

Date	October 13, 2010	Court	Intellectual Property High Court, Fourth Division
Case number	2010 (Ne) 10052		
When determining whether or not the creation of a copy of another person’s work constitutes the exploitation of a work as a quotation, various factors should be comprehensively taken into consideration, including not only the purpose for which the alleged infringer uses the work, but also the method and manner of such use, the type and nature of the work used, and the existence or nonexistence of any influence of such use on the author of the work and the extent of such influence.			

References:

Article 32, paragraph (1) of the Copyright Act

In this case, the appellee (X), who is an heir of a painter, has sued the appellant (Y), whose business is to conduct appraisal of artistic works, etc., alleging that in the process of preparing certificates of authenticity for two paintings produced by the painter, Y created reduced-size color copies of these paintings in order to affix them to the back sides of these certificates, and such act of Y infringes the painter's copyright (right of reproduction). Accordingly, X claims damages for such infringement from Y (under Article 114, paragraph (2) or paragraph (3) of the Copyright Act).

The court of first instance found Y's infringement of the painter's right of reproduction and partially upheld X's claim for damages up to the amount of damage determined by the court. Dissatisfied with this, Y appealed to the higher court.

The Intellectual Property High Court revoked the part of the judgment in prior instance for which Y lost the case, and dismissed X's claim, on the following grounds.

Y's creation of reduced-size color copies of the paintings constitutes "reproduction" in the meaning under the Copyright Act.

However, in its allegation additionally submitted in the second instance, Y stated that what Y had done is permissible as "quotation" prescribed in Article 32, paragraph (1) of said Act. In relation to this allegation, when determining whether or not the creation of a copy of another person's work constitutes the exploitation of a work as a quotation, various factors should be comprehensively taken into consideration, including not only the purpose for which the alleged infringer uses the work, but also the method and manner of such use, the type and nature of the work used, and the existence or nonexistence of any influence of such use on the author of the work and the extent of such influence. In this case, in order to identify the paintings subject to appraisal and prevent forgery of certificates of authenticity, it is necessary and helpful to affix color copies of the appraised paintings to the certificates. Proper execution of

services of appraisal of works will increase the value of works and lead to protection of rights of authors and other parties concerned. It is unthinkable that the color copies in question will be used separately from the certificates of authenticity, or that the color copies will be circulated separately from the paintings, because the certificates of authenticity to which the color copies are affixed are supposed to accompany the paintings. It is also unthinkable that the copyright owner will be deprived of the opportunity to gain economic profit by using the right of reproduction of the paintings him/herself. With all of these circumstances, the creation of the color copies in dispute is permissible as quotation.

Judgment rendered on October 13, 2010; Original received on the same date; Court clerk

2010 (Ne) 10052, Appeal Case of Seeking Damages (Court of prior instance: Tokyo District Court; 2008 (Wa) 31609)

Date of conclusion of oral argument: September 22, 2010

Judgment

Appellant: Tokyo Art Club

Counsel attorney: SUGII Takashi

Same as above: TOMATSU Fumio

Appellee: X

Counsel attorney: ITO Hajime

Same as above: YOSHINO Toru

Main Text

1. The part of the judgment in prior instance where the appellant lost the case shall be revoked.
2. The claims of the appellee pertaining to the part mentioned in the preceding paragraph shall be dismissed.
3. The appellee shall bear the court costs for the first instance and the second instance.

Facts and reasons

No. 1 Judicial decision sought by the appellant

The same as 1 to 3 of the main text of this judgment.

No. 2 Outline of the case (abbreviated names are same as those in the judgment in prior instance unless otherwise noted)

1. The appellees are deceased B, who was the oldest son and heir of deceased A who was a painter, and the adopted child of deceased B (oldest son of deceased B) (hereinafter they are collectively referred to as the "Appellees" in some cases). The appellant engages in the appraisal of works of art, etc. as a business. With regard to Paintings 1 and 2 as described in 1 and 2 in the list of paintings attached to the judgment in prior instance which were produced by deceased A (hereinafter these paintings are collectively referred to as the "Paintings" in some cases), the Appellees allege that the appellant's act of making reduced color copies of the Paintings (hereinafter referred to as the "Copies"; of which, a reduced color copy of Painting 1 is referred to as "Copy 1"

