A) a (c), but as of November 12, 2018 and November 29 of the same year, the Logo was indicated on Shibuya Shop Website (Exhibit Ko 143-3, Exhibit Otsu 41-7, Exhibit Otsu 93-3).

b. Rental Activity

At Shibuya Shop, Rental Activity was still being carried out as of March 12, 2019, which is the time of conclusion of oral argument for the Interlocutory Judgment (Exhibit Ko 92-1, entire import of the oral argument).

(D) Osaka Shop

a. Use of Defendant's Mark 1 on websites

Previously, Osaka Shop used Domain Name 4 to run Osaka Shop Website, and at the time of October 2, 2017, the website had the same indications as Shinagawa Shop 1 Website 2 as described in the above (A) a (b) (Exhibit Otsu 41-8).

After the judgment in prior instance, Osaka Shop Website no longer used writings in Japanese, as was the case with Shinagawa Shop 1 Website 2, as described in the above (A) a (c), but as of

October 12, 2018, and as of November 12 and November 29 of the same year, the Logo was indicated on Osaka Shop Website (Exhibit Ko 143-4, Exhibit Ko 144-3, Exhibit Otsu 93-4).

b. Rental Activity

At Osaka Shop, Rental Activity was carried out since around May 27, 2017, if not earlier, and was still being carried out as of March 12, 2019, which is the time of conclusion of oral argument for the Interlocutory Judgment (Exhibits Ko 105-3, Ko 106-7, Exhibit Otsu 92-2, entire import of the oral argument).

(E) Okinawa Shop

a. Previously, Okinawa Shop used Domain Name 4 to run Okinawa Shop Website, and at the time of October 2, 2017, the website had the same indications as Shinagawa Shop 1 Website 2, as described in the above (A) a (b) (Exhibit Otsu 41-9).

After the judgment in prior instance, Okinawa Shop Website no longer had writings in Japanese, as was the case with Shinagawa Shop 1 Website 2, as described in the above (A) a (c), but as of October 12, 2018, and as of November 12 and November 29 of the same year, the Logo was indicated on Okinawa Shop Website (Exhibits Ko 143-5, Ko 144-4, Exhibit Otsu 93-5).

b. Rental Activity

At Okinawa Shop, Rental Activity was still being carried out as of March 12, 2019, which is the time of conclusion of oral argument for the Interlocutory Judgment (Exhibit Ko 145, Exhibit Otsu 92-3, entire import of the oral argument).

C. Fuji-Kawaguchiko Shop

(A) Use of Defendant's Mark 1 on websites

At the time of February 23, 2017, Fuji-Kawaguchiko Shop used Domain Name 3 to run Kawaguchiko Shop Website, and the website indicated [i] "What's MariCAR?" [in Japanese], "MariCAR is Japan's largest provider of rental & tour service by public road go-karts" [in Japanese], "Please come and visit Japan's largest-scale MariCAR!" [in Japanese], and contained Defendant's Mark 1-1, and [ii] indicated the Logo (Exhibit Ko 6-2).

(B) Rental Activity

At Fuji-Kawaguchiko Shop, Rental Activity was carried out from

around February 23, 2017, if not earlier, until around November 15 of the same year (Exhibits Ko 6-2, Ko 102-2, Ko 105-2, entire import of the oral argument).

(C) Posting of Photographs 2 and 3

Photographs 2 and 3 were posted on Kawaguchiko Shop Website by February 23, 2017, if not earlier, but were deleted by June 16 of the same year, if not earlier (Exhibit Ko 6-2, entire import of the oral argument).

D. Use of Defendant's Mark 1 on public road go-karts

Some of the public road go-karts which are used at MariCAR Shops and Fuji-Kawaguchiko Shop indicated, [i] in yellow or white letters, "MariCar.com" or "MariCar.jp", containing Defendant's Mark 1-2, or "fuji-maricar.jp", containing Defendant's Mark 1-4, from around November 15, 2016 until around November 15, 2018, at the front and on the sides, and [ii] the Logo from around November 15, 2016 until November 29, 2018 at the front and on the sides (Exhibits Ko 4, Ko 6-1 to 6-4, Ko 74, Ko 85-3, Ko 102-1, Ko 105-1 to 105-3, Ko 106-1, Ko 106-6 to 106-8, Ko 132-1, Ko 132-2, Ko 134-2, Ko 143-1 to 143-5, Exhibits Otsu 85, Otsu 92-1, Otsu 92-3, Otsu 93-1 to 93-3, entire import of the oral argument).

Since ".com" of "MariCar.com" lacks distinctiveness or is not very distinctive, the essential part of "MariCar.com" is "MariCar", and since ".jp" of "fuji-maricar.jp" lacks distinctiveness or is not very distinctive, and "fuji" and "maricar" are connected with "-", and there is no relevance in concept between "fuji" and "maricar", the essential part of "fuji-maricar.jp" is "maricar".

E. Act by employees of wearing costumes

The Rental Business provided a guided tour in which customers to whom public road go-karts are rented out drive around. From around June 4, 2015 until around June 16, 2017, employees wearing costumes of "Mario", "Luigi", "Yoshi", and "King Bowser Koopa" served as guides and rode public road go-karts to lead the customers (Exhibits Ko 4, Ko 42-13, Ko 42-16, Ko 43-13, Ko 43-16, Exhibit Otsu 63, entire import of the oral argument).

(5) Posting of Videos

A. The following videos were uploaded on YouTube, an online video

sharing site, on the following dates, respectively: Video 1 on November 2, 2015; Video 2 on November 3 of the same year; Videos 3 and 4 on November 4 of the same year; Video 5 on November 22 of the same year; Video 6 on November 23 of the same year, Video 7 on December 5 of the same year; Video 8 on December 22 of the same year; Videos 9 and 10 on December 26 of the same year; Video 11 on January 6, 2016; Video 12 on January 10 of the same year; Video 13 on January 11 of the same year; Video 14 on January 26 of the same year; Video 15 on August 15 of the same year, and Video 16 on January 12, 2017 (entire import of the oral argument).

Of the Videos, Videos 1 to 12 and 16 were created by filming customers of the Rental Business who wear costumes and ride public road go-karts to drive around Tokyo and Osaka, and Videos 13 to 15 were created by recording TV programs which were broadcasted by featuring the Rental Business (Exhibits Ko 42-1 to 42-16, Ko 43-1 to 43-16).

B. Videos were deleted from YouTube by June 16, 2017, if not earlier (entire import of the oral argument).

(6) Acquisition, etc. of Domain Names

A. First Instance Defendant Company was granted registration for Domain Name 2 by a domain name registrar on May 26, 2015, and was using Domain Name 2 on Defendant Company Website, as described above in (4) (Exhibits Ko 6-3, Ko 55-2, Ko 209-1).

B. Since June 17, 2015, First Instance Defendant Company had kept Domain Name 4, but by January 31, 2018, if not earlier, transferred Domain Name 4 to a third party (Exhibit Ko 55-4, Ko 209-2, Ko 209-3, Exhibit Otsu 56, entire import of the oral argument).

As described above in (4), Domain Name 4 is used on websites run by MariCAR Shops, and even after Domain Name 4 was transferred to a third party, MariCAR Shops continued to use Domain Name 4.

C. Zent Co. was granted registration for Domain Name 1 on April 9, 2015, and for Domain Name 3 on June 1, 2016 by a domain name registrar (Exhibits Ko 55-1, Ko 55-3, Ko 209-1).

As described in above (4), Domain Name 1 was used at Shinagawa Shop 1 and Akihabara Shop 1, and Domain Name 3 was used at Fuji-Kawaguchiko Shop.

(7) Registered trademarks

With regards to the Trademark which consists of the standard characters, "マリカー", for which Zent Co. filed an application for trademark registration on May 13, 2015, First Instance Defendant Company received the right, which generated from the filing of the trademark application, by transfer from Zent Co. by October 13 of the same year, if not earlier, and holds the following trademark right for the Trademark to this day (Exhibits Ko 66-1 to 66-3, Exhibit Otsu 21).

Trademark Registration No.: 5860284

Filing date: May 13, 2015

Registration date: June 24, 2016

Registered trademark: マリカー (standard characters)

Designated goods and services, and classification of goods and services:

Class 39 Rental of vessels, airplanes, vehicles, automobiles, motorcycles, bicycles, pushchairs, rickshaws, sleds, hand barrows, wagons, carriages, and carts, and provision of information concerning the above

3. Issues

(1) Whether or not Rental Business was carried out at STREET KART Shops, and whether or not costumes bearing Defendant's Marks 1 and 2 were used (Issue 1).

(2) Whether or not costumes bearing Defendant's Marks 1 and 2 were used at Fuji-Kawaguchiko Shop and Roppongi Shop at the time of conclusion of oral argument for the Interlocutory Judgment (Issue 2).

(3) Whether or not First Instance Defendant Company carried out Rental Business at Shops from the time of its foundation on June 4, 2015 until the time of conclusion of oral argument for the Interlocutory Judgment, either singularly or jointly with Related Groups, and engaged in the act of using Defendant's Mark 1, Creating Activity, Advertising Activity, the act of using Domain Names, and Rental Activity, either singularly or jointly with Related Groups (Issue 3).

(4) Claims based on the Unfair Competition Prevention Act

A. In relation to Defendant's Mark 1

(A) Whether or not the act of using Defendant's Mark 1 in business and the act of using the same as a trade name fall under acts of unfair competition as prescribed in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act (Issue 4).

(B) Whether or not the defense of a registered trademark can be

established (Issue 5).

(C) Whether or not it is possible to file an injunction against the use and to demand deletion, and if so, to what extent (Issue 6).

B. In relation to Defendant's Mark 2

(A) Whether or not Advertising Activity and Rental Activity fall under acts of unfair competition as prescribed in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act (Issue 7).

(B) Whether or not it is possible to file an injunction against the use and to demand deletion and discarding, and if so, to what extent (Issue 8).

C. In relation to Domain Names

(A) Whether or not the act of using Domain Names falls under an act of unfair competition as prescribed in Article 2, paragraph (1), item (xiii) of the Unfair Competition Prevention Act (Issue 9).

(B) Whether or not it is possible to file an injunction against the use and to demand deletion of registration, and if so, to what extent (Issue 10).

(5) Claims based on copyright

A. Whether or not Photographs 2 and 3 and Videos fall under reproductions or adaptations of Plaintiff's Representations, and whether or not Creating Activity and Uploading Activity infringe on First Instance Plaintiff's right of reproduction, right of adaptation, right of automatic public transmission, and the right to make transmittable (Issue 11).

B. Whether or not Costumes fall under reproductions or adaptations of Plaintiff's Representations, and whether or not Rental Activity infringes on First Instance Plaintiff's right of rental (Issue 12).

(6) Whether or not a claim for compensation for damage may be made against First Instance Defendant Y (Issue 13).

(7) The amount of damages suffered by First Instance Plaintiff (Issue 14).

