

Date	August 8, 2012	Court	Intellectual Property High Court, Fourth Division
Case number	2012 (Ne) 10027		

– A case in which, with respect to the plaintiff’s game and the defendants’ game, both of which are fishing games for mobile phones, the court denied adaptation on the ground that the changes of the fish pulling page and other key pages as seen in the defendants’ game are identical to such changes as seen in the plaintiff’s game only with respect to such parts that do not constitute ideas or expressions by themselves or involve creativity in expressions, and therefore, the essential characteristics in expressions of the plaintiff’s game cannot be directly perceived from the defendants’ game.

– An image of a fishing game for mobile phones which does not appear in the beginning of the game but only appears during the game or an image similar thereto, and which is not displayed on pages throughout the entire process of the game repeatedly and for a long time, cannot be regarded as a well-known indication of goods, etc. as set forth in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act.

– An act that does not constitute copyright infringement or unfair competition practice does not constitute a tort unless under special circumstances such as where the act violates any legally protected interest other than the interest in using a copyrighted work or a well-known indication of goods, etc. governed respectively by the Copyright Act or the Unfair Competition Prevention Act.

References:

Article 27 of the Copyright Act, Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act, Article 709 of the Civil Code

X (the plaintiff in the first instance/appellant and appellee in the second instance) created an online fishing game for mobile phones named “釣り★スタ” (Tsurista), and has been distributing this game (hereinafter referred to as the “plaintiff’s game”) on its Internet website for mobile phones named “GREE,” which provides social networking services (SNS), among the SNS members by public transmission.

Y (the defendant in the first instance/appellee and appellant in the second instance) created an online game for mobile phones named “釣りゲータウン2” (Tsurige Town 2) jointly with another defendant, and started to distribute this game (hereinafter referred to as the “defendants’ game”) on its Internet website for mobile phones named “モバゲータウン” (Mobage Town) among its members by public transmission, after X’s launch of the distribution of the plaintiff’s game.

In this case, X has submitted the following allegations and claims against Y and another defendant. (1) X alleges that Y and another defendant's act of creating the defendants' game and transmitting it to the public constitutes infringement of X's copyright for the plaintiff's game (right of adaptation; right of public transmission under Article 28 of the Copyright Act) and its author's moral right (right to maintain integrity), and accordingly, X (i) seeks an injunction to stop reproduction and public transmission of the images of the defendants' game and demands deletion of said images from the website and deletion of records of said images from recording media under Article 112 of the Copyright Act, (ii) claims payment of damages under Articles 709 and 719 of the Civil Code, and (iii) demands publication of an apology under Article 115 of the Copyright Act. (2) X alleges that Y and another defendant's act of posting Defendants' Images 1 and 2, which are similar to the well-known images of the plaintiff's game, on their web pages, constitutes the act set forth in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act, and accordingly, X (i) demands deletion of Defendants' Images 1 and 2 under Article 3 of the Unfair Competition Prevention Act, (ii) claims payment of damages under Articles 709 and 719 of the Civil Code, and (iii) demands publication of an apology under Article 14 of the Unfair Competition Prevention Act. (3) X alleges that Y and another defendant's act of creating the defendants' game based on the plaintiff's game without X's permission and distributing the game violates X's interest that deserves legal protection, and therefore it constitutes a tort, and accordingly, X (i) claims payment of damages under Articles 709 and 719 of the Civil Code, and (ii) demands publication of an apology under Article 723 of the Civil Code.

The judgment in prior instance found that the "fish pulling page" in the defendants' game infringes X's copyright and its author's moral right in relation to the "fish pulling page" in the plaintiff's game, and upheld X's claims (1)(i) in whole and also upheld its claim (1)(ii) in part, while dismissing all of the other claims.

Dissatisfied with this, X appealed to the higher court, while Y and another defendant also appealed against the judgment in prior instance.

The Intellectual Property High Court dismissed all of X's claims, holding as follows.

#### 1. Infringement of the copyright and author's moral right

(1) The fish pulling page in the plaintiff's game and the fish pulling page in the defendants' game have nothing in common other than such parts that do not constitute expressions by themselves or involve creativity in expressions. These pages also differ

in terms of the specific expressions used therein.

Comparing the fish pulling page in the plaintiff's game and the fish pulling page in the defendants' game on the whole, they are different in terms of the contour of the area in which underwater scenes are depicted, and this makes them also different in terms of the size and location of the concentric circles. Their difference is found in specific expressions such as that the sizes of the concentric circles, the colors of the panel, and the figures appearing in the central circle change in the defendants' game, also found in the location and appearance of the pulling power gauge, how the silhouette of the fish is depicted and how it is located in relation to the concentric circles.

In light of these common and different features between the fish pulling page in the plaintiff's game and the fish pulling page in the defendants' game, as well as the existence and degree of creativity in the defendants' game, it cannot be said that people who see the fish pulling page in the defendants' game will receive an impression from this page on the whole that is different from the impression that may be received from the fish pulling page in the defendants' game, and will be able to directly perceive the essential characteristics in expressions of the plaintiff's game.

Thus, it cannot be said otherwise than that the fish pulling page in the defendants' game is identical to the fish pulling page in the plaintiff's game only with respect to such parts that do not constitute ideas or expressions by themselves or involve creativity in expressions, and people who see the fish pulling page in the defendants' game will not be able to directly perceive the essential characteristics in expressions of the fish pulling page in the plaintiff's game. Consequently, the fish pulling page in the defendants' game cannot be regarded as an adaptation of the fish pulling page in the plaintiff's game.

(2) Both the plaintiff's game and the defendants' game have a "top page," "fishing spot selection page," "casting page," "fish pulling page," and "fishing result page" (success or failure). In both games, these pages change according to the user's operations in the order of (i) the "top page," (ii) the "fishing spot selection page," (iii) the "casting page," then "fish pulling page," and (iv) the "fishing result page (success)" or "fishing result page (failure)," so the user can repeat the game without returning from (iv) the "fishing result page (success)" or "fishing result page (failure)," to (i) the "top page."

However, both the plaintiff's game and the defendants' game are fishing games for mobile phones, which focus on a series of basic actions that may be performed by an angler, incorporate as materials many facts observed in society in connection with an angler's actual behavior, and arrange and compose these materials in the order of such

series of actions of an angler.

In view of the fact that fishing games containing such pages as mentioned above have existed since before, and in consideration of the temporal order of the series of actions of an angler, it is nothing more than a familiar method of expressions used for fishing games to select and arrange these pages in such a manner as adopted by the plaintiff's game and the defendants' game, which are both fishing games. Furthermore, not all pages are the same between the defendants' game and the plaintiff's game (some pages contained in the defendants' game are not found in the plaintiff's game, and vice versa), and these games are also different in other specific features. Taking into account these matters as well, it cannot be said that the essential characteristics in expressions of the plaintiff's game can be directly perceived from the defendants' game, only because these games have in common the abovementioned changes of pages.

The same reasoning applies to the top page, fishing spot selection page, casting page, and fishing result page. It cannot be said otherwise than that the changes of pages and the selection and arrangement of materials as seen in the defendants' game are identical to such changes as seen in the plaintiff's game only with respect to such parts that do not constitute ideas or expressions by themselves or involve creativity in expressions, and therefore, the essential characteristics in expressions of the plaintiff's game cannot be directly perceived from the defendants' game.

(3) Consequently, Y and another defendant cannot be deemed to have infringed X's right of adaptation by creating the defendants' game that contains the fish pulling page, nor can they be deemed to have infringed X's right of public transmission under Article 28 of the Copyright Act by distributing the game. Similarly, Y and another defendant cannot be deemed to have infringed X's right to maintain integrity by creating the defendants' game that contains the fish pulling page.

The same reasoning applies to the changes of pages as well as the selection and arrangement of materials.

## 2. Unfair competition under Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act

(1) It is construed that where images of a game have unparalleled, creative features, and these images have become well known among consumers as a result of having been displayed on pages throughout the entire process of the game repeatedly and for a long time, there is a possibility that such images fall within the scope of "indication of goods, etc." as prescribed in Article 2, paragraph (1), item (i) of the Unfair

### Competition Prevention Act.

However, consumers generally will not see images of a game until they play the game. The plaintiff's image that X alleges as falling within the scope of "indication of goods, etc." is not an image that appears in the beginning of the plaintiff's game, but it is only an image that appears during the game or an image similar thereto, which means that it is not displayed on pages throughout the entire process of the game repeatedly and for a long time. Furthermore, the page containing the plaintiff's image is not indicated on the front cover, etc. of the official guidebook of the plaintiff's game, which is sold in a plastic-covered state.

Although X advertised the plaintiff's game on TV commercials and in trains, newspapers and magazines, the plaintiff's image was used only as one of the game pages in such advertising activities, and it was unclear in some advertisements. Therefore, the plaintiff's image contained in the fish pulling page cannot be found to have become a well-known indication of goods, etc. that indicates X, as a result of having been used in such advertisements. In addition, most of said advertisements were placed after Defendants' Images 1 and 2 had been posted, or in other words, after the defendants' game started to be distributed (February 25, 2009).

Thus, the plaintiff's image cannot be found to have become a well-known indication of goods, etc. that indicates X.

(2) Defendants' Images 1 and 2, in light of how they are posted, cannot be regarded as being used as an indication of goods, etc. that indicates the defendants' goods or business and distinguishes them from others, nor can these images be considered to be similar to the plaintiff's image.

(3) Thus, the plaintiff's image cannot be considered to be a well-known indication of goods, etc. that indicates X, nor can Defendants' Images 1 and 2 be considered to be used as an indication of goods, etc., and therefore, Y and another defendant's act of posting Defendants' Images 1 and 2 cannot be regarded as creating confusion by the use of an indication of goods, etc. that is similar to X's indication of goods, etc. Hence, there is no ground for X's allegations made under Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act against Y and another defendant's act of posting Defendants' Images 1 and 2 on the basis of the nature of the plaintiff's image as a well-known indication of goods, etc.

### 3. Tort arising from violation of the interest that deserves legal protection

It is reasonable to construe that an act that does not constitute copyright infringement or unfair competition practice does not constitute a tort unless under

special circumstances such as where the act violates any legally protected interest other than the interest in using a copyrighted work or a well-known indication of goods, etc. governed respectively by the Copyright Act or the Unfair Competition Prevention Act.

As mentioned above, neither Defendants' Image 1 nor 2 can be regarded as an indication of goods, etc. that is similar to X's indication of goods, nor can the posting of these images be considered to create confusion.

X alleges that its reputation has been damaged by the act performed by Y and another defendant. However, there is no evidence to show that, as alleged by X, the distribution of the defendant's game by Y and another defendant has misled a number of users nationwide into believing that the plaintiff's game or X is identical to the defendants' game or Y, thereby seriously affecting X's social confidence or business reputation.

Hence, even if Y and another defendant used the plaintiff's game as reference when they created the defendant's game, their act cannot be considered to go beyond the bounds of free competition and violate X's legally protected interest, and therefore, it does not constitute a tort under the Civil Code.

Judgment rendered on August 8, 2012, the original received on the same date, court clerk

2012 (Ne) 10027 Appeal Case of Seeking Injunction, etc. against Copyright Infringement

Court of prior instance: Tokyo District Court 2009 (Wa) 34012

Date of conclusion of oral argument: July 4, 2012

#### Judgment

Appellant/appellee: GREE, Inc.

(the "plaintiff in the first instance")

Appellee/appellant: DeNA Co., Ltd.

(the "defendant in the first instance DeNA")

Appellee/appellant: ORSO Inc.

(the "defendant in the first instance ORSO")

#### Main text

1. Based on the appeal filed by the defendant in the first instance DeNA and the defendant in the first instance ORSO,

(1) the judgment in prior instance with respect to the part for which the defendant in the first instance DeNA and the defendant in the first instance ORSO lost the case shall be revoked, and

(2) regarding the aforementioned part, all of the claims of the plaintiff in the first instance shall be dismissed.

2. The appeal filed by the plaintiff in the first instance shall be dismissed.

3. The request by the plaintiff in the first instance for expansion of the scope of claims in this instance shall be dismissed.

4. The court costs shall be borne by the plaintiff in the first instance for both first and second instances.

#### Facts and reasons

##### No. 1 Claims

[Plaintiff in the first instance]

##### 1. Objects of this appeal

(1) The judgment in prior instance with respect to the part for which the plaintiff in the first instance lost the case shall be revoked.

(2) The defendants in the first instance shall delete the image presented in the attachment "Image 1" to the judgment in prior instance from the website stated in the attachment "Website 1" to the judgment in prior instance.

(3) The defendant in the first instance ORSO shall delete the image presented in the

attachment "Image 2" to the judgment in prior instance from the website stated in the attachment "Website 2" to the judgment in prior instance.

