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| Date | June 21, 2001 | Court | Tokyo High Court |
| Case number | 2000 (Ne) 750 | | 6th Civil Division |
| – A case in which the court determined the meaning of photographic subject in a photographic work and the applicability of the definition of creative expression. | | | |

Reference: Article 2, paragraph (1), item (i) and Article 20 of the Copyright Act
Number of related rights, etc.:

Summary of the Judgment

1. This is a case in which the appellant alleged that the act of Appellee Q, who is a photographer, of taking Photograph Y and the act of Appellee P of publishing it in Catalog Y constitute infringement of the appellant's moral right of author (right to integrity) or copyright (adaptation right) for the photograph in question (the "Photograph") taken by the appellant and demanded payment of damages and publication of an apology based on the appellant's moral right of author (right to integrity) and also demanded suspension of the publication, etc. of the aforementioned catalog and the destruction of the already published copies thereof based on the appellant's moral right of author (right to integrity) or copyright (adaptation right).

In the judgment in prior instance, the court dismissed all of the appellant's claims and thus the appellant filed an appeal.

2. In this judgment, the court mainly held as follows and revoked the judgment in prior instance while upholding the claims for payment of solatium and delay damages and suspension of publication and distribution of copies of the catalog in which Photograph Y is published.

(1) In the case of a photographic work, it is quite possible that a creative expression is made through the photographer's decisions concerning the photographic subject, in other words, the selection, combination, arrangement, etc. of objects and that the creative expression exhibits originality, which should be protected under the Copyright Act. In such case, a determination of similarity between two works should naturally be made in consideration of whether the two works are similar in terms of the creative expression that can be observed in the photographer's decisions themselves concerning the photographic subject. This is because it is obvious that the creativeness of a photographic work should be determined based on what is shown in the photograph as the final product and that such determination should be made not only on what the subject of the photograph is but also on the photographer's decisions such as the choice of the time of shooting, control of exposure, manner of shading, selection of lens, adjustment of shutter speed, and technique of photographic development.

(2) The Photograph was taken indoors and the photographic subject of the Photograph is an artificial combination of watermelons, a basket, ice, blue gradation paper, etc. Therefore, it is quite possible to find the photographer's decisions concerning the photographic subject to be unique.

In light of the facts such that the Photograph and Photograph Y are similar and the artificial expression presented in Photograph Y is extremely different from the photographic style of Appellee Q and that Appellee Q had an opportunity to see the Photograph before taking Photograph Y, it can be found that Appellee Q took Photograph Y with reference to the Photograph.

It can be said that Photograph Y lacks some expressions that exist in the Photograph, changed the Photograph for the worse, or added something meaningless to the Photograph. These differences do not convey any thought or sentiment unique to Appellee Q. It is clear that Appellee Q modified the Photograph and infringed the right to integrity held by the appellant with respect to the Photograph. Furthermore, Appellee Q's series of acts as a whole, namely, the act of depositing the duplicate film (photographic original) of Photograph Y with Appellee P, publishing the photograph in the Catalog Y, and distributing it, should be considered to constitute an act of tort, i.e., intentional infringement of the right to integrity.

Judgment rendered on June 21, 2001
2000 (Ne) 750 Appeal Case of Seeking Injunction, etc. against Infringement of Copyright
(Court of prior instance: Tokyo District Court 1999 (Wa) 8996)
Date of conclusion of oral argument: April 5, 2001

Judgment

Appellant: A
Appellee: B
Appellee: Yugen Kaisha Sapporo Photo Live
Representative Director: C

Main text

1. The judgment in prior instance shall be modified as follows.

Appellee B and Appellee Yugen Kaisha Sapporo Photo Live ("Appellee Sapporo Photo Live") shall jointly pay the appellant one million yen and delay damages accrued thereon at a rate of 5% per annum from November 21, 1998, to the completion of the payment.

Appellee Sapporo Photo Live and Appellee B shall jointly pay the appellant one million yen and delay damages accrued thereon at a rate of 5% per annum from November 21, 1998, to the completion of the payment.

Appellee Sapporo Photo Live shall neither publish nor distribute a catalog titled "Silhouette in Hokkaido" containing the photograph presented in Attached Photograph 2.

Any other claims of the appellant against Appellee B and Appellee Sapporo Photo Live shall be dismissed.

2. The court costs of both the first and second instances shall be divided into three portions, one of which shall be borne by the appellees, while the other two shall be borne by the appellant.

Facts and reasons

No. 1 Judicial decision sought by the parties

1. Appellant

The judgment in prior instance shall be revoked.

The appellees shall jointly pay the appellant five million yen and delay damages accrued thereon at a rate of 5% per annum from November 21, 1998, to the completion of the payment.

The appellees shall publicize the apology presented in Attached Apology 1 on the

conditions specified in Attached Apology 2 in ／＼P／＼NEWS published by the Japan Advertising Photographers' Association.

