

Date	July 25, 2001	Court	Tokyo District Court
Case number	2001 (Wa) 56		29th Civil Division
<p>– A case in which the plaintiff, who alleges to hold copyrights, etc. for the paintings drawn on the body of a city bus, claimed damages based on an allegation that the defendant's act of publishing, etc. the book that contains the pictures of the bus whose body is painted with the plaintiff's works constitutes infringement of such copyrights, but the court held that the plaintiff's works can be exploited based on the findings that the plaintiff's works are artistic works permanently installed in open places and that the defendant's act has not been made for the purpose of "exclusively" selling artistic works.</p>			

References: Article 2, paragraph (1), item (i), Article 21, Article 10, paragraph (1), item (iv), Article 45, paragraph (2) and the main clause and item (iv) of Article 46 of the Copyright Act

Number of related rights, etc.:

Summary of the Judgment

The plaintiff, who drew paintings (the "Plaintiff's Works") on the body of a city bus, claimed damages based on an allegation that the defendant's act of publishing and selling the book (the "Defendant's Book"), on the front cover, etc. of which the pictures of the bus whose body is painted with the Plaintiff's Works are printed, constitute infringement of the plaintiff's copyrights, etc.

In this judgment, the court made the following determinations and dismissed the plaintiff's claims based on a finding that the Plaintiff's Works fall under the category of an "artistic work" but the exploitation thereof can be allowed pursuant to Article 46 of the Copyright Act.

i. In order to be protected as an "artistic work," the relevant production must be "a production in which thoughts or sentiments are expressed in a creative way and a production which pursues aesthetic value through people's eyes by creating or utilizing the shape, pattern or color of a space or article." In light of the circumstances that led to the production of the Plaintiff's Works, purpose of production and unique expressive skills, etc., it is undeniable that the Plaintiff's Works fall under the category of an artistic work in which the plaintiff's originality is shown.

ii. The main clause of Article 46 of the Copyright Act was prescribed for the purpose of allowing, in principle, the public to freely exploit artistic works permanently installed in open places by comprehensively taking into consideration the following points: [a] in cases where the original of an artistic work is permanently installed in

open places where many and unspecified persons may freely see it, if claims of right based on copyrights are allowed to be made without any limitation with respect to the exploitation of the work, an undesirable situation occurs since the public's liberty of action would be excessively constrained; [b] in such cases, allowing free exploitation by the public agrees to social practice; and [c] in many cases, it may be justified to construe that such exploitation complies with the author's intention.

In light of the purpose mentioned above, it is appropriate to construe that "open places accessible by the public" or "places easily seen by the public" (Article 45, paragraph (2) of the Copyright Act as applied *mutatis mutandis* pursuant to the main clause of Article 46 of said Act) refers to large open places that many and unspecified persons may freely see the relevant work if they intend to do so. Since the bus whose body is painted with the Plaintiff's Works (the "Bus") runs, as a city bus, on public roads that are open places accessible by the public, the Plaintiff's Works should also be regarded as being installed in "open places accessible by the public" or "places easily seen by the public."

In light of the purpose mentioned above, it is appropriate to construe that the phrase "permanently installed" (the main clause of Article 46 of the Copyright Act) refers to the act of installing an article in a state offered to many and unspecified persons for continual viewing for a considerable period of time, according to socially accepted ideas. Since the Bus runs continually like other general city buses, the plaintiff's act of drawing the Plaintiff's Works on the body of a city bus scheduled to be run on public roads on a regular basis should indeed be regarded as having an artistic work "permanently installed."

iii. Article 46, item (iv) of the Copyright At provided exceptions for the general rule prescribed in the main clause of said Article on the grounds that if it is allowed to freely exploit a work even with respect to the act of reproduction of a work made exclusively for the purpose of selling its reproductions, the copyright holder may suffer serious economic disadvantages. As such, the issue of whether or not the defendant's act falls under said item should be determined by examining whether or not such act falls under the exceptional instance of a reproduction of an artistic work "exclusively" for the purpose of selling its reproductions or the sale of such reproductions by taking into consideration in an objective manner the getup and contents of the book, etc. in which the relevant work is exploited, the mode of exploitation of the work and purpose thereof. It is true that, in the Defendant's Book, the pictures of the Bus are printed in a manner by which the characteristics of the Plaintiff's Works may be perceived. However, taking into consideration the following

circumstances in a comprehensive manner, it should be said that the defendant's act of printing the pictures of the Bus in the Defendant's Book and selling such book does not fall under the act of reproduction of an artistic work "exclusively" for the purpose of selling its reproductions or the sale of such reproductions: [a] the Defendant's Book was created for the purpose of explaining to children various types of automobiles that travel around the town by using pictures; and [b] the person who looks at the book would receive the impression that the pictures of the Bus are printed as one of the examples of the various types of automobiles.

