Date	November 30, 2016	Court	Intellectual Property High Court, Second Division
Case number	2016 (Ne) 10018		

– Goods may be considered to fall under "another person's goods" (Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act) if they have been completely "commercialized," and as for commercialization, it is necessary that goods have reached the stage of being available for sale, such as the stage where the goods can fulfill their primary function as goods, and that such fact is formally apparent.
– It is reasonable to recognize that the period of protection (Article 19, paragraph (1), item (v)(b) of the Unfair Competition Prevention Act) begins at the time when it becomes formally apparent that goods have been completely developed and commercialized and have reached the stage of being available for sale.
– A case in which the court ruled that goods exhibited in a goods exhibition are recognized as articles for which it is formally apparent that they have been completely developed and commercialized and have reached the stage of being available for sale.
– An example in which the court denied the copyrightability of applied arts.

References: Article 2, paragraph (1), item (iii), Article 5, paragraph (3), item (ii), and Article 19, paragraph (1), item (v)(a) and (b) of the Unfair Competition Prevention Act, Article 2, paragraph (1), item (i) and Article 10, paragraph (1), item (iv) of the Copyright Act
Numbers of related rights, etc.: None

Summary of the Judgment

The appellants (plaintiffs in the first instance) are product designers who jointly developed test tube-like humidifiers whose configurations are as indicated in the attachment to this judgment (Appellants' Humidifiers 1 to 3), and they exhibited Appellants' Humidifiers 1 and 2 at an international exhibition and international trade fair, and also started selling Appellants' Humidifier 3 around January 5, 2015. Incidentally, for Humidifiers 1 and 2 on exhibit, power was supplied by an uncovered copper wire.

The appellee (defendant in the first instance) is a stock company engaging in the business of importing and otherwise handling miscellaneous goods, and it imported test tube-like humidifiers (Appellee's Goods) whose configurations are as indicated in the attachment to this judgment from China and sold them to its customers in Japan in September and November 2013.

The appellants filed this action against the appellee to respectively seek [i] an injunction, etc. against the import, sale, and otherwise handling of the Appellee's

Goods based on a violation of Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act by alleging that the Appellee's Goods imitate the configurations of Appellants' Humidifiers 1 and 2, [ii] an injunction, etc. against the import, sale, and otherwise handling of the Appellee's Goods based on a copyright by alleging that Appellants' Humidifiers 1 and 2 fall under artistic works (Article 10, paragraph (1), item (iv) of the Copyright Act) and the Appellee's Goods are those that imitate and adapt them, and [iii] payment of compensation of damages based on a violation of the Unfair Competition Prevention Act or a tort of copyright infringement.

The court of prior instance (judgment of the Tokyo District Court; 2015 (Wa) 7033; January 14, 2016) ruled that [i] both Appellants' Humidifiers 1 and 2 do not fall under the "goods" referred to in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act as they are not recognized as articles subject to distribution in the market and that [ii] both of those humidifiers do not fall under works as they cannot be recognized as having a high level of creativity to be the subject of aesthetic appreciation. Based on these rulings, the court of prior instance dismissed all of the appellants' claims.

In this judgment, the court found and determined as summarized below with regard to each issue. Based on those finding and determination, the court found and determined as follows: [i] The import of the Appellee's Goods within the period of protection prescribed in the Unfair Competition Prevention Act falls under unfair competition because the Appellee's Goods are those that imitate Appellants' Humidifiers 1 and 2, but the aforementioned period of protection had already expired at the time of conclusion of the oral argument; [ii] The appellants do not hold copyright because Appellants' Humidifiers 1 and 2 are not recognized as artistic works. On that basis, the court changed the judgment of prior instance, partially upholding and dismissing the appellants' claim for compensation of damages based on a tort of violation of the Unfair Competition Prevention Act, and completely dismissed the appellants' claim for an injunction based on a violation of the Unfair Competition Prevention Act and claims based on the copyright.

1. Findings and determinations concerning the claims based on a violation of the Unfair Competition Prevention Act

(1) Whether or not the appellants' humidifiers fall under the category of "another person's goods" (Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act)

"It is reasonable to understand 'another person's goods' as those that can be made subject to transaction through input of funds or labor, that is, articles which have been

completely 'commercialized,' taking into account the purpose of the aforementioned prohibition of imitating a configuration, that is, protecting outcomes into which a product developer input funds or labor in commercialization. It is considered that such articles are not required to be sold. … However, the Unfair Competition Prevention Act aims to protect the business interests of business operators by ensuring fair competition among business operators (see Articles 3 and 4 of said Act). Therefore, commercialization that can make goods subject to transaction should be objectively confirmable and directed toward sale. Even if goods are not required to have reached the stage of production of mass-produced products or of preparation for mass production, it is considered necessary that the goods have reached the stage of being available for sale, such as the stage where the goods can fulfill their primary function as goods, and that such fact is formally apparent."

"A goods exhibition is a place where goods are displayed, advertised, and introduced to provide an opportunity to sell them or seek customers for the transaction of the goods. Therefore, it is reasonable to recognize goods exhibited in a goods exhibition as those for which it is formally apparent that they have been completely developed and commercialized and have reached the stage of being available for sale unless there are special circumstances. … Even if a model to be sold as goods has been completed, it is considered ordinary that some modifications are required to put the goods into a configuration suited for mass production, etc. before sale. Even if there is room for such ex-post modifications, this fact does not affect the conclusion that said model has reached the stage of being available for sale."

(2) Whether or not the act of "imitation" has been conducted (Article 2, paragraph (5) of the Unfair Competition Prevention Act)

"A difference can be seen in that Appellants' Humidifier 1 is in a somewhat slim and sleek shape on the whole while the Appellee's Goods have a rather waistless shape. However, … the impression of the characteristic part of both products, i.e. being a humidifier in a test tube-like shape … is extremely strong, and under its impact, a difference in the composition ratio which is the same as the aforementioned difference is recognized as being almost eliminated from the impression. Therefore, it is difficult to say that the configuration of the Appellee's Goods and that of Appellants' Humidifier 1 differ from each other. In that case, the Appellee's Goods and Appellants' Humidifier 1 should be considered as having a substantially identical configuration."

(3) Whether or not the term of protection has terminated (Article 19, paragraph (1), item (v)(a) of the Unfair Competition Prevention Act)

"It is reasonable to recognize that the period of protection began at the time when it

became formally apparent that goods have been completely developed and commercialized and have reached the stage of being available for sale. … In addition, the term 'another person's goods' means goods that are the first to have the configuration of goods, for which protection is sought, and it does not mean subsequent goods with such configuration of goods to which some modifications have been added. … Goods exhibited at a goods exhibition are articles for which it has become formally apparent that they have been completely developed and commercialized and have reached the stage of being available for sale unless there are special circumstances. Therefore, it is reasonable to recognize that the period of protection began at the time when the appellants exhibited Appellants' Humidifier 1 at a goods exhibition on November 1, 2011. There is no sufficient evidence to recognize the aforementioned special circumstances."

"[it is reasonable to construe the date they were first sold] … includes the time when the state where goods are available for sale became formally apparent …If such construction is not made, when the goods have become available for sale but the commencement of the actual sale is delayed, the person who developed and commercialized such goods will be able to enjoy a term of protection substantially exceeding three years. However, this situation does not meet the purport of stipulating the imitation of configuration as an act of unfair competition while limiting the term of protection to three years in order to seek balance with intellectual property laws concerning intellectual creations and resolve conflicts of interest between the predecessor developer and subsequent developers"

(4) Whether or not good faith and no gross negligence can be found (Article 19, paragraph (1), item (v)(b) of the Unfair Competition Prevention Act)

"If the act of imitating a configuration referred to in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act is deemed not to fall under unfair competition on the grounds referred to in Article 19, paragraph (1), item (v)(b) of said Act, the infringer must allege and prove … that at the time of receiving the relevant goods, he/she was in good faith and was free of gross negligence with respect to the fact that the relevant goods were those created by imitating the configuration of another person's goods. …the appellee has made no allegations nor has it shown any proof regarding the facts that support its good faith and no gross negligence, such as the specific circumstances at the time of importing the Appellee's Products or whether or not the appellee itself conducted any market research for goods. Therefore, there is no sufficient evidence to recognize that the appellee was in good faith and was free of gross negligence at the time of importing the Appellee's Goods."