Appellee Sapporo Photo Live, which published a catalog titled "Silhouette in Hokkaido" (the "appellee's catalog") containing the photograph presented in Attached Photograph 2, shall collect and destroy the already published copies of said catalog.

Appellee Sapporo Photo Live may neither publish nor distribute the appellee's catalog.

The appellees shall bear the court costs for both the first and second instances.

2. Appellees (Each of them)

The appeal shall be dismissed.

The court costs shall be borne by the appellant.

No. 2 Allegations of the parties

This is an appeal instance in which the appellant alleged that the act of Appellee B ("Appellee B") of taking the photograph presented in Attached Photograph 2 (the "appellee's photograph") and the act of Appellee Sapporo Photo Live (the "appellee company") of publishing it in the appellee's catalog constitute infringement of the appellant's moral right of author (right to integrity) or copyright (adaptation right) for the photograph taken by the appellant presented in Attached Photograph 1 (the "Photograph") and demanded payment of damages (solatium) and publication of an apology based on the appellant's moral right of author (right to integrity) and also demanded suspension of the publication, etc. of the aforementioned catalog and the destruction of the already published copies thereof based on the appellant's moral right of author (right to integrity) or copyright (adaptation right).

(omitted)

No. 3 Court decision

The court examined the appellant's claim in this action and found that the appellant's claim is well grounded to the extent that the appellant demanded joint payment of one million yen from the appellees and demanded that the appellee company should suspend the publication and distribution of the catalog prepared by the appellee company and also found that any other claims of the appellant are groundless for the following reasons.

1. Comparison between the Photograph and the appellee's photograph

(1) Photographic works

In the case of a photographic work, if the subject is not particularly unique, as it is in most of the cases where the photographic subject is something that actually exists such as scenery or a person, a creative expression can be made only if the photographer uses a

special technique when taking, developing, or otherwise handling the photograph. Thus, when a determination as to whether two photographic works are similar or not is made, no or almost no attention should be given to the question of whether the two works are similar in terms of any attribute of the photographic subject. In fact, a determination should be made solely from the perspective of whether the two works are similar or not in terms of creative expressions made by the photographer's careful decisions such as the choice of the time of shooting, control of exposure, manner of shading, selection of lens, adjustment of shutter speed, and technique of photographic development.

However, it is quite possible that a creative expression is made through the photographer's decisions concerning the photographic subject, in other words, the selection, combination, arrangement, etc. of objects and that the creative expression exhibits originality, which should be protected under the Copyright Act. In such case, a determination of similarity between two works should naturally be made in consideration of whether the two works are similar in terms of the creative expression that can be observed in the photographer's decisions themselves concerning the photographic subject. This is because it is obvious that the creativeness of a photographic work should be determined based on what is shown in the photograph as the final product and that such determination should be made not only on what the subject of the photograph is but also on the photographer's decisions such as the choice of the time of shooting, control of exposure, manner of shading, selection of lens, adjustment of shutter speed, and technique of photographic development.

As expressed in the Photograph, it is clear that the Photograph was taken indoors and that the photographic subject of the Photograph is an artificial combination of a watermelon, a basket, ice, blue gradation paper, etc. Therefore, it is quite possible to find the photographer's decisions concerning the photographic subject to be unique. This means that it would not be enough to examine the creative expressions made by the photographer's careful decisions such as the choice of the time of shooting, control of exposure, manner of shading, selection of lens, adjustment of shutter speed, and technique of photographic development. It would also be necessary to examine whether any part of the Photograph shows a creative expression made by the photographer's decisions concerning the photographic subject and, if yes, whether the appellee's photograph is identical with the Photograph in terms of such creative expression.

Regarding this point, the appellee company alleged that, in the case of a photograph, no infringement of the moral rights of author or copyright would be found unless an identical copy is created by another person. This is said to be a widely accepted theory in the photography industry. However, the allegation of the appellee company is the same

as saying that the provisions of the Copyright Act should be ignored in the case of a photographic work and is therefore unacceptable. Even if an interpretation similar to the allegation of the appellee company is widely accepted in the photography industry, it would merely be considered to be an example where a wrong interpretation has become widely accepted for some reasons within a certain community and should not be considered to affect the correct interpretation of the Copyright Act.

(2) Expressions presented in the Photograph

According to the evidence (Exhibits Ko 1 to 5, 11, Otsu 1), the Photograph can be described as follows: [i] A halved large, oval watermelon is placed in the middle of the front area in such way that it looks longer horizontally with the cut end surface facing upward; [ii] Under that watermelon, many ice cubes are placed; [iii] On the watermelon, six pieces of watermelon sliced in an approximately triangular shape are placed in a row and tilted toward the right side; [iv] Behind the halved large oval watermelon placed in front, in the area slightly to the left, a large round watermelon is placed, behind which, in the left area, a small round watermelon can be partially seen; [v] Behind the halved large oval watermelon placed in front, in the area slightly to the right, a wicker basket with a handle is placed, containing a small round watermelon and a small oval watermelon that is placed in such way that it looks longer horizontally; [vi] Around the three watermelons in the back, a vine with some leaves and flowers is placed; and [vii] a sheet of blue gradation paper is placed in the background to indicate the blue sky of the summer (mid-summer).

