

Date	October 17, 1985	Court	Tokyo High Court
Case number	1984 (Ne) 2293		
<p>– A case in which the court upheld the claims for an injunction and damages with regard to the printing of the reproductions of paintings in an art collection, holding that: while the reproductions of the paintings in question (Paintings) have an aspect of being structured so as to supplement readers' understanding of the research paper on art history and to enable them to understand the descriptions in said research paper by serving as a reference material of said research paper, they not only have such subordinate nature but also have independence as figures which themselves are sufficient to be appreciated; thus, printing the reproductions of the Paintings in the Art Collection cannot be found to be a quotation that fulfills the requirements prescribed in Article 32, paragraph (1) of the Copyright Act.</p>			

References: Article 32, paragraph (1), Article 112, paragraphs (1) and (2), and Article 114, paragraph (2) (current paragraph (3)) of the Copyright Act

Number of related rights, etc.: None

Summary of the Judgment

The appellee is an heir of the late Leonard Foujita, and the appellant is a publisher that published and sold a book of an art collection containing the reproductions of the paintings which are Foujita's works (the "Paintings" and the "Art Collection"). In this case, the appellee alleged that the appellant's acts infringed the appellee's copyrights for the Paintings, and demanded, among other matters, that the appellant suspend the distribution of said book, etc. and pay damages. The Art Collection selects and puts on record oil paintings for the purpose of enabling readers to understand the history of the oil paintings of the times it covers, and the research paper contained therein comments on these oil paintings.

The court of prior instance found the alleged infringement and partially upheld the appellee's claims. Dissatisfied with this, the appellant files this appeal.

In this judgment, the court upheld the judgment in prior instance that granted an injunction, etc., and amended the part concerning the claim for damages, making the findings and determinations as follows.

The term "quote" used in Article 32, paragraph (1) of the Copyright Act means the act of selecting and putting on record a work of another in whole or in part in one's own work for the purpose of news report, critique or study, etc. In addition, in light of the purpose of the provision of said Article to enable fair use of works as the cultural product of society while accomplishing protection of copyrights, the requirements of

"consistent with fair practices" and "within a scope that is justified by the aim" should be construed as follows: [i] the work which quotes and uses another work and the work which is quoted and used can be clearly distinguished and recognized in terms of the form of expression, in the overall work; and [ii] it can be found that there is a master-subordinate relationship between the two works mentioned above, i.e. the former work is the master and the latter work is the subordinate.

The master-subordinate relationship mentioned above should be determined as follows: based on the facts defined with respect to the natures, contents and volumes of the two works as well as the method and form of selecting and putting on record the quoted work and in light of the general ideas of the target readers of the work, whether or not it can be found that the quoting work has independence as a whole and that the quoted work only has a subordinate character with respect to the quoting work by supplementing the contents of the quoting work or providing examples or reference material. This also applies to this case where the quoting work is a literary work (research paper) and the quoted work is an artistic work (reproductions of paintings). Thus, it is appropriate to construe that the literary work and artistic work are in a master-subordinate relationship, i.e. the former is the master and the latter is the subordinate, when, in light of the general ideas of readers, the artistic work is structured to supplement readers' understanding of the descriptions in the literary work or contribute to the understanding of the abovementioned descriptions as examples or reference material of the abovementioned descriptions and only has such a subordinate character with respect to the literary work.

With regard to the printing of the reproductions of the Paintings in the Art Collection, while the reproductions of the Paintings have an aspect of being structured so as to supplement readers' understanding of the research paper on art history and to enable them to understand the descriptions in said research paper by serving as a reference material of said research paper, they not only have such subordinate nature but also have independence as figures which themselves are sufficient to be appreciated. Thus, printing the reproductions of the Paintings in the Art Collection cannot be found to be a quotation that fulfills the requirements prescribed in Article 32, paragraph (1) of the Copyright Act.

Judgment rendered on October 17,1985
1984(Ne)2293

Judgment

(Indication of the parties is omitted)

Main text

1. Paragraph 3 of the main text of the judgment in prior instance shall be modified as follows.

(1) The appellant shall pay to the appellee 1,380,000 yen and money accrued thereon at the rate of 5% per annum for the period from September 10, 1979, until the date of completion of the payment.

(2) The other claims made by the appellee shall be dismissed.

2.(1) The other claims made by the appellant shall be dismissed.

(2) Paragraph 2 of the main text of the judgment in prior instance was modified as follows based on the restriction of the claims.

The appellant shall destruct the films in which the paintings stated in items 1 through 8 of Attached List 1 are photographed and the printing original plate of the paintings stated in items 1 through 12 of Attached List 1 as well as the parts of the book stated in Attached List 2 in which the reproductions of the paintings stated in items 1 through 12 of Attached List 1 are printed.

