

Date	July 28, 2005	Court	Osaka High Court
Case number	2004 (Ne) 3893		

– A case in which, with regard to the original models of figures to be used as free gifts for confectionaries (Choco Egg), the court found that: the original models do not fall under the category of pure art because, although they can be found to be productions in which thoughts or sentiments are creatively expressed, they have been produced by the producer for practical purpose and it would be accepted by general average persons that they have been produced for practical purpose; however, these original models fall under the category of applied art; the court further ruled that an applied art could be covered by the protection under the Copyright Act as an "artistic work" if the relevant applied art is evaluated by general persons with certain aesthetic sense as having a sufficient level of artistic creativity to be treated like pure art.

– A case in which, the court examined the abovementioned original models for each type of figures and found copyrightability in respect of the original models for the figures made in the motif of specters, but denied copyrightability in respect to those for the figures of real or imaginary animals and for the figures based on the illustrations for the novels including "Alice's Adventures in Wonderland."

References: Article 2, paragraph (1), item (i) and Article 2, paragraph (2) of the Copyright Act

Number of related rights, etc.: None

Summary of the Judgment

1. The appellee, having entered into copyright license agreements with the appellant, manufactured the original models of figures of animals and specters (the " Animal Figures" and " Specter Figures"), which were to be used as free gifts for confectioneries (Choco Egg) manufactured and sold by the appellant, and sold these original models (the "Original Models") to the appellant. In this case, the appellee alleged that the appellant underreported the quantity of goods manufactured and failed to pay some royalties, and claimed against the appellant payment of royalties and agreed penalties based on the abovementioned agreements.

With respect to the copyright license agreements mentioned above, the appellant alleged against the appellee that: [i] the agreements were entered into based on the premise that the Original Models are copyrightable works, but in reality, the Original Models are not copyrightable works and thus the agreements are invalid due to a mistake; and [ii] since the royalty rates are too high, the agreements are invalid for being against the public policy. Based on these allegations, the appellant claimed

against the appellee return of unjust enrichment for part of the royalties paid to the appellee.

While the court of prior instance found that the Original Models are not copyrightable works, it also found that the copyright license agreements mentioned above are not invalid due to a mistake or being against public policy. In conclusion, it partially upheld the appellee's claims and dismissed the appellant's claim. Dissatisfied with this, the appellant filed this appeal.

2. In this judgment, the court upheld the judgment in prior instance and dismissed the appeal, making the findings and determinations as follows.

(1) Applied art can be categorized as follows: [i] cases where pure art work is applied to practical items (for example, making a painting into a folding screen or using a carving for a pattern of practical items); [ii] cases of creating unique individual works by focusing on the pursuit of beauty rather than practical utility while applying the techniques of pure art to goods with practical purpose; and [iii] cases where the sense or techniques of pure art are applied to machine production or mass production. In addition, taking into consideration the following facts, it cannot be construed that applied art in general would be protected by the Copyright Act: [a] originally, designs of practical items including applied art that are industrially produced in large quantities should be protected under the Design Act, which aims to contribute to the development of industry (Article 1 of the Design Act); [b] in contrast, the Copyright Act aims to contribute to the development of culture (Article 1 of the Copyright Act) and in the process of enacting the current Copyright Act, opinions suggesting that applied arts protected under the Design Act also be covered by the protection of the Copyright Act were not adopted; [c] if applied art in general, beyond works of artistic craftsmanship that are unique individually-created works, was protected by the Copyright Act, the significance of the existence of the Design Act could be lost due to the difference in the degree of protection provided by the two Acts (i.e. while registration of establishment, which is a public means for public notice, is required to obtain protection under the Design Act (formality system) and the period of protection (duration) is set to be 15 years from the date of registration of establishment, the Copyright Act does not require registration of establishment to obtain protection (non-formality system) and provides that the period of protection (duration) starts at the time when the work is created and subsists for 50 years after the death of the author and that for works whose authorship is attributed to a corporation subsists for 50 years after the date on which the work is made public). However, it is appropriate to construe that even an applied art could be covered by the protection under the Copyright Act as

an "artistic work" if the relevant applied art has independently acquired sufficient artistic quality to be the subject of aesthetic appreciation, apart from practical utility and functionality, and is evaluated by general persons with certain aesthetic sense as having a sufficient level of artistic creativity to be treated like pure art.

(2) The Original Models can be found to be productions in which thoughts or sentiments are creatively expressed because the producer's individuality is expressed in them to a certain degree. However, the Original Models have been produced by the producer for practical purpose (i.e. promoting the sales of confectioneries) rather than exclusively for appreciation and it would be accepted by general average persons that they have been produced for practical purpose. Thus, it is appropriate to construe that they do not fall under the category of pure art. In addition, based on the abovementioned purpose of production and general average persons' understandings, it is appropriate to find that the Original Models fall under the category of applied art.

