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Overview of Character Protection and Recent Cases in Japan

Ayaka Sugino
ayaka.sugino@ohebashi.com

I. Introduction

On September 18, 2024, Nintendo Co., Ltd. and The Pokémon Company (the "**Plaintiffs**") filed a patent infringement lawsuit against Pocket Pair Co., Ltd. (the "**Defendant**") asserting that the Plaintiffs' patents were being violated by the Defendant's development and sale of the video game, "Palworld." Although many people believed that the designs of the characters and settings in Palworld seem similar to Pokémon, in this lawsuit, the Plaintiffs only claimed patent infringement and not copyright infringement for such similar designs.

Why did the Plaintiffs not claim copyright infringement? One of the reasons may be the limits of character protection in Japan. This article will give an overview of the concept of character protection in Japan and the recent court cases involving this legal doctrine.

II. The Idea-Expression Dichotomy

The Copyright Act of Japan protects "works," and a character must qualify as a "work" to receive protection thereunder. Article 2(1)(i) of the Copyright Act defines a "work" as *"a creatively produced expression of thoughts or sentiments that falls within the literary, academic, artistic, or musical domain."* Therefore, a work must be an "expression" and not a mere idea, which is not a work that is entitled to protection under the Copyright Act. This difference is known as the "idea-expression dichotomy."

The characters in novels, comics, video games and other media are fictional creations. As fictional creations, the names, personalities and backgrounds of such characters are merely "ideas," not "expressions." Therefore, from the perspective of the idea-expression dichotomy, the characters themselves are generally not considered "works," and thus, are not protected by the Copyright Act. To explore this concept in more detail, we should consider the difference between fictional characters and fanciful characters.

III. Fictional Characters and Fanciful Characters

Characters can generally be classified into three types: those that appear in novels (i.e., fictional characters), those that appear in comics, anime and video games (i.e., fanciful characters), and those based on real-life people.[1] This section will focus on whether there are differences in the protection of the first two categories: fictional characters and fanciful characters under the Copyright Act.

1. Fictional Characters

It would seem that the idea-expression dichotomy may not apply to characters in novels because their

1. Zen Tatsumura, Kyaracter (Mangateki Kyaracter) no Shingai [Violation of Characters (Fanciful Characters)], Saibanjitsumutaikei, Vol. 27, p. 159 (1997).

characteristics are specifically "expressed" in the text and, therefore, they would seem to be protected as a "work" under the Copyright Act. However, this is not necessarily the case. Take Harry Potter as an example. Each of the specific expressions of Harry in the novel is a work protected under the Copyright Act. On the other hand, the character itself, which can be summarized as *"a boy with black-rimmed glasses and a lightning-bolt-like scar on his forehead" or "the boy's parents were wizards and killed by a dark wizard immediately after he was born,"* is merely an idea that is not protected.

2. Fanciful Characters

Unlike a character in a novel, the appearance of a character in comics, anime or a video game is "expressed" visually through images and illustrations. The visual appearance of a comic, anime or video game character is central to the character's formation, and there is no dispute that the Copyright Act protects such pictorial expression of a character. However, the essence of the character itself, which is formed through the entirety of a comic, anime or video game rather than the specific visual expressions therein, is merely an "idea" and not an expression. Therefore, like a character from a novel, this aspect of a character from a comic, anime or video game is not protected under the Copyright Act. This interpretation has been upheld in various court judgments.

In the Popeye Character Case,[2] a copyright infringement claim arose due to the defendant's sale of ties decorated with an illustration similar to Popeye, the main character in a comic created by Elzie Crisler Segar, et al. The court found that the illustration on the ties constituted copyright infringement because it copied the specific picture of Popeye in the comic. On the other hand, regarding the character of Popeye himself, the court stated as follows:

> *His character, "a sailor who wears a sailor hat and sailor costume, has a sailor's pipe in his mouth and an anchor tattoo on his arm, and eats spinach to gain superhuman strength, and is named Popeye or POPEYE[,]" was "not a specific comic expression but the particular idea that the comic artist tried to give through each comic. Therefore, it is not an external expression that is separate from the individual concrete comic[.]"*

The court's decision clearly illustrates the idea-expression dichotomy.[3] As described above, fanciful characters are similar to fictional characters in that the character itself is not recognized as a work. However, fanciful characters are different from fictional characters in that the specific appearance of a character in a comic, anime or video game is protected as a work.