2. Findings and determinations concerning the appellants' claims based on a violation of the Copyright Act

"As long as whether or not applied arts fall under the category of "artistic works" (Article 10, paragraph (1), item (iv) of the Copyright Act) comes into question, in order to affirm that they are copyrightable, even if the applied art per se must have aesthetic characteristics of a sufficient level to become the subject of aesthetic appreciation, it cannot be considered reasonable to uniformly establish a standard to determine whether or not the relevant applied art has a high level of creativity, such as the possession of a high level of aesthetic characteristics. It should be construed that only applied arts that fulfill the requirements of copyrightability prescribed in Article 2, paragraph (1), item (i) of the Copyright Act should be protected as works"

"The Copyright Act protects expressions and does not protect ideas per se. Therefore, even if an idea has originality, it cannot be considered as exerting personality unless it appears in an expression with originality. This naturally applies in considering the copyrightability of applied arts."

"Creating the humidifier to reproduce the situation where vapors are blowing out from a test tube put in a beaker is a mere idea and even if the idea itself is original, it is not covered by the protection under the Copyright Act. If one intends to produce a humidifier reproducing the situation where vapors are blowing out from a test tube in a beaker, the entire shape of the humidifier almost necessarily becomes like the entire shape of Appellants' Humidifier 1. Therefore, this shape is nothing more than the realization of the idea as it is. Moreover, the specific shape of Appellants' Humidifier 1, that is, the ratio of the length of cap 3 to that of the main body (upper surface of the liquid inside the test tube) and the ratio of the diameter of main body 2 and the length from the upper end of cap 3 to the lower end of main body 2 (size of the test tube), has mimicked the normal configuration of test tubes and is a common configuration as with the case of test tubes previously known. The specific ratio of the length to the size mentioned above is nothing but an appropriate selection made from existing test tubes and cannot be found to be one in which personality is exerted."

Judgment rendered on November 30, 2016

2016 (Ne) 10018, Appeal Case of Seeking Injunction Against Unfair Competition, etc.

(Court of prior instance: Tokyo District Court, 2015 (Wa) 7033)

Date of conclusion of oral argument: September 7, 2016

Judgment

Appellant (plaintiff in the first instance): X_1

Appellant (plaintiff in the first instance): X_2

Appellee (defendant in the first instance): C'est La Vie Co., Ltd.

Main text

1. The parts concerning the appellants and the appellee in the judgment in prior instance shall be modified as follows.

(1) The appellee shall pay to appellant X_1 945,000 yen and money accrued thereon at the rate of 5% per annum for the period from March 24, 2015 until the date of completion of the payment.

(2) The appellee shall pay to appellant X_2 945,000 yen and money accrued thereon at the rate of 5% per annum for the period from March 24, 2015 until the date of completion of the payment.

(3) All of the other claims made by the appellants shall be dismissed.

2. The court costs shall be divided into 5 portions for both the first and second instances, four-fifths of which shall be borne by the appellee while the remaining portion shall be borne by the appellants, respectively.

3. Paragraphs 1(1) and (2) of the main text of this judgment may be provisionally executed.

Facts and reasons

The abbreviation of the terms and meaning of the abbreviations used in the judgment in prior instance shall also be used in this judgment in addition to those added in this judgment while the terms "plaintiff" and "defendant" contained in the abbreviations used in the judgment in prior instance shall be replaced with "appellant" and "appellee," respectively, and the same shall apply as appropriate.

No. 1 Object of the appeal

1. The judgment in prior instance shall be revoked.

2. The appellee shall not import, sell or offer for sale the goods stated in Attachment 1 of this judgment "List of the Appellee's Products."

3. The appellee shall destruct the goods mentioned in the preceding paragraph.

4. The appellee shall pay to each of the appellants 1,200,000 yen and money accrued thereon at the rate of 5% per annum for the period from March 24, 2015 until the date of completion of payment, respectively.

5. The court costs shall be borne by the appellee for both the first and second instances.

6. A declaration of provisional execution.

No. 2 Outline of the case

1. Summary of the case

(1) Summary of the claims in question

In this case, the appellants, who developed the humidifiers 1 and 2 stated in Attachment 3 of this judgment "List of the Appellants' Humidifiers" (hereinafter such humidifiers shall be referred to as "Appellants' Humidifier 1" and the like, respectively, according to the number stated in said List), made the following claims against the appellee based on the respective allegation: [i] an injunction against the import and sale, etc. of the humidifiers stated in Attachment 1 of this judgment "List of the Appellee's Products" (hereinafter referred to as the "Appellee's Products") as well as the destruction thereof pursuant to Article 3, paragraphs (1) and (2) of the Unfair Competition Prevention Act based on an allegation that the Appellee's Products have been created by imitating the configuration of Appellants' Humidifier 1 or 2 and thus the act of selling, importing, or otherwise handling the Appellee's Products constitutes the act of unfair competition (imitation of configuration) prescribed in Article 2, paragraph (1), item (iii) of said Act; [ii] an injunction against the import and sale, etc. of the Appellee's Products as well as the destruction thereof pursuant to Article 112, paragraphs (1) and (2) of the Copyright Act based on an allegation that both of Appellants' Humidifiers 1 and 2 fall under the category of artistic works (Article 10, paragraph (1), item (iv) of said Act) and thus the appellants hold copyrights for them (right of transfer or right of transfer of derivative works) (an alternative joint claim made in relation to the claim mentioned in [i] above); and [iii] payment to each of the appellants 1,200,000 yen as damages (2,400,000 yen in total for two persons, the breakdown of which is 950,000 yen each as lost profits and 250,000 yen each as the attorney's fee) and delay damages accrued thereon at the rate of 5% per annum for the period from March 24, 2015, which is the date after the date on which tort was conducted, until the date of completion of the payment based on tort of violation of the Unfair Competition Prevention Act or infringement of copyrights (an alternative joint claim and alternative application of Article 5, paragraph (3), item (ii) of the Unfair Competition Prevention Act or Article 114, paragraph (3) of the Copyright Act).

The appellants were seeking joint and several payment by the appellee and StylingLife Holdings, Inc. ("StylingLife"), who was the appellee (defendant in the first instance) prior to the termination of the suit, 60,000 yen each (1,200,000 yen in total) among the abovementioned damages and the incidental money thereof, but the lawsuit between StylingLife and the appellants concluded in settlement. Thus, the object of the appellants' claims for damages shall be as stated in section 4 of No. 1, by rights.

In addition, only the pink product whose product number is CLV-3504 is stated as the "Appellee's Products" in the attached list of articles accompanying the complaint, but this does not mean that the "Appellee's Products" alleged by the appellants as infringing goods are limited to the first-mentioned product, and it is obvious that every product with the abovementioned product number and having the identical shape regardless of color will be included in light of the fact that both parties have made their oral arguments based on such premise.

(2) Determinations made in the prior instance

In the judgment in prior instance, the court dismissed all of the appellants' claims by finding as follows with respect to Appellant's Humidifiers 1 and 2: [i] both of Appellants' Humidifiers 1 and 2 cannot be found to be a product subject to the distribution in the market, and thus they do not fall under the "goods" prescribed in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act; and [ii] both of Appellants' Humidifiers 1 and 2 cannot be found to have sufficient creativity to become the subject of aesthetic appreciation, and thus they do not fall under the category of works.

2. Facts on which the decision is premised

The undisputed facts and the facts which can be found from the evidence stated below and the entire import of the oral argument as the facts on which the decision for this case is premised are as follows.

(1) Parties

i. The appellants are serving as product designers of a comprehensive consumer electronics manufacturer while working as freelance designers by forming a designer unit named "knobz design" in January 2011. (Exhibit Ko 1-1).

ii. The appellee is a stock company engaged in the business of planning, producing and import wholesaling of goods including interior accessories, well-designed consumer electronics and household goods. (Undisputed facts).