(4) The defendants in the first instance shall jointly pay the plaintiff in the first instance 705.6 million yen and money accrued thereon at the rate of 5% per annum for the period from July 7, 2011 until the date of full payment.

(5) The defendants in the first instance shall post an apology specified in paragraph (1) of the attachment "Apology 1" to the judgment in prior instance on the conditions specified in paragraph (2) thereof on the top page of the website specified in the judgment "Website 1" to the judgment in prior instance for a period of 30 days.

(6) The defendants in the first instance shall post an apology specified in paragraph (1) of the attachment "Apology 2" to the judgment in prior instance on the conditions specified in paragraph (2) thereof on a web page of the website specified in the judgment "Website 1" to the judgment in prior instance for a period of 30 days.

## 2. Expansion of the scope of claims in this instance

The defendants in the first instance shall jointly pay the plaintiff in the first instance 128.65 million yen and money accrued thereon at the rate of 5% per annum for the period from April 25, 2012, until the date of full payment.

[Defendants in the first instance]

The same as paragraphs 1 to 3 of the main text.

No. 2 Outlines of the case (the same abbreviations as those used in the judgment in prior instance will be used herein unless otherwise specified)

### 1. Summary of the case

In this case, the following allegations and demands were made.

(1) The plaintiff in the first instance alleged against the defendants in the first instance that, while the defendants in the first instance produced "釣りゲータウン (Tsurigē Town) 2" (fishing game town 2) (the "defendants' game") and have transmitted it to the public, such act of the defendants in the first instance constitutes infringement of the copyright (the right of adaptation, and the right to transmit to the public under Article 28 of the Copyright Act) and the moral rights of author (the right to integrity) of the plaintiff in the first instance for the online game for mobile phones "釣り★スタ (Tsurigō ★Suta)" (fishing star) (the "plaintiff's game"), which the plaintiff in the first instance produced and has transmitted to the public. The plaintiff in the first instance demanded against the defendants in the first instance [i] an injunction against the act of reproducing and transmitting to the public the images used in the game, i.e., the defendants' game stated in an attachment to the judgment in prior instance, deletion of said images from the website, and deletion of the recordings of said images from the



recording device under Article 112 of the Copyright Act, [ii] payment of damages under Articles 709 and 719 of the Civil Code, and [iii] publication of an apology under Article 115 of the Copyright Act.

(2) The plaintiff in the first instance alleged against the defendants in the first instance that their act of posting the images shown in the attachments "Image 1" and "Image 2" to the judgment in prior instance ("Defendants' Image 1" and "Defendants' Image 2") on the webpages of the defendants in the first instance constitutes an act of creating confusion as specified in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act and demanded against the defendants in the first instance [i] deletion of Defendants' Image 1 and deletion of Defendants' Image 2 by the defendant in the first instance ORSO under Article 3 of said Act, [ii] payment of damages under Articles 709 and 719 of the Civil Code, and [iii] publication of an apology under Article 14 of the Unfair Competition Prevention Act.

(3) The plaintiff in the first instance alleged against the defendants in the first instance that, since the defendants in the first instance produced and distributed the defendants' game based on the plaintiff's game without obtaining consent from the plaintiff in the first instance, the defendants in the first instance unlawfully infringed the interests of the plaintiff in the first instance that deserve legal protection, and therefore committed an act of tort. Based on this allegation, the plaintiff in the first instance demanded against the defendants in the first instance [i] payment of damages under Articles 709 and 719 of the Civil Code and [ii] publication of an apology under Article 723 of the Civil Code.

As damages specified in (1) [ii], (2) [ii], and (3) [i] above (including attorney's fees), the plaintiff in the first instance demanded payment of a total of 940.2 million yen, which is equivalent to the amount of damage that occurred during the period from February 25, 2009, which is the distribution commencement date of the defendants' game, until July 7, 2011, as well as payment of money accrued thereon at the rate of 5% per annum for the period from July 7, 2011, until the date of full payment. Furthermore, regarding (1) above, the plaintiff in the first instance alleged that [i] the "fish pulling page" of the defendants' game infringed the copyright and moral rights of author of the plaintiff in the first instance for the "fish pulling page" of the plaintiff's game and that [ii] the manner of transition of major pages of the defendants' game infringed the copyright and moral rights of author of the plaintiff in the first instance for the manner of transition of major pages of the plaintiff's game.

## 2. Judgment in prior instance

The court of prior instance handed down a judgment that the "fish pulling page" of

the defendants' game infringed the copyright (the right of adaptation, the right to transmit to the public) and the moral rights of author (the right to integrity) of the plaintiff in the first instance. However, the court of prior instance did not accept any other claims concerning infringement of the copyright and moral rights of author and found that the act of the defendants in the first instance constitutes neither an act of tort nor an act specified in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act and fully accepted the claim of the plaintiff in the first instance to the extent specified in 1 (1) [i] above and partially accepted the claim specified in 1 (1) [ii] up to a total of 234.6 million yen and the delay damages accrued thereon. The court of prior instance dismissed any other claims of the plaintiff in the first instance.

Dissatisfied with the judgment in prior instance, the plaintiff in the first instance filed an appeal, and expanded the scope of the claim for damages, and demanded payment of 128.65 million yen as damages for the period from July 8, 2011, until March 8, 2012, as well as payment of delay damages accrued thereon. Also dissatisfied with the judgment in prior instance, the defendants in the first instance filed an appeal as well.

### 3. Presumed facts (Undisputed facts or the facts that can be easily proven by evidence)

#### (1) Parties concerned

##### A. Plaintiff in the first instance

The plaintiff in the first instance is a stock company engaging in offering various information provision services by using the Internet and also in the development, production, sale, lease, maintenance, etc. of computer hardware and software products as a business.

The plaintiff in the first instance has been operating a website "GREE," which provides a social networking service (SNS; an online community platform service that allows each user who has registered as a member to create his/her own profile page, keep a daily journal, communicate with close friends or exchange information with other members through message boards, etc., each of which is established for a specific theme) for mobile phone users and personal computer users.

##### B. Defendant in the first instance DeNA

The defendant in the first instance DeNA is a stock company engaging in offering various information processing services and information provision services by using the Internet and also in the planning, development, designing, production, sale, lease, operation of software products and outsourcing such services as a business.

The defendant in the first instance DeNA has been operating a website "モバゲータウン (Mobage Town)," which provides portal site service and SNS for mobile phone

users and personal computer users.

#### C. Defendant in the first instance ORSO

The defendant in the first instance ORSO is a stock company engaging in the system development business and consulting service concerning the Internet, computers, mobile phones, TV game equipment, etc. and also in the planning and production, manufacturing, sale, distribution, etc. of game software products as a business.

##### (2) Plaintiff's game

A. The plaintiff in the first instance produced the plaintiff's game, i.e., an online fishing game for mobile phones, around 2007. From May 24, 2007, through the website "GREE" for mobile phones, the plaintiff in the first instance started distributing the plaintiff's game to GREE members by transmitting it to the public as the first SNS game designed to take advantage of the SNS communication function.

B. The plaintiff's game has a "top page," "fishing spot selection page," "casting page," "fish pulling page," and "fishing result page."

C. From February 7, 2009, the plaintiff's game was advertised by using the image of the "fish pulling page" of the plaintiff's game ("Plaintiff's Image") as presented in the attachment "Image 3" to the judgment in prior instance.

##### (3) Act of the defendants in the first instance

A. On February 25, 2009, the defendants in the first instance, who jointly produced the defendants' game, started distributing it to their members in general by transmitting it to the public through the website Mobage Town for mobile phones.

B. The defendants' game has a "top page," "fishing spot selection page," "casting page," "fish pulling page," and "fishing result page."

C. In Mobage Town for mobile phones, if a user who has not played the defendants' game searches for the defendants' game, the webpage introducing the defendants' game will be shown. On the webpage, even before the distribution of the defendants' game, the image of the "fish pulling page" of the defendants' game ("Defendants' Image 1") has been shown (Exhibits Ko 16 and Otsu 141).

D. The website of the defendant in the first instance ORSO has a page introducing the defendants' game. On the webpage, since the time close to the commencement of distribution of the defendants' game, the image of the "fish pulling page" of the defendants' game (Defendants' Image 2) has been shown (Exhibit Ko 17).

#### 4. Issues

(1) Whether the copyright (the right of adaptation, and the right to transmit to the public under Article 28 of the Copyright Act) and the moral rights of author (the right to integrity) were infringed

A. Whether the "fish pulling page" of the defendants' game infringed the copyright and moral rights of author of the plaintiff in the first instance for the "fish pulling page" of the plaintiff's game (Issue 1-1)

B. Whether the manner of transition of major pages of the defendants' game infringed the copyright and moral rights of author of the plaintiff in the first instance for the manner of transition of major pages of the plaintiff's game (Issue 1-2)

(2) Whether the act of posting Defendants' Images 1 and 2 on the webpages of the defendants in the first instance falls under Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act (Issue 2)

(3) Whether the act of producing the defendants' game and transmitting it to the public constitutes an act of tort that infringes the interests of the plaintiff in the first instance that deserve legal protection (Issue 3)

(4) The damage suffered by the plaintiff in the first instance (Issue 4)

(5) Whether it is necessary for the defendants in the first instance to publish an apology (Issue 5)

(omitted)

#### No. 4 Court Decision

1. Whether the "fish pulling page" of the defendants' game infringed the copyright and moral rights of author (Issue 1-1)

(1) Right of adaptation and the right to integrity

Adaptation of a work is an act of creating a new work based on an existing work by maintaining the identicalness with the existing work in terms of the fundamental characteristics of expressions, but modifying, increasing or decreasing, changing specific expressions in order to express a new thought or sentiment in a creative manner to such an extent that any person who comes across the adaptation can directly perceive the fundamental characteristics of the expressions of the existing work. An act of creating a work that is identical with an existing work would not constitute adaptation of the existing work if the identicalness is limited to the parts not consisting of expressions per se, but pertaining to thoughts, sentiments, ideas, facts, or events, or to any other parts that do not contain creative expressions (1999 (Ju) 922, judgment of the First Petty Bench of the Supreme Court on June 28, 2001, Minshu Vol. 55, No. 4, at 837).

If any person creates a work that is identical with an existing work in terms of fundamental characteristics of expressions against the will of the author of the existing

work by changing, removing, or otherwise modifying specific expressions in such a way that any person who comes across the adaptation can directly perceive the fundamental characteristics of the expressions of the existing work, such act of that person constitutes infringement of the right to integrity except for the cases that fall under Article 20, paragraph (2) of the Copyright Act (Article 20 of the Copyright Act, 1976 (O) 923, judgment of the Third Petty Bench of the Supreme Court on March 28, 1980, Minshu Vol. 34, No. 3, at244).

(2) Accepted facts

The plaintiff in the first instance alleged that the "fish pulling page" of the defendants' game can be regarded as an adaptation of the "fish pulling page" of the plaintiff's game. The plaintiff in the first instance identified the "fish pulling page" of the plaintiff's game to be the image presented in the left column of the attachment "Comparison Table 1" to the judgment in prior instance and the "fish pulling page" of the defendants' game to be the image presented in the right column of said Table. The plaintiff in the first instance made a comparison between the two and alleged that its copyright was infringed. On the other hand, the defendants in the first instance alleged as stated in 1(3) and 2 (2) of the report attached to the judgment in prior instance (images of the casting page and fish pulling page). A comparison between the "fish pulling page" of the defendants' game and that of the plaintiff's game is made as follows.

According to the evidence and the entire import of the oral argument, the following facts can be found (the evidential documents include documents with branch numbers; hereinafter the same shall apply)

A. "Fish pulling page" of the plaintiff's game

The image of the "fish pulling page" of the plaintiff's game is as follows (Exhibits Ko 4 and Otsu 1).

(A) The "fish pulling page" of the plaintiff's game has an approximately square shape. The one fifth of the upper part of the page and the one fifth of the lower part of the page are painted black. In the upper part, a "fish pulling meter" is shown, while, in the lower part, characters such as "中央に来たら OK で引け! (Chūō ni kitara OK de hike!)" (If a fish comes into the middle, pull it by pressing OK) are shown. The underwater image has a long horizontal rectangular shape occupying about three fifths of the entire page.

(B) Around the middle of the underwater image in the page, a circular figure is placed in such a way that the upper and lower edges of the figure extend slightly off the upper and lower sides of the underwater image. The circular figure consists of three concentric circles drawn at equal intervals radiating outward from a central point.

(C) The underwater image shows underwater scenery from a lateral viewpoint. A black fish-shaped figure is depicted from a lateral view. From the mouth of the fish, a blue straight line (fishing line) extends to the upper side of the page. The fish-shaped figure is placed closer to the viewer than the aforementioned concentric circles.

