Chapter 1   Introduction

1.0   Introduction

There has been dissatisfaction with some court rulings among lay people in Japan. Some judges are perceived as bigots, and justice in the courtroom as injustice in the real world, as can be seen in several sensational articles in weekly magazines such as Shukan Shinchou (vol. 47 (12 December 2002), vol. 48 (19 December 2002), vol. 49 (26 December 2002). Certain court rulings are not the only source of dissatisfaction among the public. The time taken for rulings is seen as another source of dissatisfaction with the current court system among ordinary citizens. The Shoko Asahara case might be considered the most disputable case of this sort in Japan. Shoko Asahara, the half-blind guru of the Aum Shinrikyo (Supreme Truth) sect, was accused of masterminding the sarin gas attack on Tokyo’s subway, in which twelve were killed and thousands were injured and was also accused of other homicide crimes. The sarin attack occurred on 23 March 1995. The first trial started in April of 1996 and the decision was given in February 2004, which means that it took nearly eight years only to conclude the first trial. Asahara immediately appealed against the decision. Finally, with some difficulty, he found public defenders for his appeal. As he remained silent even with the defence team, they requested a psychiatric test for him, which was rejected by the judge of the appellate court in August of 2005. His death-penalty sentence will be therefore determined by the end of 2006 at the latest. From the perspective of the public, Asahara has still continued to ‘live’ at the cost of tax money though he himself was the person most responsible for all the crimes caused by the Aum sect. Ordinary citizens have wondered why the court cannot sentence Asahara to death within one month after his arrest.

In this dissertation I would like to propose a model which is intended to explain the discrepancy between legal experts and lay people. The model, called the Linguistic Legal Model, is a combination of Layer Analysis and Register Analysis. Layer Analysis frames a theatre-type
concept to indicate that different types of perception are affected by a variety of norms of differing layers. Register Analysis aims to identify linguistic characteristics of one legal genre, the judgment. Layer Analysis elucidates the structure of law and society, whereas Register Analysis examines the structure of legal language. The Linguistic Legal Model is like a two-wheeled vehicle of Layer and Register Analyses, in which the two wheels are indispensable for the operation of the vehicle. With the movement of the two wheels the Linguistic Legal Model can progress our understanding of the complex interaction among law, language and society.

1.1 Purpose

The purpose of this dissertation is to provide a model to explain apparent discrepancies between legal experts and lay people. Legal documents are difficult for lay people to read and understand not only in the Occident but also in the Orient. In Japan law students are often told to regard legal language as a foreign language when starting to study law. Accordingly, this sort of incomprehensible nature of legal language has prompted lawyers (Mellinkoff (1963)), linguists (Crystal & Davy (1969); Danet (1985); Hiltunen (1984); Bhatia (1993); Tiersma (1999)), and social psychologists (Charrow & Charrow (1979)) to analyse the language used in the judicature. While all these studies have described the characteristics of legal language, not much work has been done to analyse the motivation behind legal language.

In the thesis I would like to argue that characteristics of legal language are mere features which appear in the surface structure of language use. Behind the surface structure lies legal reasoning, which is rooted in the deep structure of legal language. As stated in the Sapir-Whorf Hypothesis, the way people view the world is determined wholly or partly by the structure of their native language. Mintz (1992: 223) furthermore stated that the social distance between a physician and a patient arises because the language that a physician uses comes to modulate the physician’s experience of the patient. I would like to explore in this thesis the idea that the necessity of using
certain types of language in a work situation develops and determines the actual use of language in
the particular situation. In other words, the particular use of language reflects inner thinking of the
particular work situation. In the case of the judicial situation the inner thinking is legal reasoning,
which develops its distinctive features of language in the process of expressing the reasoning.
Those who do not share legal reasoning regard legal language as incomprehensible, but legal
reasoning is a comprehensible code for those who understand legal reasoning.

The Linguistic Legal Model which I propose in the thesis aims to elucidate the characteristics
of legal language and legal reasoning from the perspective of lay people. As legal experts are
located in a different layer from that of lay people, it is understandable that legal experts are
controlled by this different layer, law, in which legal reasoning is cultivated. This aloofness
causes some detachment from the rest of the world. I hope that the Model in this thesis provides
not only the characteristics of language but also the reasoning behind legal language.

1.2 Approach

As law does not exist without language, language analysis in the judicial system has been
conducted by researchers of various disciplines. Levi and Walker (1990:3-4) classify language in
the judicial process according to different values in the language and law. Type one focuses on
language, in which researchers use the law as a special context to explore linguistic patterns and
use. Type two aims to understand law and the judicial process in which linguistic analysis is used
to comprehend the legal system. Finally, Type three concerns society or culture or human
psychology, each of which is explained by the language in the law. I believe that all of these
three types do not represent clearly distinct categories. Rather, a continuum is formed from a
pure linguistic study to social or cultural study with less emphasis on linguistic aspects.

This thesis is conducted using a Type two analysis, with the intention of clarifying the
interface of law and the judicial process using linguistic methods. As Japan is undergoing
judicial reform, which will be discussed in Chapter 2, legal experts have taken up a positive attitude in discussing judicial reform with non-legal experts. I am included as a member of a project of the Japan Federation of Bar Associations to aim for plain court language, and also to chair the project for plain judicial process, working with a judge, two attorneys, three legal journalists, a legal mediator and a social psychologist. The discussions held in these projects have been reflected in the formation of the legal reasoning in the thesis.

The academic approach that I have employed in this dissertation is the analysis of two trademark cases by the use of the Linguistic Legal Model: Golden Horse case (1982, 1984, 1985) and Snack Chanel case (1994, 1994, 1998). Both cases involved a likelihood of confusion of the trademark concerned. If judgments of a likelihood of confusion between legal experts and ordinary citizens differ, different norms of the respective layers are used to explain the situation. If judgments of a likelihood of confusion by legal experts are inconsistent from the perspective of lay people, this marks the characteristic of the legal norm. More concretely, the legal norm weighs the status quo of society against the actual confusion of a particular trademark among citizens. To protect a certain well-established mark, legal experts exclude similar marks from the market and thereby unconsciously forbid citizens from using these marks. In other words, trademark cases might be considered the unconscious application of a language policy by the legal layer to the non-legal layer.

1.3 Overview

This study is structured as follows. Japanese legal culture is introduced in Chapter 2. The Japanese court system and the characteristics of the judgment are discussed. In Chapter 3, trademark issues in general are presented. In Chapter 4 and 5, the Linguistic Legal Model is explored with Layer Analysis in Chapter 4 and Register Analysis in Chapter 5. For Layer Analysis, the notion of layering is discussed from a linguistic perspective, and legal reasoning is
presented from a legal perspective. Also, the unconscious language policy is explained in Layer Analysis. Register Analysis is discussed in terms of genre and register. Japanese legal language is examined together with English legal language. Chapter 6 and Chapter 7 deal with trademark cases. The Golden Horse case in Chapter 6 presents the court’s judgment of the likelihood of confusion which is in common with that of lay people. On the other hand in Chapter 7, the Snack Chanel case portrays a judgment characteristic of the legal layer, which is quite different from the common sense of lay people. This discrepancy can be explained from the perspective of legal reasoning. Only relevant parts are cited from these cases for the purpose of the analysis for the thesis. Chapter 8 is the concluding chapter of the thesis.
Chapter 2  The Japanese Legal System

2.0   Introduction

In this chapter I give a broad introduction to the Japanese legal system. First, the types of courts are presented from the lowest to the highest one. Then, judicial proceedings are explained in terms of civil and administrative as well as criminal procedures. The practice and reality of lay participation is discussed because the Linguistic Legal Model clarifies the discrepancy between lay people and legal experts. As the trials dealt with in this thesis are trademark issues, the background of Japanese trademark issues are presented in Chapter 3.

2.1   The Japanese legal system

The information on the Japanese legal system is from the literature about the Japanese Supreme Court (Justice in Japan; Outline of Civil Litigation in Japan; Outline of Criminal Justice in Japan) and Dean (1997).

2.1.1   Types of Courts

Japan has a unitary system of the superior court and inferior courts for civil, criminal, commercial, and administrative cases. The Supreme Court is the highest of all the courts in Japan and is therefore given full judicial power. Inferior courts are made up of four types: 438 summary courts; fifty family courts; fifty district courts; and eight high courts. There is no distinction made between civil and criminal courts, or between courts of first or second instances in Japanese courts. A court of first instance means a court in which legal proceedings are begun, and a court of second instance indicates a court of intermediate appeal. In the Japanese judicial system the number of judges may vary: they may be a single judge or there may be a collegiate body of judges of varying numbers depending on the level of the court and the type of case.
Summary courts are the lowest in the Japanese court system, which are roughly equivalent to magistrate’s courts or district courts in the Common law system. The cases handled in summary courts are civil cases involving claims not exceeding 900,000 yen as well as criminal cases of minor offences such as theft. A single summary court judge determines the case.

One district court and one family court are located in every prefecture. Family courts deal with family affair cases as well as juvenile delinquency cases. When no agreement is reached, the case can be filed as a suit in a district court. District courts therefore carry out an appellate function and also exercise original jurisdiction for cases that do not fall under summary courts or family courts. In family and district courts cases can be handled either by a single judge or by a collegiate body of three judges.

High courts are located in eight major cities. The main function of the high courts is to serve as an appellate court as the first or second instance; however, the high courts also have original jurisdiction over administrative cases. Most cases at the high court level are heard by a collegiate body of three judges; however, some cases such as insurrection cases or judges’ disciplinary cases are heard by a body of five judges.

The Supreme Court has exclusively appellate jurisdiction as spelled out below:

- an appeal against a first or second instance decision of a high court, as in the Snack Chanel case;
- a direct appeal against a first instance of a summary, district, or family court;
- an appeal to be heard by a high court transferred for some special reason;
- special appeals against decisions of the high court as a third instance;
- extraordinary appeals by the Prosecutor-General;
- an appeal on a point of procedure where misinterpretation of the constitution is involved.

The Supreme Court is composed of the Chief Justice and fourteen Justices.
2.1.2 Judicial Proceedings

2.1.2.1 Civil Cases and Administrative Cases

In both civil and administrative litigation a plaintiff first files in the court a written complaint which contains allegations of the gist and the grounds of the case from the perspective of the plaintiff. The court serves the copy of the written complaint to the defendant so that the defendant can prepare an answer to the claim and its grounds. The court also sets the first date for oral argument and issues summons for both parties to appear.

Technically on the first date of oral argument, the plaintiff is to state the complaint and the defendant is to respond to the claim. However, due to the necessity of expediting the backlog of cases the plaintiff and the defendant generally exchange, between themselves, the documents of complaint and answer, and decide the date of the next argument. The oral argument often takes only five minutes and basically no oral ‘argument’ occurs. When the defendant denies the facts alleged by the plaintiff, the court examines the case and renders the judgement. A party, if dissatisfied, may appeal to a higher court. When the defendant admits the facts or does not appear in court, the defendant is considered to have admitted the facts in the complaint and the judge renders the judgment based on relevant laws. The court also recommends that the parties enter into settlement.

2.1.2.2 Criminal Cases

In criminal cases a public prosecutor files a written indictment with the court. The written indictment is the only information given to the judge so that the judge would not prejudge the case. In the trial the judge first asks the defendant personal identification questions and informs the defendant of the rights to remain silent. The prosecutor reads the indictment and the defence counsel then makes the statement regarding the case. The prosecutor presents the facts of the case from the prosecution’s perspective. At the same time the defence counsel also presents the
facts of the case from the perspective of the defendant. The court examines the case based on the opinions of the prosecution and the defence as well as on the evidence, and then renders a judgement. If dissatisfied with the judgment, the case is brought to a higher court for appeal.

2.1.3 Lay Participation

2.1.3.1 Current Lay Participation

Japan has some limited public participation in the justice system such as conciliation commissioners, judicial commissioners, family court councillors, expert commissioners, and committee members of the inquest of prosecution. Conciliation commissioners, judicial commissioners, and family court councillors are selected from prominent citizens in the area. Two conciliation commissioners work with the judge to settle various civil and domestic disputes by recommending mutual concession and compromise to both parties. In the summary court judicial commissioners assist the judge by expressing their opinions to the judge; in the family court family court councillors do the same thing to the judge.

Expert commissioners are selected citizens with professional knowledge and form an expert committee which assists the judge regarding the issue of landlords and tenants of non-contentious cases.

Committee members of the inquest of prosecution are eleven citizens selected by lot from the voters for the House of Representatives. The committee has two functions: (1) to review the propriety of the public prosecutor’s determination not to initiate prosecution; and (2) to submit proposals regarding improvements in the management of the public prosecutor system to the chief of the district public prosecutor’s office. The term of office is six months and the chairperson of the committee is elected by the committee members themselves.
2.1.3.2  

**Saibanin-seido (Mixed Court System)**

The system of the committee members of the inquest of prosecution has its root in the grand jury system in Common law countries. More interestingly, Japan has formerly had the jury system, which was introduced in 1928 and suspended in 1943 due to a limited number of uses. Although Japan has the lay participation system mentioned above, actual participation in the legal arena has been basically restricted to legal experts up to now.

Judicial reform was proposed to respond to social needs for the 21st century in Japan’s multifaceted society. Three pillars of the Judicial System Reform are: coordination of the institutional base; expansion of the human base; and establishment of the popular base (http://www.kantei.go.jp/foreign/policy/sihou/shingikai/990612_e.html). Public participation in the current on-going justice reform was stipulated in the Law concerning Establishment of the Justice System Reform Council (Law No. 68, promulgated on 9 June 1999). In order to set up the popular base of the justice system, a new participation system, *saibanin-seido* (mixed court system), is to be introduced in criminal proceedings by 2009.

The *saibanin-seido* is a middle-of-the-road system between the Common law jury system and the Roman law lay judge system. Like the Common law juries, Japanese lay judges serve a term of only one case. However, unlike the jury system of Common law countries, Japanese lay judges deliberate the case together with professional judge(s). The deliberation body consists of three professional judges and six lay judges. However, the composition of the deliberation body changes when a defendant admits to the charge, and both the defence and the prosecution have no objection to the charge. In this case, one body consists of one court judge and four lay judges.

Not all the cases are deliberated under the mixed court system; only criminal cases with serious offences are subject to the new system. Defendants indicted for serious offence cannot choose the traditional court-judge system. The Japanese government intends to put the Act into
effect in April of 2009.

The Mixed Court Act is the result of a compromise between judges and lawyers. As Japan formerly had a jury system, lawyers aimed to implement the jury system as one part of Judicial Reform. On the other hand, judges have indicated a reluctance to the participation of lay people in court proceedings. The two parties have attacked and defended their views since 2001, and they finally reached a compromise.

With the preparation time of four or five years in mind the legal profession has started preparing for the implementation of *saibanin-seido*. The Japanese Supreme Court has taken steps to set up a colloquium with intellectuals to effectively enlighten the public with an explanation of the new system. The prosecution has asked newscasters to instruct prosecutors how to speak to civil judges. The Japan Federation of Bar Associations has also taken measures to start a new project team which is investigating how to apply plain language principles to Japanese legal language. I am a member of this team.
Chapter 3   Japanese Trademark Issues

3.0   Introduction

In this chapter I present the basic points of Japanese trademarks. First, the background of trademarks is discussed from a historical perspective. Then, trademarks are explained in terms of laws such as trademark law and unfair competition prevention law. After this, trademarks are discussed in terms of purpose, types and rights.

3.1   Historical Origin

In this section I present a brief introduction to the notion of a trademark and unfair competition from a historical perspective. It is worth mentioning here the distinction between unfair competition and trademarks. McCarthy (2001:Vol.1: 1-16-17) indicates that ‘unfair competition’ is not an objective thing but an abstract and subjective intellectual concept of commercial activities. McCarthy (2001:Vol.1:1-23-27) furthermore cites some examples of unfair competition; ‘infringement of trademarks and service marks’ is just one example of them. McCarthy (2001:Vol.1: 2-11-13) states that the law of trademarks is but a branch of the broader area called Unfair Competition and concludes that the law of unfair competition covers a greater scope than the law of trademark infringement. Also, it is important to note the concept of ‘passing off’ which is prevalent in the UK and Australia. ‘Passing off’ has had two functions; one is the protection of a trader against another who enters unfair competition and the other is the protection of consumers who would be otherwise confused as to the origin or the nature of the product. By the early twentieth century, the aspect of unfair competition in the functions of ‘passing off’ was gradually reduced. The effect of confusingly similar marks on consumers has been more emphasised than the intent of the infringer. (McCarthy (2001: Vol.1:5-2).
3.1.1 Trademark

The concept of a trade mark, if we define it as any kind of mark which identifies one’s product, can go back to the Greek or Roman era in the West and the Asuka era in Japan. In the Asuka era, Taiho Ritsuryo of 701, one of the oldest legal codes of Japan, simply regulated crudely manufactured goods, but did not aim to protect consumers from a likelihood of confusion between the original one and similarly manufactured fake ones (Port 1998:11). Doi (2000:39) states that as the mark in ancient times was intended not to protect consumers, the German trademark protection law of 1874 should be understood as the origin of the concept of the trademark. This is the reason why the historical background of trademarks has been generally discussed after the Meiji era, the middle of 19th century, by Japanese researchers in Japan. Port (1998:13), however, points out that as the number of sake brewers increased during the Tokugawa regime (1603-1868), sake brewers had already needed to use symbols to identify their own products so that the consumers would not be misled. It is evident that the symbols functioned as the present-day’s trademarks. Furthermore, in 1860 the Tokugawa administration sent 77 Japanese to the US to study the intellectually property law system. Therefore, the concept of trademarks has been in existence in Japan since the 17th century. The first trademark law, with reference to the advanced German trademark law of 1874, was enforced in 1884 (Doi 2000:39).

3.1.2 Unfair Competition\(^1\)

Along with the legal concept of trademarks the concept of prevention of unfair competition also began to develop in Germany with the Commercial Law of 1899. The enactment of the German Law (Gesetz gegen den unlauteren Wettbewerb) activated the discussion on the regulations about unfair competition and thereby a draft for the bill was prepared. However, the bill was abandoned because the commercial community was not ready for it.

\(^1\) The information regarding unfair competition prevention law was mainly from Doi (2000).
In the early Meiji era the Japanese Government was desperate to abolish the unequal treaties signed by the previous Tokugawa government. In the first of the treaties, the Japan-US Friendship and Trade Treaty of 1858, Japan had acknowledged consular jurisdiction and relinquished tariff autonomy. Soon after this first treaty Japan signed similar unfair treaties one after another with the Netherlands, Russia, the UK, and France. In order that Japan might abolish these unfair treaties, the Western Great Power countries demanded that Japan be a signatory nation of the Paris Convention for the Protection of Industrial Property of 1883. The Paris Convention required signatory nations to undertake to protect patents, designs and trade marks produced in other member nations to the same extent as their own nationals received protection. In 1899 Japan signed the Paris Convention; in the same year Japan was finally able to gain tariff autonomy. To relinquish consular jurisdiction by the Great Power countries, Japan signed the New Commerce and Navigation Treaty. In the Hague Agreement of 1925 Japan was required to enact an unfair competition prevention law before the opening of the London Agreement of 1934. Japan’s first unfair competition prevention law was thus enacted to satisfy the condition presented in the Hague Agreement. This means that the law had the lowest possible prevention for unfair competition. The Japan’s first unfair competition prevention law (the Old Law) has been revised in part five times over nearly seventy years. In 1993, the law was drastically amended on Japan’s own judgment to properly function in the context of the recent trend of cleverer unfair competition in the domestic and international market. However, Japan’s unfair competition prevention law was still considered to be weak in terms of protecting consumers. The difference between the Old Law of 1925 and the New Law of 1993 is significantly relevant in the Snack Chanel case, which will be explained in Chapter 6.

3.2 Purpose of Trademarks

The purpose of trademarks is different between Japan and Common law countries such as
Australia or America with varying degrees of consumer protection. In Australia a trademark protects the interests of both traders and consumers. McKeough and Stewart (2000:419) stated that the information role of trademarks may be expanding as the use of marks in Internet domain names becomes usual practice. In America consumer protection is more clearly recognised. It is accurate to state that confusion on the part of the public is the essence of both trademark infringement and unfair competition, as stated in McCarthy (2001:Vol.1:2-57).

In contrast, Japan puts less emphasis on consumer protection. The purpose of the unfair competition prevention law is ‘to contribute to sound development of the national economy by providing … in order to ensure fair competition among enterprises and accurate implementation of international agreements related thereto’ (Article 1, Law No. 47, 27 May 1993). The purpose of trademark law is to ‘maintain the business credit of a person who uses a trade mark and thereby to contribute to the development of industry as well as to protect interests of consumers’ (Article 1, Law No. 127, 13 April 1959). This means that business protection is the main concern of trademark protection.

It is significant to note that such a minimisation of the interest of consumers leads to a more formal analysis of cases regarding the likelihood of confusion. As the jury system has not been applied in any of the trademark cases, the view of ordinary citizens is less likely to be reflected in the judgement and pure legal judgment prevails in trademark issues.

3.3 Types of Trademarks

A trademark is defined as ‘letters, figure or symbols or three dimensional shapes or any combination of these including their combination with colours …’ in Article 2 of The Trademark Law, Law No. 127. Ono (1999:34-43) discusses types of trademarks in terms of structure, function, users and others.

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2 Translation is from Port (1998: 21).
The structure of trademarks is classified into words, figures, signs, colours and three-dimensional shapes. Word trademarks are trademarks composed of only characters such as SONY. Characters include not only Japanese or English but also characters of any language. Characters of an unfamiliar language, however, are considered as figures, such as the trademark in England of a Japanese numeral as a figure-trademark (Ono 1999:35). The second type of trademark is a figure-trademark, which is the oldest type of trademark (Ono 1999: 35). An example of a figure-trademark is the figure of a crescent for Kao (a well-known detergent company in Japan). The symbol-trademark is the second oldest type of trademark as exemplified by the symbol of Louis Vuitton. Colour cannot make it a trademark by itself; however, it can be a distinguishing factor for trademarks. The three-dimensional shape is rather a new notion added with the 1996 Amendment. The purpose is to protect some advertising figures such as Colonel Sanders of Kentucky Fried Chicken. Composite trademarks generally indicate trademarks combined of letters, figures and symbols, and are discussed in detail in the chapter on the Golden Horse.

The types of trademarks include merchandise marks, service marks, house marks, and collective marks and grade-indicator marks. Merchandise marks indicate any kind of name which identifies the origin of the goods. On the other hand, service marks refer to symbols which distinguish one’s service from others’ services. House marks are marks which identify one’s own business company for which a mark is used. Collective marks are marks which are used by the members of collective organisations. Grade-indicator marks mean marks which indicate grades of a product of one’s company product such as Johnny Walker Black and Johnny Walker Red. Such grade indicators are also discussed in the chapter on the Golden Horse case.

The users of trademark are classified into manufactures, sales, service, and certification. Manufacturer marks refer to marks which indicate one’s manufactured goods. Sales marks are marks which indicate sales products chosen by their mark holder. Service marks refer to a
service which is offered by their mark holder. Certification marks are used to indicate that the quality of product is guaranteed by a responsible authority.

Others include family marks, coined marks, stock marks, advertising marks and private brands. Family marks mean basic marks of a company which is used as a series or a group of within the company. Coined marks are marks made originally by the holder of the trademark such as SONY. Stock marks are marks which are not currently used but are stocked for future use. Advertising marks are phrases which have the function of advertising. The term, private brand, refers to products that are sold with sales marks but without manufacturer’s marks.

Finally but not included in Ono’s classification, a brand name is used to indicate an advertising image or company identifier.

3.4 Trademark Rights

3.4.1 Acquisition

Trademark rights are obtained through the use or the registration of a mark. Ono (1999: 89) implied that the use of a trademark, not the registration of a mark, was protected earlier in history. However, it does not mean the use-system is better than the registration-based system. Neither system is perfect in terms of the protection of trademark rights: in the use-based system it is often difficult to determine the first user; in the registration-based system real users of trademarks could be excluded by the first registrar of the trademark. Japan has adopted a registration-based system, which is in clear contrast to the user-based system in the United States, in which trademark rights are derived from the use of the mark.

3.4.2 Infringement

Infringement of trademark rights includes ‘acts of use of a trademark similar to the registered trade mark’ (Article 37 of The Trademark Law, Law No. 12). If one’s trademark is
‘identical with or similar to another person’s’ (Article 2 of Unfair Competition Prevention Law, Law No. 47) trademark and it is thereby ‘causing confusion with the business establishment or activities of the other person’ (‘kondou o shouzeshimuru koui’) (Article 1 of Unfair Competition Prevention Law, Law No. 14) or ‘causing one’s goods or business to be confounded with another person’s’ (‘kondou o shoujisaseru koui’ (Article 2 of Unfair Competition Prevention Law, Law No. 47), the act is then unfair competition. In the USA the likelihood of confusion is also used as a test of the infringement of trademark rights. Port (1998:83), however, succinctly states that Japan’s ‘kondou no osore’ (a likelihood of confusion) standard is not synonymous with a likelihood of confusion standard in common law countries. More concretely, the Japanese concept of ‘kondou no osore’ requires less effort for a plaintiff to show infringement than the Common law concept of a likelihood of confusion.

The test for determining a likelihood of confusion is more or less similar in Japan as well as in other countries: sound, meaning and appearance are key factors in the determination. In the case of Japan confusion is acknowledged when two marks are similar or identical in terms of one of the three factors along with the consideration of the overall business circumstances regarding the trademarks. Although Amino (1999: 421-426) discusses a variety of theories regarding the degree of importance of each factor, I will not discuss these here as they are not relevant to the theme of this thesis.

3.4.3 Loss

Trademark rights are lost due to abandonment of use, invalidity, no renewal of registration and cancellation due to misuse. If a trade mark right owner does not use the mark for more than three consecutive years in Japan, a demand for trial for the cancellation of the mark may be made (Article 50 of the Trademark Law, Law No. 127). Next, a trial for the invalidation of the mark may be made if the mark fails to meet the trademark registration requirement specified in the
Trademark Law (Article 46 of The Trademark Law, Law No. 127). Third, a trademark right holder must renew the registration within the period of six to three months prior to the expiration (Article 20 of The Trademark Law, Law No. 127). Lastly, any person may demand a trial for the cancellation of the trademark if the mark’s rightful owner wilfully misleads with regard to quality of goods or causes confusion with goods relevant to others’ business (Article 51-1 of The Trademark Law, Law No. 127).
Chapter 4  Layer Analysis

4.0  Introduction
Layer Analysis which is presented in this section was termed as Layer-Based Genre Analysis in my previous study (Okawara 2002). This is because each layer is regarded as a configuration of genres. The features of layers are, accordingly, characterised by genres. In the first section of this chapter, I introduce Layering as proposed by Clark (1996) and then the notion of Reality by Hale & Gibbons (1999), and after that I present the Layer Analysis. In the rest of this chapter, the different perceptions between Layer 1 and Layer 2 are discussed in terms of linguistic community, mode of thought, and legal cases. I argue that legal reasoning is the mode of thought in Layer 1, which is acquired through legal training for membership into legal community. I also add that legal reasoning is the deep structure of Layer 1 and language characteristics are its surface structure.

4.1  Layer Analysis
4.1.1  Layering
Clark (1996) proposes a concept like theatre in which stages are built one on top of another as layering, to explain the many roles which participants conduct in language use. More concretely, an apt analysis of jokes, ghost writers, and translators can be carried out by the use of the notion of layering. For example, when a speaker tells a hearer a joke, the two people are in the actual world, and the joke itself is in a hypothetical world. Clark compares layering to a theatre stage: Layer 1 is at the ground level of a theatre on which Layer 2, the stage, is built. A theatre audience sees a play on the stage, while the performance is to be played on its own, more commonly, without the actual participation of the audience. Clark named the actual world Layer 1 and the hypothetical world Layer 2. As the courtroom is the centre in my thesis, I have named the courtroom Layer 1 and the world Layer 2, which is the opposite of Clark’s usage of layering.
Hale and Gibbons (1999) apply Clark’s notion of ‘layers of action’ and analyse the courtroom situation by their notion of ‘reality’. The courtroom situation is described as two intersecting planes of reality: the courtroom as the reality of here and now, and the world outside the courtroom as the particular events that are the subject of the court’s deliberations. Since the world outside the courtroom, the second reality, does not exist in the courtroom, the second plane of reality is represented by way of real evidence and versions through testimony.

4.1.2 Layer Analysis

Layer Analysis is grounded in two contexts: Layer 1 as the courtroom and Layer 2 as the world. Many disputes regularly arise and are settled in Layer 2 as shown in Figure 1. However, when disputes cannot be solved in the Layer 2, they come up to Layer 1, as shown in Figure 2. The case is then deliberated in the courtroom, as in Figure 3.

Each layer is characterised by its respective norms. The norm of Layer 2 is common sense. As Layer 1 is the courtroom, the norm of Layer 1 is the law. Disputes occasionally arise in the world due to a temporary lack of common sense among those concerned; however, most disputes are resolved when either or both parties are somehow able to apply common sense to the situation. When common sense is not workable in certain disputes, the dispute is in a ‘norm-less’ situation. Then, the dispute goes up to Layer 1 to be judged by the different norm, law. As the participants of Layer 2 do not share the norms of Layer 1, they judge the ruling according to their own norm. When the ruling is a satisfying one or is considered as a fair one from the perspective of the common sense of Layer 2, the judgment is generally well accepted in the Layer 2. However, dissatisfaction arises in Layer 2 when the result or the process of handling the dispute in Layer 1 is not convincing to those who adhere to the norms of Layer 2.
Figure 1: Dispute in Layer 2
Figure 2: Dispute Coming up to Layer 1
Figure 3: Dispute in Layer 1
Respective norms influence linguistic characteristics of each layer. As a result, the language used in Layer 1, legal language, differs from the language of Layer 2. As mentioned before, in the case of Layer 1, the linguistic characteristics of legal language are the features that appeared on the surface of Layer 1 whereas the legal reasoning derived from the norms of Layer 1 firmly lies in the deep structure of this layer. The deep structure of Layer 1 is discussed in terms of community and reasoning in subsequent sections.

4.2 Linguistic Community

Two terms are commonly used to represent the linguistic community: speech community and discourse community. Although the term, discourse community, is a rather new notion, the term, speech community, is a long-established concept in sociolinguistics. ‘Speech community’ has been discussed by Labov (1966, 1972), Hymes (1974), Gumperz (1968) Hudson (1980), Saville-Troike (1982). Labov (1972:158) defined ‘speech community’ as a group of speakers who all use the same norms in regard to language. Labov added that older and younger speakers in one city might belong to different speech communities. Hymes (1974:51) defined ‘speech community’ as a community sharing knowledge of rules for the conduct and interpretation of speech. Hymes emphasised that such sharing consists of both knowledge of at least one form of speech and knowledge of its patterns to use. Gumperz (1968:381) regarded ‘speech community’ as any human aggregate characterized by regular and frequent interaction by means of a shared body of verbal signs. Gumperz also viewed a speech community as one in which people share a common set of social norms for their speech variety. The notion of speech community therefore emphasises the social norm in the usage of spoken languages.

In order to focus on written language in a more specific situation such as the workplace, Swales (1990:9, 24-27) elaborated the notion of discourse community in terms of medium, function and user. Swales focused on the functional aspects of written language, which is used
for the purpose of a shared aim in a specific interest group. Swales then defined ‘discourse community’ as “sociorhetorical networks that form in order to work towards sets of common goals”.

The concept of discourse community can be applied to Layer 1, by using the notion of medium, function and user. First, the medium of Layer 1 is written language. Although the origin of the legal system is exclusively oral, legal language now operates in both spoken and written modes even in Common law countries (Tiersma 1999:9-15; Gibbons 2002:16-8). In Japan, it is the written language that serves the central role in the functioning of the present legal system. For example, the exchange of written documents is more common than the exchange of spoken interaction in the ‘oral’ proceedings of Japanese civil cases.

Second, the function of Layer 1 as a discourse community is to perform laws. Although lawyers in Common law countries sometimes use legal language to display their social status, such linguistic usage is rarely observed in Japan. The main function of legal language in Japan is to enact and enforce law.

The other characteristic of a discourse community is membership. Members of a discourse community are determined by training, while members of a speech community are determined by birth. This indicates that with legal professional training ordinary people are entitled to be members of a legal discourse community. Ordinary people who have passed the bar examination can become legal apprentices. With legal training these apprentices come to acquire basic knowledge of law and then come to use law as the norm of legal judgment. In conclusion, Layer 1 is the legal discourse community in which legal experts (users) employ written language (medium) to enforce law (function).
4.3 Different Modes of Thought

4.3.1 Paradigmatic Mode and Narrative Mode

In this section I explore the difference between Layers 1 and 2 in terms of cognitive differences. Bruner (1986) used two modes of thought, the paradigmatic mode and the narrative mode, in order to explain distinctive ways of ordering experience and of constructing reality for human beings. The paradigmatic mode uses a well-formed argument to establish one’s own truth using formal and empirical proof. For example, universal truth conditions can be searched in a representative argument ‘If x, then y’. As another name of the paradigmatic mode, the logico-scientific mode, succinctly suggests, the mode attempts to fulfil the ideal of a formal, mathematical system of description and explanation. It is therefore natural that consistency and non-contradiction must be ensured in an argument in this mode. The paradigmatic mode is concerned with not only observable worlds but also possible worlds. More concretely, possible worlds are first logically generated and examined against observables in this mode. After that, a well-formed theory is formulated through detailed analysis, logical proof and persuasive argument. Due to its abstract nature children are not strong at the paradigmatic mode, but they can acquire the mode if they are instructed to develop it as they grow older.

The narrative mode of thought, on the other hand, is inherent in human beings because the mode deals with human action and intention. These human feelings and performances are presented in the form of a good story or drama. Some inconsistency in a drama or story is quite acceptable to the narrative mode. This is because inconsistency is interpreted as a dramatic impact. Some parts of speech function differently in the two modes of thought. For instance, ‘then’ is used to indicate a consequence in a logical argument of ‘If x, then y’ of the paradigmatic mode but ‘then’ provides a particular, temporal connection between two events in the narrative mode, as in ‘The king died, and then the queen died’. The narrative mode, which is inherent in human beings, describes more or less the perception of Layer 2; in contrast, the paradigmatic mode which pursues
logic is more commonly found in Layer 1.

Conley and O’Barr (1990) classified litigants who express their problems in court into two groups: rule-oriented litigants and relational litigants. Rule-oriented litigants regard law as a system of rules for assessing responsibility and disregard those outside of the system of rules. As the law is rooted in their beliefs, they view society as a network of contractual opportunities, in which each person has the power to accept or reject a contract. In presenting their cases in the courtroom, they follow the logic of law and employ the deductive process. They concentrate on the issues which the court considers relevant and tend to ignore the issues such as motivations and feelings which the court does not consider relevant. The nature of rule-oriented litigants is more commonly found among men than women because men are more engaged in work in which rules predominate. Conley and O’Barr (1990) emphasized that rule-orientation is an acquired skill, which is the property of the literate and educated class. In other words, the mastery of rule-orientation is the key to the dominant class in the society.

