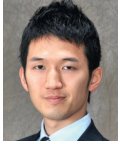


JAPAN



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Social network game copyright infringement denied

Japan is a large market for social network games which King.com and Supercell have recently entered. However, foreign companies may soon face copyright infringement lawsuits. Two Japanese then social game giants, Gree and DeNA, have already fought a copyright case.

Background

Plaintiff Gree provided a fishing game for mobile phones in its social networking service (SNS), while defendant DeNA also provided the same sort of fishing game in its SNS. The left picture is one of the game screens in the plaintiff's work and the right one is one of those in the defendant's work.

Gree sued DeNA seeking an injunction and damages against reproduction and public transmission of its work, alleging that the DeNA's act would infringe Gree's copyright (right of adaptation and public transmission) and the moral rights of author.

Tokyo District Court

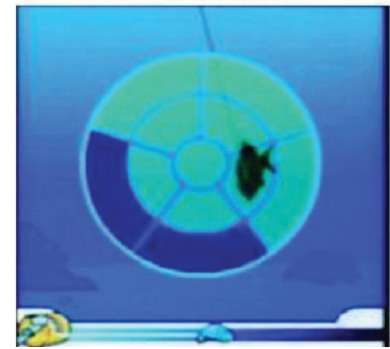
In its judgment of February 23 2012, the Tokyo District Court (Presiding Judge Abe) found infringement of the right of adaptation regarding "the screen of reeling a fish" in the Gree's game, granted an injunction and awarded around Y230 million (\$2.3 million) for damages (Gree sought around Y940 million).

The Tokyo District Court found the following as common points between Gree's work and DeNA's work:

(1) water surface and the look of the above are abbreviated and only underwater is depicted by the edge-on view, (2) in the underwater screen, there are triple concentric circles roughly set in the centre of the screen at almost regular intervals from its centre and the most lateral



Plaintiff's work



Defendant's work

circle occupies almost half of the underwater screen, (3) the background colour of the underwater screen including the colour of water is depicted generally in darkish blue, rock shadows are depicted in a shape tracing the above concentric circles at both right and left ends of the bottom, and no waterweed, other living thing, bubble or the like are depicted, (4) in the screen of the underwater, there is a black sign of fish and a black straight line (fishing line) extends from the fish mouth toward the top of the screen, (5) when hooked, the sign of fish moves round all over the underwater turning frequently while the background screen is still (however, in defendant's work, the size and colour of concentric circle and the picture in the centre of the circle change) and the user's view-point is fixed, (6) if a user pushes the key in the timing that a sign of fish is in a certain place of the above concentric circles, it becomes easier to reel the fish.

The Court also pointed out that "no games having all the above common points regarding fishing games for mobile phone released to the public before plaintiff's work existed". The Court specifically found that:

depicting the triple concentric circles in a large way, depicting a hooked fish as a black sign and letting it move round all over the underwater, and expressing the timing for reeling a fish by making it easy to reel fish when a sign of fish is in a certain place of the concentric circles have not been seen in other fishing games released before plaintiff's work. We find the producer's personality is strongly expressed here.

Furthermore, the Court found that above points (1), (2), (3), (5) and (6) are the essential features of the expression of "the screen of reeling a fish" in Gree's work and the identity of these points is maintained in DeNA's work, and found the infringement of the right

of adaptation.

IP High Court

Only half a year later, in the judgment of August 8 2012, the IP High Court (Presiding Judge Takabe) reversed the Tokyo District Court's decision and dismissed the Gree's claims, denying the infringement of the right of adaptation regarding "the screen of reeling a fish".

The IP High Court found the following as common points between Gree's work and DeNA's work: (a) the look in the above of the water surface is abbreviated and only underwater is depicted, (b) underwater is depicted by the edge-on view, and in the underwater screen, (c) there are triple concentric circles roughly set in the centre of the screen at almost regular intervals from its centre, (d) a black sign of fish and fishing line are depicted, (e) the colour of the background in the underwater screen is depicted generally in darkish blue and rock shadows are depicted in the bottom, (f) a sign of fish moves round all over the underwater while the background is still.

The High Court denied the creativity of the points (a), (d) and (e) because they were nothing more than common expressions, and stated that points (b) and (f) were not expressions but mere ideas. Furthermore, regarding (c), though the High Court admitted that adapting the triple concentric circles was a characteristic never been seen in the prior fishing games, it held that this was an application of concentric circles in archery, shooting, darts and the like to fishing games and adapting concentric circles itself is an idea. Therefore, the Court found that Gree's work and DeNA's work differed in concrete expressions. As a result, the Court concluded that these common points were nothing more than parts which were not expressions or which contained no creations, and differed in concrete expressions, and therefore a person contacting "the screen of reeling a fish" in DeNA's work could not feel the

essential feature of the expression in Gree's work.

Gree appealed to the Supreme Court. However, the High Court's decision was made final by the Supreme Court.

Practical tips

The Tokyo District Court and the IP High Court differ over whether to evaluate the common points as concrete expressions, or a mere idea or common expressions. The boundary between an idea and a concrete expression is vague and the decision is difficult to make.

Leaving aside cases where the copyrighted work is dead-copied and therefore copyright is obviously infringed, it is difficult to predict whether the claim of infringement of right of adaptation would be accepted and the decisions will be split by the courts.

Based on the Tokyo District Court and IP High Court judgments, we suggest the following strategy. For game companies that want to avoid copyright infringement, it is effective at the production stage to change concrete expressions in detail even if the idea is similar or to adopt common expressions found in the prior games and it is effective at the litigation stage to submit as many similar prior products to prove the expression is common.

Game companies who are copyright owners should not give up using copyright despite the IP High Court decision as different judges have different views on copyright infringement. Although it does not seem easy to satisfy the requirement of inventive step to be patented because a game is often made by combining prior ideas, some are effectively protected by patents such as a game system called "active time battle system" adopted in the series of RPG games Final Fantasy, so a patent should be another option. Furthermore, a design patent could be an option in the future as the JPO is discussing whether to expand the protection of screen designs under the design patent system.