More specifically, it can be found that the circumference of the halved large oval watermelon has V-shaped jagged teeth like sawteeth, that some pieces of watermelon sliced in an approximately triangular shape are placed on those notches in an orderly manner, that efforts were made to make the watermelons look fresh by spraying water all over them to such an extent that water drops were formed on their surfaces and also by lighting the surface of the watermelons from the right front side, and that these watermelons were photographed from a slightly lower angle view.

(3) Expressions presented in the appellee's photograph

(A) The appellee's photograph can be described as follows: [i] A halved large, oval watermelon-like object is placed in the middle of the front area with the cut end surface facing upward; [ii] On that watermelon-like object, six pieces of watermelon sliced in an approximately triangular shape are placed in a row and tilted toward the left side; [iii] Behind the halved large oval watermelon-like object placed in front, a large round watermelon is placed, behind which, in the left area, a small round watermelon is placed; [iv] To the right of the halved large, oval watermelon-like object placed in front, a small

round watermelon is placed, behind which, in the right area, a large oval watermelon-like object is placed on a sieve basket in such way that it looks longer horizontally; [v] From the large round watermelon placed in the middle of the back area toward the watermelon placed in the right front area, a vine with some leaves and flowers is put around these watermelons, [vi] A sheet of blue gradation paper is placed in the background to indicate the blue sky of the summer (mid-summer).

The photographer can be found to have used such shooting techniques as lighting the surface of the watermelons from the left side and choosing a slightly higher angle view to take a photograph of the watermelons.

(B) According to Exhibits Ko 2, 3, 11, Otsu 1, 2, 5, and 6, it can be found that, while the oval watermelon-like object shown in the appellee's photograph has the same oval shape as that of the watermelon shown in the Photograph, its surface doesn't have a stripe pattern unique to watermelons but is entirely dark green, with a white inside. According to Exhibits Otsu 5 and 6, if the surface of the watermelon-like object shown therein is compared with the surface of the winter melon shown in a photograph presented in Exhibit Ko 11 (Photograph No 41. "Winter melon soup of good old days"), the two can be found to be extremely similar in terms of color, shading, and pattern.

When participating in a witness examination session, Appellee B confirmed that the object was a watermelon obtained from a neighbor of his/her parents' house. However, according to Exhibit Otsu 3, Appellee B initially said: "I don't clearly remember because it was long time ago. This could be a winter melon."

Thus, unless there is clear evidence to prove otherwise, the aforementioned watermelon-like object shown in the appellee's photograph should be considered to be a winter melon. None of the evidence submitted to this case can prove otherwise.

Also, based on a comparison with the aforementioned watermelon-like object, it can be presumed that the large oval watermelon-like object in a sieve basket shown in the appellee's photograph is also a winter melon.

(4) Comparison between the Photograph and the appellee's photograph

(A) A comparison between the Photograph and the appellee's photograph reveals that the two photographs are extremely similar in terms of the photographer's decision concerning the subject, more specifically, the selection, combination, and arrangement of the materials.

In other words, the two photographs are identical in terms of the overall composition as follows: a halved large oval watermelon or winter melon is placed in the middle of the front area with the cut end surface facing upward; six pieces of watermelon sliced in an approximately triangular shape are placed in a row and tilted toward either side; a large

round watermelon is placed behind the halved large oval watermelon or winter melon; behind the large, round watermelon, a relatively small round watermelon is placed in the left area; behind the halved large oval watermelon or winter melon, in the right area, a wicker basket or sieve basket is placed, containing an oval watermelon or winter melon placed in such way that it looks longer horizontally; a small watermelon is placed in the right front area of the oval watermelon or the winter melon; a vine with some leaves and flowers is put around the watermelons; and blue gradation paper is placed in the background to indicate the blue sky of the summer (mid-summer).

Also, it is clear that the appellee's photograph is identical with the Photograph in terms of the composition that six pieces of watermelon sliced in an approximately triangular shape are placed in a row and tilted toward either side on a halved large oval watermelon or winter melon placed in the middle of the front area.

(B) On the other hand, the Photograph is different from the appellee's photograph in that, for the halved oval object placed in the central front area, the former photograph shows a watermelon, while the latter shows a winter melon (Difference 1), that the former shows a horizontally-cut half-piece of the aforementioned oval object with a V-shaped jagged edge, while the latter shows a horizontally-cut half-piece with a straight edge (Difference 2), that the former shows thinly sliced pieces of watermelon tilted toward the right side, while the latter shows thinly sliced pieces of watermelon tilted toward the left side (Difference 3), that the former shows ice cubes in the front area, while the latter does not have them (Difference 4), that, behind the aforementioned large oval watermelon or winter melon, in the right area, the former shows a wicker basket containing a small oval watermelon placed in such way that it looks longer horizontally, while the latter shows a sieve basket containing a large oval winter melon placed in such way that it looks longer horizontally (Difference 5), that the former shows a small watermelon in the right front area placed in a wicker basket, while the latter shows such object not contained in a basket (Difference 6), that, regarding lighting, etc., the former uses various techniques to make the watermelons look fresh by spraying water all over them to such an extent that water drops were formed on their surfaces and by lighting the surface of the watermelons from the right front side, while the latter does not use any particular techniques (Difference 7), and that, regarding the camera angle, the watermelon placed in the center and thinly sliced pieces of watermelon in the former photograph were photographed from a slightly lower angle view, while the photographic subject of the latter photograph was photographed from a slightly higher angle (Difference 8).