In contrast, relational litigants tend to emphasise social relations over legal rules and they believe that the law assigns rewards and punishments according to their deeds. This indicates that an individual is a passive recipient of the law, not an actor in terms of the application of the law. Furthermore, relational litigants tend to give details in their accounts of a situation, which are generally rather irrelevant to the court. In contrast to the case of rule-orientation, things relating to specific proof of responsibility are treated lightly in the minds of relational litigants. Furthermore, relational litigants generally possess less power in society and show powerless speech such as the abundant use of hedges, hesitation forms, polite forms, question intonation, and intensifiers to compensate for their weak position in the courtroom. Although Conley and O’Barr (1990) used these two categories to classify ordinary citizens as types of litigants, these two types also can be used to illustrate the characteristics of the two layers of Layer Analysis. Rule-orientation, in which law is a system of rules for assessing responsibility, is characteristic of
Layer 1; a relational approach, in which social relations are emphasised more than law, is more commonly found in Layer 2.

Heffer (2005) explored the way judges and lawyers attempt to communicate with juries based on the tension between the paradigmatic mode and the narrative mode. In analysing the jury’s sense-making task, Heffer employed Bruner’s three distinctive forms of human cognitive activity. The first form is the actional mode, which is concerned with “who is the agent of what act toward what goal by what instrumentality in what setting with what time constraints.” The second form is the intersubjective mode, in which people presuppose others’ communicative intentions by reading what they are thinking. In other words, people make a distinction between what is said and what is meant. The third form is the normative mode, which is a culture’s standard of fitness or appropriateness in the society. Heffer (2005:20) stated that jurors have to establish what actually happened in the crime (the actional mode) by making a series of inferences about the character and intentions of the defendant (the intersubjective mode) and after that they need to assess the behaviour of the defendant in terms of society’s standards and the law (the normative mode).

The difference between the paradigmatic and the narrative modes is rooted in the development of the two modes. The paradigmatic mode did not appear before Aristotelian Greeks, though the narrative mode has existed throughout the history of humankind. The development of writing contributed the separation of language from mind, which then led to the growth of the paradigmatic mode. The appearance of writing caused not only the division between literal and figurative meaning but also the distinction between rationality and speech in Aristotelian Greek. Formal logic eventually arose and it further advanced the syllogistic form of reasoning. As the de-contextualisation of mind and language is regarded as a rising above context, the paradigmatic mode is also considered as a rising above the messiness of life. Heffer implied that the tying in of law with the strictures of logic was therefore established to raise the
status of legal practice. On the other hand, the narrative mode focuses on human actions and its outcomes, and is thus considered to be of lower status as it dwells on the messiness of life.

It is evident that two different modes of thought exist in various types of people, though the classification of people differs among researchers. Conley and O’Barr (1990) classified ordinary litigants into two different groups in terms of the possession of power. On the other hand, Bruner and Heffer grouped human beings into different categories of people based on intellectual development. In this thesis I relate the distinction between the paradigmatic mode and the narrative mode to the distinction between Layer 1 and Layer 2, and also use the notion of ‘rule-orientation’ for Layer 1 and apply the term, ‘relational’, for the description of Layer 2.

As discussed before, Conley and O’Barr suggested that common people are not a mass of powerless and uneducated people. This also indicates that Layer 2 includes not only those who are concerned with worldly matters but also rule-oriented people who can use deductive reasoning. However, these rule-oriented people account for only a small segment of the whole Layer 2. As no training is required for membership of Layer 2, rule-orientation which demands logical training cannot be regarded as being typical in Layer 2. Layer 2 is therefore represented not by ‘rule-oriented’ but by ‘relational’ people.

While it is true that rule-orientation is a characteristic feature of a dominant group, it does not necessarily indicate that the nature of rule-orientation is more superior and more advanced than that of ‘relational’ in terms of a functioning society. The highly-elevated abstract nature of logical reasoning in Layer 1 often fails to seize on some concrete matters actually occurring in Layer 2. This is particularly more common in trademark issues involving a likelihood of confusion, as discussed in the following section.
4.3.2 Prescriptiveness and Descriptiveness

In the issue of trademarks, the ‘rule-orientation’ of Layer 1 approves or disapproves the usage of a certain trademark for Layer 2 in their rulings. When legal experts solely rely on laws with little or no consideration of the existence of confusion among consumers, legal judgments are occasionally inconsistent and are therefore perceived to be influenced by the power of trademark owners in the ‘relational’ mind of Layer 2.

Linguists have further argued that a legal judgment is delivered based on law, the interests of which seem to include the protection of the owner of heavily-advertised trademarks. Landau (2001:407) and Shuy (2002:12-3) asserted that jurists in fact control language policy, though unconsciously, by shunning dictionaries which include a generic use of a trademarked name such as ‘band-aid’ to mean a temporary solution, which is disadvantageous to newly arrived immigrants in terms of the acquisition of everyday English. Shuy (2002:5) even questioned whether the legal community has the right to consider themselves as the “high” segment of society and the non-legal community as the “low” segment of society, and furthermore questions whether the legal community has control over what to use or what not to use in the non-legal community.

From the perspective of linguists whose interest is to describe language use, legal experts prescribe the language use of Layer 2. In order to understand the discrepancy, I discuss a deductive process of Layer 1 in the section below.

4.3.3 Different Modes in Different Layers

Legal experts in Layer 1 regard law as a system of rules in the world. When they apply law into a particular case, they employ a deductive process called a syllogism. As noted in Heffer (2005:13) and Inoue (2001: 75-6), a general rule (the major premise) is applied to the particular facts of a case (the minor premise) producing a necessary conclusion (the conclusion). In this process legal experts are concerned with both observable words and logically generated
possible worlds. To provide formal and empirical proof for the case, they pursue consistent and non-contradictory arguments.

All the steps of the syllogism are so deeply-rooted in the paradigmatic mode that people in the narrative mode hardly understand the reasoning process. The major premise--how to interpret the rule--has some arbitrary nature in the mind of the narrative mode person. The minor premise--fact-finding methods--is very peculiar from the perspective of lay people. As mentioned before, the paradigmatic mode is acquired through legal training. On the other hand, no training is required for membership in Layer 2. In the narrative mode common people attach importance to social relations rather than legal rules. Their stories are different from legal experts’ logical argument: stimulating but often inconsistent. Although it has some illogical nature, the narrative mode cannot be ignored in the decision–making process of Layer 1. This is because the function of Layer 1 is to give an answer to a dispute in the narrative mode. The fact that Layer 1 must apply to the paradigmatic mode in the deliberation of worldly matters displays an unnatural process of reasoning. When the narrative mode is minimised in the process of the ruling, lay people notice the discrepancy between Layer 1 and 2. In other words, the intersection of the paradigmatic mode and the narrative mode often demonstrates incompatibility. The purpose of this thesis is to discuss the incompatibility which occurs in the minor premise. To put it simply, trademark cases regarding a likelihood of confusion are explored with the focus on the fact-finding process of Layer 1. However, before the discussion of the trademark cases in Chapter 6 and 7, I discuss four cases from the perspective of legal reasoning.

4.4 Legal Reasoning

In this section I discuss some aspects of legal reasoning in terms of Major and Minor Premises by citing four cases: the Holy Trinity Church case, the Anderson case, the Killing of a Father-in-law case, and the Hole in the Wall case. The first three cases deal with issues under
Major Premise reasoning: the last one, a trademark case, reflects an issue under Minor Premise reasoning because it does not involve an interpretation of the law. Rather, it is a matter of determining similarity or dissimilarity.

4.4.1 The Holy Trinity Church Case

Blatt discussed the issue of a Major Premise in the Holy Trinity Church case. In Holy Trinity Church v. USA (1891) the US Supreme Court considered whether the Alien Contract Labour Act, which prohibited the importation of ‘labour or service of any kind’ barred a New York church from hiring an English minister. The intention of the act was to prohibit the importation of cheap and unskilled foreign labourers, but not the appointment of an English minister to a church. However, in a literal interpretation of the paradigmatic mode an English minister was evidently in the category of ‘labour or service of any kind’, and thereby the minister was to be prohibited from being engaged in ministry work in America.

Justice Brewer applied the narrative mode rather than the paradigmatic mode, and held the Labour Act inapplicable with two arguments. First, Congress was only concerned with manual labour; secondly Congress could not have intended to bar the hiring of ministers because America is ‘a Christian Nation.’ His opinion, however, received strong criticism at that time.

4.4.2 The Anderson Case

The Anderson case, as described by Solan (1993:29-34), is another case of a Major Premise issue. Mrs Anderson drove Mr Larson to a country fair in Mr Yocum’s Cadillac. The problem in this case was that Mrs Anderson believed that the Cadillac was Mr Larson’s car, and she was not aware that she was actually driving Mr Yocum’s car. Unfortunately she was involved in an accident while she was driving Mr Yocum’s Cadillac, which was damaged. Mr Yocum sued Mrs Anderson for the damage to his car and obtained a judgment of thirteen thousand dollars. Mrs
Anderson then tried to collect the money from her own insurer, State Farm, but her request for the coverage was denied by her insurer. She therefore sued her insurer.

Mrs Anderson’s automobile insurance policy covers two classes of drivers in the event of a car accident involving a non-owned automobile. The following is the portion of the relevant insurance policy.

Such insurance as is afforded by this policy … with respect to the owned automobile applies to the use of a non-owned automobile by the name insured … and any other person or organization legally responsible for use by the named insured … of an automobile not owned or hired by such other person or organization provided such use is with the permission of the owner or person in lawful possession of such automobile. (Emphasis added by Solan)

The two classes of people covered in the policy are ‘the name insured’ and ‘legally responsible for use by the name insured’. In this case the issue was whether the name insured, Mrs Anderson, is eligible for the coverage or not, even though the named insured did not obtain the permission of the owner of the car. The court applied the last antecedent rule to the interpretation of the policy and ordered State Farm to pay the coverage.

Solan noted that the last antecedent rule is a principle of law which is widely applied in federal as well as local courts in America. In the Anderson case it is defined so that a limiting clause is to be confined to the last antecedent, unless the context or evident meaning requires a different construction. However, there are also exceptional cases in which the last antecedent is interpreted as a compound phrase and it is thereby taken as a whole. Solan argued that the problem is that the court does not clarify when to apply a regular last antecedent rule and when to use an exceptional rule.

The court reasoned that the second class of the drivers, ‘legally responsible for use by the name insured’, was the last antecedent to the conditional, ‘provided such use is with the permission of the owner or person in lawful possession of such automobile’. This means that the
conditional modifies only the second class driver, but not the first class driver. Since Mrs Anderson was in the first class of drivers, ‘the name insured’, the permission of the owner was thereby not required. The court also reasoned that the lack of any punctuation between the conditional and the second class driver was the evidence of the close linkage between the two parts. As a result, Mrs Anderson was able to compel the insurance company to pay the money which Mrs Anderson owed Mr Yocum for his damaged Cadillac.

Solan claimed that the court decision was peculiar and is against the intuition of most native speakers in the understanding of the relevant part of the insurance policy. The insurance company had claimed that the conditional part was directly attached to the compound noun phrase of ‘the name insured’ and ‘any other person…’ and that thereby Mrs Anderson, ‘the names insured’ ‘without the permission of the car owner’, would not be covered. Solan argued that the reasoning of the insurance company can be supported by the ‘coordinate structure constraint’ proposed by the linguist John Ross. The constraint asserts that grammatical operations generally do not disjoint a coordinate structure. Solan (1993:33) presented the following sentences (1) – (3) and argued that sentence (2) is odd because (2) disjoints a coordinate structure of ‘testimony and document’. In the case of sentence (3) the normal interpretation is ‘a young child is with both the woman and the man’. The interpretation of ‘the child is only with the man’ is odd because the reading violated the coordinate structure constraint.

(1) Which testimony and document did she introduce into evidence?

*(2) Which testimony did she introduce document into evidence?

(3) John saw a woman and a man with a young child

Solan therefore maintained that because both ‘the name insured’ and ‘legally responsible for use by the name insured’ compose one conjoined noun phrase, this conjoined noun phrase cannot be disjointed due to the coordinate structure constraint. As ‘provided such use is with the permission of the owner or person in lawful possession of such automobile’ modifies the
conjoined noun phrase, Mrs Anderson would not have been covered by the insurance policy.

It seems that legal experts intentionally maintain the ambiguous application rule of the last antecedent rule. This is because the court is able to choose a better rule for the purpose of applying a paradigmatic mode of decision-making. As the court has to rely on legitimate reasons, some room for choice is useful for the fulfilment of their goal. In this case, Mr Yocum is an innocent owner of the car and Mrs Anderson is also an innocent driver of the car; therefore, the insurance should cover the damaged Cadillac. In order to justify this decision under Major Premise reasoning, the court chose a more appropriate application and made the decision-making process paradigmatic. Solan concluded that judges do theory-talk, not to describe the process to the decision but to make the process look better.

4.4.3 The Killing of a Father-in-law Case

As the insurance policy of the Anderson case had some room for interpretation, the judge was able to apply one interpretation in making a paradigmatic judgment. However, in the Killing of a Father-in-law case, the relevant law had no room for alternative interpretations. Legal experts invented a very peculiar reading of the article for the purpose of using the paradigmatic mode.

The Killing of a Father-in-law case (27 January 1954) is a very well-known case in Japan due to the difficult decision-making involved. The defendant in this case was a woman who had five children with her husband. Unfortunately her husband died soon after they had their fifth child. Her father-in-law, the victim in this case, had often visited them, asking for money for gambling, and eventually lived with them. He raped her a couple days before the death of his son, the husband of the defendant, and continued to force himself on her. He was an alcoholic and had already sold his three daughters for money. As he needed more money, he also forced the defendant to work at a disreputable bar but also continued to force himself on her. When she
refused him, he beat both her and her young children. The only way she thought she and her children would be safe would be if he were dead. So she then strangled him to death.

The Penal Code of 1954 had Article 200 of killing an ascendant, which stated ‘a person, who kills his lineal ascendant or a lineal ascendant of his spouse, shall be punished with death or penal servitude for life’. Article 199 of the homicide code has stated that ‘a person, who kills another, shall be punished with death or penal servitude for life or not less than three years’. Since the defendant killed her father-in-law (a lineal ascendant), her crime was punishable under Article 200, not Article 199.

The Fukuoka District Court, however, applied Article 199. The court stated that the ‘spouse’ in Article 200 of the Penal Code refers to a spouse whose relationship with the other spouse exists and therefore does not include a spouse who had lost the other partner. Citing other laws\(^3\), the court said that all these laws distinguished between the present status and the past status of a person such as ‘a person who is or past a government official’. The court then reasoned that the fact that Article 200 does not specify the past status such as ‘was a spouse’ means that Article 200 does not include ‘a person who ‘was’ the spouse’. In the world of civil cases, on the other hand, Article 728.2 of the Civil Code states that ‘the same shall apply also if after the death of either husband or wife, the surviving spouse declares his or her intention to terminate the matrimonial relationship’. The fact that the defendant did not officially declare her intention to terminate the matrimonial relationship legally implies that she had agreed to the continuing relationship with her father-in-law. The court, however, argued that as Article 728 is based on the fact that a family relationship is weakened when the other partner dies, Article 728 cannot be applied to the case of killing one’s father-in-law. With the application of Article 199, the defendant was given a three-year jail sentence suspended for three years. The prosecution

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\(^3\) Other laws include Subsection 3 of Article 197; Subsection 2 of Article 20, Article 144, Paragraph 1 and 2 of Subsection 1 of Article 145, Article 149 of the Code of Criminal Procedure; Subsection 1 of Article 35, Subsection 1 of Article 280 of the Code of Civil Procedure.
appealed to the high court by stating the fact that the defendant did not mention the dissolution of the father-daughter-in-law relationship indicates that she had a wish to serve him as his daughter-in-law. However, the Fukuoka High Court rejected the appeal. The high court added some minor phrases to the original judgment. With the sentence suspended, she was able to raise all of her young children.

It is obvious that the application of Article 200 is cruel to the defendant in this case. To begin with, many legal experts questioned the relevance of Article 200. Kikuchi (1955: 505) stated that as the civil and penal codes were separate, Article 728 of the Code of Civil Procedure could not be applied.

Although people were happy about the court decision for the defendant, the court’s decision-making, which adhered to the paradigmatic mode regarding the interpretation of a law, is an unnatural and farfetched argument. The fact that Article 200 does not specify the past status of the family relationship does not mean that the past status was eliminated and that only the present status was concerned in the case. Other laws cited in the judgment regarded the receipt of bribe of a public officer, the exclusion of court officials, the examination of witnesses, and the right to refuse to testify. The function of these laws is different from that of Article 200; these laws specify qualification considerations. The central issue is that the notion of ‘was’ should be included in those qualification issues. However, in the case of Article 200 a family relationship is generally expected to be eternal; it is not a matter of qualification for some activity. Therefore, the citing of those laws is not convincing reasoning for not applying Article 200.

In the discussion of legal reasoning at the meeting of 28 March 2005 of the project for plain judicial process, I proposed one solution from the narrative perspective for rejecting the application of Article 200. The purpose of Article 200 is to respect a lineal ascendant. The definition of a lineal relative should be clarified such as raising and caring for children with love. The victim in this case is described as a vicious creature who deserves to die. Since the victim is
far from being a relative, he does not need to be protected under Article 200. However, an
teacher, Shinomiya, stated that legal experts cannot accept my solution because the solution is
rather arbitrary. A legal journalist, Ohashi, stated that a hard case requires more rigid rules and
explanation than a soft case. Shinomiya stated that a legally acceptable solution is to reject
Article 200 entirely because the Article itself is inconsistent with Article 14 of the Constitution
which states that ‘all the people are equal under the law and there shall be no discrimination in
political, economic or social relations because of race, creed, sex, social status or family origin’.
Shinomiya’s analysis is one typical example of legal reasoning in the paradigmatic mode, in which
legal judgment must be based on law.

In 1973 the Supreme Court ruled that Article 200 of the Penal Code was inconsistent with
Article 14 of the Constitution in a case of killing one’s own father due to repeated rape. This was
not a unanimous decision. Some justices stated that it was not that Article 200 was
unconstitutional but that the difference in sentencing was extreme between the two articles. A
few others were against the majority opinion and asserted that Article 200 was constitutional. I
should note that Article 200 has now been removed from the code book. Due to the restriction of
the paradigmatic mode legal experts manage to find an interpretation of the case more in
agreement with societal values.

4.4.4 The Hole in the Wall Case

The Hole in the Wall case (1996) is a trademark case regarding a likelihood of confusion.
Unlike the previous three cases, the Hole in the Wall case deals with the issue under Minor
Premise reasoning.

*Kabe No Ana Foods* holds the trademark right of *Kabe No Ana* (hole in the wall) written
laterally in Japanese *kanji* (Chinese characters) and the *hiragana* syllabary. The hiragana
syllabary is one of the two Japanese syllabaries. On the other hand, *Kabe No Ana of Pasta*
Speciality Store holds the trademark right of the figure of a woman boiling pasta and the English lettering of ‘HOLE IN THE WALL’. In 1996 Kabe No Ana Foods demanded a trial of invalidation of registration, claiming that the trademark of the pasta store is similar to its own trademark. The Japanese Patent Office, however, ruled that both trademarks were different in terms of sound, idea, and appearance. The reason for dissimilarity in sound is that one is pronounced in English sounds and the other is uttered in Japanese sounds. They are dissimilar in appearance because the one is written only in Japanese lettering whereas the other is the combined trademark of the figure and English lettering. As for the idea, the English phrase, ‘HOLE IN THE WALL’, is not a commonly understood English phrase by the average Japanese. This means that Japanese would not consider the English phrase, HOLE IN THE WALL, as its Japanese equivalent, Kabe No Ana. Dissatisfied with the judgement of the Patent Office, Kabe No Ana Foods appealed to the Tokyo High Court.

The Tokyo High Court also ruled against Kabe No Ana Foods. The court first argued that ninety percent of the trademark of the defendant consisted of the figure and a ten percent of English lettering. The court then made an interpretation that the lettering gave consumers the impression that the lettering was not the main part but some additional part of the trademark itself. The high court also supported the judgment of the district court, by repeating that the English lettering ‘HOLE IN THE WALL’ was not a commonly used English phrase for Japanese. The assessment of the English phrase carried out by the court is in accordance with the fact-finding process in the paradigmatic mode. The court acknowledged that the term ‘wall’ and the prepositional phrase ‘on the wall’ were easily understood English words for average Japanese because the court found ‘on the wall’ in English textbooks of elementary school as well as in Readers English-Japanese Dictionary (1984 edition)\(^4\). However, the court judged that the

\(^4\) Readers English-Japanese Dictionary contains 270,000 words and it is considered as one of the dictionaries with the largest number of English words in Japan.
prepositional phrase ‘in the wall’ was a more difficult one because the phrase was not found in these reliable sources. Accordingly, the court reasoned that average Japanese person would not understand the meaning of the English phrase ‘in the wall’. The court thus concluded that the import of the two trademarks were different.

It does not necessarily mean that a phrase not appearing in the dictionary is more difficult than a phrase appearing in the dictionary. Hayashi (2001:30) stated that the prepositions ‘in’ and ‘on’ are among the most basic prepositions and therefore have both basic senses and many extended senses. Hayashi contrasted basic senses (prototypes) of prepositions ‘in’ and ‘on’ with extended senses (extensions) of those in terms of English acquisition by Japanese learners. In his classification ‘in’ of ‘in the wall’ is a prototype while ‘in’ of ‘in danger’ has an extended sense. ‘On’ of ‘on the wall’ is again a prototype whereas ‘on’ of ‘on duty’ is an extended one. Hayashi indicated that the acquisition of the basic senses of prepositions ‘in’ and ‘on’ is easier for Japanese learners to make than that of less prototypical ones. He added that Japanese lexical items, ~ (no) naka and ~ (no) ue generally correspond to ‘in’ and ‘on’ respectively.

Kao (2001) used different terms for the same notion of the preposition types indicated by Hayashi. In Kao’s approach, a ‘genuine preposition’ is the same as Hayashi’s prototypes, while a ‘pseudo-preposition’ would be the same as Hayashi’s extended one. Kao (2001:197) also stated that the learning of the English pseudo-prepositions is notoriously protracted. It is because a pseudo-preposition like ‘for’ of ‘a respect for the truth’ does not carry the ‘expected’ meaning of the message.

In the issue of ‘in the wall’ and ‘on the wall’, both prepositions are genuine prepositions or prototypical prepositions. As the basic meanings of both prepositions have corresponding Japanese meanings, we can say that ordinary Japanese can understand both phrases as long as they have a minimal English vocabulary. Legal experts use laws for consultation because the application of law is mandatory in Layer 1. This is certainly the norm for legal experts.
linguist, a participant of the other Layer, the legal reasoning used in the assessment of English proficiency by the court seems to be peculiar and unconvincing. The oddity of the ruling of this case is that legal experts solely rely on the method of the paradigmatic mode rather than on the perception of lay people in the narrative mode.

4.5 Summary

When the disputes arise in the world (Layer 2), some unsettled ones go up to the courtroom (Layer 1) for resolution. Layer 1 is the discourse community because legal experts need to be trained to acquire the paradigmatic mode. The paradigmatic mode is the logical and abstract way of thinking. On the other hand, the mode of thought of Layer 2 is the narrative mode, which is typical of human beings and is a concrete way of perceiving things in the world. As the legal decision must be based on deductive processes, legal experts apply legal reasoning to arrive at a reasonable conclusion. When they cannot make the right interpretation for a particular case, they search for a logically acceptable interpretation in the paradigmatic mode. The more strained solution legal experts manage to find in the paradigmatic mode, the more distant and impersonal lay people feel toward legal experts. Thus, the gap between Layer 2 and Layer 1 opens up. In the next chapter I discuss the language characteristics of the surface level.
Chapter 5   Register Analysis

5.0   Introduction

The Linguistic Legal Model, as mentioned in earlier chapters, consists of Layer Analysis and Register Analysis. Unlike the stratified type of Layer Analysis, Register Analysis focuses on language aspects, which accounts for linguistic characteristics of judgements in the analysis of the organisation, lexicon, syntax and discourse. In this chapter, I first discuss genre and register from the perspectives of ethnographers, systemic linguists, sociolinguists, and forensic linguists. After that, the characteristics of legal language are presented. In order to expound on Register Analysis, legal genre and legal register are examined, with a comparison of Common law countries and Japan. It is argued that the similarity between the two types of legal language is determined by the shared legal reasoning. As mentioned in the previous chapter, Japan has been heavily influenced by Western legal systems.

5.1   Genre and Register

The notion of genre has been traditionally used in literary criticism, where particular types of writings such as comedies or tragedies have been distinguished by common characteristics of their own. In rhetorical analysis genre is classified into four discourses: narrative discourse; descriptive discourse; procedural discourse; and persuasive discourse. In the field of language studies the notion of genre has been used by ethnographers, systemic linguists, and forensic linguists.

5.1.1   Ethnography

The ethnography of communication developed by Hymes (1974) is an approach to communication based in anthropology and linguistics. Anthropology had traditionally often
ignored language as a cultural behaviour. Hymes, however, observed that the understanding of communication is essential not only for linguists but also for anthropologists because the way people communicate is determined by their culture. Therefore, ethnographers of communication view language as a system which uses norms that are controlled by culture. Thus, the analysis of language use helps realise the norms of culture which determine how people should act toward one another. In order to meet the objective and valid observation of language use, Hymes (1974:11) used the distinction of ‘etic’ and ‘emic’. An ‘etic’ account is to discover components of communication, and an ‘emic’ account is to discover communicative patterns extracted by the interrelation among components. Just as linguists discover meaningful sounds in a particular language by the use of a framework of physically possible sounds, ethnographers use an ‘etic’ grid of a classification of communication components to discover communicative patterns. The ‘etic’ grid of Hymes (1972) is called the SPEAKING grid. Each letter of the SPEAKING grid stands for one of eight components of communication: S for setting/scene; P for participants; E for ends; A for act sequence; K for key; I for instrumentalities; N for norms of interaction; and G for genre. The SPEAKING grid is used to identify communicative units which range from the smallest of speech acts to the largest of speech situations. One clear example is a joke: it is a speech act used in a private conversation (a speech event) during a party (a speech situation).

Hymes regards genre as ‘textual categories’ in the SPEAKING grid. Examples of genre are poems, myths, tales, proverbs, riddles, curses, prayers, orations, lectures commercials, formal letters, editorials etc. (Hymes 1974:61). The number of and explicitness of formal markers determine types of genre; for example, casual speech is a genre with less formal markers. Hymes (1974:61) stated that genres often coincide with speech events, but he pointed out the difference between the two from his standpoint: genres may occur in different speech events. For example, when a sermon is preached in a church service, the sermon is a genre as well as a speech event.
However, when the sermon occurs in a silly joke, the genre is still a sermon but the speech event is the joke. Swales (1990:38-39) disagreed with Hymes’ reasons for distinguishing genre from speech events. Swales implied that as a sermon for humorous effect in the Hymes’ example is completely different from a regular sermon in the church in terms of the communicative purpose, then the two should be considered as being different genres.

Like Hymes, Saville-Troike, (1982:138) also considered genre as a type of event (e.g. joke, story, lecture, greeting, conversation). The essence of her communicative event fits in with the notion of genre that I have explored in the analysis of judgments in this thesis.

The communicative event is the basic unit for descriptive purposes. A single event is defined by a unified set of components throughout, beginning with the same general purpose of communication, the same general topic, and involving the same participants, generally using the same language variety, maintaining the same tone or key and the same rules for interaction, in the same setting.

(Saville-Troike, 1982:27)

A judgment is then defined by a unified set of registers throughout, beginning with the same general purpose of delivering a judgment with reasons, the same case, and involving the same litigants, using legal language, maintaining a formal and discreet tone and the same rules for claiming and responding, in the setting of the courthouse.

Saville-Troike implied that a communicative event can be terminated and then resumed. One example of this sort is a conversation between a student and a professor in an office with the interruption of a phone call and the continuation of the conversation after the interruption. The fact that she used a general term ‘conversation’ for the interview between a professor and a student implies that the communicative event has less characteristics of its own event. In other words, the term ‘communicative event’ includes a variety of speech events from more typical genre such as lecture to more ordinary conversation. Also, the communicative event focuses on spoken events rather than written events. This is because Saville-Troike is an ethnographer whose
interest is to discover the way people communicate so that they could realise the norm of their culture. Unlike genre, register has not been explored substantially among ethnographers. Saville-Troike (1982:49) briefly identifies register as ‘generally varying on a formal-informal dimension which cross-cuts dialect dimensions’. Register refers to varieties of language use based on the dimension of formality.

5.1.2 Systemic linguistics

Unlike ethnographers, linguists have had a tradition of exploring register. In contrast, the development of the notion of genre did not attract much attention among linguists. The distinction between genre and register made by systemic linguists is therefore a noteworthy achievement.

Halliday et al. (1964) first considered register as one type of language variety according to use, in contrast to a dialect which is another language variety according to the user. In other words, both a register and a dialog indicate what a person is saying, but a register is determined by what he is doing at the time, and a dialect is determined by who he is. Halliday (1985:38-9) later provided a more abstract definition of register: a register is a configuration of meanings that are typically associated with a particular situational configuration of field, mode and tenor. Field, mode and tenor are features used to describe Hallidayan context of situation: field refers to what is happening; tenor refers to those who are taking part; and mode refers to what channel of the language is being used (e.g. oral-aural, visual or both). While it is a semantic concept, a register also includes lexicogrammatical and phonological features. Furthermore, Halliday (1985: 39) elaborated the concept of register to include a variety of registers from closed to open registers. One example of extremely closed registers is an index number used in cables in the armed service in the Second World War. The other end of the register scale is open registers, which have spontaneous conversation as an example. Between these extremes lies the International
Language of Aviation. As it is the language which air crew learn for navigation, the International Language of the Aviation is a fixed language. The language of legal documents is less fixed than the Language of Aviation. However, not only legal language but also medical language has to be learnt from textbooks. Halliday indicated that non-English speaking medical students have more difficulty communicating with English-speaking patients than learning English medical language because non-English and English medical languages share the common register of medical language. Halliday added that the most extreme register of open registers is not totally-open ended because even the most informal conversation has its own style of meaning. In brief, registers are the semantic configurations which are associated with particular social contexts and vary from less-talk text to much-talk text. As for genre, the notion of genre was ambiguously included in the concept of register and was not explored in Halliday’s social semiotic (1978).

Martin (1984, 1985) incorporated genre into the semiotic system. The relationship between genre, register and language is that genre is realised through register, which is realised through language. Martin (1984:25) defined genre as a staged, goal-oriented, purposeful activity in which speakers engage as members of our culture. Martin indicated that one of the principal responsibilities of genre is to constrain the possible combinations of the three variables of field, tenor, and mode. Genre represents strategies used to accomplish social purposes of many kinds at an abstract level. These strategies are basically understood as stages, which are used to realise a genre. Briefly, a genre has a beginning-middle-end structure. A genre itself thus has a schematic structure, which varies among cultures.

Swales (1990:41) indicated that Couture (1986) made a clarification of the relation between genre and register. Couture (1986:80) regarded genre as conventional instances of organised text including literary and non-literary text such as the novel and the technical manual. On the other hand, register was regarded as collections of lexical choices and syntactic arrangements relating to a specific field, tenor, and mode. More concretely, Couture (1986:82) stated that while register
imposes explicitness constraints at the level of vocabulary and syntax, genre imposes additional explicitness constraints at the discourse level. For example, a research report is a genre whereas the language of scientific reporting is a matter of registers. This means that a judgment document is a genre while legal language is a matter of registers.

5.1.3 Sociolinguistics

Ferguson (1983) was the first sociolinguist who analysed sports announcer talk in terms of register variation using Halliday’s notion. He tried to locate a presumed register by identifying situational features, roughly in Halliday’s term ‘mode’, which is the oral reporting on the radio. Next, he focused on the essential role of participants (tenor), which is a monolog or a dialog-on-stage targeted to an unseen mass audience. Lastly, he dealt with the topic of the discourse (field), which was a radio sports talk. He then concluded that there did not exist a simple way of identifying a register due to the flexible nature of its concept.

The most commonly cited definition of register among sociolinguists is the variety of language which is associated with a particular group of people who share the same occupation, like doctors or lawyers, or who have activities in common like cricket. A register is more commonly characterised by a particular set of vocabulary, for example, a German word ‘Karte’ for patient’s chart in Japanese medical practice. A distinctive grammatical construction such as the use of the tag question in cross-examination in the courts of Common law countries is also an item of legal register.

5.1.4 Forensic Linguistics

Through the use of systemic and sociolinguistic approaches, Gibbons (2002) analysed the language of legal contexts from the perspective of forensic linguistics. A legal setting is a composite of genre structures that underlines intersecting planes of three realities. The first
reality is the interaction of the legal process such as events in the courtroom, the police station. i.e. the reality of here and now in the legal process. The second reality indicates disputed events, which have caused legal actions. Finally, the third reality is the law itself. Gibbons considers the first reality as staged processes and all the realities are described through genres. The second reality is reconstructed through genres because this reality is not the actual events happening in the legal process. In other words, the function of genres is not only to comprehend discourse but also to construct discourse. Genre is a composite of several layers of genre types: macro-genre; genre; genre stage. If a macro genre is a trial, then a spoken discourse of a judge can be a genre and a conclusion of the trial is a genre stage. Different types of genres thus interweave on different planes of realities in a complex manner to form a macro genre of a trial. In brief, a good genre model must capture the first reality and the second reality. In the first reality are there found three distinctive stages (Gibbons 2002:147):

1. a representation of the second reality;
2. the ‘fit’ between the secondary reality and the legal representation (in a criminal case to see whether the secondary reality is permissible or not);
3. the degree of any difference between the secondary reality and legal theory, to determine punishment or reparation.

Gibbons (2002:150) noted the two tensions within the judicial process: one tension is between competing versions of the same event; and the other is the fit between the construction of the event and the legal theory.

5.1.5 Genre and Register in the Linguistic Legal Model

Macro-genre in the Linguistic Legal Model is the judicial process of Layer 1, which consists of a number of genres such as a judgment or legislative document, each of which is a staged, goal oriented, purposeful activity. The judgment is composed of the stages of beginning, middle and
end which are discussed in detail later in this chapter.