IV. Protection of Characters under Laws Other than the Copyright Act

In addition to the Copyright Act, the Trademark Act and the Unfair Competition Prevention Act may provide protection to characters in Japan.

1. Trademark Act

The Trademark Act of Japan only covers registered trademarks. Under Article 37 thereof, the use of a registered trademark, or any trademark similar thereto, in connection with the designated goods or services, or goods or services similar thereto, is deemed an infringement of the trademark right. As a "**trademark**" means *"any character [letter], figure, sign or three-dimensional shape or color, or any combination thereof; or sounds,"* it cannot protect the fictional or fanciful characters themselves. However, trademark protection is beneficial for the protection of the character's name, which is not protected under the Copyright Act. Additionally, trademark registration of a character

2. Tokyo High Court, May 14, 1992, Chizaishu, Vol. 24, No. 2, p. 385.
3. The Supreme Court has accepted this decision (Supreme Court, July 17, 1992, Minshu, Vol. 51, No. 6).

design can prevent competitors from using the design. For example, the name or image of "Pikachu," which appears in the Pokémon video game series, has been registered in connection with not only home video game consoles (or programs) but also various products and services, including clothing and soft drinks.

2. Unfair Competition Prevention Act

Even if not protected under the Copyright Act or the Trademark Act, if the indication of goods or a business is well-known among consumers, it is illegal to create confusion by using an indication that is identical or similar to such well-known indication (Unfair Competition Prevention Act, art. 2(1)(i)). The act of using an indication of goods or a business that is identical or similar to another person's famous[4] indication of goods or a business is also illegal (*Id*., art. 2(1)(ii)).

Although the Unfair Competition Prevention Act does not protect the characters themselves, once a character becomes well-known or famous, not only the character design but also the character name will be protected. Since Article 2(1)(iii) thereof further stipulates that it is illegal to transfer goods that imitate the form of another person's goods, the said law is also helpful in protecting character products, such as dolls or figures.

V. Recent Cases Concerning Characters

To illustrate the above, the recent court cases concerning characters are briefly described below.

1. Dragon Quest/Luca Case[5]

This case concerns the name of a character. The plaintiff was the author of a novel based on the RPG video game "Dragon Quest" released by Square Enix and had come up with the name of the main character (Luca) in the novel. The plaintiff claimed that the defendants violated the plaintiff's copyright because the defendants used the same name of the main character in the plaintiff's novel (Luca) when the defendants created a movie based on the said game.

In denying the copyright infringement, the district court and the Intellectual Property High Court ruled as follows: *"It is rational to interpret that the name of a person is not a work because it is a symbol used to identify that person, and it cannot necessarily be considered to be a creatively produced expression of thoughts or sentiments, nor can it be considered to fall within the literary, academic, artistic or musical domain."*

The above Luca case clarified that character names are considered mere symbols and not works under the Copyright Act.

2. Chinese Online Game Case [6]

This case concerns the similarity of characters that appear in online games. Although several characters were the subject of this litigation, the court ruled that *"if the only thing in common is something other than the expression, like the idea, it is understood that the defendant's images do not constitute a copy or derivation of the plaintiff's images."* Based on this rule, the court found that the image of one of the characters contained a similarity in expression to another character. However, the court denied copyright infringement for the other characters' images because, although the subject ideas were similar, each of the expressions differed. The following images are excerpts of some of the characters' images.

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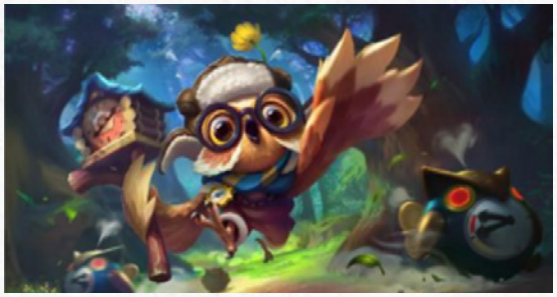
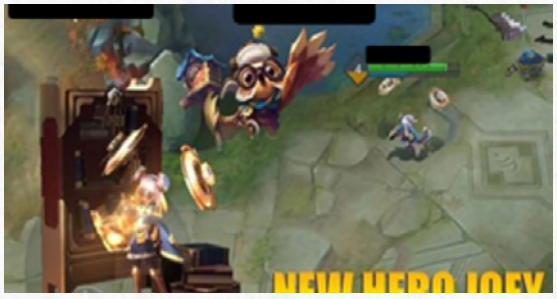
4. To be considered "well-known," it is sufficient if the indication is widely known in a particular region, while "famous" requires it to be known nationwide.
5. Tokyo District Court, October 20, 2023, available at https://www.courts.go.jp/app/files/hanrei_jp/614/092614_hanrei.pdf (in Japanese); and Intellectual Property High Court, April 23, 2024, available at https://www.courts.go.jp/app/files/hanrei_jp/966/092966_hanrei.pdf (in Japanese).
6. Tokyo District Court, April 22, 2023, available at https://www.courts.go.jp/app/files/hanrei_jp/123/091123_hanrei.pdf (in Japanese).

