

SOEI VOICE

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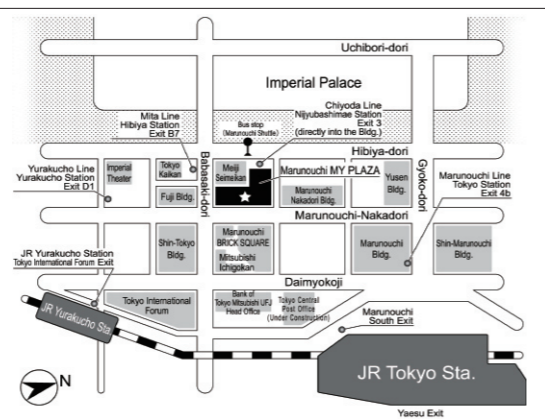


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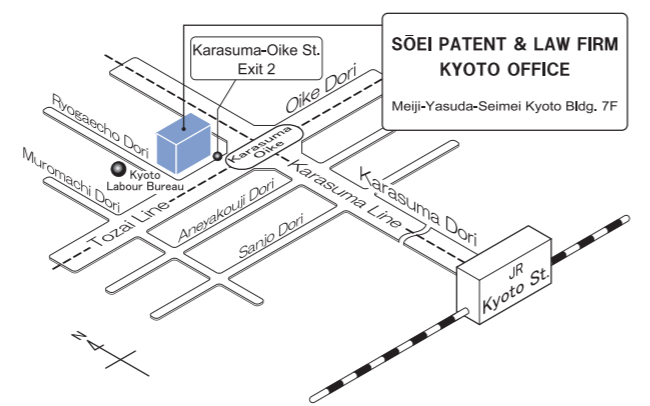
HEAD OFFICE

Address : Marunouchi MY PLAZA 9th fl.
1-1, Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-0005 JAPAN
Telephone : +81-(0)3-6738-8001
+81-(0)3-6738-8022 (for English)
Facsimile : +81-(0)3-6738-8005 (Patent/Design)
+81-(0)3-6738-8015 (Trademark)
E-mail : application@soei-patent.co.jp (Patent)
trademark@soei-patent.co.jp (Trademark)
design@soei-patent.co.jp (Design)



KYOTO OFFICE

Address : 552 Nijoden-cho Nakagyo-ku
Kyoto-shi Kyoto 604-0845 Japan
Telephone : +81+(0)75+221-8011
Facsimile : +81+(0)75+221-8013



Address
Marunouchi MY PLAZA 9th fl.
1-1, Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-0005 JAPAN
Telephone
+81-(0)3-6738-8001
+81-(0)3-6738-8022 (for English)
Facsimile
+81-(0)3-6738-8005 (Patent/Design)
+81-(0)3-6738-8015 (Trademark)
E-mail
application@soei-patent.co.jp(Patent)
trademark@soei-patent.co.jp(Trademark)
design@soei-patent.co.jp(Design)
URL
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What Changed After the Tohoku Earthquake

by Yoshiki Hasegawa , President



by Yoshiki Hasegawa

The great earthquake and tsunami that occurred in Eastern Japan took away the lives of nearly 20,000 people, destroyed the houses of millions and led to a serious nuclear accident. Japan has

suffered a financial blow and its people have been forced to change their lifestyles by this unprecedented disaster. Let us talk about what has changed after the earthquake.

VOLUNTARY RESTRAINT

Video footage of coastal towns being engulfed and destroyed by the enormous tsunami shocked everyone, and what is called a mood of voluntary restraint spread throughout the country. Many parties and celebratory events were cancelled, even in western Japan where there was no damage, and a large number of bookings at restaurants and hotels

were canceled. The impact of this kind of voluntary restraint on the economy could not be small, and, after the earthquake, Japan's GDP fell. Now that six months have passed since the disaster, the mood of voluntary restraint is fading out, but a shortage of electricity is delaying restoration.

SAVING ELECTRICITY

The nuclear power station in Fukushima has a long way to go before the critical situation comes to a close. Many other nuclear stations around the country have been taken off-line as the government evaluates their safety, and a nationwide electricity shortage has now become one of our main concerns. To deal

with this, many offices and factories are staggering their holidays so that different industries are operating their plants and offices on different days. There have been many efforts to save electricity, but these efforts cannot work to the advantage of the economy.