The notion of discourse in this chapter is divided into two aspects: text organization and cohesion/style. Text organization indicates the discourse as discussed by systemic linguists when referring to genre. Cohesion/style in this thesis is analysed by looking at language. Therefore, text organization characterises genre whereas cohesion/style is considered as part of register. In addition to cohesion/style, a special set of vocabulary and a distinctive grammatical construction characterise the register of judgments.

As mentioned in the studies of systemic linguists, register determines the genre, as defined by ‘field’, ‘mode’ and ‘tenor’. In the case of judgments, the ‘field’ is the pronouncing of a sentence or deciding the case. ‘Mode’ refers to a written language. ‘Tenor’ is rather idiosyncratic because a judgement is primarily meant to be written for litigants, in most cases, lay people. However, in reality, the judge writes up the judgment keeping in mind an executor of courts (a court staff appointed to carry out a ruling) as well as prospective appellate court judges in the event of the case being appealed. The discrepancy between actual readers and nominal readers results in incomprehensible writing of judgments from the perspective of lay people. To put it differently, this incomprehensible nature which is rooted in the legal reasoning of Layer 1 is manifested as the register of judgments. The register determines the characteristics of the document type, i.e., the genre of judgments. In brief, genre, as used in the analysis in this thesis, is the text organisation of judgments while registers involve a special set of vocabulary, a distinctive syntactic arrangement, and cohesion and styles.

5.2 Legal Language

In this section the features of legal language are discussed in terms of their functions, the nature of de-contextualisation and consistence, and the existence and non-existence of elitism.
5.2.1 Function

Communication is the process of en-coding and de-coding. In the field of legal language, en-coding is the production of legal documents such as legislative documents, judgments, while de-coding is the interpretation of legal documents. If some parts of legal documents are vague and ambiguous, the parts invite various interpretations. Legal documents are therefore expected to be precise. On the other hand, legal documents need to have room for vagueness and flexibility so that the documents can operate well in an unexpected situation. Legal documents therefore need to engage with exactly opposite tasks of preciseness and vagueness.

Tiersma (1999: 139) classifies legal documents into three classes according to function: operative documents, expository documents and persuasive documents. Operative documents have a performative function, in other words, the function of performing an act by the very fact of being uttered. Examples given are pleadings, petitions, orders and statutes, and private legal documents such as wills and contracts. Due to the nature of performative functions, operative documents have a rigid structure as well as formulaic language, and are therefore difficult for lay people to understand. On the other hand, expository documents such as office memoranda and persuasive documents like briefs to court are not as formulaic as operative documents, and have a less rigid structure.

Judgments and legislative documents are types of operative documents. As mentioned before, the judgment reflects the characteristics of the intended readership. Nominal readers are the participants of Layer 2 such as litigants and the general public. This is because judges do not expect lay litigants to read the judgment by themselves. It is attorneys who are expected to read the judgment for lay litigants. Actual readers are therefore the participants of Layer 1 such as the counsels for the parties, court executors, and appellant judges in the case of appeal (Kawakami 1994:48; Kurata 1994:10; Takano 1994:38). On the other hand, a legislative document also manifests the characteristics of authorship in the process of drafting. Legislation is enacted by
the congress or the parliament for the sake of the welfare of general citizens. Legislation is actually drafted by public servants, who are always trained as lawyers in Common law countries and who are always public servants with profound knowledge of law in Japan. Furthermore, those who interpret legislation are not general citizens but legal experts. Maley (1994:18) emphasised that it is the interpretations of legal experts which are enforceable. Although they affect the life of Layer 2, both the judgment and legislative documents are ‘written’ and ‘read’ without the direct involvement of the general public.

5.2.2 De-contextualisation and Consistency

Gibbons (2002:21-24) cited other features such as de-contextualisation, consistency and conservatism as the basic features of legal written language. These stylistic features have been developed as a matter of efficiency in the judicial process. Unlike a daily conversation which is conducted between a speaker and a hearer on the spot, the legislative document must be interpreted without any reference to a particular context, for the purpose of a fair application of legislation for all the members of a relevant community. Therefore, de-contextualisation is the primary characteristic of written legal language. Once a single meaning is accepted for a legal term, legal experts follow this particular meaning so that they can avoid challenge from the opposing party. It is certainly safer to follow suit in the legal arena. Therefore, a term with a special legal meaning has been used in a consistent and conservative manner in the legal world.

5.2.3 Elitism

Tiersma (1999) and Gibbons (2002) stated that legal language can mark the membership of the elite legal-expert club through such characteristics of lawyer-talk as peculiar pronunciation and spelling. All these idiosyncratic features function as ‘a badge of membership in the legal fraternity’ (Tiersma 1999:52).
However, this does not apply to the situation in Japan. First, as the jury system has been suspended since 1943, the Japanese courtroom is the monopoly of legal experts. Without lay people as jurors in the courtroom, Japanese lawyers did not have any need to develop a peculiar linguistic style of verbal exchanges to convince lay jurors. However, I must add that the mixed court system to be introduced in 2009 will change the conservative language use of the Japanese legal experts. Secondly, the court has been a very foreign place for litigation-hating nationals. As common people have little contact with legal experts, and legal experts are not as financially privileged as medical doctors, the legal experts are not the object of envy among the public in Japan. Therefore, the nature of elitism varies from culture to culture; elitism is not a distinctive feature of legal language.

In the following two sections legal genre and legal register are examined both in Common law countries and in Japan.

5.3 Legal Genre

5.3.1 Judgments

In Common law countries, a judge’s opinion is not necessarily written. When written, opinions are often expressed in a few lines or words such as ‘Affirmed for the reasons stated in Smith v. Jones’ (Terauchi (2001):82). However, for the purpose of this thesis, I deal with only the written type of judgement and its discourse structure.

Maley (1985:159) stated that a judgment is non-fictional discourse and has a model pattern. The pattern used in judgments of Common law countries is not as rigid as that in Japan. In Japan, the Legal Training and Research Institute educate legal apprentices in the drafting of judgements to ensure a unified approach to judgments. Also, Housou-kai (the Association of the Legal Profession) publishes several textbooks on the drafting of the judgment: how to draft the judgment of the first trial and the intermediate appeal in both civil and criminal courts: Keiji Hanketusho
Kian no Tebiki (the Manual of Drafting the Criminal Judgement), 9-ten Minji Hanketsu Kian no Tebiki (Ninth Edition, Guide to Draft Civil Case Judgement) edited by Shihou Kenshuusho (Legal Training and Research Institute). In the following sections, the organisation of the judgment is discussed.

5.3.2 Common Law Countries

5.3.2.1 Communicative Purpose

The function of a judgment is to pronounce judgment. The judgment indicates the decision as well as the process of judgment. Bhatia (1993:127-36) analysed three case reports of the same case and presented a typical structure of legal cases in terms of communicative purpose, as given below.

Move 1. Identifying the case
Move 2. Establishing facts of the case
Move 3. Arguing the case
   (a) Stating history of the case
   (b) Presenting arguments
   (c) Deriving ratio decidendi
Move 4. Pronouncing judgment

As Bhatia stated, these moves are obligatory in legal cases, though they differ in the amount of detailed information. As legal reasoning is a shared norm, these four moves of communicative purpose are also common both in Common law countries and Japan.

5.3.2.2 Organisation

Maley (1985 and 1994) proposed an analysis of an Australian legal judgment in terms of legal function. Maley used five structural elements in the analysis of one assenting judgment –
Facts, Issues, Reasoning, Conclusion, and Order. ‘Facts’ (F) is an account of events and/or the relevant history of the case; ‘Issues’ (I) is facts or laws, or both; ‘Reasoning’ (R) is the reasoning of the case; ‘Conclusion’ (C) is the principle or rule declared applicable for the case; and ‘Order’(O) is the order of the assenting judge. ‘Facts’ precedes ‘Issues’ and ‘Reasoning’, which are iterative and recursive. ‘Conclusion’ and ‘Order’ appear either initially or finally. All these elements are obligatory in the judgment paper.

Gibbons (2002:135-139) summarised the genre of the case report, modifying the structure of Maley’s work. The case report is divided into two parts: the prefatory material and the judgement. The prefatory material is added by the reporter for the relevant law journal. The following is the structure of the case report of Malaysia Tobacco Co. Bhd v. The Roadrailer Service, Bhd [1994] MLJ847.

**PREFATORY MATERIAL**

*Heading*

Name of case; Court name; Reference number; Name(s) of Judge(s); Date(s)

*Keyword summary*

Law & Procedure; (Evidence); (Words and Phrases)

*Summary of judgment*

In English: Summary (Obiter) (Per curiam)

In Bahasa Malaysia: Summary (Obiter) (Per curiam)

(Appeal)

From/To

References

(Notes); (Cases); (Legislation/Regulation); (Previous lower court); Names of counsel; (Date)
JUDGMENT

Orientation

Participants; Previous litigation

(‘Facts’)

[narrative genre]

Issues

Counsels’ argument; Judge’s interpretation/reasoning

Decision

(Legal issues); Finding; Verdict; (Penalty/Award); Costs

(Obiter)

In the next section before I discuss a similar organisation of the Japanese judgment, I present the historical background of the plain judgment.

5.3.3 Japan

5.3.3.1 Historical Background

Drafting a judgment places a tremendous amount of work upon judges. Because it is a traditional belief that the judgement is the life and soul of the judge, judges must put their hearts and souls into the writing of the judgement. To complete sections on ‘Facts and Issues’ which is the prerequisite to the judgment, they painstakingly investigate massive records of the case, and, assemble and clarify the sometimes vague and jumbled arguments of the parties. Japanese judges often say that they put as much as sixty percent of their energy into writing up the judgment paper and only forty percent into the examination of the case itself (Miyake 1994: 72).

Seeking a solution for this situation, five possible schemes have been devised by the
movement for plain written judgement for the sake of judges, but regrettably not for 
comprehension by the general public (Miyake (1994:71-6)). Several schemes have been already 
introduced at some levels of rulings. The first scheme is the omission of written judgements. 
When the defendant is absent in a civil trial, on the written complaint the judge simply writes one 
sentence ‘The court acknowledges the claim of the plaintiff’. Or a court clerk writes down the 
judge’s oral judgment on the written evidence. The second is to acknowledge the citation of 
contents of trial records. The third one is to attach the copy of written documents of the litigants 
and cite them as the main part of the judgment. The fourth is to use a prescribed wording for a 
judgment in limited cases such as litigation of bills. The last scheme is to simplify the judgment 
itself.

Since the mid-1980s the legal circle has taken a more positive attitude toward the 
advancement of plain language in judgments. This was partly because the process of 
examination itself has become emphasised more than the process of drafting the judgment. The 
drafting of the judgment is gradually being considered as a kind of ex post facto report rather than 
the life and soul of a judge. Another transition, the idea that the judgement should be written for 
the litigants, has become gradually accepted in legal circles. Due to these changes the judgment 
is now expected to be clear and short. The idea of the judgement for the sake of litigants has 
made the judgment plain in terms of organisation and terminology. The discourse organisation of 
judgments is discussed from a historical perspective in the next section.

5.3.3.2 Organisation of Civil Judgements

Nara (1994:17-26) and Takano (1994: 36-42) presented a historical view of changes in the 
written judgment for civil cases. As mentioned before, what should be entered in the writ of 
judgment is now stipulated in Article 253 of the code of civil procedure: Text; Facts; Reasons; 
Date of Conclusion of the Oral Argument; Parties and their Legal Representatives; and Court.
However, before the Second World War the judgement paper was composed of five parts: Text, Facts and Issues, Reasons, Parties and their Legal Representatives and Court. One notable characteristic of ‘Facts’ in the pre-war civil cases was that each litigant’s claim, approval or disapproval, submission method of evidence, and approval or disapproval of evidence were all written in one single sentence. The language used was literary language, full of Chinese characters (kanji), and no punctuation. This Old Style is referred as the Traditional Style (dentou-gata).

The changes in the language of the written judgement have accelerated dramatically due to the use of plain language in the Constitution. Notable improvements are the use of punctuation, spoken language, ordinary Chinese characters, and more importantly the insertion of subtitles. In 1958 the civil-case judges who taught at the Research Institute for Legal Training published a book, ‘A Guide to Prepare a Judgement of Civil Cases’ and formalised the style of judgements. Based on the title of the guidebook, the style is referred as Guide Style (tebiki-gata)\(^5\). The Guide Style has separate sections for ‘Facts’ and ‘Reasoning’. As ‘Issues’ tend to consume a larger amount of writing than ‘Reasoning’, the unbalanced distribution has drawn some criticism from among legal experts.

In order to force more energy into the drafting of the claim and establishment of facts, a new style was developed in the mid-1980s. In this New Style (shin-youshiki), ‘Facts’ and ‘Issues’ are combined into one part of the judgement statement. The combined ‘Facts’ and ‘Issues’ are then divided into three parts: Claim of Plaintiff, Summary of Case and Judgement on Issue. The Summary of the Case is further divided into Acknowledged Facts between Parties, and then, Issues. Below are the outlines of the two discourse organisations of the written judgement: the Guide Style and the New Style.

\(^5\) The term zairai-youshiki (conventional style) is used for the Guide Style in 9-tei Minji Hanketsu Kian no Tebiki (Ninth Edition, Guide to Draft Civil Case Judgement) edited by Shihou Kenshuusho (Legal Training and Research Institute).
THE GUIDE STYLE

1. Heading
   1) Reference Number
   2) Case Type
   3) Parties and Legal Representatives

2. Text

3. Facts
   The claim of the plaintiff is presented respectively together with the approval or disapproval of the defendant.
   1) Gist of Petition
   2) Grounds for Petition
   3) Issues
   4) Evidence

4. Reasons

5. Court

THE NEW STYLE

1. Heading

2. Parties and Legal Representatives

3. Text

4. Facts & Reasons
   Round off the approved part by the opposing party and extract the disputed issues.
   1) Claim of Plaintiff
   2) Summary of Facts
      (1) Acknowledged Facts between Parties
(2) Issues

3) Judgement on Issue

5. Court

A further plain style of judgment was adopted by the Supreme Court (Supreme Court: 1995). Judges are encouraged to use shorter and plainer sentences. In addition, the description of indexing evidence and application laws is simplified. It is up to the judge to use the New Style or this modified Supreme Court approach. From the perspective of a legal journalist, Fujikawa (2005), stated that judges in rural areas tend to be more conservative in language use than those in the cities.

Finally, Article 253 of the Code of Civil Procedures, as mentioned before, stipulates what is to be entered in the writ of judgment. ‘Text’ is the equivalent of ‘Order’ in Common law countries.

(i) Text
(ii) Facts
(iii) Reasons
(iv) Date of conclusion of the oral argument
(v) Parties and their legal representatives
(vi) Court

For legal experts, how to combine these structural elements is one of the challenges in the plain language movement with regard to judgments.

5.3.3.3 Illustrative Judgement

One type of judgment that stands out as an exception to the trend of the New Style is a judgment called the illustrative judgment of the Supreme Court. The Supreme Court often uses a
fixed pattern in dismissal cases of the final appeal. The appropriateness of a writ of judgment, using such a fixed pattern as found in the illustrative judgment is disputed among legal experts. The following is one example of an illustrative judgment (Inoki 1994:8), in which Inoki, a former judge of the Fukuoka High Court, was a legal representative for the appellant of the case. It took as long as three years for Inoki and the appellant to receive the decision from the Supreme Court, which turned out to be a very simple and conventional dismissal judgment. The following is the illustrative judgment Inoki was given at the Supreme Court.

TITLE: The Reason of the Final Appeal by Legal Representative(s) for the Final Appeal

We can acknowledge the fact-finding judgment (the legal conclusion obtained from fact finding and its legal application) of the original court regarding the points (argued in the Reason for Final Appeal) as justified in light of the related evidence produced in the original court and that there is no illegality of the points in the process. The Supreme Court cannot adopt the points of argument because the points criticise the fact finding and the decision of adoption or rejection of the evidence which reserve exclusively for the original court, or denounce the judgment of the original court based on their own extraordinary and unacceptable perspective.

Consequently, the court unanimously delivers judgment as stated in the Text, in accordance with Article 401, 95, 89, 93 of the code of civil procedure.

Inoki (1994 and 1996) argued that the Supreme Court did not provide any clear reasons for dismissing the appeal to the final court. Although he claimed the deficiency of the original judgment in terms of reasons, judgment process, as well as the breach of law based on legal theory, Inoki was concerned with the fact that his reason was simply treated as an ‘extraordinary and unacceptable’ view.

Inoue (1998:33-5) presents several reasons for the language of the illustrative judgment. The first reason is the rationalisation of the work load. The Supreme Court judges are simply too busy to write up legally bound ‘Reasons’ for each case. Some 4,000 cases come up to the Grand and Petty Benches in the Supreme Court every year. Next, no institutions exist where the legality of the Supreme Court decision is examined. Moreover, legal scholars cannot make any
criticisms of the content of the Reason unless they are written.

Except for the illustrative judgment, the basic organisation and structural elements of the judgments is similar between Common law countries and Japan. The structural elements are ‘Text/Order/Decision’, ‘Facts’, ‘Reasons/Reasoning’, with ‘Facts’ preceding ‘Reasoning’.

5.4. Legal Register

5.4.1. The English Legal Register

There have been many works concerning the characteristics of legal English. The pioneer in this field is law professor Mellinkoff, followed by linguists such as Crystal and Davy, Danet, Bhatia, Maley, and Gibbons, and then lawyer-linguist Tiersma to be discussed below in this order. In this section, the English legal register is examined in terms of lexicon and syntax by different approaches from law, linguistics and psycholinguistics.

5.4.1.1 Lexicon

5.4.1.1.1 Mellinkoff

An early study of legal language is the work of Mellinkoff (1963), who discussed the peculiarity of English legal language from the perspective of the lexicon. Mellinkoff presented the following characteristics of the lexicon of legal language:

1. frequent use of common words with uncommon meanings
2. frequent use of Old and Middle English words once in use but now rare
3. frequent use of Latin words and phrases
4. use of Old French and Anglo-Norman words not in the general vocabulary
5. the use of terms of art; use of argot
6. frequent use of formal words
7. deliberate use of words and expressions with flexible meanings
The use of common words with uncommon meaning indicates that the meaning of a certain word which legal experts share among themselves is a peculiar meaning of the word for lay people. For example, the term ‘action’ means ‘lawsuit’ for lawyers, but obviously the meaning is not commonly used one in Layer 2. Tiersma (1999) defined this usage as legal homonym.

The next usage is Old and Middle English. Old and Middle English have influenced present-day English, and we still see the traces in the areas of religion, sailing and law. In the case of law ‘hereafter’, ‘In witness whereof, I have set my hand, etc’, ‘aforesaid’ are commonly used archaic expressions. Not only Old and Middle English but also Latin words are frequently used in legal English. Some examples are ‘certiorari’ and ‘nisi’. Another linguistic area, which has influenced legal English, is Law French, which is mostly composed of French words of Old French and Anglo-Norman origin. All these expressions are put in a single group, legal archaism.

Mellinkoff furthermore stated that legal terms of Old/Middle English, Latin and Law French sometimes appear in sequences of two (doublets) or three (triplet). Tiersma (1999) defined a list of semantically related words as legal synonym. Examples are ‘rest, residue and remainder’ or ‘new and novel’.

In addition to the ancient words, technical words with specific meanings, which are called terms of art, are used in law as well as other specialised fields such as horsemanship. Examples are ‘amicus curiae’ or ‘felony’. Similar to terms of art, argot is also used. The difference between terms of art and argot is that argot is a specialised vocabulary exclusively used among in-group people whereas terms of art are the specialised vocabulary used by both specialists and non-specialists. However, Mellinkoff indicated the boundary between the two is not clearly defined. A word like ‘demur’ is a technical term when officially used in the courtroom, but could well be argot when used by one lawyer to another at a cafeteria in the courthouse.

For the purpose of adding a ceremonial quality onto legal English, a formal expression such
as ‘approach the bench’ instead of ‘come here’ or a euphemistic expression like ‘the deceased’ are used. I refer to this type of expression as legal formalism.

5.4.1.1.2 Linguistics

Following Mellinkoff’s work linguists elaborated the analysis of the legal lexicon. Crystal and Davy (1969) pointed out that descriptive adjectives like ‘splendid’ or ‘happy’ and intensifying adverbs like ‘very’ or ‘extremely’ are rarely used, and that abstract nouns such as ‘declaration’ or ‘stipulation’ are commonly used in legal documents.

Two words which are not antonyms in ordinary language are made to serve the function of antonyms in legal language, which Tiersma called legal antonym. ‘Speech’ and ‘conduct’ are one example of legal antonym. In ordinary language, ‘speech’ can be interpreted as a part of ‘conduct’ whereas the key distinction between ‘speech’ and ‘conduct’ in legal language is that ‘speech’, but not ‘conduct’ is protected by the Free Speech Clause of the US Constitution.

5.4.1.2 Syntax

5.4.1.2.1 Mellinkoff

In the section on mannerisms in legal language, Mellinkoff sets out four rather pointed attributes: wordy, unclear, pompous and dull. Although the items were not typically syntactic, I would like to include the mannerism of ‘wordy’ and ‘unclear’ as an aspect of syntax. An example of ‘wordy’ is ‘written document’ for ‘document’. Mellinkoff’s examples of ‘unclear’ are: extremely long sentences, a long sentence with awkward constructions, and a strange use of metaphor.
5.4.1.2.2 Linguistics

5.4.1.2.2.1 Sentence Length

Syntactic analysis is certainly the domain of linguists. Crystal & Davy (1969) first drew attention to sentence length in legal language. They noted the extreme length of sentences with arrays of subordinate devices and the repetition of lexical items and a scarcity of anaphora. This is because legal experts want all the necessary information to be presented in one single sentence. The reason behind this is that one can avoid possible legal challenges resulting from problems of coherence of words. Crystal & Davy (1969:201) therefore indicated that one legal sentence is a self-contained unit by putting connective information into the form of a very complex sentence which is capable of standing alone.

Sentence length was measured by Danet (1985:279-86). She drew on the first 60 lines of a British legal document known as an Assignment. Danet pointed out that one single sentence consisted of 242 words, which was much longer than the average sentence length of 55 words found in the work of Gustafsson’s corpus-based work on legal English(1984).

5.4.1.2.2 Multiple-embedding

Crystal & Davy (1969) indicated that most of the complete sentences have many layers of underlying logical structures such as ‘if X, then Z shall be Y’ or ‘if X, then Z shall do Y’. An adverbial clause like ‘if X’ can generally make its own sentence more complex. The modifying strata in which a small adverbial clause is embedded in a large adverbial clause, which is further embedded in a large adverbial clause, thus makes legal documents extremely incomprehensible.

Bhatia (1993) was critical about Crystal and Davy’s claim of ‘If X, then Y shall do/be Z’ as a representative form of the legal genre, and argued that it was an oversimplified account. Then, Bhatia, from the perspective of cognitive structuring, proposed three types of qualifications: preparatory qualifications, operational qualifications, and referential qualifications. Preparatory
qualifications describe cases for the application of the rule of law; operational qualifications give additional information about the implementation of the rule of law; and finally, referential qualifications identify the main inter-textual nature of the legislative provision. Bhatia (1993:115) claimed that the qualifications played a very important role in the structuring of legislative writing because most legislative provisions were written in terms of ‘a two-part interactive move-structure consisting of the main provisionary clause and the attendant qualifications of various kinds’. One part of his examples of a two-part interactive cognitive structure is given below:

Where the dwelling-house with respect to which the right to buy is exercised is a registered land, the Chief Land Registrar shall, if so requested by the Secretary of State, supply him …

Note: box indicates a provisionary clause and underlined and dotted lines indicate attendant qualifications.

The attendant qualifications of two kinds are inserted at available syntactic position within the provisionary clause to ‘answer legal questions and doubts, and offer clarifications about various aspects of the main provision’ (Bartia: 1993:116). In summary, Bhatia claimed that the sentence of legal provision is dominated by a two-part interactive structure of a provisionary clause and qualifications and that the motivation for preciseness and clarity in legal provision resulted in syntactic discontinuities.

From a quantitative perspective, Danet (1985) showed the unusual complexity of legal English in terms of the number of subordinate clauses within one sentence by contrasting Gustafsson’s work on an average of 2.86 clauses per sentence in ordinary language, with Charrow’s work on nine subordinate clauses in the most complex sentence in jury instruction.
5.4.1.2.2.3   Word Order

Over and above the sentence level, legal English has a number of distinctive features on the
clause-level. Clauses in legal language contain a large number of adverbial elements, which add
complexity to clauses and sentences as well. In order to pursue precision, an adverbial element is
often placed in a peculiar position. This can be seen in one of the examples from Crystal & Davy
(1969:204), ‘a proposal to effect an assurance with the Society’ is described in legal language as ‘a
proposal to effect with the Society an assurance’. The placement of the prepositional phrase
between the verb and the object is odd in ordinary language, but it clarifies that ‘with the Society’
is solely modifying the verb ‘effect’, but not the noun ‘assurance’. Adverbial elements are often
coordinated, which makes legal English more complicated. The use of ‘and’ or ‘but’ with
adverbial clauses makes the whole clause longer and more complex. Tiersma (1999:65)
interestingly indicated that the unusual sentence structure in legal English is a trace from the free
order pattern of Latin.

Apart from clause-level, nominal expressions in legal documents show the distinctive
law-language features: long and complex resulting from the postmodification of nouns.

The subject and the verb are distantly located in legal language because of multiple
embedding and repetition. (Gibbons: 2002)

5.4.1.2.2.4   Negation

Tiersma pointed out the frequent use of negation. This is because in legal reasoning
whatever is not explicitly forbidden is permissible.

5.4.1.2.2.5   Passive and Nominalisation

For the strategic point of view, passives and nominalisations are used to obscure the actor.
Tiersma’s example (1999:77) is that the defendant’s attorney can write ‘the (girl’s) injury
happened at 5:30’ instead of ‘the defendant injured the girl at 5:30.’

5.4.1.2.2.6 Grammatical Metaphor

Another source of syntactic elaboration relates to grammatical metaphor (proposed by Halliday). Grammatical metaphor contributes to the incomprehensible nature of legal documents. Halliday (1985:93-96) introduced the notion of ‘grammatical metaphor’ in the process of differentiating between written and spoken languages. What Halliday noted is that something represented as a verb can be represented as a noun. Let me cite one example from Halliday’s work. One sentence ‘After the announcement, people applauded.’ can be paraphrased into another sentence ‘Applause followed the announcement’. The verb ‘applauded’ in the first sentence is transformed into the noun form ‘applause’ and thereby the verb ‘followed’ is introduced in the second sentence. Halliday stated that types of newly introduced verbs are generally forms of the verb ‘to be’ verb or other verbs whose task is essentially to link nominalisations but themselves bear little semantic content. These include ‘form’ and ‘constitute’ or related verbs such as ‘lead to’, ‘follow’ in the use of grammatical metaphor. In other words, the verbs used in grammatical metaphor are rather limited (both in number and semantic content), which can cause ambiguity, while the nouns in grammatical metaphor express a diversity of lexical meanings, which can then cause confusion.

As Gibbons (2002:20) stated, grammatical metaphor can contain dense packaging of information in the form of a noun phrase. However, the sentence itself turns out to be simple. In other words, complex information can be expressed in a form of a simple sentence with noun phrases of densely packed information. Gibbons (2002:167) then elaborates three complex types of grammatical metaphor. The first type is the distortion of the expected relationship between basic parts of speech like noun, verb, adjective and their meanings (things, actions, attitudes). This can cause difficulty in comprehension. The second type is a complex morphological form
such as ‘author+ship’ or ‘in+comprehensi+bil+i+ty’. The third type is the use of Greek or Roman origin word such as ‘insertion’ instead of ‘putting in’. Grammatical metaphor is less used in spoken language as the sentence structure is too complex to capture its meaning at a one-time hearing. Thus, grammatical metaphor is a noticeable characteristic of legal written language.

5.4.1.2.3 Psycholinguistics

A well-known psycholinguistic study came from Charrow and Charrow (1979). The researchers investigated the comprehensibility of standard jury instructions by the use of a psycholinguistic study. They gave two linguistically different jury instructions to each of two different groups. The first type of jury instruction is the original standard jury instruction used in California. The second type is a linguistically modified version of the first type. They concluded that certain linguistic constructions lead to incomprehensibility but the alteration of problematic linguistic constructions facilitates the comprehension of juries.

The part of their study relevant to this thesis is the isolation of linguistic features of the legal genre. Below is their list of features.

- nominalisations
- ‘as to’ prepositional phrases
- unusual positioning of phrases
- ‘whiz’ and complement deletion
- lexical items
- passive constructions in subordinate clauses
- multiple negatives; word lists such as doublets or triplets

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6 ‘Whiz’ is a short form of ‘which is’. ‘Whiz’ deletion therefore indicates the missing of relative pronouns and ‘copula’ (Be) verbs, for example ‘questions of fact “which are” submitted to you’. The other type of deletion, complement deletion, means the omission of the complementizers ‘that’ or ‘which’, as in shown the following example, ‘if you are convinced (that) it is erroneous
Charrow and Charrow (1979) stated that the apparently incomprehensible nature of nominalisations is due to the abstraction and impersonality caused by the elimination of the true subject of a sentence. An ‘as to’ prepositional phrase has a rather vague meaning, in contrast with other prepositions with basic meanings such as ‘in’, ‘on’, ‘at’ etc. Lexical expressions are composed of legal terms, unfamiliar expressions, uncommon words in terms of the frequency appearing in dictionaries.

Charrow and Charrow (1979) emphasised that the location of passives causes more incomprehension problems than the types of passive construction. As for numbering, redundant information by the addition of numbering could cause incomprehensibility, which is supported by Grice’s Maxim of Quantity. Finally, they pointed out the quality of embeddings (types of embeddings) such as numerous subordinate clauses within one sentence, can impair the comprehension more than quantity (the number of embeddings in one single sentence).

5.4.1.3 Discourse

5.4.1.3.1 Cohesion

Looking at cohesion in discourse-level features, Danet (1985) found five cohesive devices in the Assignment: anaphora, conjunction, substitution, ellipsis, repetition, and definition. For the first device, anaphora, Danet located two instances of pronoun usage, ‘he’ and ‘him’, which referred to ‘the trustee’ in the Assignment. As the anaphora does not occur frequently in legal documents, she agreed with other predecessors such as Crystal and Davy (1969) about the avoidance of pronouns and the repetition of the term like ‘trustee’ as a feature of the legal register. Crystal & Davy (1969) said that the scarcity of anaphora itself has now been established as a characteristic of the legal genre because its use is avoided even in the unambiguous situation. The reason for the scarcity of anaphora is often said to be the avoidance of confusion.
For the second device, conjunction, Danet found, in the Assignment, terms like ‘hereinafter’ or ‘aforesaid’, together with the ordinal number were found as examples of the device of conjunction in the Assignment. The third device, substitution, was rarely exemplified in her data, though one was found: a transition from an active verb ‘has proposed’ to a nominalization ‘such proposal’. Next, ellipsis was again a rarely used device along with whiz-deletion. The next device, repetition, to create lexical cohesion: lexical reiteration was employed instead of pronouns. Little use of synonyms was found in the Assignment. Briefly, Danet claimed that, for the purpose of precision and explicitness of legal discourse, cohesion devices except conjunction or simple lexical reiteration were generally avoided.

Regarding a very uncommon way of defining terms, Tiersma (1999) indicated that some legal terms are redefined to include more meanings. For example, the masculine gender (he) includes the feminine (she) and the neuter (it). The same principle applies to the tense. The present tense includes the future, sometime even the past tense. Furthermore, the singular includes the plural, and vice versa. All these redefinitions apply only when in an appropriate context. Moreover, ‘and’ can be replaced with ‘or’ (Solan 1993:45-55) and ‘if’ can be interpreted as ‘and’ (Gibbons 2002:58). Gibbons (2002) furthermore discussed pronouns, defined pro-forms, and core noun with deictics. In order to minimise redundancy, ‘defined pro-forms’ are used. Defined pro-forms are set up to indicate special meanings for words or expressions by means of definitions and to be used in the throughout the legal text.

Syntactic and discoursal features of legislative writing are interconnected. This means that a certain legal requirement of expressing something precisely could result in syntactic discontinuities and thereby the discoursal structure of the sentence becomes more complex partly because of these syntactic discontinuities. Therefore, Bhatia (1993) argued that characteristic syntactic features needed to be analysed before the analysis of distinctive discoursal features.
5.4.1.3.2. Styles

Some of the most characteristic features of legal language are flexibility and preciseness, which were pointed out by Mellinkoff (1963), Tiersma (1999) and Gibbons (2002). Legal experts deliberately use vague terms such as ‘reasonable’ to cover a variety of situations. On the other hand, they use some words in an extremely precise way. One example drawn from a contract or a statute is to define words for the particular situation: ‘words used in the masculine gender include the feminine and neuter’. This is because legal experts believe that explicit definitions engineer precision in law.

Impersonality is another characteristic of legal language. Lawyers address the judge by saying ‘May it please the court’ as if he or she were the third person (Tiersma 1999).

5.4.1.4 Classification of the English Legal Register

In summary the register of English legal language is classified into three main levels: lexicon, syntax, and discourse. The three levels are divided into various items as follows.

LEXICON

Legal archaism; Legal formalism; Legal homonyms; Legal synonyms; Legal antonyms;

Terms of Art/Argot

SYNTAX

Lengthy Sentences; Multiple embedding; Word Order; Passive/Nominalisation;

Grammatical Metaphor

DISCOURSE

Cohesion: Anaphora; Conjunction; Substitution; Ellipsis; Repetition; Definitions;

Styles: Flexibility/Preciseness; Impersonality
5.4.2. The Japanese Legal Register

In the previous section I examined English legal registers in terms of lexicon, syntax, and discourse. However, as the Japanese legal register has been studied less than the English legal register, I present the work relating to legal language in chronological order. The first work was an article written by a self-styled linguist Okubo in 1959, immediately followed by the response to him from the Director of the Cabinet Legislation Bureau, Hayashi. A more comprehensive work came from a leading scholar of traditional Japanese language studies, Iwabuchi. Although his work was not aimed at describing legal language, it helps us consider the nature of the Japanese legal register.

5.4.2.1 Okubo and Hayashi

In 1959 Okubo contributed an article, ‘Hourei yougo wo shindan sureba’ (On my diagnosing legal language) to Hougaku Seminar (Seminar on Legal Studies). Okubo (1959a) evaluated the following revision in legal terms proposed by the Cabinet Legislation Bureau in 1954.

1. to avoid the use of uncommon homonyms
2. to try to unify synonyms into one word
3. to avoid the use of difficult words
4. to regulate the use of Chinese characters
5. to regulate the use of the hiragana syllabary

Okubo (1959a) stated that the revision was not sufficient because the simplification of sentence structure had been ignored in the revision of the Legislation Bureau.