① Character 1[7]

Plaintiff's character

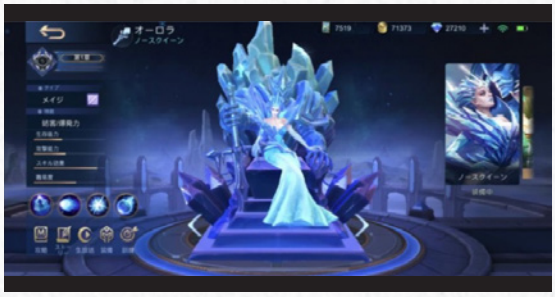


Defendant's character

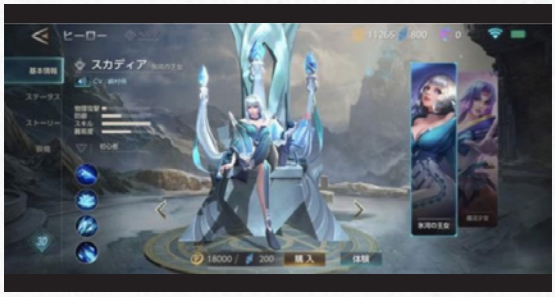


② Character 2[8]

Plaintiff's character



Defendant's character



Regarding Character 1, the court affirmed that it was a reproduction of the image of the plaintiff's character because the creative expressions were similar. As to Character 2, however, the court determined that *"although some points are similar; namely, a woman wearing a light blue top is sitting with one hand on a chair, legs crossed, and facing forward, and the backrest of the chair is higher than the woman's upper body, there are multiple differences in the specific expressions, and only the ideas are similar."*

As mentioned above, what is protected by the Copyright Act is the "expression" of the character itself, not the "idea." This case showed that the only issue when determining similarity is whether there is any commonality in the specific expressions.

VI. Conclusion

It is not easy to protect the characters themselves in Japan. There are many cases where even if two characters seem similar, it is challenging to establish infringement because only their ideas are common. This may be the reason why the Plaintiffs chose to sue the Defendant for patent infringement rather than copyright infringement despite the similarities in designs of the Pokémon and Palworld creatures. However, plaintiffs, in general, should not give up their pursuit of character protection. Efforts to protect characters by utilizing laws other than the Copyright Act, including the Trademark Act and Unfair Competition Prevention Act, are still possible in Japan.

7. No. 1 in the list of the plaintiff's images and the list of the defendant's images, cited from an annex of the Decision.
8. No. 5 in the list of the plaintiff's images and the list of the defendant's images, cited from an annex of the Decision.

Back to List of Articles

Overview of the Japanese Mandatory Retirement Age System

Yuriko Asada
yuriko.asada@ohebashi.com

I. Introduction

In Japan, where the population is rapidly aging, promoting employment stability and opportunities for elderly employees has become a critical policy focus. While Japanese law allows employers to adopt a mandatory retirement age system, whereby an employment contract automatically terminates when the employee reaches a certain age, some legal restrictions apply to the mandatory retirement age that can be set by employers.

The 2012 amendment to the Act on Stabilization of Employment of Elderly Persons (the "**Act**")[1] requires employers to maintain the employment of employees until the age of 65, but currently, employers are allowed to limit the range of employees eligible for continued employment until the age of 65 under certain transitional measures. However, the said transitional measures will end in March 2025, and from April, employers will be obligated to "employ all applicants" among their employees who wish to continue their employment until the age of 65.

This article outlines key aspects of the laws and regulations on the mandatory retirement age system in Japan that employers should be mindful of.

II. Laws and Regulations on the Mandatory Retirement Age

1. Duties to Secure Stable Employment

A mandatory retirement age system is legally valid if it is made part of the labor contract through the work rules. Although not required by law, most Japanese companies have adopted a mandatory retirement age system. According to the 2022 General Survey on Working Conditions of the Ministry of Health, Labour and Welfare ("**MHLW**"), 94.4% of companies of all sizes and 99.3% of companies with a thousand or more employees have such system.