(2) Development of the humidifiers by the appellants

i. The appellants developed Appellants' Humidifier 1 by the end of October 2011, at the latest, Appellants' Humidifier 2 by June 5, 2012 at the latest, and Appellants' Humidifier 3 by January 4, 2015 at the latest, respectively. (Undisputed facts and the entire import of the oral argument).

ii. All of Appellants' Humidifiers 1 through 3 are in the shape of a test tube-like stick wherein water is absorbed from the bottom and vapor is given forth from the top and are used by being put in a glass, etc. (Undisputed facts).

iii. The structure of Appellants' Humidifier 1 is as stated in Attachment 4 of this judgment "List of the Structure of Appellants' Humidifier 1." (Undisputed facts, Exhibits Ko 3-2, 5-1 and 25 and the entire import of the oral argument).

(3) Display of Appellants' Humidifiers 1 and 2

i. The appellants displayed Appellants' Humidifier 1 at "TOKYO DESIGNERS WEEK 2011," an international exhibition for designs and arts held at the ground located in front of the Meiji Memorial Picture Gallery of Meijijingu Gaien in Shinjuku City, Tokyo as the main venue from November 1st to 6th of 2011. (Exhibits Ko 3-1, 3-2 and 4).

ii. The appellants also displayed Appellants' Humidifier 2 at "Interior Lifestyle Tokyo 2012," an international trade fair for interior accessories and designs held at Tokyo Big Sight, West Hall in Koto City, Tokyo from June 6th to 8th of 2012. (Exhibits Ko 5-1 and 5-2).

(4) Sale of Appellants' Humidifier 3

Around January 5, 2015, the appellants started to offer for sale Appellants' Humidifier 3 on their website. (Exhibits Ko 1-1, 16 and 17-1).

(5) Appellee's acts

i. The Appellee's Products are in the shape of a test tube-like stick wherein water is absorbed from the bottom and vapor is given forth from the top and are used by being put in a glass, etc. (Undisputed facts).

ii. The structure of the Appellee's Products is as stated in Attachment 2 of this judgment "List of the Structure of the Appellee's Products." (Undisputed facts, Exhibits Ko 8-1 through 8-3 and the entire import of the oral argument).

iii. The appellee imported the Appellee's Products from China around September and November 2013 and sold them to its client companies. (Undisputed facts and the entire import of the oral argument).

(6) Warning

On February 25, 2014, the appellants sent to the appellee a written notice demanding that the appellee stop importing and selling the Appellee's Products based on an allegation that the Appellee's Products have been created by imitating the configuration of Appellants' Humidifier 2 introduced on the appellants' website. (Exhibit Ko 9 and Exhibit Otsu A1-1).

In response to this, on the 14th of the same month, the appellee made the following reply and continued selling the Appellee's Products: [i] the detail of the configuration of Appellants' Humidifier 2 cannot be grasped from the pictures thereof introduced on the abovementioned website; and [ii] even if the configuration of Appellants' Humidifier 2 is imitated in the Appellee's Products, no gross negligence can be found on the part of the appellee for not knowing that the configuration of Appellants' Humidifier 2 was imitated in the Appellee's Products since the appellee imported the Appellee's Products through an introduction from a local company in China. (Exhibit Ko 10, Exhibit Otsu A1-2 and the entire import of the oral argument).

(7) Share, etc.

The share in the rights and interests held by the appellants with respect to Appellants'

Humidifiers 1 through 3 is a half share for all of them. (Entire import of the oral argument).

3. Issues

(1) Regarding the claims based on imitation of configuration (violation of Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act)

A. Whether or not Appellants Humidifiers 1 and 2 fall under the category of "another person's goods" (Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act)

B. Whether or not the act of "imitation" has been conducted (Article 2, paragraph (5) of the Unfair Competition Prevention Act)

C. Whether or not the term of protection has terminated (Article 19, paragraph (1), item (v)(a) of the Unfair Competition Prevention Act)

D. Whether or not good faith and no gross negligence can be found (Article 19, paragraph (1), item (v)(b) of the Unfair Competition Prevention Act)

(2) Regarding the claims based on copyrights (applied arts)

A. Whether or not copyrightability can be found (Article 2, paragraph (1), item (i) and Article 10, paragraph (1), item (iv) of the Copyright Act)

B. Whether or not the act of reproduction or adaptation has been conducted (Articles 21 and 27 of the Copyright Act)

(3) Regarding the claims based on tort

A. Whether or not negligence can be found on the part of the appellee (Article 4 of the Unfair Competition Prevention Act and Article 709 of the Civil Code)

B. The amount of damages sustained by the appellants (Article 5, paragraph (3), item (ii) of the Unfair Competition Prevention Act and Article 114, paragraph (3) of the Copyright Act)

No. 3 Allegations by the parties

(omitted)

No. 4 Court decision

1. Regarding issue (1)A. (Whether or not Appellants' Humidifiers 1 and 2 fall under the category of "another person's goods")

(1) Regarding the meaning of the element of "another person's goods"

Article 1 of the Unfair Competition Prevention Act provides that "The purpose of this Act is to provide measures, etc. for the prevention of unfair competition and for the compensation of damages caused by unfair competition, in order to ensure fair competition among business operators and proper implementation of international agreements related thereto, and thereby contribute to the sound development of the national economy." Article 2, paragraph (1), item (iii) of said Act prescribes "the act of assigning, leasing, displaying for the purpose of

assignment or leasing, exporting or importing goods that imitate the configuration of another person's goods (excluding configuration that is indispensable for ensuring the function of said goods)" as the act of unfair competition.

It can be found that the act of imitating a configuration was prescribed as an act of unfair competition under the Unfair Competition Prevention Act based on the following idea: If the outcome in which the product developer invested money or labor in the process of commercializing products were imitated, the product developer's first mover advantage in the market will be considerably reduced while the imitator can enter the market by substantially reducing the risk burden associated with product commercialization. If this situation is left uncontrolled, motivations for product development and market development would be harmed. Thus, regardless of the creativity of the predecessor developer's product or the registration of rights, said Act granted predecessor developers with simple and prompt protection means to promote fair competition in product development among business operators and thereby sought sound development of the national economy, which is the purpose prescribed in Article 1 of said Act.

Under the Unfair Competition Prevention Act, the provisions prohibiting the act of imitating configurations do not apply to the act of assigning, etc. "goods for which three years have elapsed since the date they were first sold in Japan" (Article 19, paragraph (1), item (v)(a) of said Act). In light of the wordings used in the provisions and the legislators' intent at the time the Unfair Competition Prevention Act was wholly amended by Act No. 47 of 1993 in which the provision prescribing the act of imitating configurations was newly established, it is obvious that the phrase "the date they were first sold" in Article 19, paragraph (1), item (v)(a) of the Unfair Competition Prevention Act only means the initial date used to fix the end of the term of protection of "another person's goods" (the abovementioned provision was first noted in the parenthesis in Article 2, paragraph (1), item (iii) of said Act at the time of said amendment, but no change has been made to the meaning of said phrase when said statement in the parenthesis was changed into the provision of Article 19, paragraph (1), item (v)(a) of said Act by Act No. 75 of 2005). Moreover, while "another person's goods" must be goods that can be a subject of a transaction under Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act, there are no provisions requiring said goods to have been actually sold. In addition, said Act contains no other explicit provisions prescribing the start of the term of protection of "another person's goods." Accordingly, said Act cannot be found to require that the goods which can be the subject of a transaction have actually been sold as the requirement for such goods to be construed to fall under the category of "another person's goods."

Based on this finding, in light of the idea of prohibiting the act of imitating configurations mentioned above for the purpose of protecting the outcome in which the product developer

invested money or labor in the process of commercializing products, it is appropriate to interpret the element of "another person's goods" as referring to goods for which the act of making the goods become the subject of a transaction by investing money or labor, in other words, the process of "commercialization," has been completed while it can be recognized that such goods are not required to have been actually sold. If the element is not interpreted in the abovementioned manner, when the development and commercialization of a product were completed but another product created by imitating the configuration of the first-mentioned product is sold by a third party before the launch of the first-mentioned product so imitated, it would result in allowing the imitator to freely sell imitations without investing money or labor for development and commercialization of products on the grounds that the products of the person who initially developed and commercialized them were yet to fall under the category of "another person's goods." Such situation would jeopardize the competitive position of the person who initially developed and commercialized the products, and granting no protection means for such a case would substantially be against the abovementioned purpose of the Unfair Competition Prevention Act.