Okubo (1959a) then pointed out five problems in the sentence structure of legal documents with an analysis of one article from the Execution of Police Duties Law. The first problem is lengthy sentence. One sentence of the law contained 327 characters, which is six times as long
as the average sentence of about 50 characters. The second problem is long and embedded modifiers. The third one is the placement of the verb far from the subject. In one sentence there are 173 characters between the subject and the verb. The fourth one is regarding the omission of items. As those items are often fundamental components of a sentence such as the agent of a passive, the sort of omission causes confusion in understanding the sentence. The fifth one is the frequent use of embedding in conditional clauses. Okubo then offered his simplified version of this article of police law. Lastly, he indicated that the power of the police becomes clearer with his simplified version due to the use of plain sentence structure.

Hayashi (1959) refuted Okubo’s analysis from the position in the Cabinet Legislation Bureau in his article, ‘Houbun tsukuri no tachiba – Okubo shi no ‘shindan’ wo yonde’ (the position of codifying legislation – in reading Okubo’s diagnosis) in the following issue of Hougaku Seminar (Seminar on Legal Studies). Hayashi (1959) explained that lengthy sentence resulted from long embedded modifiers and conjunction clauses and the distant placement of subject and object. Hayashi (1959) indicated the pursuit of preciseness in the legislative writings and the requirement of writing in detail is the cause of lengthy sentences. Hayashi (1959) thought Okubo was wrong and pointed out Okubo’s wrong interpretation of modifiers and the unconscious omission in his analysis.

Without arguing against Hayashi’s critical remarks, Okubo (1959b) contributed another article, ‘Hanreibun no tsuzurikata kyoushitsu’ (Lecture on how to write judgment documents) again in Hougaku Seminar. In this article he focused on the nature of lengthy sentences in judgments. One of his examples of a long sentence consisted of over 4,000 characters. First, he cited two language features which made sentences longer: the use of the continuous form of a verb and the use of conjunctions. Another point he made is the lack of titles, headings, subheadings for each section. Third, the important content is not presented at the initial stage of each section. A fourth problem is the inconsistent appearance and disappearance of direct speech with or
without punctuation, depending on judges.

A series of exchanges between Okubo and Hayashi clarified the chief characteristics of Japanese legal registers. In the lexicon, legal archaism (the overuse of Chinese Characters), legal formalism (the use of difficult words) and Terms of Art were pointed out. Japanese legal language has a number of homonyms such as *kouso* (appeal and prosecution). In syntax, lengthy sentences, multiple embedding; word order (the distant placement of subject and verb) were noted, together with the continuous form of a verb.

5.4.2.2 Iwabuchi

Iwabuchi did not aim to criticise judicial documents in *Akubun* (Bad Style). However, the book has been referred to as ‘the incomprehensible nature of legal language’ in Japanese legal circles. Iwabuchi (1960) proposed fifty principles to follow in order to avoid bad style. His fifty principles are organised into four categories: the component of a discourse; the component of a sentence; the choice of words; and the usage of the honorific. The first three categories are relevant to the register analysis of legal language, whereas the last category, the honorific, is not pertinent to legal language in general. As the usage of the honorific is not very common in official documents of the present-day Japan, the honorific is not a significant features of the legal language of judgements.

Iwabuchi’s other three categories correspond to the three features of Danet. More specifically, the discourse category is comparable to the discourse-level feature. Iwabuchi’s section on the sentence could be well equivalent to Danet’s section on syntactic features. Lastly, the ‘choice of words’ can be related to Danet’s account of lexical features. For the purpose of standardisation of terminology, I will use Danet’s terminology in this thesis. Nevertheless, in a discussion of Japanese legal language it is appropriate to provide some details about Iwabuchi’s three categories. His principles are organised below under Lexicon, Syntax and Discourse.
phrase in parentheses refers to an example of the preceding word.

LEXICON
a) Do not use redundant expressions (a row of tree is in a row), and clarify the meaning of an ambiguous term
b) Avoid a roundabout way of saying something
c) Do not use inaccurate expressions which could invite misunderstanding
d) Avoid self-complacent newly-coined words for showing off one’s own intelligence
e) Avoid odd or incoherent expressions
f) Use expressions that consider the feelings of readers, particularly when giving instructions or orders
g) State facts as they are
h) Reconsider the appropriateness of the usage of similes and metaphors
i) Use the right idiomatic expressions
j) Avoid a direct-translation style
k) Paraphrase Chinese, literary, and technical vocabulary
l) Do not use loan words or foreign words
m) Avoid homonyms particularly when speaking
n) Do not use unfamiliar abbreviated words

SYNTAX
a) Shorten a long sentence
b) Do not include more than two different ideas in one sentence
c) Do not be divergent in context
d) Do not use too many chushi-ho (a continuous form of verb) when explaining complicated matters
e) Do not use chushi-ho (a continuous form of the verb) which could invite various interpretations
f) Mark chushi-ho (a continuous form of the verb) with punctuation marks
g) Do not delete the verb
h) Do not put the verb away from the subject
i) Do not delete the subject when you change the subject of the sentence
j) Try not to delete the parallel marker of the final word in parataxis (let the child drink water and bread);
k) Do not repeat the same particle with the same meaning within one sentence
l) Do not delete a grammatically required particle
m) Use adverbs in a grammatically incorrect way
n) Do not put a modifying expression away from the modified nouns
o) Clearly place the modified expression
p) Do not use negation in an ambiguous manner
q) Do not use an extremely long modifying expression
r) Divide up a sentence with extremely long modifying expressions into several shorter sentences
s) Do not overuse passives
Iwabuchi (1960) also noted that the sentences of judgments were very long. He cited one sentence of 2,851 characters from a judgment document of a civil case, which is 50 times longer than an average newspaper sentence.

5.4.2.3 Nakano

In the book ‘Hou to Nihongo’ (Law and Japanese Language) (1981) Nakano discussed Hanketsu no Bunshou (the writings of judgment documents) in Chapter 2. He referred to the works of Okubo and Iwabuchi and explained why he thought the typical sentence in judgments was long. Nakano (1981) first clarified that not all the sentences in the judgment were long. The sentences cited by Okubo and Iwabuchi were used in ‘Facts’. The sentences used in ‘Reasons’ were much shorter than those in ‘Facts’. In the ‘Facts’ section in civil cases conventional forms are used such as ‘The plaintiff’s counsellor … asks for the judgment of … states … as the reason of the claims … and states … against the defendant’s answer … cites … as the evidence … acknowledged …’ In criminal cases the phrases are similar replacing ‘the plaintiff’ with ‘the defendant’ as in ‘The defendant did such and such.’ Judges simply follow these conventional forms. In his analysis Nakano (1981) observed that the shift from a literary style to a spoken style in the post-war writing of judgments has not become plainer beyond the lexical level. However, Nakano (1981) stated that although judgments need to be improved, a comparison between the examples of the judgments in Okubo’s articles and those of the mid
1980s indicates considerable improvement.

5.4.2.4 *Nihongogaku*

*Nihongogaku* (Japanese Language Studies) published a special edition on judgements in Volume 13 (1994). The salient features of judgments are pointed out by several contributors to that issue of the journal. In this section, I have re-arranged those features under the categories of lexicon and syntax.

The distinctive characteristics of the lexicon of judgements are rather contradictory: literal but plain (Tao 1994). A decorative type of vocabulary which conveys the expression of flourishes, loftiness, coinage and strangeness, is avoided in legal texts. However, the vocabulary of archaism results from the legal tradition of following precedents. More concretely, the laws enacted in the Meiji era (1868 – 1912) had stylistic features: the exclusive use of Chinese characters (*kanji*) and the *katakana* syllabary (one of the two Japanese syllabaries, mainly used write non-Chinese foreign loanwords) in the old usage without the *hiragana* syllabary, and furthermore without punctuation and voiced sound markers (*dakuon*). Chinese words and expressions together with literal language have thus been thus predominantly used even in the present-day legal texts.

Another unique feature of the lexicon is the use of legal technical terms. This includes the use of ordinary terms with unusual legal meanings (legal homonyms). One example is *zeni* and *akui*. In ordinary usage, the meaning of *zeni* has a positive meaning, ‘good intentions’ whereas *akui* means ‘an evil intention’. In contrast, *zeni* refers to a fact that one is not aware of whereas *akui* refers to a fact that one knows. If one commits a crime, knowing it is a crime, this act is perceived as *akui*. In contrast, *zeni* indicates that one does wrong without knowing it is a crime. Another type of legal technical terminology is the group of terms exclusively used in legal texts. As an illustration, the term *shoron* (assertion) is predominantly used as a legal term and is rarely
used in the ordinary sense.

The distinctive nature of legal syntax involves redundancy, a stiff style, and lengthy sentences. In addition, a unique grammatical structure is used: *mata wa* (or, either or) and *moshiku wa* (or, either or). *Mata wa* is used to connect the largest parts, whereas *moshiku wa* marks the other parts. Another notable feature of legal discourse is starting a new paragraph with conjunctions such as *shikashite* (and then), or *shikaraba* (however). One of the most notorious features of judgements is the ‘extremely long-sentence disease’ (Hagiwara 1994:32; Kawakami 1994:47). Nara (1994:21) stated that it was a tradition early in the Showa era (before 1945) that the ‘Facts’ of the written judgement contained only two extremely long sentences in which the defendant and plaintiff were the respective subjects of the two sentences. As each sentence contained the claim, approval or disapproval, and the evidence of the party, the sentence simply became very long. Therefore, Miyake (1994:78) also mentioned that as a judge must include many items in the judgment, it seems to be a natural habit that the judge uses *chushi-ho* (continuous form of a verb) and continues the sentence in a far-stretching way. Another notorious feature of the written judgement, though it is also related to the use of lengthy sentences, is the long distance between subject and verb. Takano (1994: 36) gives us one example; there are 2,851 characters between the subject and verb in one single sentence.

The use of technical terms has been accepted in legal circles because the judgement is usually written with legal experts in mind such as the judges of appellate courts, legal executors, and attorneys. To make legal language more incomprehensible, the definitions of legal terms vary in different areas of the law, as different types of laws involve distinct notions of a certain legal term. For example, a ‘person’ in the civil code indicates a fetus which has completely left the mother’s womb whereas a ‘person’ in the penal code does not need to wait for the complete secession of the fetus from the mother’s womb for its definition. A fetus partially leaving the mother’s womb is regarded as a ‘person’ in the penal code (Tao 1994:69).
5.4.2.5 Classification of the Japanese Legal Register

The following are the characteristics of legal Japanese based on the work cited. These characteristics are registers which make up the genre of the judgment paper.

LEXICON

Legal Archaism: Uncommon Words; Overuse of Chinese Characters
Legal Terminology: Terms of Art; Legal Homonyms; Legal Jargons
Legal Phrase: Legal Set Formulae; Legal Idiomatic Expressions

SYNTAX

Lengthy Sentences; Dispersed Subject/Verb; Multiple Embedding; Continuous Verb Forms; Grammatical Construction

DISCOURSE

Cohesion: Anaphora; Conjunction; Substitution; Ellipsis; Repetition; Definition
Style: Flexibility/Preciseness; Impersonality

Although little work has been done in terms of legal phrase and cohesion in the area of the Japanese legal register, I have included the notion of cohesion in the classification for the purpose of the analyses of the two trademark cases.

5.5 Summary

Layer 1 in the Linguistic Legal Model has the judicial process as its macro-genre, which consists of a number of genres such as the judgment or the legislative document, each of which is a staged, goal oriented, and purposeful activity. The discourse organisation of the judgment characterises the judgment as genre. On the other hand, a special set of vocabulary, a distinctive grammatical construction, and cohesion and stylistic characteristics of discourse are regarded as
creating the register of the judgment. The legal register determines the genre of the judgment.

The Register Analysis of Japanese legal language presented in this chapter is based on studies of English legal language. In order to develop a more substantial scheme for Register Analysis for the Japanese context, analyses of several writs of judgement in Japanese cases are needed. In the following two chapters, I present two trademark cases with the issue of a likelihood of confusion.
6.0 Introduction

In this chapter the judgement in the Golden Horse case is examined using the Linguistic Legal Model. First, the background of the case is introduced in the section on Layer Analysis; then the Register Analyses of the case is provided. Unlike the judgment in the Snack Chanel case, the judgment in the Golden Horse case coincided with the general opinion of ordinary citizens. However, the thought process in the legal judgment was controlled by the paradigmatic mode. In the section on Register Analysis a discussion of the discourse organisation of the judgement paper is first provided. This is followed by the analysis of the judgment paper in terms of lexicon, syntax and discourse. It is argued in this chapter that the combined analyses clarify the characteristics of judgments. Before discussing Layer Analysis, I would like to note that all the underlines in the examples are added by the writer and that I use EHS Law Bulletin Series for the translation of Japanese laws.

6.1 Layer Analysis

In Layer 1 legal experts regard law as a system of rules. In contrast, ordinary citizens emphasize social relations over legal rules in Layer 2. In the issue of trademark cases regarding a likelihood of confusion, ordinary people are concerned with whether they themselves confuse the relevant trademarks or not. However, legal experts decide whether they should prohibit others from using someone’s trademark or not, following the logic of law. They attach more importance to rules rather than the existence of actual confusion. In this section I first examine the judgment in the rulings of the Tokyo District Court, the Tokyo High Court, and the Japanese Supreme Court from the perspective of the paradigmatic mode of Layer 1. In doing so, I present the available claims of litigants. After that, I discuss the naming of the two trademarks from the
viewpoint of etymology and morphology, and the perspective of lay persons by analysing the data base.

6.1.1 Court Rulings

6.1.1.1 The Background of the Golden Horse case

White Horse Distillers Ltd has produced and sold Scottish blended whisky to UK as well as other countries since the 1880s. The trademark of White Horse Distillers consists of three parts. The brandname, ‘WHITE HORSE’, is in red-coloured English capital alphabetic letters; its Japanese equivalent ‘ホワイトホース’ is written in the Japanese *katakana* syllabary (one of the two Japanese syllabaries used for non-Chinese foreign loanwords.). The picture is of a standing white horse in profile.

The defendant, Toa Shuzo (on behalf of Toa Distillers), bought the trademark and business of Golden Horse in 1959. Golden Horse has two classes of whisky\(^7\): Golden Horse (symphony) and Golden Horse (special). The labels consisted of ‘GOLDEN HORSE’ in English capital alphabet letters, its Japanese equivalent in the *katakana* syllabary, the emblem of a crown, and a jumping horse in profile.

6.1.1.2 The Tokyo District Court\(^8\)

6.1.1.2.1 Court Reasoning

In the Tokyo District Court the plaintiff claimed that there was a likelihood of confusion between the two trademarks and demanded that Toa cease from using the business identification of Golden Horse on the basis of the (old) prevention of unfair competition law.

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\(^7\) ’Whisky’ has two spellings, ‘whisky’ and ‘whiskey’. In the UK, Australia, and Canada ‘whisky’ is used while ‘whiskey’ is used in Ireland and the US. However, in the US ‘whisky’ is used for the spelling for Bourbon. Toa Shuzo uses the British spelling for ‘whisky’.

\(^8\) Judgement of 25 April 1983, Tokyo District Court 465
White Horse Distillers made three main arguments. Firstly, their trademark White Horse literally meant ‘a white horse’ and Golden Horse meant ‘a golden horse’. As ‘horse’ was their common distinguishable and principal part, the two marks differed only in colour terms. Secondly, colour terms were often used to give grade designation to western liquors such as ‘Suntory White’ or ‘Suntory Gold’. This indicates that Golden Horse could be well considered as a higher quality of White Horse. In addition, in liquor transactions White Horse was referred to by its Japanese short form ‘uma’ (horse). Therefore, the use of Golden Horse by the defendant would cause a likelihood of confusion between the two marks.

The defendant Toa Shuzo (Toa Distillers), without giving a clear reasoning, first argued that the distinguishable part of each trademark was the trademark as a whole, not one part of the trademark. Toa then argued that a colour term can be used as a grade designation only when the term is added to a basic product name. Toa also pointed out that The White Horse product ‘Logan’ is already sold as a higher quality of White Horse, thus, this clearly denied the plaintiff’s claim of the possibility of Golden Horse being regarded as a higher grade of White Horse. Furthermore, Toa cited as an example the Japanese rice wines, *Hakutaka* 白鷹 (white falcon) and *Kintaka* 金鷹 (golden falcon) produced by different distillers and stated that no confusion has been observed in these liquor transactions. In addition, as the term ‘*shirouma*’ 白馬 (the common Japanese equivalent for the English word ‘white horse’) means unrefined sake, the Japanese word of ‘white horse’ was not associated exclusively with Scotch whisky in Japan. Moreover, the images ‘a horse’ and ‘a white horse’ have been commonly used in various liquor trademarks. Finally, no possible confusion between the two has been reported as there was a sharp distinction between the internationally brewed Scotch whiskey and domestically brewed whiskey in the liquor transactions of dealers and consumers.

The Tokyo District Court acknowledged all of Toa’s claims and ruled that the two marks were not similar. In order to acknowledge a likelihood of confusion, a comprehensive
comparison of appearance, sound, and meaning of the relevant marks is required in Japanese courts. The two marks must bear a strong resemblance in regard to at least one of the three items. In terms of appearance and sound, the court, with little explanation, did not acknowledge the term, Horse, as the principal part of both trademarks. As to meaning, the court also stated that the principal part was the trademark as a whole, not the Horse part. The court’s reasoning was that ‘white horse’ was a real horse which indicated the symbol of victory and nobility, while ‘golden horse’ was an imaginary horse with very distinctive ‘gold’-coloured hair. This meant that their difference was not a mere difference in colours but one of existence. The court then admitted the defendant’s claim regarding colour terms and basic product names. The court first indicated that colour terms, or colour terms with ‘label’ or ‘cap’, functioned as grade designation, as in the examples of ‘John Beggs Blue Cap, John Beggs Gold Cap’ or ‘Johnny Walker Red Label, Johnny Walker Black Label’. After that, the court presented colour terms used within the basic names such as ‘White Heather’, ‘White Heather Aged 8 Years’ or ‘Black and White’, and stated that these colour terms were not grade designation for liquor.

6.1.1.2.2 Discussion

The argument of legal experts was developed and carried out within the framework of the paradigmatic mode. Instead of arguing about actually occurring confusion, the plaintiff examined the two trademarks piece by piece. Perhaps the White Horse Distillers did not find any instances of confusion between the trademarks in the business transaction. In contrast, the defendant used some aspects of the narrative mode indicating, from the perspective of consumers, a sharp line between the internationally distilled Scotch and domestic distilled whisky. The defendant offered a more convincing argument regarding the colour terms used in liquor naming, which was acknowledged in the judgment. The court used the paradigmatic mode of applying the comprehensive comparison rule of trademark issues but failed to offer a convincing argument.
in the application of the rule to this case. The dissatisfied plaintiff appealed to a higher court.

6.1.1.3 The Tokyo High Court

6.1.1.3.1 Court Reasoning

In the appellate court White Horse Distillers again claimed that the two marks were composite marks. The argument presented by the distiller was as follows: White Horse is a trademark B (white) + A (horse) while Golden Horse is a trademark C (golden) + A (horse). A (horse) is a principal part of each trademark; B (white) and C (golden) are modifiers respectively. As stated before, in liquor transactions White Horse is referred to ‘uma’ (horse). This indicates that B (white) is often omitted from B (white) + A (horse). The issue in this case is therefore between the trademarks A (horse) and C (golden) + A (horse). Furthermore, the omission of B (white) from B (white) + A (horse) suggests a possible omission of C (golden) from C (golden) + A (horse). Therefore, the two marks were composite marks with Horse as its central part.

The Tokyo High Court, however, dismissed the appellant’s claim, and added some minor correction on the reasoning of the previous court. It is common to see correction in the high court judgment of a lower court. The high court judgment is therefore called a 'correction judgment'.

The court stated without any linguistic analysis that each tradename was regarded as one united expression because ‘white’ and ‘golden’ were not idiosyncratic but ordinary words and because the two words of each mark were written in the same size, type style, and form. The court also stated that the term, White Horse, was not long enough to have a need of a short form. The court considered the usage of Horse to refer to White Horse among dealers as a conventional usage of short forms such as Imperial for Suntory Imperial or K-chu (K-middle) for Kirin Chubin (middle sized bottle of Kirin Beer). However, this was not the abbreviation claimed by the

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9 Judgement of 29 November 1984, Tokyo High Court 2044.
appellant.

6.1.1.3.2 Discussion

The appellant presented a logical argument using mathematical symbols. The court, however, did not send back a logical reply. On the contrary, the court put forth several desultory reasons to support their foregone conclusion of ‘no confusion’. Again the appellant was dissatisfied and made a final appeal.

6.1.1.4 The Japanese Supreme Court

6.1.1.4.1 Court Reasoning

White Horse Distillers made a final appeal, which was flatly dismissed by the Supreme Court. The appellant stated that a long-name trademark did have abbreviations, as in the case of ‘Mild’ of ‘Mild Seven’ tobacco. The appellant then referred to several previous trademark rulings, in which a likelihood of confusion was acknowledged in terms of the abbreviation of trademarks including Kanenishikan v. Ushigomekan, Takasago Mikuron v. Meishoku Mikuron and Merrywood v. Lucky Wood. In these cases the Tokyo High Court acknowledged that when a trademark name is long, the most distinctive part of each trademark is used as an abbreviation. As ‘nishikan’, ‘mikuron’, and ‘wood’ are the most distinguishing parts of each relevant trademark, ‘Kanenishikan v. Ushigomekan’, ‘Takasago Mikuron v. Meishoku Mikuron’, and ‘Merrywood v. Lucky Wood’ are similar trademarks. The court found these pairs of trademarks similar. Using these rulings, the appellant then argued that ‘White Horse’ and ‘Golden Horse’ were therefore separable words based on a rule of thumb.

10 Judgement of 1 July 1985, Japanese Supreme Court 580.
11 Judgment of 30 May 1952, Tokyo High Court.
12 Judgment of 28 November 1972, Tokyo High Court.
13 Judgment of 18 September 1974, Tokyo High Court.
6.1.1.4.2 Discussion

The appellant reiterated their previous argument made in the lower courts and emphasised that the High Court erred in the interpretation of the Unfair Competition Prevention Law by not acknowledging their claims. On the other hand, the Supreme Court gave an illustrative judgement, but not specify any concrete reasons for the dismissal of the case.

6.1.2 Linguistic Analysis

As mentioned in Chapter 3, Japan’s first unfair competition prevention law was enacted to satisfy the condition presented in the Hague Agreement of 1925. Although this law (the Old Law) had been revised as many as five times before the drastic amendment of the law of 1993 (the New Law), the Old Law remained without a substantial incentive to protect well-known trademarks. As the Golden Horse case was deliberated under this Old Law, the court showed an adequate understanding regarding the likelihood of confusion between the two trademarks in consideration of actual confusion of Layer 2 and did not prescribe the language use of Layer 2. However, it was unfortunate that the court did not provide sound reasoning to support their understanding. On the other hand, the White Horse Distillers demonstrated their own formula regarding the marks using the paradigmatic mode to support their claim.

In order to observe the actual usage of each trademark in Layer 2, I use several linguistic methods introduced by Shuy (2002:47-53) for the analysis: the analysis of database in terms of flexitibility and dictionary listings. I also explain the issue from the origin of naming as well as the etymological difference between ‘gold’ and ‘golden’.

6.1.2.1 Database

Searches using Google\textsuperscript{14} were conducted on 12 August 2004 to find out each mark’s

\textsuperscript{14} I would like to note that the Google search is used here as a kind of reference because Google
recency and flexibility of each mark. Flexibility indicates that a word can be changed easily from one grammatical form to another such as from noun to adjective. Shuy (2002:51) defines recency as “a dramatic sudden increase in its usage” in a diachronic way, but I would like to use recency in a more synchronic way, which indicates a proportion of its usage by different countries at a certain time. As the case was argued around twenty years ago, it is likely that some listed words in 2004 were not in use around 1985. The analysis of current listed words, however, would give us a general guideline how the two words have been used.

The search included the marks with or without punctuation both in English and in Japanese. Among Japanese *katakana* writings of ‘white horse’,ホワイトホース (no space between ‘white’ and ‘horse’) came in with the largest number of hits:7,150. In contrast, both ホワイト・ホース (one punctuation mark between ‘white’ and ‘horse’) and ホワイトホース (one space between ‘white’ and ‘horse’) had many fewer hits: 750. These variations regarding punctuation or space, however, appeared irrelevant because punctuation or space in the *katakana* transcription for western naming varies among users or even among individuals, as seen in the listing. In the case of *katakana* writing of ‘golden horse’, no marked distinction was observed among one united-word, two words with one space, and those without any punctuation. The total number of hits for all three possibilities was only 333.

In the case of English writing, ‘whitehorse’ had the largest number of hits: 1,130,000; whereas ‘white horse’ had 633,000 times of hits. In contrast, the number of hit for Golden Horse is much smaller: ‘goldenhorse’ with 13,900 and ‘golden horse’ with 51,800. The difference in number of hits is substantially large enough to suggest that White Horse is a more established word than Golden Horse. Also, ‘whitehorse’ appears more commonly than ‘white horse’ while ‘gold horse’ is more frequently used than ‘goldenhorse’.

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has not been considered to be a thorough search in Corpus Linguistics.
6.1.2.2 Geographical Distribution

Google can only be used for what appears across all the databases on the date of the search, in this case 12 August 2004. However, using total hits does not reveal the dates of individual entries in the databases. This would be especially relevant for material written before internet use but that has since been uploaded to internet accessible databases. More detailed analyses would be needed to weed out those uses that appeared in the mid-1980s, but they have limits on investigation if the analyses were carried out twenty or so years after the trial. Although I am aware of some drawbacks in using total hits with Google, I looked at geographical distribution and then at collocational patterns that appeared either to cause significant peaks in the data or other particular cross-cultural contrasts.

Analyses using the Google search were conducted for Anglo and Oriental countries: uk (United Kingdom); au (Australia); nz (New Zealand); ca (Canada); jp (Japan); cn (China); tw (Taiwan). The United States was not included because it does not have a country code; therefore, it is difficult to identify this country.

It is clear that ‘whitehorse’ and ‘white horse’ appeared significantly more frequently in Anglo countries than in Oriental countries, as shown in Graph 1 and 2. Among Anglo countries, the number of hits for Canada for ‘whitehorse’ (Graph 1) was the largest because it contained sites for the capital of the Yukon Territory, Whitehorse. Although Australia also has a local town called Whitehorse in Victoria, it had fewer hits than that of Canada due to the small size of the town. More generally, one would expect a lower number of hits for Australia and New Zealand because of their relatively small populations: about 20 million and 4 million, respectively. The UK had the largest numbers of hits for ‘white horse’ relating to horses.
The noticeable difference in the disproportionate appearance of ‘whitehorse’ between Anglo and Oriental countries was not observed in the case of ‘goldenhorse’ and ‘gold horse’, as shown in Graph 3 and 4. New Zealand’s particularly high hit number for ‘goldenhorse’ (Graph 3) was due to their pop music group ‘Goldenhorse’. The extremely high number of hits for Taiwan was because of the site of ‘Golden Horse Film Festival’.
White Horse was a more commonly used name for inns in Anglo countries whereas Golden Horse was often used with accommodations such as ‘Golden Horse Hotel’ in Oriental countries excluding Japan. Some Anglo hotels or inns have a figure of white horse at the front, which implies their cultural preference not with a merely a simple horse but with a white horse. On the other hand, the using the name of ‘golden horse’ for accommodations or awards in Chinese cultural areas seems to be based on a preference for the metal -- gold. This explains the high number of hits for ‘golden horse’ or ‘goldenhorse’ in the search of Taiwan. The reason why the
UK and Canada had a large number of ‘golden horse’ hits was that they included both the Chinese award and the New Zealand music group.

6.1.2.3  Flexibility

In this section the flexibility of ‘whitehorse’, ‘white horse’, ‘goldenhorse’, and ‘golden horse’ is discussed with regard to the usage of a proper name, the adjective usage of naming, the usage of a collective noun, and flexibility.

6.1.2.3.1  Proper Names

As I mentioned before, ‘whitehorse’ had a much larger number of hits than that of ‘white horse’. The term ‘Whitehorse’ appeared as a city name or a personal name or a code name. Examples of a city name included the capital of Yukon in Canada, a town in Victoria, Australia, and a small American town in South Dakota. ‘Harry Whitehorse’, an artist, was an example of a personal name. Code names using ‘whitehorse’ were found in the name of Microsoft’s new software at its developmental stage, and in several names specifying military operations. In contrast, a lexically combined ‘goldenhorse’ was found only in the New Zealand’s pop group ‘Goldenhorse’.

6.1.2.3.2  Adjective Usage for Naming

‘White horse’, ‘Whitehorse’ and ‘Golden Horse’ were used as an adjective modifying a noun for the purpose of naming: Whitehorse Fishway; White Horse Tavern; Golden Horse Temple. However, the adjective usage for naming was not found in the word ‘Goldenhorse’. Instead, ‘Goldenhorse album’ or ‘Goldenhorse members’ were searched for, but these terms only indicated the New Zealand pop group, and were not used with other names. This was because the term ‘Goldenhorse’ was still at the stage which exclusively denoted the pop group.
There were cases of the adjective usage of ‘goldenhorse’ and ‘whitehorse’ with the indefinite article ‘a’. In the following examples ‘Whitehorse’ referred Yukon’s capital city. In the second example ‘goldenhorse’ refers to a pop group.

Where can I find a Whitehorse business? (http://www.whitehorsechamber.com/)
what about a goldenhorse record, anyone? (http://www.nzmusic.com/topic.cfm?id=1260)

Note that in the second example the capital letter ‘g’ was not used any more. This flexibility in form, however, is probably not related to meaning/use of the phrase itself. Rather, it is probably due to the more recent trend of not using capital letters in informal writing in emails and in internet spaces: it is felt to take too much time to shift to a capital letter. This assumption is reinforced by the lack of a capital with the first letter of the question word “what”.

6.1.2.3.3 Collective Noun Usage

Both ‘Goldenhorse’ and ‘Whitehorse’ functioned as a collective noun like ‘family’. The following example is the usage of ‘Goldenhorse’, in which ‘Goldenhorse’ took the plural verb form of ‘are’ when ‘Goldenhorse’ was focused on each member of the group.

Goldenhorse are an accomplished 5-piece band from Auckland. Their music is a hybrid of a number of influences including Bjork, The Cranberries, Robbie Robertson and Burt Bacharach. (http://www.muzic.net.nz/artists/734.html)

The next example took the singular verb form of ‘is’ probably because it is followed by a singular referent “shooting star”.

Goldenhorse is the shooting star on the NZ Music scene. The five piece band’s soundscapes wind through swing, funk, calypso, waltz, ska and all-out rock. (www.akl-phil.co.nz/index.php/ps_pagename/eventdetail/eventid/145)
‘Whitehorse’ also took both a singular verb and a plural verb.

Whitehorse is a suite of graphical design tools to be delivered in ‘Whidbey’ that supports the design and validation of service-oriented applications based on web services, and is targeted at architects, designers, developers and operations analysts. ( http://blogs.msdn.com/keith_short/archive/2004/02/12/72006.aspx )

Whitehorse have recently established a Marketing Committee to aid in the publicity and awareness of the company and its shows. ( http://www.whitehorsemusical.com.au/marketing.html )

‘Whitehorse’ in the above example indicates a supporters’ organisation for Whitehorse Theatre in Australia. ‘The collective noun + are’ is a British English usage, which is also common in Australia and New Zealand, hence their uses in the Australian and New Zealand examples. None of these examples actually refer to a horse with a certain colour. What they denoted is the name of a group, a product or an organisation.

6.1.2.3.4 Flexibility

As ‘goldenhorsec’ is exclusively used to signify the pop music group, its grammatically variant usage is therefore very limited. On the contrary, ‘whitehorsec’ has developed into a verb form. The following is an example of ‘whitehorsed’ with quotations marks, but carries its original meaning ‘powdered with white flour or powder’.

He has every cause to be "conscious of enemies, a kingbilly whitehorsed in a Finglass mill," with "whitehorsed" echoing "unhorsed" (and a king's horse put to work in a mill, like the horse of Gabriel Conroy's story, or like Samson, with perhaps a suggestion that the flour has powdered him white) and "on anxious seat," since during the early years of his exile there were calls all over Europe for his execution. Typically, the voice assailing him most violently here is English, "engles to the teeth." ( http://www.robotwisdom.com/jaj/fwake/habben.html )

The next example described ‘whitely driven (waves)’. It seems that ‘to whitehorse’
indicated ‘to drive waves violently to the extent they become white’.

We clung to it with the full length of our bodies, anchored by sodden toes and suspended from crooked fingers. The whitehorsed sea galloped past...So this was sailing?"  

‘Whitehorses’ in British English refer to waves that are high enough and move fast enough to cause the water to break and have white tops. This image is of whitehorses galloping the water. Thus, in this example the noun ‘whitehorse’ becomes an adjective ‘whitehorsed sea’. ‘Whitehorsed’ in the following example derives from the meaning: ‘to ride a white horse’.

GOLDEN SADDLES, SILVER SPURS  
A documentary on the Golden Era of the early Westerns featuring those hard ridin', straight shootin', head'-em-off-at-the-pass, white-hatted, whitehorsed heroes of yesteryear. GOLDEN SADDLES, SILVER SPURS takes us back to the Old West with a complete historical look at the Hollywood Western, including the actors Tom Mix, John Wayne, Gene Autry, and Roy Rogers who helped make the Western an adored film genre.  
( http://www.cableready.net/catalog/docs.html)

Shuy (2002:59-60) states that combined words as well as individual words undergo four types of processes when semantic change occurs: specialisation; generalisation; pejoration, and amelioration. An example of specialisation is ‘airline’ which has a specific meaning with the two combined words. ‘Frock’ is an example of generalisation in which the term for a specific type of monk gown is now used for any kind of gown. An example of pejoration is ‘villain’ which used to mean a farm labour. ‘Marshal’ is one example of amelioration which used to mean a humble groom at a stable but now indicates a head post in the government or the military. Unlike ‘airline’ or ‘frock’, ‘whitehorse’ has not acquired a fixed meaning yet. It seems to me that the fact that each writer uses ‘whitehorse’ as verb with various definitions is most likely that ‘whitehorse’ is at the very incipient stage of semantic change.
6.1.2.4 Dictionaries

The Oxford English Dictionary (OED) gives six senses of the term ‘White horse’: 1) the figure of a white horse; 2) a crested wave; 3) a local name for a fish; 4) the West Indian shrub; 5) a sinewy substance of a sperm whale’s head area; and 6) a rock in a coal seam. In its first sense, OED adds that ‘White horse’ is ‘the sign, and hence the name, of an inn’ of which usage appeared in 1647. This explains many listings of accommodations named White Horse in the Google search. The association between a white horse and a crested wave was formed by the image of white horses galloping as written in the example (1848) of “the sea is covered with ‘white horses’”. At that time the term was put in quotation, but it is now used without quotation because it is a common term for crested waves or white caps.