RADIATION

The uncontrolled release of radioactive isotopes from the Fukushima nuclear power station has already stopped and there may be no further danger of new radioactive contamination. The problem lies with the radioactive fallout after the accident, but the regions that

were affected and the intensity of the radiation have been investigated. Tokyo, for example, received only a small amount of radioactive fallout. Although some of the mass media in Japan have been featuring sensational stories, there is not much to worry about concerning health.

RESTORATION AND RECOVERY

Unfortunately, restoration and recovery of the affected areas are going slowly. One of the many reasons is political confusion, and the fact that the Democratic Party lacks a majority in the

Upper House is a big drawback. Our leader changed at the end of August and we are hoping for strong leadership from our new Prime Minister, Noda Yoshihiko.

GAMBARO NIPPON!

Since the earthquake, the Japanese have been able to say "Gambaro! Nippon (Don't give up, Japan)" without reservation. This change in the mind of the people will be the driving force for change in Japan. Just like Nadeshiko

Japan, the national football team that beat the world's top teams and won FIFA Women's World Cup in July, Japan will transform itself in the aftermath of the earthquake and become a prosperous and vibrant country.



The View from SOEI Tokyo Office, in October 2011

Patent

Responding to a Final Notice of Reasons for Rejection – A Divisional Application and a Petition

by Hiroyuki Nishimoto



by Hiroyuki Nishimoto

Although applicants often file divisional applications when the Examiner determines that the basic application does not fulfill the requirements for unity of invention, there are numerous other situations in which a divisional application is a useful option.

Once an application receives a Final Notice of Reasons for Rejection or a Final Rejection, amendments to the claims is severely limited. In addition to not

including new matter, amendments to the claims must meet at least one of the following conditions:

- (1) deletion of a claim
- (2) restriction by limitation of the scope of a claim
- (3) correction of typographical errors
- (4) clarification of an ambiguous description (but only if it has been mentioned in a Notice of Reasons for Rejection or a Final Notice of Reasons for

Rejection)

A divisional application is effective where an amendment aimed at fulfilling these conditions and clarifying differences over the cited references proves difficult.

Take, for example, a Claim 1 that, as originally filed, describes an invention comprising "A+B" and the first Notice of Reasons for Rejection cited lack of inventive step over Cited Reference 1, which describes an invention comprising "A+B'" (see flowchart).

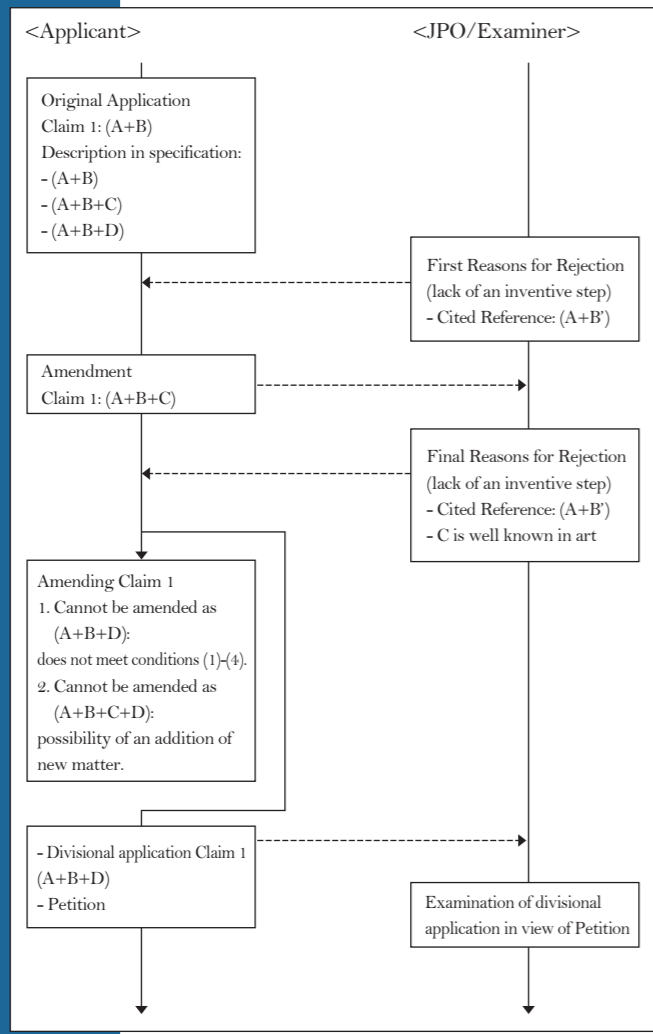
Because the specification as originally filed describes the embodiments "A+B", "A+B+C" and "A+B+D" (but not "A+B+C+D"), the Applicant amends Claim 1 to "A+B+C." However, the Examiner issues a "Final Notice of Reasons for Rejection" stating that