Yet, the Unfair Competition Prevention Act aims to ensure that business interests of business operators are protected by securing fair competition among business operators (see Articles 3 and 4 of said Act). Thus, the process of commercializing products to make them the subject of transactions must be objectively confirmed and conducted with an aim to sell such products. Though the process may not be required to have reached the stage of preparing for production of mass-produced products or commercial production, it may be construed that such process must have at least reached the stage wherein the products have come to fulfill their primary function or are otherwise available for sale and that the fact of having reached that stage must be formally apparent.

Based on the abovementioned premise, this court will examine whether or not Appellants' Humidifiers 1 and 2 fall under the category of "another person's goods."

(2) Regarding Appellants' Humidifier 1

As stated in section 2(3)i. of No. 2 above, the appellants displayed Appellants' Humidifier 1 at a goods exhibition in November 2011. A goods exhibition is a place to provide an opportunity to advertise and introduce goods by displaying them and sell the goods or find a trading partner for the goods. Thus, unless there are special circumstances, it is appropriate to find that it has become formally apparent that the goods which have been displayed at a goods exhibition have reached the stage wherein the development and commercialization of the products are completed and the goods can be sold. In addition, the pictures taken at the abovementioned goods exhibition (Exhibits Ko 3-2 and 25) clearly show the state where vapors are blowing out from the top of Appellants' Humidifier 1 put in a glass filled with water. Thus,

it is obvious that Appellants' Humidifier 1 was fulfilling the primary function as a humidifier during the time it was displayed at the abovementioned goods exhibition.

As stated in section 2(2)iii. of No. 2 above, in Appellants' Humidifier 1, electricity is delivered to an ultrasonic transducer by an uncoated copper wire, and it is obvious that it would not be sold without any change to this configuration.

However, even if the model of the goods has been completed, it is considered normal that some modifications to make the configuration of goods appropriate for mass-production would be required in selling them and thus the fact that there is room for such modifications ex-post facto does not affect the result that said model has reached the stage of being available for sale.

It may be found extremely easy for a business operator to supply power to an ultrasonic transducer by replacing the uncoated copper wire of Appellants' Humidifier 1 as mentioned above with a coated cord line or the like. Since the copper wire connected to the tip of an external USB cable is dragged inside the cap part in Appellants' Humidifier 1 (Exhibit Ko 24), replacement for commercialization is only required for the part between this copper wire and the ultrasonic transducer. Moreover, in light of the mode of supplying power used in Appellants' Humidifier 3, which was actually offered commercially, it is found that the relevant structure has been replaced with a simple structure wherein the USB cable itself is led inside the cap part from the small opening thereof and is connected to the ultrasonic transducer through the cable protection part fit with the notch established in the core cylinder (Exhibit Otsu B4 and the entire import of the oral argument) and thus it is obvious that the mode of supplying power can also be easily replaced in such a manner in Appellants' Humidifier 1. As such, the fact that power is supplied by an uncoated copper wire in Appellants' Humidifier 1 does impede the finding that Appellants' Humidifier 1 has reached the stage of being available for sale.

Based on the abovementioned findings, Appellants' Humidifier 1 can be found to fall under the category of "another person's goods."

(3) Regarding Appellants' Humidifier 2

Except for the differences found between Appellants' Humidifier 2 and Appellants' Humidifier 1, such that the overall length of the former is slightly shorter than that of the latter and the cylinder part of the former is a little broader than that of the latter, Appellants' Humidifier 2 has the same configuration as that of Appellant's Humidifier 1. Thus, as long as Appellants' Humidifier 1, which has a substantially identical configuration with that of Appellant's Humidifier 2, falls under the category of "another person's goods," it stands to reason that Appellants' Humidifier 2, which was developed after Appellants' Humidifier 1 and displayed at an international trade fair, has formally and apparently reached the state of being available for sale.

Therefore, it can be found that Appellants' Humidifier 2 falls under the category of "another

person's goods."

(4) Regarding the appellee's allegation

The appellee makes the following allegations: [i] Appellants' Humidifiers 1 and 2 are unfinished goods and specific developments for commercializing them are yet to be started; and [ii] the method to supply power has not been fixed in Appellants' Humidifiers 1 and 2 and thus they cannot be sold as goods in the first place.

However, as explained in (2) above, even if Appellants' Humidifiers 1 and 2 were not intended to be sold without changing their configurations and the specific shape of the power supply part had to be modified, it can be found that their commercialization had been completed; they cannot be regarded as unfinished goods. Even if there was room for future changes to the specific means of power supply, Appellants' Humidifiers 1 and 2 themselves have been fixed as those wherein external power will be drawn based on the actual configuration.

In addition, in July 2012, Appellant X_1 returned the following e-mail to P, who was in charge of purchasing goods at StylingLife engaged in the business of managing, etc. variety stores ("P"), in response to an inquiry from P asking the specific schedule for commercializing Appellants' Humidifier 2. (Exhibit Ko 7)

"The specific schedule for commercializing 'Stick Humidifier' is yet to be fixed. Although we have received some proposals from manufacturers to commercialize it, we haven't found any partner who can share our understanding and thus its development is slightly postponed right now. Yet, as we have received a number of inquiries for purchase and buying, we are willing to complete its development with no further delay."

It is obvious that the term "commercialize" stated above means mass-production while the term "development" can be construed to mean the design change according to such mass-production. Thus, the abovementioned statements cannot be construed as meaning that Appellants' Humidifier 2 or 1 was unfinished and was not in a state of being available for sale. Even if there was room for further modifications according to the sales partners or the product developer had any intention to make such modifications with respect to goods for which commercialization had once been completed, the goods would not be retroactively regarded as those for which commercialization is yet to be completed. The contents of the abovementioned e-mail do not serve as the basis to find that Appellants' Humidifier 1 was yet to be commercialized.

The other allegations made by the appellee cannot be accepted in light of the findings and determinations made in (1) and (2) above.

(5) Summary

As found above, both Appellants' Humidifiers 1 and 2 fall under the category of "another

person's goods."

2. Regarding issue (1)B (whether or not the configuration was imitated)

(1) Regarding the substantial identity

A. Regarding the internal construction

Article 2, paragraph (4) of the Unfair Competition Prevention Act provides that the term "configuration of goods" means "the external and internal shape of goods […] which can be perceived through the human senses by consumers when they use the goods in an ordinary way." Thus, the internal shape of goods does not constitute the configuration of goods unless it can be perceived through the human senses by consumers when they use the goods in an ordinary way. Considering the Appellee's Products and Appellants' Humidifier 1, their structures are as stated in Attachment 2 of this judgment "List of the Structure of the Appellee's Products" and Attachment 4 of this judgment "List of the Structure of Appellants' Humidifier 1," respectively. The internal shape is physically visible if upper main body 3' is removed from core main body 2' in the Appellee's Products and if cap 3 is removed from main body 2 in the case of Appellants' Humidifier 1. However, this act of removal is found to be conducted for the purpose of replacing filter 35' in the case of the Appellee's Products and water absorbing bar 35 in the case of Appellants' Humidifier 1. The frequency of replacement is once or less in six months in the case of the Appellee's Products (Exhibit Ko 8-3) and such frequency is presumed to be of a similar level in the case of Appellants' Humidifier 1. Moreover, it is hard to find that consumers would be motivated to purchase humidifiers by focusing on the internal construction thereof.

As such, it is appropriate to find that the internal construction of the Appellee's Products and Appellants' Humidifier 1 as well as the specific structure regarding how consumers would deal with the internal construction would not be included in the "configuration of goods" under Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act.

B. Regarding Appellants' Humidifier 1

(A) Identification of the configuration

Based on the determination stated in A. above, the following common features can be found in the external shapes of the Appellee's Products and Appellants' Humidifier 1 as a result of the comparison thereof.

[Common features]

A" A stick shaped humidifier which is used by being put in a glass filled with water, wherein a cylindrical main body is connected to the upper side of the semispherical bottom part, a cylindrical cap part is connected to the upper side of a ring-shaped part, the upper end of the cap part is flanged, an atomizing port is open on the upper surface of the cap part and an ultrasonic transducer is arranged in the atomizing port.