(D) Rocks are shown in the page in such a way that the rocks touch the left, right, and lower sides of the page and surround the lower part of said concentric circles. No waterweeds, air bubbles, or creatures other than the fish-shaped figure are shown in the page. The rocks are placed closer to the viewer than the aforementioned concentric circles.

(E) The color of the underwater image is mostly slightly dark blue. The outer donut-shaped area and the central circle are painted in a blue lighter than the blue used to paint the underwater image. The inner donut-shaped area between said outer donut-shaped area and said central circle shows the background underwater image. The rocks are painted in a slightly darker blue.

(F) The fish-shaped figure has a round black body with a triangular tail fin. The fish-shaped figure on a hook swims around the entire underwater space. The motion of the fish-shaped figure and the fish line resembles the movement of a pendulum, while the concentric circles and the background image remain still at that time.

(G) In the upper black area of the page, a fish pulling meter (gauge) colored in different shades of green, yellow, and red is shown. On the upper left corner of the gauge, a white silhouette of a person holding a fishing rod is shown. The black fish-shaped figure is shown within the gauge.

(H) If the user presses the decision key when the fish-shaped figure is in the central circular area, the indication "PERFECT" will be shown. If the user presses the decision key when the fish-shaped figure is in the area between the central circular area and the outer donut-shaped area, the indication "GREAT" will be shown. If the decision key is pressed when the fish-shaped figure is inside the outer donut-shaped area, the indication "GOOD" will be shown. If the decision key is pressed when the fish-shaped figure is in any other areas, the indication "BAD" will be shown. These indications will be written in small characters and shown in an area close to the fish-shaped figure.

(I) If the user catches the fish, large characters "GET!" colored in orange and yellow will be shown in the central part of the underwater image, which are so large that they almost fill the page. The fish pulling meter shown in the upper area will disappear and be replaced with a black area. Also, the characters shown in the lower part of the page will also be replaced with the characters "OK." If the user fails to catch the fish, red characters "Miss" and white characters "逃げられた (Nigerareta)" (You missed it) will

be shown in the central part of the underwater image. The fish pulling meter shown in the upper area will disappear and will be replaced with a black area. Also, the characters shown in the lower part of the page will also be replaced with the characters "OK"

B. "Fish pulling page" of the defendants' game

The image of the "fish pulling page" of the defendants' game is as follows (Exhibits Ko 4 and Otsu 1).

(A) In the lower part of an approximately square-shape page, a long horizontal gauge (fish pulling meter) is shown. The rest of the page shows the underwater image, which has an approximately square shape.

(B) Almost in the middle of the page, a circular figure is shown. The size of the circular figure is changeable. The circular figure at its maximum size would not touch the upper, lower, left, or right sides of the page. The circular figure consists of three concentric circles drawn at equal intervals radiating outward from a central point. The concentric circles are divided into 11 panels by radially extending five lines from the central circle.

(C) The underwater image presents underwater scenery from a lateral viewpoint. A black fish-shaped figure is depicted from a front view. A pale blue straight line (fishing line) extends from the mouth of the fish to the upper left corner of the page. From the viewpoint of the user, the fish-shaped figure is shown behind the aforementioned concentric circles.

(D) In the left and lower right areas of the page showing the underwater image, rocks are placed in such a way that they do not touch the right to lower sides of the page. No waterweeds, air bubbles, or creatures other than the fish-shaped figure are shown in the page. The rocks are placed behind the aforementioned concentric circle. When these circles reach their maximum sizes, they overlap with some rocks.

(E) The color of the underwater image is mostly blue. The concentric circles are divided into 11 panels by radially extending lines. Some of the panels excluding the circle at the center are painted green or purple. The aforementioned radially extending lines are the areas through which the background underwater image can be seen. The rocks are painted in a slightly dark blue. The sizes of the aforementioned concentric circles change in nine stages according to a certain parameter system. The number and positions of the colored panels in the concentric circles are different for each fish pulling page. The number and positions thereof even change on the same page. The central circle of the concentric circles shows a movement like a rotating coin and changes into one of the following five variations: plain green, a gold fishhook on a silver background, a yellow star on a vivid green background, a silver harpoon on a gold background, and a red X-mark on a black background (as described in 2 (2) [ii] of the

report (images of the casting page and fish pulling page) attached to the judgment in prior instance).

(F) The fish-shaped figure is expressed from a front view as a black body with a tail fin, a back fin, and pectoral fins. The fish-shaped figure on a hook swims around the entire underwater space. Regardless of the movement of the fish, the fishing line always extends to the upper left corner of the page. At that time, the background image remains still, but the sizes of the concentric circles change.

(G) In the lower part of the page, a fish pulling meter (gauge) colored in different shades of blue is shown in a long horizontal white area that looks as if it were concave. At the left end of the gauge, a yellow fishing reel is shown. Within the gauge, a blue fish is shown.

(H) If the user presses the decision key when the fish-shaped figure is in a green area of the concentric circles, the indication "GOOD" written in green characters will be shown in the upper part of the page. Similarly, if the user presses the decision key when the fish-shaped figure is in a purple area of the concentric circles or in any area outside the concentric circles, the indication "Out" written in red characters will be shown in the upper part of the page. These indications will be written in large characters and shown in the upper part of the page. If the user presses the decision key when the fish-shaped figure is in the central circle, any of such indications as "必殺金縛り (Hissatsu kanashibari)" (killer sleep paralysis), "確変 (Kakuhen)" (higher probability), and "一本釣りモード (Ipponzuri mōdo)" (single-hook fishing mode) will be shown in the form of animation (as described in 2 (2) [iii] of the report (images of the casting page and fish pulling page) attached to the judgment in prior instance).

(I) If the user catches the fish, the concentric circles will disappear and will be replaced with the indication "釣れた! (Tsureta!)" (You got it) written in yellow characters shown as an animation moving from the upper part of the page to the central part of the page. If the user fails to catch the fish, the concentric circles and the gauge will disappear and indications "逃がした (Nigashita)" (You missed it) and "決定キーを押してください (Kettei kī o oshite kudasai)" (Press the decision key) written in white characters will be shown in the central part of the page.

(J) At the beginning of the fish pulling page, before the concentric circles mentioned in (B) above appear, the fish-shaped figure moves from right to left in the water and moves away into the distance in the page. Subsequently, the concentric circles appear and the fish-shaped figure swims forward from the far distance (as described in 2 (2) [i] of the report (images of the casting page and fish pulling page) attached to the judgment in prior instance).



### C. Images of other fishing games

#### (A) 釣りバカ気分 (Tsuribaka kibun) (fishing mania)

This is a game application for mobile phones. The distribution of this game started in December 2003. The fish pulling page of "釣りバカ気分 (Tsuribaka kibun) Second Stage" shows each fish as a black fish-shaped figure so that the user cannot tell the type of the fish until it is caught. The fish-shaped figure swims around in the page in a random manner. The user repeatedly presses number keys to pull and catch the fish (Exhibits Otsu 5 and Otsu 112).

#### (b) ぬし釣りシリーズ (Nushi zuri shirīzu) (fishing the guardian spirit of the river/ocean series)

The game application for mobile phones "川のぬし釣り (Kawa no nushi zuri)" (fishing the guardian spirit of the river) was released in August 2004, "海のぬし釣り (Umi no nushi zuri)" (fishing the guardian spirit of the ocean) in January 2006, and "新・川のぬし釣り (Shin kawa no nushi zuri)" (fishing the guardian spirit of the river (new version)) in December 2006. All of these games offer three stages in the fishing process, i.e. "casting," "awase" (hooking), and "fight." In the "fight" page (fish pulling page), the underwater image shows no water surface, but only presents underwater scenery from a lateral viewpoint. The background of the underwater image is painted mostly in a slightly dark bluish color. Only the ocean floor and rocks are shown in the page. The fish pulling rule of these games is that the user should press the button at the right moment, while the fish is moving all over the underwater space. If the user presses the button when the fish stops moving, it will be easier for the user to pull the fish (Exhibit Otsu 107).

The "ぬし釣りシリーズ (Nushi zuri shirīzu)" games including the aforementioned games consist of 16 games that have been released since August 1990 as game software products for household game consoles. Some of those games offer three stages in the fishing process, i.e. "casting," "awase" (hooking), and "fight." In the fight page (fish pulling page), the underwater image shows no water surface, but only presents underwater scenery from a lateral viewpoint. The background of the underwater image is painted mostly in a slightly dark bluish color. Only the ocean floor and rocks are shown in the page. The fish pulling rule of these games is the same as the one mentioned above (Exhibits Otsu 107 and 108).

#### (C) フィッシュアイズ (Fisshu aizu) (Fish Eyes)

The "フィッシュアイズ (Fisshu aizu)" (Fish Eyes) series, which is a household TV game series, also offers three stages in the fishing process, i.e. "casting," "awase" (hooking), and "fight." In the "fight" page (fish pulling page), the user pulls the fish,

while the fish is depicted from an underwater viewpoint (Exhibit Otsu 110).

(D) Other fishing games for mobile phones

The fishing games that only present underwater images and do not show the water surface and any above-water image from a lateral viewpoint include not only the plaintiff's game and the defendants' game, but also "川のぬし釣り (Kawa no nushi zuri)," "海のぬし釣り (Umi no nushi zuri)" as well as "THE バス釣り (Basu zuri)" (bass fishing), "川釣りパラダイス (Kawazuri paradaisu)" (river fishing paradise), "バス釣り支店河口湖 (Basuzuri shiten kawaguchiko)" (bass fishing branch office, Kawaguchi Lake), etc. (Exhibit Ko 3). There are many games in which the page transitions to the one showing underwater images after hooking the fish, and some games offer such underwater images in their fish pulling pages (Exhibit Otsu 109).

In many games including "THE バス釣り (Basu zuri)," "THE マグロの一本釣り (Maguro no ipponzuri)" (tuna single-hook fishing), and "バス釣り支店河口湖 (Basuzuri shiten kawaguchiko)," the background of underwater images, including the water itself, is painted mostly in a bluish color (Exhibit Ko 3).

Other than the plaintiff's game and the defendants' game, there are some other games that depict the fish as a fish-shaped figure until the user successfully catches it and that also show a fishing line, such as "川釣りマスター (Kawazuri masutā)" (river fishing master), "GOGO! フィッシング2 (GO GO! fisshingu 2)" (GO GO fishing 2), and "海釣りマスター (Umizuri masutā)" (ocean fishing master). However, these games show a fish-shaped figure from an above-water viewpoint as an object moving underwater (Exhibit Ko 3).

Other than the plaintiff's game and the defendants' game, there are fishing games that have a fish pulling meter that indicates the distance between the angler and the fish, such as "THE マグロの一本釣り (Maguro no ipponzuri)" and "バス★フィッシング (Basu★fisshingu)" (bass fishing) (Exhibit Ko 3).

Fishing games are different in terms of the manner of transition of the images showing the movement of the fish that is trying to swim away. "EX FISHING DAYS" AND "THE バス釣り (Basuzuri)" (bass fishing) express the movement of the fish trying to swim away by showing the fish going to the right and left, taking turns. "バス釣りにいこう (Basuzuri ni ikou)" (Let's go bass fishing) and "ポケットフィッシング (Poketto fisshingu) 3D" (Pocket Fishing 3D) express such movement by showing the fish turning around the fishhook (Exhibit Ko 3).

(E) Similar games after the distribution of the plaintiff's game

Before the distribution of the plaintiff's game, there had been no fishing games showing three concentric circles. Fishing games showing concentric circles in the water,

such as "釣り★タウン (Tsurī★taun)" (fishing town) and "釣りコレ (Tsurī kore) DX" (fishing collection DX), were only distributed after the distribution of the plaintiff's game. These fishing games are similar to the plaintiff's game in many respects. For example, these games show three concentric circles, a black fish-shaped figure, fishing line, fish pulling meter, etc. (Exhibit Otsu 6).

The plaintiff in the first instance demanded that the distributor of the aforementioned two games stop distributing them. The distributor of "釣りコレ (Tsurī kore) DX" stopped the distribution on August 13, 2010 and also stopped the distribution of "釣り★タウン (Tsurī★taun)," which was still distributed at the time, on May 31, 2012 (Exhibits Ko 45, 46, and 86).

Other games, namely "NEO 釣り倶楽部 (Tsurī kurabu)" (NEO fishing club) and "釣りとも (Tsurī tomo)" (fishing friends) also adopted concentric circles (Exhibit Otsu 6).

#### D. Target hitting flash games

In an action game such as a shooting game or a battle game, "hit judgment" is a gaming term meaning the range in which the user's character or the opponent character on the display would be considered to have suffered an attack or in which an attack such as a shot would be considered to have hit the target (Exhibit Otsu 115). The fish pulling page of the plaintiff's game has adapted a rule that, if the user presses the decision key when the head of the fish-shaped figure is in the concentric circles, the user is considered to have hit the target.