A. The Animal Figures are models that have faithfully reproduced the shape and colors, etc. of real animals and the posture and pose, etc. of the animals can generally be found in pictures and photographs included in commercially available illustrated encyclopedias, etc.; there are no circumstances to find that the model sculptor who produced them added his/her own interpretation or arrangements.

Therefore, it must be said that the creativity in the Animal Figures is not particularly high, and as such, the original models of these figures cannot be found to have been evaluated by general persons with certain aesthetic sense as having a sufficient level of artistic creativity to be treated like pure art and thus it is construed that they do not fall under the category of work.

With respect to the *tsuchinoko* that is included in the Animal Figures, it cannot be found that the shape and color, etc. of the real animal have been faithfully reproduced but instead can be found that the producer's individuality has been strongly expressed in comparison to other Animal Figures. Yet, it has also been produced based on a number of imaginary pictures drawn in the past and thus it does not go beyond the general image pictured therefrom. It cannot be said that the figure has achieved a sufficient level of artistic creativity to be treated like pure art.

B. The Specter Figures have been created by shaping imaginary specters, and some of them have been created based on the original drawings included in Sekien's "*Zuga Hyakki Yagyō*."

However, in the case of producing a three-dimensional model based on a planar painting, the producer must structure the parts which have not been drawn in the paintings so as to avoid any difference or strangeness with the parts drawn by using

imagination and grasping the entire picture of the specter including the parts not drawn in the painting. Thus, in the process of such production, the producer's imaginations or emotions will be exercised and the producer's thoughts and feelings will be reflected in the production.

In addition, taking into consideration the following facts, the producer's individuality has been strongly expressed in the process of production of making Sekien's original drawings three-dimensional and the Specter Figures can be found to have high creativity: [i] the Specter Figures have not been created by faithfully making Sekien's original drawings three-dimensional but rather the producer's own interpretation and arrangements are added throughout the figures; [ii] the producer of the Specter Figures not only created the main bodies of the specters but also uniquely set up backgrounds and situations for each specter; and [iii] some of the Specter Figures have been uniquely colored.

Moreover, some of the Specter Figures that are not based on the original drawings included in Sekien's "Zuga Hyakki Yagyō" have been created by the producer by uniquely shaping imaginary specters and thus can be found to have high creativity.

Furthermore, the Specter Figures are extremely sophisticated and have a certain degree of artistic quality to become the subject of general aesthetic appreciation in addition to being the subject of collection and appreciation of some figure collectors. Therefore, the original models of the Specter Figures can all be found to be evaluated by general persons with certain aesthetic sense as having a sufficient level of aesthetic creativity to be treated like pure art and thus they fall under the category of works of applied art.

C. The Alice Figures have been created based on the illustrations drawn by John Tenniel for the novels titled "Alice's Adventures in Wonderland" and "Through the Looking-Glass, and What Alice Found There," by making these illustrations three-dimensional. The Alice Figures are extremely sophisticated and can be evaluated as having a certain degree of artistic quality by general persons with certain aesthetic sense.

However, taking into consideration the following facts, it cannot be found that the producer's individuality has been strongly expressed in the process of making Tenniel's original drawings three-dimensional and it should be found that the creativity of the Alice Figures is not very high: [i] although the Alice Figures can be found to have some creativity as the producer's thoughts or sentiments are reflected in the process of producing a three-dimensional model based on Tenniel's illustrations drawn in a planar manner, the Alice Figures have been created by faithfully making Tenniel's

illustrations three-dimensional and thus the producer's own interpretation or arrangements have not been applied at the time of making the drawings three-dimensional; and [ii] the colors used have not gone beyond the general colors that will be used in normally coloring Tenniel's illustrations. As such, the original models of the Alice Figures cannot be found to be evaluated by general persons with certain aesthetic sense as having a sufficient level of artistic quality to be treated like pure art and thus they do not fall under the category of works of applied art.

Judgment rendered on July 28,2005

2004 (Ne) 3893, Appeal Case Regarding Claims for Payment of Penalties, etc. in the Principal Action and Return of Benefit of Unjust Enrichment in the Counterclaim (Court of prior instance: Osaka District Court, 2003 (Wa) 10346 and 2004 (Wa) 5016)

Judgment

Appellant (the defendant in the principal action and the plaintiff in the counterclaim in the prior instance): Furuta Confectionary, Co., Ltd. (hereinafter referred to as the "Defendant")

Appellee (the plaintiff in the principal action and the defendant in the counterclaim in the prior instance): KAIYODO Co., Ltd. (hereinafter referred to as the "Plaintiff")

Main text

1. The appeal in question ("Appeal") shall be dismissed.
2. The costs of the Appeal shall be borne by the Defendant.

Facts and reasons

No. 1 Object of the appeal

1. The part of the judgment in prior instance for which the Defendant lost the case shall be revoked.
2. The claims made by the Plaintiff in the principal action shall be dismissed.
3. The Plaintiff shall pay to the Defendant 5,725,048 yen and money accrued thereon at the rate of 5% per annum for the period from June 1, 2002, until the date of completion of the payment.
4. The court costs for the principal action and counterclaim in both the first and second instances shall be borne by the Plaintiff.

