

=====

Date of the judgement

-----

1980.03.28

=====

Case Number

-----

1976(O)923

=====

Reporter

-----

Minshu Vol.34, No.3, at 244

=====

Title

-----

Judgment upon the case concerning the meaning of citation in Article 30, para.1, subpara.2 of the previous Copyright Law (Law No.39, 1899), and the creation and publication of a montage photo by the modification and use of a photograph taken by another person and the infringement of the moral rights of the author.

=====

Case name

-----

Claim for Compensation

=====

Result

-----

Judgment of the Third Petty Bench, quashed and reversed

=====

Court of the Second Instance

-----

Tokyo High Court, Judgment of May 19, 1976

=====

Summary of the judgement

-----

1. Citation in Article 30, para.1, subpara.2 of the previous Copyright Law (Law No.39, 1899) means accommodation of, in principle, part of other person's work in one's work for the purpose

of introduction, reference, criticism, etc. It is required that from the viewpoint of the form of the work citing another person's work, the work which is citing the other person's work and the work being cited should be clearly and distinctively recognisable and furthermore, the relationship between both works is that the former is the main and the latter is the subordinate.

2. In a case where a person modified a photograph taken by another person and used it to produce a montage photograph, if it is possible directly to perceive the essential characteristics of the other person's photograph from this montage photograph, even though the montage photograph can be regarded as a work, its production and publication are an infringement of the author's moral rights unless the other person has given consent.

3. The publication of the montage photograph in black and white that is synthetically produced by cutting off a part of the photograph taken with a view of a mountain and six skiers coming down from the snow slope with a spur resembling the track of a snow tyre and placing a photograph of a huge snow tyre at the upper edge of the snow slope and the beginning of the above-mentioned spur by likening the ski spur to the track of a snow tyre is an infringement of the right to maintain the identity of the photograph held by the author of the photograph, unless there is consent by the author.

---

#### References

---

The previous Copyright Law (Law No.39, 1899): Article 18; Article 30, para.1, subpara.2; and Article 36-2

---

#### Main text of the judgement

---

The judgment of the original instance court shall be quashed.

The case shall be remanded to the Tokyo High Court.

---

#### Reasons

---

On Item 3 of the representatives of jokoku appeal, TT, NC and CM:

1. The original instance court established the facts that:

(1) The jokoku appellant made a coloured photograph, attached to the judgment of the original instance court as photograph (1), in the size of 30 centimetres in height and 37 centimetres in width from a coloured photograph which he produced and for which he obtained a copyright,

reproduced and published this in the photo album 'SKI '67 volume 4' published by P. on January 1, 1967, and later, cut one-fifth of the left part of the photograph, slightly enlarged the remaining part, produced a photograph of 37 centimetres in height and width, and reproduced it in an advertisement calendar for 1968 published by Q. without crediting the name of the jokoku appellant. The jokoku appellee utilised the photograph in this calendar by cutting either one-third (in R, *infra*) or one-sixth (in S, *infra*) of the left part, reproduced it as a black and white photograph, added a photograph of a snow car tyre reproduced from an advertising photograph of T. and synthetically produced a black and white photograph as attached to the judgment of the original instance court as photograph (2) (hereinafter, 'the Montage Photograph') and published it in his own photo-album 'SOS' around January 1970 and also in the June 4, 1970 issue of the 'S' published by Kodansha Co.;

(2) (a) The Montage Photograph is a work separate from the above photographs which the jokoku appellant has produced and reproduced (hereinafter, 'the Photographs') and is a work of the jokoku appellee produced by the jokoku appellee as a parody of the Photographs, and therefore, is 'one's own work' as provided by Article 30, para.1, subpara.2 of the previous Copyright Law (Law No.39, 1899, hereinafter, 'the Law'), (b) the Photograph has been used as the material for the Montage Photograph - this is a use corresponding to 'recording pieces and citation' in the above provision, (c) the production of the Montage Photograph was aimed at the criticism of the Photograph and to make a satire of various aspects of life and for its production, citation of part of the Photograph was needed and such means of citation is objectively justifiable as a method of photo-montage which is socially accepted nowadays as an artistic form of expression, and as such it should be allowed as a free use of other person's work. Partial modification of the Photograph at the time of its citation can be regarded as necessary and appropriate in light of the above purpose of the production of the Montage Photograph and cannot be regarded to be in excess of the level which the jokoku appellant, who is the original author, should tolerate. Therefore, the montage photograph is not an infringement of the right to maintain the identity of the work on the part of the original author, and thus the use of the Photograph by the jokoku appellee is not in excess of the 'justifiable scope' as provided in the above provision;

(3) Since, in the photograph in the above calendar which the jokoku appellee used as a material, there was no credit to the jokoku appellant, the jokoku appellee should be regarded to have been allowed to use this without referring to the sources;

and dismissed the claim of the jokoku appellant vis a vis the jokoku appellee for the payment of moral damages on the ground of the infringement of the author's moral rights. This is clear from the judgment of the original instance court.

