

Trademark Right	Date	March 11, 2020	Court	Intellectual Property High Court, Fourth Division
	Case number	2019 (Gyo-Ke) 10119		
<p>- A case in which, concerning a trademark consisting solely of an orange color, the court held that it cannot be acknowledged that said trademark, by nature, has a function to distinguish a person's services from another person's services, or that it is distinctive enough to distinguish a person's services from another person's services in relation to the designated services, and that it also cannot be acknowledged that the trademark, through its use, acquired a function to distinguish a person's services from another person's services or became distinctive enough to distinguish a person's services from another person's services, so that the trademark falls under a trademark by which consumers are not able to recognize the services as those pertaining to a business of a particular person (Article 3, paragraph (1), item (vi) of the Trademark Act).</p>				

Case type: Rescission of Appeal Decision of Refusal

Result: Dismissed

References: Article 3, paragraph (1), item (vi) of the Trademark Act

Related rights, etc.: Trademark Application No. 2015-30535

Decision of JPO: Appeal against Examiner's Decision of Refusal No. 2018-3370

Summary of the Judgment

1. The present case is a lawsuit seeking rescission of the JPO decision which dismissed the Plaintiff's appeal against an examiner's decision of refusal for the Applied Trademark, which consists solely of an orange color and which has the designated services of "Providing information on buildings or land [real estate affairs] through a portal site in regards to real estate available on the Internet" in Class 36. As the reasons for rescission of the JPO Decision, Plaintiff claimed that the JPO's determination as to the applicability of Article 3, paragraph (1), item (vi) of the Trademark Act was erroneous.
2. In the judgment of the present case, the court dismissed the Plaintiff's claims by ruling as follows.
 - (1) Whether or not the Applied Trademark is distinctive by nature
 - A. [i] The Applied Trademark consists solely of a single color of orange, and it cannot be said that the orange color of the Applied Trademark is unique, and [ii] an orange color is commonly used as a color that gives a positive and active impression in advertisement and website designs, and it is also commonly used on websites of real estate traders, who engage in real estate brokerage for the sale and rental of real properties, as a color for

decorating logo marks, other letters, frames, icons and other figures, and backgrounds, and [iii] even on the Plaintiff's website, on its front page, the orange color of the Applied Trademark is used as the color of a figure and a logo mark that are placed in the left corner at the very top of the page, and is also used as the color of other letters, the background of letters that are outlined in white and of the buttons for clicking and figures, characters, and banners, but it cannot be said that the orange color of the Applied Trademark is used by itself and separately from these letters and figures. When the above is comprehensively taken into consideration, the orange color itself of the Applied Trademark is recognizable by the consumers, who come in contact with the Plaintiff's website, as merely being used as a color for decorating the letters, icon figures, and background on the website, and thus it cannot be acknowledged that the orange color of the Applied Trademark is recognizable as being independent and indicating the service of "Providing information on buildings or land [real estate affairs] through a portal site", which pertains to the plaintiff's business.

Therefore, it cannot be acknowledged that the Applied Trademark, by nature, has a function to distinguish a person's services from another person's services or is distinctive enough to distinguish a person's services from another person's services.

- B. Generally speaking, a portal site is a "general term for a convenient website which is the first site viewed by users when they get connected to the Internet". Consumers of designated services for the Applied Trademark are ordinary consumers who are considering to purchase or rent real estate such as a house and an apartment, and it is normal for such consumers to search for necessary information on a portal site, and based on the search results, make inquiries to real estate traders about real properties listed, or to engage in real estate transactions by having real properties introduced by real estate traders. Accordingly, it is acknowledged that such consumers are either the same as, or overlap with, the consumers for real estate trading that involves real estate brokerage for the sale and rental of real property.

Next, a portal site that provides general information on real estate is the same as other websites that are operated by real estate traders, in that they provide an entrance to obtaining real estate information on the Internet, and considering that their services of providing real estate information are

closely related to each other's services, it cannot be acknowledged that the above consumers would recognize any difference in the qualities of these services.

Furthermore, there is no evidence to support that the actual circumstances of a transaction are such that a person searching for a real property would first access real estate information via a portal site that provides general information on real estate.

