

# JTA BULLETIN

THE JAPAN TRADEMARK ASSOCIATION

## THANK YOU FOR YOUR SUPPORT

*As reported in the media, we suffered a huge earthquake and tsunami in the Tohoku area on March 11, 2011. We have since received many warm messages of encouragement and support from all over the world. Although it will take time to recover from the damage caused by these disasters, we believe we will be able to successfully overcome these difficulties. We thank you very much for your thoughtfulness and appreciate your continuous friendship.*

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### 1. Recent Court Decisions

#### (1) Trademark case

**The Japanese Supreme Court dismisses the plaintiff's appeal in the "Syohukumaki" case**

*NAKATANI, Yuko  
Anderson Mori & Tomotsune*

In this case, the plaintiff, K.K. Kodaisuzumeshi-sushiman, a chain of sushi restaurants, owns the registered trademark "syo-u-hu-ku-ma-ki" (the "Registered Trademark") and brought a claim for trademark infringement against the major retail chain, AEON K.K., over the defendant's use of the

word "Jyu-ni-hi-to-e-no-syo-u-hu-ku-ma-ki". In the first instance, the Osaka District Court found in favor of the plaintiff on October 2, 2008. This decision was then reversed by the Osaka High Court on January 22, 2010 and the defendant's appeal was upheld. The Supreme Court rejected the plaintiff's request for review and consequently, the High Court decision became final.

There were two principal issues in this case: (1) whether or not "Jyu-ni-hi-to-e-no-syo-u-hu-ku-ma-ki" is similar to "syo-u-hu-ku-ma-ki" and also (2) whether or not "syo-u-hu-ku-ma-ki" is a "common name" under Article 26 (1) (ii) of Trademark Act.

## (1) The first issue

Registered Trademark (the mark of the plaintiff)	Trademark (the mark of the defendant)
招福巻	十二単の招福巻
(pronunciation) “Syo-u-hu-ku-ma-ki”	(pronunciation) “Jyu-ni-hi-to-e-no-syo-u-hu-ku-ma-ki”

“Jyu-ni-hi-to-e-no-syo-u-hu-ku-ma-ki” is a compound noun comprised of “Jyu-ni-hi-to-e” and “Syo-u-hu-ku-ma-ki” because in Japanese “no” is equivalent to “of” in English. Furthermore, “Syouhukumaki” consists of “Syouhuku” and “maki”. “Syouhuku” means to bring luck and “maki” means a (sushi) roll. Therefore, it means a sushi roll bringing luck. “Syouhukumaki” is often used to refer to the sushi roll that is eaten, in order to bring good fortune, on significant occasions including *Setsubun* on February 3, i.e., the traditional event celebrating the beginning of spring (please see (2) below). Regarding the part “Jyunihitoe”, “Jyuni” means twelve and therefore consumers naturally recognize from “Jyunihitoeo (syohukumaki)” that the sushi roll is made of twelve ingredients. As such, “Jyunihitoe” is added as a modifier to the “Syohukumaki” and is not distinctive per se. Accordingly, the part “Syouhukumaki” gives a strong impression as an indication of the goods.

Regarding the criteria for evaluating the similarity of trademarks, according to Supreme Court precedent (the Tsutsumino-ohinakkoya case, Supreme Court, September 8, 2008) the court is only allowed to focus on part of a trademark and compare that part with another trademark if (a) that part gives a strong impression as an indication of the source of the goods or services or (b) the remaining part is not distinctive.

Therefore, in light of this Supreme Court decision, the court was allowed in this case to focus on “Syo-u-hu-ku-ma-ki”. Consequently, these trademarks are similar due to the inclusion of the word “Syo-u-hu-ku-ma-ki” in both.

## (2) The second issue

With respect to whether or not “Syo-u-hu-ku-ma-ki” is a “common name” for a sushi roll which is eaten to bring good fortune on significant occasions under Article 26 (1) (ii) of the Trademark Act, the court of

first instance decided that “syo-u-hu-ku-ma-ki” is not a common name from the following facts; (i) prior to 2005, only a few advertisements used “Syouhukumaki” as a name for a sushi roll eaten on *Setsubun*, (ii) “E-ho-u-ma-ki”, “Ma-ru-ka-bu-ri-ma-ki” or other names were used for a sushi roll eaten on *Setsubun* in advertisements, (iii) while a well-known Japanese dictionary published in 1999 did not include “Syouhukumaki”, the dictionary included “Ehoumaki” and (iv) the plaintiff made some efforts to secure its trademark.