(3) The court costs shall be divided into three portions for both the first and second instances, one-third of which shall be borne by the appellee and the remaining portion shall be borne by the appellant.

Facts

No. 1 Judicial decisions sought by the parties

1. The appellant

A judgment to the effect that "The part of the judgment in prior instance for which the appellant lost the case shall be revoked. The claims made by the appellee in the principal action shall be dismissed. The court costs shall be borne by the appellee for both the first and second instances."

2. The appellee

The appellee sought a judgment to the effect that "The appeal in question shall be dismissed. The costs of the appeal shall be borne by the appellant" and restricted the claim seeking the destruction of the films in which the paintings stated in Attached List 1 are photographed among the claims made in the principal action to the extent seeking the destruction of the films in which the paintings stated in items 1 through 8 of Attached List 1 are photographed.

No. 2 Allegations of the parties

1. Statement of claim

(1) The appellee is the wife of deceased [A] (French nationality; Japanese name: [B]; hereinafter the abbreviated name "[A]" may sometimes be used) and has French nationality.

(2) On January 29, 1968, the appellee acquired by inheritance the copyright held with respect to [A]'s works as the sole heir upon [A]'s death and started to receive the protection for the works in Japan under the Berne Convention for the Protection of Literary and Artistic Work (revision of the Paris Convention for the Protection of Industrial Property) and the Copyright Act of Japan.

(3) The appellant published the book stated in Attached List 2 (hereinafter referred to as the "Book") on September 10, 1979, as the date of publication of the first impression of the first edition, and reproduced and printed in the Book the paintings stated in Attached List 1 that are [A]'s works for which the appellee holds the copyright (hereinafter referred to as the "Paintings").

(omitted)

Reasons

1. There are no disputes between the parties with respect to the facts stated in items 1 through 3 of the statement of claim as well as the fact that a total of 18,973 copies of the Book has been published at a fixed price of 4,800 yen for one copy and 17,525 copies were sold.

2. As such, this court will determine the defense of legitimate quotation alleged by the appellant.

(1) Article 32, paragraph (1) of the Copyright Act prescribes that "It is permissible to quote from and thereby exploit a work that has been made public. In such a case, the work must be quoted consistent with fair practices and within a scope that is justified by the aim of the news report, critique, study or other place in which the work is quoted." The term "quote" used hereby means the act of selecting and putting on record the work of others in whole or in part in one's own work for the purpose of news report, critique or study, etc. In addition, in light of the purpose of the provision of said Article to enable fair use of works as the cultural product of society while accomplishing protection of copyrights, the requirements of "consistent with fair practices" and "within a scope that is justified by the aim" should be construed as follows: [i] the work which quotes and uses another work and the work which is quoted and used can be clearly distinguished and recognized in terms of the form of expression, in the overall work; and [ii] it can be found that there is a master-subordinate relationship between the two works mentioned above, i.e. the former work is the master and the latter work is the subordinate. The

master-subordinate relationship mentioned above should be determined as follows: based on the facts defined with respect to the natures, contents and volumes of the two works as well as the method and form of selecting and putting on record the quoted work and in light of the general ideas of the target readers of the work, whether or not it can be found that the quoting work has independence as a whole and that the quoted work only has a subordinate character with respect to the quoting work by supplementing the contents of the quoting work or providing examples or reference material. This also applies to this case where the quoting work is a literary work ([C]'s research paper) and the quoted work is an artistic work (reproductions of the Paintings). Thus, it is appropriate to construe that the literary work and artistic work are in a master-subordinate relationship, i.e. the former is the master and the latter is the subordinate, when, in light of the general ideas of readers, the artistic work is structured to supplement readers' understanding of the descriptions in the literary work or contribute to the understanding of the abovementioned descriptions as examples or reference material of the abovementioned descriptions and only has such a subordinate character with respect to the literary work.

The appellant alleges as follows: [i] in the case where the quoting work is a research paper and the quoted work is a painting as in this case, not only do a research paper and painting have a different nature but also they cannot be compared in terms of quantity, and thus there is no room for a master-subordinate relationship to be established between them in the first place or it is inappropriate to bring this issue into question; and [ii] the requirements for the master-subordinate relationship in this case are substantially equivalent to requiring the quotation to be necessary or inevitable and thus, in order to have the quotation be found legitimate, the abovementioned quotation must be necessary or inevitable and is limited to the minimum necessary in addition to taking an expressional format to clearly distinguish the quoting work and quoted work.