Judgment rendered on July 25, 2001

2001 (Wa) 56 Case of Seeking Compensation for Damages

Date of conclusion of oral argument: May 8, 2001

Judgment

Plaintiff: A

Counsel attorney: MORIYA Noriko

Defendant: Nagaokashoten, LTD.

Counsel attorney: IMAI Masao

Main text

1. The plaintiff's claims shall be dismissed.
2. The court costs shall be borne by the plaintiff.

Facts and reasons

No. 1 Claims

The defendant shall pay to the plaintiff 3,000,000 yen and money accrued thereon at the rate of 5% per annum for the period from January 1, 1999 until the completion of payment.

No. 2 Outline of the case

The plaintiff alleged that the defendant's act of reproducing the work listed in the attached list of works (hereinafter referred to as the "plaintiff's work") in the book stated in the attached list of books (hereinafter referred to as the "defendant's book") and publishing the defendant's book constitutes infringement of the plaintiff's copyright and moral rights of author (right to determine the indication of the author's name) and claimed payment of damages against the defendant.

1. Assumed facts (except for the facts for which evidence has been presented, there are no disputes between the parties)

(1) The plaintiff and the plaintiff's work

The plaintiff is an artist who received attention with his/her mural paintings on the walls of the area under the girders of what was then Sakuragicho station on the Tokyu Toyoko line in Yokohama city in the late 1970s. Since then the plaintiff has been conducting creative activities under the name B, based in Yokohama City and the city of San Diego in the United States (Exhibits Ko No. 8 and No. 9). In 1989, the plaintiff created paintings for the pavilion at Yokohama expo and provided some works for the landscapes that give character to Yokohama city, such as the Shin-hommoku area, Minato Mirai 21 area and Yokohama Port Side area.

In December 1990, the plaintiff was selected as one of the top ten west coast artists (Exhibit Ko No. 11). The plaintiff was also voted Artist of the Year in the U.S. and, in

1999, was given the Yokohama Cultural Award's encouragement prize (Exhibits Ko No. 16 and No. 17).

B. In 1994, the plaintiff drew paintings on the right and left sides, the top surface and the rear surface of the body of a Yokohama city bus that runs the circular bus route bound for Pacifico Yokohama (this route is commonly known as the "Y loop") in the inner city area, which includes Kannai, Isezaki-cho and Chinatown in Yokohama city.

(2) The defendant's act

In 1998, the defendant published and sold the defendant's book in which the pictures of the bus whose body is painted with the plaintiff's work (hereinafter referred to as the "Bus") are printed on the front cover and on the upper left of page 14 of the text. The plaintiff's name is not indicated in the defendant's book as the author of the plaintiff's work.

2. Issues

(1) Whether or not the plaintiff's work is an "artistic work" (statement of claim)

(omitted)

(2) Whether or not the plaintiff's work is an artistic work prescribed in Article 46 of the Copyright Act (hereinafter referred to as the "Act") and can be regarded as being "permanently installed" "in open places accessible by the public, such as streets and parks, or at places easily seen by the public, such as the outer walls of buildings" (defense).

(omitted)

(3) Whether or not the act of printing the pictures of the Bus whose body is painted with the plaintiff's work in the defendant's book and selling it constitutes the act of "reproduction of an artistic work exclusively for the purpose of selling its reproductions and the sale of such reproductions" (re-defense).

(omitted)

(4) Whether or not the right to determine the indication of the author's name was infringed.

(omitted)

(5) Amount of damages

(omitted)

No. 3 Court decision on the issues

1. Regarding Issue (1)

(1) The court will first determine whether or not the plaintiff's work painted on the body of a city bus falls under an "artistic work."

Article 2, paragraph (1), item (i) of the Act defines that a "work" "means a production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain." In order to be protected as such "work," the relevant production must be one in which thoughts or sentiments are expressed in a creative way. However, with respect to the degree of creativity, it should be construed that such production is not required to be one in which the creator's originality is shown, but would be sufficiently regarded as a "work" if the creator's individual characteristics are expressed. In addition, while it is difficult to define the term "artistic" used in said item in a precise sense, it should be said that the term refers to the "expressive skills or activities that pursue aesthetic value through people's eyes by creating or utilizing the shape, pattern or color of a space or article." Accordingly, in order to be protected as an "artistic work," the relevant production must be "a production in which thoughts or sentiments are expressed in a creative way and a production which pursues aesthetic value through people's eyes by creating or utilizing the shape, pattern or color of a space or article."

(2) Based on this standpoint, the court makes the following examination.

According to the assumed facts, evidence (Exhibits Ko No. 3 through No. 5) and entire import of oral argument, the following facts are found and there is not sufficient evidence to reverse such fact findings.