However, the Osaka High Court decided that “Syouhukumaki” is considered a “common name” under Article 26 (1) (ii) of the Trademark Act.

The word “Syouhukumaki” is recognized as the sushi roll eaten on significant occasions by general consumers and so general consumers who do not know the Registered Trademark are likely to recognize “Syouhukumaki” as a common name of goods. In addition, the word has been used in supermarket advertisements since 2005 (if not before) and consumers do not recognize “Syouhukumaki” as a trade name of goods made by a specific manufacturer. Moreover, the fact that the word “Syouhuku” was included in well-known Japanese dictionaries published in 2008 means that the name has become more commonplace than in 2004 because publishers determine new dictionary entries on the basis of actual usage of a word over a period of several years. In light of the foregoing facts, the court affirmed that “Syouhukumaki” had become a “common name” from 2007 onwards (if not before) and consequently the Registered Trademark does not have any effect of the trademark rights under Article 26 (1) (ii) of the Trademark Act.

In the light of these considerations, the use of “Jyu-ni-hi-to-e-no-syo-u-hu-ku-ma-ki” does not constitute an infringement of the Plaintiff’s trademark rights.

- END

## (2) Unfair Competition Prevention Law Case

MURAI, Koji

S.KITAMURA PATENT OFFICE

## Case Overview

Case Number: 2008 (wa) 8262

Decision Date: June 9, 2009

Plaintiff (X): Faith Beauty Kabushiki Kaisha  
 Defendant (Y): Kabushiki Kaisha Bloom • Classic,  
 Kabushiki Kaisha Medicabote, Kabushiki Kaisha  
 Ands Corporation, Kabushiki Kaisha Sanmedicos

### Brief summary of the Decision

1. The court rejects all of the plaintiff's claims.
2. The court costs shall be borne by the plaintiff.

### Fact Summary

X, a cosmetic product sales company, claims that Y, cosmetic and beauty related products manufacturing and sales companies, imitate the configuration of X's goods, which is the action stipulated in Article 2 (1) (iii) of the Unfair Competition Prevention Act, so X seeks an injunction against acts of assigning, leasing, displaying for the purpose of assignment or leasing, exporting or importing of Y's goods and requests that they be destroyed. Further, X claims that Y's sales of imitations of X's goods constitutes a tort, so X seeks an injunction against acts of assignment and others according to Articles 709 and 719 of the Civil Code.

### Issue

1. Whether or not X's products are another person's goods
2. Whether or not Y's products are imitations of X's products
3. Whether or not the sales of Y's products constitute a tort under Article 709 of the Civil Code
4. The amount of damages incurred by X

### Background

X has sold cosmetic products comprising nine items since around October, 1997. In October, 2007, the modified configuration of the goods, X's product, was launched in the market. In the meantime, Y launched Y's products in the market in January 2009 or March 2009. The product containers of X's products and Y's products are made using the same mold tool, so the shape and dimension of the containers are identical.

### Decision of the court

1. Whether or not X's products are another person's goods.

Article 2 (1) (iii) of Unfair Competition Prevention Act stipulates that it is an act of unfair competition to sell the imitated configuration of another person's goods. That is because such sales of the imitated configuration of another person's goods, which are developed and manufactured by another person's capital and efforts, put another person in an unreasonably disadvantageous position in the market while it puts the other person in an unreasonably advantageous position in the market; furthermore, allowing such actions discourages product development.

The term "configuration of goods" means the external and internal shape of goods and the pattern, color, gloss, and texture combined with such shape, which may be perceived by consumers or other purchasers when making ordinary use of the goods (Article 2 (4) of Unfair Competition Prevention Act).

Product concepts and item names of Y's products do not constitute a configuration of the goods. The configuration of X's goods should be determined mainly by judging the shapes, dimensions, colors, spot color, material gloss and textures, considering materials, product names, and letters applied to the containers as far as they are considered to be designs.