(8) Whether or not it is possible to file a counterclaim (Issue 15).

(omitted)

No. 3 Judgment of this court

1. From among the judgments by the court concerning Issues 1 to 5, 7, 9, 11 to 13, and Issue 14, those which concern the defense which is made on the basis of Article 15 of the LLP Act are as indicated in the Interlocutory Judgment.

According to the evidence (Exhibits Ko 229 to 231, Exhibit Otsu 113-4) and the entire import of the oral argument, it is acknowledged that the Related Group

involved in the operation of Asakusa Shop is SAMURAI.Nets Kabushiki Kaisha.

2. Concerning Issue 6 (Whether or not it is possible to file an injunction against the use and to demand deletion, and if so, to what extent [pertaining to Defendant's Mark 1]), and Issue 8 (Whether or not it is possible to file an injunction against the use and to demand deletion and discarding, and if so, to what extent [pertaining to Defendant's Mark 2])

(1) Concerning the claim for injunction against the use of Defendant's Marks 1 and 2

As indicated in Paragraph 2 (4) and (5) under "No. 2 Outline of the case" of this judgment and in Paragraphs 1 to 6 under "No. 3 Judgment of this court" of the Interlocutory Judgment, First Instance Defendant Company acted personally or jointly with Related Groups, since its establishment on June 4, 2015, and used Defendant's Marks 1 and 2 to engage in an act of unfair competition as prescribed in Article 2, paragraph (1), item (ii) of the Unfair Competition Prevention Act, thereby infringing on the business interests of First Instance Plaintiff.

Some of the acts of unfair competition according to the above finding have already been discontinued. However, considering that First Instance Defendant Company argues against the allegation that the use of Defendant's Marks 1 and 2 constitute acts of unfair competition, and that it is easy to restart the acts which have been discontinued, it can be said that there is a risk that First Instance Defendant Company may engage in acts of unfair competition, as per the above findings, including acts that were already discontinued.

Accordingly, First Instance Plaintiff is allowed to demand First Instance Defendant Company, pursuant to Article 3, paragraph (1) of the Unfair Competition Prevention Act, not to use Defendant's Marks 1 and 2 at its business facilities and for its business activities.

(2) Concerning the claim for deletion of Defendant's Marks 1 and 2

A. Concerning the claim for deletion of Defendant's Mark 1

First Instance Defendant Company asserted that as of June 10, 2019, Defendant's Mark 1 is no longer used at any of the Shops, and submitted screen images (Exhibits Otsu 134-1 to 134-13) of websites of the Shops as evidence.

However, as per the findings of Paragraph 2 (4) D under "No. 2 Outline of the case" of this judgment as well as Paragraphs 1 and 2 under "No. 3 Judgment of this court" of the Interlocutory Judgment,

Defendant's Mark 1 is also used in places other than websites, so that the court finds that the above evidence alone is not sufficient to prove that the use of Defendant's Mark 1 was completely discontinued, and it is assumed that the use still continues. Accordingly, First Instance Plaintiff is allowed to demand First Instance Defendant Company, pursuant to Article 3, paragraph 2 of the Unfair Competition Prevention Act, to delete Defendant's Mark 1 from its business activities, advertising materials, and go-kart vehicles.

B. Concerning the claim for discarding Videos

It is acknowledged that the Videos were uploaded by First Instance Defendant Company, personally or jointly with Related Groups, in order to offer a broad introduction of the Rental Business (Paragraph 6 (2) C (B) under "No. 3 Judgment of this court" of the Interlocutory Judgment), and it is acknowledged that they were also created by First Instance Defendant Company.

Since the data of Videos are advertising materials as described above, it cannot be said that there are usages that would not constitute acts of unfair competition.

Accordingly, First Instance Plaintiff may demand First Instance Defendant Company, pursuant to Article 3, paragraph (2) of the Unfair Competition Prevention Act, for discarding of data of Videos.

(3) Concerning the claims made by First Instance Defendants

First Instance Defendants argue that [i] the main text of the judgment in prior instance (Paragraphs 1 and 3 of the main text) which orders an injunction against the use of Defendant's Marks 1 and 2 is unspecific or excessive, and that it creates an imbalance with the fact that it dismissed a claim to prohibit reproduction, which is based on the Copyright Act, by reasoning that the subject of the injunction is unspecific, [ii] while the use of Defendant's Mark 1 in connection with a notice that Japanese cannot use the service provided by the Rental Business, or with the indication of the address of the shop of a Related Group, or the carrying out of Rental Business in the premises of the embassy or in a U.S. military base does not fall under an act of unfair competition, and while the rental of Costumes as requested by shopping districts, or rental of the Costume to only one person from among multiple tourists does not fall under an act of unfair competition, even such cases that do not constitute acts of unfair competition may be the subject of the

injunction, [iii] there are multiple models of go-kart vehicles, and deletion of Defendant's Mark 1 would turn public road go-karts into the same state as that of stolen vehicles, and there are go-kart vehicles that are owned by third parties, and [iv] no assertion was made with regard to the need for an injunction against the export of Costumes along with submission of relevant evidence. In view of the above, First Instance Defendants assert that it is unspecific or excessive to order an injunction against the "use" of Defendant's Marks 1 and 2 at "business facilities and for business activities", and to order deletion of Defendant's Mark 1 from go-kart vehicles.

A. The main text (Paragraph 1 of this judgment and Paragraph 3 of the main text of the judgment in prior instance) which grants an injunction against the use of Defendant's Marks 1 and 2 is specific about the subject of the injunction, and it cannot be considered to be an excessive injunction.

In addition, since an injunction pursuant to the Unfair Competition Prevention Act and a claim for prohibiting reproduction pursuant to the Copyright Act are different in terms of the subject against which an injunction is filed, it does not create imbalance with the decision about these claims.

B. The act of using Defendant's Marks 1 and 2 in business in relation to the Rental Business broadly falls under an act of unfair competition, and the examples listed by First Instance Defendants in above [ii] all fall under acts of unfair competition.

C. Even if there are multiple models of go-kart vehicles, it cannot be said that the "go-kart vehicles" intended by the injunction are unspecific.

In addition, even if removal of Defendant's Mark 1 may create inconvenience as asserted by First Instance Defendant Company, it cannot be acknowledged that it is completely impossible to redo procedures and the like anew, so that it cannot be said, based on this reason, that an injunction is excessive.

Furthermore, even if there are go-kart vehicles that are owned by third parties, it is acknowledged that First Instance Defendant Company engaged in the Rental Business jointly with Related Groups by placing Defendant's Mark 1 on public road go-karts, and it can be assumed that First Instance Defendant Company has the authority to delete Defendant's Mark 1, so that it cannot be said that ordering First Instance Defendant Company to delete Defendant's Mark 1 from go-kart vehicles is an excessive injunction.

D. The "use" according to Article 2, paragraph (1), item (ii) of the Unfair Competition Prevention Act refers to the use of an indication of goods or business, which is identical or similar to a famous indication of goods or business, in connection with a product or business. The manners of such use can be various, but an injunction against use can be ordered even without each and every manner of such use being acknowledged as constituting an act of unfair competition. Accordingly, when an injunction against "use" for "business facilities and business activities" is granted, it cannot be said that the injunction is excessive or unspecific.

E. Based on what is described above, the claims made by First Instance Defendants do not influence the determination described above in (1) and (2).

First Instance Defendants also argue that the judgment in prior instance, which held that the claim for an injunction against the use of Defendant's Mark 2 pursuant to the Unfair Competition Prevention Act covers the claim for prohibition of the Rental Activity, is unlawful because such determination is against the adversary system. However, since it is acknowledged that the claim for an injunction against the use of Defendant's Mark 2 pursuant to the Unfair Competition Prevention Act covers the claim for prohibition of the Rental Activity, there is no unlawfulness.

3. Concerning Issue 10 (Whether or not it is possible to file an injunction against the use and to demand deletion of registration, and if so, to what extent [in relation to Domain Names])

(1) As described in Paragraphs 2 (4) and (6) under "No. 2 Outline of the case" of this judgment, and Paragraph 7 under "No. 3 Judgment of this court" of the Interlocutory Judgment, First Instance Defendant Company used Domain Names and engaged in an act of unfair competition as prescribed in Article 2, paragraph (1), item (xiii) of the Unfair Competition Prevention Act, thereby infringing on the business interests of First Instance Plaintiff.

First Instance Defendants have submitted screen images of websites of Shops (Exhibits Otsu 134-1 to 134-13) as evidence to show that Domain Names are not currently used. However, whether or not the use of Domain Name 2 (maricar.co.jp), which First Instance Defendant Company was using personally, has been discontinued is not clear from the above evidence, and there is no other evidence to acknowledge that the use of Domain Name 2 has

been discontinued. In addition, considering that First Instance Defendant Company argues against the allegation that the use of Domain Name falls under an act of unfair competition, and that it is easy to restart the use, it can be said that even if the use of Domain Names, other than Domain Name 2, has been discontinued now, there is a risk that the use may restart in future.

Accordingly, First Instance Plaintiff is allowed to demand against First Instance Defendant Company, pursuant to Article 3, paragraph (1) of the Unfair Competition Prevention Act, for prohibition of the use of Domain Names as well as for deletion of registration of Domain Name 2 pursuant to paragraph (2) of the same Article.

(2) First Instance Defendants argue that uniformly prohibiting the use of Domain Names is an excessive injunction.

However, since First Instance Defendant Company was using Domain Names for the purpose of wrongful gain, it cannot be said that uniform prohibition of the use is an excessive injunction.

4. Concerning Issue 14 (The amount of damages suffered by First Instance Plaintiff)

(1) Liability of First Instance Defendants

As described in Paragraphs 1 to 7, and 9 under "No. 3 Judgment of this court" of the Interlocutory Judgment, it can be acknowledged that First Instance Defendant Company engaged in acts of unfair competition, among which the use of Defendant's Marks 1 and 2 falls under an act of unfair competition as prescribed in Article 2, paragraph (1), item (ii) of the Unfair Competition Prevention Act, and the use of Domain Names falls under an act of unfair competition as prescribed in item (xiii) of the same paragraph, and that First Instance Plaintiff's business interests were infringed due to these acts. Also, there was at least negligence on the part of First Instance Defendant Company. As such, First Instance Defendant Company is liable to First Instance Plaintiff, pursuant to Article 4 of the Unfair Competition Prevention Act, for compensation for the damage suffered by First Instance Plaintiff during the period from June 4, 2015, which is when the First Instance Defendant Company was founded, until October 31, 2018, as claimed by First Instance Plaintiff.

Also, as for First Instance Defendant Y, it is acknowledged, as described in Paragraph 8 under "No. 3 Judgment of this court" of the Interlocutory Judgment, that there was negligence of duties resulting from bad faith or gross

negligence, so that First Instance Defendant Y is liable for compensation of the above damage jointly with First Instance Defendant Company pursuant to Article 429, paragraph (1) of the Companies Act.