"A+B+C" lacks an inventive step since "C" is well-known in the art.

If "D" is not well-known in the art, it may be possible to overcome the inventive step objection with an amendment claiming "A+B+D". However, crucially, this amendment would not meet condition (2), on Page2. Furthermore, an amendment adding "D" to "A+B+C" would satisfy condition (2), but since the specification does not include an embodiment or other description covering "A+B+C+D," there is a risk that this amendment would constitute an addition of new matter. Thus, such an amendment would be quite risky.

In this situation, a divisional application with "A+B+D" as Claim 1 would be effective, since it is not necessary for a divisional application to fulfill conditions (1) to (4). However, if the Examiner decides that this divisional application can be rejected for the same reasons as the parent application, he will issue a "Final Notice of Reasons for Rejection" immediately.

To avoid a "Final Notice of Reasons for Rejection" in this situation, it is effective to file of a Petition. In the Petition, the Applicant supplies the JPO with an explanation stating that the divisional application is described in the specification of the parent application and that the inventions according to the claims of the divisional application and the inventions according to the claims of the parent application are not identical. The Petition also allows the Applicant to explain why the application should not be rejected for the same reasons as the parent application. Thus, we strongly recommend that a Petition be filed together with a divisional application.



Patent

Exception to Lack of Novelty

by Yasuki Yanagi



by Yasuki Yanagi

The Japanese Diet passed legislation to revise the Japanese Patent Law on 31 May, 2011, and it is expected to go into effect

next year. Here we will discuss the newly expanded scope of Art. 30, "Exceptions to lack of novelty."

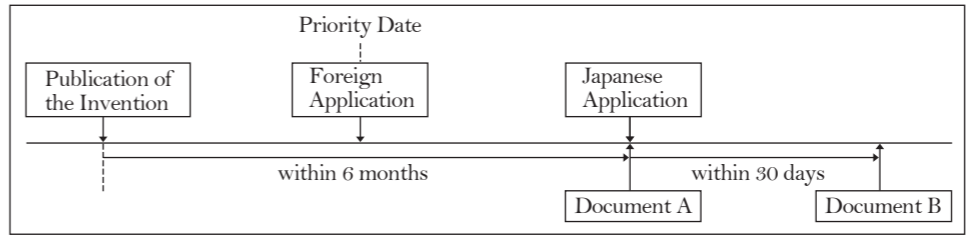
SUMMARY OF THE SYSTEM

In principle, inventions which become publicly known before the application has been filed are not patentable under the Japanese Patent Law. However, Art 30 establishes a procedure whereby an invention that has become publicly known prior to the filing date can be treated as not lacking in novelty if certain requirements are fulfilled.

While the concept behind "Exception to lack of novelty" is similar to the "grace period" in US, there are significant differences. In the U.S., the "grace period" is one year; in Japan, it is six months. In Japan, "the person having the right to obtain a patent" (usually the inventor or assignee) must file the application within six months of the act that resulted in the loss of novelty. If application claims priority based on the Paris Convention, the Japanese application (not the foreign application) must be filed within six months of the date on which the invention became publicly known. If it is a PCT application, the international application must be filed within six months. For

applications first filed in Japan or claiming Paris Convention priority, the applicant must also submit a document stating that he is seeking an Exception to lack of novelty at the same time he files the application (Document A), and, no more than 30 days later, he must submit a document proving that the application satisfies the requirements (Document B). If the application is a PCT application, Documents A and B must be submitted within 30 days following the due date for entry into the national phase or a Request for Examination is filed, whichever is earlier.

