

Date	April 25, 2012	Court	Intellectual Property High Court, Fourth Division
Case number	2011 (Ne) 10089		
<p>–The author of the graphic images which have been created based on the storyboard prepared by a university professor, in which a rough picture of the graphic images to be created was given, or specific instructions noted by him/her, is the professor who decided on the basic structure of the graphic images in question and took the initiative in the actual creations thereafter.</p> <p>–A case in which the court held that, in cases where the exploitation of the graphic images is to be authorized on the condition that the holder of the copyright him/herself confirms and approves the final descriptions in the parts of the book where the graphic images will be reproduced, the act of publishing the book without obtaining the final confirmation from the holder of the copyright despite the fact that there was no response therefrom by the time limit which had been decided unilaterally, constitutes infringement of the right of reproduction and right of ownership transfer.</p>			

References:

Article 2, paragraph (1), items (i) and (ii), Article 19, Article 20, and Article 21 of the Copyright Act

In this case, the appellee made the following claims by alleging that the appellant’s act of publishing and distributing the book in which the appellant’s graphic images were reproduced constituted infringement of the appellee’s copyrights (right of reproduction and right of ownership transfer) and moral rights of an author (right to preserve integrity and right to determine the indication of the author’s name) in the graphic images in question: (i) injunction of the publication or distribution of the appellant’s book from which the appellant’s graphic images have not been deleted, pursuant to Article 112, paragraph (1) of the Copyright Act; (ii) deletion of the appellant’s graphic images from the appellant’s book, pursuant to paragraph (2) of said Article; and (iii) payment of 4 million yen as compensation for damages for a tort and delay damages accrued thereon for the period from the day immediately following the day of service of complaint until the completion of payment at a rate of 5% per annum as provided for in the Civil Code.

The judgment in prior instance upheld the appellee’s claims as mentioned in (i) and (ii) above, and the claim mentioned in (iii) above to the extent of payment of 500,000 yen and delay damages accrued thereon, but dismissed the remaining claims. Unsatisfied with this judgment, the appellant filed an appeal.

This judgment dismissed the appeal by holding as follows.

The works subject to the protection under the Copyright Act are ‘productions in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain’ (Article 2, paragraph (1), item (i) of the Copyright Act). In order to find the relevant work to be expressed in a “creative” way, it is not required that the originality is demonstrated in a strict sense, and it should be sufficient if the author’s individual character is expressed. ...The graphic images in question are productions in which thoughts or sentiments are expressed in a creative way and falls within the scientific or artistic domain, and thus may be regarded as works under the Copyright Act.”

“The graphic images in question were created to be used as an explanation material at the appellee’s press conference on the mammoth research. Moreover, they were created by the appellee and the staff in question, based on the storyboard prepared by the appellee, in which a rough picture of the graphic images to be created was given, and the specific instructions noted by the appellee instructing the parts to be modified and the details thereof in the draft graphic images which were printed out in the process of the creation of the graphic images in question. In light of the fact that all of the staff in question worked at the research institute where the appellee serves as the director and were in a position to receive instructions from the appellee, it is appropriate to find that the person who decided on the basic structure of the graphic images in question and took the initiative in the actual creation thereafter was the appellee, and that the staff in question were assistants that conducted the creation under the instructions of the appellee. Accordingly, the appellee is found to be the person who created the graphic images and thus the author thereof.”

“The graphic images in question and the appellant’s graphic images are identical except for the colors of the graphic images in question, which are the features of expression that constitute intellectual creations, and as the essential feature of the expression of the graphic images in question can be directly perceived from the appellant’s graphic images, the appellant’s graphic images may be deemed to be a reproduction of the graphic images in question in a tangible form.”

“The appellee may be found to have set as a condition for giving authorization to exploit the graphic images in question, the confirmation and approval of the final descriptions in the parts of the appellant’s book where the graphic images in question will be reproduced.

Nevertheless, the appellant, around the end of August 2009, when almost two years had elapsed after the negotiation conducted during the period from May 2007 to August of the same year had stopped, sent to the appellee the final galley proof copy

with a statement that the appellant's book is scheduled to be published at the end of September 2009, and unilaterally limited the time limit for the appellee to confirm the copy to be around September 2 of the same year. Furthermore, the appellant published the appellant's book in October of the same year without obtaining the final confirmation from the appellee, despite the fact that there was no response from the appellee before the time limit. Thus, the abovementioned appellant's act is insufficient to find the condition that the final descriptions be confirmed by the appellee to have been fulfilled.

Then, it cannot be found that the appellee authorized appellant to exploit the graphic images in question.

Based on the abovementioned findings, the appellant's graphic images may be found to be the reproductions of the graphic images in question made without the authorization of the appellee, and therefore, the appellant's act of publishing and distributing the appellant's book in which the appellant's graphic images were reproduced constitutes infringement of the copyrights (right of reproduction and right of ownership transfer) held by the appellee in regard to the graphic images in question."

"The colors and color tone contrasts of the graphic images in question constitute one of the important elements of the expression that serve as the basis for their intellectual creations, and therefore, the acts of modifying the graphic images in question, which are originally in color, to black and white and reversing the contrasts without obtaining the authorization of the author fall under the modification made against the intent of the author (Article 20, paragraph (1) of the Copyright Act)."