and a reduced color copy of Painting 2 is referred to as "Copy 2" in some cases) for the purpose of attaching them to Certificates of Appraisal 1 and 2 (hereinafter these certificates of appraisal are collectively referred to as the "Certificates of Appraisal" in some cases) in preparing the Certificates of Appraisal constitutes an infringement of the copyright (right of reproduction) of deceased A. Based on this allegation, the Appellees seek against the appellant payment of 120,000 yen as damages based on said infringement (Article 114, paragraph (2) or (3) of the Copyright Act) with delay damages accrued thereon calculated at the rate of 5% per annum as prescribed in the Civil Code, for the period from November 15, 2008, the day following the date of service of the complaint after said infringement was committed, to the date of payment.

Deceased B died on December 27, 2009, while this action was pending, and the appellee, who is the heir of deceased B, succeeded to the court proceedings.

2. In the judgment in prior instance, the court ruled that the appellant's act of making the Copies constitutes infringement of the copyright (right of reproduction) of deceased A, which was inherited by deceased B and the appellee, and that the appellant is at least found to have been negligent. Based on this ruling, the court partially upheld the appellee's claims to the extent of seeking the amount of damages of 60,000 yen pertaining to said finding with delay damages accrued thereon under Article 114, paragraph (2) of the Copyright Act. Dissatisfied with this, the appellant filed this appeal.

3. Premised facts

In addition to the addition and correction as follows, the facts that serve as the premises of making a determination on the claims in question are as briefly shown on line 8 of page 2 to line 19 of page 3 of the judgment in prior instance. Therefore, the relevant part is cited. For facts other than undisputed facts, evidence is stated at the end of each item.

(1) The numbers, "11, 12," on line 9 of page 2 of the judgment in prior instance are revised to "11 to 14."

(2) The phrase, "(Exhibits Ko No. 5, No. 13, and No. 14)," is added following the phrase, "filing of this action, etc." on line 14 of page 3 of the judgment in prior instance.

4. Issues

The issues in this action are as follows.

- (1) Establishment of infringement of the right of reproduction (Issue 1)
- (2) Establishment of a quotation (Issue 2)
- (3) Establishment of an abuse of right or the doctrine of fair use, etc. (Issue 3)
- (4) Existence of intention or negligence (Issue 4)
- (5) Amount of damages (Issue 5)

No. 3 Allegations of the parties

1. Issue 1 (establishment of infringement of the right of reproduction)

[Allegations of the appellee]

In addition to the addition as follows by starting a new line following line 24 of page 4 of the judgment in prior instance, the allegations of the appellee in this regard are as stated on line 2 to line 24 of page 4 of the judgment in prior instance. Therefore, the relevant part is cited.

"c. Incidentally, the appellant refers to Article 47 of the Copyright Act, alleging that the existence of worthiness of being appreciated serves as a key point in determining whether the right of reproduction is infringed. However, said Article provides for reproduction required for exhibition, and the interpretation and application of 'pamphlets' set forth in said Article and the issue of 'reproduction' set forth in Article 21 of said Act differ from each other. Moreover, in a practical way, what matters when interpreting and applying the term 'pamphlets' set forth in Article 47 of said Act is whether a reproduction is limited to the extent necessary to explain or introduce exhibited works. The case under said Article differs from this case that has nothing to do with the issue of exhibition. Therefore, the provisions of said Article do not serve as a reference."

[Allegations of the appellant]

In addition to the additions as follows by starting a new line following line 7 of page 5 of the judgment in prior instance, the allegations of the appellant in this regard are as stated on the last line of page 4 to line 7 of page 5 of the judgment in prior instance. Therefore, the relevant part is cited.

"c. Regarding artistic works, such as paintings, engravings and sculptures, whether these works have an aesthetic nature and worthiness of being appreciated, which are the inherent characteristics of these works, serves as a key point. A reproduction of an artistic work should fall under the 'reproduction' set forth in Article 2, paragraph (1), item (xv) of the Copyright Act only where it appears to be worthy of appreciation. The thickness and the degree of blur of Indian ink (sumi) and momentum of tone of writing with an ink brush were pointed out in court precedents concerning calligraphy. They are the factors on which whether a work is worthy of appreciation is determined. It has been made clear that 'aesthetic elements' are key points.