2. Issue of whether the appellee's photograph was created based on the Photograph

(1) Similarity between the Photograph and the appellee's photograph

(A) A comparison between the Photograph and appellee's photograph reveals that both photographs show one large round watermelon, two small round watermelons, one oval watermelon or winter melon, a halved large oval watermelon or winter melon, six pieces of watermelon sliced in an approximately triangular shape, one watermelon vine with leaves and flowers, and one sheet of blue gradation paper. The differences between the two photographs are limited to the existence or nonexistence of ice cubes, the use of either a wicker basket or a sieve basket, the use of either watermelon or winter melon, the use of either an oval watermelon or oval winter melon and the size thereof placed in a wicker basket or sieve basket. If a photographer chooses watermelons as a motif of a photograph, the photographer can freely choose watermelons from a variety of different types of watermelons and can decide how many watermelons should be included in the photograph and how those watermelons should be cut. The appellee's photograph is identical with the Photograph in terms of the types, number, cutting style of watermelons, and the use of a vine with leaves and flowers, and a sheet of blue gradation paper. While this level of accidental similarity cannot be considered to be impossible, the chances are not that high.

(B) An examination of the Photograph and the appellee's photograph from the perspective of the arrangement of photographic subject reveals that both photographs show the following: a halved large oval watermelon or winter melon placed in the central front area, on which six pieces of watermelon sliced in an approximately triangular shape are placed in a row and tilted toward either side; a large round watermelon placed behind it; a small round watermelon placed to the left of said watermelon; a wicker basket or a sieve basket placed to the right of the large round watermelon, containing a large oval watermelon or winter melon; a small round watermelon placed in the right front area thereof; one vine with leaves and flowers placed on top of those watermelons; and a sheet of blue gradation paper placed in the background to indicate the blue sky of midsummer.

(C) It is clear that the materials of the Photograph are watermelons (whole watermelons and sliced or cut watermelons), a watermelon vine, ice cubes, a wicker basket, and a sheet of blue paper in the background and that all of these materials are commonly seen in daily life. However, an overall examination of the composition, more specifically, the selection, combination, and arrangement of the materials, shows that the Photograph exhibits the author's thought or sentiment by choosing watermelons as a motif and by artificially creating an image of fresh watermelons under the blue summer sky. It can be found that such thought or sentiment is embodied in the combination and arrangement of the aforementioned commonplace materials as a whole as shown in the Photograph.

It would be impossible to conclude that any third party cannot independently conceive

of the idea of making such artificial expression as described above. However, if the same arrangement and composition are conceived of by accident, it would be fair to say that it is an extremely rare coincidence.

(D) Appellee B alleged that such arrangement does not go beyond the typical arrangement that any photographer could have come up with.

However, Appellee B failed to provide any evidence to prove the aforementioned allegation. If the Photograph is commonplace, it must be possible to submit, as evidence, some photographs, etc. that show the same materials and the same arrangement as those of the Photograph or that use gradation paper as the background of the watermelons. However, none of such works have been submitted as evidence. In other words, even if all of the evidence submitted to this case is examined, such works cannot be found. If the aforementioned allegation is correct, Appellee B, who is a professional photographer, could have submitted photographs similar to the appellee's photograph from among a large number of photographs he took in the past, but he/she did not do so. According to Exhibits Otsu 22 and 24, which were submitted by Appellee B as photographs taken by him/herself, he/she can be considered to have been known for capturing the nature, sceneries, animals and plants, foods, etc. of Hokkaido just as they are. In consideration of his/her such photographic style, the artificial expression presented in the appellee's photograph must be considered to be extremely different from the photographic style of Appellee B.

(E) Based on the results of the examination described above, it would be fair to presume that the aforementioned similarity between the Photograph and appellee's photograph is the result of creating the appellee's photograph based on the Photograph.