No. 2 Outline of the case

1.(1) Principal action

The Plaintiff and the Defendant sequentially entered into several copyright license agreements with respect to the manufacture of the original models of various types of figures (this term originally refers to silhouettes and shapes of a person, but has now evolved to refer to dolls and models) that will be used as free gifts for confectioneries, etc. manufactured and sold by the Defendant and to the provision of those original models to the Defendant. The agreements prescribed the royalties and penalties. However, alleging that the Defendant underreported the quantity of goods manufactured and failed to pay some royalties, the Plaintiff claimed payment of royalties and agreed penalties (180,117,389 yen in total) based on the abovementioned agreements.

(2) Counterclaim

The Defendant alleged against the Plaintiff as follows with respect to part of the various copyright license agreements mentioned above: [i] the agreements mentioned above were entered into based on the premise that the original models of the figures are works and the Plaintiff holds copyrights therefor, but in reality, the original models of the figures are not works and thus the agreements are invalid due to a mistake; and [ii] the provisions prescribing the payment of royalties are invalid for being against the public policy, since the royalty rates are too high. Based on these allegations, the Defendant claimed against the Plaintiff return of benefit of unjust enrichment for part of the royalties paid to the Plaintiff (5,725,048 yen).

(3) In the prior instance, the court found that the original models of the figures are not works. Meanwhile, the court also found that the copyright license agreements mentioned above are not invalid due to a mistake or being against public policy and upheld the Plaintiff's claims to the extent of claiming payment of a total of 160,178,278 yen as royalties and agreed penalties and delay damages accrued thereon at the rate of 6% per annum as the statutory interest rate for commercial affairs. Therefore, the Defendant filed this appeal.

(omitted)

3. Issues

(1) Whether or not the original models of the various figures that are the subject matter of the agreements in question (the "Agreements") are works.

(2) Whether or not the provisions prescribing the payment of penalties in the Agreements are invalid due to the mistake of the Defendant falsely believing that the original models of the figures are works and that the Plaintiff holds or manages the copyrights therefor.

(3) Whether or not the provisions prescribing the payment of penalties in the Agreements are invalid for being against the public policy.

(4) Whether or not it can be found that Agreement 11 is in effect and the agreement on penalties has been reached.

(5) Whether or not Agreement 14 has come into effect.

(6) Amount of unpaid royalties and penalties.

(7) Whether or not the Plaintiff has obtained benefit of unjust enrichment and the loss sustained by the Defendant.

(omitted)

No. 4 Court decision

1. This court also determines that the Plaintiff's claims are well-grounded to the extent stated in

paragraph (1) of the main text of the judgment in prior instance. The reasons are, in addition to those added and amended, etc. as follows, as stated in line 21 of page 25 to line 3 of page 60 of the judgment in prior instance and thus such part shall be cited.

(1) The part from line 23 of page 25 to line 16 of page 35 shall be modified as follows.

"(1) Facts which can be found from the evidence

The following facts are found according to the evidence set forth in each paragraph and the entire import of the oral argument in addition to the facts on which the decision is premised mentioned above.

A. Process of production of the original models in question

After discussing the product planning with the Defendant, the Plaintiff appointed the model sculptor suited to the plan. Following this, mainly C, who is the executive director of the Plaintiff, and the model sculptor arranged the sizes of the original models, the characteristic features that would be the sales point, and the quantities, etc. thereof. The model sculptor created the basic pictures in accordance with the contents of the arrangement and started the molding after the pictures were examined and modified by C. The original models (original molds) created by the model sculptor were checked by the Plaintiff and then colored by the Plaintiff's employees in charge of coloring. The original models so colored are the original models in question ("Original Models").

Based on the Original Models, the Defendant manufactured metallic molds at a plant located in a foreign country and the figures were manufactured by using the abovementioned metallic molds and by being colored by a number of factory workers including non-skilled workers. (Exhibit Ko 29, Exhibit Otsu 67 and the entire import of the oral argument)

B. Choco Egg and Choco Egg Classic

(A) Choco Egg (a chocolate, egg-shaped candy) and Choco Egg Classic are a line of goods wherein figures of animals that finely imitate existing animals that belong to various species and families (excluding "tsuchinoko (a legendary snake-like cryptid)" covered by Agreement 3 and including extinct animals such as "Japanese wolf" covered by Agreement 2) are encapsulated and put inside an egg-shaped chocolate as a free gift (hereinafter, the figures contained in Choco Egg (Agreement 1 through Agreement 8) and Choco Egg Classic (Agreement 13) are collectively referred to as the "Animal Figures"). (Exhibits Otsu 22 through 29)