Under Article 8 of the Act, where the employers have set the retirement age of their employees, such retirement age should not be lower than 60. According to one court decision, a violation of this rule would render the mandatory retirement age system invalid and void.[2] With regard to the retirement age, there should be no distinction between nationalities.

Also, under Article 9(1) of the Act, where employers have set the retirement age at less than 65 years old, such employers must take any of the following measures to secure the stable employment of their employees until the age of 65:

1. Act No. 68 of 1971, as amended by Act No. 78 of 2012.
2. Fukuoka High Court, Miyazaki Branch, Judgement, November 30, 2005, Rodo Hanrei No. 953, 71.

(a) raise the mandatory retirement age;
(b) introduce a continuous employment system (i.e., a system that requires the continuous employment of elderly employees beyond their retirement age if they so desire); or
(c) abolish the mandatory retirement age.

According to the MHLW's report as of December 22, 2023 (the "**Report**"), almost all Japanese companies have already implemented one of the above measures.

Additionally, under Article 10-2(1) of the Act, where employers have set the retirement age at 65 years old or over but under 70 years old, or a continuous employment system (except to continue to employ elderly employees until they reach the age of 70 or over), employers must endeavor to take any of the following measures to secure the stable employment of their employees until the age of 70:
(a) raise the mandatory retirement age;
(b) introduce a continuous employment system for those at the age of 65 years old and over; or
(c) abolish the mandatory retirement age.

According to the Report, 30% of Japanese companies have already implemented one of the above measures.

2. Continuous Employment System

There are two main systems for continuous employment, namely, re-employment and employment extension. The former involves allowing employees to first retire upon reaching the mandatory retirement age, and then rehiring them. They may be re-employed as full-time, part-time or contract-based employees. Typically, re-employment contracts are for a one-year period, with annual renewals.

In contrast, the employment extension system enables employees to continue working without retiring once they reach the mandatory retirement age, thereby maintaining their original employment contract without interruption.

Based on a survey, 63.9% of companies have only adopted the re-employment system, while 10.5% of companies have only adopted the employment extension system. Notably, 19.8% of companies have adopted both systems.

Even if a company adopts a continuous employment system, the company may not continue to employ an employee who has reached the mandatory retirement age if there are grounds for his or her dismissal or retirement (except on account of age) as provided in the work rules. However, it should be noted that there must be objectively reasonable grounds for not providing continued employment, and such grounds must be socially acceptable.[3]

III. Reduction of Wages After Reaching the Mandatory Retirement Age

If an employee's role, responsibilities and options for assignment changes remain the same before and after re-employment as a fixed-term employee (e.g., one year) upon reaching the mandatory retirement age, then a reduction in wages after re-employment could violate Article 9 of the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers (the "**Part-Time and Fixed-Term Employment Act**").[4] Therefore, such practice should be avoided.

Specifically, Article 9 of the Part-Time and Fixed-Term Employment Act prohibits differing employment conditions for fixed-term employees if their job duties and potential changes in job description and assignments are the same as those of regular employees. "**Job description**"

3. Guidelines for the Implementation and Operation of Measures to Secure Employment of Elderly Persons.
4. Act No. 76 of 1993, as amended by Act No. 71 of 2018.

refers to the nature of duties and the associated level of responsibility, which includes the scope of authority, role expectations in achieving outcomes, required responses in urgent or unexpected situations, and the level of performance targets. "**Changes in job description**" include alterations due to reassignments or job orders, while "**changes in assignments**" indicate personnel transfers between positions.

Thus, it is generally advisable to adjust the employee's role, responsibilities or options for assignment changes if the employer wishes to make a reduction in wages after re-employment to justify such reduction.

Please also note that Article 8 of the Part-Time and Fixed-Term Employment Act prohibits establishing unreasonable differences in the base pay, bonuses or other payments between fixed-term employees and regular employees, considering the relevant circumstances, including the roles, responsibilities and options for assignment changes. Therefore, it is essential to ensure that any changes in payment after re-employment with a fixed term are limited to reasonable changes considering the change in such circumstances.

IV. Concluding Remarks

The current laws and regulations on the mandatory retirement age system in Japan may continue to change as the need to secure stable employment for elderly employees increases. It is important to continue to pay attention to any such further amendments and related court decisions interpreting them.

Back to List of Articles