(2) According to the evidence (Exhibits Ko 4, 5, and the results of the examinations of Appellee B and the representative of the appellee company), the following can be found. The Photograph was taken by the appellant in July 1986 and published in "Kyou no ryori" (Today's cooking) (published by NHK Publishing, Inc.) issued in said month and also published in "A (tentative name) no Shunsaika" (A's fruits and vegetables in season) (published by Seibundo Shinkosha). C, who is the representative of the appellee company, visited the office of the appellant to talk about a photographic original commission agreement in late February 1993. C visited the office of the appellant again on March 18, 1993, and purchased the appellant's work "A (tentative name) no Shunsaika" and brought it home. Since the commencement of transactions between Appellee B and C in around 1992 until today, Appellee B has deposited about 50,000 photographs with the appellee company. Appellee B took the appellee's photograph on around August 18, 1993, and subsequently, deposited said photograph with the appellee company on an unknown date.

Then, the appellee company published appellee's photograph in the appellee's catalog.

According to the facts found above, it is obvious that Appellee B took the appellee's photograph five months after C's acquisition of "A (tentative name) no Shunsaika" and that, in consideration of the aforementioned relationship between Appellee B and C, Appellee B had an opportunity to see the Photograph before taking the appellee's photograph. In other words, it was physically possible for Appellee B to see "A (tentative name) no Shunsaika" owned by C and to create the appellee's photograph based on the Photograph.

(3) The following section examines whether Appellee B called the appellant on November 20, 1998, and admitted that Appellee B created the appellee's photograph based on the Photograph.

(A) The appellant alleged that, when the appellant talked with Appellee B on November 20, 1998, after complaining to Appellee B, Appellee B clearly stated that Appellee B was impressed by the appellant's photograph and used it as a reference. The appellant further alleged that the only possible book that Appellee B was impressed by and referred to would be a photo book titled "A (tentative name) no Shunsaika." On the other hand, Appellee B alleged that Appellee B called the appellant without recognizing which photograph was at issue and merely said, in general, "I have seen photographs taken by many great photographers. I can learn a lot from them," without specifying whether Appellee B saw or emulated the appellant's photograph.

(B) According to the evidence (Exhibits Ko 32-1 to 32-3, 33-1, 33-2, 35, Otsu 3, the results of the examinations of the appellant, Appellee B, the representative of the appellee company), the following can be found. C received an inquiry from the appellant, who is a business partner of the appellee company, and sent two copies of the appellee's catalog to the appellant on November 16, 1998. On November 19, 1998, the appellant realized that the appellee's photograph was published in the aforementioned catalog and presumed that the appellee's photograph was created by imitating the Photograph, and immediately faxed the appellee company a written warning that contains such statements as: "Who took the photograph of watermelons published in the middle of page 125 of the catalog?," "It is similar to the photograph published in my photo book "A (tentative name) no Shunsaika,"" and "It is inevitable to consider this photograph as intentional plagiarism," together with the Photograph and appellee's photograph. C called Appellee B, who was on a business trip, on November 20, 1998, and asked him/her to call the appellant. Appellee B called the appellant on that day. Appellee B called the office of the appellant on November 24, 1998, and said to Staff Member E, who answered the phone, that Appellee B independently created the appellee's photograph and has never seen the

Photograph. On November 25, 1998, C sent the appellant a fax message that the appellee's photograph was not created based on the Photograph. The appellant had thought that Appellee B and C expressed apologies by telephone calls made by November 20, 1998, and had not taken any action against the appellees until the appellant received a phone call from Appellee B again on November 24, 1998.

In view of these facts found above, the following can be found. C received a complaint from the appellant by fax (Exhibits Ko 32-1 to 32-3) and contacted Appellee B. The aforementioned fax message clearly identified the photograph subject to the complaint by attaching a copy of the appellee's photograph (Exhibit Ko 32-3) and stating: "The photograph of watermelons published in the middle of page 125 of the catalog" (Exhibit 32-1). Since there is various other data based on which the photographer of the photograph in dispute can be identified, C can be considered to have identified the photograph about which the complaint was made and then understood that Appellee B is the photographer that C should contact. Under these circumstances, C called Appellee B and asked him/her to call the appellant. It is extremely difficult to consider that, when C talked with Appellee B on the phone, C did not tell him/her that the appellee's photograph was at issue.

Under these circumstances as described above, Appellee B called the appellant on November 20, 1998. Thus, generally speaking, it is not easy to accept Appellee B's allegation that Appellee B called the appellant without recognizing which photograph was at issue and merely said, in general, "I have seen photographs taken by many great photographers. I can learn a lot from them." Since Appellee B called upon request of C, both the appellant and Appellee B were expected to be aware that the appellee's photograph was at issue. In the telephone conversation, it would be natural to talk about that photograph. Thus, the allegation that the telephone conversation was made not on the specifics about the photograph, but on photography in general is unreasonable. If such response had been given from Appellee B, it is reasonable to consider that the appellant would have reacted very angrily. According to all the evidence submitted to this case, such angry reaction from the appellant cannot be found. In view of the fact that the appellant did not complain until the appellant received the second call from Appellee B four days after the first call, and according to Exhibit Ko 35 (the statement of the appellant) and the results of the examination of the appellant, it is very likely that the response that the appellant received from Appellee B by phone on November 20, 1998 convinced the appellant, at least at that time.