(2) Recognition of the sales amount

A. Sales on which to base calculation

Considering that the rental of public road go-karts and the Rental Business which is incidental thereto are carried out at Shops, it can be said that the sales of Rental Business at Shops provide the basis for calculating damages pursuant to Article 5, paragraph (3), items (i) and (iv) of the Unfair Competition Prevention Act, so that the sales amount pertaining to Rental Business at Shops during the period for damage calculation (from June 4, 2015 until October 31, 2018), as asserted by First Instance Plaintiff, shall be considered below.

B. Dates on which Shops started operation

(A) Shinagawa Shop 1

The parties are not in dispute over the fact that Shinagawa Shop 1 started its operation from August 1, 2015, so that it is acknowledged that said Shop began its operation as such.

(B) Shibuya Shop, and Akihabara Shops 1 and 2

Considering that the website (Exhibit Ko 232) which First Instance Defendant Company was operating as of September 9, 2016 introduced Shibuya Shop, and Akihabara Shops 1 and 2, it is acknowledged that Shibuya Shop, and Akihabara Shops 1 and 2 had begun to operate as of such date, if not earlier.

(C) Osaka Shop

Considering that the words, "MARICAR OSAKA 2016.10.15 GRAND OPEN", along with the Logo, appear in a tweet posted by an ordinary person (Exhibit Ko 233), and that an article posted online (Exhibit Ko 234) also indicates that the Shop opened in October 2016, it is acknowledged that Osaka Shop began its operation on the 15th of the same month.

(D) Okinawa Shop

Considering that an article posted online to introduce Okinawa Shop (Exhibit Ko 235) indicates that the Shop opened on September 1, 2016, it is acknowledged that Okinawa Shop began its operation on such date.

(E) Yokohama Shop

Considering that Facebook pages of Yokohama Shop (Exhibit Ko 238) indicate that the Shop began its operation on September 2, 2017, it is acknowledged that the Shop began its operation on such date.

(F) Kyoto Shop

Considering that promotional videos for Kyoto Shop (Exhibits Ko 200-1, Ko 200-2) announce that the Shop will open in April 2018, and based on the entire import of the oral argument, it is acknowledged that the Shop began its operation on the 1st of the same month.

(G) Asakusa Shop

Since an article posted online by a customer (Exhibit Ko 239) indicates that the Shop opened on August 21, 2017, it is acknowledged that Asakusa Shop began its operation on such date.

(H) Shinagawa Shop 2

According to an on-site investigation report (Exhibit Ko 236), it is acknowledged that Shinagawa Shop 2 had begun its operation as of September 21, 2017, if not earlier.

(I) Tokyo Bay BBQ Shop

According to a post made on a customer's Facebook (Exhibit Ko 237), it is acknowledged that Tokyo Bay BBQ Shop had begun its operation as of August 30, 2017, if not earlier.

(J) Roppongi Shop

Considering that the first post on Facebook pages of Roppongi Shop was made on September 21, 2016 (Exhibit Ko 241), it is acknowledged that the Shop had begun its operation on such date, if not earlier.

(K) Fuji-Kawaguchiko Shop

Considering that a post made by Fuji-Kawaguchiko Shop on July 30, 2016 on Facebook indicates the words, "We will open tomorrow on the 31st (Sunday) at 8:00" [in Japanese] (Exhibit Ko 240), it is acknowledged that the Shop began its operation on the 31st of the same month.

C. The average number of customers per day at each Shop

(A) Fact situation

According to the evidence and the entire import of the oral argument, the following facts about Shops are acknowledged.

a. Questionnaire

The Questionnaire was conducted by Shinagawa Kumiai. From

among the dates which can be confirmed, the earliest date is February 17, 2017, and the latest date is April 10 of the same year (Exhibits Otsu 14-1, Otsu 14-2, entire import of the oral argument). In Questionnaire, replies were collected from a total of 2,131 customers (a fact over which the parties are not in dispute).

b. Shinagawa Shop 1

Shinagawa Shop 1 is open from 10:00 until 22:00. During the daytime on Thursday, November 15, 2016 when the investigation was being carried out at the request of First Instance Plaintiff, about 10 to 13 customers visited Shinagawa Shop 1 (Exhibits Ko 4, Ko 6-1, Ko 143-1, Ko 246-1, Exhibits Otsu 41-1, Otsu 93-1, Otsu 128-2, Otsu 134-5).

On Thursday, November 8, 2018, which is when the experiment on the fact situation of the present case (hereinafter referred to as "Experiment") was carried out, a total of 18 customers in three groups went on tours that were guided by the Shop's employees during the two and a half hours or so from 12:20 until 14:50 (Exhibit Otsu 92-1).

In front of Shinagawa Shop 1 is a space for parking a total of 14 public road go-karts, and at the time of the Experiment, the Shop had 72 costumes other than those being rented to customers (Exhibit Ko 4, Exhibit Otsu 92-1, entire import of the oral argument).

c. Shibuya Shop

Shibuya Shop is open from 10:00 until 22:00. During the two hours or so between around 15:30 and around 17:30 on Thursday, November 8, 2018 when the Experiment was being carried out, four customers returned from tours, and separately, a total of eight customers in two groups left for tours that were guided by the Shop's employees (Exhibits Ko 143-3, Ko 248, Exhibits Otsu 41-7, Otsu 92-1, Otsu 93-3, Otsu 128-5, Otsu 134-4).

At the time of Experiment, the Shop had 64 costumes other than those being rented to customers, and about four to five public road go-karts were parked inside the Shop (Exhibit Otsu 92-1).

d. Akihabara Shop 1

Akihabara Shop 1 is open from 10:00 until 22:00. During the three hours and ten minutes or so between around 12:20 and around

15:30 on Thursday, November 15, 2018 when the Experiment was being carried out, a total of 25 customers in five groups left for tours that were guided by the Shop's employees (Exhibits Ko 143-2, Ko 144-1, Exhibits Otsu 41-6, Otsu 92-1, Otsu 93-2, Otsu 128-4, Otsu 134-1).

Akihabara Shop 1 has a parking space nearby that is more than 200 square meters in size where a number of public road go-karts can be parked, and at the time of Experiment, a number of public road go-karts were parked there. In addition, about 50 public road go-karts were parked there when First Instance Plaintiff conducted an investigation (Exhibit Ko 159, Exhibit Otsu 92-1).

At the time of Experiment, the Shop had 108 costumes other than those being rented to customers (Exhibit Otsu 92-1).

e. Osaka Shop

According to TripAdvisor, a website on travel information (Exhibit Ko 210-5), Osaka Shop is open from 10:00 until 22:00. According to TOKYO CHEAPO, another website (Exhibit Ko 258), a shop that seems to be Osaka Shop is described as accepting tour reservations from 10:00. However, the website of Osaka Shop (Exhibits Ko 143-4, Ko 144-3, Ko 247, Exhibits Otsu 41-8, Otsu 126-1, Otsu 126-2, Otsu 128-8, Otsu 134-9) indicates its business hours to be from 12:00 until 22:00, which are consistent with the explanation provided by the representative of Osaka Shop below, so that it is acknowledged that business hours are from 12:00 until 22:00.

On Thursday, November 8, 2018 when the Experiment was implemented, the representative of Osaka Shop explained that tours start at 13:00, 16:00, and 19:00, and during the two and a half hours or so from around 13:40 until around 16:10, four customers who had gone on a tour that starts at 13:00 came back, and a group of five customers departed for a tour that starts at 16:00 (both tours were guided by employees) (Exhibit Otsu 92-2).

Osaka Shop has at least 25 public road go-karts, and posts multiple photographs of tours attended by at least ten customers (Exhibits Ko 243-1 to 243-6, Ko 245).

When the Experiment was carried out, the Shop had 136

costumes (Exhibit Otsu 92-2).

f. Okinawa Shop

Okinawa Shop is open from 10:00 until 22:00, and on Wednesday, November 14, 2018 when the Experiment was carried out, during the period of one hour and fifty minutes from 13:30 until 15:20, the Shop had two tours that are accompanied by employees as guides, and a total of 16 customers went on these tours (Exhibits Ko 143-5, Ko 144-4, Exhibits Otsu 41-9, Otsu 92-3, Otsu 128-10, Otsu 134-11).

Okinawa Shop has a parking space in front of the Shop, and when an investigation was carried out in the daytime of Wednesday, October 24, 2018 at the request of First Instance Plaintiff, approximately 28 public road go-karts were parked there (Exhibit Ko 145, Exhibit Otsu 92-3).

When the Experiment was carried out, the Shop had 81 costumes (Exhibit Otsu 92-3).

g. Shinagawa Shop 2

Shinagawa Shop 2 is open from 11:00 until 21:00, and when an investigation was carried out in the daytime of Thursday, September 21, 2017 at the request of First Instance Plaintiff, the Shop had approximately 10 public road go-karts inside, and at least 20 costumes (Exhibits Ko 143-6, Ko 236, Exhibits Otsu 113-1, Otsu 128-3, and Otsu 134-6).

h. Akihabara Shop 2

Akihabara Shop 2 is open from 10:00 until 22:00, and when an investigation was carried out in the daytime of Wednesday, October 17, 2018 at the request of First Instance Plaintiff, the Shop had approximately 30 costumes, and there were approximately 20 public road go-karts in the parking space located elsewhere (Exhibits Ko 143-7, Ko 157, Ko 249, Exhibits Otsu 113-2, Otsu 128-1, Otsu 134-2).

i. Asakusa Shop

As of September 25, 2017, Asakusa Shop was open from 9:00 until 20:00, and from November 12, 2018, if not earlier, the Shop was open from 9:30 until 21:30 (Exhibits Ko 143-9, Ko 250, Exhibits Otsu 113-4, Otsu 128-7, Otsu 134-3).

In a tweet posted by Asakusa Shop on August 27, 2017, over ten costumes were shown in a photograph used in the tweet, and a tweet posted by a customer of Asakusa Shop described that there were 15 public road go-karts in the Shop as of September 4, 2017 (Exhibit Ko 158-3, Exhibit Otsu 119-1).

j. Tokyo Bay BBQ Shop

Tokyo Bay BBQ Shop is open from 10:00 until 22:00 (Exhibit Ko 143-8, Exhibits Otsu 113-3, Otsu 128-6, Otsu 134-7).

In TripAdvisor, a building that is shaped like a warehouse and that has a number of public road go-karts parked there is introduced as Tokyo Bay BBQ Shop, and as of November 12, 2018 and January 12, 2019, photographs of the same building are shown on the website of Tokyo Bay BBQ Shop (Exhibits Ko 143-8, Ko 210-10, Exhibits Otsu 113-3, Otsu 135).

k. Yokohama Shop

Yokohama Shop is open from 10:00 until 22:00 (Exhibit Ko 143-10, Exhibits Otsu 113-5, Otsu 134-8).