The shape of X's product containers are not new and made using an existing molding tool at a container manufacturer; the design company was assigned to design the container color, gloss, texture, and spot color besides the container shape and dimensions. Therefore, what is developed and manufactured by X is a configuration of goods comprising the container color, gloss, texture, and spot color.

2. Whether or not the Y's products are imitations of the configuration of X's products.

Imitation as stated in Article 2 (1) (iii) of the Unfair Competition Prevention Act means to make a substantially identical configuration of another person's goods based on that person's goods.

Therefore, the product concept and item names of X's products cannot be elements to be imitated. The elements to be imitated are a configuration of goods that comprises the container color, gloss, texture, and spot color.

In this case, the configuration of Y's goods cannot be said to be substantially identical to that of X's goods. Therefore, the manufacture and sales of Y's goods do not constitute an action stipulated in Article 2 (3) (iii) of the Unfair Competition Prevention Act.

3. Whether or not the sales of Y's products constitute a tort action under Article 709 of the Civil Code.

Y's product containers are made using the same molding tool which is used to make X's products, so that the shape and dimensions of Y's product containers are identical to those of X's products. Furthermore, product line-ups and item names of Y's products are the same as those of X's products.

Y commenced the manufacture and sale of Y's

products to fulfill Y's obligation to supply the products to clients because of difficulties in obtaining X's products after receiving unilateral notice that X would double the commission rate without the chance for negotiation. Such actions of Y are not problematic under the law as they are an independent company's discretion.

Even if product line-ups are attributed to X, there are no legal grounds to give X exclusive use of such product line-ups. There being no claims that X has any exclusive rights such as a patent concerning the product composition, it is natural that Y's product has the same composition as substitute products.

Therefore, even if Y has imitated X's products in the above-mentioned aspects, it cannot be said that Y's actions are out of the scope of fair and free competition in the market.

4. The amount of damage incurred by X  
No decisions have been rendered.


- END


## 2. Recent IP High Court Decisions and Appeal Board Decisions

### (1) Cases where Distinctiveness of the mark was discussed

*TSURU, Kurumi*

*Onda Techno Int'l Patent Attys.*



Trial No. Date	Trademark in question	CL(s)	Decision Yes/No	Reason
<b>Appeal</b>				
2009-650169 Apr. 27, 10	MORE CONTROL. LESS RISK.	9 10 35	Yes	The Examiner found that the trademark in question is recognized as a catch-phrase merely describing a selling point of goods or services; however, the trademark in question, as a whole, should be considered as a sort of newly-coined phrase which has no special meaning.
2009-15390 Jul. 28, 10	DF Double Forged	12	Yes	The term "Double Forged" is not generally recognized as describing a nature of particular goods directly nor specifically. Therefore, the trademark in question will serve as a "trademark" under the Japanese Trademark Law.
2009-650165 Sep. 7, 10	17 74	10 18 25	No	The trademark in question is comprised only of regular numbers. It must be said that the trademark in question is merely a simple and ordinary mark.
2009-19046 Sep. 15, 10		31	No	The trademark in question, when used in relation to dog foods, will be recognized merely as a container of such goods. Therefore, it must be said the trademark in question will not serve as a "trademark" under the Japanese Trademark Law.
2009-12730 Apr. 28, 10	CRISPY ONION	29	No	The trademark in question is descriptive of a quality or an ingredient of goods and therefore, will not serve as a "trademark" under the Japanese Trademark Law.
2009-4625 Jun. 10, 10	PLAY BETTER, PLAY FASTER, AND HAVE MORE FUN	9	No	The trademark in question is recognized as a catch-phrase merely describing a selling point of goods or services.
<b>Opposition</b>				
2009-685002 Apr. 15, 10	OLIGO GEL	3	Yes	The term "OLIGO" will not be recognized as "oligosaccharide" by consumers. Therefore, the trademark in question will serve as a "trademark" under the Japanese Trademark Law.