However, the master-subordinate relationship mentioned above can also be established in the case where the quoting work is a research paper and the quoted work is a painting. Moreover, as mentioned above, the master-subordinate relationship should not be determined by merely defining the quoting work and quoted work in terms of quantity and thus, the appellant's allegation is inappropriate in its premise. In addition, in light of the fact that a work is an outcome of the author's free mental activity, the determination on whether or not quotation of other works is necessary or inevitable when an author creates a work must be made by largely taking into consideration the author's subjective view. However, adopting such subjective view as the basis for determination is likely to result in a conclusion that lacks objectivity and is thus inappropriate.

Moreover, with respect to the other requirement for a quotation to be regarded as legitimate, as alleged by the appellant, i.e., the limitation to "the use to the minimum necessary," it would

suffice to take into consideration such element in the determination on the master-subordinate relationship as mentioned above in the sense that the independence of the quoting work and the subordinate character of the quoted work could be lost when the use significantly exceeds such limit, and thus there are no reasons to treat such element as an independent requirement.

Meanwhile, there are no disputes between the parties with respect to the fact that all of the Paintings are works that have been made public. Therefore, this court will examine whether or not the act of printing the Paintings in the Book falls under the quotation that fulfills the requirements prescribed in Article 32, paragraph (1) of the Copyright Act.

(omitted)

(3) Based on the facts found above, [C]'s research paper deals with art history and reviews the history of oil paintings of the times covered by the Book and selects and puts on record the oil paintings for the purpose of enabling readers to understand the history of the oil paintings of those times. Moreover, when reference to these paintings is made in the research paper (in particular, reference is also made to paintings which have not been selected and put on record), both the titles of the paintings and record numbers are written for the readers' convenience of reference and this treatment has also been made with respect to the Paintings. (There are also texts as found above referring to a painting titled "Cat." According to Exhibit Ko 1 and Object of Observation Ko 1 listed above, it can be found that the Chapter titled "Chapter V Teikokubijutsuin Kaiso no Hamon (Repercussions of the Reorganization of the Imperial Art Academy)," wherein the reproduction of the painting is printed below its title, describes in detail the background to the major confusion in the art world over the reorganization of the Imperial Art Academy that started in 1935 in the section titled "Bijutsukai Ageteno Kuzen no Konran (Unprecedented confusion in the whole art world)." However, in light of the target readership of the Book, it is difficult to determine that the painting is used as an allegorical figure in relation to the abovementioned descriptions as alleged by the appellant.)

In addition, based on the difference in the nature of the two works, such that [C]'s research paper is a literary work while the Paintings are artistic works, as well as the method of printing the Paintings as found above, it is found that the Paintings and [C]'s research paper can be recognized in a clearly distinguishable manner.

As such, with respect to the determination on the issue of a master-subordinate relationship, since [C]'s research paper has the nature and contents of descriptions of the art history as mentioned above and has printed the reproductions of the Paintings that are the relevant oil paintings for the purpose of enabling readers to understand the history of oil painting, it is not deniable that there are aspects that the reproductions of the Paintings are structured so as to

supplement the understanding of [C]'s research paper and to enable readers to understand the descriptions in said research paper through them as a reference material for said research paper.

However, based on the abovementioned facts found, among the reproductions of the Paintings, special coated paper is used for the color figures while special pure paper is used for the monochrome figures. With respect to the size of each figure, the smallest one accounts for approximately one-eighth of the page while the large one accounts for approximately two-thirds of the page, which is bigger than some of the figures contained in the figures for appreciation. In addition, the reproductions of the Paintings, except for three of them, are printed at a rate of one reproduction on one page, though their sizes vary, and three of such reproductions are printed below the title while the other nine reproductions are laid out in the sizes found above in the upper part of [C]'s research paper, which only accounts for about one-third of the relevant pages. Furthermore, according to Exhibit Ko 1 and Object of Observation Ko 1 stated above, it can be found that the paper stated above is both high quality paper with high printability and that, especially, with respect to the color figures, the number of colors has been limited to not greater than four but strenuous efforts have been made to develop the paper quality due to calling the Book an art collection with "original colors." Taking into consideration in a comprehensive manner the paper quality of the Book, sizes of the figures, printing arrangement and the facts concerning the number of colors used for the color figures mentioned above as well as the finishing state of the reproductions of the Paintings found in Object of Observation Ko 1 stated above, it is appropriate to find as follows: [i] all of the reproductions mentioned above including those of monochrome figures have excellent artistic quality and are capable of being subjects of appreciation by readers; [ii] readers of [C]'s research paper who open the pages in which the reproductions of the Paintings are printed can receive artistic interest and appreciate them independently of the descriptions in said research paper; and [iii] the reproductions of the Paintings are not merely used by readers as an aid to understand [C]'s research paper. The issue of faithful reproduction of the original work of art in reproducing a painting cannot be easily solved even now where printing technology has grown sophisticated and paper quality has been improved. Though it might be differently evaluated from the perspective of art appreciation in a strict sense, in light of the general idea of the wide range of target readership of the Book, it should be found that the Paintings are sufficient to be appreciated.