Yokohama Shop operates by securing a parking space where a significant number of public road go-karts can be parked, and it ran a website as of June 10, 2019. However, as of November 26, 2019, the name of Yokohama Shop ceased to appear on the website, and currently, Rental Business no longer operates at the place which used to be the location of Yokohama Shop (Exhibits Otsu 134-8, Otsu 137, Otsu 138).

l. Kyoto Shop

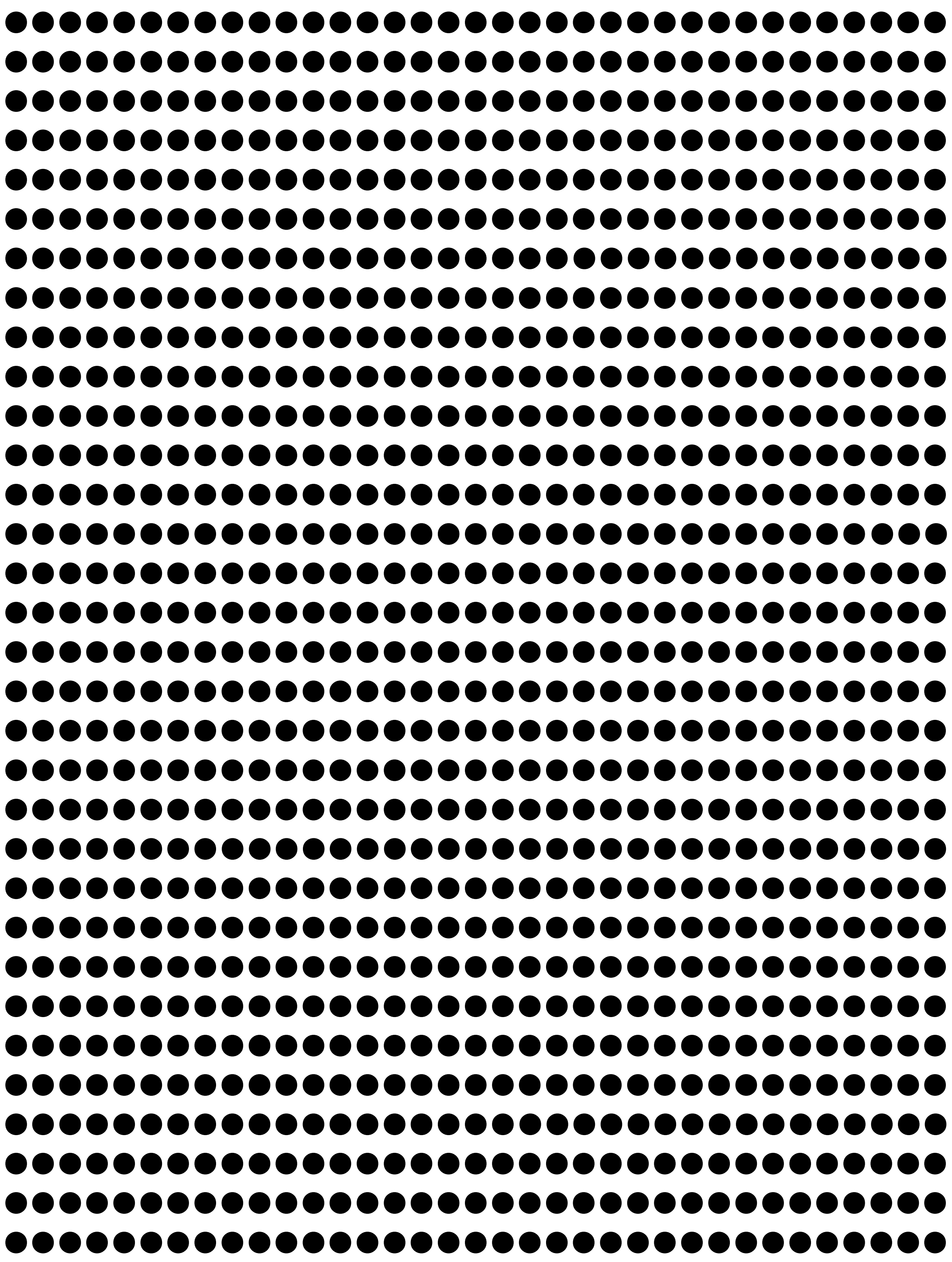
Kyoto Shop is open from 10:00 until 20:00 (Exhibit Ko 143-11, Exhibits Otsu 113-6, Otsu 128-9, Otsu 134-10).

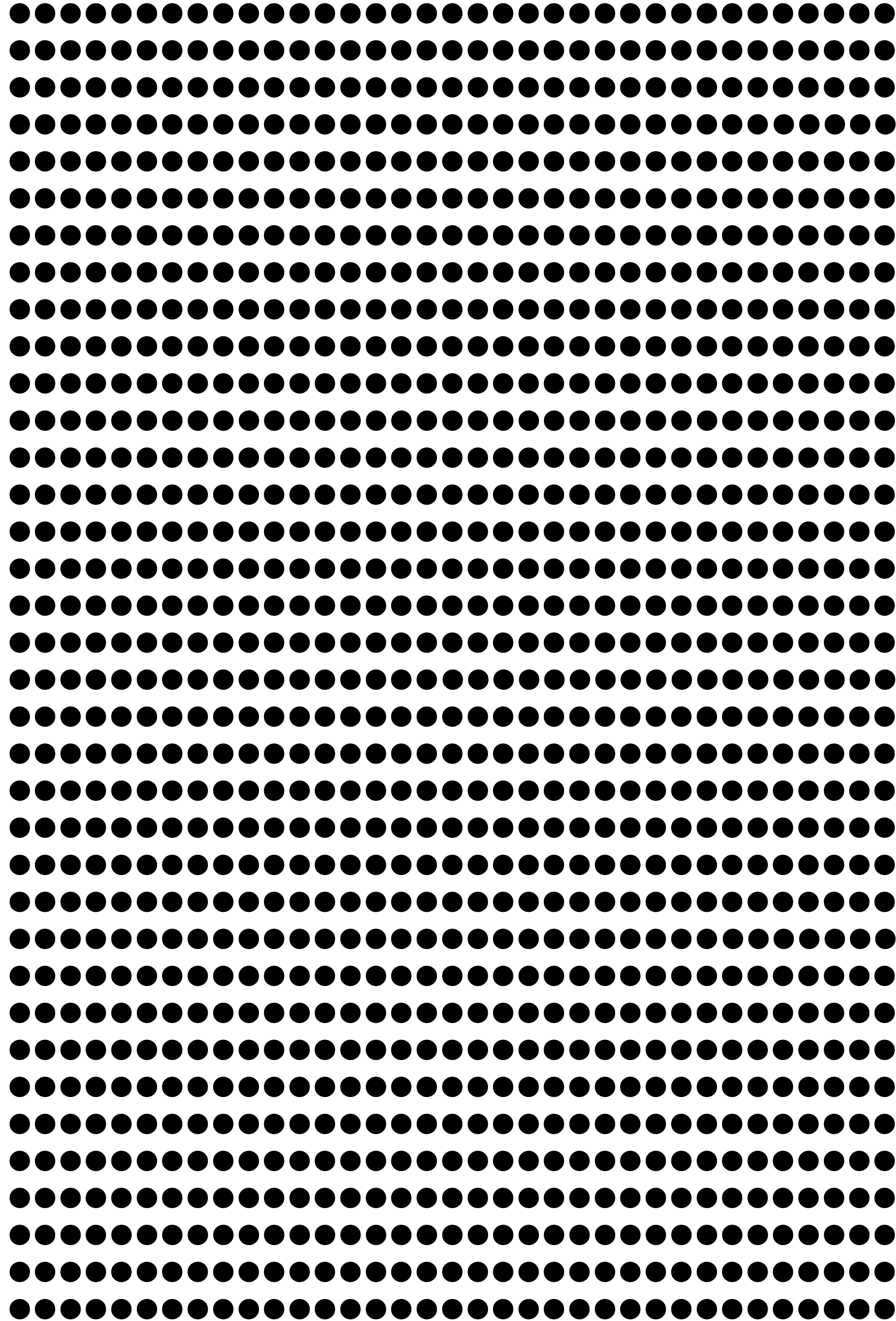
Photographs of a statement prepared by the representative of Kyoto Shop (Exhibit Otsu 118) show that the Shop has at least tens of costumes (as per Paragraphs 1 (1) E and (2) C under "No. 3 Judgment of this court" of the Interlocutory Judgment, it is acknowledged that the Shop uses costumes that are shown in the photographs of Exhibit Otsu 118 as well as the Costumes) along with approximately nine public road go-karts.

m. Roppongi Shop

Roppongi Shop is open from 10:00 until 20:00 (Exhibit Ko 252).

According to a photograph posted on the website run by EcoKART (Exhibit Otsu 117), Roppongi Store had at least 10 public road go-karts, and at one time, a tour was attended by about nine customers.





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d. Considering that the website (Exhibit Ko 6-2) and Facebook pages (Exhibit Ko 212-4) of Fuji-Kawaguchiko Shop indicate its business hours as 10 to 12 hours, and considering that the Shop has been in operation since July 31, 2016 until today and has at least sales that exceed the expenses necessary for maintaining the Shop, the sales amount indicated in the Tax Return for PLAN-S as submitted by First Instance Defendants (Exhibits Otsu 124-1 to 124-3) is too low. On the other hand, however, considering that Fuji-Kawaguchiko Shop does not operate during the off-season for tourists, and the possibility that the deficits from Rental Business are covered by a house cleaning business which is separately operated by PLAN-S (Exhibits Otsu 124-1 to 124-3), the numbers on the above Tax Return cannot be dismissed as completely untrustworthy. Accordingly, sales at Fuji-Kawaguchiko Shop shall be calculated based on the above Tax Return.

According to the daily pro-rata calculation by First Instance Defendants, the sales amount of Rental Business as declared on Tax Return for the period from June 8, 2016 until May 31, 2017 is ●●●●●●●●●, and First Instance Defendants assert that the sales amount for the period from July 31, 2016 until May 31, 2017 is ●●●●●●●●●, but as per the findings above, Fuji-Kawaguchiko Shop began its operation on July 31, 2016, and it is acknowledged that Rental Business began to generate sales from the same date, so that it shall be recognized that the sales amount for the period from the same date until May 31, 2017 is ●●●●●●●●● indicated in the Tax Return (Exhibits Otsu 124-1).

Accordingly, the sales amount at Fuji-Kawaguchiko Shop for the period from July 31, 2016 until October 31, 2018 is ●●●●●●●●● as per the following equation.