Furthermore, when the invention is published against the will of the person having the right to obtain the patent, the application can receive an exception by filing the application in Japan or the international application designating Japan within six months following the date on which the invention became publicly known. In this case, there is no need to submit Documents A and B.



REVISION

In the present Law, when the person having the right to obtain the patent publishes the inventions at his own volition, the inventions which can receive the exception to lack of novelty are limited to certain types of disclosure. For example, it is limited to conducting an experiment for developing the invention, making a presentation in a printed publications or through the internet, or making a presentation in writing at a designated study meeting or exhibition, and so on. Inventions which become publicly known due to sales activity and so on do not qualify for the exception.

Once the revision comes into force, the inventions becoming publicly known merely as a result of “actions of the person having the right to obtain the patent*” will be able to receive exception to lack of

novelty. In other words, inventions which become publicly known due to presentations on TV or radio, sales and distribution, or any kind of presentation (e.g. oral) at any meeting, seminar or exhibition will be able to receive the exception.

This expansion of the system will be useful to applicants, but please keep in mind that this system is only a special exemption. For example, an exception to lack of novelty with respect to your own publication will not enable the application to overcome the same invention made public or filed by a third party prior to the filing date of your invention, if the third party also made the same invention. Therefore, as always, it is preferable to file the application before disclosing the invention to the public even after the revision go into effect.

NOTE

I will be in Washington D.C. from November 2011 to February 2012, and I would be pleased to discuss the above topics

further with anyone who is interested while I am there. Please do not hesitate to contact me (E-mail: yanagi@soei-patent.co.jp).

* Publication of a patent application by the JPO or a foreign Patent Office is not the result of “actions of the person having the right to obtain the patent.”

Copyright

Are TV Broadcasters’ Copyrights Infringed by Peer-to-Peer Forwarding?

~2011.1.18, Supreme Court Decision, H21-653~

by Tomoya Kurokawa



by Tomoya Kurokawa

1. BACKGROUND

Under the Japanese Copyright Act, a copyright owner has the exclusive right to make a public transmission of his work, including making the work transmittable (Art. 23). Thus, if an unauthorized party uploads copyrighted content, such as

recorded TV program, onto computer server which is connected to the Internet, this act infringes the copyright because the content can be transmitted to any person who would like to download the contents.

2. FACTS

Nagano-Shoten, the defendant, enables persons who live outside the broadcast area to enjoy TV programs broadcast by TV broadcasting companies by re-transmitting the TV programs over the internet at the same time they were being broadcast by the broadcasting companies, as shown in Fig. 1. To enjoy the service, a User must buy a data transmitter and connect it to the system managed by the defendant. Prior to the actual broadcast, the User instructs the system to download a specific TV program, the system receives the TV program as it is broadcast by the TV broadcasting company, transfers the TV program to the data transmitter and the transmitter sends it to the User through the Internet.

Intellectual Property High Court

dismissed the plaintiffs’ claim because each data transmitter in the defendant’s system is connected to each user on a peer-to-peer basis, and the defendant did not transfer the TV programs to anyone, only to a predetermined user. Thus, the court found that defendant did not transmit the TV program to the “public.”

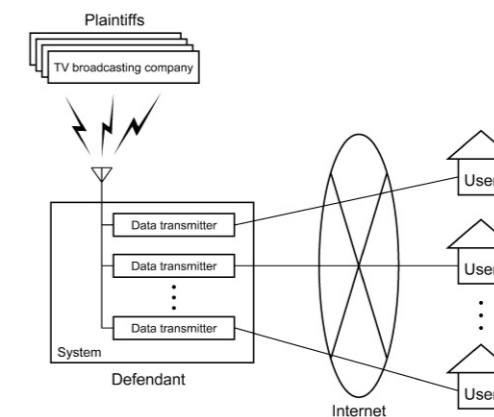


Fig.1 Service of the Defendant

3. SUPREME COURT DECISION

The plaintiffs appealed to the Supreme Court. The Supreme Court said that (i) the copyright law prohibits an act of making the work transmittable to public, (ii) defendant makes the requested TV program transmittable to users by connecting the data transmitter in his system and managing it, (iii) even if every one of the data transmitters in the defendant’s system is connected to a

different user on a peer-to-peer basis, any person who enters into a contract with the defendant can enjoy the service, and (iv) the defendant thus makes TV program transmittable to public users. Finally, the Supreme Court vacated the decision and remanded it to the IP High Court for further proceeding with respect to the plaintiffs’ claim.