(B) At the time of launch of Choco Egg and Choco Egg Classic, leaflets stating the following advertising copies were distributed with the goods: [i] "We encapsulated a blue capsule in an egg-shaped milk chocolate. A collection of realistic animal figures can be found inside the capsule. We will introduce various kinds of animals: from endemic species of Japan to extinct species that no longer exist, one after another." ("Japanese animal collection (i)" covered by Agreement 1, Exhibit Otsu 22); [ii] "A collection of animal figures that will be desired by figure

fanatics! Full-fledged figures that are realistically molded such as those used at animal and insect museums and which impress researchers" ("Japanese animal collection (iv)" covered by Agreement 4; Exhibit Otsu 25); [iii] "A new series for Choco Egg has been launched. In addition to the sought-after Japanese animal series, a realistic pet animal collection has been launched. We will introduce various kinds of pet animals: from ordinary pets to idol pets, one after another." ("Pet animal collection (i)" covered by Agreement 6; Exhibit Otsu 27); and [iv] "The Choco Egg Japanese animal" series that was launched in 1999 and has been introduced up to the fifth series to date. This time, 24 kinds were picked up from among the lineup of figures that appeared in the first to third series and have been productized as upgraded versions by changing the colors or coloring method or the mold itself." ("Japanese animal collection (upgraded version)" covered by Agreement 13; Exhibit Otsu 29). (Exhibits Otsu 22 through 29)

(C) The original models of the animal figures were created by E, the Plaintiff's employee (model sculptor), as a performance of the Plaintiff's obligation to produce original models under Agreements 1 through 8 and 13 by referring to the pictures and photographs included in commercially available illustrated encyclopedias of animals and birds, etc., and then were colored by the Plaintiff's employees and published as the Plaintiff's products.

In the original models of the Animal Figures, the coat of the animals, boss of the legs of insects and fish scales, etc. not to mention the shape of each part of the body, size ratio and postures, were made three-dimensional to resemble real animals to the greatest extent possible. Moreover, a number of colors were delicately painted and the same color and pattern as real animals were used. (Exhibits Ko 29 and 51, Exhibits Otsu 36 through 41 and Objects of Observation Ko 2 through 9)

C. Specter series

(A) Specter series are a line of goods wherein the figures produced under the inspiration of the old literature generally known as Hyakki Yagyō are boxed as free gifts with candies (hereinafter the figures used in the specter collection (Agreements 9 and 10), omnibus (Agreement 11) and specter netsuke (specter key chain) (Agreement 12) shall be collectively referred to as the "Specter Figures").

(B) Among the specter series, the "Specter Collection" was sold along with the leaflets stating the advisory copies such as "Amidst the specter boom as typified by the specter novels written by Mr. Natsuhiko Kyogoku in recent years, the specters that appear in the old literature titled 'Hyakki Yagyō' have been made three-dimensional. The figures have been completed to have a realistic and full-fledged specification for adult collectors, thereby increasing their value as a collection." ("Hyakki Yagyō I" covered by Agreement 9; Exhibit Otsu 30) and "The second series of the much-discussed 'Specter Collection.' Nine realistic figures have been released under the supreme command of Mr. F, as in the case of the first series. In addition to kappa

(mythical Japanese water imps), tengu (long-nosed goblin) and wanyūdo (a ghost of an oxcart wheel with a man's close-cropped head at its center), one of the specters is made secret to increase mysteriousness. An ivory-like colored version and gold colored version have been added to the ordinary colored version and thereby finished the goods to have great value as a collection." ("Hyakki Yagyō II" covered by Agreement 10; Exhibit Otsu 31), while the "specter netsuke" products (covered by Agreement 12) were sold with leaflets stating the advertising copy which reads "A collection of 'specter-themed' figures. The figures were made in the motif of key chains that are called 'netsuke' that exist from the Edo period" (Exhibit Otsu 32). (Exhibits Otsu 30 through 32)

(C) The original molds of the Specter Figures were produced by F. With the understanding that original molds are works, F assigned all of the copyrights to the Plaintiff at the time of delivering the original molds to the Plaintiff and receiving the payments. The Plaintiff had its employees color the original molds delivered from F and completed them as original models.

The Specter Figures are mainly modeled after the specters that appear in the ancient folk tales of Japan.

A considerable number of them were created based on the pictures of specters that appear in the "Gazu Hyakki Yagyō (The Illustrated Night Procession of One Hundred Demons)" written by Sekien Toriyama (hereinafter referred to as "Sekien") in the Edo period, by making them three-dimensional and applying colors in an original fashion (Exhibits Otsu 89-1 through 89-9).