(Equation)

●●●●●●●●●● + ●●●●●●●●●● + ●●●●●●●●● × 153 ÷ 365 ≒●●●●●●●●● (rounded up or down to the nearest whole yen)

e. First Instance Defendants assert that [i] the fact that the period during which the Questionnaire was conducted is from February

until April, during which the climate is suitable for spring travel, should be taken into consideration, and that [ii] the number of customers actually using Shibuya Shop at the time of Experiment is four, and as for Osaka Shop, four customers participated in a tour that was scheduled for 13:00, with one remaining customer participating in a tour that was scheduled for 16:00, and that First Instance Plaintiff's allegations concerning other Shops are similarly misleading, and that [iii] upon recognizing the average number of customers per day, it should be assumed that no customer other than the customers who were recognized in the Experiment came to the Shop on the day of Experiment, and that [iv] it can be assumed that the public road go-karts that were parked in a parking space were undergoing maintenance, and the number of cars parked there cannot lead directly to the assumption of the number of customers, and [v] since First Instance Plaintiff, who is supposed to have investigated the number of customers as well, has not submitted any evidence in connection with the number of customers, so that it is assumed that only a very small number of customers actually came to the Shop.

(a) Concerning the above [i], since the period during which Questionnaire was conducted includes February and early March, during which the season cannot be considered best suited for travel due to the low temperature, the allegation made by First Instance Defendants lacks its premise. In addition, as described above in (A) b and c, there were 10 to 13 customers or 18 customers at Shinagawa Shop 1, and 12 customers at Shibuya Shop during the limited hours on a weekday of November, so that it cannot be said that Questionnaire was conducted during a time with an especially large number of customers.

(b) Concerning the above [ii], in regards to Shibuya Shop, there are the words, "Immediately after my arrival at the shop, four customers returned on go-karts ... (since I had just arrived at the shop and was therefore not ready ... I could not take photos or confirm their nationalities and other information, so that no such information is indicated on the list below)" [in Japanese], from line 7 at the bottom of page 25 to line 2 on page 26 of Exhibit

Otsu 92-1, followed furthermore by the words, "Later, during my stay at the shop, a total of eight customers, whose nationalities and other information are as described in the Attachment 4, went on go-kart tours ..." [in Japanese], starting from line 3 of the same page, so that it is acknowledged that the notary confirmed that 12 customers were at Shibuya Shop, and that eight out of the 12 customers newly went on tours while the notary was there.

As for Osaka Shop, there are the words, "... public road go-kart tours organized by the Shop are scheduled for departure at 13:00, 16:00, and 19:00 each day. As such, on the day of Experiment, the tour that starts at 13:00 had already departed, and I was told that four foreign customers and two staff members from the shop attended the tour ... At around 14:30, two customers and one staff member returned from the tour, and at around 15:00, two customers and one staff member returned from the tour ... From among the above four customers, two were from Malaysia, and two were from Australia ..." [in Japanese], indicated in Exhibit Otsu 92-2 from line 2 at the bottom of page 8 until line 11 on page 9, followed furthermore by the words, "Customers for a tour scheduled to depart at 16:00 arrived at the shop from around 15:00. The first two customers ... were both Americans ... The next two customers ... were from China (Hong Kong) ... and the remaining one customer was from China (Hong Kong)" [in Japanese], starting from line 12 of the same page. Accordingly, it is acknowledged that the notary confirmed a total of nine customers, four of whom participated in a tour leaving at 13:00, and five of whom participated in a tour leaving at 16:00.

Other matters concerning the day of Experiment are as per the findings of the above (A) b to f.

(c) Concerning the above [iii], as described above in (A) b to f, the notary stayed at MariCAR Shops for Experiment for a limited time of one hour and fifty minutes to approximately three hours and ten minutes during the daytime of a weekday. However, considering the business hours of MariCAR Shops, it is actually unnatural to assume that there were no other

customers during other hours, so that it is not at all unreasonable to recognize the numbers shown by Experiment as one of the factors for considering the number of customers who came to MariCAR Shops, as described in above a.

(d) Concerning the above [iv], it cannot be acknowledged that the public road go-karts that are parked in a parking space were all undergoing maintenance. Furthermore, even when considering the necessity to be equipped with an ample number of public road go-karts in cases of maintenance and accidents, the findings of the above a to c remain the same.

(e) Concerning the above [v], there is no evidence, other than what is submitted as evidence in the present case, to acknowledge that First Instance Plaintiff was carrying out an investigation to know the number of customers at the Shop. As has been discussed above, the average number of customers at each Shop can be recognized based on evidence and the entire import of the oral argument.

(f) From what is describe above, it cannot be said that the above allegations made by First Instance Defendants have any effect on the findings of the above a to d.

D. Average usage fees paid by each customer at each Shop

(A) Fact situation

According to the evidence and the entire import of the oral argument, the following facts about usage fees at Shops can be acknowledged.

a. Shinagawa Shop 1

According to the website of Shinagawa Shop 1 (unless noted otherwise hereinafter, tours and usage fees shall be recognized as indicated on the website of each Shop), as of August 12, 2016, a one-hour guided tour cost 3,500 yen at a normal rate and 3,000 yen with a discount for writing a review on SNS (hereinafter sometimes referred to as "SNS Review Price"), and a two-hour guided tour cost 6,500 yen at a normal rate and 5,000 yen with a discount for writing a review on SNS, and a three-hour guided tour cost 10,500 yen at a normal rate and

7,000 yen with a discount for writing a review on SNS, and rental of costumes (for go-kart drivers) cost 750 yen at a normal rate and 500 yen with a discount for writing a review on SNS (Exhibit Ko 35).

As of February 23, 2017, a one-hour guided tour cost 5,000 yen at a normal rate and 4,000 yen with a discount for writing a review on SNS, and a two-hour guided tour cost 8,000 yen at a normal rate and 6,000 with a discount for writing a review on SNS, and a three-hour guided tour cost 11,000 yen at a normal rate and 8,000 yen with a discount for writing a review on SNS, and rental of costumes was free (Exhibits Ko 6-1, Ko 6-4).

On June 30, 2017 and August 10, October 2, and November 14 of the same year, a one-hour guided tour that covers the rental fee for a costume cost 6,000 yen at a normal rate and 5,000 yen with a discount for writing a review on SNS, a two-hour guided tour that covers the rental fee for a costume cost 8,000 yen at a normal rate and 7,000 yen with a discount for writing a review on SNS, and a three-hour guided tour that covers the rental fee for a costume cost 10,000 yen at a normal rate and 9,000 yen with a discount for writing a review on SNS (Exhibits Ko 74, Ko 102-1, Ko 246-1, Ko 246-2, Exhibit Otsu 41-1, the entire import of the oral argument).

As of November 12, 2018, a guided tour called Middle Course (1.5 to 2 hours) that covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,500 yen with a discount for writing a review on SNS, and a guided tour called Long Course (2.5 to 3 hours) cost 12,000 yen at a normal rate and 10,000 yen with a discount for writing a review on SNS (Exhibit Ko 143-1).

b. Shibuya Shop

According to the website of Shibuya Shop, as of September 25, 2017 and October 2 of the same year, a one-hour guided tour that covers the rental fee for a costume cost 7,000 yen at a normal rate and 5,000 yen

with a discount for writing a review on SNS (Exhibit Ko 248, Exhibit Otsu 41-7).

As of November 12, 2018, a one-hour guided tour that covers the rental fee for a costume cost 8,000 yen at a normal rate and 7,000 yen with a discount for writing a review on SNS (Exhibit Ko 143-3).

c. Akihabara Shop 1

According to the website of Akihabara Shop 1, as of October 2, 2017, a two-hour guided tour that covers the rental fee for a costume cost 8,000 yen at a normal rate and 7,000 yen with a discount for writing a review on SNS (Exhibit Otsu 41-6).

As of May 7, 2018 and November 12 of the same year, a guided tour called Middle Course (1.5 to 2 hours) that covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,500 yen with a discount for writing a review on SNS, and a guided tour called Long Course (2.5 to 3 hours) cost 12,000 yen at a normal rate and 10,000 yen with a discount for writing a review on SNS, and a Long Course with a boat cruise cost 15,000 yen at a normal rate and 12,000 yen with a discount for writing a review on SNS (Exhibits Ko 132-1, Ko 143-2).

d. Osaka Shop

According to the website of Osaka Shop, as of December 18, 2016, a two-hour guided tour that covers the rental fee for a costume cost 8,000 yen at a normal rate and 6,000 yen with a discount for writing a review on SNS, and a three-hour guided tour that covers the rental fee for a costume cost 10,000 yen at a normal rate and 8,000 yen with a discount for writing a review on SNS (Exhibit Ko 247).

As of October 2, 2017, a two-hour guided tour that covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,000 yen with a discount for writing a review on SNS (Exhibit Otsu 41-8).

As of November 12, 2018, a two-hour guided tour that

covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,500 yen with a discount for writing a review on SNS (Exhibit Ko 143-4).

e. Okinawa Shop

According to the website of Okinawa Shop, as of October 2, 2017, a one-hour guided tour that covers the rental fee for a costume cost 7,000 yen at a normal rate and 5,000 yen with a discount for writing a review on SNS, and a two-hour guided tour that covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,000 yen with a discount for writing a review on SNS (Exhibit Otsu 41-9).

As of November 12, 2018, a guided tour called Short Course (1 hour) that covers the rental fee for a costume cost 6,000 yen at a normal rate and 5,000 yen with a discount for writing a review on SNS, and a guided tour called Middle Course (2 hours) that covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,500 yen with a discount for writing a review on SNS (Exhibit Ko 143-5).

f. Shinagawa Shop 2

As of September 21, 2017, when an investigation was conducted at the request of First Instance Plaintiff, a two-hour guided tour that covers the rental fee for a costume cost 7,000 yen (Exhibit Ko 236, entire import of the oral argument).

According to the website of Shinagawa Shop 2, as of November 12, 2018, a guided tour called Middle Course that covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,500 yen with a discount for writing a review on SNS, and a guided tour called Long Course that covers the rental fee for a costume cost 12,000 yen at a normal rate and 10,000 yen with a discount for writing a review on SNS (Exhibit Ko 143-6).

g. Akihabara Shop 2

According to the website of Akihabara Shop 2, as of

September 25, 2017, a guided tour that lasts for one hour and a half and that covers the rental fee for a costume cost 6,000 yen at a normal rate and 5,000 yen with a discount for writing a review on SNS (Exhibit Ko 249).