2. In the following paragraphs, in light of the arguments, the appropriateness of the ruling of the original instance court will be examined.

Article 30, para.1, subpara.2 of the Law allows the citation of another person's work that is already published in one's own work within a justifiable scope. Citation in this context should be construed to mean the accommodation of, in principle, part of another person's work in one's own work for the purpose of introduction, reference, criticism etc. It is required that from the viewpoint of the form of the work citing another person's work, the work which is citing the other person's work and the work being cited should be clearly and distinctively recognisable and furthermore, the relationship between both works is that the former is the main and the latter is the subordinate. Furthermore, by virtue of Article 18, para.3 of the Law, it is obvious that a citation in a form that infringes the moral rights of the author of the work which is being cited is not allowed.

If we contrast the Photograph and the Montage Photograph, based upon the above facts established by the original instance court, the Photograph is a coloured photograph characterised by mountains covered by snow from left to right in the distance and a view of a mountain with a wide downward snow slope in the front, six skiers coming down from the snow slope on the right hand side with a spur resembling the track of a snow tyre, taken from above. On the other hand, the Montage Photograph is a synthetic photograph which has cut off the part of the view on the left without the skiers, but on the above-right, at the beginning of the above-mentioned spur, at the upper edge of the snow slope, there is a photograph of a huge snow tyre which conceals part of the mountains behind the slope on the right hand side and the upper part of the tyre comes out of the frame, which has been duplicated in black and white. Thus, the Montage Photograph can be regarded to have been produced by modifying and using the Photograph, in that it cut part of the coloured Photograph and added a photograph of a snow tyre which is not included in the Photograph and reproduced it in black and white.

The Photograph has been thus included and used in the Montage Photograph. The part of the Photograph which is being used (hereinafter, 'Part of the Photograph') has ceased to be identical to the Photograph as a result of the modification in its external form of expression, concerning the part of six skiers coming down the snow slope with a spur as mentioned above and the view of the mountains which comprise the essential characteristic of the Photograph, the former in total and the latter partly still comprise parts which maintain those characteristics, and therefore, the essential characteristics in the form of the expression of the Photograph can be perceived by

the Part of the Photograph itself. With a glance at the Montage Photograph, it is possible to find that it was produced by adding a photograph of a snow tyre to the Part of the Photograph, and the essential characteristics of the Photograph are directly perceivable from the Montage Photograph to a sufficient extent, even though the Montage Photograph has come to express ideas and feelings different from the Photograph which expresses the real world by likening the ski spur to the track of a snow tyre and places a huge snow tyre at the beginning of the spur, so that the Part of the Photograph and the tyre have a synergistic effect and express an unrealistic world. If this is the case, it is evident that the essential characteristics of the Photograph, although inseparably included and used in the Montage Photograph, are still directly perceivable themselves, and the above use of the Photograph by the jokoku appellee has to be regarded as a modification which infringes the right to maintain the identity of the Photograph held by the jokoku appellant as the author of the Photograph.

Furthermore, since, as mentioned above, the Part of the Photograph which is included and used in the Montage Photograph cannot be regarded as being cited in a subordinate way in the form of an expression of the Montage Photograph as explained, it cannot be said that the Photograph has been cited in the Montage Photograph within the meaning of Article 30, para.1, subpara.2 of the Law. This is not affected by the above facts established by the original instance court that the purpose of producing the Montage Photograph was to criticise the Photograph and make a satire of various aspects of the world and therefore, a citation of the Part of the Photograph was needed, or the fact that the Montage Photograph is in line with the method of photo-montage which is socially accepted nowadays as an artistic form of expression.

If this is the case, the publication of the Montage Photograph by the jokoku appellee is an infringement of the right to maintain the identity of the Photograph held by the jokoku appellant as the author of the Photograph, unless there is consent by the jokoku appellant.