Flash games for mobile phones in which users are considered to have hit the target if a subject such as a dot or circle is in a certain area include a game based on the Japanese art of archery "弓道正射必中 (Kyūdo seisha hicchu)" (an accurately shot arrow surely hits the target), games of archery "ラウスポアーチェリー (Rausupo ācherī)" (Rausupo archery) and "ケータイアーチェリー (Kētai ācherī) Ver. 2" (mobile phone archery Ver. 2), a shooting game "狙撃の凡人 (Sogeki no bonjin)" (ordinary shooter) and a darts game "DARTS!" Some of these games show concentric circles. Also, there are target-hitting games that show virtual circles such as "ハエたたキング (Haetata kingu)" (fly flapping king), "THE 昆虫採集 (Konchu saishu)" (insect collection), and "ゴーストゲッター (Gōsuto gettā)" (ghost getter) (Exhibits Otsu 6, 119, and 121).

In flash games, there is a rule that the user should click a button at the right time. The rule of clicking a button when a subject is in a certain area corresponds to one of the aforementioned rules, i.e., the rule of clicking a button when a moving subject overlaps with another subject that is not moving (Exhibits Otsu 42 and 121).

(3) Whether the defendants' game can be regarded as an adaptation of the plaintiff's

game

A. Both the plaintiff's game and the defendants' game are fishing games distributed via social network systems to mobile phone users. The fish pulling pages of both games are identical in the following respects. These pages do not show any above-water images, but show only an underwater image from a lateral viewpoint. Three concentric circles drawn at equal intervals, radiating outward from a central point, are placed in the middle of the underwater image, along with a black fish-shaped figure and fishing line. The background underwater image, including the water itself, is mostly blue. In the lower part of the image, some rocks are placed. The fish-shaped figure on a hook swims around the entire underwater space while the background image remains still.

B. However, as mentioned in (2) C above, it must be said that, when it comes to a fishing game, if compared with the actual underwater scenery, presenting only a mostly blue underwater image along with a fish-shaped figure, a fishing line, and rocks is an ordinary type of expression in light of the fact that these elements exist in other fishing games as well.

Next, one of the characteristics of the plaintiff's game is the presentation of underwater scenery from a lateral viewpoint with a background image that remains still even when the fish-shaped figure swims around. Drawing underwater scenery in such a way, in itself, may be regarded as merely an idea.

Furthermore, while no conventional fishing games had adopted the three concentric circles, they may be regarded as the application of concentric circles as used in archery, shooting, darts, etc., to a fishing game. The adoption of concentric circles in a fishing game should be considered to be the embodiment of an idea. The plaintiff's game and the defendants' game have commonalities in that three concentric circles drawn at equal intervals radiating outward from a central point are placed at around the center of the page in both. However, the specific expressions are different in the two games. For example, in the case of the plaintiff's game, since the underwater image is presented in a long horizontal rectangular shape that only occupies about three fifths of the entire space, the concentric circles are presented in such a way that the upper and lower edges of the outermost circle slightly extend off the upper and lower edges of said rectangular shape. The sizes and other attributes of the circles do not change during the game. In the case of the defendants' work, however, the underwater image is presented in an approximately square shape that occupies almost the entire page. The upper and lower edges of the outermost circle, which changes in size, do not extend off the edges of said square even when the circle reaches its maximum size. While the fish-shaped figure is moving around, the concentric circles change in size and color, and the image presented

in the central circle also changes. Moreover, in the case of the plaintiff's game, the colors chosen for the concentric circles de-emphasize them: the outermost doughnut-shaped area and the central circle are colored in a paler shade of blue than the one used for the water, while the area between said doughnut-shaped area and the central circle displays the background underwater scenery. On the other hand, in the case of the defendants' game, the concentric circles are divided into 11 panels in a radial fashion. The concentric circles are emphasized because the panels, excluding the central circle, are colored in green or purple. The number and positions of the colored panels in the concentric circles are different for each fish pulling page and change even on the same page. Furthermore, there are five variations of the image presented in the central circle of the concentric circles, which moves like a rotating coin: plain green, a gold fishhook on a silver background, a yellow star on a vivid green background, a silver harpoon on a gold background, and a red X-mark on a black background. The defendants' game differs from the plaintiff's game in these respects. Therefore, even though both the plaintiff's game and the defendants' game present three concentric circles, the viewers' impression is not necessarily the same because specific expressions are different.

Furthermore, as mentioned in (2) C above, it must be said that the expression of a black fish-shaped figure and fishing line is ordinary since there have long been other games which show a fish-shaped figure until the fish is pulled in and also show a fishing line. The plaintiff's game and the defendants' game are different in terms of specific expressions, etc. in that in the case of the plaintiff's game, the fish-shaped figure is depicted from a lateral viewpoint, while in the case of the defendants' game, the fish-shaped figure is depicted from a front view.

C. As described above, the fish pulling page of the plaintiff's game and the fish pulling page of the defendants' game have commonalities as follows in an abstract sense: neither page displays an above-water image and both show only an underwater image from a lateral viewpoint; around the center of both pages, three concentric circles are drawn at equal intervals radiating outward from a central point; both pages display a black fish-shaped figure and a fishing line; both pages contain a background underwater image colored mostly in blue, including the water itself; some rocks are placed in the lower part of the images used in both pages; and the fish-shaped figure on a hook swims around the entire underwater space, while the background image remains still. However, the aforementioned commonalities do not constitute expressions by themselves or lack creative expressions. The specific expressions of the aforementioned commonalities even differ.

A comparison of the overall characteristics of the fish pulling pages of the plaintiff's game and the defendants' game shows that, in the case of the defendants' game, after concentric circles appear on the page, the underwater image is presented in an approximately square shape that takes up almost all of the space on the page except for a narrow space in the lower part of the page. On the other hand, in the case of the plaintiff's game, the underwater image is presented in a long horizontal rectangular shape. Due to this difference in the shape of the underwater image, the sizes and positions of the concentric circles are different. In the case of the defendants' game, the upper and lower sides of the outermost circle do not extend off the edges of said square. While the fish-shaped figure swims around, the concentric circles change in size, and the color of the panels and the image presented in the central circle also change. On the other hand, in the case of the plaintiff's game, the upper and lower sides of the outermost circle extend off the edges of the rectangular shape. The sizes and other aspects of the concentric circles remain the same. In these respects, the defendants' game is different from the plaintiff's game. Also, the defendants' game is different from the plaintiff's game in terms of the position and design of the pulling meter, the depiction of the fish-shaped figure, whether the fish-shaped figure is presented in front of or behind the concentric circles, and in that pressing a decision key when the fish-shaped figure enters the central circle prompts the display of an animation chosen according to the image presented in the central circle, which changes subsequently presented images. In addition, as mentioned in D (F) below, the two games are also different in terms of the specific expressions presented after the decision key is pressed depending on the positional relationship between the fish-shaped figure and the concentric circles. The defendants' game presents an underwater image of a swimming fish-shaped figure prior to the presentation of the concentric circles.

As described above, a comparison between the fish pulling pages of the plaintiff's game and the defendants' game shows that, in light of the commonalities and differences between the two games and also in terms of the existence or lack of creativity in the games and their relative levels of creativity, it cannot be said that any person who comes across the fish pulling page of the defendants' game would directly perceive the fundamental characteristics of the expressions presented in the plaintiff's game since such person receives different impressions from the two games as a whole.

#### D. Allegation of the plaintiff in the first instance

(A) The plaintiff in the first instance alleged that the fundamental characteristics of the expressions of the plaintiff's game lie in that said game only presents underwater scenery from a lateral viewpoint and that the viewpoint stays the same.

However, as mentioned above, there are at least five more games other than the plaintiff's game and the defendants' game that only present underwater scenery from a lateral viewpoint and do not depict the water surface or any above-water scenery (Exhibit Ko 3). Therefore, games presenting underwater scenery as mentioned above are commonplace.

(B) The plaintiff in the first instance also alleged that the fundamental characteristics of the expressions of the plaintiff's game lie in that the plaintiff's game shows three concentric circles drawn at equal intervals radiating outward from a central point with the center of those circles placed almost at the center of the page and that the outermost circle occupies about 50% of the underwater image.

Among the features mentioned above, the feature of showing three concentric circles is unique and had not been adopted by any conventional fishing games (Exhibit Ko 3). It can be presumed that the defendants in the first instance were inspired by the plaintiff's game and adopted three concentric circles in the defendants' game. However, the adoption of three concentric circles in a fishing game should be considered to be merely an idea, and in view of the fact that the plaintiff's game and the defendants' game are different in terms of the specific expressions of those concentric circles as mentioned in B above, it cannot be said that the fundamental characteristics of the expressions presented in the plaintiff's game can be directly perceived just because both games adopted concentric circles. It should be noted that those concentric circles in the defendants' game change their sizes in nine stages and do not occupy about 50% of the underwater image.

(C) The plaintiff in the first instance alleged that the fundamental characteristics of the expressions presented in the plaintiff's game lie in that the background image of water is painted mostly in dark blue, that rocks are placed in such a way that they touch the left and right ends of the bottom of water and surround the lower part of the concentric circles, and that no waterweeds, air bubbles, or creatures other than the fish-shaped figure are shown in the page.

However, it is common to use a bluish color to express seawater or river water and draw rocks on the background of underwater scenery (Exhibits Otsu 108 and 110). The blue used in the defendants' game is slightly lighter than the blue used in the plaintiff's game. The two games are not necessarily the same in terms of the shade of blue, and the manner of depiction and locations of rocks.

(D) The plaintiff in the first instance alleged that the fundamental characteristics of the expressions presented in the plaintiff's game lie in that the fish is depicted as a black fish-shaped figure and that a black straight line is drawn from the mouth of the fish to

the upper side of the page.

However in fishing games, it is common to show fish and a fishing line. The depiction of fish as a fish-shaped figure, not as a detailed picture of fish, should be considered to be merely an idea. There had been games in which a fish was expressed as a fish-shaped figure (Exhibits Ko 3 and Otsu 112). In the plaintiff's game, a fish is depicted as a fish-shaped figure having a round body with a triangular tail fin from a lateral viewpoint, while, in the defendants' game, a fish is depicted as a fish-shaped figure with a tail fin, a back fin, and pectoral fins from a front view. In this respect, the specific expressions are different in the two games. Regarding a fishing line, in the plaintiff's game, the fishing line moves in conjunction with the movement of the fish, while, in the defendants' game, a fishing line always extends to the upper left corner of the page regardless of the movement of the fish. In this way, the two games are also different in terms of the specific expressions of a fishing line.

(E) The plaintiff in the first instance alleged that the fundamental characteristics of the expressions presented in the plaintiff's game lie in that the concentric circles and the background image remain still, while the fish-shaped figure on a hook swims around in the entire underwater space, frequently taking turns.

On the other hand, in the defendants' game, the concentric circles do not remain still, but change in size and color in the panels, etc. Therefore, the defendants' game should be considered to be different from the plaintiff's game because, in the defendants' game, the fish-shaped figure on a hook is not the only moving part of the image.

(F) The plaintiff in the first instance alleged that the fundamental characteristics of the expressions presented in the plaintiff's game lie in that the plaintiff's game let the user determine the right timing for pulling the fishing line based on the positional relationship between the motionless concentric circles and the moving fish-shaped figure.

However, as mentioned in (2) D above, in many flash games, there is a rule that the user is asked to click a button at the right time. The rule that the user is asked to click a button when an object is in a certain area falls under one of the aforementioned types of rules that require the user to click a button when a moving object overlaps with another object that is not moving. In other words, letting the user determine the right timing for pulling the fishing line based on the positional relation between the motionless concentric circles and the moving fish-shaped figure can be considered to be a rule of a game. It is just a game rule to consider it to be a success if the user presses the decision key when an object, which is moving quickly around the entire space of the page in a random manner, is in a certain area designated in the page, and to consider that the user



who has thus succeeded for a certain number of times has cleared the relevant stage and can move on to the next stage. All of these rules can be regarded as mere ideas. As mentioned in (2) A (H) and B (H) above, in the case of the plaintiff's game, the following indications are shown: if the user presses the decision key when the fish-shaped figure is in the central circle, the indication "PERFECT" will be shown; if the user presses the decision key when the fish-shaped figure is in the area between the central circle and the outer donut-shaped area, the indication "GREAT" will be shown; if the decision key is pressed when the fish-shaped figure is inside the outer donut-shaped area, the indication "GOOD" will be shown; and if the decision key is pressed when the fish-shaped figure is in any other areas, the indication "BAD" will be shown. In the case of the defendants' game, if the user presses the decision key when the fish-shaped figure is in a green area of the concentric circles, the indication "GOOD" will be shown, and similarly, if the user presses the decision key when the fish-shaped figure is in a purple area of the concentric circles or in any area outside the concentric circles, the indication "Out" will be shown. In this way, the two games are different in specific positional relations of the fish-shaped figure in the page and also in positions to indicate the right timing.