In addition, the term 'reproduction' represents an extended concept and it is impossible to obtain a reasonable conclusion without interpreting it in a limited way in some situations. Article 45 of the Copyright Act provides that the original of an artistic work, etc. may be publicly exhibited by its owner, and that in this case, the authorization

of the copyright holder is unnecessary. Article 47 of said Act puts Article 45, paragraph (1) of said Act into effect by providing that the originals of artistic works that are exhibited may be reproduced in guidebooks and brochures, though limited to pamphlets for the purpose of explaining or introducing them. The Copyright Act distributes the power for an artistic work to the copyright holder and the owner to vest the former with the power to exploit an artistic work through reproduction and the latter with the power to exploit an artistic work through exhibition. The determination standard therefor is whether a work can be regarded as being worthy of transaction in the market as a book for appreciation based on such elements as the paper quality, standard (format) and form of reproduction of the work. The reproduction of an artistic work includes reproduction associated with exhibition and reproduction that has color worthy of appreciation that exceeds the former.

From the above perspective, reproduction of an artistic work is regarded as constituting an infringement of the right of reproduction of the artistic work only if the part that has color worthy of appreciation is exploited.

d. In the judgment in prior instance, the court ruled that the Copies should be regarded as sufficient to have a person with ordinary attention who sees them feel the characteristic parts of the Paintings, which are expressed by the painting tools used, the objects painted, composition, color and tone of painting with brushes. Based on this ruling, the court held that it is reasonable to find that the appellant's act of making the Copies falls under the reproduction of the Paintings.

However, as mentioned in c. above, it is considered that an article that is alleged to be a reproduction must have color that is worthy of appreciation as a painting in order to be regarded as a reproduction of a work of painting. The Copies are considerably reduced copies (specifically, the size of Copy 1 is 16.2 cm by 11.9 cm (about 23% of the size of the original painting) and the size of Copy 2 is 15.2 cm by 12.0 cm (about 16% of the size of the original painting)) and have been pouch laminated. Therefore, if a person with ordinary attention sees the Copies, he/she cannot feel the painting tools used, composition, color tone of the painting, etc., and the Copies cannot convey the inherent aesthetic emotion of the original aesthetic works and their reproductions worthy of appreciation. Therefore, the Copies cannot be regarded as having color worthy of appreciation as paintings.

In this case, it is necessary to prepare certificates of appraisal for the purpose of appraisal, and it is necessary to attach reproductions to identify the paintings subject to appraisal in order to prepare a certificate of appraisal. Consequently, it is obvious that these reproductions are not worthy of appreciation.

Incidentally, the court of prior instance did not verify the Paintings themselves. Even if it is possible to feel the characteristics of the Paintings, such as the painting tools used, composition, color and tone of the painting, from the Copies, those felt are merely the characteristics of the reduced color copies. Therefore, the judgment in prior instance holding that such characteristics are the characteristics of the Paintings contains a false recognition of facts."

2. Issue 2 (establishment of a quotation)

[Allegations of the appellant]

The act of making the Copies for the purpose of attaching them to the Certificates of Appraisal should be permitted as exploitation as a quotation (Article 32 of the Copyright Act), as mentioned below.

Exploitation as a quotation is considered legitimate if two requirements, [i] obvious distinction and [ii] master-subordinate relationship, are fulfilled.

In this case, it is clear that the requirement, [i] obvious distinction, is satisfied.

Regarding [ii] master-subordinate relationship, it is considered that the existence of a master-subordinate relationship is ordinarily determined from two perspectives, i.e., qualitatively and quantitatively. The primary purpose of a certificate of appraisal is consistently to show the content of appraisal. In light of the fact that the Copies are reduced copies and are attached to the back side of the pouch laminated certificates of appraisal, it is clear that the Copies are merely for the purpose of identifying the paintings subject to appraisal and are not for appreciation. Therefore, the Copies can be regarded as subordinating entities in terms of quality. In addition, the Copies are attached on the back side of the Certificates of Appraisal, each of which consists of a single paper, and account for one-half in terms of quantity. The main part of the Certificates of Appraisal is consistently the front side, and the reproduction part on the back side is also considered as less than one-half in terms of quantity. Therefore, the reproductions in question can also be regarded as subordinating entities from a quantitative perspective.