In that case, even if the Plaintiff's website is well-known and famous as a top brand from among the portal sites for general information on real estate, and if each of such portal sites has its own signature color which enables compartmentalization, it cannot be acknowledged that the circumstances surrounding the consumers for the portal sites that provide general information about real estate are such that they enable the consumers to distinguish one portal site from another based only on colors.

(2) Whether or not the Applied Trademark acquired distinctiveness through use

Even if the following circumstances are taken into consideration; namely, the continued use of the orange color of the Applied Trademark on the Plaintiff's website for thirteen years since 2006, as well as the Plaintiff's performance of TV commercials and the Plaintiff's sales records, it cannot be acknowledged that, at the time of the judgment of the present case, the orange color itself of the Applied Trademark had become independent from the rest and become widely recognizable by consumers in Japan as an indication for the service of "Providing information on buildings or land [real estate affairs] through a portal site", which pertains to the Plaintiff's business. Accordingly, it cannot be acknowledged that the Applied Trademark has, through its use, acquired a function to distinguish a person's services from another person's use, or become distinctive enough to distinguish a person's services from another person's services.

(3) Summary

Based on the above, it is acknowledged that the Applied Trademark falls under a trademark by which consumers are not able to recognize the services as those pertaining to a business of a particular person (Article 3, paragraph (1), item (vi) of the Trademark Act).

Judgment rendered on March 11, 2020

2019 (Gyo-Ke) 10119 A case of seeking rescission of the JPO decision

Date of conclusion of oral argument: January 27, 2020

Judgment

Plaintiff: LIFULL Co., Ltd.

Defendant: Commissioner of the JPO

Main text

1. The Plaintiff's claims shall be dismissed.
2. Plaintiff shall bear the court costs.

Facts and reasons

No. 1 Claims

The decision rendered by the JPO on July 31, 2019 for the Case of Appeal against Examiner's Decision of Refusal No. 2018-3370 shall be rescinded.

No. 2 Background

1. History of procedures at JPO

- (1) On April 1, 2015, Plaintiff filed an application for a trademark consisting solely of an orange color (hereinafter referred to as "Applied Trademark") as indicated in Attachment 1 by designating services in Classes 35 and 36 (Trademark Application No. 2015-30535) (Exhibit Ko 34).
- (2) Plaintiff received a Decision of Refusal dated December 8, 2017 (Exhibit Ko 44). On March 8, 2018, Plaintiff filed an appeal against the examiner's decision of refusal (hereinafter referred to as "Appeal Case") (Exhibit Ko 45), in addition to filing an amendment for procedures in regards to the designated service of the present application to "Providing information on buildings or land [real estate affairs] through a portal site in regards to real estate available on the internet" in Class 36 (Exhibit Ko 46).

The JPO tried the Plaintiff's claims as the Case of Appeal against Examiner's Decision of Refusal No. 2018-3370, and on July 31, 2019, rendered

a decision to the effect that "the request for a trial of the present case shall be dismissed" (hereinafter referred to as "JPO Decision"), and a certified copy of the decision was sent to Plaintiff on August 14 of the same year.

(3) On September 10, 2019, Plaintiff filed a lawsuit of the present case of seeking rescission of the JPO Decision.

2. Summary of the reasons for the JPO Decision

The reasons for the JPO Decision are as indicated in the attached Written Decision (copy).

In summary, the JPO Decision stated that the Applied Trademark cannot be granted registration because [i] the Applied Trademark is a trademark consisting solely of an orange color, and it is recognized that the color is used to improve the appeal of the service in relation to the designated service of the Applied Trademark, and considering that a color which closely resembles the Applied Trademark is used on websites of persons other than the appellant (Plaintiff), it can be said that any person would want to use the color, so that it is not reasonable to allow a single private person to use the same exclusively. Furthermore, since it also cannot be recognized that the Applied Trademark became sufficiently distinctive through use of the same by Plaintiff, if the Trademark is used in the designated service of the present application, consumers coming in contact with the Applied Trademark would merely recognize that it is a representation of a color that is commonly used, or that can be commonly used, in goods and advertising and the like for such service, and it should be said that said consumers would not recognize the Applied Trademark as a source indicator for services, or as an indicator for distinguishing a person's services from another person's services, and [ii] therefore, the Applied Trademark is a trademark which cannot be recognized by consumers as pertaining to a particular person's business, and thus falls under Article 3, paragraph (1), item (vi) of the Trademark Act.