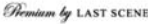

2010-900084 Sep. 14, 10		29	Yes	The trademark in question is not immediately recognized as a milk crown although the motif thereof may be the same. Therefore, it can't be said that the trademark in question directly nor specifically indicates a quality of the designated goods "milk; goods made from milk; milk flavored goods."
2009-900292 Mar. 29, 10	<b>SIXTY FORTY FABRIC</b>	18 25	Yes	The Examiner found that the trademark in question merely describes a quantity or product number of goods; however, the trademark in question, as a whole, should be considered as a sort of coined word.
2009-900267 Apr. 26, 10	Health & Beauty	35	No	The trademark in question, when used in relation to the designated services "retail service or wholesale services of cosmetics, dentifrices and soaps," will be recognized only as meaning "health and beauty."
2009-900249 May 19, 10	Scan to FTP	9	No	The trademark in question is recognized merely as one of functions that process scanned data in relation to digital complex machines and their parts and fittings.

(2) Cases where similarity of marks was discussed

SATO, Shunji  
TMI Associates

(Hereinafter "=" means "similar" and "≠" means "not similar")

Case No. Date	Registered Trademark / Plaintiff's mark	Decision = / ≠	Challenged mark	CL (s)	Reason
<b>Trademark Infringement Cases</b>					
2009(Ne)10031 Oct. 13, 09 (IP High Court Decision)	<b>AGATHA</b>	=	 Agatha Naomi	14	The IP High Court recognized that registered trademark AGATHA for its accessories was well known among traders and consumers in Japan, and decided that the challenged marks were similar to the registered trademark "AGATHA."
2009(Wa)21018 Feb. 27, 09 (Tokyo Dist. Court Decision)		≠			The Tokyo Dist. Court found that the challenged marks should be recognized in their totality, and were thus dissimilar to the registered trademark.




2007(Wa)4733 Jul. 16, 09 (Osaka Dist. Court Decision)	プレミアム <b>PREMIUM</b>  (PREMIUM in katakana)	≠	   Premium by LASTSCENE	25	Since the word “Premium” was considered to be weak as a source indicator, the portion “by LAST SCENE” functioned in a stronger manner as a source indicator. The Osaka Dist. Court found that the challenged marks should be recognized in their totality, and were thus dissimilar to the registered trademark.
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**Unfair Competition Case**


2007(Wa)8023 Apr. 23, 09 (Osaka Dist. Court Decision)	ARK アーケ ARK/アーケ	=	1 ARK-ANGELS 2 Ark-Angels 3 アーク・エンジェルズ 4 アークエンジェルズ  (Ark-Angels in katakana)	—	It was assumed that “ARK” or “Ark” was well known among traders and consumers who were engaged in animal protection activities. On the other hand, the words “ANGELS” or “Angels” were very familiar words and would thus be weak, and “ARK” or “Ark” was considered to be the dominant portion of the challenged marks.
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Case No. Date	Trademark in question	Decision = / ≠	Prior Trademark	CL (s)	Reason
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**IP High Court Decisions (Appeals against JPO’s Appeal Board Decisions)**

2008 (gyo KE) 10258 Jan. 28, 09	MIZUHO.NET	=	MIZUHO	36	Since there was a period between “MIZUHO” and “NET,” “MIZUHO” was visually recognized as being separate. In addition, “NET” should be recognized as “.net” in capital letters, and traders and consumers would not recognize “.net” as a source indicator. Thus, the trademark in question and prior trademark were found to be similar. The IP High Court thus sustained the JPO’s Appeal Board decision.
2008 (gyo KE) 10295 Jan. 29, 09		=		9 14 18 25 28	Even if the “sportsman.jp” portion of the trademark in question was used as a trademark, traders and consumers would consider the “sportsman” portion to be a source indicator. Thus, the dominant portion of the trademark in question should be “sportsman.” Thus, the trademark in question and the prior trademarks were found to be similar. The IP High Court therefore sustained the JPO’s Appeal Board decision.
2008 (gyo KE) 10442 May. 27, 09	QuickChange	=	 (Quick change in katakana)	7	Although the trademark in question and the prior trademark were different in appearance, both trademarks were found to be identical or similar in sound and connotation.