4. COMMENTS

The act of the users, enjoying TV programs received from the defendant, is private use and copyright cannot reach their act (Art. 30). The act of the defendant is simply in support of the users’ private use and it is unlikely that the defendant’s system would cause the TV program to be

copied or spread to a wider public than TV broadcasting companies intended when they broadcast the signal. This decision is over protective of established TV broadcasting companies and less protective of innovative new service providers.

Trademark

Practical Use of the Defensive Mark System

by Mitsuharu TAKEUCHI



by Mitsuharu TAKEUCHI

1. INTRODUCTION

One option for protecting a well-known trademark in the Japanese Trademark System is to obtain a "Defensive Mark Registration." In 1960, the Japanese Trademark practice introduced "Defensive Marks" based on the British Trademark System in order to enhance the protection of well-known trademarks.

A Trademark Registration only provides protection when a third party uses the mark with respect to goods/services similar to or the same as the

goods/services designated for a Registered Trademark. However, use of the mark by a third party with respect to goods/services different from the goods/services designated for the trademark may cause confusion, dilution or pollution if the trademark is well-known and damages the goodwill that has accrued to the Registered Trademark. The "Defensive Mark System" is able to remedy this weakness in the protection provided by trademark registration.

2. REGISTRATION REQUIREMENT

Art.64 of Trademark Law sets out the requirements for registration of a Defensive Mark. These requirements may be outlined as follows:

- (1) Registered Trademark [A] is well-known with respect to the designated goods/services provided by the trademark owner and designated in the registration.
- (2) If a third party were to use Trademark

- [A] with respect to goods/services, [B], which are different from and not similar to the goods/services designated in the Trademark [A] registration, there is a risk that consumers would be confused about the origin of the goods/services, [B].
- (3) The application for a Defensive Mark is filed by the owner of Trademark [A], is directed to Trademark [A] and designates the goods/services, [B].

3. DEFENSIVE MARK PROTECTION

The table below compares the range of protection provided by Trademark

Registrations and Defensive Mark Registrations

	Range of Protection (A third party's trademark application that meets the following conditions will be rejected, and the registrant can exercise its rights against a third party if the third party uses a mark with respect to goods/services that meet the following conditions.)	
	Mark	Goods/Services
Trademark Registration	similar or same	similar or same
Defensive Mark Registration	same	same

As shown in the table, the range of protection of a Defensive Mark Registration is narrower than that of a Trademark Registration. As a result, it seems to be impractical to protect a well-known mark with only the Defensive Mark System because the number of goods/services on this earth that could

cause confusion with respect to a well-known mark could, in many cases, be too many. That is to say, in order to obtain secure protection for a well-known mark using only the Defensive Mark System, the trademark owner has to designate all the goods/services for which there is at least some risk of infringement.

4. VALUE OF THE DEFENSIVE MARK SYSTEM IN PRACTICE

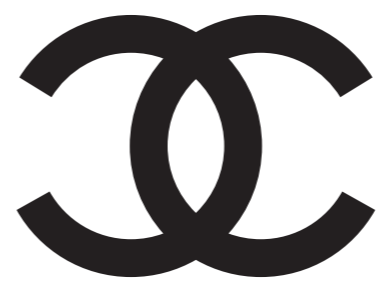
In practice the value of the Defensive Mark Registration is not only the protection provided by a Defensive Mark Registration. The value of a registration often lies in providing a means for easily proving the fame of the registered mark in a Trademark Invalidation Trial or a lawsuit alleging infringement, etc. The mere fact that the mark has been registered as a Defensive Mark means that the JPO has officially determined that the mark is well-known, and, regardless of the goods/services with which a third party uses the mark, it is easy to prove that the mark is being used to compete

unfairly or is infringing under the Unfair Competition Prevention Law.