In consideration of these facts, it is reasonable to find that Appellee B was well aware of which photograph was at issue and that Appellee B stated that he/she was impressed

by the appellant's photograph and used it as a reference. If this is the case, it is quite easy to understand the appellant's statement that Appellee B changed his/her explanation about how the appellee's photograph came to be taken (Exhibit Ko 35 and the results of the examination of the appellant). In short, as of November 20, 1998, Appellee B admitted that he/she used the Photograph as a reference. Subsequently, Appellee B denied it for some reasons.

Therefore, at least as of November 20, 1998, Appellee B should be considered to have explained to the appellant that Appellee B used the Photograph as a reference.

Thus, it is impossible to accept the following evidence that goes against the aforementioned finding: the results of the examinations of representative of the appellee company and Appellee B, Exhibit Otsu 3 (the statement of Appellee B), and Exhibit Hei 1 (the statement of C).

(4) As described above, the oval watermelon-like objects shown in the appellee's photograph can be considered to be winter melons.

It is clear from the appellee's photograph as a whole that said photograph uses watermelons as a motif. Appellee B him/herself admitted that this interpretation is correct. Adding winter melons to the photographic subject is clearly not in line with the motif. In light of social norms, this is unusual. In other words, it strongly suggests that there was a need to disguise winter melons as watermelons.

(5) Based on a comprehensive evaluation of the facts described above, it can be found that Appellee B took the appellee's photograph with reference to the Photograph and that Appellee B would not have been able to take the appellee's photograph without depending on the Photograph.

(6) Appellee B alleged that, on August 18, 1993, he/she went to Asahikawa City with his/her friend(s) on a sunny or cloudy day to take photographs of fruits and came up with an original idea of taking photographs of watermelons grown in nearby fields by arranging watermelons in such way as shown in the appellee's photographs. Appellee B alleged that he/she had neither seen the Photograph nor used it as a reference. Appellee B submitted a statement to that effect and said the same thing in the examination of Appellee B. However, in light of the facts found above, such allegation of Appellee B is unacceptable.

Any other allegations of Appellee B that denied the possibility of creating the appellee's photograph based on the Photograph are unacceptable either.

3. Act of infringement by Appellee B

(1) Examination of differences

Regarding Difference 1 (for the halved oval object placed in the central front area, the

Photograph shows an oval watermelon, while the appellee's photograph shows a winter melon) and Difference 5 (behind the aforementioned large oval watermelon or winter melon, in the right area, the Photograph shows a wicker basket containing a small oval watermelon placed in such way that it looks longer horizontally, while the appellee's photograph shows a sieve basket containing a large oval winter melon), as described above, both the appellee's photograph and the Photograph use watermelons as a motif. Appellee B admits this interpretation. It is inevitable to say that Appellee B's act of creating the appellee's photograph based on the Photograph by replacing an oval watermelon with a winter melon constitutes a change for the worse. Also, it is inevitable to say that the impression that the viewers of the Photograph get from the wicker basket was changed when the wicker basket was replaced with a sieve basket. More specifically, the impression lost distinctiveness and became commonplace.

Regarding Difference 2 (the Photograph shows a horizontally-cut half-piece of the aforementioned oval object with a V-shaped jagged edge, while the appellee's photograph shows a horizontally-cut half-piece with a straight edge) and Difference 4 (the Photograph shows ice cubes in the front area, while the appellee's photograph does not have them), the appellee's photograph lacks some expressions that exist in the Photograph. However, such lack of expressions does not make the appellee's photograph different from the Photograph in terms of thought or sentiment expressed therein.

Regarding Difference 3 (the Photograph shows thinly sliced pieces of watermelon tilted toward the right side, while the appellee's photograph shows thinly sliced pieces of watermelon tilted toward the left side), Difference 6 (the Photograph shows a small watermelon in the right front area placed in a wicker basket, while the appellee's photograph shows an object not contained in a basket), Difference 8 (regarding the camera angle, the watermelon placed in the center and thinly sliced pieces of watermelon in the Photograph were photographed from a slightly lower angle view, while the photographic subject of the appellee's photograph was photographed from a slightly higher angle), these differences can be considered to be small and insignificant and cannot make the appellee's photograph different from the Photograph in terms of thought or sentiment expressed therein.

Regarding Difference 7 (regarding lighting, etc., the Photograph uses various techniques to make the watermelons look fresh by spraying water all over the watermelons to such an extent that water drops were formed on their surfaces and also by lighting the surface of the watermelons from the right front side, while the appellee's photograph does not use any particular techniques), these differences can be evidently considered to have been created by changing the Photograph for the worse.

(2) In view of these facts described above, it can be said that the appellee's photograph lacks some expressions that exist in the Photograph, changed the Photograph for the worse, or added something meaningless to the Photograph. These differences do not convey any thought or sentiment unique to Appellee B.