Naturally, it is not impermissible to use another person's work as material in creating one's own work, but the occasion in which the use of other person's work without consent is permissible is limited to cases where it is used in a manner which does not enable direct perception of the essential characteristics per se of the form of expression of other person's work. Therefore, unless there is consent by the jokoku appellant, the above modification and use of the Photograph when producing the Montage Photograph is not justifiable. Even if, by focussing on the unique form of expression in combining the Part of the Photograph and the photograph of a snow tyre, it is possible to acknowledge the creativeness of the Montage Photograph and regard the Montage Photograph as a work, since in the Montage Photograph, the essential

characteristics of the Photograph in its form of expression can be directly perceived as above, and the Montage Photograph modifies the form of expression of the Photograph and uses it, therefore, there is no problem in finding that this affects the identity of the Photograph.

3. Thus, the production and publication of the Montage Photograph by the jokoku appellee cannot be regarded as not infringing the right to maintain the identity of the Photograph held by the jokoku appellant as the author of the Photograph unless there is consent by the jokoku appellant on this. The judgment of the original instance court which differs from this opinion and found that the Montage Photograph has merely cited the Photograph as provided in Article 30, para.1, subpara.2 of the Law, and found that since there is no inappropriateness in the purpose or means of the citation, even if the Photograph was modified by citation, the right to maintain the identity of the Photograph held by the jokoku appellant as the author of the Photograph was not infringed and the publication of the Montage Photograph by the jokoku appellee was not an infringement of the author's moral right of the jokoku appellant and thus dismissed the claim is unlawful in erring in the interpretation of Article 30, para.1, subpara.2 of the Law and subsequently, Article 18, para.1 of the Law. Since the above unlawfulness evidently affects the judgment, the arguments are with grounds and the judgment of the original instance court cannot but be quashed. In the present case, there is a need for further examination, so it is appropriate to remand the case to the original instance court.

Therefore, without ruling on other points of argument, in accordance with Article 407 of the Code of Civil Procedure, justices unanimously rule as the main text of the judgment with the supplementary opinion of Justice TAMAKI Shoichi.

The supplementary opinion of Justice TAMAKI Shoichi is as follows:

I believe that the above opinion of the court does not ignore or deny the significance or value of the expression which is usually called a parody (its concept and content are not necessarily clear). However, if we examine the problem in accordance with the statutes on copyright (an example if the above-mentioned Article 30, para.1, subpara.2 of the Law) whose goal is to strike a balance between the requirement of the protection of copyright as a private right of the author and the social needs based upon the aspect of copyrighted works as a public property, in cases such as the present case where, in order to produce a parody photograph with the photo-montage method, using a photograph which is the work of another person (hereinafter, 'the Original Photograph') as an object and reproducing part of the Original Photograph as a photograph and using it, due to the technological nature of photographs, the part of the Original Photograph has

to be included in a completely identical manner, and the inclusion and use of the Original Photograph for the purpose of creating a parody inevitably accompanies modification, more or less, of the external as well as internal form of expression of the Original Photograph, and since photograph is a means of expression which directly appeals to our eyesight, if the Original Photograph is included and used in a large scale, it cannot be immune from the criticism that it damages the completeness of the Original Photograph, and furthermore, it is almost impossible to obtain the consent of the author of the Original Photograph due to the nature of the matter. On the other hand, if the montage is effected by using parts of the original photograph which are so fragmented that the identity of the Original Photograph is completely lost, it can be assumed that its value as a parody will be significantly reduced. Taking into consideration these points, the expression known as parody using a photograph as the original work to be the object of a photo-montage method has fatal limits in relation to the author's moral rights, namely the right to maintain the identity of the work, due to the above technological nature of photographs and the fact that it is a means of expression which directly appeals to our vision. From this viewpoint, it has to be acknowledged that the Montage Photograph is in excess of the above limits, and although there is no problem in confirming the significance and value of the Montage Photograph as a parody of the Photograph, if, for this reason, to interpret the law in a way which results in the denial of the author's moral right of the jokoku appellant who is the author of the Photograph without an explicit legal basis is against the above-mentioned balance which is purported by the statutes and biased towards the jokoku appellee and thus unjustifiable. Even if interpreted as above, in the present case, the possibility of expression by parody as intended by the jokoku appellee is not entirely denied (for example, the jokoku appellee may take a photograph which imitates the form of expression of the Photograph within the scope considered to be necessary for a parody and apply the montage method to this). Therefore, it is not biased to the jokoku appellant either.

=====

Presiding judge

-----

JusticeTAMAKI Shoichi

JusticeERIKUCHI Kiyoo

JusticeTAKATSUJI Masami

JusticeYOKOI Daizo

(\*Translated by Sir Ernest Satow Chair of Japanese Law, University of London)