B" A vertically long water inlet to take water inside the humidifier is established at a position

near to the lower end of the main body.

D" The main body is considerably longer than the cap part.

E" The humidifier has a long and thin cylindrical shape.

F" The water inlet consists of a vertically long rectangular.

The following differences are found in the external shapes of the two humidifiers.

[Differences]

A"' i. With respect to the relation between the bottom part and the main body, while two separate bodies, i.e. bottom part 1' and central main body 2', are connected in the Appellee's Product, the two parts are connected integrally in Appellants' Humidifier 1.

ii. With respect to the structure of the upper surface of the cap part, while such upper surface is formed with a circular ring shaped switch button 23' being fit in the Appellee's Product, a cone-shaped concave portion 8 is formed in Appellants' Humidifier 1.

C"' With respect to electric supply, while micro USB charging female terminal 44' is established (USB code is connected to this part) in the Appellee's Products, bare copper wire 20 is derived from the upper edge part of ring-shaped part 5 in Appellants' Humidifier 1.

D"' While the specific numerical value of the ratio of the length of the cap part to that of the main body is about 1:3.4 in the Appellee's Products, it is about 1:3.8 in Appellants' Humidifier 1.

E"' While the specific numerical value of the ratio of the diameter of the main body to the length from the cap part to the lower end of the main body is about 1:5.5 in the Appellee's Products, it is about 1:6.7 in Appellants' Humidifier 1.

F"' With respect to the shape of the vertically long rectangular water inlet, while only the upper end is shaped as a semicircle and the vertical to horizontal ratio is about 10:1 in the Appellee's Products, both the upper end and lower end are shaped as a semicircle and the vertical to horizontal ratio is about 8.3:1 in Appellants' Humidifier 1.

(B) Determination of substantial identity

With respect to the determination on whether or not the Appellee's Products and Appellants' Humidifier 1 are identical based on the findings made in (A) above, it is immediately obvious that the two products completely share the overall impression. In addition, all of the differences mentioned in A"'i. and ii., C"' and F"' above are not parts that would be focused on by consumers and their degree of difference is not so large, and thus such differences should be regarded as a slight design difference (the Appellee's Products are also used by being connected to a USB code and thus, the difference at the time of use is whether an uncoated code or a bare copper wire is used).

On the other hand, both the Appellee's Products and Appellants' Humidifier 1 have a simple design modeled after a test tube. Their beauty solely depends on the specific position at which

the ring-shaped part is arranged and the specific ratio of the length from the upper end to the lower end to the diameter of the cylindrical part, and these points affect the determination on whether or not the two products are identical.

Examining these points with respect to the Appellee's Products and Appellants' Humidifier 1, it is difficult to tell the difference between the two products with respect to the position of the ring-shaped part, but a difference can be perceived in that the ring-shaped part has a rather slim shape as a whole in Appellants' Humidifier 1 while such part has a rather waistless shape in the Appellee's Products.

However, the impression of the characteristic parts of the two products such that they are humidifiers having a shape modeled after a test tube, which are found as the common features between the Appellee's Products and Appellants' Humidifier 1, is extremely strong and under the influence of such impression, such difference in the constituent ratio as the abovementioned differences is found to be almost eliminated from their impressions and thus it is difficult to find that the Appellee's Products and Appellants' Humidifier 1 have different configurations.

As such, the Appellee's Products and Appellants' Humidifier 1 should be considered to have a substantially identical configuration.

C. Appellants' Humidifier 2

The shape of Appellants' Humidifier 2 has an external shape identical with that of Appellants' Humidifier 1 except for the differences between the two products such that the overall length of the former is slightly shorter than that of the latter and that the cylindrical part of the former is a little broader than that of the latter. Thus, if Appellants' Humidifier 1 has a configuration substantially identical with that of the Appellee's Products, it is obvious that Appellants' Humidifier 2, which has a configuration more similar to that of the Appellee's Products, has a configuration substantially identical with that of the Appellee's Products.

D. Regarding the appellee's allegations

The appellee alleges that the difference in the electrical power source part has a decisive impact on the determination on the identity.

However, as found above, since Appellants' Humidifier 1 uses an external power source, no difference can be found between Appellants' Humidifier 1 and the Appellee's Products in this regard. Moreover, in both products, the place where power is supplied is the same, i.e. the ring-shaped part, and there are no circumstances to deem that consumers would focus on the structure of the power supply means of a humidifier. As such, the difference in the power source part of the two products is nothing but a mere slight design difference in the accessory part, and thus the abovementioned appellee's allegation cannot be accepted.

The other allegations made by the appellee cannot be accepted as found and determined in A. through C. above.

E. Summary

Based on the abovementioned findings, it should be found that the Appellee's Products and Appellants' Humidifier 1 or Appellants' Humidifier 2 have a substantially identical configuration.

(2) Regarding the dependence

As found and determined in (1) above, the Appellee's Products and Appellants' Humidifier 1 or Appellants' Humidifier 2 have a substantially identical configuration. As long as the fact that the two products have such an identical configuration, including the manner of arrangement of the ring-shaped part and making such part the power supply part, is not a selection of an indispensable configuration to secure the function of a product, a mere coincidental match would not be a reasonable explanation. Moreover, both Appellants' Humidifiers 1 and 2 had been displayed at an international exhibition or international trade fair prior to the import of the Appellee's Products while the picture of Appellants' Humidifier 2, in other words, a picture showing the configuration substantially identical with that of Appellants' Humidifier 1 was published on the appellants' website; many persons including foreigners could easily know the configuration of Appellants' Humidifier 1 or 2.

As such, it can be presumed that the Appellee's Products were created based on the configuration of Appellants' Humidifier 1 or the configuration of Appellants' Humidifier 2, which is substantially identical with that of Appellants' Humidifier 1.

Even if dependence is affirmed on the grounds that there is room for choice of the configuration of goods, the copyrightability of the goods cannot be affirmed by rights since there is so much room for choice to exert personality (mentioned below). This is because the choice made in the former case includes the choice of a common configuration which would not leave any room to exert personality.

(3) Summary

Based on the abovementioned findings, the Appellee's Products are found to have been created by imitating either Appellants' Humidifier 1 or Appellants' Humidifier 2 or both.

3. Regarding issue (1)C. (whether or not the term of protection has terminated)

(1) Findings

Under the Unfair Competition Prevention Act, it is prescribed that the act of assigning, etc. "goods for which three years have elapsed since the date they were first sold in Japan" does not fall under the act of imitation of configuration and thereby fixes the end of the term of protection of "another person's goods" (Article 19, paragraph (1), item (v)(b) of said Act).

The intent of this provision can be found as follows: The provision prescribing imitation of configuration provides the predecessor developer with an opportunity to collect the invested capital while prohibiting the assignment, etc. of imitations regardless of the creative value of the

configuration of goods. Thus, if the term of prohibition continues over a long period of time, the purpose of establishing stringent protection requirements in intellectual property laws concerning intellectual creations could be lost. Moreover, the subsequent developers' motivation to develop the same kind of goods would be excessively suppressed. Thus, the term of protection was defined as the period in which the predecessor developer can finish collecting the invested capital and gain normally expectable profits by achieving a balance between the developers.

In light of the intent of defining the end of the term of protection as mentioned above, it is appropriate to find that the term of protection starts when it becomes formally apparent that the development and commercialization of the product have been completed and the product has reached the stage of being available for sale. This is because the predecessor developer would be able to start collecting the invested capital from this point of time.

Moreover, the term "another person's goods" means the first goods which were furnished with the configuration of goods requiring protection but not subsequent goods with slight changes that are furnished with such configuration of goods. As such, since Appellants' Humidifier 1 was developed and commercialized ahead of Appellants' Humidifier 2 and Appellants' Humidifier 1 and Appellants' Humidifier 2 are goods with substantially identical shape, the term of protection should be calculated based on Appellants' Humidifier 1.