(G) the plaintiff in the first instance alleged that, in some cases, even if each of the individual elements does not contain any creative expression, those elements could collectively exhibit creative expressions and therefore that it would be unreasonable to divide an integrated work into individual component parts and evaluate whether each part can be considered to be creative and whether each part should be considered to be an expression or a mere idea.

However, the creative expressions in a work consist of a set of creative elements. Therefore, before determining whether the common parts between the plaintiff's game and the defendants' game can be regarded as expressions or whether such expressions can be regarded as creative, it is beneficial and necessary to examine whether each of the component parts can be regarded as an expression and whether the expression can be regarded as creative. It is reasonable to determine, based on the results of the aforementioned examination, whether the work as a whole or the allegedly infringed part as a whole can be regarded as an expression and whether the expression can be regarded as creative.

In this case, regarding the fish pulling page as a whole, the defendants' game has some pages and animation images that do not exist in the plaintiff's game. Moreover, the two games are different in terms of the specific expressions such as the outline of the image of the underwater scenery, which causes difference in the size and position of the

outermost concentric circle, as well as the size and color of other concentric circles, the change in the design of the central circle, the manner of depicting the fish-shaped figure, and the relative positions of the fish-shaped figure and the concentric circles. Due to these differences, any person who comes across these games would receive the impression that the two games are different in terms of the fish pulling page as a whole.

(H) The plaintiff in the first instance alleged that a comparison should be made only within the framework established by the plaintiff in the first instance and that it would be unreasonable to discuss any irrelevant page that is outside the scope of the subject matter of this lawsuit.

In the case of a lawsuit over infringement of the right of adaptation, if the plaintiff, i.e. the author, finds that a part of the plaintiff's work has been infringed, the plaintiff needs to allege and prove that such infringement has occurred by making a comparison between the allegedly infringed part of the plaintiff's work and the infringing work. As long as said part of the plaintiff's work is considered to be integrated as one piece of work, the parties concerned need to do their best to allege or prove that said part as a whole has been infringed or to allege or prove otherwise.

However, in this case, the plaintiff in the first instance alleged that its right of adaptation for the "fish pulling page" has been infringed and, at the same time, alleged that the fish pulling page means the page that appears after the presentation of concentric circles and does not include other pages such as the page where a fish-shaped figure moves from right to left, and swims into the distance at the beginning of the fish pulling page before the concentric circles show up. In other words, the plaintiff in the first instance alleged that only the page presented in the attachment "Comparison Table 1" to the judgment in prior instance should be used for comparison and that other features of the fish pulling page of the defendants' game should be disregarded such as the changes observed in the size of circles and the color of panels and the presentation of indications such as "必殺金縛り (Hissatsu kanashibari)" (killer sleep paralysis), "確変 (Kakuhen)" (higher probability), and "一本釣りモード (Ipponzuri mōdo)" (single-hook fishing mode) shown in the form of animation, if the user presses the decision key when the fish-shaped figure is in the central circle. In this way, the author alleged, in this case, that a certain part of his/her work should be used for comparison and that other parts of the work should be disregarded although the work is integrated as one piece of work. Under such circumstances, as mentioned in 1 (3) and 2 (2) of the report (images of the casting page and fish pulling page) attached to the judgment in prior instance, even if the other party alleges and proves that, if a comparison is made including the disregarded parts of the integrated work, any person who comes across

these games cannot directly perceive the fundamental characteristics of the expressions in the original work, there is no reason for interpreting that such allegation and proof is impermissible from the perspective of the subject matter of the lawsuit as long as those disregarded parts fall within the scope of the fish pulling page.

The subject matter of this lawsuit is, among other things, the right to seek an injunction based on the copyright for the plaintiff's game since the allegation of the plaintiff in the first instance concerning the "fish pulling page" is nothing but one of the possible methods of offense that could provide grounds for the right. Therefore, the aforementioned method of defense adopted by the defendants in the first instance cannot be considered to be outside the scope of the subject matter of this lawsuit. Even if the subject matter of this lawsuit is interpreted to be, among other things, the right to seek an injunction based on the copyright for the "fish pulling page" of the plaintiff's game, the aforementioned method of defense adopted by the defendants in the first instance cannot be considered to be outside the scope of the aforementioned subject matter.

#### E. Summary

As described above, the fish pulling page of the defendants' game has commonalities with the fish pulling page of the plaintiff's game only in the parts that are not expressions per se but mere ideas or only in the parts that do not contain creative expressions. Any person who comes across the defendants' game would not be able to directly perceive the fundamental characteristics of the expressions of the fish pulling page of the plaintiff's game. Therefore, the fish pulling page of the defendants' game cannot be considered to be an adaptation of the fish pulling page of the plaintiff's game.

#### (4) Conclusion

Any person who comes across the defendants' game would not be able to directly perceive the fundamental characteristics of the expressions of the fish pulling page of the plaintiff's game. Therefore, the production of the defendants' game including the fish pulling page by the defendants in the first instance does not constitute infringement of the right of adaptation of the plaintiff in the first instance for the plaintiff's game. The distribution of the defendants' game does not constitute infringement of the right to transmit to the public specified in Article 28 of the Copyright Act either. Similarly, the production of the defendants' game including the fish pulling page by the defendants in the first instance cannot be considered to constitute infringement of the right to integrity of the plaintiff in the first instance for the plaintiff's game.

2. Whether the manner of transition of major pages of the defendants' game infringed the copyright and moral rights of author of the plaintiff in the first instance for the manner of transition of major pages of the plaintiff's game (Issue 1-2)

(1) Accepted facts

According to the evidence and the entire import of the oral argument, the following facts can be found.

A. Plaintiff's game

(A) As shown in the attachment "Comparison Table 2-1" to the judgment in prior instance, the plaintiff's game has [i] the top page, [ii] the fishing spot selection page, [iii] the pages including the casting page and the fish pulling page, and [iv] the fishing result page (including the page shown when the user caught the fish and the page shown when the user failed to catch the fish). Among these pages, the pages specified in [i], [ii], and [iv] are webpages, whereas the page specified in [iii] was produced by using a platform called Flash (Exhibits Ko 5, Otsu 40 and 104, and the entire import of the oral argument).

(B) In the plaintiff's game, [i] the "top page" transitions to [ii] the "fishing spot selection page." The user is expected to choose either ocean or river fishing and choose a fishing spot. If the user chooses a fishing spot, the page transitions to [iii] the "casting page" of the selected fishing spot in which the user uses a fishing rod to cast a lure in the case of ocean fishing and a bait in the case of river fishing. If fish is hooked on the lure or bait, the page will transition to the "fish pulling page" and then transition to [iv] the "fishing result page" (Exhibits Ko 5, Otsu 40 and 104, and the entire import of the oral argument).

If the user wants to repeat the game, the user does not have to go back to [i] the "top page," but, can go back from [iv] the "fishing result page" (the page shown when the user caught the fish) or the "fishing result page" (the page shown when the user failed to catch the fish) to [ii] the "fishing spot selection page" or to [iii] the "casting page" and can repeat the game.

(C) In the most upper part of the top page, the logo "釣り★スタ" written in large characters is shown. Under the logo, notices about events, etc. are shown. Under the notices, the phrase "さあ、釣りにいこう! (Sa, tsuri ni ikou!)" (Let's go fishing) and an illustration, and a link "釣りに行く (Tsuru ni iku)" (go fishing) are placed. The aforementioned illustration depicts the entire bay-shape fishing spot, with the ocean in the lower part of the page and mountains, blue skies, clouds, and some greenery in the upper part of the page. Below the illustration, indications "日誌 (Nisshi)" (journal), "攻略法 (Kouryakuhou)" (strategies), "釣具 (Tsurigu)" (fishing tools), and "ショップ (Shoppu)" (shop) are placed as links to the journal page, the strategy page, the fishing tool page, and the shop page, respectively. Below that, more links are provided to the information on events and the page that introduces specific users. Under these links,

links to "お知らせ (Oshirase)" (notice), "釣りの手引き (Tsuru no tebiki)" (fishing guidelines), "対応機種 (Taiou kishu)" (compatible devices), "お問い合わせ (Otoiawase)" (inquiry) and "ゴールドを貯めるには (Gōrudo o tameruniwa)" (how to save gold) are placed at the bottom of the page. In this way, links to major pages are made available (Exhibits Ko 5 and 6, Otsu 40 and 41).

(D) In the fishing spot selection page (ocean fishing), the characters "海の釣り場 (Umi no tsuriba)" (ocean fishing spot) are shown in the uppermost part of the page, under which an illustration and the characters "釣り場を選んでスタート (Tsuriba o erande sutāto)" (start by selecting a fishing spot), and the names of four fishing spots are shown. The aforementioned illustration depicts the bay on which the fishing spot is located from the above and from the side of the ocean, with the ocean in the lower part of the page and green mountains in the upper part of the page, and also with a white beach, the surface of the ocean with white waves, and a lighthouse. Below the illustration, the characters "釣りの準備をする (Tsuru no junbi o suru)" (getting ready for fishing) is shown, under which indications "釣具えらび (Tsurigu erabi)" (select fishing tools), "釣具を買う (Tsurigu o kau)" (buy fishing tools), "魚の釣り方 (Sakana no tsurikata)" (how to fish), and "攻略をみる (Kouryaku o miru)" (see the strategies) are placed providing links to the fishing tool page, the shop page, the help page, and the strategy page, respectively. Below those links, as "釣り場情報 (Tsuriba jyouhou)" (fishing spot information), a link is provided to the casting page of the fishing spot (Himemi Harbor) available to the user. Additionally, the names of other fishing spots that are not available to the user are listed with the illustration and name of each fishing spot, a link "釣りに行く (Tsuru ni iku)" (go fishing) to the casting page thereof, a link to the page showing a ranking of users who caught large fish on the fishing spot, and links to the pages showing message boards under the names of "攻略 (Kouryaku)" (strategies) and "雑談 (Zatsudan)" (chat). In the fishing spots not available to the user, a message is shown to notify that the user cannot go to the relevant fishing spot unless obtaining a higher title (Exhibits Ko 5 and 7, Otsu 40 and 41).

(E) In the case of ocean fishing, the casting page depicts skies in the upper part of the page, the water surface in the middle part of the page, and the land in the lower part of the page. An arrow indicating the casting target shows a regular movement. If the user presses the decision key, the movement of casting a fishing rod is shown in animation. The fishing hook is cast at the indicated position. In the case of river fishing, a small fish-shaped figure appears at random on the water surface. If a fishing hook is cast, a bobber is shown in the upper right corner of the page. If the fish is hooked, the bobber sinks. In either case, if the fish is hooked, the characters "HIT!" are shown in large

orange letters in the middle part of the page (Exhibits Ko 5 and 8, Otsu 1 and 40).

(F) After the hooking page, the fish pulling page will appear. As mentioned in 1 above, the fish pulling page shows a fish pulling meter, etc. on the black area in the upper part of the page, the characters "中央に来たら OK で引け! (Chūō ni kitara OK de hike!)" (If the fish comes in the middle, pull it by pressing OK), a dark blue underwater image in the middle part of the page, three concentric circles, a black fish-shaped figure, and a fishing line.

(G) In the fishing result page (when the user caught the fish), the characters "XX が釣れた! (XX ga tsureta!)" (XX is caught) in the uppermost part of the page, under which a large illustration of the fish is shown with the name of the fish. Below that, the following are shown: the star marks showing the evaluation result, the points gained as a result of catching the fish, the points and ranking as a record of the fishing result, and a link to the ranking. Below that, "Menu" is shown such as "もっと釣る! (Motto tsuru!)" (fish again) and "魚拓をとる (Gyotaku o toru)" (make a fish print) with links to go back to the casting page and the fish print page. Below that, links are provided to the pages of "移動 (Idō)" (transition), "釣具 (Tsurigu)" (fishing tools), "ショップ (Shoppu)" (shop), "攻略法 (Kouryakuhō)" (strategies), and "日誌 (Nisshi)" (journal), respectively (Exhibits Ko 5 and 9, Otsu 40 and 41).

(H) In the fishing result page (the page shown when the user failed to catch the fish), the characters "逃げられた(Nigerareta)" (You missed it) are shown aside a fish-shaped figure with a question mark placed in the middle and the indication of the type and approximate size of the fish that the user failed to catch. Below that, the characters "もっと釣る! (Motto tsuru!)" (Fish again) are shown with a link to go back to the casting page. Below that, links are provided to the pages of "transition," "fishing tools," "shop," "strategies," and "journal" respectively (Exhibits Ko 5 and 10, Otsu 40 and 41).