In addition, this court will additionally refer to the Paintings' sufficiency for appreciation in comparison to the figures for appreciation contained in the Book. With respect to the figures for appreciation, special art paper is used and five colors are used in principle. Moreover, as found above, 88 figures, except for some of them, are reproduced in sizes larger than those of the supplementary figures and are printed at a rate of one reproduction for one or two pages and, in rare cases, two reproductions on one page and thus have, in all reason, superiority over the other

figures in terms of sufficiency for appreciation. Yet, such fact is nothing but a relative difference between the sufficiency for appreciation of the supplemental figures including the reproductions of the Paintings and that of the figures for appreciation, and there are no reasons to deny the sufficiency for appreciation of the reproductions of the Paintings in comparison to the figures for appreciation.

As described above, in addition to the fact that the reproductions of the Paintings themselves are sufficient to be appreciated, although they supplement readers' understanding of [C]'s research paper and serve as a reference material therefor, only two of such reproductions are printed on the same page where the descriptions concerning the relevant paintings in the research paper are printed as found above. In addition, taking into consideration the fact that the reproductions are not necessarily strongly connected to the research paper, the reproductions of the Paintings should be found to have independence as figures which themselves are sufficient to be appreciated although having the abovementioned relevance with [C]'s research paper. Thus, it cannot be found that the reproductions of the Paintings are in a subordinate relationship with respect to [C]'s research paper to that extent.

The appellant alleges that sufficiency for appreciation is an attribute that is essentially associated with artistic works such as paintings, and thus the fact that the reproductions of paintings have sufficiency for appreciation cannot serve as the grounds for denying that the relevant quotation is legitimate.

The element of sufficiency for appreciation is obviously extremely important for artistic works such as paintings, in terms of their nature, and this is also applicable in the case of reproductions thereof. Thus, it should be taken into consideration that the protection of copyrights of artistic works such as paintings could be jeopardized if it is, by right, allowed to quote reproductions of such artistic works in literary works such as research papers in a mode that they have sufficiency for appreciation. In addition, even in the case of artistic works such as paintings, it cannot be found difficult to include them as quoted works in a mode that they do not have sufficiency for appreciation by means of partial quotation or otherwise, and thus, it cannot be said that questioning the sufficiency for appreciation would make quotations of artistic works completely impossible. Therefore, the abovementioned appellant's allegation cannot be accepted.

(4) The abovementioned findings can be summarized as follows: while the reproductions of the Paintings have an aspect of being structured so as to supplement readers' understanding of [C]'s research paper and to enable them to understand the descriptions in said research paper by serving as a reference material of said research paper, they not only have such subordinate nature but also have independence as figures which themselves are sufficient to be appreciated. Thus, printing the reproductions of the Paintings in the Book cannot be found to be a quotation

that fulfills the requirements prescribed in Article 32, paragraph (1) of the Copyright Act.

(omitted)

(5) As found above, among the claims made by the appellee in the principal action, the claim seeking injunction against the reproduction of the Paintings and the distribution of the Book as stated in 3.(1) above and the claim seeking destruction of the parts of the Book in which the Paintings are printed should be upheld for being legitimate, while the claim for compensation of damages stated in 3.(2) above shall be upheld for being legitimate to the extent of claiming payment of 1,380,000 yen and delay damages accrued thereon at the rate of 5% per annum for the period from September 10, 1979, until the date of completion of the payment. The other claims should be dismissed for being inappropriate.

Accordingly, the parts of the judgment in prior instance in which the claims stated in 3.(1) above were upheld and the claims for payment of the abovementioned amount upheld with respect to the claim stated in 3.(2) above are appropriate, while those in which the claims for payment of an amount beyond the abovementioned amount were upheld are inappropriate and thus, the Appeal is well-grounded to that extent. In order to modify paragraph 3 of the main text of the judgment in prior instance pursuant to the provisions of Article 386 of the Code of Civil Procedure and to dismiss the other claims made in the Appeal for being inappropriate, the judgment shall be rendered in the form of the main text by clearly stating that paragraph 2 of the main text of the judgment in prior instance has been modified as stated in paragraph 2-2 of the main text of this judgment based on the restriction of claims made by the appellee in this instance and applying the provisions of Article 96, Article 89 and Article 92 of said Code with respect to the burden of the court costs.

Tokyo High Court

Judges: KABUYAMA Gen, TAKEDA Minoru and HAMAZAKI Kouichi

(omitted)