Incidentally, although clear indication of the source is not a requirement for legitimate exploitation as a quotation, the source is also clearly indicated in the statements on the front side of the Certificates of Appraisal.

[Allegations of the appellee]

(1) Quotation means incorporating part of another person's work, in principle, in one's own work for the purpose of introducing, referring to or making a comment on the former work or for other purposes. In order to fall under the "quotation" set forth in Article 32 of the Copyright Act, the Certificates of Appraisal themselves need to be

works.

However, the Certificates of Appraisal merely convey the fact that the Paintings are the works of deceased A, and do not express any "thoughts or sentiments." In addition, they cannot be regarded as "creative" expressions. Therefore, they do not fall under works.

(2) In addition, the Certificates of Appraisal were made for the purpose of transaction, and there is no purpose of making a quotation that contributes to the development of culture, which falls under the "purpose of the quotation, such as news reporting, critique or research."

(3) Furthermore, in order to say that exploitation falls under quotation, a work that exploits another work by quoting it and said other work that is exploited by being quoted need to be clearly distinguishable in terms of the form of expression of the work that includes the quotation, and these works must be recognized as being in a master-subordinate relationship, specifically, under which the former is the master and the latter is the subordinate.

However, it is impossible to say that the front side of the Certificates of Appraisal and the Copies are in a master-subordinate relationship (the former are masters while the latter are subordinates), taking into account that the Copies are those from which the characteristic parts of the Paintings can be felt sufficiently and that the content of the statements on the front side of the Certificates of Appraisal does not include any new creation.

(4) Consequently, Article 32 of the Copyright Act is not applicable to the act of making the Copies for the purpose of attaching them to the Certificates of Appraisal in preparing the Certificates of Appraisal, and the act is not permitted as exploitation as a quotation.

3. Issue 3 (establishment of an abuse of right or the doctrine of fair use, etc.)

[Allegations of the appellant]

In addition to the additions and correction as follows, the allegations of the appellant in this regard are as stated on the last line of page 7 to line 5 of page 10 of the judgment in prior instance. Therefore, the relevant part is cited.

(1) The following is added by starting a new line following line 16 of page 8 of the judgment in prior instance.

"In order to make appropriate and prompt response to a rapid change in the environment surrounding works and facilitate exploitation thereof, it is insufficient to wait for solutions by legislation, and the court is expected to proactively make judicial rulings. Moreover, the doctrine of fair use has also already been an inherent part of the Japanese

Copyright Act as provisions limiting individual rights. Therefore, the absence of provisions on the doctrine of fair use as general provisions limiting rights in the current Japanese Copyright Act does not serve as a reason for the impossibility of application of said doctrine.

Then, it is obvious that finding infringement of the right of reproduction in this case will cause an unjust result, and it is necessary to apply the doctrine of fair use to cases like this case. The appellant's exploitation is considered as causing no special disadvantage to the copyright holder in light of its form, etc., taking into account the following points: [i] in an appraisal like that in this case, there is no effective means of identifying an article subject to appraisal other than attaching an image that is a reproduction as the subject matter, and such attachment is essential; this falls under exploitation of the work incidental to another act (appraisal) whose main purpose is not the exploitation of the work, and this falls under the case where exploitation can be evaluated as minor in terms of quality or quantity in light of common sense; [ii] safety in the transaction of paintings in the painting distribution market is protected by exploitation in this case."

(2) The following is added by starting a new line following line 22 of page 8 of the judgment in prior instance.

"In the judgment in prior instance, the court held that the certificates of appraisal prepared by the appellant were not those that were prepared by the owner of the artistic works or another person who has the authority to transfer, etc., or a person entrusted thereby. However, the appellant's appraisals were conducted based on requests from the owner or a person entrusted by the owner. Regarding the Certificates of Appraisal, the appellant conducted appraisal at the request of the owner of the Paintings and prepared the Certificates of Appraisal.

In the judgment in prior instance, the court also holds that the certificates of appraisal cannot be recognized as having been prepared for the purpose of offering transfer, etc. of the works. However, the Certificates of Appraisal were prepared on request for the purpose of transferring the Paintings."

(3) The following is added by starting a new line following the last line of page 9 of the judgment in prior instance.