Webster’s Third International Dictionary gives three senses including whitecap (crested wave), sperm whale’s sinewy substance and a sucker (a fish). Webster furthermore gives a very North American sense of the combined word ‘whitehorse’ as an adjective, ‘of or from Whitehorse, the capital of Yukon Territory, Canada; of the kind or style prevalent in Whitehorse’. This explains the large number of listings related to ‘ca’ in Google search. Dictionary for the General Reader (one of the most comprehensive English-Japanese dictionaries in Japan, listing 260,000 words) gives another sense ‘a white horse figure curved on a chalk-bed hill’.

There were no listings of ‘golden horse’ or ‘goldenhorse’ in OED. However, Webster gives ‘golden horse’ as ‘a palomino, which is a slender-legged short-coupled horse of a light tan or cream colour with white markings on the face and legs and flaxen or white mane and tail from ancestry largely of Arabian stock’. In conclusion, dictionary definitions indicated that ‘white horse’ is not simply a horse merely with white hair; on the contrary, ‘golden horse’ does not contain a fixed definition.
6.1.2.5 Etymology

*Eiwa Shōhinmei Jiten* (A Dictionary of Trade Names) explains the origin of White Horse as follows. The original name of White Horse Distillers was Mackie & Co., Distillers, derived from its founder Sir Peter Mackie. Their main product was called Mackie’s. In the late 19th century Mackie Distillers changed its whiskey name Mackie to White Horse. White Horse was the name of a famous inn in Edinburgh, the White Horse Inn, where Mackie was served. It is interesting to note that the name of the White Horse Inn was not their original name. The inn was named after a white horse which had been ridden by Mary, Queen of Scot on her frequent trips between Edinburgh Castle and the Palace of Holyroodhouse in the 16th century. Online information on White Horse 12 Y (http://homepage1.nifty.com/Tate-Vin/white_horse.htm) furthermore stated that the White Horse Inn which doubled as a pub, was a well-known shared carriage station between Edinburgh and London. The Scotch Distillers had therefore used the sign of the inn on the front label and the passenger regulation of 1754 on the back label of their whiskey.

A system for making distinctions in trademarks was proposed by McCarthy and has been used for trademark candidates in the United States. Candidates are classified into four categories: (1) generic terms; (2) descriptive; (3) suggestive; and (4) arbitrary or fanciful. They are arrayed in an ascending order in light of the distinctiveness of marks (McCarthy (2001), Volume 2, §11:1-2). ‘Generic’ refers to a characteristic of a class of things such as ‘salt’. ‘Descriptive’ is used to describe the quality of a thing such as ‘Yellow Pages’. ‘Brilliant Furniture Polish’ is an example of ‘suggestive’ because the name requires some mental operation to connect ‘brilliant’ and ‘furniture polish’. ‘Shell’ for gasoline is an example of ‘arbitrary’ and ‘fanciful’ names because it requires some sort of mental twist to connect the product and the name itself.

The inn located in the capital of Scotland was able to create the image of Scotland by the association with the white horse of the most well-known Scottish queen. The Scotch Distillers
changed their whisky name from their founder’s surname to the inn’s name because their new
name was able to form the image of Scotland. From the perspective of McCarthy’s four
categories, the naming of White Horse Inn is ‘suggestive’ because the use of ‘white horse’ does not
project an ‘odd’ image. This is different from the arbitrary or fanciful names of Stork Club for a
night club (McCarthy (2001), Volume 2, § 11:11). As shown in the Google search, ‘white
horse’ has been widely used as a premodifying adjective for nouns in pub names in Anglo
communities such as ‘White Horse Saloon’. These pub names are obviously suggestive.

The origin of Whitehorse, Yukon’s capital city, is ‘the historic rapids on the Yukon River
which resembled the flowing manes of charging white horses.’¹⁵ The naming of this city is also
suggestive. Therefore, I would like to assert that in this case ‘White Horse’ is suggestive, and not
arbitrary or fanciful.

Macintosh’s Apple is seemingly an ‘arbitrary’ mark because the association between a
computer maker and a fruit is odd, just like ‘Shell’ for gasoline. However, Macintosh is a species
of an apple raised by John McIntosh in Ontario, Canada. The computer maker used this
connection for their computer. As the connection between McIntosh/Macintosh and an apple is
not their original conception, Macintosh’s Apple is less arbitrary than Shell’s gasoline. Rather, it
is more or less suggestive. ‘Apple’ has now the secondary meaning, which has been established
as a computer maker’s mark. On the other hand, ‘White Horse’ does not carry such a secondary
meaning of Scotch whiskey because the term ‘white horse’ has been widely used with non-liquor
names such as city names, hotel names, school names.

6.1.2.6 Morphology

The Scotch Distillers claimed that the name of Golden Horse could be well perceived as one

¹⁵ E-mail correspondence with Freda Smith, a staff member at Whitehorse city office, on 8
In a series of White Horse products. In this section I would like to argue that it is not ‘golden’ but ‘gold’ that is likely to be used for the designation of liquor grades. Such a distinction between ‘golden’ and ‘gold’ may be difficult in Japanese and thereby irrelevant for Japanese consumers. However, the Scotch Distillers, being native English speakers, would be inclined to use ‘Horse White’ and ‘Horse Gold’ instead of ‘White Horse’ and ‘Golden Horse’ as a series of White Horse products.

Certain English colour words have two different forms of adjectives: one type of adjective is formed by the attachment of suffix ‘-en’; the other type uses the same form as that of noun. ‘Golden’ and ‘gold’ are one example of a morphologically derived adjective and noun-form adjective.

OED states suffix ‘-en’ carries the meaning of ‘pertaining to, of the nature of’. In the language of Teuton spoken in Jutland in the fourth century BC, the ‘-en’ adjective signified the material of which a thing was composed. ‘-En’ adjectives continued to exist both in the Old English and in the Middle English. In the case of ‘golden’, ‘golden’ was derived from ‘gylden’ of the Old English. However, since the 16th century there has been a growing tendency to discard ‘-en’ adjectives and instead to use noun-form adjectives. As a result, many ‘-en’ adjectives have become obsolete and only a few of ‘-en’ adjectives have been used for metaphorical or rhetorical emphases such as ‘golden’ or ‘silvern’. Other examples of ‘-en’ adjectives are ‘earthen’ or ‘leaden’ or ‘oaken’ or ‘tinnen’ or ‘wheaten’ or ‘wooden’ or ‘woollen’. Among them, ‘tinnen’ is an obsolete adjective; ‘oaken’ is archaic. As a noun-form adjective such as ‘wheat bread’ has become more commonly used; ‘wheaten’ has been used less frequently. The ‘-en’ adjectives therefore originally indicated the material of which a thing was composed.

Bauer (2001:69) cited one example of German adjectivalisation suffixes ‘-isch’ and ‘-lich’, which is largely in complementary distribution, determined by whether the base is foreign or native. Bauer then noted that English suffix ‘-en’ has been overwhelmingly used on native bases.
In the case of ‘gold’ and ‘golden’, both adjectives can also be regarded as being generally in complementary distribution. The adjective ‘gold’ carries the meaning of the metal gold: gold buttons, gold velvet curtains. ‘Gold buttons’ are not necessarily made of pure gold but are expected to be at least brassware, and the colour must be gold. ‘Gold velvet curtains’ indicates the curtain which is made of velvet fabric with gold thread. In brief, ‘gold’ refers to the quality of metal. On the other hand, ‘golden’ refers to gold-like colour such as ‘golden sunlight’ or ‘golden hair’. ‘Golden sunlight’ indicates the sunlight with the colour of a bright, rich, yellow colour and ‘golden hair’ refers to blond coloured hair. The substitution of ‘golden’ with ‘gold’ could well produce different meanings. My own word sense is that ‘gold sunlight’ refers to an imaginary sunlight made of gold and ‘gold hair’ means hair made of gold thread. ‘Golden buttons’ are buttons with golden colour and ‘golden velvet curtains’ are velvet curtains with the colour of gold. ‘A golden retriever’ is a dog with light brown fur, but ‘a gold retriever’ is a gold-plated retriever. ‘Golden syrup’ is sweet thick liquid with light brown colour made from sugar. ‘Gold syrup’ would make me think that it is the syrup has been given a gold medal for its quality.

A similar usage is also found in the brochure of a hotel with hot springs in Japan (Arima Grand Hotel).

Arima Hot Springs
As Japan’s oldest hot springs, Arima hot springs are known as the “golden hot springs” because of their iron-rich rust-colored water...
The following is found on the wall of a bath of the hotel.

Golden Hot Spring (金泉 Kinsen)
The quality of this hot spring is weak in acid, though it is a high-sodium spring, which makes it gentle to the skin and is said to have a beautifying effect for the skin. Because of its high iron content, the clear fountainhead oxidizes with air causing unique brown color. Therefore this hot spring is called the “Golden Hot Spring” (金泉 kinsen) or the “Red Bathing Water” (赤湯 Akayu).

Apparently, ‘golden’ is used to denote not the substance of the water but the colour of hot
water. If this type of hot spring is called ‘gold hot spring’ instead of ‘golden hot spring’, one might imagine the hot springs contain some substance of gold. In conclusion, ‘golden’ indicates ‘a bright, rich, yellow colour just like gold’, and ‘gold’ literally refers to the metal of gold.

In the case of grade designation for liquor, ‘gold’ has been more predominantly used than ‘golden’. This is because ‘gold’ indicates a gold medal, which represents the highest quality of the product. Therefore, if the Distillers were to develop a higher quality of whiskey as a series of White Horse, the name ‘Gold Horse’ would more likely be used than ‘Golden Horse’.

Another example of ‘–en’ adjective of colour word is ‘leaden’. ‘Leaden’ means ‘dark grey’ as in ‘a leaden sky’. ‘Lead’ of ‘lead pencil’ and ‘lead glass’ is not an attributive adjective but a premodifying noun. Like ‘garden’ of ‘garden tools’, the premodifying noun usage of ‘lead’ is rather limited; instead, another adjectival form ‘leaded’ is used to convey the meaning of ‘of lead’ as in the example ‘leaded petrol/gas’. It seems that ‘leaded’ and ‘leaden’ are in complementary distribution. ‘Leaded’ is related to the metal of lead whereas ‘leaden’ means ‘dark grey colour’ or more metaphorically ‘without happiness or excitement’.

More importantly, colour words are placed after a liquor name when used as a grade designation such as Don Q White/Gold or Larson White Label/Black Label/Red Label. This leads to the argument that ‘white’ must be placed after the main trade name if the main name is ‘Horse’ as claimed by White Horse Distillers. In other words, the colour term ‘white’ should be used like ‘Horse White’ or ‘Horse Gold’ just like Tequila Cuervo Gold, Tequila Cuervo White. Therefore, I believe that Scotch Distiller’s claim of Golden Horse as a name possibility in a series is a needless ‘worry’.

6.1.2.7 Court Reasoning

The Golden Horse case is a case in which the participants in Layer 2 are in agreement on the judgment in Layer 1. In the narrative mode the common sense of Layer 2 indicates that
consumers who pay money for liquor never fail to check the distillers; whether the whiskey is Scotch or domestic is the important point for the purchase of whisky in Japan. Also, consumers are accustomed to the western naming for products of western origin such as cars. Therefore, it is very unlikely that Golden Horse would be considered as a series of White Horse.

The courts in the Golden Horse case deliberated the case with the focus on the similarity issue of the two trade names from language perspectives. The courts analysed the claims of both parties in consideration of the possibility of confusion among dealers and consumers. Although the court did not take a prescriptive attitude to the Golden Horse case, their method is in the paradigmatic mode. The court uses the principle of making a judgment by listening to both sides of the story. The court agreed with the defendant but did not provide sound reasoning for their judgment. This is why the case was appealed to higher courts. If the court had used a linguistic analysis, the case would have been settled at the first trial. In the next section I observe the characteristics of Layer 1 from the perspective of the legal register.

6.2 Register Analysis

The Register Analysis of the judgements of the Golden Horse Case is discussed in four parts: organisation (legal genre); lexicon; syntax and discourse. The respective judgment papers of the district court, the high court, and the Supreme Court are analysed for discourse organisation, lexicon, syntax, and discourse. The court level of use of lexical, syntactic or discourse items appeared is marked with (d) for the district court, (h) for the high court, and (s) for the Supreme Court.

6.2.1 Organisation

The Golden Horse case is more or less a representative type of Japanese civil court cases in terms of acknowledging the decision of lower courts. As the district court ruling was the
primary judgement, the ruling contained basic information on the issues in the case. In contrast, the
judgment paper of the high court ruling was a correction judgment because it basically corrected
the word usage of the district court judgment, but not the ruling of the judgment itself. Finally,
the Supreme Court ruling was an illustrative judgment, which consisted of only the fixed phrases
regularly used in dismissal cases of final appeal.

As for the style of the judgment, Guide Style was used for the judgements of the Tokyo
District Court and the Tokyo High Court. The Guide Style has separate sections for ‘Facts’ and
‘Reasons’. In the following section I first discuss the organisation of the district court judgment
and then that of the high court.

6.2.1.1 The Tokyo District Court

Heading
1. Judgement Day
2. Reference Number
3. Case Type
4. Parties and Legal Representatives

Text
1. Dismissal of Claims
2. Litigation Costs

Facts
1. Trial Claimed by Parties
   1) Gist of Plaintiff’s Claims: Claim 1; Claim 2; Litigation Cost
   2) Defendant’s Answers to Plaintiff’s Claims: Dismissal of Claims; Litigation Cost
2. Claims of the Parties
   1) Plaintiff’s Claims: Claim 1 (about the plaintiff’s trademark)
Claim 2 (about the defendant’s trademark)

Claim 3 (a likelihood of confusion between the marks)

Claim 4 (damage)

Claim 5 (application of law; conclusion)

2) Defendant’s Answers: Answer 1 (about Plaintiff’s Claim 1)
   Answer 2 (about Plaintiff’s Claim 2)
   Answer 3 (about Plaintiff’s Claim 3)
   Answer 4 (about Plaintiff’s Claim 4)

3) Defendant’s Claims: Claim 1 (no confusion between the two marks)
   Claim 2 (no confusion regarding liquor transaction)
   Claim 3 (about the defendant’s business)

4) Plaintiff’s (Dis)Approval
   Disapproval 1 (about Defendant’s Claim 1)
   Disapproval 2 (about Defendant’s Claim 2)
   Partial Disapproval 3 (about Defendant’s Claim 3)

3. Evidence

Reasons

1. Plaintiff’s Trademark

2. Defendant’s Trademark

3. Examination

   1) Contrast between Plaintiff’s Trademark (1&2) and Defendant’s Trademark (1&2):
      Finding 1 – 4; Conclusion

   2) Contrast between Plaintiff’s Trademark (1 &3) and Plaintiff’s Trademark (3):
      Finding 1 – 3; Conclusion

4. Conclusion
The judgement of the district court is logically organised. The document itself consists of six parts: ‘Heading’, ‘Text’, ‘Facts’, ‘Reasons’, ‘Court’ and ‘List of Enclosures’. While stories in the narrative mode often aim for an unexpected twist at the end of the story, in the judgment the identification of the case (Heading) comes first, the paper ends with the logically reached conclusion (Text).

‘Heading’ includes the identification type of the information of the case in terms of ‘when’ (judgement day), ‘which type of case’ (reference number and case type), and ‘whom’ (parties and legal representatives). Among the three pieces of information the date of judgment and the type of the case are more important than individual litigants. This is similar to the dehumanised usage of medical language, as stated in Mintz (1992:225).

The conclusion of the judgment paper, ‘Text’, is always written in a very short and simple format. In this ruling only ‘dismissal of claims’ and ‘the payer of litigation cost’ were written. The motive for such brevity is to minimise possible confusion for the part of a court executor. More concretely, only what is written in ‘Text’ is considered to be the definite conclusion of the case (Kurata: 1994; 8). As a result, ‘Text’ is basically written using fixed phrases.

‘Facts’, which consists of ‘Trial Claimed by Parties’ and ‘Claims of Parties’ and ‘Evidence’, is the part which displays a systematic and logical approach of the paradigmatic mode. First, ‘Trial Claimed by Parties’ is made up of ‘Gist of Plaintiff’s’ Claims’ and ‘Defendant’s Answers to Claims’. These two parts are used as Texts, depending on which party has won the case.
plaintiff wins the case totally, ‘Gist of Plaintiff’s Claims’ becomes ‘Text’. However, in this case
the defendant had a complete victory; thus, ‘Defendant’s Answer to Claim’ became ‘Text’. Secondly, in ‘Claims of Parties’, the plaintiff made four claims, which were respectively
responded to by the defendant. After ‘Defendant’s Answers to the Plaintiff’s Claims’, the
defendant then made three claims on their side, which were subsequently agreed or disagreed by
the plaintiff. In this way each party responded to the other party, which is quite logical and
systematic. Lastly, ‘Evidence’, which refers to the citation of the evidence inventory of the case,
is an essential part for the fact-finding process. Legal experts establish facts using evidence.
Those without evidence are regarded as hearsay or speculation or rumour and are therefore not
permitted to be used in the court. It is obvious that such a distinction of usage is not observed in
the narrative mode.

‘Reasons’ is the opinion of the judges on the case, in which their fact-finding process is to be revealed. In the first and second parts of ‘Reasons’, the judges examined respective trademarks
of the parties. After this, the judges contrasted the plaintiff’s trademarks with the defendant’s
trademarks. Finally, the judges stated their conclusions, the designation of the payer of litigation
cost, and the application of law in this case.

The fourth part of a writ of judgment is ‘Court’ including the name of the courthouse and its
classifying number such as civil case no.29, and the signatures of judges. In this case, three male
judges were appointed, but on the day of judgement one of them was not present because he was
transferred to a different court.

The last part of the judgment is ‘List of Enclosures’, in which the pictures of the trademarks
of both parties were included.

As the judgement of the Tokyo District Court is the initial judgement of the case, the
judgement paper explains the origin of the case. In a book published by Japanese Legal Training
and Research Institute for newly appointed High Court judges, the difference in judgement papers
between the first trial and the appellate trial is clarified. The first trial aims for the readjustment and description of issues as well as the justice of claims, whereas the appellate court involves the judgement of the right or wrong of an appeal of dissatisfaction (Shihou Kenshuusho (Legal Training and Research Institute); Minji Dainishin Hanketsusho ni tuite (On Civil Case Judgement of Second Instance)).

6.2.1.2 The Tokyo High Court

The discourse organisation of the high court judgment is basically the same as that of the district. Both parties were in response to each other in the section of ‘Claims of the Parties’ in ‘Facts’. After the claims made by the appellant and the respondent completed, the ‘Reasons’ of the court was presented. The characteristic of the judgment of the high court was that some minor corrections were made to the judgment of the district court. Finally, although the litigants were the same, their reference was changed from plaintiff to appellant and from defendant to respondent respectively as it was the court of intermediate appeal. Again, comparing the language of a judgment with that in a medical context, Mintz (1992: 227) noted that the patient is seldom named in the case report. Designating a person using a common noun instead of a proper noun in legal language shares the same type of the pursuit of objectivity with the avoidance of using personal names in the medical language. However, it is more confusing for those in Layer 2 to comprehend that the same person who is referred as the plaintiff at the first trial is now called the respondent at the second court in the legal language than to observe a mere avoidance of a personal name in medical language.

Heading

1. Judgement Day
2. Reference Number
3. Case Type

4. Parties and Legal Representatives

Text

1. Dismissal of Claim

2. Litigation Cost

Facts

1. Trial Claimed by Parties
   1) Gist of Appellant’s Claim
   2) Respondent’s Answer to Claim: Dismissal of Claim; Litigation Cost

2. Claims of Parties
   1) Appellant: Claims: Claim 1 (about the composite trademarks)
      Claim 2 (about colour terms)
      Claim 3 (about a likelihood of confusion)
      Claim 4 (about the picture of horse)
   2) Respondent’s Answers: Answer 1 (about Appellant’s Claim 1)
      Answer 2 (about Appellant’s Claim 2)
      Answer 3 (about Appellant’s Claim 3)
      Answer 4 (about Appellant’s Claim 4)

3. Evidence

Reasons

1. Reasons 1 – 5 with respective minor corrections to the district-court-judgment

2. Conclusion
   1) Litigation Costs
   2) Application of Laws
6.2.1.3 The Supreme Court

As mentioned before, the Supreme Court judgment of this case is a good example of the illustrative judgment. The total number of characters used in the Supreme Court decision was only 533 characters, which was drastically fewer than the 10,714 character-judgement of the Tokyo District Court and the 15,137 character-judgment of the Tokyo High Court. Moreover, the statement of grounds for a final civil appeal contained as many as 26,451 characters. It is understandable ‘Reasons’ does not contain fact-finding at the Supreme Court level because the Supreme Court involves the issue of constitutionality. However, the problem of the illustrative judgment is that ‘Reasons’ did not include any specific reasons relating to the case. Such an imbalance of length in the statements at the Supreme Court level suggests a disparity of power and thus authority between the highest court and the rest of the country.

The central figure of the final appeal has shifted from the parties (appellant) to their legal representatives, as can be seen in ‘Reason’ where the Supreme Court refers to the legal representatives for the appellants. This is because in the final appeal the Supreme Court deliberated the interpretation of law in terms of a breach of the Constitution. The role of legal representatives is a key figure in the Supreme Court decision, not the parties who pays the court cost. The removal of the parties from the ‘Reasons’ indicates the Supreme Court is the place exclusively for the deliberation among legal experts.
Heading

1. Judgement Day
2. Reference Number
3. Parties and Legal Representatives

Text

1. Dismissal of Claim
2. Litigation Costs

Reasons

1. Dismissal Format
2. Conclusion
   1) In Reference to Previous Court and Appellant’s Reasons
   2) Application of Laws

Court

Judges’ Names and Seals

All the ‘Conclusions’ of the ‘Reasons’ in the judgments, including the illustrative judgement of the Supreme Court, contain ‘application of laws’. As law is the norm of Layer 1, it is mandatory that judges apply law to a case. When appropriate laws are not found, judges still manage to find a law and interpret it to make their decision objective. Not only the judges but also attorneys use the law as the norm in their opinions, as can be seen in the claim of the plaintiff in the initial court. Attorneys initiate the case claiming a breach of a certain law, and present their own version of facts at the court. Judges then construct the facts using evidence and different versions of the story, and apply the law. After that judges finally render a judgment.
6.2.2 Lexicon

In the previous section I have discussed the discourse organisation of writ of judgments in the district court, the high court, and the Supreme Court. In this section I show lexical characteristics of the written judgment in these three courts. The classification of Lexicon observes that of Chapter 6, as provided for below:

1) Legal Archaism
   (1) Uncommon Words
   (2) Overuse of Chinese Characters

2) Legal Terminology
   (1) Terms of Art
   (2) Legal Homonyms
   (3) Legal Jargon

6.2.2.1 Legal Archaism

6.2.2.1.1 Uncommon Words

The following are examples uncommon words found in the three court rulings.

- *touben* (answer/defense) (d)
- *shousuru* (to calls oneself) (d)
- *yuusuru* (to have, to possess) (d)
- *betsui* (unusual) (d)(h)
- *shouko* (name-calling/pronunciation) (d) (h)(s)
- *kijou suru* (to ride on horseback) (d)
- *kansuru* (to crown, to name) (d)
- *tekishi* (summing up) (h)
The high court used an old form of counting paper, *chou* (丁) indicating a piece of paper used for a book. In old times one piece of paper is folded into two, in which the first part is referred as *omote* (the front 表) and the second as *ura* (the back 裏). In this method, for example, page one in ordinary page becomes one *chou omote* (the front side of page one) and page two becomes one *chou ura* (the back side of page one). Although this method was not used in the ordinary Japanese, the court continued to use this archaic method of counting until quite recently.
6.2.2.1.2 Overuse of Chinese Characters

Numerals in all the court rulings are written not in Arabic numerals but in Chinese characters. This is because all the judgment papers were written vertically until recently. For example, numeral one ‘1’ is written in ‘一’. Furthermore, Chinese characters are used in the adverbs in which hiragana is commonly used in the ordinary Japanese. The following are the examples of these adverbs used in Chinese characters:

- sarani (moreover): 更に instead of さらに (d) (h)
- youyaku (at last) 漸く instead of ようやく(h)
- kotoni (especially) 殊に instead of ことに(h)
- chinamini (in this connection) 因みに instead of ちなみに(s)

Adverbs are not the only part of writing for overuse of Chinese characters. A verb honomekasu (to hint) (仄めかす instead of ほのめかす) is also an example of overused Chinese characters for verbs. The Japanese Language Council selected a list of 1945 Chinese characters for common use in 1981. Newspaper limits the usage of Chinese characters within the list of 1945 Chinese characters. I would like to add that the Chinese character of honomekasu (仄めかす) is out of the list.

It is interesting to note that the usage of Chinese characters varies among judges. For example, mochiron (of course) is written the combination of hiragana and Chinese character at the high court (もち論), but it is written solely at Chinese characters in the Supreme Court (勿論). It is not surprising that more conservative judges tend to use more Chinese characters in words.

6.2.2.2 Legal Terminology

6.2.2.2.1 Terms of Art

Terms of art play the central role in legal vocabulary. In trademark disputes the legal professions use three terms of art referring to the three standards of judgment for a likelihood of
confusion: *gaikan* (appearance); *shouko* (pronunciation); and *kannen* (idea). Although there are other vocabulary which has the meanings of ‘appearance’, ‘pronunciation’ and ‘idea’, the replacement for other words is absolutely impossible in legal language. This is because these legal terms precisely designate the meanings of the three key notions of a likelihood of confusion, which are generally shared among legal experts.

The followings are examples of technical vocabulary found at the three court rulings.

- *kikyaku suru* (to dismiss) (d) (h) (s)
- *kouso* (an intermediate appeal) (h)
- *joukoku* (to appeal to a court of final appeal) (s)
- *shouhyou* (trademark) (d) (h) (s)
- *shouhyouken* (trademark right) (d) (h) (s)
- *gaikan* (appearance) (d) (h) (s)
- *shouko* (pronunciation) (d) (h) (s)
- *kannen* (idea) (d) (h) (s)
- *kakufu* (to give, to sell, to display) (d) (h)
- *shoukei* (to succeed legal right and obligation of another) (d)

### 6.2.2.2 Legal Homonyms

Legal homonyms are ordinary words which are used with different meanings in legal genre.

**(i) seikyuu** (a claim 請求) (d)

The term *seikyuu* is predominantly used in Text and Facts of the judgment paper. In the ordinary usage its meaning is ‘a demand’; however, in written judgment it refers to a ‘claim’. Although *shushi* (the gist 趣旨) is not necessarily a legal homonym, the collocation of *seikyuu*, with *shushi* or *gennin* as in *seikyuu no shushi* (the gist of the claims 請求の趣旨) and *seikyuu no gennin* (literally ‘the cause of the claim’ but more commonly ‘the plaintiff’s claims’ 請求の原因)
is not used in ordinary Japanese.

(ii)  

\textit{zeni} (do not know 善意)(d)

The term \textit{zeni} means ‘good faith’ in ordinary Japanese. However, in legal language \textit{zeni} indicates ‘one does not know (and does something illegal).’

6.2.2.3.3 Legal Jargon

Legal jargon indicates terms used in Layer 1 which are neither terms of art, nor legal homonyms.

(i) \textit{keiyu} (by way of 経由)(d)

In ordinary Japanese \textit{keiyu} is used with some geographical names such as ‘Sydney wo keiyu shite’ (by way of Sydney). However, an example of the district court, ‘touroku wo keiyu shite, hyouji wo shiyou shitekita presents the usage of ‘keiyu’ without a place name. The literal translation is that one has used the mark, by way of registration. This is quite an odd usage of ‘keiyu’ in Japanese as well as in English. The sentence is intended to mean that ‘one has used the mark since the registration’.

(ii) \textit{arasou} (to refute 争う) (d)

In ordinary language \textit{arasou} means ‘to fight, to quarrel’. However, in the court \textit{arasou} is used to denote ‘do not agree with the other party and therefore refute’.

(iii) \textit{dokuji no kenkai} (one’s own idiosyncratic view 独自の見解) (s)

‘One’s own views’ is a shared meaning among lay people for the expression \textit{dokuji no kenkai}. The term includes some positive image because it is ‘original’. In the court, however, a negative connotation is attached to the usage of this term by the court, which means ‘one’s own
personal and uncooperative views’

6.2.3 Syntax

The syntax in the judgment papers is examined, as in the following.

1) Lengthy Sentences
2) Multiple Embedding
3) Continuous Verb Form
4) Dispersed Subject/Verb
5) Grammatical Construction

A lengthy sentence is caused by the use of multiple embeddings and continuous verb forms. The insertion of multiple embeddings makes the distance between the subject and the verb even farther. A unique grammatical construction is used to organise characteristics peculiar to legal language.

6.2.3.1 Lengthy Sentences

The nature of long sentences is one of the most distinctive features of legal language. However, I would like to note that not all the sentences are long in the judgment paper. ‘Text’ in the district court and the high court consists of only two short sentences. The first sentence indicates dismissal of claim and the second indicates litigation cost. In the district the first sentence is composed of ten characters; nine characters in the high court. The second sentence in ‘Text’ of the district court has thirteen characters and fourteen characters in the high court. Takagi (1991:78) stated that the average number of the local news page is 51 characters and that of editorials is 58.7 characters. If we compare the average length of a newspaper sentence with that of Text, Text is certainly a concise piece of writing.

Unlike ‘Text’, long sentences are commonly found in ‘Facts’ and ‘Reasons’. The average number of characters per sentence in Plaintiff’s claim is 113 words whereas in Defendant’s claim
is 215 words in the district court ruling. The longest sentence of the three court rulings is found in ‘Reason’ in the High Court. Its length is 577 characters per sentence. The judgment of the Supreme Court consisting of only three sentences in the ‘Reason’ has the sentence of 78 characters as its longest and that of 46 characters as its shortest. The ‘Reason’ in the Supreme Court has rather short sentences because the Supreme Court used a fixed phrase for ‘Reason’. When legal experts write down their original sentences, they tend to express their opinions using lengthy sentence. In contrast, sentences become short when they use fixed forms or write an illustrative judgment.

What factors make legal sentence longer? As I mentioned before, one single sentence often has several embedded clauses in which a few more embeddings are further used. The use of defined pro-form also makes a sentence longer. As I mentioned in Chapter 5, defined pro-forms are used to indicate special meanings for words by means of definition. In addition to defined pro-forms, continuous forms of verb and repetition contribute to lengthy sentence. Among these causes of lengthy sentence multiple embedding is a major cause of incomprehensibility of legal language.

6.2.3.2 Multiple Embedding

Although sentence length of legal language has been criticised, the length is not the central cause of the incomprehensible nature of legal language. Kuno (1973:9) stated that the layer of self-embedded structure impairs comprehension. Hotta (2005) also pointed out that deep centre embeddings and heavy centre constituents are the cause of incomprehensibility of legal language. Before discussing the incomprehensible nature of multiple embedding, I briefly introduce the structure of Japanese language from Kuno (1973). Then, I provide Kuno’s two example sentences of self-embedding in English and Japanese. After that I examine two sentences in the judgment paper from the perspective of self-embedding.
6.2.3.2.1 Japanese Language

Japanese language is an SOV language. In other words, Subject comes first and the sentence ends with Verb. It is important to note that the position of Verb is restricted at the end of the sentence in Japanese language. The other components are placed between Subject and Verb. This indicates that Japanese language has a ground in the escalation of centre embedment. A more complicated matter for native English speakers is that in Japanese language Subjects, Objects, or other constituents except Verbs can be deleted as long as they are recoverable from the context.

English is a right-branching language, but Japanese is a left-branching language. Sentence (i) is an English sentence, which indicates a characteristic of a right-branching in its syntactic structure. The noun ‘a cat’ is followed by three layers of relative clauses.

(i) John owned a cat that killed a rat that ate cheese that was rotten.
In contrast, the Japanese sentence (ii) shows a syntactic structure of a left-branching language. The head noun, ‘cheese wa’ was preceded by three layers of relative clauses. In Japanese language the head nouns are preceded by genitives, adjectives, and relative clauses. Sentence (iii) is the English translation of (ii). Although (ii) is a well-formed sentence in Japanese, (iii) is quite incomprehensible for English speakers.

(ii) John ga katte-iru neko ga koroshita nezumi ga tabeta cheese wa kusatte-ita.
    keep cat killed rat ate rotten-was

(iii) The cheese that the rat that the cat that John keeps killed ate was rotten.

Kuno (1973: 8-9) explained the reason of the incomprehensibility of (iii) from the perspective of self-embedding, which is discussed in the following section.
Kuno showed the syntactic structure of the sentence (iii).

Kuno (1973:9) stated that the difference between (iii), on the other hand, and (i) and (ii), on the other, is that (iii) contains self-embedding. He defined self-embedding as ‘a structure of category A is self-embedded if it is preceded and followed by nonnull B and C, and if BAC is also of category A, namely, if we have \([BAC]_\alpha\). In sentence (iii) S3 (John keeps) is self-embedded in S2 (the cat S3 killed), and S2 is furthermore embedded in S1 (the rat S2 ate), and S1 is
embedded in S (the cheese S1 was rotten). In contrast, sentences (i) and (ii) do not have any self-embeddings. Kuno concluded that the layer of self-embedded structures impairs comprehension.

Based on self-embedding I discuss the illegibility of a legal sentence at the Golden Horse case. The following sentence (1) is from the district court.

(1)

\begin{quote}
Hikoku wa, sono seizou, hanbai ni kakawaru [Golden Horse]
\end{quote}

The defendant topic marker, its manufacture, sales about

to shousuru [whisky] (ika [hikoku shouhin] to iu.) ni tsuite, called (hereafter [defendant product] called) about,

sono raberu ni [GOLDEN HORSE] to iu hyouji (ika [hikoku shouhin] to iu.) its label on called mark (hereafter [defendant product] called)

oyobi besshi daini mokuroku kisai no hyouji (ika and attached document no.2 inventory listed of mark 3 (hereafter

[hikoku hyouji (san) to iu.) wo, hikoku shouhin no panfuretto ni [defendant mark (3) called.] object marker defendant product of pamphlet on

[Golden Horse] to iu hyouji (ika, [hikoku hyouji (ni)] to ii, kore to called mark (hereafter [defendant mark (2)] calls, this and

hikoku hyouji (ichi), (san) to wo soushou suru toki wa, tan ni defendant mark (1), (3) object marker collectively call when, merely

[hikoku hyouji] to iu.) wo shiyou shiteiru. [defendant mark] calls.) object marker is using.