2008 (gyo KE) 10439 May. 28, 09		≠			The IP High Court overturned the JPO's Appeal Board decision which decided both trademarks to be similar, finding the "900" of trademark in question was not distinctive. The IP High Court found that trademark in question should be considered as a whole and that the prior trademark was recognized as a complex facility in Sapporo. Considering the difference in appearance, sound and connotation, the trademark in question and the prior trademark were found to be dissimilar.
2008-3312 Oct.15, 08 (JPO's Appeal Board Decision)	Factory900	=		9	
2009 (gyo KE) 10021 Jul. 16, 09	ラブコスメティック (love cosmetic in katakana)	=	LOVE ラブ (love in katakana)  ラブ LOVE	3	Since the "cosmetic" portion of the trademark in question lacked distinctiveness in relation to the designated goods, the dominant portion of the trademark in question was "love" although "love" was considered weak. Thus, the IP High Court sustained the JPO's Appeal Board decision which found the trademark in question and the prior trademarks to be similar.
2009 (gyo KE) 10022 Aug. 27, 09		=		30	The trademark in question was similar to the prior mark in terms of sound and the connotation. Thus, the IP High Court sustained the JPO's Appeal Board decision which found the trademark in question and the prior trademark to be similar.
2009 (gyo KE) 10102 Sep. 15, 09		=	Eye Lux	9	The IP High Court sustained the JPO's Appeal Board decision which found the trademark in question and the prior trademark to be similar.



Case No. Date	Trademark in question	Decision = / ≠	Prior Trademark	CL(s)	Reason
<b>IP High Court Decision (Appeals against Invalidation Decision)</b>					
2008 (gyo KE) 10219 Jan. 28, 09	コラゲヴェール COLLAGE VEIL	≠	コラージュ コラージュ Collage 	3	The trademark in question should be regarded in its totality because it is written in the same font and size. Thus, the prior trademarks were not found to be similar to the trademark in question.  The IP High Court sustained the JPO's Invalidation decision which found both trademarks to be dissimilar.
2008 (gyo KE) 10221 Jan. 28, 2009	ディープコラゲ DEEP COLLAGE				
2008 (gyo KE) 10222 Jan. 28, 09	コラゲディープ COLLAGE DEEP				
2008 (gyo KE) 10223 Jan. 28, 2009	コラゲテクト COLLAGE TECHTO				



2009 (gyo KE) 10007 Jun. 29, 09		≠	<b>mikiHOUSE</b>	25	Although the IP High Court recognized that the prior trademark had become well known in relation to children's clothing, it was decided that both trademarks were dissimilar.
2009 (gyo KE) 10380 Apr. 27, 09	ラブコスメ (LOVECOSME in katakana)	≠	<i>Love</i>	3	The IP High Court overturned the JPO's Invalidation decision which decided both trademarks to be similar, considering the "COSME" portion of the trademark in question as meaning "cosmetic."  The IP High Court found that the trademark in question should be inseparable since "COSME" was not familiar to traders and consumers and thus, the trademark in question and the prior trademarks were held to be dissimilar.
2007-890121 Sep. 9, 08 (JPO's Decision)		=	<i>Love</i> ラブ (love in katakana)		
2009 (gyo KE) 10048 Jul. 21, 2009		≠		25	The IP High Court sustained the JPO's Invalidation decision which decided both trademarks were dissimilar, finding both trademarks to be different in appearance, sound and connotation. Especially, the IP High Court considered the fact that the trademark in question was a name of a Jazz band, whereas the prior trademark was used in relation to the sales of confectionary.
2009 (gyo KE) 10071 Oct. 28, 2009	肌優	=	ゆう き 優 肌	5	The IP High Court overturned the JPO's Invalidation decision which decided both trademarks to be dissimilar. The IP High Court found both trademarks to be similar since the connotation of both trademarks were identical and the appearance of both trademarks were similar, although the pronunciation of both trademarks were not similar.
2008-890053 Feb 8, 2009 (JPO's Decision)		≠	YU-KI		
<b>IP High Court Decision (Appeals against Opposition Decision)</b>					
2008 (gyo KE) 10311 Feb. 10, 2009		≠		25	The IP High Court overturned the JPO's Opposition decision which decided both trademarks to be similar. The IP High Court found that although the trademark in question may remind consumers and traders of PUMA brand, it was not likely that they would confuse the trademark in question with the prior trademark. Thus, the trademark in question and the prior trademarks were found to be dissimilar.
2007-900349 Jul. 2, 08 (JPO's Decision)		=			

**(3) Well-known among consumers outside of Japan Article 4 (1) 19**

*HIROSE, Fumihiko*  
*Hirose Int'l Patent & Trademark*

Herein after “Yes” means the decision was made that the mark in question fell under Article 4 (1) 19