"If the act of preparing the Certificates of Appraisal is regarded as constituting infringement of the right of reproduction, it becomes difficult for the appellant to conduct appraisal business, which causes a risk that the Japanese painting distribution market that is supported by the existence of certificates of appraisal will lose stability. The disadvantage incurred by the appellant is far more significant than the advantage

obtained by the appellee. This disadvantage will go beyond the appellant and affect the entire Japanese painting distribution market. As a matter of fact, it is impossible to prepare a certificate of appraisal without attaching a copy of a work to the certificate of appraisal to identify the article subject to appraisal. Following the judgment in prior instance will eventually cause an unreasonable result, specifically, permitting a bereaved family to exclusively conduct appraisal."

(4) The following is added by starting a new line following line 3 of page 10 of the judgment in prior instance.

"(d) In a document addressed to the appellant on November 28, 2005, prior to the filing of this action (Exhibit Otsu No. 11), in relation to appraisal of deceased A's works by the appellant, deceased B states that the appellant's act of issuing a certificate of appraisal is a legally problematic act, and requests the appellant to discontinue the act of issuing a certificate of appraisal for deceased A's works in the future. In the document, deceased B also states that the Appellees have received a complaint to the effect that deceased A's work for which the Appellees engaged in appraisal was appraised as a counterfeit through the appraisal by the appellant in the principal action and that deceased B, who attended deceased A until her death and is also a painter, can appraise deceased A's works best and credit should not be given to appraisal by the appellant. The purpose of this action of the Appellees is not to protect the right of reproduction but to obstruct the appraisal of deceased A's works by the appellant.

Moreover, the fact that the principal of the amount claimed in this action is small, specifically, 120,000 yen in total for the two works, proves that the purpose of this action of the Appellees is something other than to claim damages."

(5) "(d)" on line 4 of page 10 of the judgment in prior instance is revised to "(e)."

[Allegations of the appellee]

In addition to the additions as follows, the allegations of the appellee in this regard are as stated in line 7 of page 10 to line 9 of page 14 of the judgment in prior instance. Therefore, the relevant part is cited.

(1) The following is added by starting a new line following line 17 of page 10 of the judgment in prior instance.

"The appellant alleges that the Appellees mean mischief to the appellant based on the fact that deceased B sent to the appellant a document dated November 28, 2005. However, deceased B had no other choice but to take action against the appellant's act as the holder of the copyrights for the Paintings in order to protect his own rights because the Appellees obtained information showing the possibility of infringement of the right of reproduction by the appellant's act of preparing certificates of appraisal

using the Copies. Deceased B did not take the action with the intention of harming the appellant."

(2) The following is added by starting a new line following line 4 of page 14 of the judgment in prior instance.

"(d) Article 47-2 of the Copyright Act permits placing images, etc. from the perspective of identifying the subject matter as provision of commodity information, mainly taking into account Internet auctions and other forms of commodity transactions that are not made face-to-face. Then, the 'person entrusted thereby' set forth in said Article refers to a 'person entrusted with transfer or rental,' and does not include a person who was requested to conduct appraisal like the appellant.

Moreover, the phrase, 'for the purpose of offering,' means 'for the purpose of presenting a commodity, that is, for the purpose of identifying the subject matter of transaction.' Showing whether the relevant work of art is authentic is also a circumstance outside the scope of said Article.

Said Article provides for limitations on copyright from the perspective of transaction, that is, promotion of distribution of works. Therefore, interpreting such provisions in an expansive manner will eventually cause neglect of protection of copyright. This cannot be regarded as reasonable in terms of the purpose of the Copyright Act that is intended for the protection of copyrights."

4. Issue 4 (existence of intention or negligence)

The allegations of both parties in this regard are as stated on line 9 to line 18 of page 5 of the judgment in prior instance. Therefore, the relevant part is cited.

5. Issue 5 (amount of damages)

[Allegations of the appellee]

In addition to the addition as follows by starting a new line following line 7 of page 6 of the judgment in prior instance, the allegations of the appellee in this regard are as stated on line 21 of page 5 to line 18 of page 6 of the judgment in prior instance. Therefore, the relevant part is cited.

"The appellant alleges a labor cost of 27,099 yen per certificate of appraisal as indirect costs for preparing the certificates of appraisal.