The defendant is using trademark called ‘Golden Horse’ (hereafter ‘defendant’s trademark no.1) and the trademark listed on the attached document no. 2 inventory (hereafter ‘defendant’s trademark no.3) on its label as well as the trademark called ‘Golden Horse’ on the brochure of the defendant’s product about whiskey called ‘Golden Horse’ (hereafter ‘defendant’s product) which the defendant gets involved in manufacture and sales.
The underlined clause, ‘sono seizou, hanbai ni kakawaru [Golden Horse] to shousuru’ modifies the noun ‘whisky’, which is not the subject but a part of prepositional phrase. Readers are required to discern the modified part of this embedding while reading the sentence. In addition to the self-embedding, three defined pro-forms, which are shown in shaded parts in (1) and written as ‘(s) ika – to iu’ in the syntactic structure, are embedded in one single VP. As these defined pro-forms are written in a sentence of ‘ika xxx to iu’ (hereafter xxx called), they can be regarded as a kind of self-embedding. The purpose of a defined pro-form is to avoid redundancy, but the embedding of several long defined pro-forms simply makes the sentence longer and thus more incomprehensible.

It is important to note that the legal sentence is quite comprehensible to legal experts. This
is because the sentence contains not only a set phrase of the defined pro-form ‘ika – to iu’ but several symmetrical usages of Noun Phrases. NP2 and NP3 are paired in terms of the construction of Prepositional Phrase and Noun Phrase. NP4 has in its subordinate position NP6 and NP7, which are also paired and connected by the conjunction ‘oyobi’ (and). Once one is familiar with such a set phrase or a legal propensity to use symmetrical expressions, these phrases become ‘old’ information in their minds. No matter how long a sentence is, legal experts simply sift through ‘old’ information of set phrases and symmetrical phrases, and ‘new’ information. What they concentrate on is to search for ‘new’ information. With training legal experts can identify the frame type of ‘old’ information and remove it from a long sentence. They are simply reading the remaining new information only. Therefore, a long sentence with self-embedding and defined pro-forms is a comprehensible sentence to legal experts.

Sentence (2) is from the high court ruling, in which I would like to show the problem of embedding in more depth.

(2)

\[
\text{Kono shouhyou to [Golden Horse] to no handann wa,}
\]

This trademark and between (dis)similarity of judgment topic marker

\[
B+A to iu kousei no shouhyou to C+A to iu kousei no shouhyou
\]

called construction of trademark and called construction of trademark

\[
o ruihi no mondai [clear] B+A, oyobi C+A ga shouko
\]
of (dis)similarity of issue is, and subject marker pronunciation

\[
kannen ni oite ichiren fukabun no monodewa naku, futatsu ni wakete
\]
idea in a train of indivisible of is not two in divide

\[
shouko sare, mata, kannen toshitemo futatsu ni wakareru to iu baai
\]
is pronounced, or, idea as for two into devide if

\[
toku ni, B to C to ga A ni hishi, A ga hontai de atte,
\]
particularly, and as well subject marker compare, subject marker main part is,

\[
B, C wa A wo shushoku suru kotoba de aru baai
\]
topic marker object marker modify word is if,

\[
ryousha wa ruiji suru
\]
the two topic marker are similar.
The judgment as to a likelihood of confusion between this trademark and ‘Golden Horse’ is the issue between one trademark composed of B + A and another of C + A, both B+A and C+A are not indivisible trademarks (respectively) in terms of pronunciation and idea, if both marks are pronounced by separate word of each mark and divided by separate word of each mark in terms of idea, if A is the main part in comparison B as well as C and B as well as C are modifying words, both marks are similar.

This 340-character sentence consists of two ‘sentences’: the first sentence of 58 characters starts with kono shouhyou to [Golden Horse] tono ruihi no handann wa and ends with its verb deari; the second sentence of 282 characters begins with B+A, oyobi C+A ga and ends with its verb ruiji suru. The second sentence has two embedded conditional clauses: 1) ADV1: B+A, oyobi C+A ga shouko kannen ni oite ichiren fukabun no monodewanaku, futatsu ni wakete shouko sare, mata, kannen toshitemo futatsu ni wakaruru to iu baai; 2) ADV3: B to C to ga A ni hishi, A ga hontai de atte, B, C wa A wo shuushoku suru kotoba de aru baai. The first conditional has the
subject of \( B+A, \text{ oyobi } C+A \text{ ga} \). Its Verb Phrase is VP1 and VP2 which are connected by CONJ ‘mata’. VP is divided into VP3 and VP4. On the contrary, three verb phrases VP3, VP4, VP2, not VP1 and VP2, seem to be in apposition if we do not read the sentence carefully. To avoid this misunderstanding, ‘mata (wa)’ is used to indicate the correct apposition of the two verb phrases. Such a usage is peculiar in legal language, which is discussed in the section of Grammatical Construction in more detail. The second conditional ADV3 has a more complicated structure. In ADV3, S5 has three embedded structures: S6: \( B \text{ to } C \text{ to } ga \text{ ni } hishi \); S7: \( A \text{ ga hontai de ate} \); S8: \( A \text{ wo } shuushoku \text{ suru} \). S5 is self-embedded in S4, which is further self-embedded in S2. Many layers of VP or S and many VP and S in apposition make one single sentence longer and more difficult to grasp the core of the sentence.

Both (1) and (2), particularly S2 of (2), is illegible because several layers of self-embedding and the parallel arrangement of NPs and VPs are embedded within one single sentence.

6.2.2.3 Continuous Verb Forms

A continuous form is a verb form of Japanese language, which can make the verb suspended not terminated. By using a verb in a continuous form, one can make the sentence endlessly long. In sentence (2) VP ‘de arī’ in S1 is an example of the continuous form of verb. S1 can become an independent sentence if the end-form of this verb ‘de aru’ is used. There is no need to make S1 and S2 combined into one single long sentence.

6.2.3.4 Dispersed Subject/Verb

Sentence (1) shows an example of the dispersed location of core sentence structures in legal language. The subject \( \text{ hikoku wa} \) (the defendant) is located at the initial position of the sentence whereas the verb \( \text{ shiyou shiteiru} \) (uses) is placed at the final position of the sentence. As mentioned before, three defined pro-forms are embedded in one single VP. It is difficult to grasp
the core of the sentence:  （【Subject (the defendant)】_NP1【《about the Golden Horse whiskey》_PP《on the label the trademarks》_NP2《on the pamphlet the trademarks》_NP3《Verb (uses)》_vp】_VP2）.

This is because the sentence consists of 215 characters and contains one self-embedding in addition to five defined pro-forms.

As mentioned before, sentence (2) consists of two sentences S1 and S2.  S1 is a very simple sentence: the subject NP is preceded by its VP.  In contrast, S2 is quite complicated, as shown in the syntactic structure of (2).  As it is recoverable, the subject of S2 is deleted.  For a first-time reader of the sentence, the omission of the subject is not recoverable instantly and thereby increases the incomprehensibility of the sentence.  The core of sentence (2) is :  【Subject (deleted)】【ADV1】【ADV2】【ADV3】【NP】【VP】.  As mentioned before, ADV has the embeddings of VP and S.  Again, it is difficult to grasp the structure of such a layer of embedded VP and S.

6.2.3.5 Grammatical Construction

(1) Conjunction

The English conjunctions, ‘and’ and ‘or’, have different usage in a legal context.  Hayakawa (1992: 43-73) introduced the work of Dickerson (1965: 110-14) regarding four types of ‘and’ and six types of ‘or’.

AND

1) A and B (joint ‘and’): ‘Every husband and wife’ means ‘every husband and every wife’.

2) A or B or both (several ‘and’, joint ‘and’): ‘Every husband and father’ means ‘every person who is either a husband or a father’ or ‘every person who is both (=at once= at the same time) a husband and a father’.

3) A person or thing that is both A and B (joint ‘and’):

‘Dr. Richard Roe, Vice-President and Professor of Law’.
4) A combination of synonyms: ‘act and deed’.

**OR**

1) Either A or B=A or B, but not both (exclusive ‘or’):

Which do you like better, coffee or tea?

2) A or B, or both (inclusive ‘or’): same as 2) of **AND**.

3) A person or thing that is A or B, but not both (exclusive ‘or’):

Which is he, a friend or an enemy?

4) A person or thing that is A or B, or both (inclusive ‘or’): same as 2) of **AND**.

5) Namely: The canine, or dog, is a useful animal.

6) A combination of synonyms: ‘alter or change’; same as 4) of **AND**.

**AND** and **OR** can be interchangeable if **AND** denotes inclusive ‘or’ and several ‘and’ are replaceable, though ‘and’ and ‘or’ are not interchangeable words for the minds of Layer 2.

Solan (1993:45-55) has also discussed the idiosyncratic legal usage of ‘and’ and ‘or’. In most legislative interpretation ‘and’ means ‘and’; ‘or’ indicates ‘or’, just like ordinary language. However, the terms ‘and’ and ‘or’ are construed as interchangeable when it is considered necessary to effectuate legislative intent. This interchangeability between ‘and’ and ‘or’ is found when the clause with the conjunction is a negative. Also, unlike natural language in which ‘or’ does not mean ‘and’, in logic ‘or’ means ‘and/or’. English conjunctions have some interchangeability with ‘and’ and ‘or’, which would certainly cause difficulty for non-legal experts.

Japanese also has a peculiar grammatical rule of the conjunction in the legal genre, though Japanese conjunction indicates a more systematic usage. Japanese has three types of ‘and’: *to*; *oyobi*; and *narabi ni*. The difference among the three types can be characterised in terms of syntax. ‘*To*’ is to join clauses; ‘*oyobi*’ is to join phrases; ‘*narabi ni*’ is to join words.

Another conjunction ‘or’ is also characterised by the syntactic role in Japanese legal
language. Japanese ‘or’ is described with *moshiku wa, mata wa* ‘either or’. *Moshiku wa* and *mata wa* are to connect parts of sentences, clauses or phrases. *Moshiku wa* is a literary conjunction word, while *mata wa* was is an ordinary equivalent. The characteristics of the use of *mata wa* and *moshiku wa* in legal language are found in their paired coordination. When alternative selections are made on both the embedded clause and the main clause, *moshiku wa* is used in the embedded clause and *mata wa* is used in the main clause.

In the section on self-embedding, I showed the usage of CONJ (*oyobi*) connecting two NPs in the sentence (1) and the usage of CONJ (*mata*) VP1 and VP2 in the sentence (2). Without CONJ (*mata*), one would take three VPs in apposition rather than two ‘main’ VPs. The Japanese conjunction thus clarifies complicated modification and functions as a tool for better understanding of the text though the syntactic distinction among Japanese conjunctions is not shared by Layer 2. For Layer 1 such a syntactic device is wisdom gained from the experience of the tackling incomprehensible legal language.

6.2.4 Discourse

The discourse of the judgments is examined as in the following:

1) Cohesion
   (1) Anaphora
   (2) Substitution
   (3) Definition
   (4) Conjunction
   (5) Repetition

2) Style
   (1) Legal Set Formulae
   (2) Legal Idiomatic Expressions.
6.2.4.1 Cohesion

6.2.4.1.1 Anaphora

In order to ensure accurate reference, indexical nouns are used with the core noun. Unlike ‘core noun with deictic’ such as ‘the term so varied’ or ‘such a person’ (Gibbons: 2003:66) in the English legal genre, Japanese indexical nouns are more fixed in variation and usage. Four types of indexical nouns are used in the three courts: mae/zen (before); migi (right); gen (original); and tou (the very). All these indexical nouns are placed before core nouns.

Although indexical nouns include ato/go (after) and hidari (left), only mae/zen (before) and migi (right) are used in all three courts. This is because legal experts refer things mentioned before in their argument to make their statement more supportive and convincing. The reason migi (right) is used is due to the fact that the writ of judgment has been written from top to bottom. In vertical writing things written on the right are things mentioned. The distinction between migi and mae is that migi indicates things mentioned immediately before, whereas mae points out things mentioned before.

The followings are the indexing nouns of mae (before) and migi (right).

(i) mae (before 前): zenki (noted before) 前記 (d)(h)(s); zenjutsu (mentioned before 前述) (d); zenshoujutsu (mentioned in detail before 前詳述) (s); zennkei (cited before 前掲) (h)(s); zenkou (the preceding clause 前項)(d)

(ii) migi (right; immediately mentioned 右): migi ninetei ((those) approved which were immediately mentioned 右認定)(d)(h); migi shouhyouken (the trademark right which was immediately mentioned 右商標権) (d); migi kaku hyouji (each trademark mentioned immediately before 右各表示) (d); migi no toori (as right above 右のとおり) (d); migi kaitousha (those respondent who were mentioned immediately before 右回答者) (h); migi kaku shouko (each evidence mentioned immediately before 右各証拠); migi shitumon (the question mentioned immediately before 右質問); migi (1) naishi (4) no hanketsu (the
judgement from (1) to (4) mentioned just before 右(1)乃至(4)の判決) (s); migi toujisha (the parties who were just now mentioned 右当事者) (s)

The following are the examples of gen (original) and tou (the very).

(iii)  gen (original 原): genshin (the original court 原審) (h) (s); genhanketu (the original decision 原判決) (h) (s)

(iv)  tou (the very 当); tousaibansho (this court 当裁判所) (h) (s); toushin shounin (the witness of this court 当審証人) (h)

It is as a matter of fact that gen (original) is used only at appellant courts. It is interesting to note that gen (original) refers to its previous (court or ruling) in the legal genre. In the case of the Supreme Court, gen (original) indicates its previous court, the high court. However, as gen (original) means ‘the origin’ or ‘the source’, Layer 2 often considers ‘genshin’ as the court of first instance. For Layer 1 they refer only to the previous court in the appellant system and therefore it is unquestionable for ‘genshin’ (the original court) to refer only to its previous court.

6.2.4.1.2  Substitution

Common nouns are used instead of proper nouns, i.e. the real names of people concerned in the case. These common nouns are referred to as legal pronoun as in the following:

toujisha (concerned party 当事者) (d)(h)(s)

genkoku (plaintiff 原告) (d)

hikoku (defendant 被告) (d)

kousonin (appellant of intermediate civil appeal 控訴人)(h)

hikousonin (respondent of intermediate civil appeal 被控訴人) (h)

joukokunin (appellant of final civil appeal 上告人) (s)

hijoukokunin (respondent of final civil appeal 被上告人) (s)
saibansho (court/judges 裁判所)(d)(h) (s).

Tooujisha (parties) and saibansho (court) are used at all the three courts. Although all these people have personal names, they are referred to as collective nouns. Just like the English, judges refer to themselves as the organisation of court. This causes impersonal nature of judicial system, which is the base of Layer 1.

It is interesting from the perspective of Layer 2 that the same person is called differently at each different level of the trial. Genkoku (plaintiff), kousonin (appellant), and joukokunin (appellant of final appeal) denotes White Horse Distillers, whereas hikoku (defendant), hikousonin (respondent), hijoukokunin (respondent of final appeal) indicates Toa Shuzo. As the key element of Layer 1 is law, Layer 1 focuses on legal system rather than individuals. This is the reason why the same people are given different function-names at different levels of trials.

6.2.4.1.3 Definition

Gibbons (2003:65) called reference in the legal genre to set up special meanings for words or expressions by means of definition as defined pro-forms. These references are known as ‘referential indices’ in Layer 1, of which function is like a pronoun. They are therefore used throughout the text. In the current court case, the use of defined pro-forms is predominantly found in the judgment paper of the district court. This is because the district court defines trademarks of each party as the initial court. The following is the example of the goods and trademarks of each party defined in the section of Claims of Parties of the district court. The phrase used is ‘hereafter xxx’ in parenthesis.

(3) WHITE HORSE to iu hyouji (ika [genkoku hyouji 1] to iu) called trademark (hereafter [plaintiff trademark 1] called) Trademark called WHITE HORSE (hereafter ‘Plaintiff Trademark no.1’)

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(4) White Horse  to iu  hyouji  (ika [genkoku hyouji 2] to iu)
called  trademark (hereafter [Plaintiff Trademark no.2] called)
Trademark called White Horse (hereafter ‘Plaintiff Trademark no.2’)

(5) Besshi  dai ichi  mokuroku  kisai  no  hyouji
Attached document no.1 inventory listed of trademark
(ika [genkoku hyouji 3] to iu)
(hereafter [plaintiff trademark 3] called)
Trademark listed in the No. 1 attached inventory document (hereafter ‘Plaintiff Trademark no.1’)

(6) [White Horse] to shousuru  Scotch whisky  (ika [genkoku shouhin] to iu)
called  (hereafter ‘Plaintiff Product’)
Scotch Whiskey Product called White Horse (hereafter ‘Plaintiff Product’)

(7) GOLDEN HORSE  to iu  hyouji  (ika [hikoku hyouji 1] to iu)
called  trademark  (hereafter [defendant trademark 1] called)
Trademark called GOLDEN HORSE (hereafter ‘Defendant Trademark no.1’)

(8) Golden Horse  to iu  hyouji  (ika [hikoku hyouji 2] to iu)
called  trademark  (hereafter [Defendant Trademark no.2] called)
Trademark called Golden Horse (hereafter ‘Defendant Trademark no.2’)

(9) Besshi  dai ichi  mokuroku  kisai  no  hyouji
Attached document no.1 inventory listed of trademark
(ika [hikoku hyouji 3] to iu)
(hereafter [defendant trademark 3] called)
Trademark listed in the No. 1 attached inventory document (hereafter ‘Defendant Trademark no.1’)

(10) [Golden Horse] to shousuru  whisky  (ika [hikoku shouhin] to iu)
called  (hereafter ‘Defendant Product’)
Whiskey Product called Golden Horse (hereafter ‘Defendant Product’)
In the high court the defined pro-forms such as *genkoku hyouji* (plaintiff’s mark) and *hikoku hyouji* (defendant’s mark) are simply transformed into *kousonin hyouji* (appellant’s mark) and *hikousonin hyouji* (respondent’s mark) respectively.

6.2.4.1.4 Conjunction

*Yotte* (therefore) is used at a final paragraph as the conclusion of all three courts. Other than *yotte*, *ijou no tooi* (as stated above) or *ijou no koko kara, ijou no toori* (from the above) are also used in the district court and the high court.

6.2.4.1.5 Repetition

Repetition is also observed in the whole text. For example, sentence (3) in the previous section contains several repetitions: *hyouji* (*ika [hikoku shouhin] to iu*). The phrase (hereafter [ ] called) was repeated third times in one single sentence.

6.2.4.2 Style

Unlike the Snack Chanel case, the definition of confusion was not the issue of this case. The usage of legal set formulae and the substitution of legal common nouns for personal names have made the judgement impersonal. As substitution was discussed in the previous section, I focus on legal set formulae here.

6.2.4.2.1 Legal Set Formulae

Legal set formulae are conventionally used in the Text of the dismissal case. The following dismissal Texts of the district court, the high court, and the Supreme Court are the same except the reference of the type of the court. The illocutionary act of Text set formula is ‘order’: dismissal and payment.
[Tokyo District Court]

(i)  Genkoku no seikyuu wo kikyaku suru.
    Plaintiff of claim object marker dismiss
    (The claim of the plaintiff shall be dismissed.)

(ii) Soshou hiyou wa genkoku no futan to suru.
    Litigation cost topic marker plaintiff of bear shall
    (The cost of the suit shall be considered as the payment of the plaintiff.)

[Tokyo High Court]

(i)  Honken Kouso wo kikyaku suru.
    this case appeal object marker dismiss
    (The appeal of the case shall be dismissed.)

(ii) Kouso hiyou wa kousonin no futan to suru.
    appeal cost topic marker appellant of bear shall
    (The cost of the appeal shall be considered as the payment of the appellant.)

[Supreme Court]

(i)  Honken Joukoku wo kikyaku suru.
    this case final appeal object marker dismiss
    (The final appeal of the case shall be dismissed.)

(ii) Joukoku hiyou wa joukokunin no futan to suru.
    final appeal cost topic marker appellant of the final appeal of bear shall
    (The cost of the final appeal shall be considered as the payment of the appellant of final appeal.)

(2) Facts and Reasons

Unlike Text, Facts and Reasons are the part in which legal professionals write up for the respective case. I here have to note that gist of plaintiff’s/appellant’s claims and that of defendant’s/respondent’s answers are set phrases because they are the parts to be used as Text in the judgment. The rest of Facts and Reason still have some common mode of expression.
6.2.4.2.2 Legal Idiomatic Expressions

The followings are legal idiomatic expressions used in the district court and the high court.

sono yo wa fuchi (I do not know the rest) (d)
sono yo wa hininsuru (I deny the rest) (d)
sono yo wa arasou (don't acknowledge and argue the rest) (d)
seikyuu no gennin 1 no uchi (regarding the claim) (d)
shinsei ni seiritsu shita (properly established (witness)) (h)

6.3 Summary

The Golden Horse case was analysed using the Linguistic Legal Model. In Layer Analysis the judgment of the case was examined with the focus of the thought process in the legal judgment. The judgment of judges in this case coincided with the perception of Layer 2. This is because legal experts did not prescribe language use of Layer 2 by protecting a well-known trademark in the mid-1980s. As the court did not provide sound reasoning to support their position, I presented several linguistic analyses using a database in terms of flexibility, dictionary listing, and etymology. In Register Analysis the legal reasoning is traced down from the characteristics of legal language used in the judgment paper. Not all legal sentences are long. A lengthy sentence does not necessarily mean incomprehensibility of legal language. It is layers of embedding that make a legal sentence appear longer and more difficult to parse. Legal experts are trained to shift through ‘old’ information such as conventional expression and ‘new’ information regarding the case. For those in Layer 1 legal language is a piece of comprehensible writings. In the following chapter I present a case in which the judgment of legal experts is different from that of ordinary people.
Chapter 7   The Snack Chanel Case

7.0   Introduction

In this Chapter the Snack Chanel case is also analysed using the Linguistic Legal Model. Unlike the Golden Horse case, the Snack Chanel case is the one which prescribed the language use of Layer 2 under the influence from Japanese industry in the protection of well-known trademarks. More concretely, the district court and the Supreme Court acknowledged a likelihood of confusion between a shabby snack bar and the Chanel brand. For those in Layer 2 it is very inexplicable that the judicial system which had not acknowledged a likelihood of confusion between the two distillers in the same trade did admit a likelihood of confusion between the two different types of business fifteen years later. In order to explain the discrepancy between Layer 1 and Layer 2, I would like to state that the argument of Layer 1 is based on the paradigmatic mode while the perception of Layer 2 is rooted in the narrative mode. In this chapter I first discuss the background of the Snack Chanel case.

7.1.   Layer Analysis

7.1.1   Court Rulings

7.1.1.1   Other Chanel Cases

The Snack Chanel Case is only one of many cases initiated by the Chanel Group for an act of using their trademark. One snack bar named Chanel in Tokyo was sued for its name by the Chanel Group and reached an out-of-court settlement by paying 1,000,000 yen (A$12,000 at the exchange rate of 83 yen to the Australian Dollars). A love hotel\textsuperscript{16} in Kobe was sued for a violation of the Old Law by the Chanel Group because of the use of Chanel as its hotel name. In 1987 the Kobe District Court acknowledged that the use of the trademark Chanel caused

\textsuperscript{16} A love hotel is a hotel which provides rooms mainly for couples by hourly charges.
confusion between the love hotel and the Chanel Group. In 1992 the Osaka District Court ruled against a rental *oshibori*\(^\text{17}\) dealer named as Chanel in the same interpretation. A very similar Snack Chanel Case occurred in Tokyo in 1994. The Chanel Group sued a snack bar named ‘Kayo Snack Chanel’ (Japanese Song and Ballads Snack Bar Chanel) which was located under an elevated railway near Nakameguro station and demanded 68,000,000 yen for damage. Both the Tokyo District Court and its appeal court (the Tokyo High Court) acknowledged a likelihood of confusion between the two and ruled in favour of the Chanel Group. However, both courts found the damage was limited and the damage amount was thus reduced to 800,000 yen.

All these Chanel cases revealed the distinct perception of Layer 1 regarding the confusion issue in trademark cases. Legal experts in Layer 1 use a high degree of abstraction in dealing with the confusion issue regarding trademark disputes. The existence of actual confusion is not necessarily relevant in the thought process of the paradigmatic mode. In contrast, the narrative mode of Layer 2 concerns only whether they themselves are confused or not. This means that the different type of business is not confusing at all to those in Layer 2 even though one uses the other’s mark. Before discussing the conflict of the two modes regarding the Snack Chanel case, I present the background of this Chanel case.

### 7.1.1.2 The Background of the Snack Chanel Case

Snack Chanel was a snack bar of the type, commonly seen on the outskirt of the downtown area. It is located on the second floor of a shabby old building near the eastside entrance of Matsudo Station. Matsudo City, which is situated twenty kilometres (fourteen miles) east of downtown Tokyo, is considered an unrefined and inexpensive area. The proprietress was a single mother and was able to open the snack bar in 1984 with a sum of three million yen which

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\(^{17}\) *Oshibori* is a handtowel served either steaming hot or refreshingly cool at a restaurant or in the airplane.
she borrowed from her relative. The monthly rent was 123,000 yen as of 1993. The average yearly sales figure between 1986 and 1997 was 8,700,000 yen. The bar covers a space of 32 square metres. The employees were one full-timer and one part-timer. The average number of customers per day was usually less than twenty.

The proprietress innocently named her bar Chanel.\textsuperscript{18} Her relative happened to suggest Chanel as one of some possible names. She claimed that she was not aware that Chanel was a company diversifying into a range of different fashion products. The only knowledge that the proprietress had about Chanel at that time was that Chanel produced a famous perfume Chanel Number Five. Outside her bar the proprietress set up four Chanel signboards. The name of the snack bar, Snack Chanel, was written in the \textit{katakana} syllabary. In the post-war standard Japanese writing system the \textit{katakana} syllabary is mainly used for words or names that are foreign in origin. All the signboards vividly showed black letters against a yellow background. The largest signboard, 140 centimetres long and 50 centimetres wide, which was set up on the roof of the building, was quite conspicuous for its size and a combination of the two distinct colours seen from the eastside entrance of Matsudo Station.

It is important to note that the Chanel Group does not use the Japanese \textit{katakana} syllabary for their trademark. Their trademark is written in the English alphabet with white-colour capital letters against a black background as in CHANEL. All of the proprietress’ signboards were quite different from that of the Chanel Group because the signboards were written in Japanese and the word ‘snack’ is used in the signboards.

In March of 1992 the Chanel Group sued Snack Chanel for a violation of the Old Law. In July of 1993 the proprietress changed one signboard from Chanel to ‘Charel’ in the \textit{katakana} syllabary without consulting her attorney and kept the other three unchanged. The Chanel Group accordingly added ‘Chanel and other similar names’ in their claim.

\textsuperscript{18} Interview with the proprietress of Snack Chanel on 26 November 1998.
Snack Chanel was not the only snack bar which carried the name of Chanel in this town. Rather further from the station another snack bar carried Chanel as its name. One easily find one snack bar named Chanel in every population unit of 100,000. Just as German words and German family names are popular among brand names for beer due to the product’s association with Germany (Nuessel 1992:92), Chanel is also popular among names for snack bars or beauty parlours. As mentioned before, the Chanel Group has initiated many cases for an act of using their tradename. The Snack Chanel case is one of Chanel cases which have occurred in Japan.

7.1.1.3 The Chiba District Court

7.1.1.3.1 Court Reasoning

The Chanel Group claimed that general consumers would confuse Snack Chanel with the Chanel Group, because the trademark Chanel has been widely acknowledged and because the Chanel Group has been engaged in diversified fashion business. Furthermore, the use of the trademark Chanel on the snack bar would diminish the name’s intellectual property value and would impair Chanel’s diversified business activities.

The Chanel Group thus sought compensation for damages for the sum of 14,935,622 yen, made up of 6,935,622 yen for loss of profits and 8,000,000 yen for loss of credit and business. Furthermore, 2,000,000 yen were added for lawyer’s fees. As part payment, the Chanel Group demanded 10,000,000 yen with interest for delayed damages as part payment. However, Snack Chanel flatly rejected the charge simply because the proprietress could not afford to pay the astronomical numeral of 10,000,000 yen. She then contested the damage claim.

The court decided against the snack bar on 26 January 1994: 1) the snack bar should not use the trademark Chanel, Charel, or other similar names; 2) the snack bar was to pay 2,000,000 yen with delayed interest to the Chanel Group; 3) the snack bar also was to pay one-fifth of court costs

19 Judgement of 26 January 1994, Chiba District Court 673.
and the Chanel Group to pay the rest (four-fifths of the costs).

As for the signboard Chanel, the district court ruled that the business indications of the snack bar bore much resemblance to the trademark Chanel. The court acknowledged that not only Chanel but also Charel caused a likelihood of confusion. The court gave an analysis of the similarity of the two names. First, Charel and Chanel are trisyllable words. This is because Japanese pronounce ‘Chanel’ as ‘Chaneru’ and ‘Charel’ as ‘Chareru’ which are trisyllable words. There is no contrast between /l/ and /r/ in indigenous Japanese words. When /l/ is encountered in loan-words from foreign languages, it is treated as an allophone of /r/ and pronounced accordingly. Secondly, the first and the last syllables of ‘Charel’ and ‘Chanel’ are identical: ‘cha’. Thirdly, the middle syllables of each word, ‘re’ and ‘ne’, are alveolar consonants in Japanese. Therefore, ‘Chanel’ and ‘Charel’ are similar words.

The district court ruled that general consumers would misunderstand the snack bar for a business arm of the Chanel Group due to the recent trend of diversified business activity in the fashion industry. The court’s judgment was based on the Supreme Court decision of National Football League Properties v. Marutake Shoji on 29 May 1983. Marutake Shouji manufactured and sold vinyl lockers using the helmet symbol of National Football League Properties without permission. National Football League Properties and its general agent in Japan sued Marutake for the violation of the Old Law. The Osaka District Court forbade Marutake from selling these vinyl lockers. However, Marutake argued that the general agent did not have the right to make a request for injunction. The Supreme Court regarded the general agent as a business arm of National Football League Properties and acknowledged the claim of the Football Properties and their agent. The court, however, did not acknowledge the fact that more customers had patronised the snack bar because of its business representations Chanel and Charel, for this court judged that the snack bar did not gain any advantage from the use of the name. Rather, the court decided that these business representations impaired the high-class image of the Chanel Group,
thereby ruling 1,500,000 yen for loss of credit and business. The Chiba District Court also ruled that the snack bar should pay 500,000 yen, not 2,000,000 yen, for lawyer’s fee.

7.1.1.3.2 Discussion

First, the major premise at the district court was that the Old Law prohibits the act of using an indication identical with or similar to another person’s well-known trademark and thereby causing confusion with the business establishment or activities of the other person. The minor premise was that the term Snack Chanel is similar to the Chanel trademark and thereby causes confusion with the Chanel Group. Therefore, the use of the Snack Chanel label must be proscribed. In the minor premise, the court used the paradigmatic mode and acknowledged the similarity based on the precedent, not on the consumers’ perception. On the other hand, the court, using the narrative mode, admitted the snack bar did not gain any advantage for the use of the indication. As they wanted a total victory, the Chanel group appealed the high court in pursuit of a more paradigmatic decision.

Second, it is interesting to note that the term Charel was not the same as Chanel in the mind of proprietress, but that Charel was conveniently included in the category of Chanel in the mind of legal experts. The motive of legal experts for the inclusion can be explained by the prescriptive nature of Layer 1, which aims the order of the industrial market. The proprietress’ perception of the non-similarity between Chanel and Charel coincides with that of ordinary people, which is discussed later in this chapter.

7.1.1.4 The Tokyo High Court

7.1.1.4.1 Court Reasoning

In the appeal hearing the Chanel Group claimed 10,000,000 yen damages with interest.

20 Judgement of 29 September 1994, Tokyo High Court 571.
The Tokyo High Court, however, rejected the claim, reversed the former decision, and ordered the Chanel Group to pay the court costs.

The Tokyo High Court acknowledged that general consumers would not misconceive that the snack bar had a business relation with the Chanel Group. The court pointed out the small-scale business size of the snack bar, in terms of the number of employees, the proceeds of sales, the average number of customers, the size of the bar, as well as the financially underprivileged situation of the proprietress. Furthermore, the court stated that a bar offering snacks and alcohol beverages was a different type of industry from the generally perceived type of business conducted in the diversified fashion industry.

The Tokyo High Court argued that it was the Old Law (Article 1, Section 1 (2))\(^{21}\) which was deficient in protecting a prominent business trademark, but the court added that the New Law distinctly protects business representation, the problem thereby being solved. Article 2, Section 1 (2) of the New Law, states that unfair competition is defined as the use of another person’s well-known business indication, without taking account into any confusion caused by the public mind. As the Snack Chanel case occurred before the enforcement date of the New law, this law was not applicable to the Chanel case. The court could not acknowledge the confusion between the two businesses under the Old Law and thereby dismissed the Chanel Group’s claim.

7.1.1.4.2 Discussion

Although the decision of the high court showed some features of the narrative mode by acknowledging the difference between the snack bar and the Chanel Group in terms of the actual condition of business, the court decision was purely under the influence of the paradigmatic mode.

\(^{21}\) Article 1…therewith may demand cessation of such an act: (2) Act of using an indication identical with or similar to such full name, trade name, mark of the other person or any such other indication of the business and good will of the other person as widely known in the territory where this law is in force and thereby causing confusion with the business establishment or activities of the other person;…

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The court reluctantly admitted that these two business types were so different that they did not cause confusion, and placed the responsibility onto the Old Law. In other words, the high court argued that the literal interpretation of the Old Law led them into a kind of deadlock, which would be resolved by the New Law.

7.1.1.5 The Japanese Supreme Court

7.1.1.5.1 Court Reasoning

The Chanel Group appealed. On 10 September 1998 the Japanese Supreme Court reversed the decision of the high court and referred the case back to the court for the amount of damages.

The Supreme Court emphasised that both the Old Law (Article 1. Section 1 (2)) and the New Law (Article 2. Section 1 (1)) shared a broad interpretation of confusion to include a close business relationship between the two parties such as affiliate companies or interlocking business groups. The Court therefore indicated that the Tokyo High Court had wrongfully interpreted the Old Law. Although the Court acknowledged that the snack bar was quite different from the Chanel Group in terms of its business type and size, the Supreme Court nonetheless claimed that general consumers would misconceive the bar as associated with the Chanel Group due to the Chanel’s widely known trademark and the fashion industry’s diversified business activities.