For this reason, some companies actively take advantage of the Defensive Mark System. The Industrial Property Digital Library (IPDL) provides information on registered Defensive Marks in its "Japanese Well-Known Trademark" database (http://www.ipdl.inpit.go.jp/homepg_e.ipdl).

For more information on obtaining a Defensive Mark Registration, please contact us. (trademark@soei-patent.co.jp)

5. SAMPLES OF REGISTERED DEFENSIVE MARKS



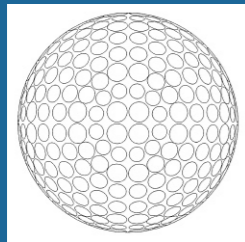
Design

Design and Patent Applications -The Belt and Suspenders Approach-

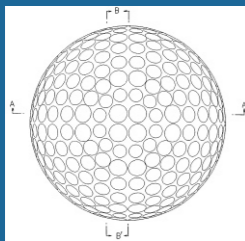
by Kenichi Tsukahara



by Kenichi Tsukahara



Patent



Design

In Japan, many companies file not only a patent application but also a design application for a same product. For example, a Japanese golf ball maker filed a patent application and a design application for a golf ball having dimples that are shaped and arranged to reduce air resistance and enable the ball to fly farther. (The upper drawing is Japanese patent registration No. 3698195, and the lower drawing is Japanese design registration No. 1144546.)

This strategy is particularly effective and useful because protection under the design law has the following advantages that are not found under the patent law:

- (1) The registration rate (Number of Registrations/Number of Applications) for design applications is higher than for patent applications. The registration rate for patents is approximately 50% while for designs it is approximately 80%!
- (2) It is possible to register a design application more quickly than a patent application. It generally takes longer to register a patent right. When the applicant receives an official action, it takes longer still, and patent applications commonly receive official actions. On the other hand, majority of design applications are registered within one year following the filing date, and official actions are not common.
- (3) Design applications are less expensive than patent applications, and, because it is unnecessary to prepare detailed claims and

specification for a design application, it is possible to prepare design application relatively quickly.

- (4) When a patent right is an element in a lawsuit or a negotiation, technical disputes often delay resolution of the problem. On the other hand, it is often possible to solve the problem quickly by using a design right, because technical expertise is not necessary to the determination of whether the alleged infringing product is identical or similar to the registered design.
- (5) The term of the protection of a design right is longer than that of a patent right. The term of the protection for a design right is 20 years from the date of the registration, but the term of the protection for a patent right is 20 years from the filing date. In many cases, it takes much longer for a patent application to mature into a patent right, and, consequently, the term of the protection is shorter than 20 years.

Some Japanese companies are of the opinion that the scope of a design right is narrow and can only be used to stop an infringing product that is identical to the registered design. But use of the partial design system and the related design system provides broader scope to a design right. Based on the above reasons, many Japanese companies recently began filing design applications to compensate the limitations on the patent right.

Law

Precedent in Focus – Derelict Building Photograph Case Do Photographs That Imitate Infringe? (Intellectual Property High Court decision, May 10, 2011)

by Kazuhiro Ajisaka



by Kazuhiro Ajisaka

1. OUTLINE

In the present case, the appellant (plaintiff) is a photographer who has taken “derelict buildings” as his subject, and the appellee (defendant), is another photographer who has also taken “derelict

buildings” as his subject, photographing many of the same buildings previously photographed by the plaintiff as well as publishing and distributing books containing these photographs.

THE PLAINTIFF CLAIMED THAT THE DEFENDANT’S ACTIONS

- (1) Infringed the copyrights of the plaintiff’s copyrighted photographs (the right of adaptation and rights of reproduction and assignment as the copyright owner) and the moral rights of the copyright owner (proprietary rights); and
- (2) Infringed a legally protected right for recognition of the appellant as having first

featured “derelict buildings” as a photographic subject. Further, the plaintiff demanded an injunction against the reproduction and distribution of the defendant’s books by the appellee, as well as partial disposal and damages, in accordance with the Japanese Copyright Law.