## B. Defendants' game

(A) As shown in the attachment "Comparison Table 2-2" to the judgment in prior instance, the defendants' game has [i] the top page, [ii] the fishing spot selection page, [iii] the pages including the casting page and the fish pulling page, and [iv] the fishing result page (including the page shown when the user caught the fish and the page shown when the user failed to catch the fish). Among these pages, the pages specified in [i], [ii], and [iv] are webpages, whereas the page specified in [iii] was produced by using a platform called Flash (Exhibits Ko 5, Otsu 40, and the entire import of the oral argument).

(B) In the defendants' game, [i] the "top page" transitions to [ii] the "fishing spot selection page." The user is expected to choose either ocean or river fishing and choose

a fishing spot. If the user chooses a fishing spot, the page transitions to the page where the user can press the decision key, and to [iii] the "casting page" of the fishing spot. In the "casting page," the user casts a bait by using a fishing rod. If a fish is hooked, the page transitions to the "fish pulling page," while some cut-in images might be inserted. Finally, the page will transition to [iv] the "fishing result page" (Exhibits Ko 5, Otsu 40, and the entire import of the oral argument).

If the user wants to repeat the game, the user does not have to go back to [i] the "top page," but can go back from [iv] the "fishing result page" (the page shown when the user caught the fish) or the "fishing result page" (the page shown when the user failed to catch the fish) to [ii] the "fishing spot selection page" or to the page to press the decision key, which shows up prior to [iii] and can repeat the game.

(C) In the most upper part of the top page, the characters "サイトメンテナンスのお知らせ (Saito meintenansu no oshirase)" (notice of the site maintenance) and the title "釣りゲータウン (Tsurigē taun) 2" written in large characters are shown. Below that, an illustration is shown with links titled "すずなみ島へようこそ (Suzunami tou e youkoso)" (Welcome to Suzunami Island) and "釣りに行こう!! (Tsuru ni ikou!!)" (Let's go fishing). The aforementioned illustration depicts the entire bay-shape fishing spot, with the ocean in the lower part of the page and mountains, blue skies, clouds, and some greenery in the upper part of the page. Below the illustration, indications "記録を見る (Kiroku o miru)" (see the record), "攻略を見る (Kouryaku o miru)" (see the strategies), "そうび (Soubi)" (equipment), and "お店 (Omise)" (shop) are placed as links to the journal page, the strategy page, the fishing tool page, and the shop page, respectively. Below that, more links are provided to the information on events and the page that introduces specific users. On the lowest part of the top page, links are provided to "マイゲーム登録 (Mai geimu touroku)" (personal game registration), "ご意見 BOX (Goiken bokkusu)" (opinion box), "よくある質問 (Yokuaru shitsumon)" (frequently asked questions), "お問い合わせ (Otoiawase)" (inquiry), and "モバコインを購入 (Mobakoin o kounyū)" (buy moba-coins). In this way, links to major pages are made available (Exhibits Ko 5 and 6, Otsu 40 and 41).

(D) In the fishing spot selection page, the characters "釣り場を選ぼう (Tsuriba o erabou)" (select the fishing spot) are shown in the most upper part of the page. Below that, an illustration is shown. The aforementioned illustration depicts a bay on which the fishing spot is located from the above and from the side of the ocean, with the ocean in the lower part of the page and green mountains in the upper part of the page, and also with a white beach, the surface of the ocean with white waves, and a lighthouse. On the right side of the illustration, the names of four fishing spots are shown. A link is

provided to the casting page of the fishing spot available to the user (Hamana Park, Asashio Dike), and only names are shown for the fishing spots that are not available to the user. Below that, under the characters "釣りの準備をする (Tsuru no jyunbi o suru)" (get ready for fishing) is shown, under which indications "そうび (Soubi)" (equipment), "魚の釣り方 (Sakana no tsurikata)" (how to fish), "お店 (Omise)" (shop), and "攻略をみる (Kouryaku o miru)" (see the strategies) are placed, providing links to the fishing page, the shop page, the strategy page, and the help page, respectively. Moreover, the following information is also provided to the user as "釣り場情報 (Tsuriba jyouhou)" (fishing spot information): the name and illustration of each of the fishing spots, a link "釣りに行く (Tsurini iku)" (go fishing) to the casting page thereof, links to the pages offering a "stagey" message board where users exchange strategy-related information and a "chat" message board where users can chat, and a link to the ranking page of each fishing spot. In the fishing spots not available to the user, a message is shown to notify that the user cannot go to the relevant fishing spot unless obtaining a higher title (Exhibits Ko 5 and 7, Otsu 40 and 41).

(E) After the page to press the decision key is shown, the casting page shows up, which depicts skies in the upper part of the page, the water surface in the lower part of the page, and a little bit of land in the lowest part of the page. An arrow indicating the casting target shows a regular movement. If the user presses the decision key, the movement of casting a fishing rod is shown in animation. The fishing hook is cast at the indicated position (Exhibits Ko 5 and 8, Otsu 1 and 40).

(F) The fish pulling page is as described in 1 above. At the beginning of the fish pulling page, a moving fish-shaped figure is shown. In the bottom of the page, a thin gauge (fish pulling meter), etc. is shown. The fish pulling page consists mostly of a blue underwater image, containing three concentric circles, a black fish-shaped figure, and a fishing line.

(G) In the fishing result page (when the user caught the fish), the illustration of the fish is shown, under which the name, size, and the star marks indicating the level of rareness are shown. In the lower part of the page, the points and ranking gained as a result of catching the fish are shown with a link to the ranking. The indications "もう一度釣る (Mouichido tsuru)" (fish gain) and "他の釣り場に行く (Hokano tsuriba ni iku)" (move to another fishing spot) are shown with a link to go back to the fishing spot selection page and a link to the page to press the decision key. Also links to the pages of fishing tools, shop, strategies, and journal are provided, respectively (Exhibits Ko 5 and 9, Otsu 40 and 41).

(H) In the fishing result page (the page shown when the user failed to catch the fish), the



characters "釣り失敗 (Tsuru shippai)" (fishing failed) are shown with a fish-shaped figure with a question mark placed in the middle and an indication of the type, approximate size, etc. of the fish that the user failed to catch. Below that, the characters "もう一度釣る (Mouichido tsuru)" (fish again) "他の釣り場に行く (Hokano tsuriba ni iku)" (go to another fishing spot) are shown with links to go back to the fishing spot selection page or the casting page. Also links to the pages of fishing tools, shop, and strategies are provided, respectively (Exhibits Ko 5 and 10, Otsu 40 and 41).

### C. Other games

(A) Fishing games for mobile phones allow users to use a fishing rod and enjoy catching fish swimming in an underwater image shown on the displays of their mobile phones. The timing of raising the fishing rod determines whether the user can or cannot catch the fish. The game shows a page telling whether the fishing was successful or not. Therefore, many of the fishing games for mobile phones distributed prior to the release of the plaintiff's game contain a "top page," "casting page," and "fishing result page." Some of them also have a "fish spot selection page," which allows the user to select a fishing spot from multiple options. There have been some games that have the "fish pulling page" in order to make the game more entertaining and some games that show the "fishing result page" both in the case where the user caught the fish or in the case where the user failed to catch the fish (Exhibits Ko 3 and 23, Otsu 111 and 134).

(B) Among the games that allow the user to choose a fishing spot from multiple options, there had been many games containing an illustration of a fishing spot with mountains, white sand, white waves, and a lighthouse.

Among other fishing games and the games for mobile phones that were distributed prior to the release of the plaintiff's game, there had been some games showing a fishing result page containing the illustration, name and size of the fish that the user caught and indicating the points, evaluation, etc. that the user was given as a result of catching the fish (Exhibits Ko 3 and 23, Otsu 107 and 111).

In the "ぬし釣りシリーズ (Nushi zuri shirīzu)" (fishing the guardian spirit of the river/ocean series), the data of the fish that the user caught is recorded. The user can talk with other anglers to get fishing information and ask how to play the game and how to fish (Exhibits Otsu 108 and 133).

(C) Among other fishing games, there have been some fishing games in which a transition is possible from the top page to the fishing spot selection page, from the fishing spot selection page to the casting page, from the casting page to the fish pulling page, or from the fish pulling page to the fishing result page.

In the bobber fishing game of the "ぬし釣りシリーズ (Nushi zuri shirīzu)," major

pages transition as follows. After the user casts a bait in a page showing an image of a river or ocean viewed from above, the bobber will be shown on the water surface. The user is expected to hook by pressing a button when the bobber sinks deeply. If the hooking is successful, the page transitions to the underwater image that does not show any above-water images and only depicts the underwater scenery from a lateral viewpoint (Exhibits Ko 23 and Otsu 107).

(D) Among collection games, there have been many games that show the illustration, name, size, and points of each of the items collected by the user or show a ranking for each collection spot. Some games show the name, approximate size, shape, the indication "?" of the item that the user failed to collect. Furthermore, some games show a message to notify that the user cannot go to a certain spot because "the user has not reached a certain level" or "the user has not obtained a certain title" (Exhibits Otsu 4, 89, 90, 107, and 108).

#### D. Features of games for mobile phones

In the case of games for mobile phones using the webpage browsing function, the following restrictions and features can be observed with regard to the game page structure.

(A) In the case of games for mobile phones using the webpage browsing function, the page shown on the display is not always the same. When the user clicks a link offered on a page, the page transitions to a different page. By repeating such transition, the game will progress. Thus, each page of the aforementioned games for mobile phones consists of an information page and links except for the pages designed specifically to play the game (the casting page and the fish pulling page in this case).

Since the volume of information that the user can get at any one time is limited due to the small size of the display of a mobile phone, if a large volume of information needs to be provided, the user would be required to scroll the page downward in order to see all the information. For the convenience of users, in general, the frequently used information and links to frequently used pages are placed in the upper part of the page, whenever possible. It is necessary to use such layout technique and to use short words in the text.

It is basically necessary to ensure that the user can browse a webpage on a mobile phone by the use of only two keys, namely, the up-and-down key and the decision key. Generally speaking, links are listed from the top on a webpage in accordance with the level of importance of their destination page.

Therefore, in the case of the top page in particular, the page needs to look like an overall index. Since the possibility of layout variation is limited, it is common that

multiple contents about the same subject matter are placed under each title.

Also, many users of websites for mobile phones are under certain time constraints such as needing to access webpages during a short period of spare time, like a break time or commuting time. For this reason, it is necessary to minimize the number of transitions and the number of clicks necessary for those transitions from the perspective of ensuring easiness to find and access relevant links and webpages and the convenience of users. Also, it is necessary to allow the user to access the page of his/her choice from any page (Exhibits Ko 40, Otsu 7, 8, 30, and 31).

(B) On a community site such as a SNS site, it is common to provide a message board function. A message board is established for each topic so that users who are interested in the topic can freely post comments. The idea of providing a message board concerning strategies or for chatting is commonly seen among the websites to exchange tips about games and among the games using the webpage browsing function of mobile phones (Exhibits Otsu 9 and 10).

(2) Whether the defendants' game can be considered to be an adaptation of the plaintiff's game

#### A. Selection and transition of pages

Both the plaintiff's game and the defendants' game have the "top page," "fishing spot selection page," "casting page," "fish pulling page," and "fishing result page (the page shown when the user caught the fish or when the user failed to catch the fish)." These pages transition in accordance with the user's instructions in the following order: [i] the "top page" to [ii] the "fishing spot selection page" to [iii] the "casting page" and to the "fish pulling page," and then transition to [iv] the "fishing result page (the page shown when the user caught the fish)" or the "fishing result page (the page shown when the user failed to catch the fish)." In both games, it is possible for the users to repeat the game without going back to [i] the "top page."

However, both the plaintiff's game and the defendants' game are fishing games for mobile phones, which incorporate observable facts, i.e., the actual actions of anglers with a focus on a series of basic actions that may be performed, such as collecting information on fishing spots in preparation for fishing, getting fully prepared in terms of tools by selecting and purchasing fishing equipment appropriate for the type of fish being targeted, traveling to the fishing spot and fishing, checking the fishing results, deciding whether to continue fishing in the same fishing spot, and changing equipment and fishing spots if the angler decides to change the target. Fishing games use many of these observable facts as materials, and arrange and organize these materials as a series of actions performed by an angler.