7.1.1.5.2 Discussion

The major premise of the Supreme Court was also the same as that of the other courts; the Old Law prohibits the act of using an identical or similar well-known indication of the other person and thereby causing confusion with that person’s business establishment or activities. The Court held fast to the paradigmatic mode as being the highest court in the nation. In order to

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22 Judgement of 10 September 1998, Supreme Court 637.
pursue the paradigmatic mode, the Court used a strained interpretation concerning the similarity issue. However, this farfetched argument was criticised by the media including newspaper articles and television news.

Her attorney went into hiding after the Supreme Court decision without telling the court the reason. The court clerk of this case told the proprietress to appear in court. Without any attorneys on her side, she negotiated the amount of damages with fourteen Chanel Group attorneys. They reached a settlement that Snack Chanel pay 500,000 yen for damage and court costs. The Chanel Group made a compromise in the amount because the proprietress could not afford to pay what they demanded. This settlement worked for both sides. What Chanel searched for is not money but the confirmation of the legal protection of their well-known trademark. On the contrary, the proprietress was concerned how much she was forced to pay but did not mind at all changing her snack bar’s name for a different one. In the narrative mode, it is a central matter how much one pays or receives. The proprietress was content with the agreed payment of 500,000 yen, which was the smallest amount of money ever mentioned at the three courts.

7.1.2 The Perception of the Narrative Mode

The paradigmatic mode of Layer 1 acknowledged that the two indications (and businesses as well) were similar enough for the public to misunderstand the bar for a business arm of the Chanel Group. In this section I examine whether general consumers with the narrative mode would confuse the snack bar with the Chanel Group or not. While the issue of the White Horse case was whether there was a likelihood of confusion between the two tradenames, the issue of the Snack Chanel case is whether consumers confuse the two businesses carrying the tradename of Chanel. Although database analyses function adequately to compare and contrast the two

23 Asahi Shimbun, “Snack Chanel Yappari Dame: Saikousai ga Tenmei Kinshi (Turned Out To Be No Good Snack Chanel Name Again: Supreme Court Prohibits Snack Bar’s Name).
24 Telephone interview with the proprietress on 25 April 1999.
marks, language attitude tests are more appropriate to capture the image for a certain word than database analyses.

7.1.2.1 Methodology

I conducted language attitude tests by using open-question questionnaires, semantic differential scaling, and interviews. The semantic differential is a meaning device in a behaviourists’ framework developed by Osgood, Suci, and Tannenbaum (1957) to remedy the behaviourists’ simplistic account of meaning. The semantic differential has been often used to investigate language attitudes of teachers or learners (Williams 1974). Also, the connotative aspect of meaning which refers to the speaker’s attitudes and emotional reaction toward a given word has been measured by the semantic differential, as in desirability of first names (Lawson 1987).

The subjects of this research were 394 Japanese university students. Office workers also should be normally included for language attitude tests intended for general consumers. However, it was not possible to have a large number of office workers at one time at one place. Despite this limitation, I believe that the results of this study reflect a general consumer’s attitude fairly well since the subjects in this study are as commonly engaged in drinking activities just like office workers.

7.1.2.2 Impressions Obtained from the Words Charel and Chanel

7.1.2.2.1 Charel

Group A – 102 college students consisting of 69 males and 33 females - was first asked to describe their own impressions about the word ‘Charel’ by using adjectives. Next, the same students were asked to write their own impressions on the word ‘Chanel’.

Sixty-two subjects (60.8%) did not have any impressions on ‘Charel’ because ‘Charel’ is a
coined word by the proprietress. The writer was frequently asked by the subjects to repeat the word or what ‘Charel’ was. Those who put some adjectives simply wrote their impressions which they received from the sound of the unknown word ‘Charel’. The images which subjects had about ‘Charel’ are more or less fashion-related positive types of images, as shown in Table 1. The most prominent image is ‘beautiful’ (16.7%), followed by ‘pretty and cute’ (5.9%), ‘smart’ and ‘sounds good’ (3.9%), ‘bright and cheerful’ and ‘dandyism and finery’ (2.9%). Only four students (‘imitation’, ‘brand name’) indicated a possible brand name of ‘Chanel’. Although the Japanese courts judged in their language analysis that ‘Charel’ bore a close resemblance to ‘Chanel’, it can be said that ‘Charel’ is a quite different word from ‘Chanel’ to general consumers.

Graph 5: Impressions on the Word ‘Charel’
Graph 6: Various Impressions on the Word ‘Charel’
Table 1: Impressions on the Word ‘Charel’

<table>
<thead>
<tr>
<th>Impression</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Don’t Know</td>
<td>62</td>
<td>60.8%</td>
</tr>
<tr>
<td>Various Impressions</td>
<td>40</td>
<td>39.2%</td>
</tr>
<tr>
<td>Beautiful</td>
<td>17</td>
<td>16.7%</td>
</tr>
<tr>
<td>Pretty, Cute</td>
<td>6</td>
<td>5.9%</td>
</tr>
<tr>
<td>Smart</td>
<td>4</td>
<td>3.9%</td>
</tr>
<tr>
<td>Sounds Good</td>
<td>4</td>
<td>3.9%</td>
</tr>
<tr>
<td>Bright, Cheerful</td>
<td>3</td>
<td>2.9%</td>
</tr>
<tr>
<td>Dandyism and Finery</td>
<td>3</td>
<td>2.9%</td>
</tr>
<tr>
<td>Dirty and Indecent</td>
<td>2</td>
<td>2.0%</td>
</tr>
<tr>
<td>Feminine</td>
<td>2</td>
<td>2.0%</td>
</tr>
<tr>
<td>Imitation</td>
<td>2</td>
<td>2.0%</td>
</tr>
<tr>
<td>Brand Name</td>
<td>2</td>
<td>2.0%</td>
</tr>
<tr>
<td>Sounds High-class</td>
<td>2</td>
<td>2.0%</td>
</tr>
<tr>
<td>Flowery and Noble</td>
<td>2</td>
<td>2.0%</td>
</tr>
<tr>
<td>Others</td>
<td>18</td>
<td>17.6%</td>
</tr>
</tbody>
</table>

Others include:

- Cheerful, Mysterious, Long, Round, Tasty, Underwear Name, Car Name,
- Thin, Vulgar, Cold, Fish Name, Inaccessible, Mail Order Company Name,
- White and Beautiful, Science Experiment Name, Unusual, Expensive, Justice.
7.1.2.2 Chanel

Unlike ‘Charel’, most respondents know about ‘Chanel’. The most prominent image which the subjects had about ‘Chanel’ is ‘expensive’ (33.3%), as shown in Table 2. Next come ‘flashy and showy’ (9.7%), ‘high-class’ (9.1%), ‘brand name’ and ‘beautiful’ (8.5%). These adjectives are representative impressions about ‘Chanel’.

Graph 7: Impressions on ‘Chanel’
Graph 8: Various Impressions on the Word ‘Chanel’

- Expensive
- Flashy
- High-class
- BrandName
- Beautiful
- Fragrance
- Graceful
- Adult-like
Table 2: Impressions on the Word ‘Chanel’

<table>
<thead>
<tr>
<th></th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Don’t Know</td>
<td>8</td>
<td>4.8%</td>
</tr>
<tr>
<td>Various Impressions</td>
<td>157</td>
<td>95.2%</td>
</tr>
<tr>
<td>Expensive</td>
<td>55</td>
<td>33.3%</td>
</tr>
<tr>
<td>Flashy and Showy</td>
<td>16</td>
<td>9.7%</td>
</tr>
<tr>
<td>High-class</td>
<td>15</td>
<td>9.1%</td>
</tr>
<tr>
<td>Brand Name</td>
<td>14</td>
<td>8.5%</td>
</tr>
<tr>
<td>Beautiful</td>
<td>14</td>
<td>8.5%</td>
</tr>
<tr>
<td>Fragrance</td>
<td>5</td>
<td>3.0%</td>
</tr>
<tr>
<td>Graceful and Noble</td>
<td>4</td>
<td>2.4%</td>
</tr>
<tr>
<td>Adult-like</td>
<td>3</td>
<td>1.8%</td>
</tr>
<tr>
<td>Smart</td>
<td>3</td>
<td>1.8%</td>
</tr>
<tr>
<td>TV Personalities</td>
<td>3</td>
<td>1.8%</td>
</tr>
<tr>
<td>Strange</td>
<td>2</td>
<td>1.2%</td>
</tr>
<tr>
<td>Valuable</td>
<td>2</td>
<td>1.2%</td>
</tr>
<tr>
<td>Black</td>
<td>2</td>
<td>1.2%</td>
</tr>
<tr>
<td>Gold</td>
<td>2</td>
<td>1.2%</td>
</tr>
<tr>
<td>Chanel Mark X</td>
<td>2</td>
<td>1.2%</td>
</tr>
<tr>
<td>Handbag</td>
<td>2</td>
<td>1.2%</td>
</tr>
<tr>
<td>Others</td>
<td>13</td>
<td>7.9%</td>
</tr>
</tbody>
</table>

Others include: Unbecoming, No sense, Inaccessible, Popularity, Dislike, Enormous, Envious
Small number, Lipstick, Excellent for a Gift, High School Girl Students, Middle-aged Women, and France.
7.1.2.3. Chanel Associable Merchandises/Stores

Group B - 103 college students (48 males and 55 females) - was asked to mark goods or stores which they think are associated with the Chanel Group. The list was given in the Japanese alphabetic order of kanji/hiragana/katakana. A word in the Japanese language is represented in one of the ten ways: 1) a single kanji; 2) a single hiragana; 3) a single katakana; 4) multiple kanji; 5) multiple hiragana; 6) multiple katakana; 7) a combination of a kanji with a hiragana suffix; 8) multiple kanji with a hiragana suffix; 9) a combination of a kanji with a katakana suffix; 10) multiple kanji with a katakana suffix. The names were taken from the telephone directory, since this style of naming is familiar from every day use of telephone directories. Table 3 indicates the arrangement in order of percentage. ‘*’ mark indicates goods or stores which the Chanel Group actually produce or are related to.

Graph 9 (Chanel associable merchandise) shows that the subjects considered ‘Chanel’ as a fashion industry, predominantly for women associated with such items as ‘perfumes’, ‘lipsticks’, and ‘accessories’. Chanel perfume Number Five has been widely known in Japan as the perfume used by Marilyn Monroe, so all the subjects were able to associate the Chanel image to perfumes. It is interesting to note that ‘bag’ is considerably lower than other female fashion items, even slightly lower than a male fashion item, ‘necktie’. This low recognition of ‘bag’ is likely due to the fact that other brand name fashion industries are also active in selling their own brand-name bags. Briefly, more than eighty percent of the subjects answered that female fashion goods are associated with the Chanel Group. On the contrary, only twenty to under fifty percent of the subjects considered male goods as Chanel associable merchandise.
Graph 9: Chanel Associable Merchandise
<table>
<thead>
<tr>
<th>Merchandise Type</th>
<th>Percentage</th>
<th>Next Most Frequent Type</th>
<th>Frequency</th>
<th>Next Most Frequent Type</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perfume</td>
<td>100%</td>
<td>Cabaret</td>
<td>10</td>
<td>Meal-serving Lodge</td>
<td>1</td>
</tr>
<tr>
<td>Lipstick</td>
<td>95%</td>
<td>Snack Bar</td>
<td>10</td>
<td>Computer Shop</td>
<td>0</td>
</tr>
<tr>
<td>Accessories</td>
<td>93%</td>
<td>Discotheque</td>
<td>10</td>
<td>Caterer</td>
<td>0</td>
</tr>
<tr>
<td>Women's Clothes</td>
<td>90%</td>
<td>Hair Dressing Salon</td>
<td>10</td>
<td>Bakery</td>
<td>0</td>
</tr>
<tr>
<td>Watch</td>
<td>84%</td>
<td>Hotel</td>
<td>9</td>
<td>Beer House</td>
<td>0</td>
</tr>
<tr>
<td>Women's shoes</td>
<td>83%</td>
<td>Laundry</td>
<td>4</td>
<td>Fast-food</td>
<td>0</td>
</tr>
<tr>
<td>Jewellery store</td>
<td>77%</td>
<td>Coffee Shop</td>
<td>4</td>
<td>House Lots</td>
<td>0</td>
</tr>
<tr>
<td>Eyeglasses</td>
<td>67%</td>
<td>Dancing School</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Department store</td>
<td>55%</td>
<td>Pinball House</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Necktie</td>
<td>46%</td>
<td>Bar</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Handbag</td>
<td>44%</td>
<td>Movie Theatre</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lingerie Store</td>
<td>44%</td>
<td>Anglo-French School</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Travelling Goods</td>
<td>27%</td>
<td>Karaoke Bar</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Children's Clothes Store</td>
<td>27%</td>
<td>Supermarket</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men's Clothes</td>
<td>24%</td>
<td>Restaurant</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men's Clothes Store</td>
<td>23%</td>
<td>Pastry Shop</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men's Shoes</td>
<td>22%</td>
<td>Tennis Shop</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Beauty Salon</td>
<td>18%</td>
<td>Culture Training School</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discount Store</td>
<td>17%</td>
<td>Amusement Arcade</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mail Order</td>
<td>16%</td>
<td>Bookstore</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Design School</td>
<td>13%</td>
<td>Villa Lots</td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As for the stores, stores which sell women’s clothes, including a department store, are recognised by nearly eighty of the subjects, as shown in Graph 2. However, lingerie shops or beauty salons or hairdressers’ are considered significantly lower than a women’s clothes store. This is because stores which sell Chanel goods are considered Chanel associated stores.

Stores selling food and drink are ranked greatly lower than fashion related stores. Among food and drink type of stores, ‘snack bar’ and ‘cabaret’ are ten percent, which is considerably higher than another liquor serving bar, ‘beer house’. Group C of five students (4 male and 1 female) had a free talk regarding naming businesses ‘Chanel’. Possible stores named as ‘Chanel’ are ‘love hotel’, ‘snack bar’, ‘cabaret’, but never ‘beer house’. ‘Chanel’ has an image of ‘flashy and showy’, which is somehow associated with seductive and bewitching images. Consequently, hostess bars and love hotels are appropriate in naming ‘Chanel’. Therefore, a relatively high percentage of snack bars in the food and drink industry being named ‘Chanel’ seems to be due to the fact that the ‘Chanel’ name is associated with a seductive and bewitching image in Japan.
Graph 10: Chanel Associable Stores

Chanel Associable Stores

- Reception
- Snack Bar
- Discount
- Department
- Last Door
- Mens Cl
- Womans Cl
- Children's Cl
- Lingerie
- Beauty Cl
- Cabinet
- Quick Bar
- Shampoo
- discount
- departmen
- last door
- men's cl
- women's cl
- children's cl
- lingerie
- beauty cl
- cabinet
- quick bar
- shampoo

Vertical Axis:
- 0
- 10
- 20
- 30
- 40
- 50
- 60
- 70
- 80
- 90

Horizontal Axis:
- Reception
- Snack Bar
- Discount
- Department
- Last Door
- Mens Cl
- Womans Cl
- Children's Cl
- Lingerie
- Beauty Cl
- Cabinet
- Quick Bar
- Shampoo
7.1.2.4 Impressions Received from Chanel and the Snack Bar Photo

Based on the impression of the word ‘Chanel’, ten adjectives were obtained for the purpose of a semantic differential scale. Group D (consisting of 82 subjects (58 males and 24 females)) was asked to rate the Chanel group on the basis of these adjectives. Group E (consisting of 102 subjects (64 males and 38 females)) was asked to rate the photo of the snack bar in Matsudo in the same way. The result is shown on the Graph 3.

‘Chanel’ is extremely ‘expensive’, but the snack bar has the image of being ‘cheap’. ‘Chanel’ has a ‘flashy and showy’ image, while the snack bar is rather plain. Unlike the high-class and exclusive image of ‘Chanel’, the snack bar has a low-class image. ‘Chanel’ is undoubtedly perceived to have a brand name, but the snack bar is not. ‘Chanel’ is relatively ‘beautiful’ and ‘noble’; on the contrary, the snack has an image of ‘dirty’ and ‘common’. The rating of the description ‘good sense’ was not high for ‘Chanel’ as some subjects showed their disfavour with the ‘Chanel’ brand. The image of fragrance is also not so prominent in ‘Chanel’. The snack bar does not have images of fragrance nor good sense. The image of the feminine is predominantly high in ‘Chanel’; on the contrary, the snack bar has more a male-type image. Finally, ‘Chanel’ has the image of France, but the snack bar has a more Japanese image.

Although the Japanese Supreme Court in the paradigmatic mode decided that the snack bar would cause confusion with the Chanel Group by the use of the name ‘Chanel’, the subjects in the narrative mode did not confuse the snack bar in Matsudo with the Chanel Group.
Graph 11: Impressions Received from Chanel and the Snack Bar Photo
7.1.2.5 Conclusion

In trademark disputes Japanese courts have considered the recent trend of the diverse nature of large business as the main factor in their decisions. As a result, the use of ‘Chanel’ by the shabby snack bar was considered an act of unfair competition due to a possible linkage to the Chanel Group. However, the subjects in this paper found that the use of the ‘Chanel’ name by the shabby snack bar would not arouse any association with Chanel and a high class image. The Supreme Court has based their rulings on all the possible associations to the diversified management policy step by step, as in the following case of the confusion between the Chanel Group and Love Hotel Chanel: Chanel (fashion) → hotel (interior done by a fashion company with diverse interests) → love hotel (hotel trade). For Layer 2 it would be considered a farfetched interpretation to seek for any linkage in such a broad interpretation of a multi-faceted policy. If the snack bar had not acquired any benefits, it would not be an act of unfair competition in the mind of Layer 2. The common sense of Layer 2 shows that an innocent use of someone’s well-known trademark such as the Snack Chanel case or the Love Hotel Chanel case needs to be distinguished from other intentional uses of well-known trademarks to promote their sales in the arena of business.

7.2 Register Analysis

In the previous section I have discussed the discrepancy between legal experts and ordinary citizens using Layer Analysis. In this section the Snack Chanel case is examined using Register Analysis. The discourse organisation of the Snack Chanel case is quite different from the Golden Horse case because the style of the judgment paper was in a period of transition from the Guide Style to the New Style. On the contrary, the characteristics of lexicon and syntax are more or less similar in both cases.
7.2.1  Organisation

The Appendix 2 shows a good diagram of the discourse organisation of the judgment paper of the three rulings.

7.2.1.1 The Chiba District Court

Judgements in the district court are an example of the New Style. The major change is that ‘Facts’ and ‘Reasons’ which were placed separately in the Guide Style are now combined together under the section of ‘Facts and Reasons’. In this style each claim of the plaintiff is followed by its corresponding defendant’s short answer. Although the ‘Reason’ joined ‘Facts’ in the New Style, the content of ‘Reason’ itself has not changed from the Guide Style. This is because the motivation of the implementation of the New Style is the simplification for the sake of the judges, not for comprehensibility to the public. Therefore, the characteristics of legal language have remained intact, which will be shown in the section on lexicon and syntax.

The organisation of judgments is given as below:

**Heading**

1. Judgement Day
2. Reference Number
3. Case Type
4. Parties and Legal Representatives

**Text**

1. Judgment on Defendant
2. Judgment on Defendant
3. Judgment on Plaintiff’s Claims
4. Litigation Cost
5. Conditional Execution

**Facts and Reasons**

1. Trial Claimed by the Parties
   1) Gist of Plaintiff’s Claims: Claim 1; Claim 2; Litigation Cost
   2) Defendant’s Answer to Plaintiff’s Claims: Dismissal of Claims; Litigation Cost

2. Claims of the Parties
   Plaintiff’s Claims:
   - Claim 1 (about the plaintiff’s business and mark)
     - defendant’s answer (do not know)
   - Claim 2 (about the defendant’s business and mark)
     - defendant’s answer (do not know)
   - Claim 3 (a likelihood of confusion)
     - defendant’s answer (acknowledgement)
   - Claim 4 (the defendant’s recognition of the plaintiff’s mark)
     - defendant’s answer (denial)
   - Claim 5 (damage)
     - defendant’s answer (denial)

3. Reasons
   1. Evidence
   2. Plaintiff’s Trademark
   3. Examination
      - Contrast between Plaintiff’s Trademark and Defendant’s Trademark
   4. Legal Interpretation of a Likelihood of Confusion
   5. Defendant’s Intent
7.2.1.2   The Tokyo High Court

Although the Chiba District Court adopted the New Style in the judgment, the high court used the Guide Style. As mentioned before, the style of the judgment paper is left to each judge’s discretion. However, it does not mean that judges are free to use any kind of style for a judgment. When a new style is introduced, the time to shift from an older version to newer one depends on each judge’s choice (Fujikawa, 17 January 2005). More open-minded judges are generally keen to adopt a newer style whereas more conservative ones are slow to change to a newer one.

The high court judgment includes an incidental appeal together with an appeal. The Chanel Group appealed to the high court with a demand of ten million yen for damages and the full payment of court costs by the snack bar. The snack bar, however, took advantage of this appeal and demanded the reversal of the lost part of the original judgment as an incidental appeal. In this way the judgment of the appellate court included an incidental appeal.
Text

1. Dismissal of Appellant’s Claim
2. Reversal of Incidental Appellant’s Lost Part of Original Judgment
3. Dismissal of Incidental Respondent’s Claim
4. Litigation Costs
5. Time for Final Appeal

Facts

1. Pleading
   1) Appeal
      Appellant’s Claims: Claim & Conditional Execution
      Respondent’s Answer to Claims: Dismissal of Appellant’s Claim (Same as Text 1)
   2) Incident Appeal
      Incidental Appellant: Reversal of Incidental Appellant’s Lost Part of Original Judgment &
      Litigation Cost (Same as Text 2 & 4)
      Incidental Respondent: Dismissal of Incidental Appeal & Litigation Cost

2. Claims of Parties
   1) Trial Claimed by Parties
      (1) Appellant’s Claims: Claim 1 & 2 (about appellant’s business and mark)
          Claim 3 (about respondent’s business and mark)
          Claim 4 (a likelihood of confusion)
          Claim 5 (damages)
          Claim 6 (respondent’s recognition of the appellant’s mark)
          Claim 7 (assessed damages)
          Claim 8 (conclusion)
      (2) Respondent’s Answers:
about Claims 1 & 2; Do not know
about Claims 3 & 4; Partial acknowledgement/Do not know/Contest
about Claims 5 -7; Contest

3. Evidence

Reasons

1. about Appellant’s claims 1 & 2; acknowledgement
2. about Appellant’s claim 3; acknowledgement
3. Examination; confusion between the two marks
4. Examination; non-confusion between the two businesses

2. Conclusion

1) Litigation Costs
2) Application of Laws

Court

Judges’ Names and Seals

List of Enclosures

Unlike the judgment in the high court of the Golden Horse case, this judgment does not have any corrections to the original judgment. It is because this high court reversed the decision of the original court completely.

7.2.1.3 The Supreme Court

In the Golden Horse case the Supreme Court granted the decision of the high court. However, the Supreme Court in the Snack Chanel case reversed the judgment of the Tokyo High Court and did not therefore use an illustrative judgment. The court interpretation of the case was well discussed in the section on ‘Reasons’. The major difference between the Supreme Court and
lower courts regarding the style of the judgment paper is that the Supreme Court does not include
the claim of the appellant. It would therefore be difficult to follow the case if you read only the
judgment at the Supreme Court. The judgment is certainly an internal document of Layer 1
which is aimed to be read by legal experts who are aware of the proceedings of the case.

**Heading**

1. Judgement Day

2. Reference Number

3. Parties and Legal Representatives

**Text**

1. Reversal of Some of Original Judgment

2. Dismissal of Incidental Claim

3. Re-trial of Some of Original Judgment

4. Dismissal of the rest of the Appellant’s Claim

5. Litigation Cost

**Reasons**

1. Summary of the case (appellant’s business and mark; respondent’s business and mark)

2. Summary of the high court judgment

3. Correction of the high court judgment

4. Conclusion

**Court**

Judges’ Names and Seals

7.2.1.4 Discussion

The organisation of judgments is also very systematic in the New Style. The conclusion of
the case comes first in the form of ‘Text’. In the ‘Facts and Reasons’ each party’s claims are placed in order; its response is immediately followed after the respective claim. As the format of the judgment paper is prescribed in Layer 1, legal experts with training try to search for and read only newly inputted information for the case concerned. For those in Layer 1 the judgment is a very functional document. In contrast, for those without legal training in Layer 2 would find it difficult to obtain needful information from the judgment.

7.2.2 Lexicon

The lexical features of the judgments are examined as in the following:

1) Legal Archaism
   (1) Uncommon Words
   (2) Overuse of Chinese Characters

2) Legal Terminology
   (1) Terms of Art
   (2) Legal Homonyms
   (3) Legal Jargon

7.2.2.1 Legal Archaism

7.2.2.1.1 Uncommon words

In contrast with that of the Golden Horse case, the occurrence of uncommon words is rather infrequent in the judgment paper of the three rulings in the Chanel case. This is probably due to a trend towards the simplification of judgments. The replacement of an uncommon word with a common word is not a difficult task unless the word contains a legal concept. The followings are examples of uncommon words found in the three rulings.

\textit{sain boodo} (signboard) instead of \textit{kanban} (d) (h) (s)
yuusuru (to have, to possess) instead of motte iru (d) (h)
kinin (an amount of money) instead of kinsen (d)
jakki suru (cause) instead of hikiokosu (s)
katagaki shozaiichi (the address) instead of juusho of (d)
kedashi (presumably) instead of tashika ni (s)
shouko suru (to pronounce) instead of hatsuon suru (h)
shittou (inappropriateness) instead of futou (h)
hanji suru (to judge) instead of handan suru (s)

It is interesting to note that shouko suru (to pronounce) is used at the high court. In the district court an ordinary word hatsuon suru (to pronounce) is used. This is also an example of some variation of usage among judges.

All three courts used ‘sainboodo’ (signboard), which is an English word. However, a word of Chinese characters, kanban, is commonly used in Layer 2.

7.2.2.1.2 Overuse of Chinese Characters

Numerals in the Chanel case are also written in Chinese characters though Arabic numerals are more commonly used in ordinary Japanese. In contrast with the Golden Horse case, Chinese characters are less frequently used for adverbs in this case. It is interesting to note that the overuse of Chinese characters is observed in the judgments of the high court, which also uses the Guide Style. This reflects a conservative language usage of the high court judges.

toutei (possibly): 到底 instead of とうてい (h)
kutugaesu (overturn): 覆す instead of くつがえす(h)
suusei (tendency): 趨勢 instead of すうせい (h)
7.2.2.2  Legal Terminology

7.2.2.2.1  Terms of Art

As the Golden Horse case also deals with trademark issues regarding a likelihood of confusion, technical terms used in Chapter 7 are basically the same as those in Chapter 6. The following are a few terms which appeared only in Chapter 8.

_isshitsu rieki_  （compensation for lost profits）

_jijitsushin_  （fact finding proceedings）

_sashitome seikyuu_  （demand for the stoppage）

_kouben_  （defense, plea）

_futai kouso_  （incidental appeal）

7.2.2.2.2  Legal Homonyms

The Snack Chanel case and the Golden Horse case share common legal homonyms. However, the following example is used in the Chanel case, not in the Horse case.

_seiritsu ni arasoi no nai_  (acknowledged by both parties)

This phrase legally means that the evidence is acknowledged by both parties and that thereby the court can use the evidence as an authorised one. The direct translation is ‘non contested regarding the formation’, which does not make sense to Layer 2. Layer 2 does not have such a fine distinction among examples of evidence. ‘Seiritsu’ and ‘arasou’ are never collocated in the language of Layer 2.

7.2.2.2.3  Legal Jargon

No new vocabulary of legal jargon is found in the Snack Chanel case.
7.2.3 Syntax

The syntactic features of the judgments are examined as in the following:

1) Lengthy Sentences
2) Dispersed Subject/Verb
3) Multiple Embedding
4) Continuous Verb Forms
5) Grammatical Construction

The first four features are interconnected with each other. A lengthy sentence is caused by the use of multiple embeddings and continuous verb forms. The insertion of multiple embeddings extends the distance between the subject and the verb even farther.

7.2.3.1 Lengthy Sentences

The longest sentence in the three rulings, as shown in the following sentence (1), is found in the ‘Reason’ of the judgment in the Tokyo high court. The sentence is composed of 632 characters, which is 12 times longer than a newspaper sentence. However, the core of the sentence is very simple: the court acknowledged several facts regarding the plaintiff’s mark. As mentioned before, the High Court judge who used the Guide Style also wrote this extremely long sentence. For those in Layer 2, such a long sentence is difficult to understand, but those in Layer 1 consider a short sentence to be unpolished and unartistic.\(^{25}\) This means that the aesthetic sense of language is quite different between legal experts and lay people. Moreover, as legal experts are familiar with the structure of internal legal documents, they do not have any communication problems among themselves.

\(^{25}\) Takafumi Hayano’s remark on a lengthy sentence from the perspective of an attorney at the meeting of the project for plain judicial process on 19 August 2005.
(1) Seiritsu ni arasoi no nai kou dai 10 goushou naishi dai 13 goushou, oyobi benron no zenshushi ni yoreba, kousonin no zokusuru Chanel sha wa, sono design ya hinshitu ni sugurete iru koto kara takai hyouka wo eteori Chanel sha wa Paris haute couture no shinise toshite seikaiteki ni shirarete iru koto, Chanel sha ni wa, France houjin Chanel S R wo hajime, koukyuu fujin fuku, kousui, keshouhin, handbag, katsu, accessory, tokei to no Chanel seihin no seizou, hanbai wo mokateki tosuru kaisha ga sekai kakuchi ni sonzaishi, migi Chanel seihin no seizou, hanbai no eigyou hyouji to shite ‘Chanel’ wo shiyou shite iru, Chanel seihin wa ippan shouhisha ni koukyuu no image ga motarete iru koto, Chanelsha ni Paris haute couture no shinise toshite sekai teki ni shirarete iru koto, kousui ga yunyyuu, hanbai sareta no wo kwakikiri ni Chanelsha no eigyou katsudou ga kashi sareta koto, Shouwa 29 nen ni rainichi shita America no joyuu Marilyn Monroe no gendou kara, kousui ‘Chanel no.5’ no shouhinmei ga wagakuni ni otemo ichiyakyu yuumei natta koto, Shouwa 55 nen 10 gatsu niwa Chanel kabushikigaisha ga setsuritu sare, dousha ga Chanelsha no ichiin toshite, wagakuni no okeru Chanel seihin no yunyyuu, hanbai wo okonatte iru koto no kaku jujitsu ga mitomerareru.

(The court acknowledged that Plaintiff’s evidence no. 10 or no.13, no.29 as well as the intended meaning of the pleading show that the origin of the Chanel corp. which the appellant belongs to started with the opening of a hat shop in Paris, France in 1914 by fashion designer Gabrielle Chanel; women’s dresses manufactures and sold by the Chanel corp. are rated highly due to the superior quality of quality and design; the Chanel corp. is known in the world as a long-standing store of a high-class dress store in Paris; the Chanel corp. has in the world companies including a French corp. Chanel of which purpose is to manufacture and sell high-class dresses, perfumes, cosmetics, handbags, shoes, accessories, and watches etc; they use ‘Chanel’ as their business mark for manufacture and sales of the above mentioned Chanel products; Chanel products have a high-class image among general consumers; the perfume called Chanel no. 5 which was developed by Gabrielle Chanel in 1921 is well-known and has continued to be a best-seller since the appearance on the market; the business activity of Chanel has started in Japan with the import and sales of Chanel perfumes in 1933; Chanel no.5 has become famous because of the remarks of Marilyn Monroe, an American actress when she visited Japan in 1954; in October of 1980 Chanel Inc., which as a member of the Chanel group has conducted sales and import regarding Japan.)

7.2.3.2 Dispersed Subject/Verb

I have mentioned that a Japanese sentence starts with a subject and ends with a verb. In a lengthy legal sentence the distance between a subject and a verb increases the level of incomprehensibility. Sentence (2) from the ‘Reason’ in the Chiba District Court is a good example of the case of dispersed subject and verb. The initial expression, [Genkoku wa (plaintiff)] is the subject and the final expression, [shuchou suru (claims)] is the verb of the sentence.
The plaintiff claims that the Chanel business mark of the Chanel corp. including the plaintiff is protected under Article 1 (1)-2 of the Unfair Competition Prevention Law and its exclusive use is acknowledged, and that the regular usage charge would be estimated at least 10% of the defendant’s sales if the plaintiff had consented the usage to the defendant, the estimated usage charge would 6,935,622 yen at least if the total sales amount of the defendant from 1984 to the start of the case was 60,686,700 yen, and thereby the same amount of lost profit would have arisen for the part of the plaintiff.)
Sentence (2) consists of 240 characters. The initial word ‘genkoku wa’ (plaintiff) is the subject of
the sentence; its verb ‘shuchou suru’ (claims) is placed at the end of the sentence. What the
plaintiff claimed was crammed with many embedded sentences between the subject and the
object.

7.2.3.3 Multiple Embedding

Kuno (1973:9) stated that self-embedding leads to incomprehensibility. Sentence (2) has
layers of self-embedding between the subject and the verb. What the subject ‘genkoku wa’
(plaintiff) claimed (shuchou suru) consists of one long adverb clause (starting with the second
expression ‘genkoku wo fukumu’ and ends with ‘sou suru to’ (if that is the case) just before S1) and
two sentences (S1 and S2).

‘Sou’ (that) signifies three NPs (NP1, NP2, NP3), each of which ends with complementizer
‘koto’ (fact). The first NP1 consists of two sentences: 1) genkoku wo fukumu ‘Chanel’ sha no
Chanel eigyou hyouji ga fusei kyousou boushihou 1 jou 1 kou 2 gou ni yoru hogo wo uke;  2) genkoku wo fukumu ‘Chanel’ sha no dokusenteki shiyou ga mitomerareu.  The subject of each sentence has the adjectival clause, which has the identical wording ‘genkoku wo fukumu ‘Chanel’ sha no’ (of the Chanel Group which includes the plaintiff).  The core of the two sentences in the first NP1 is: 1) the Chanel business mark is protected by a law; 2) the exclusive use of the Chanel Group is acknowledged.  NP1 has a total self-embedding of four, which impairs comprehension to Layer 2.  However, it is intelligible to those in Layer 1 because they have received a training to sift through a long sentence, and remove all the repeated and commonly used expressions, and then focus on core sentences.  NP2 has one adverb clause (genkoku ga karini hikoku ni Chanel eigyou hyouji no shiyou wo kaidaku shita to sureb) and one sentence (tsuujou shiyouryou wa sukonaku mitsumottemo hikoku no uriage no 10 % dearu).  Among the three NPs, NP3 is the simplest in terms of structure.  All these NPs are embedded in the Adverbial clause sou suru to, which is embedded in a larger sentence, which is then claimed (the verb of the sentence) by the plaintiff (the subject of the sentence).  Without training it is very difficult to grasp ‘who’ does ‘what’. In brief, the syntactic structure of sentence (2) shows multiple self-embeddings between the subject and the verb of the sentence.
The length of sentences is not necessarily a problem for incomprehensibility. It is multiple self-embeddings that causes incomprehensibility. The longest sentence (1), which consists of one adverbial clause and three sentences, is not as incomprehensible as (2). The following is the syntactic structure of sentence (1).
I also put a simplified structure of sentence (1) below for easy reference. It is clear that sentence (1) is easier to comprehend than sentence (2). This is because it has, first of all, fewer self-embeddings, and because the inserted embeddings are horizontally placed. More concretely, in sentence (1) seven NPs are stood in a row. Each NP is composed of a common structure of ‘S + complementizer ‘koto’ (fact)’. As the syntactic structure is not so complicated, even a lay reader can pick up the chief points of this extremely long sentence.