3. Reasons for rescission

Error in judgment on applicability of Article 3, paragraph (1), item (vi) of the Trademark Act to the Applied Trademark

(omitted)

No. 4 Judgment of this court

1. Findings

It is recognized that the evidence (Exhibits Ko 1, 2, 4 through 7, 20, 27, 28, 30

through 32, and 53 through 67, and Exhibits Otsu 4 through 13) and the entire import of the oral argument show the following.

(1) Use of orange color on Plaintiff's website

A. Plaintiff is a business corporation (former trade name: "Kabushiki Kaisha Lifull") having been established on March 12, 1997 with the purpose of providing various information services.

Plaintiff has managed and operated the Plaintiff's website (called "HOME's" until March 2017, and "LIFULL HOME's" since April of the same year), which provides real estate information and the like, since 2006.

The total number of properties listed on the Plaintiff's website as of September 2018 was approximately 6,760,000 (Exhibit Ko 32).

B. On the front page (as of March 20, 2016; Exhibit Ko 20) of the Plaintiff's website, as shown in Attachment 2, the orange color of the Applied Trademark was used as the color of a logo mark consisting of a figure and the letters, "LIFULL HOME'S", placed in the top left corner, other letters, the backgrounds of letters that are outlined in white and of the buttons for clicking and figures, characters pictures, and banners and the like.

Also, on the front page of the Plaintiff's Website, the orange color of the Applied Trademark was used, generally in the same manner of use as described above, between 2006 and 2019.

(2) Use of orange color in TV commercials

The Plaintiff's TV commercials (HOME'S "Himurasannoie Morning Version", HOME'S "Kironitsuku Version", HOME'S "Konomachinisumitai" version, and HOME'S "Rakugaki" version, etc.) were broadcasted on stations nationwide between May and October 2014, between January and September 2015, and in April and May 2018 (Exhibits Ko 5, 6, 31).

In some of the TV commercials (Exhibit Ko 27), there were images in which the letters, "オンライン内見、はじまる", in white, and a character picture that uses a lot of orange color, and the letters, "LIFULL HOME'S", in orange, and the like were placed at the center against the background of images of rooms in houses, as well as images in which a logo mark consisting of an orange figure and the letters, "LIFULL" and "HOME'S", in orange, was placed at the center against a white background.

(3) Survey results

A. First Survey

In the First Survey (Exhibit Ko 30), Plaintiff requested Hakuodo Inc. to conduct a preliminary survey between March 27 and 30, 2018; the First Survey was followed by the main survey, which was conducted between March 30 and April 1 of the same year.

The preliminary survey targeted a total of 30,000 men and women aged 18 to 59 and living in Tokyo, Kanagawa, Chiba, Saitama, Aichi, Kyoto, Osaka, Hyogo, and Fukuoka. Of the 28,892 respondents (response rate of 96.3%), 9,009 respondents (31.2% of all respondents in the preliminary survey) were interested in relocating to a rental apartment/house, purchasing a property, renovation, and the like, and were likely to act on such plan in the future (irrespective of the timing).

In the main survey, 1,648 persons were picked at random from among the above 9,009 respondents and were asked to freely write the names of "websites that provide information on real estate". Next, the "orange color" of the Applied Trademark was shown to the 228 respondents who had written "LIFULL HOME'S" or "HOME'S", and who were then asked to freely write the name of a "website that provides information on real estate", and 198 respondents (86.8% of the above 228 persons) wrote names such as "LIFULL HOME'S" and "HOME'S".

B. Second Survey

The Second Survey (Exhibit Ko 33) was conducted online by Rakuten Insight, Inc. at the Plaintiff's request between October 11 and 13, 2019. It targeted 20,000 men and women aged 18 to 59 and living in Hokkaido, Miyagi, the Tokyo metropolitan area (Saitama, Chiba, Tokyo, Kanagawa), Aichi, the Keihanshin area (Osaka, Kyoto, Hyogo), Hiroshima, and Fukuoka. From among the above number, 560 respondents who fulfilled the requirements of [i] having considered or experienced "moving out" or "relocating", or "purchasing or building a home" in the most recent one year, [ii] having gathered information on a "website or app that provides information on real estate and housing", and [iii] having the awareness that any of the websites of "LIFULL HOME'S", "SUUMO", "at home", "Mynavi Chintai", and "CHINTAI" is a "service that provides information on real estate and housing companies nationwide", and furthermore, who is not, and whose family member is not, a "housing developer or sales agent", "involved in real estate or construction", or "involved in advertising agency, mass media, or market research", were picked at random. Next, they were