Trial No.	Trademark in Question	Yes/No	Prior Trademark	Class	Reason
Invalidation 2008-890102 Aug. 10, 09 2009 gyo-ke 10220		Yes		12	Invalidated since notice of termination of agreement had been provided to the registrant and they were requested to stop use of the mark but an application was filed adding the word DESIGN to the original S design which comprised unfair intention.
Invalidation 2008-890080 March 23, 10 2009 gyo-ke 10210/10211	ANTHROPOLOGIE	Yes	ANTHROPOLOGIE	3 21 26	Invalidated since the registrant had professional knowledge regarding fashion brands and about the existence of the brand and obtained unjust enrichment through registration and use of the mark.
Opposition 2008-900286 June 23, 09	Jumeirah	Yes	Jumeirah Beach Hotel	18	The name Jumeirah is a famous abbreviation for the Jumeirah group which runs hotels, restaurants and shopping malls. The registrant knew the name of this group and harmed its business by taking advantage of their absence of registration in class 18, and thus the mark should be cancelled.
Opposition 2008-900313 Feb. 16, 10	CIPRIANI	Yes	HOTEL CIPRIANI	43	CIPRIANI has an established reputation in high grade hotels in Italy the fame of which the registrant might have known and thus registered the mark by taking advantage of their lack of registration in class 43 with the intention of using the mark abusively and thus it should be cancelled.
Opposition 2008-900495 Nov. 25, 09	STEPCHILD	Yes	StepChild	28	StepChild is a famous Snowboard brand. The registrant imported and sold the products as an agent in Japan but obtained registration in an attempt to take over the brand or force StepChild to maintain the original license agreement and thus it should be cancelled.
Invalidation 2009-890085 July 7, 10	ROCCA	No	ROCCA CALDERONI	14	ROCCA is dissimilar to ROCCA CALDERONI. The mark ROCCA was not extensively used in Japan though it may be known in the Italian market to some extent.

Opposition 2009-900144 March 12, 10		Yes		25	The mark PERNOD is widely known as the name of a famous liqueur. The registrant registered the mark with bad will under conditions in which there was no right covering clothing in order to use the mark to gain profit through unfair means.
Opposition 2009-900168 Jan. 25, 10	AHAVA	No	AHAVA	14 18 25	AHAVA in Hebraic means “love” and the mark is not a coined word. It is uncertain whether the registrant knew of the existence of the mark but may have chosen the mark by coincidence with no reasons of bad will behind using the mark.
Opposition 2008-900313 June 23, 09	U2-pack	No	U 2	9	U2 reminds us of the name of the famous and still existing Irish music group but U2-pack was considered to be an inseparable coined word that cannot be derived separately as U2.

#### Protection of Famous marks in Japan Article 4 (1) 15

Herein after “No” means the decision was made that the mark in question did not fall under Article 4 (1) 15

Trial No.	Trademark in Question	Yes/No	Prior Trademark	Class	Reason
Opposition 2008-900352 March 26, 10	WHAT'S IN YOUR MARTINI	No	MARTINI	33	The word MARTINI in the mark in question is recognized as the name of a cocktail by Japanese consumers. The famous trademark MARTINI is used but causes no confusion with the business of the famous mark's proprietor.

### 3. Tips for Renewal of Trademark Registration for goods reclassified

*SAITO, Junko  
ISHIDA & ASSOCIATES*

As you may be aware, trademark owners who filed applications before March 31, 1992 are required to apply for reclassification of goods designated by applicable registered trademarks. If the reclassification is not made within a certain term, the next renewal is not allowed. Due to the reclassification procedure, the designations of goods in some registrations have spread into multiple classes.

For renewal of trademark registration designating goods in multiple classes, the amount of the official fee has increased, as the amount is determined based on the number of classes involved. However, we would like to draw your attention to the fact that any unnecessary classes can be deleted when a renewal request is filed, so that the amount of the official fee can thusly be reduced. Please note that a power of attorney is required when an unnecessary class is deleted at the time of filing a renewal request.

END

*Written and edited by JTA Bulletin Group of The International Activities Committee*

© Chiaki Kawai, Yuko Nakatani, Koji Murai, Kurumi Tsuru, Shunji Sato, Fumihiko Hirose, Junko Saito

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