However, no evidence has been provided in relation to which employees of the appellant exclusively engage in appraisal or preparation of certificates of appraisal, or engage in both appraisal and preparation of certificates of appraisal, and whether there are operations other than appraisal and preparation of certificates of appraisal. Therefore, it is questionable whether the costs alleged by the appellant fall under the amount that should be deducted."

[Allegations of the appellant]

In addition to the addition as follows by starting a new line following line 24 of page 6 of the judgment in prior instance, the allegations of the appellant in this regard are as stated on line 20 of page 6 to line 23 of page 7 of the judgment in prior instance. Therefore, the relevant part is cited.

"In addition to this, for preparing a certificate of appraisal, the appellant spent direct costs of 1,267 yen in total, consisting of a cost of 77 yen for a certificate paper (Exhibit Otsu No. 16), a cost of 151 yen for a film of an image that serves as the original of a color copy, a cost of 183 yen for image development, a cost of 750 yen for printing (Exhibits Otsu No. 17-1 to No. 17-3), a cost of 30 yen for a pouching film (Exhibit Otsu No. 18), and a cost of 76 yen for a hologram seal (Exhibit Otsu No. 19), as well as indirect costs of 27,099 yen (Exhibits Otsu No. 20-1 to No. 20-3 and Exhibits Otsu No. 21 and No. 22) based on the ratio of labor costs for 10 employees who exclusively engage in appraisal. The amount of profits obtained by the appellant from preparation of a certificate of appraisal is 1,634 yen, which is calculated by deducting the total of the aforementioned costs, 28,366 yen, from the 30,000-yen appraisal fee."

No. 4 Summary of the court decision

1. Issue 1 (establishment of infringement of the right of reproduction)

(1) Facts found

The following facts can be found based on the premised facts as stated in No. 2, 3 above, evidence and the entire import of argument.

a. Deceased A is a famous female painter, and the Paintings are her works which she produced.

b. Both of the Paintings are titled "flower." The size of Painting 1 is 33.2 cm by 24.4 cm (area: 810.08 cm²), while that of Painting 2 is 41.0 cm by 31.9 cm (area: 1,307.9 cm²) (Exhibits Ko No. 3-1 and No. 3-2).

c. Certificate of Appraisal 1 was prepared by attaching Copy 1 (the size thereof is 16.2 cm by 11.9 cm; the area thereof is 192.78 cm², that is, about 23.8% of the area of Painting 1 that is the original) to the back side of a certificate of appraisal to which a hologram seal describing the "title of the work," the "name of the painter," "size," and other matters concerning Painting 1 is pasted (Certificate of Appraisal No. 005-0495) and by pouch laminating the entirety, under the name of the chairperson of the appraisal committee of the appellant on April 25, 2005, based on a request from a fine arts dealer who is the owner of Painting 1 (Exhibit Ko No. 3-1 and Exhibit Otsu No. 15).

Copy 1 was made by first photographing Painting 1 and developing the film, and then color copying the printed photograph (Exhibit Otsu No. 15 and entire import of

argument).

d. Certificate of Appraisal 2 was prepared by attaching Copy 2 (the size thereof is 15.2 cm by 12.0 cm; the area thereof is 182.4 cm^2 , that is, about 13.9% of the area of Painting 2 that is the original) to the back side of a certificate of appraisal to which a hologram seal describing the "title of the work," the "name of the painter," "size," and other matters concerning Painting 2 is pasted (Certificate of Appraisal No. 008-0923) and by pouch laminating the entirety, under the name of the chairperson of the appraisal committee of the appellant on June 25, 2008, based on a request from a fine arts dealer who was entrusted by the owner of Painting 2 (Exhibit Ko No. 3-2 and Exhibit Otsu No. 15).

Copy 2 was made by first photographing Painting 2 and developing the film, and then color copying the printed photograph (Exhibit Otsu No. 15 and entire import of argument).

e. The titles of paintings subject to painting appraisal by the appellee are common in many cases, such as "flower," "rose," "landscape," "nude woman," and "still life." Therefore, a reduced color copy of a painting subject to appraisal is attached to the back side of a certificate of appraisal in order to identify the painting subject to appraisal and to prevent counterfeiting of a certificate of appraisal (Exhibit Otsu No. 13).