As described above, the Photograph expresses the thought or sentiment of the appellant, who authored the Photograph, and can therefore be considered to be copyrightable. On the other hand, the appellee's photograph should be considered to have been created merely by roughly reproducing or modifying the expressions presented in the Photograph in a manner that does not go beyond what is expressed in the Photograph. It is clear that such reproduction or modification should be considered to be illegal under the Copyright Act.

(3) Regarding this point, Appellee B alleged that the strength of a photograph is the ability to easily and accurately express the photographic subject, and if no photograph identical or similar to a prior work in terms of the photographic subject is permitted to be taken, such rule would considerably restrict creative activities by means of photographs. Therefore, it is clear that such conclusion is against the objective of the Copyright Act, which is designed to provide motivation for creative activities.

However, this court is not saying that it would be against the Copyright Act to take any photographs that are identical or similar to a prior work in terms of photographic subject in general. In particular, this court is not saying that it would be against the Copyright Act if a photographer chooses a photographic subject with reference to the photographic subject of a prior work and takes a new photograph by using his/her creativity. This court is saying that, regardless of the scope of protection provided to the prior work, an act of reproduction or modification in the manner mentioned above would not be permitted if the very choice of the photographic subject of said prior work exhibits copyrightable distinctiveness. Thus, the interpretation described above would never considerably restrict an act of expression by way of photographs.

4. Infringement of the right to integrity

According to the facts found above, Appellee B created the appellee's photograph, which is similar to the Photograph, and published it in appellee's catalog. As described above, since the appellee's photograph is different from the Photograph, it is clear that Appellee B modified the expressions presented in the Photograph by changing or partially deleting them.

Thus, the act of Appellee B can be considered to be an act of infringing the right to integrity owned by the appellant for the Photograph (Article 20 of the Copyright Act) unless Appellee B obtained consent from the appellant, who is the author of the

Photograph, or there were any circumstances that fall under the provisions about the exemption of application specified in the Copyright Act. Since it cannot be found that Appellee B obtained the appellant's consent or that there were circumstances that fall under the provisions about the exemption of application specified in the Copyright Act, the act of Appellee B should be considered to constitute infringement of the appellant's right to integrity.

5. Obligation of the appellees

(1) Obligation of Appellee B

As described above, Appellee B's act of taking the appellee's photograph constitutes infringement of the appellant's right to integrity. As found below, it should be considered that Appellee B's series of acts as a whole, namely, the act of depositing the duplicate film (photographic original) of the appellee's photograph with the appellee company, having a discussion with C, publishing the photograph in the appellee's catalog issued by the appellee company, and distributing the catalog, should be considered to constitute an act of tort, i.e., intentional infringement of the right to integrity.

(2) Obligation of the appellee company

(A) As described above, the appellee company published, in the appellee's catalog, the appellee's photograph, which infringes the appellant's right to integrity. Thus, if the appellee company's act can be considered to be intentional or negligent, it would constitute an act of tort.

(B) As found above, C visited the appellant's office on March 18, 1993, purchased a work of the appellant "A (tentative name) no Shunsaika" and brought it home.

According to the evidence (Exhibits Ko 3, 29, and the results of the examination of the representative of the appellee company), the following can be found. As of 1993, for the last 12 years, C had been engaged in the business of storing duplicate films (photographic originals) of photographs deposited by photographers and renting them for a fee upon request. While it is not clear when, C stored a duplicate film of the appellee's photograph together with many other films of photographs received from Appellee B. C had a discussion with Appellee B, and published the appellee's photograph in the appellee's catalog issued by the appellee company.

It should be said that, since the appellee company is engaged in the business of storing duplicate films deposited by photographers and renting them to third parties for a fee, and allowing them to use the photographs based on which duplicate films were produced, the appellee company was obliged to be very careful to prevent the occurrence of infringement of moral rights of authors as a result of renting duplicate films. In consideration of the facts found above, C must have been at least aware that the appellee's

photograph is similar to the Photograph published in "A (tentative name)' no Shunsaika." Despite such awareness, C published the appellee's photograph in the appellee's catalog. Therefore, such act of the appellee company should be considered to be a violation of the aforementioned obligation.

On these grounds, the appellee company can be considered to have been negligent in committing the aforementioned act of infringement.

(C) The appellee company alleged that, although C purchased the photo book "A (tentative name) no Shunsaika," C did not see the Photograph and was not aware of the existence of the Photograph. Such allegation of the appellee company should be considered to be unreasonable.

According to the evidence (Exhibits Ko 27 to 35, the results of the examination of the appellant), the following can be found. While C, who is the representative of the appellee company, voluntarily contacted the appellant and visited the office of the appellant on February 25, 1993, C was unable to have a sufficient business discussion with the appellant due to the appellant's work. On the same day, C treated the appellant's staff to a meal. C visited the appellant's office again on March 18, 1993, and had a business discussion to obtain permission to use the appellant's photographs for the business of the appellee company, listened to the appellant's explanation about the photograph, and, as mentioned above, C purchased the photo book "A (tentative name) no Shunsaika." Subsequently, at the end of May 1993, C visited the appellant's office for the third time and concluded a photographic original deposit agreement as of June 1, 1993. The appellant sent the appellee company 85 items of duplicate films of the appellant's photographs based on said agreement.