As mentioned in (1) C above, in light of the fact that there had been some fishing games containing the aforementioned pages, given the natural temporal order of the series of actions performed by an angler, it can be said that the selection and arrangement of pages in the manner adopted in the plaintiff's game and the defendants' game is nothing more than a common method of expression used in all fishing games. Furthermore, not all of the pages used in the plaintiff's game and the defendants' game are the same. For example, the defendants' game contains a preparation page for pressing the decision key and a page showing the fish swimming away into the distance. The plaintiff's game does not have such pages. On the other hand, the plaintiff's game contains a page for selecting either ocean fishing or river fishing and a page for attracting fish. The defendants' game does not have such pages. Other specific features are different as well between the two games. Taking these matters into account, it cannot be said that the fundamental characteristics of the expressions of the plaintiff's game can be directly perceived from the defendants' game although these games have commonalities in terms of the aforementioned page transitions.

#### B. Top page

The top page of the plaintiff's game and that of the defendants' game have many commonalities such as the presence of a title, a link to the fishing spot selection page below an illustration of the entire bay-shape fishing spot, links to the journal page, strategy page, fishing tool page, and shop page, and a link to the notification page about events, etc. and a link to a page introducing specific users.

However, it has to be said that a top page containing a title and an illustration is commonplace. It is common for fishing games for mobile phones to provide a link to the fishing spot selection page in consideration of a series of actions expected to be included in a fishing game. In view of the fact that a series of major actions of the users of fishing games include purchasing fishing tools, getting ready for fishing, catching fish, checking the record of fishing, and exchanging information about fishing (fishing techniques and tips), and that these actions are the same as a series of basic actions of real-life anglers, the idea of providing links to the "journal," "strategies," "fishing tools," and "shop" pages on the top page of the website for mobile phones is a common technique adopted for the sake of user convenience, i.e., a technique to collectively place links to frequently used pages in the upper part of the page. There are many differences between the plaintiff's game and the defendants' game in terms of the detailed expressions such as the aforementioned title, illustration, and the indications placed as links, and the design, position, etc. of each link.

#### C. Fishing spot selection page

Regarding the fishing spot selection page, the plaintiff's game and the defendants' game have many commonalities. For example, the fishing spot selection pages of both games show a fishing spot on a bay viewed from the side of the ocean as an illustration drawn from a bird's-eye view containing the ocean, mountains, white beach, white waves on the surface of the ocean, and a lighthouse; the names of four fishing spots in total are shown; the names of the fishing spots available to the user with links to the casting page of each of those fishing spots and the names of the fishing spots that are not available to the users are indicated; links are provided under the title "釣りの準備をする (Tsurino jyunbi o suru)" (get ready for fishing) to access the pages to select fishing tools, purchase fishing tools, see the strategies, and learn how to fish, respectively; and more information is provided under the title "釣り場情報 (Tsuriba jyouhou)" (fishing spot information), such as the name and illustration of each fishing spot, a link to the casting page, a link to the ranking of the users who caught large fish on the fishing spot, and links to the pages of message boards concerning strategies and for chatting.

However, the use of an illustration to depict a fishing spot can be considered to be a mere idea. The two games are completely different in terms of the illustration used in the fishing spot selection page. Furthermore, among fishing games where each user selects a fishing spot from multiple options, there have been many games that show a bay in which the fishing spot is located as an illustration drawn from a bird's-eye view with the ocean, mountains, white beach, white waves, and a lighthouse. Therefore, it has to be said that the use of such illustration is commonplace. Meanwhile, in the plaintiff's game, ocean fishing spots in general are expressed as four fishing spots, namely, Himemi Harbor, Susano Bay, Tsurugi Cape, and Kagami Bridge, located in a harbor with a breakwater, sand beach, rocky shore, and river mouth, respectively. On the other hand, the defendants' game expresses ocean fishing spots as four fishing spots, namely, Hamana Park, Asashio Dike, Mikazuki Beach, and Shimakaze rocky shore, located in an ocean fishing facility, harbor with a breakwater, sand beach, and rocky shore, respectively. These fishing spots are typical places for ocean fishing (Exhibits Otsu 17 and 36). It is common knowledge among anglers that the more experienced the angler gets, the more difficult fishing spot the angler would move to; from an ocean fishing facility to a breakwater, a sand beach, and, finally, to a rocky shore.

Furthermore, the act of providing links to the pages to select fishing tools, purchase fishing tools, see the strategies, and learn how to fish can be considered to be commonplace because it reflects the typical actions of the users of fishing games.

As found in (1) D above, on a community site such as a SNS site, it is common to

provide a message board function. A message board is established for each topic so that users who are interested in the topic can freely post comments. The idea of providing a message board concerning strategies or for chatting is commonly seen among the websites to exchange tips about games and among the games using the webpage browsing function for mobile phones. Also, the provision of a list of ranking is a mere idea. As found in (1) C above, there have been many games that present a ranking for each collection spot. In view of these facts, the provision of a message board or a ranking and a link thereto should be considered to be commonplace. The two games are different in terms of the specific expressions used in the message board page and the ranking page.

#### D. Casting page

The plaintiff's game (in the case of ocean fishing) and the defendants' game have many commonalities in terms of the casting page such as the fact that the page does not show the angler, but shows the fishing spot from the angler's viewpoint by depicting skies in the upper part of the page, the water surface in the middle part of the page, and the land on which the angler is standing in the lower part of the page, and the facts that an arrow indicating the casting target shows a regular movement and that, if the user presses the decision key, the movement of casting a fishing rod is shown in animation. The lure or hook rig is cast toward the indicated position.

However, the choice of the viewpoint to depict the image falls under the realm of ideas. There have been some games that depict the fishing spot from the viewpoint of the angler (Exhibits Otsu 110 and 135). There have been many differences in terms of the specific expressions used in major pages such as illustrations, the arrow indicating the casting target, the indication of a fishing rod, the image shown in the page from the time of casting until the time of hooking, etc. and the characters indicated to notify the timing of hooking.

#### E. Fish pulling page

The fish pulling page of the plaintiff's game and that of the defendants' game are as described in 1 above. In the case of the plaintiff's game, regarding the manner of transition from the casting page to the fish pulling page, there have been some other games that adopted a similar manner of transition. On the other hand, the defendants' game is different from conventional games in terms of specific expressions such as how a fish-shaped figure appears in the page.

#### F. Fishing result page (the page shown when the user caught the fish)

The plaintiff's game and the defendants' game have many commonalities in terms of the fishing result page (the page shown when the user caught fish) such as the

illustration of the fish caught, the name and size of the fish, the star marks indicating the evaluation of the fish, and the points gained as a result of catching the fish, links to the "fish again" page and the pages of fishing tools, shop, strategies, and journal, respectively.

However, as found in (1) C above, there have been other games that show an illustration of the fish caught, the name and size of the fish, and all or a part of the points gained by the user as a result of catching the fish. Therefore, these features can be considered to be commonplace. The two games are different in terms of the specific expressions. The provision of links not only on the top page but also on other pages in order to accomplish the goals such as preparing and purchasing fishing tools, checking the records of fishing, learning how to fish, and exchanging information about fishing tips should be considered to be a mere idea adopted for the sake of users' convenience.

#### G. Fishing result page (the page shown when the user failed to catch the fish)

The plaintiff's game and the defendants' game have many commonalities in terms of the fishing result page (the page shown when the user failed to catch the fish) such as a fish-shaped figure with a question mark in the middle, an indication of the type and size of the fish that the user failed to catch, and links to the casting page, the fishing spot selection page, and the pages of fishing tools, shop, and strategies.

However, as found in (1) C above, there have been collection games that show the name, approximate size, and shape of the item that the user failed to catch, and a question mark. The aforementioned commonalities reflect common actions of anglers in actual fishing spots. Furthermore, the provision of the aforementioned links not only on the top page but also on other pages should be considered to be a mere idea.

#### H. Direct perception of the fundamental characteristics

As described above, the page transition and the selection and arrangement of materials in the defendants' game are identical with those of the plaintiff's game only in the parts that are not expressions per se, such as the parts that are considered to be mere ideas, or any part that do not contain creative expressions. Since the two games are different in terms of specific expressions, the fundamental characteristics of the expressions presented in the plaintiff's game cannot be directly perceived.

#### I. Allegation of the plaintiff in the first instance

(A) The plaintiff in the first instance alleged that the two games have many commonalities in the pages other than the major pages and that, since the two games are identical in terms of the manner of a transition between major pages, it is possible for any person who comes across the defendants' game to directly perceive the fundamental characteristics of the expressions presented in the plaintiff's game.

However, the plaintiff in the first instance also alleged that the two games are identical in terms of major pages. As explained above, it is obvious that the major pages of the defendants' game cannot be regarded as adaptations of the major pages of the plaintiff's game. Meanwhile, while the plaintiff in the first instance alleged that the two games have many commonalities in terms of non-major pages as mentioned above, those commonalities are limited to mere ideas or common, uncreative expressions. With regard to the selection and arrangement of the materials in non-major pages, the plaintiff's game and the defendants' game are similar only in terms of the parts that should be considered to be mere ideas or uncreative expressions.

(B) The plaintiff in the first instance also alleged that it would be unreasonable to divide an integrated work into individual component parts and evaluate whether each part can be considered to be creative and whether each part should be considered to be an expression or a mere idea.

However, the creative expressions in a work consist of a set of creative elements. Therefore, before determining whether the common parts between the plaintiff's game and the defendants' game can be regarded as expressions or whether such expressions can be regarded as creative, it is beneficial and necessary to examine whether each of the component parts can be considered as an expression and whether the expression can be regarded as creative. As found in 1 above, it is reasonable to determine, based on the results of the aforementioned examination, whether the work as a whole or the allegedly infringed part as a whole can be regarded as an expression and whether the expression can be regarded as creative.

Even in the case where the commonalities between the plaintiff's game and the defendants' game are regarded as mere ideas or uncreative expressions, if the combination of ideas and other elements plays an important role in those games and can be regarded as identical between the two games, and consequently allows any person who comes across the defendants' game to perceive the fundamental characteristics of the expressions presented in the plaintiff's game, the defendants' game could be regarded as an adaptation of the plaintiff's game. However, in this case, since the two games are different in terms of individual pages and specific expressions, it cannot go so far as to say that the fundamental characteristics of expressions can be directly perceived.

(C) The plaintiff in the first instance alleged that the manner of transition between main pages of the plaintiff's game, i.e., the transitions from the top page to the fishing spot selection page, the casting page, the fish pulling page, or the fishing result page, could be regarded as an expression that cannot be seen in other fishing games. The plaintiff in



the first instance also alleged that, although the two games have commonalities in terms of the selection and arrangement of major pages, the selection and arrangement adopted by the plaintiff's game was not the only option and could have been different and that the plaintiff in the first instance decided to adopt such selection and arrangement of major pages as presented in the plaintiff's game in order to express originality in the manner of transition. The plaintiff in the first instance concluded that the defendants in the first instance made a decision to adopt the same selection and arrangement of major pages for the defendants' game.

If there are no options for the manner of expression, the use of the same expression would not constitute infringement of a copyright. Even if there are some options, however, it would not necessarily provide grounds for finding copyright infringement. Under the Copyright Act, copyright protection will be provided not to the ideas embodied in selection of those options but to specific expressions. Therefore, even in the case where there are multiple options for the manner of selection and arrangement of pages, if the expressions actually created in the end are commonplace, the use of the same expression would not constitute infringement of a right of adaptation. In other cases, the use of different expressions might make it impossible to directly perceive the fundamental characteristics of expressions.

In this case, any person who sees the selection and arrangement of the pages of the defendants' game would not be able to directly perceive the fundamental characteristics of the expressions presented in the selection and arrangement of the pages of the plaintiff's game. While the plaintiff in the first instance alleged that the fundamental characteristics of expressions can be perceived due to the similarity between the two games in terms of abstract perspectives and angles, such allegation is unacceptable.

#### J. Summary

As described above, the transition of pages and the selection and arrangement of materials of the defendants' game are identical with those of the plaintiff's game only in terms of the parts that are not expressions per se such as the parts that should be regarded as mere ideas or that do not contain creative expressions. Since any person who comes across the defendants' game cannot directly perceive the fundamental characteristics of the expressions embodied in the manner of transition between pages and the selection and arrangement of materials of the plaintiff's game, the defendants' game cannot be regarded as an adaptation of the plaintiff's game.

#### (3) Conclusion

Any person who comes across the expression embodied in the manner of transition between pages and the selection and arrangement of materials of the defendants' game

cannot directly perceive the fundamental characteristics of the expressions embodied in the corresponding features of the plaintiff's game. Therefore, the production of the defendants' game by the defendants in the first instance does not constitute infringement of the right of adaptation of the plaintiff in the first instance for the plaintiff's game. The distribution of the defendants' game does not constitute infringement of the right to transmit to the public specified in Article 28 of the Copyright Act either. Similarly, the production of the defendants' game by the defendants in the first instance does not constitute infringement of the right to integrity of the plaintiff in the first instance for the plaintiff's game.