(2) Establishment of reproduction

a. A reproduction of a work refers to reproducing a thing that is sufficient to make people perceive the content and form of an existing work based on the existing work (see the judgment of the First Petty Bench of the Supreme Court; 1975 (O) 324; September 7, 1978; Minshu, Vol. 32, No. 6, at 1145). As mentioned in (1) above, Copy 1 was made based on Painting 1, and Copy 2 was made based on Painting 2. The size of Copy 1 is 16.2 cm by 11.9 cm and that of Copy 2 is 15.2 cm by 12.0 cm, as explained that they are reduced color copies. Therefore, the Copies differ from the Paintings in size. However, they can be identified with the Paintings. According to the method and form of making the Copies as found above, the Copies are sufficient to make people perceive the content and form of the Paintings. Consequently, it is obvious that such reproduction of the Paintings falls under the "reproduction" of the Paintings under the Copyright Act.

b. In this regard, the appellant alleges that both of the Copies are not reproductions of the artistic character, aesthetic creativity and emotion that are originally subject to protection under the Copyright Act but have a meaning merely as symbols to ensure safety in distribution and prevent fraudulent articles and do not have worthiness of being appreciated, which is necessary for a reproduction of an artistic work to fall under

the "reproduction" under the Copyright Act, and that the act of making the Copies thus does not fall under the "reproduction" under said Act.

However, a painting is composed of the object painted, composition, color tone of painting with brushes, etc. and generally has creative elements. A painting itself thus has the worthiness of being appreciated as alleged by the appellant. Therefore, as long as a reproduction from which people can perceive the content and form of the relevant painting has been made, the reproduction also has the worthiness of being appreciated as does the painting itself. Therefore, in relation to the determination of whether an act falls under reproduction of a painting, there is no need to establish a requirement concerning whether the reproduction has the worthiness of being appreciated separately from the requirement concerning whether the reproduction makes people perceive the content and form of the painting. Consequently, the allegation of the appellant cannot be adopted.

c. Moreover, the appellant alleges that even if people can feel the characteristics of the Paintings by seeing the Copies, the characteristics they feel are consistently the characteristics of the Copies, which are reduced color copies.

However, as mentioned above, the Copies are sufficient for people to perceive the content and form of the Paintings, as found above. Therefore, there is no problem in finding the reproduction of the Paintings based on this fact, and the allegation of the appellant cannot be adopted even if it means that the act of making the Copies does not fall under the "reproduction" under the Copyright Act.

2. Issue 2 (establishment of a quotation)

(1) Requirement for a legitimate quotation

a. The purpose of the Copyright Act is to secure protection of the rights of authors, etc., while giving due regard to the fair exploitation of works and other cultural products, and by doing so, to contribute to the development of culture (Article 1 of said Act). For that purpose, said Act provides not only for the moral rights of author (Chapter II, Section 3, Subsection 2 of said Act) and copyright (Subsection 3 of the same) as the content of the rights of an author but also for the limitations on copyright (Subsection 5 of the same). As one of the limitations, said Act provides that it shall be permissible to quote from and thereby exploit a work already made public, provided that such quotation is compatible with fair practice and made to the extent justified by the purpose of the quotation, such as news reporting, critique or research (Article 32, paragraph (1) of said Act). Therefore, in order to permit to quote from and thereby exploit another person's work, it is necessary that the method and form of quotation and exploitation are compatible with fair practice and made to the extent justified by the purpose of the

quotation, that is, to the extent that is reasonable in light of common sense. Also taking the aforementioned purpose under the Copyright Act into account, it is necessary to comprehensively consider the method and form of quoting and exploiting another person's work, the kind and nature of the work exploited, and the existence and degree of effect on the copyright holder of the work, in addition to the purpose of exploitation by the person who exploits said other person's work, in order to determine whether the exploitation falls under exploitation as a quotation.

b. However, the appellant reproduced the Paintings by making the reduced color copies thereof to attach them to the Certificates of Appraisal that the appellant prepared. Therefore, it is necessary to examine the aforementioned points in relation to the method and form whereby the appellant reproduced the Paintings and exploited the reproductions, in order to find that the reproduction is legitimate as exploitation as a quotation under the Copyright Act.