2. POINTS IN DISPUTE

- (1) Whether there was copyright infringement focusing on adaptive rights infringement where the photographic

subject is identical
(2) Whether a legal right exists for the appellant as a result of pioneering a genre

3. COURT DETERMINATIONS

(1) Existence of copyright infringement

To be called an adaptation of a copyrighted work, a copyrighted work is first required to be based on an existing work, and, while retaining essential characteristics that are identical in terms of expression, includes improvements, additions/reductions or modifications to

the precise expression (First Petty Bench of the Supreme Court decision, June 28, 2001 (Esashioiwake Case)). Since the plaintiff’s photographs are of an existing derelict building, and the photographer did not intentionally position the photographic subject or personally add the photographic subject matter, there is

no argument that the essential characteristics of the plaintiff's photographs are to be found in the expression of the photographic subject itself, and the essential characteristics are found in such expressive decisions such as the season during which the photograph is taken, the photographic angle, coloration and the angle of view. Since the defendant's photograph (right) and the plaintiff's photograph (left) differ in terms of their composition or in terms of the overall impression that they give,

their essential characteristics in terms of expression also differ, and thus the appellant's claim of infringing the right of adaptation are groundless.

(2) Legal right as a pioneer

Since derelict buildings are existing buildings, legal protection against photographs taken of derelict buildings, which may be photographed freely, exceeds the copyright and the moral right of the author and cannot be recognized as a principle.

4. REVIEW

Where the photographic subject, such as an existing building or scenery, can be photographed freely, recognizing copyright and the moral right of the author to the photographic subject matter itself would be improper, since this would result in giving exclusive rights under copyright law to the photographer who first photographed the photographic subject. Conversely, even where such existing buildings and scenery are photographed, each photographer controls how to capture objectively existing scenery in a "photograph" by, for example, selecting certain photographic procedures (angle, lens, film or imager size and focal length), photographic techniques (diaphragm, shutter speed, etc.) and post-photographic processing

(printing, cropping, etc.), thereby embodying the photographer's conceptual emotiveness in terms of expression, and copyright is recognized for the resulting work. This point cannot be denied even if it leaves much of the photographic technique described above to the camera. In the present case, the appellee might have referred to the appellant's photographs as an option for a photographic subject, but copyright cannot be recognized as extending to imitation in view of such differences as the composition of the photograph, and thus the decision is reasonable.



The plaintiff's photograph



The defendant's photograph



The plaintiff's photograph



The defendant's photograph

Come to Japan

Dashi –Japanese Cuisine is Impossible Without It

by Kaori Kotani

In recent years, Japanese cuisine has acquired a worldwide following. Restaurants serving Japanese cuisine can be found the world over and their numbers continue to rise.

Dashi, or soup stock, is one ingredient that is essential to Japanese cuisine. It is generally made by boiling *konbu* (dried

kelp), *katsuobushi* (see the picture, dried bonito shavings), and *shiitake* (mushrooms), and widely used in Japanese dishes such as *miso soup*, *udon broth*, and various boiled dishes. Japanese people are fastidious about their dashi, with many going by the mantra that "one who cannot make good dashi cannot make good Japanese food."



Katsuobushi

ICHIBAN DASHI AND NIBAN DASHI

This insistence on dashi perfection manifests itself in the obsession with *Ichiban Dashi* or *Niban Dashi* or, in other words, first dashi and second dashi. First dashi is mainly made by simple extraction of only the dried bonito's refined flavor and is used to make refreshing soups. On the other hand, second dashi is made by combining new dried bonito with the bonito recovered after making first dashi

and fresh water, boiling it longer, and producing a richer stock. This second dashi has more flavor and a broad range of uses. It is commonly used in *miso soup*, boiled dishes, and as a seasoning for blanched spinach served with soy sauce.

People use the same ingredients in a wide variety of creative ways by varying the various elements such as amounts and boiling time to achieve fine distinctions in taste.

DASHI BY REGION

Dashi varies considerably by region. Although bonito is generally used for making dashi, some regions use mackerel, tuna, and dried minnow. Dried kelp, which is also used quite commonly in making dashi, can vary significantly in taste depending on the length of time and methods used in drying, enabling one to enjoy many different flavors across regions.

