

Judgments of Osaka District Court, 26th Civil Division

Date of the Judgment: 2005.1.17

Case Number: 2003(Wa)No.2886

Title (Case):

The case, in which the court recognized the liability of an advertisement company for copyright infringement but not of the advertiser because of no negligence, where the advertisement company was given a photograph film from the copyright owner, lent the film to the advertiser without permission from the copyright owner and the advertiser used the copyright work without the owner's permission

Summary of the Judgment:

An advertisement photographer (hereafter Photographer) took up commission work from an advertisement company (hereafter Company), shot photographs for the purpose of using them on a promotion brochure for the advertiser's product (hereafter Advertiser), and delivered the film to the Company. The Company lent the film to Advertiser without the Photographer's permission, and Advertiser used the photographs for the product's advertisement without indicating the Photographer's name. Photographer claimed that these acts were the infringement of the moral right of the author (the right that calls for the indication of the author's name) and the copyright (the right of reproduction), and demanded the compensatory damages against Company and Advertiser.

Although there were many issues in this case, the principal issues were; 1) whether the photographs at issue could be considered work for hire, 2) whether there was any illegality in not indicating the name of Photographer, and 3) whether Company and Advertiser acted out of malice or negligence.

For the first issue, the court recognized the facts in the process from the shooting of the photograph to the film's delivery, and that Photographer's action was not included in the work he had been hired to do, what should have been the completion of the commission work and the delivery of the work. The court did not recognize that the Photographer had any understanding that the copyright of the photographs inherently belonged to Company. Therefore, the photographs were not hired work.

For the second issue, based on the Photographer's statement, the court concluded that it is common not to indicate the photographer's name when a photograph is used in an advertisement, and the Photographer had followed this custom following tradition. He admitted that he had felt neither special damages nor uncomfortable feeling in following this custom. The photographs at issue were shot for the purpose of the commercial advertisement and the use of these photographs by

Advertiser was for the advertisement for the same product. Thus, considering the purpose of the photographs, this use did not damage the benefits that the plaintiff claimed as an author, but was in accordance with custom. The court concluded that in this case the indication of the name could be omitted.

For the third issue, in a general view, where an advertiser's business is separate from the business that produces advertisements, the advertiser does not have the duty of care to inquire to the advertisement company about whether permission by a third party would be necessary for the use of the photographs at such time the advertiser borrows photograph film for advertisement from an advertisement company. Unless the advertisement company has pointed out that the advertiser would need to obtain permission from the copyright owner separately, it would not be a breach of the duty of care for the advertiser to consider whether the use of the photographs would not infringe the copyrights of others. Following this general view, considering the situation in this case, the court denied the Advertiser's malice or negligence in this copyright infringement. On the other hand, since an advertisement company is in nature a service that makes profit off of dealing with photographs and writings that are the copyright work of others, it has duty of care to pay sufficient attention when dealing with the copyrights of such work. When the advertisement company is to lend its stored photograph film to its client based on the client's request, the advertisement company has the duty to research who the copyright owner of the photographs is and whether they have permission to use the photographs. If ever the expected use by the client might be outside of the scope of the permission that the copyright owner already has given, the advertisement company has duty of care to pay attention to avoid copyright infringement by the clients by means of obtaining permission from the copyright owner, or warning the client that the clients would need to obtain permission from the copyright owner separately. Thus, the court concluded that Company breached this duty and recognized negligence in the infringement.

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