According to the information found above, it is clear that, as of 1993, C was deeply interested in appellant's photographs. C was planning to use the appellant's photographs for the business of the company managed by C to gain profits. Thus, even if the photo book "A (tentative name) no Shunsaika" is not covered by the aforementioned agreement, it is impossible to consider that C did not look at "A (tentative name) no Shunsaika," which shows the appellant's photographic style. It would be reasonable to believe that C was well aware of the Photograph published in the book "A (tentative name) no Shunsaika."

6. Injunction, etc. against the publication of the appellee's catalog published by the appellee company

(1) As described above, the appellee company published the appellee's photograph in the appellee's catalog.

As explained above, the appellee's photograph published in the aforementioned

catalog was created as a result of an act of infringing the appellant's moral rights of author. Since it is clear that the aforementioned catalog was created as a result of the act of infringement, the appellant is entitled to demand the suspension of the publication and distribution of the aforementioned catalog as one of the measures necessary to suspend or prevent infringement.

In this case, it should be concluded that the appellant would be entitled to demand the appellee company's suspension of distribution of the appellee's catalog regardless of whether or not the appellee company's act satisfies the requirement "with knowledge of such infringement" as specified in Article 113, paragraph (1), item (ii) of the Copyright Act. In other words it should be interpreted that the purpose of Article 113, paragraph (1), item (ii) of the Copyright Act is to impose the requirement "with knowledge of such infringement" in order to clarify that, in the case where a product produced as a result of an act of infringement of the moral rights of author, etc. is released in the market, not every act of reselling and renting such product after its market release should be considered to be an act of infringement. The appellee company's act should not be interpreted as "distribution" specified in Article 113, paragraph (1), item (ii) of said Act because the appellee company was the very company that published the appellee's photograph in the aforementioned catalog and was not a company that resold or rented a product after its market release. The appellee company was not entitled to publish the appellee's photograph in the aforementioned catalog in the first place. Thus, it is obvious that the appellee company was not entitled to distribute any product that it produced as a result of such illegal act. In short, the appellee company's series of acts including the act of publishing the appellee's photograph in the appellee's catalog and distributing it, whether in whole or in part, should be considered to be an act of infringement of the right to integrity.

(2) The appellant demands that the appellee company should collect and destroy the already published copies of the appellee's catalog. However, in general, it would be difficult to collect already published copies of the aforementioned catalog. In this case, it should be considered that the appellee company does not need to shoulder such difficult obligation. This stance would remain the same even if infringement of the adaptation right in addition to the infringement of the right to integrity are taken into consideration as the grounds for making such claim.

7. Publication of an apology

According to the entire import of the oral argument, it can be found that the appellee's photograph was published only in the appellee's catalog and that the appellant filed the principal action after having discussions with photographers who belong to the Japan

Advertising Photographers' Association. Under these circumstances, a court judgment would be enough to recover the reputation of the appellant. Thus, it would be unnecessary to order any particular disposition in order to recover the reputation of the appellant.

8. Damage

Since the appellees infringed the appellant's right to integrity for the Photograph, they must bear the responsibility to compensate the non-economic damage suffered by the appellant.

According to the evidence (Exhibits Ko 5, 12, 35), the appellant is a photographer specialized in food advertisements for publication. The photographer is famous for being enthusiastic about expressing daintiness and freshness of food through photographic images by using unique techniques and is highly respected not only in Japan but also in the U.S. The Photograph is one of those photographs that reflect the aforementioned techniques of the appellant. The Photograph uses watermelons as a motif and created an image of fresh watermelons under the blue sky in midsummer. Since the Photograph was reproduced or modified into an ordinary photograph, the appellant can be considered to have suffered defamation and non-economic damage. In consideration of the circumstances under which the modification was made and other factors related to this case, it would be reasonable to determine that the appellees shall jointly pay the appellant one million yen as a solatium in order to compensate the non-economic damage suffered by the appellant.

9. Conclusion

Based on information found above, the appellant's claim in this action should be accepted to the extent that the appellant demands that the appellees should jointly pay one million yen as a solatium as well as delay damages accrued thereon at a rate of 5% per annum as specified in the Civil Code from November 21, 1998, to the completion of the payment and also demands that the appellee company should stop publishing and distributing the appellee's catalog. Any other claims of the appellant shall be dismissed. The judgment in prior instance, which is different from this judgment, shall be modified as above. Article 67, paragraph (2), Article 61, Article 64, and Article 65 of the Code of Civil Procedure shall apply to the payment of court costs, and the judgment shall be rendered in the form of the main text.

Tokyo High Court, 6th Civil Division

Presiding judge: YAMASHITA Kazuaki

Judge: SHISHIDO Mitsuru

Judge: ABE Masayuki

別紙　　写真一

Attached Photograph 1

別紙　　写真二
Attached Photograph 2