However, the Specter Figures have not been created by faithfully making the original drawings of Sekien three-dimensional. For example, with respect to the specter named "Kyōkotsu (a bleached bone specter living in a well)," while its torso is drawn flat without the concavity and convexity in Sekien's original drawing (Exhibit Ko 89-4), a white-bone like structure stands out in the overall torso in the Specter Figure (Exhibit Ko 93). In addition, with respect to the "Tengu (included in Hyakki Yagyō II)," only the head and wings are drawn in Sekien's original drawing (Exhibit Ko 89-5), but the entire body is portrayed in the Specter Figure (Exhibit Ko 94). As described above, the producer's own interpretation and arrangements have been added in the Specter Figures.

Moreover, the producer of the Specter Figures not only created the main bodies of the specters but also uniquely set up backgrounds and situations for each specter. For example, the situation where the "Kamaitachi (a weasel-like specter with sharp sickles in place of each arm; included in Hyakki Yagyō I)" is slashing the throat of a stone statute of jizo (Exhibit Ko 92) and the situation where the "Kappa (included in Hyakki Yagyō II)" is picking the mythical ball inside the anus out of a drowned body (Exhibit Ko 96) do not exist in Sekien's original drawings "Kamaitachi" (Exhibit Ko 89-3) and "Kappa" (Exhibit Ko 89-7).

Furthermore, regarding the colors, for example, while the body and shell of the

abovementioned kappa are colored green and brown, which are common colors that will normally be selected in coloring a kappa, purple is selected for the body of "Ningyo (mermaid; included in Hyakki Yagyō I)" (Exhibit Ko 91); a unique coloring is thus applied. (Exhibits Ko 31, 52, 89-1 through 89-9 and 90 through 98 and Objects of Observation Ko 10 through 12)

D. Alice collection

(A) The Alice collection is a line of goods that contain the figures created based on the illustrations drawn by John Tenniel (hereinafter referred to as "Tenniel") used in the novels titled "Alice's Adventures in Wonderland" and "Through the Looking-Glass, and What Alice Found There" by Lewis Carroll by making them three-dimensional. Such figures are boxed as free gifts with candies (hereinafter the figures used in the Alice collection (Agreement 14) shall be referred to as "Alice Figures" and shall be collectively referred to as the "Figures" along with the Animal Figures and Specter Figures).

(B) The Alice collection was sold with a leaflet stating the advisory copy which reads "The characters that appear in the timeless stories filled with fantasy that originate in the novels titled 'Alice's Adventures in Wonderland' and 'Through the Looking-Glass, and What Alice Found There' by Lewis Carroll read by every girl have been made into figures without any change. John Tenniel's illustrations used in the original copies have been used as the model of the figures and the familiar figures make you feel more familiar with the world of Alice. In addition, when two specific types of figures are combined, they change into a miniature that directly reproduces the sceneries of the illustrations; by attaching mobility to the figures, their value as a collection is increased" (Exhibit Otsu 34).

(C) All of the original molds of the Alice Figures were produced by G (hereinafter referred to as "G"). With the understanding that original molds are works, G assigned all of the copyrights to the Plaintiff at the time of delivering the original molds to the Plaintiff and receiving the payments.

The Plaintiff had its employees color the original molds delivered from G and completed them as original models.

Although Tenniel's illustrations are line drawings and have no colors, they have been colored by Harry Theaker or Macmillan Publishers of the U.K. The original models of the Alice Figures have been created by faithfully making Tenniel's illustrations three-dimensional and coloring them based thereon (Exhibits Ko 32 and 53, Exhibit Otsu 3 through 5 and Object of Observation Ko 13).

E. All of the abovementioned goods, i.e. Choco Egg, Choco Egg Classic, specter series and Alice collection, are a line of goods wherein various kinds of figures are encapsulated and put inside a chocolate or boxed with candies as free gifts for confectioneries. For example, in the case of Choco Egg (sold in bulk), the figures are stored inside a capsule sized 65×43×43 (mm),

while in the specter series, the figures are stored inside a box sized 140×98×53 (mm) with four candies (two in the case of specter netsuke). As described above, though the Figures are used as free gifts for the confectionaries sold by the Defendant and can be held on the palm, they do have a certain size, and the Defendant has also strongly appealed the figures as the consumer's target for collection at the time of selling the goods. Thus, they can be evaluated as holding a key position as goods rather than the confectionaries (especially as, with respect to the specter series, an explanation on the figures is conspicuously stated in the leaflet and a small note which reads "with candies" is printed in small letters below such explanation; Exhibit Otsu 30).

In addition, the Plaintiff is highly reputed by collectors of these kinds of figures as a manufacturing company of figures and is enjoying an enduring popularity.

Moreover, various figures (including the Figures) produced by the model sculptors who belong to the Plaintiff are stored at the American Museum of Natural History, and were exhibited at an exhibition entitled "OTAKU: personality = space = city" held at the Japan Pavilion at the 9th International Architecture Exhibition, Venice Biennale. Furthermore, exhibitions have been held for them at museums such as Tokyo Photographic Art Museum and Contemporary Art Gallery of Art Tower Mito; they have been highly valued as modern art (Exhibits Ko 56 through 78 and 99 and Exhibit Otsu 74).