3. Whether the act of the defendants in the first instance can be regarded as an act of unfair competition specified in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act (Issue 2)

(1) Whether Plaintiff's Image can be regarded as a well-known indication of goods or business

The plaintiff in the first instance alleged that Plaintiff's Image should be regarded as a well-known indication of goods or business of the plaintiff in the first instance.

A. In the case where an image used in a game has a unique, ingenious structure that has not been adopted by any other games, if such image is repeatedly shown in the game throughout the course of the game for a long period of time and has become widely known among consumers, such image could be regarded as "indication of goods or business" specified in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act.

However, an image used in a game is usually viewed by consumers only when they actually play a game. In this court case, Plaintiff's Image alleged by the plaintiff in the first instance to be an indication of goods or business is not used in a page shown at the beginning of the plaintiff's game, but is a page that shows up in the middle of the game or a page similar to such page. Plaintiff's Image is not repeatedly used in the course of the game and used in game pages for a long period of time. The page showing Plaintiff's Image is not shown on the front cover of the official guidebook for the plaintiff's game. It is important to note that the official guidebook is shrink-wrapped when it is sold in a shop (Exhibits Otsu 104 and 139).

B. The plaintiff in the first instance advertised the plaintiff's game by using a TV commercial (Exhibit Ko 13). However, Plaintiff's Image was used only as one of many images presented in the advertisement, which accounts for about three seconds in the 15-second TV commercial. Moreover, the plaintiff in the first instance advertised the plaintiff's game by using in-train ad space (Exhibit Ko 12), and newspapers and

magazines (Exhibit Ko 14). Plaintiff's Image was used only as one of the game images presented in the advertisements. Plaintiff's Image was too blurry to see in some of those advertisements.

Thus, Plaintiff's Image used in the fish pulling page cannot be considered to have become recognized as a well-known indication of goods or business of the plaintiff in the first instance. In Iwate, Kagoshima, Shizuoka, and Kita-Kyushu area, a TV commercial started on February 7, 2009. However, most of the aforementioned advertisement activities were conducted after the publication of Defendants' Image 1 and Defendants' Image 2, in other words, after the commencement of the distribution of the defendants' game on February 25, 2009.

C. The photograph (Exhibit Ko 81) attached to the article concerning the representative of the plaintiff in the first instance does not provide grounds to find that Plaintiff's Image has become a well-known indication of goods or business.

D. As described above, Plaintiff's Image cannot be considered to have become a well-known indication of goods or business of the plaintiff in the first instance.

(2) Similar indication of goods or business

A. Defendants' Image 1

(A) Defendants' Image 1 appears as follows (Exhibit Ko 16 and the entire import of the oral argument)

Defendants' Image 1 would be shown on the top page of the defendants' game only if a Mobage Town member conducts an online search for the defendants' game and accesses the website of the defendants' game for the first time.

Defendants' Image 1 is not shown independently. Four images including Defendants' Image 1 are listed vertically with a text placed on the side of each image. In the most upper part of the page, the characters (logo) "釣りゲータウン 2 (Tsurigē Taun 2)" and a long horizontal rectangular illustration of swimming fish drawn from a lateral viewpoint are placed. Immediately below said illustration, the following links are provided: "無料で遊べる (Muryoude asoberu)" (can play the game free of charge), "釣りゲータウン 2 を始める (Tsurigē Taun 2 o hajimeru)" (start Tsurigē Town 2), and "大好評の釣りゲータウンが 2 になって再登場 (Daikouhyou no Tsurigē Town ga 2 ni natte saitoujyou)" (the popular Tsurigē Town game coming back as Version 2). Below the aforementioned links, the section containing the characters "ここが進化した釣りゲー2!! (Kokota shinka shita Tsurigē 2!!)" (improvements in Tsurigē 2) is placed. Below said section, four images including Defendants' Image 1 are shown. Defendants' Image 1 is placed at the top of the list of the four images. Beside Defendants' Image 1, the following texts are placed: "ゲームシステムが一新 (Gēmu shisutemu ga isshin)"

(game system has been renewed) and "確変システムを導入したドキドキのワンボタンゲームに進化! (Kakuhēn shisutemu o dounyū shita dokidoki no wanbotan gēmu ni shinka!)" (exciting one-button game introducing a higher probability system).

(B) As found above, Defendants' Image 1 would be shown only to the person who searched for the defendants' game. On the page containing Defendants' Image 1, the defendants' game is shown under the logo "釣りゲータウン 2 (Tsurigē Town 2)," and the characters "釣りゲータウン 2 (Tsurigē Town 2)," which provides a link. Defendants' Image 1 is used merely as one of the images explaining the details of the defendants' game. On these grounds, Defendants' Image 1 cannot be considered to have been used as an indication of goods or business to distinguish one's goods or business from others'.

(C) When Defendants' Image 1 is shown on the display of a mobile phone, it is small and unclear. Viewers could only see the pale blue background, green and purple circular panels, the indication "ファイト! (Faito!)" (never give up) written in yellow characters in the middle part of the page, and the indication "Good" written in green characters in the lower part of the page.

Thus, Defendants' Image 1 cannot be considered to be similar to Plaintiff's Image.

#### B. Defendants' Image 2

(A) Defendants' Image 2 appears as follows (Exhibit Ko 17 and the entire import of the oral argument)

Defendants' Image 2 is shown on the webpage of the website of the defendant in the first instance ORSO that introduces the defendants' game. The characters "アイテム課金型ゲーム'釣りゲータウン 2'(Aitemu kakingata gēmu "Tsurigē Town 2")" (item-charge type game "Tsurigē Town 2") are shown in the most upper part of the page.

Defendants' Image 2 is shown immediately below the aforementioned characters. Beside Defendants' Image 2, the indication "携帯総合ポータルサイト'モバゲータウン'にて配信中(Keitai sougou pōtaru saito "Mobage Town" nite haishinhcū)" (available at a comprehensive portal site for mobile phones "Mobage Town").

Below Defendants' Image 2 and the aforementioned indication, the characters (logo) "釣りゲータウン 2 (Tsurigē Town 2)" and a long horizontal rectangular illustration of swimming fish drawn from a lateral viewpoint are shown in a size larger than Defendants' Image 2. Beside said illustration, the characters "釣りゲータウン 2 (Tsurigē Town 2)," the address of the Mobage Town (URL), and the text introducing Mobage Town are shown.

(B) In view of the manner of showing Defendants' Image 2 as found above, the characters "釣りゲータウン 2 (Tsurigē Town 2)" placed in the most upper part of the

page and the logo "釣りゲータウン 2 (Tsurigē Town 2)" shown in the illustration placed in the lower part of the page were used as indications of the defendants' game. Defendants' Image 2 was used together with the text placed on the right side of said page just to introduce the content of the defendants' game. Therefore, Defendants' Image 2 cannot be considered to be used as a well-known indication of goods or business in order to distinguish one's goods or business from others'.

(C) Defendants' Image 2 shows a large circle in the middle of the pale blue background. In the lower part of the circle, a blue panel is placed. At the center of the circle, a silver harpoon is shown against the gold background. However, this design does not necessarily appear to be three concentric circles. In the upper part of the page, the characters "Good" are written in green letters. In the lower part of the page, the characters "あとちよっと! (Ato chotto!)" (almost) are written in white letters.

In consideration of these facts, the aforementioned Defendants' Image 2 is not necessarily similar to Plaintiff's Image, which is characterized by the fish pulling gauge placed in the upper part of the page, three concentric circles placed in the middle part, and a fish-shaped figure.

C. Thus, neither Defendants' Image 1 nor Defendants' Image 2 can be considered to be used as an indication of goods or business. Neither of them can be considered to be similar to Plaintiff's Image.

### (3) Summary

As described above, Plaintiff's Image cannot be considered to be a well-known indication of goods or business of the plaintiff in the first instance. Also, neither Defendants' Image 1 nor Defendants' Image 2 can be considered to be a well-known indication of goods or business either. Therefore, the act of using Defendants' Image 1 or Defendants' Image 2 cannot be considered to constitute an act of creating confusion by using a similar indication of goods or business. Based on the premise that Plaintiff's Image is a well-known indication of goods or business, the plaintiff in the first instance alleged that the act of using Defendants' Image 1 and Defendants' Image 2 violates Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act. However, such allegation of the plaintiff in the first instance is groundless.

4. Whether the act of the defendants in the first instance constitutes an act of tort that infringes any interests of the plaintiff in the first instance that deserve legal protection (Issue 3)

(1) The plaintiff in the first instance alleged that the defendants in the first instance created the defendants' game based on the plaintiff's game, which was developed and frequently advertised by the plaintiff in the first instance at great cost, with a clear,

malicious intent of free-riding, and distributed the defendants' game nationwide. The plaintiff in the first instance also alleged that, since any person who comes across the defendants' game can directly perceive the fundamental characteristics of the expressions of the plaintiff's game, the aforementioned act of defendants in the first instance caused great damage to the plaintiff in the first instance and destroyed the credibility of the plaintiff in the first instance and that said act can be considered to have infringed the interests of the plaintiff in the first instance that deserve legal protection. The plaintiff in the first instance concluded that, even if the act of the defendants in the first instance does not constitute infringement of a copyright or any other legally stipulated right in a strict sense, such act of the defendants in the first instance constitutes an act of tort.

However, the Copyright Act grants an exclusive right to certain people under certain conditions to use a work, and clarifies the scope and the limit of such exclusive right by specifying, among other things, the grounds for a copyright to take effect or lose effect and the nature, scope, etc. of a copyright for the purpose of balancing the exclusive right thus granted with the free, cultural life of all citizens. On the other hand, the Unfair Competition Prevention Act specifies the grounds for an act of unfair competition to be found, the nature, scope, etc. of an act of unfair competition for the purpose of maintaining a fair competition environment, etc. among companies and clarifies the limit of acts that may create confusion with regard to well-known indication of goods or business. It can be interpreted that, if an act of using a work does not constitute infringement of a copyright for the work or an act of unfair competition that takes advantage of the work, the right to exclusively use the work and the right to exclusively use the work as a well-known indication of goods or business would not be subject to legal protection. Therefore, it is reasonable to interpret that such act does not constitute an act of tort unless there are special circumstances where the act has infringed any legally-protected interests other than the interests protected under the Copyright Act or the Unfair Competition Prevention Act, i.e., the interests of exclusively using a work or the interests of using a work as a well-known indication of goods or business.

(2) As explained in 1 and 2 above, the act of producing the defendants' game and transmitting it to the public by the defendants in the first instance cannot be considered to constitute infringement of the copyright and moral rights of author of the plaintiff in the first instance for the plaintiff's game. Also as explained in 3 above, the act of using the Defendants' Images 1 and 2 cannot be considered to constitute an act of creating confusion with a well-known indication of goods or business of the plaintiff in the first instance.

The plaintiff in the first instance alleged that the act of the defendants in the first instance destroys the credibility of the plaintiff in the first instance. However, according to the evidence submitted by the plaintiff in the first instance (Exhibits Ko 18, 19, etc.), it can be found that confusion between the defendants' game and the plaintiff's game exists only among some of the users of the two games. There is no sufficient evidence to prove the allegation of the plaintiff in the first instance that the act of the defendants in the first instance of distributing the defendants' game misled many users throughout Japan into believing that the plaintiff's game or the plaintiff in the first instance is identical with the defendants' game or the defendant in the first instance DeNA, respectively, and consequently caused a significant negative effect on the social credibility and business reputation of the plaintiff in the first instance.

(3) Therefore, even if the defendants in the first instance produced the defendants' game based on the plaintiff's game, since the act of the defendants in the first instance cannot be considered to be an act that is outside the scope of free competition and infringed the legally-protected interests of the plaintiff in the first instance, the act of the defendants in the first instance does not constitute an act of tort under the Civil Code.

Therefore, the aforementioned allegation of the plaintiff in the first instance has no grounds.

## 5. Conclusion

On these grounds, all of the claims of the plaintiff in the first instance have no grounds and shall therefore be dismissed. The judgment in prior instance, which accepted some of those claims, shall be considered to be partially unreasonable. Since the appeal by the defendants in the first instance has grounds, the judgment in prior instance with respect to the part for which the defendants in the first instance lost the case shall be revoked. The claims of the plaintiff in the first instance with regard to said part shall also be dismissed. Since the appeal by the plaintiff in the first instance and the request for expansion of the scope of the claims have no grounds, said appeal and request shall be dismissed. The judgment has been rendered in the form of the main text.

Intellectual Property High Court, Fourth Division

Presiding judge: TAKABE Makiko

Judge: INOUE Yasuhito

Judge: ARAI Akimitsu