We recommend comparing the varying tastes of *oden* (boiled radish or devil's tongue jelly) and *ozoni* (see the picture, boiled rice cake and vegetables, generally a dish consumed during New Year's celebrations), which are two dishes that contain dashi obtained using different methods. As a result, there is a diverse range of tastes that differs by household.



Ozoni

DASHI IS WIDELY AVAILABLE

Although dashi is essential to Japanese home cooking, the sheer amount of time taken to produce it has given rise to convenient options such as dashi powder produced by extracting the flavor from dried bonito and dried kelp. These are widely available for purchase in

supermarkets in liquid or solid form ready for instant consumption.

We hope that visitors to Japan will take the time to give this example of Japanese attention-to-detail a try and enjoy the full spectrum of pleasures dashi's flavors can provide.

Come to Japan

The Site of Reversible Destiny-Yoro Park

by Kyohei Fujita



In Japan, we have many wonderful art galleries and science museums. The number of museums exceeds 100 in Tokyo alone. For example, the Mitsubishi Ichigokan Museum is less than a block from our Tokyo headquarters. I enjoyed the opening exhibition, "Manet and Modern Paris," and saw many of his famous pieces when the museum first opened in 2010.

However, I would like to introduce our readers to a museum with a taste quite different from that found in any other museum. Located in Gifu Prefecture, well away from Tokyo, its name, "The Site of Reversible Destiny," does not make it easy for people to imagine the exhibits that will be found there. The artist/architect Shusaku ARAKAWA and

his partner, the poet Madeline GINS, designed and created "The Site of Reversible Destiny" park in 1995. They wanted to create "a theme park of the mind" that would overturn and reverse the old and negative concept of "death equals destiny."

Once you set foot in the park, you will be surprised by the peculiar view of the park. Unlike typical parks, this special park consists entirely of inclines and gradients. At the park's entrance, you can even rent helmets and athletic shoes for your walk. In other words, a walk in the park can be a little dangerous without a helmet and athletic shoes! The truth is, newspapers have reported injuries in the past.

However, the park is still full of attractions.

THE ELLIPTICAL FIELD

The *Elliptical Field* is the center of the park and is a web-like circuit of paths in a bowl-shaped field with the longest diameter of 130 meters. In order to view

the entire park, you have to walk up and down many steep grades laid out in a sylvan field, which will work up a sweat even for adults.

THE CRITICAL RESEMBLANCE HOUSE

The *Critical Resemblance House* is a house that reverses the normal notion of a house. The sofa and the kitchen unit are stuck through the wall and the toilet and

the desk are put on the ceiling. You will experience extraordinary feelings in this house.

There are many other interesting

spots in the park: *Insect Mountain Range*, *Gate of Non-Dying*, *Zone of the Clearest Confusion and Exactitude Ridge*. It is impossible to imagine what these places look like from their names. However, the creators have provided "Instructions" at each spot on how to enjoy it.

I believe the extraordinary experiences at the Site of Reversible Destiny will remind you of feelings that have been lost in the busy lives in the big cities.

If you have already traveled in Japan many times and have had enough of Tokyo and Kyoto, you may want consider The Site of Reversible Destiny, Yoro-Park as your next destination!

URL:<http://www.yoro-park.com/e/rev/index.html>
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Staff News

Kazuaki TAKAHASHI

Mr. Takahashi graduated from Doshisha University in 1997. After graduation, he worked for a design firm, control and automation equipment manufacturer and patent firm in Osaka. He qualified as a Patent Attorney in 2009 and joined SOEI in 2011. He is a member of the Japan Patent Attorneys Association (JPAA).



Kazuaki TAKAHASHI

Toshiaki MATSUZAWA

Mr. Matsuzawa received a bachelor's degree in Aeronautical Engineering from Tohoku University in 2004. After graduation, he joined SOEI and qualified as a patent attorney in 2007. In 2010, he spent a year in the Intellectual Property Department at IHI Corporation and then he rejoined SOEI in 2011.

He is handling patent prosecutions and appeals in the fields of semiconductor processing, mechanical devices, gaming machines and construction machines.

He is a member of the Japan Patent Attorneys Association (JPAA).



Toshiaki MATSUZAWA