

Date	December 25, 2013	Court	Intellectual Property High Court, Third Division
Case number	2013 (Ne) 10076		

– A case in which, regarding the act of the defendant in the first instance of receiving from the supporting intervenor a photograph that the plaintiff in the first instance took upon request of the supporting intervenor and, then, reproducing the photograph in magazines and distributing it, and conducting public transmission by posting it on a website, the court denied the infringement of the copyright, denied the infringement of the right to make the work public and the right to maintain integrity, but recognized the infringement of the right to determine the indication of the author's name, and ordered the payment of damages for the infringement of the right to determine the indication of the author's name, issued an injunction against the publication, etc., of the magazines, and ordered disposal, etc. of the magazines, by holding that the plaintiff in the first instance granted to the supporting intervenor a comprehensive license to make use of the photograph for future publication of a book by the supporting intervenor or any other company or to make any other secondary use thereof.

References: Articles 2, 15, 19 to 21, and 23 of the Copyright Act

The plaintiff in the first instance, who is a professional photographer, asserted against the defendant in the first instance, who is a publisher, that, while the plaintiff in the first instance held a copyright for the photograph (the "Photograph") taken by the plaintiff in the first instance, the defendant in the first instance infringed the copyright (the right of reproduction, the right of public transmission) and the moral rights of author (the right to make the work public, the right to determine the indication of the author's name, the right to maintain integrity) of the plaintiff in the first instance by publishing the Photograph in a book (the "Book") without the consent of the plaintiff in the first instance. The plaintiff sought [1] the damages for the tort and [2] an injunction against the publication, etc. of the Book under Article 112, paragraph (1) of the Copyright Act and disposal, etc. of the Book under paragraph (2) of said Article, respectively. It should be noted that the Photograph was taken by the plaintiff in the first instance upon request of the supporting intervenor, that the defendant in the first instance requested a packager to produce and edit the Book, and that it was the packager who received the Photograph from the supporting intervenor.

In the judgment in prior instance, the court found that the author of the Photograph was the plaintiff in the first instance and that, since the Photograph may not be regarded as an employee work, a copyright for the Photograph shall belong to the plaintiff in the first instance. Then, the court found that the act of the defendant in the first instance of

publishing the Photograph in the Book constitutes infringement of the copyright (the right of reproduction, the right of public transmission) and the moral rights of author (the right to make the work public, the right to determine the indication of the author's name, the right to maintain integrity) of the plaintiff in the first instance and accepted a part of the request for damages and all of the request for an injunction and disposal. Dissatisfied with this judgment, both the plaintiff in the first instance and the defendant in the first instance filed an appeal.

In the judgment in this instance, based on the following grounds, the court modified the judgment in prior instance based on the appeal filed by the defendant in the first instance, reduced the amount of damages, limited the scope of the injunction and disposal, and dismissed the appeal filed by the plaintiff in the first instance.

In this judgment, like the judgment in prior instance, the court first found that the plaintiff in the first instance shall be regarded as the author of the Photograph and that the Photograph may not be regarded as an employee work. However, in this judgment, unlike the judgment in prior instance, the court found that the plaintiff in the first instance granted a comprehensive license to the supporting intervener to make use of the photograph taken by the plaintiff in the first instance for future publication of a book by the supporting intervener or any other company or to make any other secondary use thereof and also that the two parties agreed that the compensation was paid at the time of the photo shoot. On these grounds, the court denied the infringement of the copyright.

In light of the aforementioned agreement, the court denied the infringement of the right to make the work public by holding that the plaintiff in the first instance granted a comprehensive license to the supporting intervener (or any other person licensed by the supporting intervener to use the copyright for the Photograph) to make use or make secondary use of the Photograph and make it available to the public. The court also denied the infringement of the right to maintain integrity by holding that the plaintiff in the first instance had agreed to a modification of the Photograph at least to such an extent necessary for the purpose of use of the Photograph in the book to be published as long as the honor and reputation of the plaintiff in the first instance is not damaged.

On the other hand, as was the case with the judgment in prior instance, the court recognized the infringement of the right to determine the indication of the author's name and found that the defendant in the first instance was negligent by holding that the Book does not indicate the name of the plaintiff in the first instance and that there was no sufficient evidence to prove that the plaintiff in the first instance agreed to impose no restrictions (including such matters as whether to indicate the name and the manner of

indicating the name) on the manner of the secondary use of the Photograph taken by the plaintiff in the first instance. Furthermore, the court ordered the payment of damages (solatium), issued an injunction against the publication, etc., of the Book, which does not indicate the name of the plaintiff in the first instance, and ordered the disposal, etc. of the Book.