Examining this issue based on the abovementioned premise, as explained in 1.(2) above, goods displayed at a goods exhibition are products for which it has formally become apparent that their development and commercialization have been completed and they have reached the stage of being available for sale, unless there are any special circumstances. Thus, it is appropriate to find that the term of protection started on November 1, 2011, the time when the appellants displayed Appellants' Humidifier 1 at a goods exhibition, and there is not sufficient evidence to find the abovementioned special circumstances.

Accordingly, the terms of protection of the configurations of Appellants' Humidifiers 1 and 2 have terminated by the passage of November 1, 2014, which is prior to the date of conclusion of oral argument of this case.

(2) Regarding the appellants' allegations

The appellants allege that the phrase "the date they were first sold" as referred to in Article 19, paragraph (1), item (v)(a) of the Unfair Competition Prevention Act means the day on which the relevant product was put on the market as goods and thus the term of protection ends on the date on which three years have passed from January 5, 2015, which is the date on which the sale of Appellants' Humidifier 3 was commenced.

However, in light of the import of the provision and intent of the legislators, it is obvious that the phrase "the date they were first sold" mentioned above includes not only the case where

the relevant product was actually sold as goods but also the time when the advertising activities for the product such as displaying the goods at trade fairs were started, and thus it is appropriate to construe that the time when it has become formally apparent that the goods have become available for sale would also be included. If such construction is not made, when the goods have become available for sale but the commencement of the actual sale is delayed, the person who developed and commercialized such goods will be able to enjoy a term of protection substantially exceeding three years. However, this situation does not meet the purport of stipulating imitation of configuration as an act of unfair competition while limiting the term of protection to three years to seek balance with intellectual property laws concerning intellectual creations and to arrange conflicts of interest between the predecessor developer and subsequent developers. Therefore, the appellants' allegation mentioned above cannot be accepted.

(3) Summary

As described above, the term of protection has terminated by the passage of November 1, 2014.

4. Regarding issue (1)D (whether or not good faith and no gross-negligence can be found) and issue (3)A (whether or not negligence can be found on the part of the appellee)

According to the determinations made in 3. above, the appellants' claim for an injunction based on violation of the Unfair Competition Prevention Act lacks legal basis due to the termination of the term of protection. However, as stated in 1. and 2. above, the Appellee's Products have been created by imitating the configuration of Appellants' Humidifier 1 or 2 and thus the appellee's act of importing the Appellee' Products constitutes violation of the Unfair Competition Prevention Act. Thus, in the following parts, this court will collectively examine issues (1)D and (3)A to determine whether or not the appellants' claim for damages based on violation of the Unfair Competition Prevention Act is appropriate.

(1) Facts found

The undisputed facts as well as the facts found from the evidence mentioned below and the entire import of the oral argument are as follows.

i. The abovementioned person P, who was in charge of purchasing goods at StylingLife engaged in the business of managing, etc. variety stores, looked around both the "TOKYO DESIGNERS WEEK 2011" held in November 2011 as stated in section 2(3)i. of No. 2 above and "Interior Lifestyle Tokyo 2012" held in June 2012 as stated in section 2(3)ii. of No. 2 above. (Exhibit Otsu B1)

ii. On July 12, 2012, P contacted the appellants regarding the specific date for commercializing Appellants' Humidifier 2 by an e-mail attaching a picture of Appellants' Humidifier 2 obtained from the appellants' website. In response to this, on the immediately following day, i.e. 13th of the same month, Appellant X_1 returned an e-mail stating that the specific date for

commercialization is yet to be fixed. On the 17th of the same month, P returned an e-mail asking the appellants to tell him/her when they have decided to commercialize it. (Exhibit Ko 7)

iii. Around April 2013, StylingLife received a proposal concerning the autumn and winter goods for FY2013 from the appellee. Among the humidifiers included in such goods, the Appellee's Products were also included as a stick type humidifier. Q, who was the responsible personnel of the appellee ("Q"), and R, who was the replacement for P ("R"), made negotiations on the purchase of goods covered in the proposal. On this occasion, as R had received a warning about imitations from another business operator in advance with respect to the doughnut-shaped humidifier among the proposed humidifiers, R requested Q to confirm the relations of rights in June of the same year, on the grounds that the doughnut-shaped humidifier is suspected of being an imitation. However, as a clear answer could not be obtained from Q, R decided not to purchase it. Meanwhile, as R received no handoff from P regarding Appellants' Humidifier 2 nor did he/she have any knowledge on the existence thereof, he/she decided to purchase the Appellee's Products. (Exhibits Otsu B2, 3, 5, 11-1 and 11-2 and 12 through 14, witness R of this instance)

iv. Since July 2012 at the latest, the picture of Appellants' Humidifier 2 has been published on the appellants' website (ii. above and Exhibits Ko 1-1, 1-2 and 23-3).

(2) Regarding the appellee's negligence

As found in (1) above, as P, who was the responsible personnel of StylingLife, not only actually knew the existence of Appellants' Humidifier 2 but was also willing to sell it, it is obvious that Q, who is considered to be in a similar status and position as the person in the same trade with P (Q is nothing less than the business partner of R, who is the replacement for P), could have easily come to know at least the existence of Appellants' Humidifier 2 or the fact that the appellants had displayed the works they produced at goods exhibitions (Exhibit Ko 1-1 and Exhibit Otsu B3) by searching or inspecting the appellants' website. Beyond that, as found above, Q had been informed by R that some of the goods of the same kind that he/she proposed simultaneously with the Appellee's Products are suspected of being imitations, and thus Q should have presumed the specific possibility that there may be imitations in other goods that had been simultaneously introduced by a local company in China.

Moreover, since Appellants' Humidifiers 1 and 2 are substantially identical, if Appellants' Humidifier 2 and the Appellee's Products were compared, Q could have immediately come to know facts equivalent to the following: [i] that the Appellee's Products had been created by imitating the configuration of Appellants' Humidifier 2; and [ii] that the Appellee's Products had been created by imitating the configuration of Appellants' Humidifier 1.

Therefore, negligence can be found on the part of the appellee.

(3) Regarding good faith and no gross negligence

In order to allege that the act of imitating configurations under Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act does not constitute an act of unfair competition based on the grounds under Article 19, paragraph (1), item (v)(b) of said Act, the infringer must make allegations or show proof, as the grounds prescribed in Article 19, paragraph (1), item (v)(b) of said Act, that he/she was in good faith and is free of gross negligence with respect to the fact that the relevant goods were created by imitating the configuration of another person's goods, at the time of accepting them.

The appellee alleges that good faith and no gross negligence can be found on the part of the appellee since Appellants Humidifiers 1 and 2 were not distributed in the market.

However, as found in (2) above, there was a person in the same trade who actually knew the configuration of Appellants' Humidifier 1 or 2 and thus it can be found that the appellee could have easily come to know the configuration of Appellants' Humidifier 1 or 2. Therefore, the fact that Appellants' Humidifier 1 or 2 was not distributed in the market is insufficient to serve as the circumstances to support the appellee's good faith and no gross negligence. In addition, the appellee has made no allegations nor has it shown any proof regarding the facts that support its good faith and no gross negligence, such as the specific circumstances at the time of importing the Appellee's Products or whether or not the appellee itself conducted any market research for goods. Thus, there is no sufficient evidence to find that the appellee was in good faith and was free of gross negligence at the time it imported the Appellee's Products.

Accordingly, the appellee's allegation regarding good faith and no gross negligence cannot be accepted.

5. Regarding issue (2) A (whether or not copyrightability can be found in Appellants' Humidifiers 1 and 2)

According to the findings made in 3. above, the appellants' claim for an injunction based on violation of the Unfair Competition Prevention Act lacks legal basis. Thus, this court will examine their claim for an injunction based on copyrights, which is an alternative joint claim made in relation to the first-mentioned claim.

(1) Regarding applied arts and copyrightability

Article 2, paragraph (1), item (i) of the Copyright Act prescribes the meaning of work as "a production in which thoughts or sentiments are creatively expressed and which falls within the literary, academic, artistic or musical domain." The phrase "creatively expressed" is construed to mean that the relevant expression is not required to have originality in a strict sense but is one in which some kind of personality of the author is exerted.

Since the appellants allege that Appellants' Humidifiers 1 and 2 are copyrightable based on the premise that they are offered for practical use of humidification (Article 10, paragraph (1), item (iv) of the Copyright Act), the copyrightability of what is generally called applied arts

come into question in this case.