(2) Based on the abovementioned findings, this court will examine as follows.

A. Provisions of the Copyright Act

Article 2, paragraph (1), item (i) of the Copyright Act defines a work as "a production in which thoughts or sentiments are creatively expressed and which falls within the literary, academic, artistic or musical domain." Article 10 of said Act lists "paintings, woodblock prints, sculptures, and other works of fine art" (paragraph (1), item (iv) of said Article) as illustrative examples of works. Meanwhile, Article 2, paragraph (2) of said Act prescribes that "As used in this Act, an 'artistic work' includes a work of artistic craftsmanship."

B. Distinction of pure art and applied art

(A) Artistic creations can be categorized as follows: [i] productions in which thoughts or sentiments are creatively expressed that have been produced by the producer exclusively for appreciation and are accepted by general average persons as being produced for the abovementioned purpose (pure art); and [ii] productions in which thoughts or sentiments are creatively expressed that have been produced by the producer for purposes other than the abovementioned purpose or would be accepted by general average persons as being produced for purposes other than the abovementioned purpose.

What is generally called applied art falls under the latter category and refers to a production produced by the producer for the purpose of applying it to practical goods (hereinafter referred to as "practical purpose") or accepted by general average persons as being produced for

practical purpose.

(B) As stated in A. above, the Copyright Act prescribes that "artistic work" includes "a work of artistic craftsmanship" while listing "paintings, woodblock prints, sculptures, and other works of fine art" as one of the illustrative examples of works, and thus it is obvious that an "artistic work" is not limited to pure art. However, while unique works of artistic craftsmanship that are individually-created fall under the category of "artistic work" pursuant to Article 2, paragraph (2) of the Copyright Act, it remains unclear from the provisions of said Act as to whether or not applied arts other than such works also fall under the category of "artistic work."

(C) Applied art can be categorized as follows: [i] cases where pure art work is applied to practical items (for example, making a painting into a folding screen or using a carving for a pattern of practical items); [ii] cases of creating unique individual works by focusing on the pursuit of beauty rather than practical utility while applying the techniques of pure art to goods with practical purpose; and [iii] cases where the sense or techniques of pure art are applied to machine production or mass production. In addition, taking into consideration the following facts, it cannot be construed that applied art in general would be protected by the Copyright Act: [a] originally, designs of practical items that are industrially produced in large quantities should be protected under the Design Act, which aims to contribute to the development of industry (Article 1 of the Design Act); [b] in contrast, the Copyright Act aims to contribute to the development of culture (Article 1 of the Copyright Act) and in the process of enacting the current Copyright Act, opinions suggesting that applied arts protected under the Design Act also be covered by the protection of the Copyright Act were not adopted; [c] if applied art in general was protected by the Copyright Act beyond works of artistic craftsmanship that are unique individually-created works, the significance of the existence of the Design Act could be lost due to the difference in the degree of protection provided by the two Acts (i.e. while registration of establishment which is a public means for public notice is required to obtain protection under the Design Act (formality system) and the period of protection (duration) is set to be 15 years from the date of registration of establishment, the Copyright Act does not require registration of establishment to obtain protection (non-formality system) and provides that the period of protection (duration) starts at the time when the work is created and subsists for 50 years after the death of the author and that for works whose authorship is attributed to a corporation subsists for 50 years after the date on which the work is made public). However, it is appropriate to construe that even an applied art could be covered by the protection under the Copyright Act as an "artistic work" if the relevant applied art has independently acquired sufficient artistic quality to be the subject of aesthetic appreciation, apart from practical utility and functionality, and is evaluated by general persons with certain aesthetic sense as having a sufficient level of artistic creativity to be treated like pure art.

(D) Based on the abovementioned standpoints, this court will examine whether or not the Original Models fall under the category of "artistic works."

C. Whether or not the Original Models are pure art

(A) First, as found above, the Original Models are those which have portrayed in three dimensions existing animals or specters or persons, etc. drawn in paintings.

The Original Models have not been produced by using typological method of expression that could be similar no matter who produces them by portraying in three dimensions existing animals or specters or persons, etc. drawn in painting. Rather, the producer's individuality is expressed to a certain degree and thus the Original Models can be found to be productions in which thoughts or sentiments are creatively expressed (yet, the degree of creativity varies as stated in the following parts).

(B) Manufacturers and sellers of confectioneries have widely employed the practice of promoting the sales of confectioneries by offering small toys modeled after animals and vehicles, etc. popular among the consumers of confectioneries (mainly children) or stickers or cards with an illustration of cartoon characters as free gifts, thereby intensifying the confectionery consumers' desire to collect them (Exhibit Otsu 46 and publicly known facts). These kinds of toys which are offered as free gifts for confectioneries, etc. are generally called "shokugan (small toys sold with food)."