shown an image of the orange color of the Applied Trademark, and were asked to choose one "website or app that provides information on real estate or housing" from among the choices of "LIFULL HOME'S", "HOME'S", "SUUMO", "at home", "Mynavi Chintai", "CHINTAI", and "None / I don't know", and 13.2% chose "LIFULL HOME'S", 41.8% chose "HOME'S", 16.3% chose "SUUMO", 10.9% chose "at home", 1.3% chose "Mynavi Chintai", 2.1% chose "CHINTAI", and 14.5% chose "None / I don't know".

(4) How an orange color is used in other websites that provide information on real estate

A. Website of "Home Agent"

This website (<http://> the rest omitted) was using an orange color as the color of a logo mark, which was created by designing part of the letters, "Home Agent", and which was placed in the upper left part, and as the color of other letters ("お部屋探し", "仲介 賃貸 売買 店舗 管理", etc.), figures (frames, icons, etc.), and the store's signboard and the like (Exhibit Otsu 4, Sheet 2-(6) attached to the Written Decision).

B. Website of "Double Orange"

This website (<http://> the rest omitted) was using an orange color as the color of a figure that is created by designing the letters, "D" and "O", and of the letters, "Double Orange" and "ダブルオレンジ", and as the color of other letters ("厳選！日野市おすすめ物件", etc.), figures, (frames, icons, etc.), and the store's interior and signboard and the like (Exhibit Otsu 5, Sheet 2-(9) attached to the Written Decision).

C. Website of "Kabushiki Kaisha Up-light"

This website (<http://> the rest omitted) was using an orange color as the color of a logo mark that is created by designing part of the letters, "Up Light", and as the color inside a line-shaped bar frame at the top of the page, as well as other letters ("不動産売買・賃貸・管理", "株式会社アップライト", etc.), and figures (frames, icons, etc.) (Exhibit Otsu 6, Sheet 2-(3) attached to the Written Decision).

D. Website of "Kabushiki Kaisha Bestate"

This website (<http://> the rest omitted) was using an orange color as the color of a logo mark that shows a figure of a designed house, and as the color of the letters, "BESTATE", as well as of other figures (frames, icons, etc.), and the store's exterior and signboard and the like (Exhibit Otsu 7).

E. Website of "Wakuwaku Real Estate Co., Ltd."

This website (<http://> the rest omitted) was using an orange color as the color of a logo mark that is created by designing a house with the letters, "WAKU / WAKU", inside, and as the color of other letters ("焼津市・藤枝市周辺の不動産売買情報", etc.), figures (maps, frames, icons, etc.), and the inside of a line-shaped bar frame at the bottom of the page (Exhibit Otsu 8).

F. Website of "LIXIL Fudosan Shop-no ERA Fudosan Online"

This website (<http://> the rest omitted) was using an orange color as the color inside a line-shaped bar frame showing letters such as "LIXIL 不動産 ショップ LIXIL 賃貸ショップ" at the top of the page, and as the color of other letters ("Realtor", "リアルター", etc.), and figures (maps, frames, icons, etc.) (Exhibit Otsu 9, Sheet 2-(1) attached to the Written Decision).

G. Website of "Awajishima-no Fudosanya I'll"

This website (<http://> the rest omitted) was using an orange color as the color of a logo mark that is created by designing a house, with letters such as "淡路島の不動産屋アイル" inside, and persons and the like, and as the color of the inside of a line-shaped bar frame at the top of the page, as well as other letters ("そんな想いを込めてアイルならではのアドバイスをご提供します", etc.), figures (frames, background color, etc.), and the shop's signboard and the like (Exhibit Otsu 10).

H. Website of "Orange Home Co., Ltd."

This website (<http://> the rest omitted) was using an orange color as the color of the inside of a line-shaped bar frame at the top of the page and of the inside of a line-shaped bar frame showing letters such as "不動産のことなら／オレンジホーム (株)", and as the color of other letters ("来店・内覧予約のお客様を優先させて頂いております", etc.), and figures (figures imitating persons, frames, route maps, etc.) (Exhibit Otsu 11).