(2) Whether the requirements are fulfilled

a. Therefore, examining whether the act of attaching the Copies, which are the reproductions of the Paintings, to the Certificates of Appraisal is permitted as exploitation as a quotation as mentioned in Article 32 of the Copyright Act from the aforementioned perspective, it is found that the Certificates of Appraisal are certificates of appraisal proving that the Paintings to which the Copies are attached are authentic works, and the Copies were attached to the Certificates of Appraisal in order to identify the paintings subject to the appraisal and prevent the counterfeiting of the certificates of appraisal. For that purpose, it is generally a reliable method to attach a color copy of a painting subject to appraisal, and the necessity and usefulness of attachment is also recognized. In addition, appropriate appraisal of a work leads to eliminating forged paintings, enhancing the value of the work, and ensuring protection of the rights of the copyright holder, etc. Considering these points together, exploiting a reproduction of a work for appraisal of the work must be regarded as being included in the purpose of the quotation as provided for in the Copyright Act.

Then, both of the Copies are attached to the back side of a certificate of appraisal to which a hologram seal is pasted and are pouch laminated together with the certificate of appraisal in an inextricable manner. Therefore, it is hardly considered that the Copies are exploited separately from the Certificates of Appraisal. There is only one copy of the Certificates of Appraisal, respectively, and the Certificates of Appraisal were prepared based on a direct or indirect request from the owners of the Paintings and are assumed to be located with the Paintings, respectively. They are thus hardly considered to be distributed separately from the Paintings. In light of these points, attaching the Copies,

which are reproductions of the Paintings, to the Certificates of Appraisal in preparing the Certificates of Appraisal can be regarded as being within the extent that is reasonable in light of common sense even in terms of the method or form.

Moreover, in the case of the aforementioned method or form, it is hardly considered that the opportunity for the Appellees to obtain economic profits from exploitation of the right of reproduction of the Paintings is lost, differently from the case where color copies, which are reproductions of the Paintings, are attached to art books, etc. and distributed without the authorization of the Appellees who have inherited the copyrights for the Paintings. Comprehensively taking the above into account, the appellant's act of attaching the Copies to the back side of the Certificates of Appraisal in preparing the Certificates of Appraisal can be regarded as being compatible with fair practice that is required for the appraisal in terms of the method or form of appraising a work by quoting it. In addition, said act can also be regarded as being within the justifiable extent in terms of the purpose of the quotation.

b. In this regard, the appellee alleges that an article that exploits a work must be a work in itself in order to find that the exploitation is legitimate as a quotation under Article 32, paragraph (1) of the Copyright Act. However, differently from Article 30, paragraph (1), item (ii) of the old Copyright Act (Act No. 39 of 1899), which set "quoting a work in one's own work within the justifiable extent" as a requirement, Article 32, paragraph (1) of the current Copyright Act (Act No. 48 of 1970) does not provide for the case of quotation of another person's work in one's own work as a requirement. In addition, said paragraph is considered as meaning that in the case where another person's work is quoted for the purpose of news reporting, critique or research, etc., it is the purpose of the current Copyright Act to protect such quotation as a socially meaningful act as long as it is within the justifiable extent. In light of this, it should be considered that the fact that the person who exploits another person's work exploits it in his/her own work is not a requirement for the exploitation being regarded as legitimate as a quotation under Article 32, paragraph (1) of said Act. Even if the Certificates of Appraisal themselves are not works, it will not prevent the aforementioned determination that the act of using the Copies by attaching them to the Certificates of Appraisal falls under a quotation. Consequently, the allegation of the appellee cannot be adopted.

c. Incidentally, the appellant's engagement in the appraisal of the Paintings does not constitute an infringement of the right of reproduction of the appellee at all. Therefore, needless to say, it is impossible to say that the copyright holder's legitimate interests were harmed by the fact that the appellee who engages in the appraisal of the Paintings cannot exclusively engage therein.

(3) Conclusion

Consequently, it must be said that the appellant's act of making the Copies for the purpose of attaching them to the Certificates of Appraisal in preparing the Certificates of Appraisal was an act that is permissible as a quotation provided for in Article 32, paragraph (1) of the Copyright Act even if it falls under the reproduction of the Paintings.

3. Conclusion

On these grounds, all of the appellee's claims in this action shall be dismissed without the need for a ruling on other issues, and thus, the judgment in prior instance that partially upheld them shall be revoked.

Intellectual Property High Court, Fourth Division

Presiding judge: TAKIZAWA Takaomi

Judge: HONDA Tomonari

Judge: ARAI Akimitsu