As of November 12, 2018, a guided tour called Short Course that covers the rental fee for a costume cost 6,000 yen at a normal rate and 5,000 yen with a discount for writing a review on SNS (Exhibit Ko 143-7).

h. Tokyo Bay BBQ Shop

According to the website of Tokyo Bay BBQ Shop, as of November 12, 2018, a guided tour called Middle Course that covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,500 yen with a discount for writing a review on SNS, a Middle Course with a boat cruise cost 12,000 yen at a normal rate and 10,000 yen with a discount for writing a review on SNS, a Long Course cost 12,000 yen at a normal rate and 10,000 yen with a discount for writing a review on SNS, and a Long Course with a boat cruise cost 15,000 yen at a normal rate and 12,000 yen with a discount for writing a review on SNS (Exhibit Ko 143-8).

i. Yokohama Shop

According to the website of Yokohama Shop, as of November 12, 2018, a guided tour called Middle Course that covers the rental fee for a costume cost 9,000 yen at a normal rate and 7,500 yen with a discount for writing a review on SNS, and a Long Course cost 12,000 yen at a normal rate and 10,000 yen with a discount for writing a review on SNS (Exhibit Ko 143-10).

j. Kyoto Shop

According to the website of Kyoto Shop, as of November 12, 2018, a three-hour guided tour that covers the rental fee for a costume cost 12,000 yen at a normal rate and 10,000 yen with a discount for writing a review on SNS (Exhibit Ko 143-11).

k. Asakusa Shop

According to the website of Asakusa Shop, as of September 25, 2017, a two-hour guided tour that covers the rental fee for a costume cost 8,000 yen at a normal rate and 7,000 yen with a discount for writing a review on SNS (Exhibit Ko 250).

As of November 12, 2018, a guided tour called Middle Course that covers the rental fee for a costume cost 10,000 yen at a normal rate and 7,500 yen with a discount for writing a review on SNS (Exhibit Ko 143-9).

l. Roppongi Shop

According to the website of Roppongi Shop, as of December 18, 2016, a guided tour that covers the rental fee for a costume and that is advertised with the words, "Try first! Tokyo Tower! Roppongi Drive Tour!" [in Japanese], cost 4,000 yen, and a guided tour that is advertised with the words, "Most Conspicuous Tour We Recommend!" [in Japanese], cost 6,000 yen (the price was on a special offer to mark the opening, and the tour ordinarily cost 8,000 yen) (Exhibit Ko 252).

As of May 14, 2017, a guided tour that covers the rental fee for a costume and that is advertised with the words, "Try first! Tokyo Tower! Roppongi Drive Tour!" [in Japanese], cost 4,000 yen, and a guided tour that is advertised with the words, "Most Conspicuous Tour We Recommend!" [in Japanese], cost 8,000 yen (Exhibit Ko 253).

As of August 26, 2017, a guided tour that covers the rental fee for a costume and that is advertised with the words, "Three-Hour Tour of Flat-Out Run in Central Tokyo" [in Japanese], cost 11,000 yen at a normal rate and 9,000 yen with a discount for writing a review on SNS, and a guided tour that is advertised with the words, "Most Conspicuous Tour We Recommend!" [in Japanese], cost 8,750 yen at a normal rate and 7,000 yen with a discount for writing a review on SNS, and a guided tour that covers the rental fee for a costume and that is

advertised with the words, "Try first! Tokyo Tower! Roppongi Drive Tour!" [in Japanese], cost 6,250 yen at a normal rate and 5,000 yen with a discount for writing a review on SNS (Exhibit Ko 254).

(B) Given that Consumers are ordinary people who want to drive public road go-karts as a tourism experience and who are mostly of foreign nationalities (Paragraph 4 (1) under "No. 3 Judgment of this court" of the Interlocutory Judgment), and that most of the customers who were observed during the Experiment were actually using guided tours, and that many of the websites of Shops introduce only guided tours, it is acknowledged that most of the customers of Rental Business would use guided tours.

In addition, each Shop set discounted prices of SNS Review Prices which are applied when customers post their experiences on SNS, and upon comparing the prices at the time of the investigation which was conducted at the request of First Instance Plaintiff (Exhibits Ko 145, Ko 157, Ko 236) with the prices according to the findings of the above (A), it is acknowledged that only SNS Review Prices were applied, so that it is acknowledged that SNS Review Prices were applied in most cases at the Shops. Furthermore, as described later in (C), considering that each Shop also had discounts other than the one by the SNS Review Price, it is reasonable to recognize the average usage fees per customer to be based on the SNS Review Price for a guided tour (in the case of Roppongi Shop, any other discounted prices which can be recognized based on evidence).

Furthermore, given the information about the courses available at each Shop and about price setting as well as the progress in change of prices, as per the findings of the above (A), it is acknowledged that the services offered within the price range of two-hour tours or Middle Courses were at the core of the Rental Business, so that in order to recognize the average usage fees per customer, it is appropriate to use the SNS Review Prices for the guided tours within the range of

two-hour tours or Middle Courses (in the cases of Shibuya Shop, Akihabara Shop 2, Kyoto Shop, and Roppongi Shop that do not offer tours within the aforementioned range, what is described below applies) as the basis for calculation.

As described above in (A) a, rental fees for costumes were set for Shinagawa Shop 1 at a time, but later, rental fees for costumes came to be included in tour fees at each Shop including Shinagawa Shop 1, so that it is appropriate not to add the rental fees for costumes upon calculation.

In view of the above, given that First Instance Defendants are not actively arguing against the amount per se of usage fees asserted by First Instance Plaintiff, it is acknowledged that the average usage fees per customer at each Shop shall be as described above.

On December 18, 2016, June 30, 2017, and May 7, 2018, First Instance Plaintiff made its assertion based on the premise that the usage fees at the Shops were changed simultaneously. However, since the courses available and the price setting are not exactly the same at all of the Shops, and since it cannot be acknowledged that the prices were raised simultaneously, it is appropriate to acknowledge that change in prices occurred at the timings which can be supported by evidence.

a. Shinagawa Shop 1

The average usage fees per customer at Shinagawa Shop 1 are calculated based on the SNS Review Prices for two-hour guided tours at the timings of August 12, 2016 or thereafter, February 23, 2017 or thereafter, or June 30, 2017 thereafter, respectively, as per the findings of the above (A) a. As for before August 12, 2016, it is appropriate to recognize that the "usage fees" of "Shinagawa Shop 1" as indicated in the attached Table 3 shall apply by taking into consideration the assertion made by First Instance Plaintiff (SNS Review Price of 5,000 yen).

b. Shibuya Shop

As for September 25, 2017 and thereafter, average usage fees per customer at Shibuya Shop should be calculated based on the 5,000 yen which is the SNS Review Price for a one-hour guided tour as per the findings of the above (A) b, and as for before the same date, it is appropriate to recognize that the "usage fees" of "Shibuya Shop" as indicated in the attached Table 3 shall apply by taking into consideration the assertion made by First Instance Plaintiff (SNS Review Price of 3,000 yen).

c. Akihabara Shop 1

As for October 2, 2017 and thereafter, average usage fees per customer at Akihabara Shop 1 should be calculated based on the 7,000 yen which is the SNS Review Price for a two-hour guided tour as per the findings of the above (A) c, and as for May 7, 2018 and thereafter, average usage fees per customer at Akihabara Shop 1 should be calculated based on the 7,500 yen which is the SNS Review Price for a guided tour called Middle Course as per the findings of the above (A) c, respectively, and as for before October 2, 2017, it is appropriate to recognize that the "usage fees" of "Akihabara Shop 1" according to the attached Table 3 shall apply by taking into consideration the assertion made by First Instance Plaintiff (SNS Review Price of 5,000 yen).

d. Osaka Shop

As for December 18, 2016 and thereafter, average usage fees per customer at Osaka Shop should be calculated based on the 6,000 yen which is the SNS Review Price for a two-hour guided tour as per the findings of the above (A) d, and as for October 2, 2017 and thereafter, average usage fees per customer at Osaka Shop should be calculated based on the 7,000 yen which is the SNS Review Price for a two-hour guided tour as per the findings of the above (A) d, respectively, and as for before December 18, 2016, it is appropriate to

recognize that the "usage fees" of "Osaka Shop" according to the attached Table 3 shall apply by taking into consideration the assertion made by First Instance Plaintiff (SNS Review Price of 5,000 yen).

e. Okinawa Shop

As for October 2, 2017 and thereafter, average usage fees per customer at Okinawa Shop should be calculated based on the 7,000 yen which is the SNS Review Price for a two-hour guided tour as per the findings of the above (A) e, and as for before the same date, it is appropriate to recognize that the "usage fees" of "Okinawa Shop" according to the attached Table 3 shall apply by taking into consideration the assertion made by First Instance Plaintiff (SNS Review Price of 5,000 yen).

f. Shinagawa Shop 2

It is appropriate to recognize that the average usage fees per customer at Shinagawa Shop 2 shall be 7,000 yen, which is the SNS Review Price for a two-hour guided tour as per the findings of the above (A) f and (B).

g. Akihabara Shop 2

As for September 25, 2017 and thereafter, average usage fees per customer at Akihabara Shop 2 should be calculated based on the 5,000 yen which is the SNS Review Price for a guided tour of one hour and a half as per the findings of the above (A) g, and as for before the same date, it is appropriate to recognize that the "usage fees" of "Akihabara Shop 2" according to the attached Table 3 shall apply by taking into consideration the assertion made by First Instance Plaintiff (SNS Review Price of 3,000 yen).

h. Tokyo Bay BBQ Shop

It is appropriate to recognize that the average usage fees per customer at Tokyo Bay BBQ Shop should be calculated based on the courses available and the price setting (a guided tour for a Middle Course costing the SNS Review Price of 7,500 yen) at the Shop as of

November 12, 2018, as per the findings of the above (A) h, as well as on 7,000 yen, which is the SNS Review Price as asserted by First Instance Plaintiff, as indicated in the attached Table 3 for "usage fees" of "Tokyo Bay BBQ Shop".

i. Yokohama Shop

It is appropriate to recognize that the average usage fees per customer at Yokohama Shop should be calculated based on the courses available and the price setting (a guided tour for a Middle Course costing the SNS Review Price of 7,500 yen) at the Shop as of November 12, 2018, as per the findings of the above (A) i, as well as on 7,000 yen, which is the SNS Review Price as asserted by First Instance Plaintiff, as indicated in the attached Table 3 for "usage fees" of "Yokohama Shop".

j. Kyoto Shop

It is appropriate to recognize that the average usage fees per customer at Kyoto Shop should be calculated based on the courses available and the price setting (a three-hour guided tour costing the SNS Review Price of 10,000 yen) at the Shop as of November 12, 2018, as per the findings of the above (A) j, as well as on 9,000 yen, which is the SNS Review Price as asserted by First Instance Plaintiff, as indicated in the attached Table 3 for "usage fees" of "Kyoto Shop".

k. Asakusa Shop

As for September 25, 2017 and thereafter, it is appropriate to recognize that the average usage fees per customer at Asakusa Shop should be calculated based on 7,000 yen, which is the SNS Review Price for a two-hour guided tour as per the findings of the above (A) k, and as for before the same date, it is reasonable to recognize that the "usage fees" of "Asakusa Shop" as indicated in the attached Table 3 shall apply by taking into consideration the assertion made by First Instance Plaintiff (SNS Review Price of 7,000 yen).

l. Roppongi Shop

As for December 18, 2016 and thereafter, it is reasonable to recognize that the average usage fees per customer at Roppongi Shop should be calculated based on the price for a "Most Conspicuous Tour We Recommend!" [in Japanese] as per the findings of the above (A) l (according to the facts described in the above (A) l, it is acknowledged that the tour is equivalent to a two-hour guided tour or a guided tour for a Middle Course at other Shops) (in the case where a discounted price is applicable, such discounted price). As for before the same date, it is appropriate to recognize that the "usage fees" of "Roppongi Shop" according to the attached Table 3 shall apply by taking into consideration the assertion made by First Instance Plaintiff (the price of 6,000 yen).