It is found that though the Figures are extremely sophisticated in comparison to previous small toys sold with food (Objects of Observation Ko 14 and 15 and publicly known facts), they are offered as free gifts of confectionaries and used for the purpose of promoting the sales of confectionaries. The Original Models are used as the original metal mold and a sample for coloring in order to mass-produce the Figures described above.

(C) As such, though the Original Models are productions in which thoughts or sentiments are creatively expressed as stated in (A) above, they have been produced by the producer for practical purpose rather than exclusively for appreciation and it would be accepted by general average persons that they have been produced for practical purpose. Thus, it is appropriate to construe that they do not fall under the category of pure art. In addition, based on the abovementioned purpose of production and general average persons' understandings, it is appropriate to find that the Original Models fall under the category of applied art.

(D) According to the evidence (Exhibits Ko 22 and 23) and the entire import of the oral argument, the Figures are found to have become popular not only among children but also among some adults after their release thanks to their sophistication. Moreover, according to the evidence (Exhibits Ko 54 through 88 and 99) and the entire import of the oral argument, it is found that many of the purchasers of the confectionaries purchased them for the Figures rather than the confectioneries and that many of such purchasers treated the Figures as the subject of

appreciation.

However, taking into consideration the following facts, if productions for which the determination on whether or not they have been produced exclusively for appreciation differs according to the person who looks at them are to be also protected as pure art under the Copyright Act, this will harm the predictability and is thus inappropriate: [i] pure arts fall under the category of works regardless of their degree of workmanship and will be protected under the Copyright Act; but [ii] under the copyright system of Japan, while the establishment of copyrights does not require examination or registration nor is it required to make external indication of the copyright, a provision prescribing criminal punishments is stipulated for infringement of copyrights.

Moreover, all of the evidence mentioned above is insufficient to find that general average persons will recognize the Figures or Original Models as having been produced exclusively for appreciation.

Furthermore, even if a production produced by a producer for purposes other than exclusively for appreciation at the time of production comes to be treated as the subject of appreciation as its artistic reputation grows due to changes in the circumstances after the production, it would substantially impair legal stability and it is thus inappropriate to construe that the production that was originally an applied art has converted to pure art and has attained copyrightability under the abovementioned situation.

Thus, the abovementioned circumstance does not affect the determination made in (C) above.

D. Whether or not the Original Models which are applied arts are works.

(A) Based on the abovementioned findings, this court will examine whether or not the Original Models will be evaluated by general persons with certain aesthetic sense as having a sufficient level of artistic creativity to be treated like pure art based on the premise that the Original Models are applied arts.

(B) Animal Figures

As found above, the Animal Figures have been produced by portraying the shapes, etc. of animals in three dimensions as real as possible and applying the same colors and patterns of real animals based on commercially available illustrated encyclopedias of animals and birds, etc. and are extremely sophisticated and thus can be evaluated as having a certain degree of artistic quality by general persons with certain aesthetic sense. This is also supported by the fact found above that the various kinds of figures produced by the Plaintiff have been exhibited in museums, etc. located in various areas and have been highly evaluated.

However, as stated above, the Animal Figures are models that have faithfully reproduced the shape and colors, etc. of real animals and the posture and pose, etc. of the animals can generally

be found in pictures and photographs included in commercially available illustrated encyclopedias, etc.; there are no circumstances to find that the model sculptor who produced them added his/her own interpretation or arrangements (according to Exhibit Ko 51, some of the Animal Figures have intentionally adopted a shape, etc. different from that of real animals but it is found that such adoption was conducted mainly for reasons based on the manufacturing process, such as the convenience in cutting or the need to secure the size to fit in the capsule, rather than for deformation to increase artistic quality). Accordingly, it cannot be found that the producer's individuality has been strongly expressed in the Animal Figures and their creativity is not particularly high.

As such, the original models of the Animal Figures cannot be found to have been evaluated by general persons with certain aesthetic sense as having a sufficient level of artistic creativity to be treated like pure art and thus it is construed that they do not fall under the category of work.

In addition, with respect to the tsuchinoko that is included in the Animal Figures, it has not been confirmed whether or not the animal after which the figure was modeled exists and thus it cannot be found that the shape and color, etc. of the real animal have been faithfully reproduced but instead can be found that the producer's individuality has been strongly expressed in comparison to other Animal Figures. Yet, it has also been produced based on a number of imaginary pictures drawn in the past and thus it does not go beyond the general image pictured therefrom (Exhibit Ko 51 and the entire import of the oral argument). It cannot be said that the figure has achieved a sufficient level of artistic creativity to be treated like pure art.

(C) Specter Figures

Unlike the Animal Figures, the Specter Figures have been created by shaping imaginary specters.

It is true that, as found above, some of the Specter Figures have been created based on the original drawings included in Sekien's "Zuga Hyakki Yagyo."