I. Website of "Shinai Real Estate Kabushiki Kaisha"

This website (<http://> the rest omitted) was using an orange color as the color of a logo mark that was created by designing a figure resembling a home, and of the inside of a line-shaped bar frame at the top of the page (showing letters such as "トップページ"), as well as of other letters ("夏季休業のお知らせ", etc.), and figures (frames, etc.) (Exhibit Otsu 12).

J. Website of "Marusho Chintai Center Ltd."

This website (<http://> the rest omitted) was using an orange color as the color of a logo mark that was created by designing a circle figure, the letters, "丸晶賃貸センター", and the inside of a line-shaped bar frame at the bottom of the page (showing the letters, "株式会社丸晶賃貸センター"), and as the color of other figures (frames, icons, etc.) and of the shop's signboard and the like (Exhibit Otsu 13, Sheet 2-(5) attached to the Written Decision).

2. Regarding the applicability of Article 3, paragraph (1), item (vi) of the Trademark Act to the Applied Trademark

Plaintiff asserts that the Applied Trademark, by nature, has a function to distinguish a person's services from another person's services, and that, as a result of the Plaintiff's use on its website and in TV commercials, it became sufficiently distinctive to distinguish a person's services from another person's services as an indication of services pertaining to the Plaintiff's business, so that the JPO Decision, which was rendered to the effect that the Applied Trademark falls under a trademark by which consumers are not able to recognize the services as those pertaining to a business of a particular person (Article 3, paragraph (1), item (vi) of the Trademark Act), is erroneous. Accordingly, the court of the present case determines the matter in the following respects.

(1) Whether or not the Applied Trademark is distinctive by nature

A. (A) It is acknowledged that customers of the designated service of the present application, which is "Providing information on buildings or land [real estate affairs] through a portal site in regards to real estate available on the internet" in Class 36, are ordinary consumers who are considering the purchase or rental or the like of real estate such as a house and an apartment.

It is recognized that it is normal for such consumers to search for necessary information on a portal site, and based on the search results, to make inquiries to real estate traders about properties listed or to engage in real estate transactions by having properties introduced by real estate traders.

(B) As shown in Attachment 1, the Applied Trademark is a trademark consisting solely of an orange color (a combination of RGB: R237, G97, B3).

Since an orange color is "reddish yellow" (Exhibit Otsu 1) and is also listed as an example of JIS Color Specification (Exhibit Otsu 2), it cannot

be said that the color is special.

Furthermore, considering that Exhibit Otsu 3 (the website of "Mikkadewakaru! Design Gakko Kaitai Shinsho") states that "the color of orange is categorized into a 'warm color' as a signature color for warmth, heat, and energy", and that "this color is often used in corporate advertising to get publicity, as well as in designs of portfolios and in websites that sell iPhone apps, and use of this color can give a positive and active impression", it is acknowledged that an orange color is commonly used in advertising and website designs as a color that gives a positive and active impression.

Also, according to the findings of the above 1 (4), it is recognized that an orange color is commonly used in websites of real estate traders, who engage in real estate brokerage for the sale and rental of properties, as the color for decorating logo marks, other letters, frames, icons and other figures, and backgrounds and the like.

However, according to the findings of the above 1 (1) B, the orange color of the Applied Trademark is also used on the front page of the Plaintiff's website (Exhibit Ko 20) as the color of a logo mark consisting of a figure and the letters, "LIFULL HOME'S", placed in the top left corner, other letters, the backgrounds of the letters that are outlined in white and of the buttons for clicking and figures, characters pictures, and banners and the like, as shown in Attachment 2, but it cannot be said that the orange color of the Applied Trademark is used on its own and separately from these letters and figures and the like.