Under the Copyright Act, productions which are solely offered for practical use such as architecture (Article 10, paragraph (1), item (v) of said Act), maps and other diagrammatic works of an academic nature (item (vi) of said paragraph), computer programming (item (ix) of said paragraph) and databases (Article 12-2 of said Act) are explicitly listed as items that can be regarded as works. Thus, no direct connection can be found between the fact that the relevant production is offered for practical use per se and whether or not the relevant production is copyrightable. Therefore, it is difficult to find reasonable grounds to treat applied arts differently due to their practical utility. Moreover, as there are variations in applied arts while the mode of expression thereof also has variety, the way of exerting the author's personality can also be considered to be individual and specific.

As such, as long as whether or not applied arts fall under the category of "artistic works" (Article 10, paragraph (1), item (iv) of the Copyright Act) comes into question, in order to affirm that they are copyrightable, even if the applied art per se must have aesthetic characteristics of a sufficient level to become the subject of aesthetic appreciation, it cannot be found appropriate to uniformly establish a standard to determine whether or not the relevant applied art has a high level of creativity such as the possession of a high level of aesthetic characteristics. It should be construed that only applied arts that fulfill the requirements of copyrightability prescribed in Article 2, paragraph (1), item (i) of the Copyright Act should be protected as works.

Yet, since applied arts are offered for practical use or created for the purpose of industrial application, they must achieve a certain function that meets the practical use or purpose of industrial application while having aesthetic characteristics, and the expression used therein must fall within the scope wherein such function can be fulfilled. Since the expression to be used in applied arts would be subject to such constraint, the room for choice in which the author's originality will be exerted will be limited. Therefore, applied arts have less room to be found copyrightable as those having creativity than other production of expression which are not subject to the abovementioned constraint and even if they are found to be copyrightable, the scope of protection of the copyright thereof is assumed to be limited to a comparatively narrow level. As such, even if the standard to determine the existence or absence of high level of creativity is not established for affirming copyrightability of applied arts as artistic works, it is difficult to construe that the purpose of another intellectual property system will be ignored or it will result in imposing excess constraints on social lives.

Moreover, the Copyright Act protects expressions but not the ideas per se and thus even if the idea simply has originality, if such idea is not embodied with originality in its expression, it cannot be found that personality has been exerted. This understanding applies by rights to the

examination of the copyrightability of applied arts.

Based on the abovementioned findings, this court will determine the copyrightability of Appellants' Humidifiers 1 and 2.

(2) Regarding the copyrightability

A. Examination

The configuration of Appellants' Humidifier 1 is as stated in Attachment 4 of this judgment "List of the Structure of Appellants' Humidifier 1" and Appellants' Humidifier 2 is substantially identical with Appellants' Humidifier 1 as stated above, and thus the two products can be regarded as being substantially identical in examining their copyrightability.

Appellants' Humidifier 1 is a humidifier created in the shape of a test tube-like stick (in addition, the lower end is shaped semispherically while a flange part is formed on the upper end) wherein a water inlet is established at a position near the lower end of the main body while having vapors blow out from the atomizing port arranged on the upper end of the cap. In addition, it has been created to reproduce the situation where vapors are blowing out from a test tube put in a beaker by putting the humidifier in a glass in its use. In light of this standpoint, ring-shaped part 5 can be understood as reproducing the upper surface of the liquid put in the test tube and such structure itself can be considered to form an external appearance which could never be found in conventional humidifiers. However, as stated above, the Copyright Act protects expressions but not ideas and thus unless personality is exerted in its expression, the relevant production cannot be found to fall under the category of works. Creating the humidifier to reproduce the situation where vapors are blowing out from a test tube put in a beaker is a mere idea and even if the idea itself is original, it is not covered by the protection under the Copyright Act. Moreover, if one intends to produce a humidifier reproducing the situation where vapors are blowing out from a test tube put in a beaker, the humidifier would almost naturally have an overall shape as that of Appellants' Humidifier 1 and the humidifier so created is nothing but an embodiment of the idea without any change. The specific shape of Appellants' Humidifier 1, in other words, the ratio of the length of cap 3 to that of the main body (upper surface of the liquid inside the test tube) and the ratio of the diameter of main body 2 to the length from the upper end of cap 3 to the lower end of main body 2 (size of the test tube), has mimicked the normal configuration of test tubes and is a common configuration as with the case of test tubes previously known. Moreover, the specific ratio of the length to the size mentioned above is nothing but an appropriate selection made from existing test tubes and cannot be found to be one in which personality is exerted.

Therefore, copyrightability can only be examined with respect to the following points which are other than the abovementioned structures: [i] use of ring-shaped part 5; [ii] the shape of water inlet 6; and [iii] the shape of the part around atomizing port 7. However, all of them are

commonplace expressions or shapes and it cannot go so far as to say that the author's personality is exerted therein and the same findings can also be made with respect to the other parts.

Accordingly, Appellants' Humidifiers 1 and 2 cannot be found to be productions in which the author's personality is exerted as prescribed in the Copyright Act.

B. Regarding the appellants' allegation

The appellants allege that the author's personality is especially exerted in the following points with respect to Appellants' Humidifiers 1 and 2: [i] they are portable humidifiers created in the shape of a test tube-like stick and used by being put in a glass, etc. wherein the lower end is structured in a semispherical shape while the central part above it is formed in a cylindrical shape and a flange part is formed on the upper end: and [ii] ring-shaped part is incorporated into a part slightly lower than the uppermost part and the part above this ring-shaped part is made removable.

However, the part above ring-shaped part 5 (cap 3) is presumed to have been made removable to replace water absorbing bar 35. In order to replace water absorbing bar 35, any of the part must be removable and thus the structure of making cap 3 removable is only a structure necessary to fulfill the function as a humidifier. Moreover, selecting cap 3 as the removable part is nothing but a selection of an extremely typical part and there is no room to exert the author's personality in any way.

The points other than the point that the part above ring-shaped part 5 is made removable are as explained in A. above.

Therefore, the abovementioned appellants' allegation cannot be accepted.

(3) Summary

Based on the abovementioned findings, Appellants' Humidifiers 1 and 2 cannot be found to fall under the category of works without the need to examine whether or not they have aesthetic characteristics.

6. Regarding issue (3)B (the amount of damages sustained by the appellants)

According to the findings made in 1., 2. and 4. above, the appellants have the right to claim damages against the appellee based on violation of the Unfair Competition Prevention Act. Thus, this court will calculate the amount of damages in the following parts.

(1) Lost profits

There are no disputes between the parties with respect to the facts that the Appellee's Products imported by the appellee were sold at the retail price of 1,900 yen per one product and that 16,739 pieces of them were sold. In addition, as stated in section 2(5)iii. of No. 2 above, the Appellee's Products were imported in September and November of 2013, which is before November 1, 2014, the date on which the term of protection for the Appellants' Humidifiers 1

and 2 ended (as long as the import of the goods per se is an act of infringement, the time when the goods were sold do not affect the calculation of the amount of damages).

In light of the various circumstances that became apparent from the evidence submitted in this case, the appropriate royalty rate for the configuration of Appellants' Humidifiers 1 and 2 cannot be found to fall below 5%, which is the rate alleged by the appellants. The appellee alleges that the appropriate royalty rate is 1% but no particular characteristics can be found in the internal construction, etc. of the Appellee's Products while it may be found that consumers will mainly focus on the shape of the external appearance and thus, the configuration of the Appellee's Products can be found to have contributed for a certain degree to the formation of the consumers' willingness to purchase the Appellee's Products. As such, the appropriate royalty rate will not fall below 5%, which is the rate alleged by the appellants.

Based on the abovementioned findings, it is appropriate to calculate the lost profits sustained by the appellants based on the retail price, which is found to be the objective value of the Appellee's Products, and to find the amount of such lost profits to be 1,590,000 yen as shown in the following formula (Article 5, paragraph (3), item (ii) of the Unfair Competition Prevention Act).