(1) [Seiritsu ni arasoi no nai kou dai 10 goushou naishi dai 13 goushou, dai 29 goushou, acknowledged plaintiff no. evidence or no. evidence no. evidence oyobi benron no zenshushi ni yoreba]ADV [kousonin no zokusuru Chanel sha no kigen wa and pleading of all purpose by appellant of belong corp. of origin topic marker

fashion designer no Gabielle Chanel ga 1914 nen ni France no Paris city ni boushten of subject marker year in of at hat shop
wo kaiten shita koto ni hajimar u ga], [Chanel sha no seizou, hanbai suru
object marker opened started corp. of manufacture sell
fujinfuku wa, sono design ya hinshitu ni sugurete iru koto kara
women's dresses topic marker, its design or quality in superior fact due to
takai hyouka wo eteori], [{Chanel sha wa Paris haute couture no shinise
high reputation object marker obtain corp. topic marker of long standing store
toshite sekaiteki ni shirareteiru koto}, {Chanel sha niwa, France houjin Chanel S R
as worldly well-known fact corp. in corp.
wo hajime, koukyuu fujinfuku, kousui, keshouhin, handbag, kutsu, accessory, tokei tou
including high-class women's dresses perfume cosmetics shoes watches etc.
no Chanel seihin no seizou, hanbai wo mokuteki tosuru kaisha ga
of product of manufacture sell object marker purpose make corp. subject marker
sekaikakuchi ni sonzaishi, migi Chanel seihin no seizou, hanbai no eigyou hyouji
world places in exists mentioned products of manufacture sell of business mark
toshite 'Chanel' wo shiyou shiteiru koto}, {Chanel seihin wa ippan shouhisha ni
as a fact product topic marker ordinary consumers to
koukyuhin no image ga motareteiru koto}, {Gablielle Chanel ga 1921 nen ni
high-class products of subject marker have fact subject marker year in
kaihatsu shita 'Chanel no.5' to shousuru kousui wa, sekaijuu de sono na wo
developed called perfume topic marker in the world its name object marker
shirare, hatubai irai bestseller wo tsuzukete iru koto}, {wagakuni ni oite wa,
known sales since object marker continue fact own country in topic marker
Shouwa 8 nen (1933 nen) ni hajimete Chanel sei no kousui ga yunyu,
Showa 8 (1933) in for the first time -made of perfume subject marker import
hanbai sareta no wo kawakiri ni Chanel sha no eigyou katadou ga kaishi sareta koto],
sold of object marker start corp. of business activity subject marker started fact
{Shouwa 29 nen ni rainichi shita America no joyuu Marilyn Monroe no gendou kara, kousui
year in came to Japan actress of words from perfume
‘Chanel no.5’ no shouhinmei ga wagakuni ni oitemo ichiyaku yuumei ni natta koto},
perfume of product name subject marker Japan in at a bound famous became fact
{Shouwa 55 nen 10 gatsu niwa Chanel kabushikigaisha ga setsuritu sare,
October by stock company subject marker established
7.2.3.4 Continuous Verb Forms

Not many verbs of continuous form are found in Chapter 7. An example of the verb is the verb ‘eteori’ in S2 of sentence (1) (‘…………takai hyouka wo eteori’).

It is possible to divide this extremely long sentence of (1) into three separate sentences. The reason why the high court judge did not put the three sentences side by side is the existence of the adverb clause ‘[Seiritsu ni arasoi no nai kou dai 10 goushou naishi dai 13 goushou, dai 29 goushou, oyobi benron no zenshushi ni yoreba]’. The adverb clause modifies S1, S2, and S3. If the sentence (1) has three complete separate sentences, this adverb clause modifies only S1. However, this is not what the judge aimed to write. Therefore, the judge crammed all the sentences together with the adverb clause into one sentence.

7.2.3.5 Grammatical Construction

Calculation of a period or age is critically important in terms of the application of law. One might wonder if ‘children under five years’ contains ‘a five-year-old child’ or not. If one writes ‘children of five years or under’, it is clear that ‘a five-year-old child’ is included. In Japanese ordinary language ‘go’ (後), ‘igo’ (以後), and ‘kara’ mean ‘after’. However, in legal language, the inclusion of the initial date is specified by the existence of ‘i’ (以) (from; on and after) (Tajima (1989:41)). ‘1st January igo’ means ‘on and after 1st January’. In contrast, ‘1st January go’ does not include 1st January. In other words, ‘1st January go’ can be paraphrased as ‘2nd January igo’ (Tajima (1989:41)). However, in ordinary language both ‘1st January igo’ and ‘1st January go’,
which are commonly translated as ‘after 1st January’, refer to ‘on and after 1st January’. It is confusing to those in Layer 2 that the date which does not reckon does appear in the document. However, as legal experts can consider matters in the abstract, they have devised their own way of calculating periods.

In legal language, ‘kara’ does not include the initial date like ‘go’ unless the period begins at midnight by the application of Article 140 of the Civil Code of Japan26 (Hourei Yougo Jiden (1950), 11; Housoukai (1987)). This is very confusing to ordinary people. The following sentence (3) from Kenkyusha’s New Japanese-English Dictionary carries a markedly different ordinary use of ‘kara’(2003, 5th Edition, 1st Printing, Tokyo: Kenkyusha).

(3) *Unchin wa September 1st kara neage ni naru.*
Fares will increase on September 1st.

To make the use of ‘kara’ more confusing to ordinary people, when ‘kara’ (from) is used with ‘made’ (to) such as ‘1995 kara 2026 made’ (from 1995 to 2026), both ‘kara’ and ‘made’ include the years mentioned (Tajima 1989:42). The following sentence (4) is also an example of ‘kara … made’ from ‘the Text’ of the Tokyo District Court.

(4) *Hikoku wa genkoku ni taishi, kin 2 hyakuman yen oyobi kore ni taisuru*  
Defendant topic marker plaintiff to 2 million yen and this to

*heisei 5 nen January 17th kara shiharai zumi made nen 5 bu no warai*  
heisei 5 year January 17th from completion of payment year 5% of

*ni yoru kinin wo shiharai e*  
on interest object marker pay

(The defendant must pay 2 million yen, together with 5-percent interest from 17 January 1993 to the day of the complete payment of 2 million yen.)

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26 Article 140. If a period has been fixed by the day, week, month or year, the first day of such period shall not be included in the computation; however, this shall not apply if the period begins at midnight.
It is logical that the inclusion of the initial date is clearly prescribed with the addition of ‘i’. The use of ‘kara ~ made’, however, is not very systematic from the perspective of those in Layer 2. Legal experts make the distinction of usage between ‘kara~’ and ‘kara ~ made’. As ‘kara ~ made’ signifies a certain period of time, the initial date is included. In contrast, ‘kara~’ refers to only the beginning, the initial date is not included. This distinction is a systematic way from the perspective of legal experts, but lay people think that the distinction is designed simply to meet the needs of the moment. Just like the different definitions of ‘fetus’ between the Criminal Code and the Civil Code, inconsistency or a kind of double standard from the perspective of ordinary citizens are observed in legal language. As legal training is almost like an apprenticeship, particularly in the case of judges, legal experts are well trained to learn this kind of inconsistency. Therefore, it does not create any serious difficulties among legal experts.27 Legal experts are comparable to skilled craftsmen because they are trained to master such intricacy.

7.2.4 Discourse

The discourse of the judgments is examined as in the following:

1) Cohesion
   (1) Anaphora
   (2) Substitution
   (3) Definition
   (4) Conjunction
   (5) Repetition

2) Style

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27 Judge Nishiguchi's remark on the characteristics of legal language at the meeting of the project for plain judicial process on 23 May 2005.
7.2.4.1 Cohesion
7.2.4.1.1 Anaphora

Indexical nouns were used in all the three courts. The most noticeable noun in terms of frequency is ‘migi’ (right). Another indexical noun mae/zen (before) was not found in the Chanel case. Indexical nouns which refer something to occur in the (near) future such as hidari (left) or ato (after) did not occur, either. The indexical noun which refers to the same item ‘dou’ (the same) was used.

(i)  

```
(i) dou (the same )  
doujo (the same woman 同女) (d) (h)  
```

Doujo in the judgment indicates Coco Chanel. The reference with ‘dou’ (same 同) is commonly used in judgements. As the term doujo (the same woman 同女) and another word doujo (a little girl 童女) are homonyms of each other, it is confusing to those without a legal background. In the following example from the judgment of the district court, Gabrielle Chanel was referred to as ‘doujo’ (the same woman).

```
Gabrielle Chanel ga 1910 nendai ni France no Paris city ni boushiten wo kaiten shita koto ni
subject marker 1910s of at hat shop object marker opened
hajimaru koto, Chanel Group ni zokusuru kigyou ga seizou, hanbai suru fujinfuku wa
started belong to corp subject marker manufacture sell women’s dresses topic marker
 takai hyouka wo kakutoku shiteori, Chanel Group wa haute couture no shinise
high reputation object marker obtain topic marker of long standing store
```
toshite sekaiteki ni shirareteiru koto, mata doujo ga 1921 nen ni kaihatsu shita 'Chanel no. 5' as worldly well-known fact also same woman subject marker year in developed

(ii) migi (right; immediately mentioned)

Migi (right) is commonly used in judgments as it refers to something occurred in the past. Until quite recently a judgment was written from top to bottom and right to left. Migi (right) signifies those already written in the vertical writing. The purpose of the judgment is to clarify what occurred between the parties. Therefore, it is understandable that migi (right) is frequently used.

migi tanin (the mentioned another person) (d)
migi keii (the mentioned circumstances) (d)
migi inshokuten (the mentioned snack bar) (h)
migi kaiseizen no houritu (the mentioned law before revision) (h)
migi nintei jijitru (the mentioned fact which is acknowledged) (h)
migi shuchou (the claim mentioned) (h)
migi no youna monndai ten (the problem mentioned) (h)
migi hyouji (the mark mentioned) (s)

7.2.4.1.2 Substitution

Common nouns are again used instead of proper nouns. In addition to genkoku (plaintiff), hikoku (defendant), kousonin (appellant to the appellate court), hikousonin (respondent to the appellate court), joukokunin (appellant to the final court), and hijoukokunin (respondent to the final court), in the high court futai kousonin (appellant to the incidental court) and futai hikousonin (respondent to the incidental court) were used. The Chanel Group is referred as genkoku (plaintiff), kousonin (appellant to the second court), futai hikousonin (respondent to the incidental
court), and *joukokunin* (appellant to final court) and vice versa for the Snack Chanel. It is very confusing for Layer 2 to get hold of the correct party unless one understands the judicial system.

Moreover, the evidence of the plaintiff/appellant is called *kou* (the former 甲) and that of the defendant/respondent as *otsu* (the latter 乙). The terms *kou* and *otsu* were used to signify various kinds of grades in the past. *Kou* stood for the highest grade and *Otsu* represented the second highest grade. However, the English alphabet or Arabic numerals are now used for grades including academic records. The usage of *kou* and *otsu* is found only in legal documents in the present-day of Japan. In Layer 2 only older people understand what *kou* and *otsu* mean, but not younger people any more.

7.2.4.1.3 Definition

Defined pro-forms to label nouns are frequently used in the Chanel case. However, as labelling is based on the perception of Layer 1, it is confusing to those in Layer 2. In (4) the Chanel mark is defined as ‘*Chanel eigyou hyouji*’ (Chanel business mark). In (5) the mark (name) of Snack Chanel is defined as ‘*honken eigyou hyouji*’ (this case’s business mark).

Ordinary people talk about trademark disputes saying it is a Chanel case and they picture the Chanel brand mark in their minds. Therefore, for those in Layer 2 ‘*honken eigyou hyouji*’ (this case’s business mark) refers to the brand mark of Chanel, not the mark of the shabby snack bar. In (6) ‘Charel’ is referred to as ‘*honken henkou go eigyou hyouji*’ (this case’s changed business mark). It is therefore possible for those in Layer 2 to mistake ‘*honken henkou go eigyou hyouji*’ (this case’s changed business mark’) for the Snack’s ‘Chanel’ mark if they confuse ‘*honken eigyou hyouji*’ (this case’s business mark) with the Chanel brand mark.

In contrast, the Snack’s mark is the central issue for legal experts. Therefore, they use ‘*honken eigyou hyouji*’ (this case’s business mark) for any marks claimed to be illegally used.
The Snack Chanel mark is just one of many disputed marks for legal experts. In order to handle trademark cases efficiently, they label the disputed mark as ‘honken eigyou hyouji’ (this case’s business mark).

(4) Chanel sha no eigyou hyouji deari genkoku no shouhyou demo aru
company of business mark is plaintiff of trademark is
‘Chanel’ to iu hyouji (ika ‘Chanel eigyou hyouji’ to iu.)
called mark (hereafter ‘Chanel business mark’ called)

(the mark called ‘Chanel’ which is the business mark of Chanel corp and the trademark of the plaintiff (hereafter ‘Chanel business mark’)

(5) ‘Snack Chanel’ no yagou (ika ‘honken eigyou hyouji’ to iu.)
of name (hereafter ‘this case business mark’ called)

(the name of ‘Snack Chanel’ (hereafter ‘this case’s business mark’)

(6) ‘Snack Charel’ (ika ‘honken henkou go eigyou hyouji’ to iu.)
hereafter this change after business mark called

(‘Snack Charel’ (hereafter ‘this case’s changed business mark’)

Not only the name of mark but also the name of law, the role of litigants, and the conduct of litigants are defined.

1) Name of Law

The Old Unfair Competition Prevention Law=the Old Law

The Law after Revision=the New Law

(7) kyuu fusei kyousou boushihou (heisei 5nen houritu dai 47gou ni yoru
old unfair competition prevention 1993 law no. by
kaiseizen no mono. ika, kore wo ‘kyuu hou’ to ii, migi
before revision of one hereafter this object marker old law called above
kaiseigo no mono wo ‘shin pou’ to iu.)
after revision of one object marker ‘new law’ called

(the Old Unfair Competition Prevention Law (the one before the 1993 revision of law no.47,
hereafter, this law is referred as ‘the Old Law’ and the one after revision is referred as ‘the New Law’.

2) Role of Litigants

The role of litigants indicates that the same person is called by a different name when the case is appealed: the Chanel Group→(plaintiff=) appellant = incidental respondent in (8); the Snack Chanel→(defendant=) respondent=incidental appellant in (9).

(8) kousonin (futai hikousonin, ika tanni ‘kousonin’ to iu.)
    appellant incidental respondent, hereafter simply ‘appellant’ called
    (appellant (incidental respondent, but hereafter simply referred as appellant)

    hikousonin (futai kousonin, ika tanni ‘hikousonin’ to iu.)
    respondent incidental appellant hereafter simply respondent called

(9) hikoku no migi 2 no kaku koui (ika ‘honken kaku koui’ to iu.)
    defendant of right of each conduct hereafter this each conduct called

    (each conduct of the defendant mentioned in the above no.2 (hereafter ‘this case’s each conduct’))

3) Conduct of Litigants

The conduct of the defendant is categorised under legal concepts.

(10) to goshin saseru koui (ika ‘kougi no kondou
    made to wrongly believe conduct hereafter broad sense of confusion

    jakki koui’ to iu.)
    cause conduct called

    (conduct which is made to wrongly believe (hereafter ‘the conduct which causes confusion in broad sense’)

7.2.4.1.4 Conjunction

Yotte (therefore) is used at a final paragraph as the conclusion in all three rulings. Other than yotte, ijou kara (from the above) are also used in the two lower courts and ijou … ni

yoreba (from the above …) is used in the Supreme Court.
7.2.4.1.5 Repetition

Repetition is commonly observed in the three judgments. For example, the term ‘genkoku’ (plaintiff) is repeatedly used five times in sentence (2).

7.2.4.2 Style

The usage of legal set formulae and the substitution of legal common nouns for personal names have made the judgment impersonal.

7.2.4.2.1 Legal Set Formulae

The Snack Chanel case is not a simple dismissal cases. The plaintiff partially won at the district court; the appellant totally lost at the hight court; the appellant totally won at the Supreme Court. Consequently, more original expressions were used at the ‘Text’ of the Chanel case than that in the Horse case. Nonetheless, some legal set formulae were predominantly used in the ‘Text’, as shown in the following.

[The Chiba District Court]
(i) Hikoku wa.....~shite wa naranai.
   defendant topic marker do not ~
   (The defendant must not do ~.)

(ii) Hikoku wa.....~e.
    defendant topic marker (imperative form)
    (The defendant must do ~.)

(iii) Genkoku no sono yo no seikyuu wo kikyaku suru.
     plaintiff of the rest of claim object marker dismiss
     (Dismiss the rest of the plaintiff’s claims.)

(iv) Soshou hiyou wa kore wo ~bun shi, sono ~wo
    litigation cost object marker this divide its object marker
    hikoku no futan toshi, sono yo wo genkoku no futan to suru.
    defendant of charge do the rest object marker defendant of charge do
    (Litigation cost is divided ~. The defendant pays ~ and the plaintiff pays the rest.)
(v) *kono hanketsu wa genkoku shousou bubun ni kagiri, kari ni shikkou suru koto ga dekiru.*
This ruling topic marker plaintiff winning part limited provisionally execute subject marker can
(This ruling provisionally executes only the part of the case in favour of the plaintiff.)

[The Tokyo High Court]
(i) *Kousonin no honken kousou wo kikyaku suru.*
appellant of this case appeal object marker dismiss
(Dismiss the appellant’s appeal-part of this case.)

(ii) *Futai kousou ni motodzuki, gen hanketsu chuu, futai kousonin (hikousonin)*
incidental appeal based on original ruling in
haiso bubun wo torikesu.
incidental appellant respondent lost case part object marker repeal
(Repeal the part of the original ruling against the incidental appellant (respondent) based on
the incidental appeal.)

(iii) *Futai hikousonin (kousonin) no seikyuu wo izuremo kikyaku suru.*
incidental respondent (appellant) of claims object marker all dismiss
(Dismiss all the claims of the incidental respondent (appellant).)

(iv) *Soshou hiyou wa daiichi, nishin tomo kousonin (futai hikousonin) no futan to suru.*
litigation cost topic marker 1st trial 2nd trial as well appellant (incidental respondent) of charge do
(The appellant (the incidental respondent) pays the litigation costs of the 1st and 2nd trials.)

(v) *Kono hanketsu ni taisuru joukoku no tame no fuka kikan wo 90 nichi to sadameru.*
this ruling regarding final appeal for added duration object marker days decide
(The court decides 90 days added for the final appeal.)

[The Supreme Court]
(i) *Genhanketsu chuu, ~ kansuru bubun wo haki suru.*
original ruling in regarding parts object marker repeal
(Repeal the part of ~ in the previous ruling.)

(ii) *Zen kou no ~ ni kansuru bubun ni tsuite ..... wo kikyaku suru.*
previous item of regarding parts about object marker dismiss
(Dismiss the part regarding the previous item of ~.)

(iii) ~ ni kansuru bubun wo ~ ni sashimodosu.
regarding parts object marker refer back
(Refer the part regarding ~ to ~.)

(iv) *Joukokunin no sono yo no joukoku wo kikyaku suru.*
appeellant of the rest of final appeal object marker dismiss
(Dismiss the rest of the final appeal of the appellant.)

(v) ~ ni kansuru ~wa ~ no futan toshi,~ ni kansuru ~ wa ~ no futan to suru.
regarding topic marker of charge regarding topic marker of charge
As the district court ruling is a partial winning case in favour of the plaintiff, the court first clarified the losing part of the defendant using an imperative. Then, the court mentioned a minor losing part of the plaintiff and litigation costs, and lastly a provisional execution. In the high court, the respondent added the incidental appeal as well. The high court included the incidental appeal part in the Text. The Supreme Court used the set formula of the trial sent back from a higher court to a lower court. Legal professionals learn these set formulae when they are students at the Legal Training and Research Centre right after their success in the Bar Examination.

As mentioned in Chapter 7, ‘Facts’ and ‘Reasons’ are the parts in which legal experts write their own argument. Some common expressions are presented as in the following.

7.2.4.2.2 Legal Idiomatic Expressions

Below are idiomatic expressions found in the three rulings.

*fuchi* (I do not know) (d) (h)

*hininsuru* (I deny) (d)

*ninpi* (approval or disapproval) (d) (h)

*seikyuu no gemin no jijitsu* (regarding the facts of the claim) (d) (h)

*seiritsu ni arasoi no nai* (no disagreement with regards to) (h)

*shinsei ni seiritsu shita* (properly established (witness)) (h)

*(so no yo wa) arasou* (don’t acknowledge and argue (the rest)) (d) (h)

*toujisha kan ni arasoi ga nai.* (There are no disagreements between the parties.) (d) (h)

~ wa akiraka dearu. (It is evident that ~) (d) (h)

~ no ga soutou dearu. (It is appropriate to ~) (d) (h) (s)

~ ga/to mitomerareru. (~ acknowledged) (d) (h)


mitomerarenai (cannot acknowledge) (d)

mitomeru koto ga dekinai (cannot acknowledge) (h)

kangaerarenai (cannot believe) (d)

~ taru shouko wa nai. (There is no sufficient evidence to ~) (d)

~ to iwazaru wo enai (is forced to say ~) (h)

~ to iubeki de aru (must say ~) (h) (s)

kaisareru (is understood) (s)

shubun no toori hanketsu suru (pass judgment as written in the Text) (d) (h) (s)

In the ‘Reasons’ judges predominantly use ‘mitomerareru’ (acknowledged), which is the passive form of ‘mitomeru’ (acknowledge). Other expressions ‘akiraka dearu’ (it is evident) ‘~ to iwazaru wo enai’ (we have no options but to do ~) ‘~ to iubeki de aru’ (we must say ~) kaisareru (can be understood) are also employed. All these expressions are a passive form, a causative form, and a compulsory form, which hide the agent of the sentence. Using these forms, the judge claims that the decision is not based on their personal view and that judges are rather compelled to reach the decision. The usage reflects the pursuit of objectivity, not subjectivity in Layer 1.

7.2.5 Legal Reasoning with Register Analysis

The organisation of judgments is very systematic and logical. The ‘Text’ (conclusion) first comes and ‘Facts’ and ‘Reasons’ follow. As the New Style was introduced around the rulings of the Chanel case, the district court judge adopted the New Style but the high court judges remained with the Guide Style. In the judgment paper of the district court plaintiff’s every claim was followed by its corresponding defendant’s answer respectively. In the judgment paper of the high court all the appellant’s claims were first presented and Respondent’s answers came after the claims. As the incidental appeal was added at the high court, this appeal was also orderly.
included in the ‘Text’ and ‘Facts’ of the judgment. Whichever style it is, the judgment is logically organised.

With a span of fifteen years between the Horse case and the Chanel case, the use of archaic terms significantly decreased. This is because it is not a difficult task to switch from archaic and uncommon words to ordinary words as long as the words do not contain any legal concepts. However, syntactic characteristics remained almost intact. As legal experts are trained to be familiar with the characteristics of syntax in legal language, they do not have any strong incentives to use ordinary, short, and comprehensible sentences. Rather, they have a fear that shortening a sentence would cause an unexpected interpretation. As a result, their sentence is characterised by its length and lack of readability due to the insertion of multiple embeddings between the subject and the verb.

The frequent use of defined-pronouns indicates that legal experts keep the judgment impersonal and abstract as much as possible. The tendency toward dehumanization is not peculiar to legal language. Mintz (1992: 226) stated that medical language serves a distancing function by painting diseases as discrete, self-sufficient objects and then assuming the person to be a passive substrate of the disease. More concretely, patients are seldom named at a case conference. Grammatically passives are often used to make no direct reference to patients. This is because doctors are concerned with the disease rather than the illness of a patient. Legal experts are also more concerned with the trial itself rather than the welfare of an individual party. In consequence of the use of defined-pronouns, different persons in entirely different cases are lumped together by saying ‘defendant’, and the same person is addressed by different names such as ‘plaintiff’, ‘appellant of intermediate court’ or ‘incidental respondent’ or ‘appellate of final civil appeal’ when the case is appealed. For judges and lawyers each case is only one out their pile of cases to process. Their workload and their commitment to objectivity have tended to cause them to use dehumanised language.
In order to be precise, legal language has its fine grammatical distinctions such as the different usage of *go* (after) and *igo* (on and after). One day’s difference could cause severe loss of money in the judgment. Legal experts prefer using set formulae rather than writing up their own sentences. This is because they believe that they can avoid an unpredictable mistake by following the language of their predecessors. Even though some usages are out of date, it is faster and easier for trained legal experts to follow the old fashioned style.

Legal experts’ professional traits are thus reflected in the characteristics of legal language. Their occupational tendency to pursue objectivity and abstractness causes legal register to be unique and far apart from ordinary language.

7.3 Prescriptive Nature of Layer 1

The striking contrast in the rulings between the Chanel case and the Horse case indicates that legal judgment is rather inconsistent from the perspective Layer 2. Although the shabby snack bar is an entirely different trade from the Chanel brand store, the Supreme Court acknowledged a likelihood of confusion between the two. On the other hand, a likelihood of confusion between White Horse and Golden Horse was not acknowledged in any of the rulings of the Horse case, even though the two parties are in the same line of business. To make matters more inconsistent, if this Horse case occurs now, the court will not acknowledge a likelihood of confusion obeying the New Law. If that is the case, those in Layer 2 would view that legal decisions are as changeable as a weathercock.

Linguists, on the other hand, concern themselves only whether disputed marks are linguistically similar or not. By carrying out scientific analyses, results obtained from linguistic analysis tend to be more predictable and consistent than those of legal decisions. This is because linguists aim to analyse how ordinary people use language, not how language should be used by those in Layer 2.
Several linguists including Landau and Shuy argue that a legal judgment is often influenced by the power of trademark owners. Furthermore, Landau (2001:407) and Shuy (2002:12-3) succinctly point out that jurists in fact control language policy, though unconsciously, by shunning from dictionaries the appearance of generic use of a trademarked name such as ‘band-aid’ to mean a makeshift, which is disadvantageous to newly arrived immigrants in terms of the acquisition of English in daily use. Shuy (2003:5) even questions whether the legal community has the right to consider themselves as the “high” segment of society and the non-legal community as the “low” segment of society, and furthermore questions whether the legal community has control over what to use or what not to use in the non-legal community.

Such a prescriptive nature of Layer 1 often causes discrepancy between Layer 1 and Layer 2. Those in Layer 2 regard court reasoning as unnatural and unreasonable. Ordinary people would consider some trials as mistrials and legal experts as a different species of people. On the other hand, the norm of Layer 1 demands that legal experts must apply laws to the judgment. When the intention of the industrial world is to protect a well-known trademark and legal experts cannot find an appropriate law of protecting an eminent mark, the legal profession have no option but to use farfetched reasoning to force their conclusion of the protection a prominent mark. Those in Layer 2, who do not have laws as their norm, assess a legal decision by seeing only the result of the ruling, and the prescriptive nature of Layer 1 is not well understood by those in Layer 2.

7.4 Summary

The Snack Chanel case is a case which legal experts ruled the issue of a likelihood of confusion from the prescriptive nature of the legal profession. Not only ordinary people but also legal experts are aware that the shabby snack bar named Chanel would have never been taken to have a relationship with the Chanel group. Nonetheless, legal experts, who are attuned to the demand of the industry, did acknowledge a likelihood of confusion between the two trademarks.
When the industry of one’s own country was not strong enough, the court was more willing to examine the marks from the perspective of language. The legal profession twisted the interpretation to suit their conclusion. The scientific examination of the two marks was not conducted because there was no need for the examination. In the beginning was the conclusion and after came the reasoning.

The paradigmatic mode of Layer 1 reflects the features of legal language. The fear of causing an unexpected interpretation has developed a long sentence composed of many layers of embedded clauses. To facilitate the understanding of such a long sentence, Layer 1 has developed its own grammatical form. To avoid an unpredictable contest from the other party, legal experts use set phrases for safety. As they are more concerned with the trial itself rather than actual people involved in the case, their use of language becomes dehumanised. In this way, the language of Layer 1 also indicates the characteristic way of reasoning of Layer 1.
Chapter 8 Conclusion

In this thesis I have presented the Linguistic Legal Model to explain the discrepancy between legal experts and lay people. The model is a combination of Layer Analysis and Register Analysis. Layer Analysis frames a theatre-type concept to indicate that different types of perception are affected by a variety of norms in differing layers. Register Analysis aims to identify the linguistic characteristics of legal language. Layer Analysis elucidates the structure of law and society, while Register Analysis examines the structure of legal language.

Layer Analysis was examined in Chapter 4. Layer Analysis is grounded in two contexts: Layer 1 as the courtroom and Layer 2 as the world. Many disputes regularly arise and are settled in Layer 2. However, when disputes cannot be solved in Layer 2, they are deliberated in Layer 1. Each layer is characterised by its respective norms; the norm of law for Layer 1 and the norm of common sense for Layer 2. In Layer 1 legal experts are trained to acquire the paradigmatic mode, which is the logical and abstract way of thinking. On the other hand, those in Layer 2 use the narrative mode, which is typical of human beings and is a concrete way of perceiving things in the world. The different modes of thought between Layer 1 and Layer 2 cause discrepancy between legal experts and lay people.

Register Analysis was examined in Chapter 5. Register Analysis accounts for linguistic characteristics of judgments in terms of organisation, lexicon, and syntax. The discourse organisation of the judgment characterises the judgment as genre. On the other hand, a special set of vocabulary, distinctive grammatical constructions, and cohesion and stylistic characteristics of discourse are regarded as creating the register of the judgment.

In Chapter 6 and 7 two trademark cases were analysed using the Linguistic Legal Model. The Golden Horse case in Chapter 6 presented court’s judgment of the likelihood of confusion which was in common with that of lay people. This is because legal experts in the Horse case
did not prescribe the language use of Layer 2 by protecting a well-known trademark. As the court did not provide sound reasoning to support their position, I presented several linguistic analyses using a database in terms of flexibility, dictionary listing, and etymology. In Register Analysis the legal reasoning is traced down from the characteristics of legal language used in the judgment. Not all legal sentences are long. A lengthy sentence does not necessarily mean incomprehensibility of legal language. It is layers of embedding that make a legal sentence appear longer and more difficult to parse. In the case of the Japanese language, Subject comes first and the sentence ends with Verb, and the other components are placed between Subject and Verb. In such an SOV language layers of embedded structures severely impair the comprehension of lay people. Legal experts, however, are trained to shift through ‘old’ information such as conventional expressions and ‘new’ information regarding the case. For those in Layer 1 legal language is a piece of comprehensible writing.

In Chapter 7 the Snack Chanel case was examined using the Linguistic Legal Model. Legal experts ruled the issue of a likelihood of confusion from the prescriptive nature of the legal profession. Legal experts were aware that the shabby snack bar named Chanel would never have been taken to have a relationship with the Chanel group. Nonetheless, legal experts, who were attuned to the demands of the industry, did acknowledge a likelihood of confusion between the two trademarks. In other words, the legal profession ‘twisted’ the interpretation to suit their conclusion. In the beginning was the conclusion and after came the reasoning. The paradigmatic mode of Layer 1 reflects registers of legal language. The fear of causing an unexpected interpretation has developed a long sentence composed of many layers of embedded clauses. To facilitate the understanding of a lengthy and self-embedded sentence, Layer 1 has developed its own grammatical form. To avoid an unpredictable contest from the other party, legal experts use set phrases for safety. As they are more concerned with the trial itself rather than actual people involved in the case, their use of language becomes dehumanised. The
characteristics of legal language are the representation of thought process of legal experts.

I have pointed out in this thesis that the Linguistic Legal Model analyses the discrepancy between legal experts and lay people using Layer Analysis and Register Analysis. Layer Analysis accounts for different norms in Layer 1 and Layer 2, and Register Analysis elucidates the characteristics of legal language caused by the norm of Layer 1.


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## Organizational Comparison of Three Judgements in the White Horse Case

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3. Evidence

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2. Conclusion
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<td>1) Gist of Plaintiff’s Claims:</td>
<td>1) Appeal</td>
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<td>Claim 1; Claim 2; Litigation Costs</td>
<td>Appellant’s Claims:</td>
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<td>Claim; Conditional Execution</td>
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<td>2) Defendant’s Answers to</td>
<td>Respondent’s Answer to Claim:</td>
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<td>Plaintiff’s Claims: Dismissal of</td>
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<td>2. Claims of the Parties</td>
<td>2) Incidental Appeal</td>
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<td>Incidental Appellant’s Claims:</td>
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<td>Claim 1 (about the plaintiff’s</td>
<td>Reversal of Incidental</td>
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<td>business and mark)</td>
<td>Appellant’s Lost Part of Original Judgment;</td>
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<td>defendant’s answer</td>
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<td>(do not know)</td>
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<td>2. Claims of Parties</td>
<td>2. Trial Claimed by Parties</td>
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<td>Claim 3 (about respondent’s</td>
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defendant’s answer (do not know)
Claim 3 (a likelihood of confusion)
defendant’s answer (acknowledgment)
Claim 4 (the defendant’s recognition of the plaintiff’s mark)
defendant’s answer (denial)
Claim 5 (damage)
defendant’s answer (denial)

3. Reasons
1) Evidence
2) Plaintiff’s Trademark
3) Examination
   Contrast between Plaintiff’s Trademark and Defendant’s Trademark
4) Legal Interpretation of a Likelihood of Confusion
5) Defendant’s Intent
6) Effects on Plaintiff’s Business
7) Litigation Costs
8) Conclusion

Reasons
1. Appellant’s Claims 1 & 2 (acknowledgment)
2. Appellant’s Claim 3 (acknowledgment)
3. Examination (confusion between the two marks)
4. Examination (non-confusion between the two businesses)
5. Conclusion
   1) Litigation Costs
   2) Application of Laws

Court
Judges’ Names and Seals

List of Enclosures