(C) According to the findings of the above (A) and (B), [i] The Applied Trademark consists solely of a single color of orange, and it cannot be said that the orange color of the Applied Trademark is unique, and [ii] an orange color is commonly used as a color that gives a positive and active impression in advertising and website designs, and it is also commonly used on websites of real estate traders, who engage in real estate brokerage for the sale and rental of properties, as a color for decorating logo marks, other letters, frames, icons and other figures, and backgrounds and the like, and [iii] as per Attachment 2, the orange color of the Applied Trademark is also used on the front page of the Plaintiff's website as the color of a logo mark consisting of a figure and the letters, "LIFULL HOME'S", placed in the top left corner, other letters, the backgrounds of the letters that are

outlined in white and of the buttons for clicking and figures, character pictures, and banners and the like, but it cannot be said that the orange color of the Applied Trademark is used on its own and separately from these letters and figures and the like. When these circumstances are comprehensively taken into account, the orange color of the Applied Trademark is recognizable by the consumers, who come in contact with the Plaintiff's website, as merely being used as the color for decorating the letters, icon figures, and backgrounds and the like on the website, and thus it cannot be acknowledged that the orange color of the Applied Trademark is recognizable as being independent on its own and indicating the service of "Providing information on buildings or land [real estate affairs] through a portal site", which pertains to the Plaintiff's business.

Therefore, it cannot be acknowledged that the Applied Trademark, by nature, has a function to distinguish a person's services from another person's services or is distinctive enough to distinguish a person's services from another person's services, in relation to the designated service of the present application.

- B. In response, Plaintiff asserts as follows. The Plaintiff's website has established a strong position as a top brand among portal sites that provide general information on real estate, and is well-known and famous in the field of the designated service of the present application. Furthermore, in addition to the Plaintiff's, there are other portal sites in Japan that provide general information on real estate and that operate a business of a certain scale or more nationwide by listing properties of various forms of transaction (always listing at least 1,000,000 properties), including "SUUMO" operated by Recruit Sumai Company Ltd., "e-heya.net" operated by Daito Trust Construction Co., Ltd., "O-uccino" operated by O-uccino, Inc., "Yahoo Fudosan" operated by Yahoo Japan Corporation, "apamanshop" operated by Apaman Network Co., Ltd., and "at home" operated by At Home Co., Ltd. Each of these sites has its own signature color. For example, Plaintiff uses orange, "SUUMO" uses green, "e-heya.net" uses red, "O-uccino" uses pink, "Yahoo Fudosan" uses red, "apamanshop" uses dark blue, and "at home" uses deep red, thus allowing for compartmentalization. Accordingly, traders and consumers coming in contact with portal sites that provide general information on properties are able to identify each portal site by color, and there are actual circumstances

under which the orange color of the Applied Trademark is immediately recognized and understood to be the Plaintiff's website. Given these circumstances, the orange color of the Applied Trademark, independently on its own and by nature, has a function to distinguish a person's services from another person's services or is distinctive enough to distinguish a person's services from another person's services, in relation to the designated service of the Applied Trademark.

However, generally speaking, a portal site is a "general term for a convenient website which is the first site viewed by users when they get connected to the internet" (Daijirin, Third Edition), and according to the findings of the above (1) A, consumers for the designated service of the present application are ordinary consumers who are considering to purchase or rent properties such as a house and an apartment, and it is normal for such consumers to search for necessary information on a portal site, and based on the search results, make inquiries to real estate traders about properties listed or to engage in real estate transactions by having properties introduced by real estate traders. Accordingly, it is acknowledged that such consumers are either the same as, or overlap with, the consumers for real estate trading that involves real estate brokerage for the sale and rental of real estate.

Even if portal sites that provide general information on real estate and that always list at least 1,000,000 properties cover the real estate information throughout Japan, as asserted by Plaintiff, considering that a website that provides general information on real estate is the same as websites operated by other real estate traders in that they both provide an entrance for obtaining information on real estate online, and that their services are closely related in that they both provide information related to real estate, it cannot be acknowledged that the above customers would recognize that the above portal sites are different in quality from the above websites operated by other real estate traders.

Furthermore, there is no evidence to support the assertion that the actual circumstances of a transaction are such that a person searching for a property would first access real estate information via a portal site that provides general information on real estate.

In that case, even if, as asserted by Plaintiff, the Plaintiff's website is well-known and famous as a top brand among portal sites that provide

general information on real estate, with each portal site having a signature color of its own, thereby allowing for compartmentalization, it cannot be acknowledged that the circumstances surrounding the consumers for the portal sites that provide general information on real estate are such that they enable the consumers to distinguish one portal site from another based only on colors.

Therefore, the above assertion made by Plaintiff cannot be accepted due to its premise.

(2) Whether or not the Applied Trademark became distinctive enough through use

A. Use of the Applied Trademark on the Plaintiff's website

According to the findings of the above 1 (1), it is acknowledged that Plaintiff has used the orange color of the Applied Trademark on its website continuously for thirteen years since 2006.