1,900 yen×16,739 units×5%≒1,590,000 yen

(2) Attorney's fee

Taking into consideration the various circumstances including the contents and difficulty level of the case, developments in the proceedings and the amount upheld in this action, the appropriate amount of attorney's fee is found to be 300,000 yen in total for the appellants.

(3) Summary

Based on the abovementioned findings, the amount of damages to be paid by the appellee to the appellants shall be 945,000 yen each based on the proration by the share in the rights and interests held by the appellants with respect to Appellants' Humidifiers 1 and 2 as shown in the following formula.

(1,590,000 yen ÷2)+(300,000 yen÷2)=795,000 yen + 150,000 yen = 945,000 yen

7. Overall summary

Based on the abovementioned findings, the following determinations can be made: [i] the appellants' claims for an injunction and destruction based on violation of the Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act (imitation of configurations) lack legal basis since the term of protection has terminated; [ii] thus, the appellants' claim for an injunction based on the Copyright Act, which is an alternative joint claim made in relation to the claimed mentioned in [i] above, also lacks legal basis without the need to make determination on other points since both Appellants' Humidifiers 1 and 2 cannot be found to fall under the category of works; [iii] with respect to the appellants' claims based on tort, the claim for

damages based on tort of violation of the Unfair Competition Prevention Act is well-grounded to the extent of seeking payment of 945,000 yen each and delay damages accrued thereon at the rate of 5% per annum as prescribed in the Civil Code for the period from March 24, 2015, which is the day after the day on which tort was conducted and which is the day immediately following the day on which the complaint was served, to the completion of payment, but the other parts lack legal basis; and [iv] the claim for damages based on tort of infringement under the Copyright Act, which is an alternative joint claim made in relation to the claim mentioned in [iii] above, lacks legal basis for the parts that go beyond the abovementioned amount of damages.

8. Regarding the resumption of the oral argument

On September 27, 2016, which is the day after the conclusion of the oral argument (7th of the same month), the appellee requested the resumption of the oral argument to submit documentary evidence that proves the following facts: [i] the number of pieces of the Appellee's Products which were continuously sold on and after February 5, 2014, which is the day on which the appellee was required to suspend the sale of the Appellee's Products by the appellants in a written notice; and [ii] the fact that the appellee sold the Appellee's Products at a reduced price and the selling price thereof.

The abovementioned documentary evidence is related to the matters which were required to be clarified by this court in the first oral argument held in the appeal instance (May 18, 2016) and thus it is an allegation or defense advanced out of time and causes a delay in the conclusion of the suit. Therefore, at least the appellee's gross negligence can be presumed and such documentary evidence should be dismissed at any rate. As such, there are no needs for resumption of the oral argument for this case.

No. 5 Conclusion

Accordingly, the judgment in prior instance which dismissed all of the appellants' claims shall be modified and the judgment shall be rendered in the form of the main text.

Intellectual Property High Court, Second Division

Presiding judge: SHIMIZU Misao

Judge: NAKAMURA Kyo

Judge: MORIOKA Reiko

(Attachment 1 of the Judgment for Case No. 2016 (Ne) 10018)

List of the Appellee's Products

STICK HUMIDIFIER

A test tube-like humidifier shown in the following picture and a humidifier having the same shape.

End

(Attachment 2 of the Judgment for Case No. 2016 (Ne) 10018)

List of the Structure of the Appellee's Products

a. A stick-shaped humidifier used by being put in a glass filled with water, whose overall structure is comprised of bottom part 1', core main body 2' and upper main body 3' wherein bottom 1' is formed by integrating the semispherical-shaped part in the lower end and the cylindrical part extended thereto, central main body 2' is formed in a vertically long cylindrical shape connected to the upper side of bottom part 1', upper main body 3' is assembled in a removable manner by being fit to the upper side of core main body 2', upper circular ring part 5' and upper cylindrical part 43' are sequentially formed in the upper end direction, ring-shaped disc part 4' that expands is formed on the upper end of upper cylindrical part 43' and circular ring-shaped switch button 23' is formed by being fit inside ring-shaped disc part 4'.

b. A vertically long water inlet 6' to take water inside the humidifier is established at the lower end of core main body 2', ultrasonic transducer 47' is established in atomizing port 7' located inside switch button 23' and water taken inside from water inlet 6' is changed into vapor and blown out from atomizing port 7' arranged on the upper end of upper main body 3'.

c. Micro USB charging female terminal 44' to supply power to ultrasonic transducer 47' is established at a position slightly lower than the upper end of upper cylindrical part 43'.

d. The ratio of the length of upper main body 3' (about 2.9cm) to the length of bottom part 1' and central main body 2' (about 9.8cm) is about 1:3.4.

e. The ratio of the diameter of core main body 2' (2.4cm) to the length from the upper end of upper main body 3' to the lower end of bottom part 1' (13.3cm) is about 1:5.5.

f. Water inlet 6' consists of a shape wherein the vertically long rectangular upper end is shaped as a semicircle and the vertical (3.0cm) to horizontal (0.3cm) ratio is about 10:1.

g. The interior of central main body 2' is watertightly divided in the longitudinal direction into wiring space 38' and water supply space 39' wherein water supply space 39' contains filter case 40' in which filter 35' is stored and core cylinder 34' in which downwardly protruding part 41' is established while wiring space 38' supplies the power supplied from female terminal 44' to voltage circuit 24' containing the power transformer established inside bottom part 1' and further to ultrasonic transducer 47'.

End

(Attachment 3 of the Judgment for Case No. 2016 (Ne) 10018)

List of the Appellants' Humidifier

1. A test tube-like humidifier shown in the following picture (excluding the glass)

End

(Attachment 3 of the Judgment for Case No. 2016 (Ne) 10018)

List of the Appellants' Humidifiers

2. The test tube-like humidifiers shown in the following pictures (excluding the glasses)

End

(Attachment 3 of the Judgment for Case No. 2016 (Ne) 10018)

List of the Appellants' Humidifier

3. A test tube like-humidifier shown in the following picture (including the cord and plug)

End

(Attachment 4 of the Judgment for Case No. 2016 (Ne) 10018)

List of the Structure of Appellants' Humidifier 1

A. A stick-shaped humidifier used by being put in a glass filled with water, whose overall structure is comprised of bottom part 1, main body 2, cap 3 and ring-shaped part 5 wherein bottom part 1 is shaped semispherically, main body 2 has a cylindrical shape integrally and consecutively installed on the upper side of bottom part 1, cap 3 is assembled in a removable manner by being fit into the upper side of main body 2 and is shaped cylindrically having flange part 4 that expands in the circumferential direction on the upper end, cone-shaped concave part 8 is formed on the upper end surface of cap 3, atomizing port 7 is open at the bottom of said concave part 8, flange part 4 and cone-shaped concave part 8 are formed integrally with circumferential surface 9 of cap 3 and ring-shaped part 5 is arranged between the circumference of main body 2 and that of cap 3.

B. A vertically long water inlet 6 to take water inside the humidifier is established at a position near the lower end of main body 2, ultrasonic transducer 47 is established in atomizing port 7 of cap 3, and water taken inside the humidifier from water inlet 6 is changed into vapor and blown out from atomizing port 7 of cap 3.

C. Bare copper wire 20 to supply power to ultrasonic transducer 47 is derived from the upper edge part of ring-shaped part 5.

D. The ratio of the length of cap 3 (about 3.0cm) to the length of main body 2 (about 11.4cm) is about 1:3.8.

E. The ratio of the diameter of main body 2 (about 2.2cm) to the length from the upper end of cap 3 to the lower end of main body 2 (about 14.8cm) is about 1:6.7.

F. Water inlet 6 is shaped into a form with a vertically long rectangular upper end and semicircle lower end and the vertical (about 2.5cm) to horizontal (about 0.3cm) ratio is about 8.3:1.

G. Main body 2 is comprised of external cylinder 33 and core cylinder 34 fixed inside said external cylinder 33, wherein core cylinder 34 is protruding from the upper end of external cylinder 33, cap 3 is fit in the protruding part of core cylinder 34 in a insertable and removable manner, cylindrical shaped space 36 formed by core cylinder 34 contains water absorbing bar 35 formed in a cylindrical shape and the upper end surface of water absorbing bar 35 comes into contact with ultrasonic transducer 47 inside cap 3.

End