(C) Based on the evidence (Exhibits Otsu 127-1 to 127-4), First Instance Defendants assert that, upon calculating the average usage fees per customer, an extra 24% should be deducted from SNS Review Prices because various discounts are offered at each Shop.

However, although Exhibit Otsu 127-1 shows a website that was acquired on November 9, 2019 and indicates "10% Off", the website per se has no indications as to the start time when the discount will be applicable. Accordingly, it cannot be acknowledged that the aforementioned discount was offered during the period for which compensation for damage is demanded in the present case.

The website of Exhibit Otsu 127-2 was acquired on November 9, 2019, and indicates "37% Off" for "Tokyo Street Go-Karting". A different website to which a link is pasted from the website of Exhibit Otsu 127-2 (Exhibit Ko 258) indicates as follows: the usage fee for a one-hour tour at Asakusa Shop is 7,000 yen, which includes a 30% discount and is the minimum usage fee; the minimum usage fee at the Shops in Akihabara is 7,000 yen; the usage fee at Osaka

Shop is 4,500 yen, which includes a 25% discount and is the minimum usage fee; and the usage fee at Kyoto Shop is 7,500 yen, which includes a 16% discount and is the minimum usage fee. However, the usage fee of 7,000 yen at Asakusa Shop is the same amount as the average usage fee at the same Shop as per the findings of the above (B) k (7,000 yen for a two-hour tour), and it cannot be said that there would be any effect on the findings concerning the average fee at the same Shop. As for the usage fee of 7,000 yen at Shops in Akihabara, if the amount is compared with the average usage fees at Akihabara Shop 1 (5,000 yen to 7,500 yen) and changes thereof according to the attached Table 3, as per the findings of the above (B) c, as well as the fact that the timing from which the above discount has been applied is unclear are taken into consideration, it cannot be said that there would be any effect on the findings as to the average usage fees at Akihabara Shop 1, and furthermore, it is more expensive than the average usage fees at Akihabara Shop 2 as per the findings of the above (B) g, so that it cannot be said that there would be any effect on the average usage fees of the same Shop. As for Osaka Shop and Kyoto Shop, since the aforementioned minimum usage fee on the website (Exhibit Ko 258) is highly likely to be the usage fee for a one-hour tour, and since it is unclear from when the aforementioned discount has been offered, it cannot be said that there would be any effect on the average usage fees at Osaka Shop and Kyoto Shop as per the findings of the above (B) d and j.

The website of Exhibit Otsu 127-3 was acquired on November 9, 2019 and merely indicates that a coupon that offers a maximum of 50% discount had been purchased by 90 persons as of the same date. As such, the extent to which discounts were applied during the period that is covered by the demand for compensation for damage in the present case is unclear.

It is understandable from the website of Exhibit Otsu

127-4 that Osaka Shop offered a 50% discount from August 20 until August 25. However, it is unclear whether the discount was offered during the period for which compensation for damage is demanded in the present case.

In addition, Exhibit Ko 221 indicates that a customer was offered a 50% discount on a three-hour tour at Kyoto Shop around September 2018. However, it is not clear to what extent such discount was available.

Based on the above, it is not appropriate to add an extra 24% discount to the SNS Review Price even when the assertions made by First Instance Defendants are taken into consideration, and there is no effect on the findings of the above (B).

E. Number of business days

(A) According to the entire import of the oral argument, it is acknowledged that the Shops had no fixed holidays. As such, it is acknowledged that the number of business days of each Shop from the date of start of operation until October 31, 2018, which is the last day of the period for which damage compensation is demanded, is as indicated in the column of "Total number of days" for each Shop on the attached Table 3.

(B) First Instance Defendants state that the Shops were not well-known when they first started operating, and assert, based on the Statement (Exhibit Otsu 59) by a certified public tax accountant, that with respect to the Shops other than Fuji-Kawaguchiko Shop, the number of days during the first four months or so of operation at each Shop (120 days) should be deducted upon counting the number of days of operation.

Since it is generally considered difficult, given the lack of fame of Rental Business, to increase sales in a stable manner from the start of operation, the sales at Shinagawa Shop 1, which started its operation the earliest of all other Shops, shall be calculated by assuming that no sales were generated for the first 120 days from the start of operation, as asserted by First Instance Defendants.

Naturally, as for other Shops, as per the findings of the above B, [i] all Shops began operating approximately one year to two years and eight months after Shinagawa Shop 1 began its operation, and

especially in regards to the year of 2016, the seven shops of Shibuya Shop, Akihabara Shop 1, Akihabara Shop 2, Osaka Shop, Okinawa Shop, Fuji-Kawaguchiko Shop, and Roppongi Shop had begun operation one after another during the short period from July until October of the same year, and it can be assumed that Rental Business had by then acquired a considerable level of recognition, [ii] First Instance Defendant Company indicated, in its job advertisement made during the same period in October 2016 (Exhibit Ko 59-2), the following words, "attracting a lot of attention from both within and outside Japan ..." [in Japanese], "being 'expected' to operate nationwide, with a large number of requests to open shops from all around the country" [in Japanese], and "we have stabilized our operation during the past year and left significant results, so we plan to expand our business scale explosively" [in Japanese], showing that the Rental Business had come to be widely recognized in and out of Japan by that time, [iii] on December 12, 2016, which is hardly two months from when Osaka Shop started its operation on October 15 of the same year, the Shop was featured on online news (Exhibit Ko 234) and a tweet of an ordinary person (Exhibit Ko 233), so that it can be acknowledged that the Shop had already acquired a considerable level of recognition at that time, and thus it can be assumed that the Shops other than Shinagawa Shop 1 were able to increase sales in a stable manner at an earlier time than Shinagawa Shop 1. Accordingly, concerning Shops other than Shinagawa Shop 1, it is appropriate to consider that the period during which no sales are deemed to have been made shall be calculated as 60 days, which is half the number of days applied to Shinagawa Shop 1 (in other words, it shall be deemed that the Shop began to increase sales in a stable manner after approximately four months have passed from the start of operation).

The Statement by a certified public tax accountant (Exhibit Otsu 59) does have any effect on the above findings.

(C) First Instance Defendants assert that since there are no customers or fewer customers on rainy and snowy days as well as on days when the temperature is high, the number of days should be adjusted by taking into consideration how the business is affected by weather.

However, since the period during which Questionnaire was

conducted (from February 17, 2017 until April 10 of the same year), which is the basis for recognizing the average number of customers per day at each Shop, includes multiple days of bad weather such as rainy days and days with low temperature (Exhibit Otsu 132-1), it is not appropriate to adjust the number of business days by further taking weather into consideration.

In addition, when the weather during the period for carrying out Questionnaire (Exhibit Otsu 132-1) is compared with the Questionnaire (Exhibit Otsu 14-1), it can be acknowledged that on March 21, 2017, on which it rained all day, as many as 68 customers in total used Shinagawa Shop 1 and Shibuya Shop, and similarly, on February 23 of the same year, which was a partially rainy day, a total of 99 customers used the two Shops. As such, it cannot be acknowledged that there is a clear correlation between the weather and the number of customers.

Furthermore, as for high temperature, the summer is a season for summer holidays, which suggests that the number of foreign visitors, who constitute most of the Consumers, will likely increase. Accordingly, it cannot be said that a day with high temperature necessarily decreases the number of customers, and First Instance Defendants do not provide any evidence, by showing specific numbers, to support the argument that there are fewer customers on high-temperature days.

As such, the assertion made by First Instance Defendants that the number of business days should be adjusted by taking weather into consideration cannot be accepted.

F. Sales at Shops

(A) When the sales at each Shop are calculated based on the first day of operation at each Shop, the average number of customers per day at each Shop, the average usage fees per customer, and the number of business days, as per the findings of the above B to E, and the indications in the column of "Sales" for "Fuji-Kawaguchiko Shop" in the attached Table 3, the total amount of sales at each Shop is as indicated in the attached Table 3 for "Total amount of sales" for each Shop, and the grand total becomes 654,677,219 yen as indicated in the column of "Grand total of sales" under "Sales / rate / damages" of the attached Table 3.

(B) First Instance Defendants assert that, given the example of Starbucks (Exhibit Otsu 136), if sales at a single Shop amount to approximately 100,000,000 yen, there should be more shops in operation. However, since the business operated by Starbucks and the Rental Business are completely different, such assertion does not have any effect on the findings of the above (A).

(3) Amount of damages equivalent to royalties

A. Upon calculating damages pursuant to Article 5, paragraph (3) of the Unfair Competition Prevention Act, it is not always necessary to base the calculation on the rate that is prescribed in a licensing agreement concerning the indication of goods or business concerned. It should be said that the rate, which should be determined after the fact and which is payable by the person who performed an act of unfair competition, naturally becomes higher than the ordinary rate.

The rate to be used for calculating damages pursuant to Article 5, paragraph (3) of the Unfair Competition Prevention Act and which is payable for an act of unfair competition should be a reasonable rate that is determined by comprehensively taking into consideration [i] the rate prescribed in an actual licensing agreement for the indication of goods or business concerned, and if the rate is unclear, the market rate of the industry, as well as various circumstances shown in the litigation such as [ii] the level of goodwill of the indication of goods or business concerned, [iii] the manner of the act of unfair competition, as well as the sales made by the person who performed the act of unfair competition involving the indication of goods or business or a similar indication, and the level of contribution made by such indication to profit, and [iv] the relationship between the entity of the indication of goods or business and the person who performed the act of unfair competition.

B. When the above is considered in the present case, the following circumstances are acknowledged; namely, [i] the rates according to the license agreements which First Instance Plaintiff has so far concluded concerning First Instance Plaintiff's copyrights and trademarks (Exhibits Ko 128-1, Ko 128-2), [ii] the fact that the Plaintiff's indication of goods or business is famous (Paragraphs 4 (2) and 6 (1) under "No. 3 Judgment of this court" of the Interlocutory Judgment) and has a high level of goodwill, and [iii] the fact that the manner of the act of unfair competition by First

Instance Defendant Company is as determined in Paragraphs 2 (4) to (6) under "No. 2 Outline of the case" of this judgment as well as Paragraphs 1 to 7 under "No. 3 Judgment of this court" of the Interlocutory Judgment, and the fact that First Instance Defendant Company has performed an act of unfair competition with the intention of unlawfully taking advantage of the high level of goodwill of Plaintiff's Indication of Goods or Business, so that the level of contribution made by Defendant's Marks 1 and 2, which are similar to Plaintiff's Indications of Goods or Business, as well as by Domain Names on the sales made by First Instance Defendant Company is considerably great. In light of these circumstances, it is appropriate to consider that the rate for sales by MariCAR Shops and Fuji-Kawaguchiko Shop, which use Domain Names, shall be 15%, and the rate for sales by other Shops, which do not use Domain Names, shall be 12%.