On the other hand, however, as described in the above (1) A (C) [i] through [iii], it cannot be said that the orange color of the Applied Trademark is unique, and in view that an orange color is commonly used as a color that gives a positive and active impression in advertising and website designs, in addition to being commonly used on websites of real estate traders, who engage in real estate brokerage for the sale and rental of properties, as a color for decorating logo marks, other letters, frames, icons and other figures, and backgrounds and the like, and that, while an orange color of the Applied Trademark is used on the Plaintiff's website on its front page in the same manner as the use of the color on the aforementioned websites of traders, who engage in real estate brokerage, as the color of a logo mark, other letters, the backgrounds of the letters that are outlined in white and of the buttons for clicking and figures, character pictures, and banners and the like, it cannot be said that the orange color of the Applied Trademark is used separately from these letters and figures. Given these circumstances, it cannot be acknowledged that the orange color of the Applied Trademark had become widely recognizable among consumers in Japan as being independent on its own and indicating the service of "Providing information on buildings or land [real estate affairs] through a portal site", which pertains to the Plaintiff's business, as of the time of the JPO Decision (rendered on July 31, 2019), as a result of the Plaintiff's use of the Applied Trademark on its website.

B. Use of the Applied Trademark in TV commercials

As described above in 1 (2), it is acknowledged that the Plaintiff's TV commercials were broadcasted on stations nationwide between May and October 2014, between January and September 2015, and in April and May 2018. On the other hand, there is no sufficient evidence to acknowledge the specific manner of use of the orange color of the Applied Trademark in these broadcasts other than the TV commercials pertaining to Exhibit Ko 27.

Furthermore, the TV commercials pertaining to Exhibit Ko 27 are such that an orange color is used in character pictures, and in the letters, "LIFULL HOME'S", and figures and the like, and are not such that the images themselves from the front page of the Plaintiff's website are projected, so that it cannot be acknowledged that viewers of the above TV commercials would understand the commercials by associating them with the orange color of the Applied Trademark and the services pertaining to the Plaintiff's website.

C. Amount of sales by Plaintiff

Plaintiff asserts that since it can be said that there is a close and direct relationship between the orange color of the Applied Trademark and the Plaintiff's business of providing information on real estate, the orange color of the Applied Trademark greatly contributes to the amount of sales of the Plaintiff's business.

However, there is no sufficient evidence to acknowledge that there is a close and direct relationship between the orange color of the Applied Trademark and the Plaintiff's business of providing information on real estate, and the fact that the amount of sales of the Plaintiff's business is high does not provide any basis for the assertion that the orange color of the Trademark as being independent on its own had come to be widely recognized by consumers in Japan as an indication for the services pertaining to the Plaintiff's business.

Therefore, the above assertion made by Plaintiff cannot be accepted.

D. Regarding survey results

(A) When the survey results submitted by Plaintiff are considered, the First Survey (Exhibit Ko 30) targeted 228 persons who responded "LIFULL HOME'S" and "HOME'S" for names of "websites that provide information on real estate", and who were shown the orange color of the

Applied Trademark and were then asked to write the names of websites that provide information on real estate and that came to their mind (as described above in 1 (3) A). The target is limited to the persons who were aware of the names of the Plaintiff's websites even before the survey, so that being presented with the names of the Plaintiff's websites at a stage prior to being shown the orange color of the Applied Trademark is, in a way, being presented with the correct answer before responding, and thus it should be said that it is natural for a high percentage of respondents to be able to write the names of the Plaintiff's websites.

Therefore, the results of the First Survey cannot be accepted.

(B) Next, in the Second Survey (Exhibit Ko 33), respondents were presented with the image of the orange color of the Applied Trademark and were asked to choose a "website or app that provides information on real estate" from among the choices of "LIFULL HOME'S", "HOME'S", "SUUMO", "at home", "Mynavi Chintai", "CHINTAI", and "None / I don't know" without indicating any reason for the choice. Accordingly, the possibility of choosing "LIFULL HOME'S" or "HOME'S" by coincidence cannot be eliminated, and furthermore, the fact that "LIFULL HOME'S" and "HOME'S" are both listed as choices for the Plaintiff's website inevitably increases the probability of respondents choosing the Plaintiff's website. Nevertheless, 13.2% of the respondents chose "LIFULL HOME'S" and 41.8% of the respondents chose "HOME'S", and thus the total is 55%, which is not very high. Rather, when the 16.3% of the respondents choosing "SUUMO", the 10.9% of the respondents choosing "at home", and 14.5% of the respondents choosing "None / I don't know" are totaled, the sum accounts for a certain percentage and is higher than the percentage of the respondents choosing "LIFULL HOME'S". Given these circumstances, the results of the Second Survey cannot be accepted.