However, in the case of producing a three-dimensional model based on a planar painting, the producer must structure the parts which have not been drawn in the paintings so as to avoid any difference or strangeness with the parts drawn by using imagination and grasping the entire picture of the specter including the parts not drawn in the painting. Thus, in the process of such production, the producer's imaginations or emotions will be exercised and the producer's thoughts and feelings will be reflected in the production.

In addition, as found above, taking into consideration the following facts, the producer's individuality has been strongly expressed in the process of production of making Sekien's original drawings three-dimensional and the Specter Figures can be found to have high creativity: [i] the Specter Figures have not been created by faithfully making Sekien's original

drawings three-dimensional but rather the producer's own interpretation and arrangements are added throughout the figures; [ii] the producer of the Specter Figures not only created the main bodies of the specters but also uniquely set up backgrounds and situations for each specter (especially, the scenes of the "Kamaitachi" and "Kappa" as found above, or the scene wherein "Tsuchigumo" (earth spider) is killed by Minamoto no Yorimitsu and Watanabe no Tsuna and numerous skulls are hanging out from its torn belly (Exhibit Ko 52) can be evaluated as a mold with a certain kind of narrativity and appreciated as being considerably creative.); and [iii] some of the Specter Figures have been uniquely colored.

Moreover, some of the Specter Figures that are not based on the original drawings included in Sekien's "Zuga Hyakki Yagyō" have been created by the producer by uniquely shaping imaginary specters and thus can be found to have high creativity.

Furthermore, as found above, the Specter Figures are extremely sophisticated and have a certain degree of artistic quality to become the subject of general aesthetic appreciation in addition to being the subject of collection and appreciation of some figure collectors.

Based on the abovementioned findings, the original models of the Specter Figures, including those based on the original drawings included in Sekien's "Zuga Hyakki Yagyō" and those that are not, can all be found to be evaluated by general persons with certain aesthetic sense as having a sufficient level of aesthetic creativity to be treated like pure art and thus it is appropriate to find that they fall under the category of works of applied art.

(D) Alice Figures

As found above, the Alice Figures have been created by making Tenniel's illustrations three-dimensional.

As with the case of the Animal Figures and Specter Figures, the Alice Figures are also extremely sophisticated and can be evaluated as having a certain degree of artistic quality by general persons with certain aesthetic sense.

However, taking into consideration the following facts, it cannot be found that the producer's individuality has been strongly expressed in the process of making Tenniel's original drawings three-dimensional and it should be found that the creativity of the Alice Figures is not very high: [i] although the Alice Figures can be found to have some creativity as the producer's thoughts or sentiments are reflected in the process of producing a three-dimensional model based on Tenniel's illustrations drawn in a planar manner, as found above, the Alice Figures have been created by faithfully making Tenniel's illustrations three-dimensional and thus the producer's own interpretation or arrangements have not been applied at the time of making the drawings three-dimensional (in this regard, the circumstances differ from the case of Specter Figures); and [ii] the colors used have not gone beyond the general colors that will be used in normally coloring Tenniel's illustrations (however, as found above, although there are some

productions in which Tenniel's illustrations have been colored, their colors remain unclear based on the evidence, and moreover, some of the Alice Figures have been created by including backgrounds or situations (for example, the tree of the "Cheshire cat"), but these backgrounds were originally drawn in Tenniel's illustrations).

As such, the original models of the Alice Figures are extremely sophisticated but cannot be found to be evaluated by general persons with certain aesthetic sense as having a sufficient level of artistic quality to be treated like pure art and thus it is construed that they do not fall under the category of works of applied art."

(omitted)

3. Based on the abovementioned findings, the Plaintiff's claims are well-grounded to the extent of claiming the payment of 160,178,278 yen as well as delay damages accrued on 1,672,650 yen among the first-mentioned amount at the rate of 6% per annum as provided by the Commercial Code for the period from November 28, 2002, which is the date after making the claim, until the date of completion of the payment, delay damages accrued on 155,551,593 yen among the first-mentioned amount at the rate of 6% per annum as provided by the Commercial Code for the period from December 12 of the same year, which is the date after making the claim, until the date of completion of the payment, and delay damages accrued on 2,954,035 yen among the first-mentioned amount at the rate of 6% per annum as provided by the Commercial Code for the period from July 28, 2004, which is the date after making the claim, until the date of completion of the payment, and thus will be upheld while the other claims lack legal basis and thus will be dismissed. Accordingly, the judgment in prior instance rendered to the same effect is appropriate and the Appeal must be dismissed for lacking legal basis.

Therefore, the judgment shall be rendered in the form of the main text.

(Date of conclusion of oral argument in this instance: June 14, 2005)

Osaka High Court, 8th Civil Division

Presiding judge: TAKEHARA Toshikazu

Judge: ONO Youichi

Judge: NAKAMURA Kokoro