Accordingly, the damages equivalent to royalties in the present case shall be 92,399,253 yen as indicated for "Total amount of damages" under "Sales / rate / damages" on the attached Table 3.

C. First Instance Defendants assert that the rate should be 3% for Shops using Domain Names and 2.5% for Shops not using Domain Names, in light of [i] the fact that go-karts are driving on public roads per se is highly attractive to customers, [ii] there being the indication for avoiding confusion as to the relationship between First Instance Plaintiff and Mario Kart, [iii] the fact that First Instance Defendant Company changed its trade name and that the proportion of customers wearing Costumes is low, and [iv] the rates according to judicial precedents.

However, concerning the above [i], it is clear from the manner of the act of unfair competition as per the findings above that First Instance Defendant Company operated the Rental Business by using an indication that is similar to Plaintiff's Indication of Goods or Business and taking advantage of Plaintiff's Indication of Goods or Business, which has a high level of goodwill, and it cannot be said that the mere driving of go-karts on public roads is highly attractive to customers in comparison.

Regarding the above [ii], a risk of confusion is not a requirement under Article 2, paragraph (1), item (ii) of the Unfair Competition Prevention Act. Even if an indication for avoiding confusion is used, it does not change the fact that First Instance Defendant Company is taking advantage of the high

level of goodwill of Plaintiff's Indication of Goods or Service, which is famous, for its business. Accordingly, the existence of the indication for avoiding confusion cannot be taken into consideration as a circumstance for lowering the rate in the present case.

Concerning the above [iii], the timing of when First Defendant Company changed its trade name is as late as March 2018, which is after the Rental Business was sufficiently expanded by First Instance Defendant Company. In addition, while First Instance Defendants assert that the proportion of customers wearing Costumes is low, there is no precise evidence based on which to recognize the assertion, and even if the proportion of customers wearing Costumes has decreased recently, First Instance Defendant Company has so far performed Rental Business and has used Costumes in its business, so that the fact that the proportion of customers wearing Costumes has decreased does not immediately mean that the rate should be lowered.

Concerning the above [iv], given what has been considered so far, it is appropriate to recognize the rate in the present case to be the one shown in the above B.

Based on what is described above, the assertions made by First Instance Defendants do not have any effect on the determination as to the rate of the above B.

(4) Attorney's fees

In light of various circumstances such as the details of the present case, the progress of trial in the present case, and the amount of damages equivalent to royalties, it is appropriate to acknowledge that the amount of money equivalent to attorney's fees borne by First Instance Plaintiff shall be 10,000,000 yen.

(5) Summary

Upon totaling the above amounts, it is acknowledged that the damage suffered by First Instance Plaintiff shall be 102,399,253 yen, and the claim for compensation for damage made by First Instance Plaintiff against First Instance Defendants shall be approved in the full amount (50,000,000 yen).

5. Concerning Issue 15 (Whether or not a counterclaim can be filed)

First Instance Defendant Company filed a counterclaim on December 26, 2018 in this trial, which is an appeal case, but First Instance Plaintiff, who is the other party in the trial, does not give its consent to the filing of the above counterclaim (Article 300, paragraph (1) of the Code of Civil Procedure).

In regards to the issue of whether or not the costumes that are indicated on the List of Costumes attached to the above Counterclaim are reproductions of the representations shown on the List of Counter-Defendant's Representations attached to the Counterclaim, it is interpreted that the issue is substantively the same as the issue which was also argued in the trial of the prior instance concerning whether or not the Costumes are reproductions of Plaintiff's Representations. However, since the following issues; namely: [i] the issue of whether or not the filing of a counterclaim as described above is based on demonstration of a personal stake in the outcome, and [ii] the issue of what is included in the photographs or videos as contemplated by First Instance Defendant Company for public transmission, and in the case where the above Costumes can be considered as reproductions, what kind of photographs and videos, when posted, can constitute infringement of the right of reproduction and the right of public transmission, were not at all argued and supported by evidence between the parties during the trial of the prior instance, and since it cannot be acknowledged that these issues are not harmful to the interests, in terms of pursuit of the suit, of First Instance Plaintiff, who is the other party in the filing of the above counterclaim, the consent by First Instance Plaintiff shall remain a requirement.

Accordingly, without having to determine other points, it is appropriate to dismiss the filing of the above counterclaim by First Instance Defendant Company on the grounds that it is unlawful.

6. Conclusion

As described above, the claims made by First Instance Plaintiff (including the claims added in this trial) shall be approved on the grounds of being reasonable within the extent of [i] an injunction against the use of Defendant's Mark 1 at business facilities and for business activities, [ii] deletion of Defendant's Mark 1 from business facilities, advertising materials, and go-kart vehicles, [iii] an injunction against the use of Defendant's Mark 2 at business facilities and for business activities, [iv] discarding of data of Videos, [v] prohibition against the use of Domain Names, and [vi] deletion of registration of Domain Name 2, being ordered against First Instance Defendant Company, in addition to [vii] joint payment of damages in the amount of 50,000,000 yen along with delay damages accruing therefrom at the rate of 5% per annum for the period from October 31, 2018 until full payment, being issued against First Instance Defendants, and other claims, which are not reasonable, shall be dismissed. The judgment in prior instance, which ruled otherwise, shall be changed accordingly. Furthermore, the

appeal filed by First Instance Defendant Company, which is not reasonable, shall be dismissed, and the counterclaim which is filed by First Instance Defendant Company in this trial shall be dismissed on the grounds of being unlawful. As for Paragraphs 1 (2) and (4) of the main text, a declaration of provisional execution is inappropriate and shall not be issued, whereas it is appropriate to issue a declaration of provisional execution for Paragraphs 1 (1), (3), and (5) of the main text. Therefore, the court rendered a judgment in the form of the main text.

Intellectual Property High Court, Second Division

Presiding judge: MORI Yoshiyuki
Judge: MANABE Mihoko
Judge: KUMAGAI Daisuke

(Attachment)

List of Shops

No. 1 MariCAR Shops

1. Shinagawa Shop 1
2. Shibuya Shop
3. Akihabara Shop 1
4. Osaka Shop
5. Okinawa Shop

No. 2 STREET KART Shops

1. Shinagawa Shop 2
2. Akihabara Shop 2
3. Tokyo Bay BBQ Shop
4. Yokohama Shop
5. Kyoto Shop
6. Asakusa Shop

No. 3 Other Shops

1. Fuji-Kawaguchiko Shop
2. Roppongi Shop

(Attachment)

List of Counter-Defendant's Representations

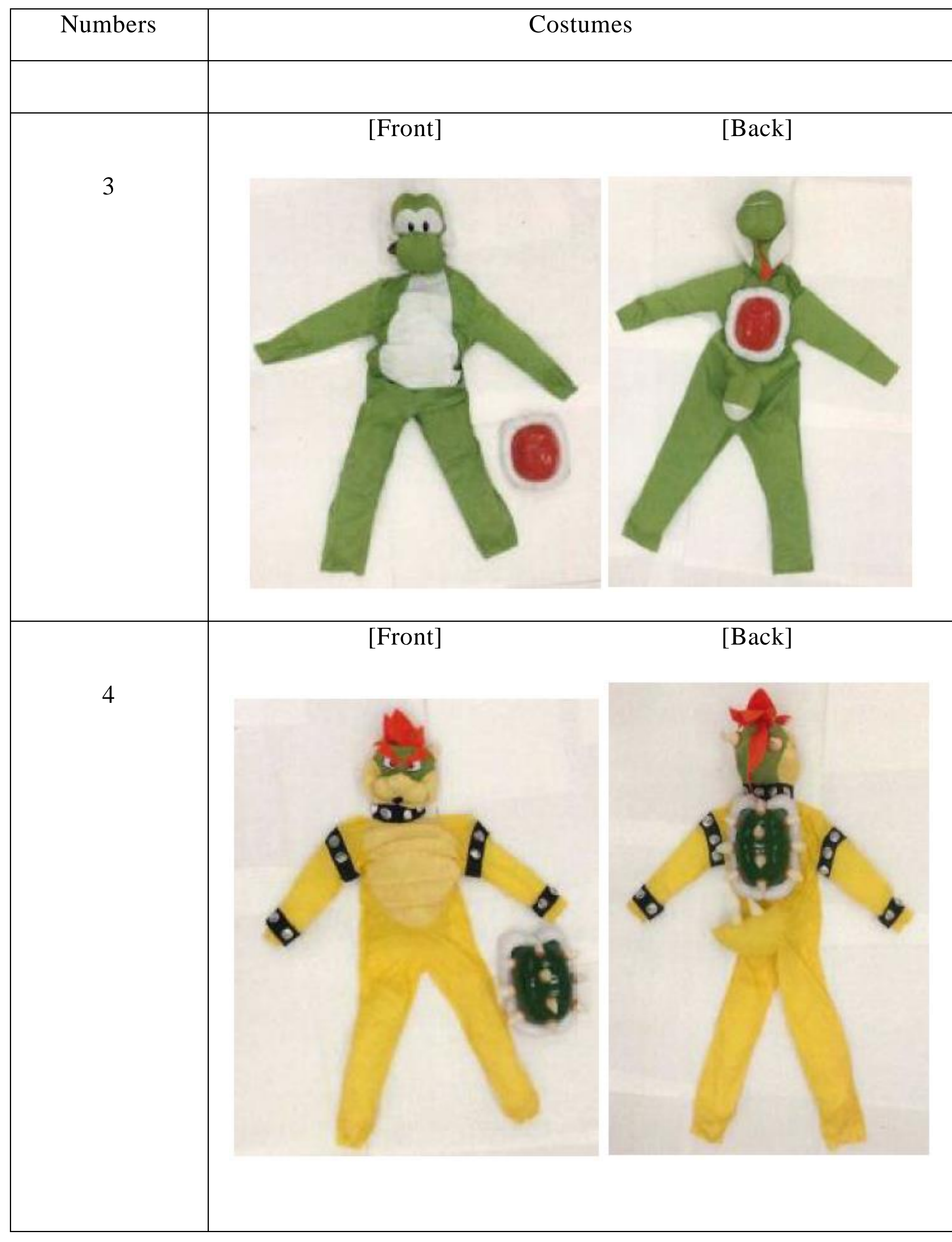
Numbers Character names	Representations
1 Mario	
2 Luigi	

Numbers Character names	Representations
3 Yoshi	
4 King Bowser Koopa	

(Attachment)

List of Costumes

Numbers	Costumes
1	[Front] [Back]
2	[Front] [Back]



Numbers	Costumes
3	[Front] [Back]
4	[Front] [Back]

(Attachment of Tables shall be omitted)