E. Conclusion

According to what is described above, even when the following circumstances are taken into consideration; namely, that Plaintiff has used the orange color of the Applied Trademark on its website continuously for thirteen years since 2006, the performance of the Plaintiff's TV

commercials, and the Plaintiff's sales, it cannot be acknowledged that, as of the time of the JPO Decision (rendered on July 31, 2019), only the orange color of the Applied Trademark had become widely recognizable among consumers in Japan as being independent on its own and indicating the service of "Providing information on buildings or land [real estate affairs] through a portal site", so that it cannot be acknowledged that the Applied Trademark has obtained, through its use, a function to distinguish a person's services from another person's services, or became distinctive enough to distinguish a person's services from another person's services as an indication of services pertaining to the Plaintiff's business.

The Plaintiff's assertion to the contrary is not reasonable.

(3) Summary

Based on what is describe above, it is acknowledged that the Applied Trademark falls under a trademark by which consumers are not able to recognize the services as those pertaining to a business of a particular person (Article 3, paragraph (1), item (vi) of the Trademark Act).

Therefore, there is no error with the JPO Decision, which was rendered to the same effect, and thus the Plaintiff's assertion to the effect of rescission of the JPO Decision is unreasonable.

3. Conclusion

As described above, the grounds for the Plaintiff's assertion are unreasonable, and it cannot be acknowledged that the JPO Decision has any unlawfulness, due to which the JPO Decision should be rescinded.

Therefore, the Plaintiff's claims shall be dismissed.

Intellectual Property High Court, Fourth Division

Presiding judge: OTAKA Ichiro

Judge: KOKUBU Takafumi

Judge: HAZUI Takuya

(Attachment 1)

1. The trademark for which an application for registration was filed.



2. Detailed explanation of the trademark

The trademark for which an application for registration was filed is a trademark consisting solely of an orange color (a combination of RGB: R237, G97, B3).

(Attachment 2)
Exhibit Ko 20



住まいの悩みを解決

賃貸や中古、購入の悩み、お家のことまで、あなたの住まいの悩みを解決する住まいの悩み解決サービス。

住まいの悩みを解決

LIFULL HOME'S のサービスは、あなたの住まいの悩みを解決する住まいの悩み解決サービス。

住まいの悩みを解決

マドリーム
Madriom 住まいの悩み解決サービス

Q 住まいが決まったら

LIFULL HOME'S

賃貸の悩み解決サービス。お家のことまで、あなたの住まいの悩みを解決する住まいの悩み解決サービス。

LIFULL HOME'S

中古の悩み解決サービス。お家のことまで、あなたの住まいの悩みを解決する住まいの悩み解決サービス。

LIFULL HOME'S

不動産の悩み解決サービス。お家のことまで、あなたの住まいの悩みを解決する住まいの悩み解決サービス。

LIFULL HOME'S

住まいの悩み解決サービス。お家のことまで、あなたの住まいの悩みを解決する住まいの悩み解決サービス。

Q 住まいをキレイに、快適に

リフォーム

古いお家でも最新の設備を取り入れることで、お家をキレイに、快適にすることができます。

メンテナンス

定期的なメンテナンスを行うことで、お家をキレイに、快適にすることができます。

DIY

自分でお家のメンテナンスを行うことで、お家をキレイに、快適にすることができます。

LIFULL HOME'S

賃貸の悩み解決サービス。お家のことまで、あなたの住まいの悩みを解決する住まいの悩み解決サービス。

LIFULL HOME'S

中古の悩み解決サービス。お家のことまで、あなたの住まいの悩みを解決する住まいの悩み解決サービス。

LIFULL HOME'S

不動産の悩み解決サービス。お家のことまで、あなたの住まいの悩みを解決する住まいの悩み解決サービス。