In 1994, the plaintiff painted the plaintiff's work on both the left and right sides, the top surface and the rear surface (four surfaces in total) of the body of a city bus as part of a plan by the shopping street associations of Yokohama city to revitalize the Minato Mirai 21 area in Yokohama city and the central part thereof, such as Kannai by applying designs highlighting the characteristics of Yokohama city to the body of a city bus circulating the route in the Minato Mirai 21 area. As can be seen in the attached list of works, the plaintiff's work is a work of art in which the plaintiff used his/her characteristic touch and a thick brush to draw images representing the Kannai and

Bashamichi areas that are painted in the primary colors red, blue, yellow, and green, and include various dynamic figures, such as people's faces, petals, a crescent moon, eyes, stars, carriages, animals, buildings, spirals, circles and triangles.

The plaintiff's work is indeed painted on the body of a city bus, but as stated above, in light of the circumstances that led to the production of the plaintiff's work, purpose of production and unique expressive skills, it is undeniable that the plaintiff's work is an artistic work in which the plaintiff's originality is shown.

In this regard, the defendant alleges that the plaintiff's work is a mere decoration in which figures are painted with colors for the purpose of having the bus achieve prominence. However, in light of the abovementioned findings and determinations, such allegation cannot be accepted.

2. Regarding Issue (2)

(1) The court will determine whether or not the plaintiff's work may be said to be a work "permanently installed" "in open places accessible by the public, such as streets and parks, or at places easily seen by the public, such as the outer walls of buildings."

The main clause of Article 46 of the Act prescribes that, with the exception of the prescribed instances, it shall be permissible to exploit, by any means whatsoever, an artistic work whose original is "permanently installed" "in open places accessible by the public, such as streets and parks, or at places easily seen by the public, such as the outer walls of buildings" and allows the public to freely exploit an artistic work permanently installed in open places unless such exploitation falls under certain exceptions. This provision was prescribed for the purpose of allowing, in principle, the public to freely exploit artistic works permanently installed in open places by comprehensively taking into consideration the following points: [i] in cases where the original of an artistic work is permanently installed in open places where many and unspecified persons may freely see it, if claims of right based on copyright are allowed to be made without any limitation with respect to the exploitation of the work, an undesirable situation occurs since the public's liberty of action would be excessively constrained; [ii] in such cases, allowing free exploitation by the public agrees to social practice; and [iii] in many cases, it may be justified to construe that such exploitation complies with the author's intention.

(2) Based on the abovementioned standpoint, the court shall examine this point.

A. According to the evidence (Exhibits Ko No. 1, No. 4 and No. 5) and entire import of oral argument, the following facts may be found: [i] the Bus is the sole Yokohama city bus whose body is painted with the plaintiff's work and is running the circular bus route bound for Pacifico Yokohama (Y loop), which connects the main areas of

Yokohama city, including Kannai, Isezaki-cho, Motomachi and Chinatown; [ii] while the details of the hours of operation and intervals are not necessarily apparent, the Bus is repeatedly run on a regular basis every day; [iii] while the Bus is running the route, many and unspecified persons may see the Bus; and [iv] during the night, the Bus is parked in a dedicated parking facility for Yokohama city buses and many and unspecified persons cannot see the Bus.

B. Based on the abovementioned facts found, the court will examine each factor for determining whether or not the plaintiff's work falls under the main clause of Article 46 of the Act.

First, the court will examine the term "open places."

In light of the purpose mentioned above, it is appropriate to construe that "open places accessible by the public" or "places easily seen by the public," as prescribed in said Article, refers to large open places that many and unspecified persons may see freely if they intend to do so. Since the Bus, whose body is painted with the plaintiff's work, runs, as a city bus, on public roads that are open places accessible by the public, the plaintiff's work should also be regarded as being installed in "open places accessible by the public" or "places easily seen by the public."

Next, the court will examine the phrase "permanently installed."

In light of the purpose mentioned above, it is appropriate to construe that the phrase "permanently installed" prescribed in said Article refers to the act of installing an article in a state offered to many and unspecified persons for continual viewing for a long period of time, according to socially accepted ideas. Since the Bus, whose body is painted with the plaintiff's work, is not one that is operated only for a short period of time for a specific event, but instead runs continually like other general city buses, the plaintiff's act of drawing the plaintiff's work on the body of a city bus scheduled to be run on public roads on a regular basis should indeed be regarded as having an artistic work "permanently installed."

In this regard, the plaintiff alleges that the Bus is parked in the garage during the night and thus cannot be regarded as being permanently installed. However, in ordinary cases, it is likely to prohibit the entrance or viewing by the public with respect to general artistic works during the night for security reasons, etc. Placing restrictions on such viewing would not be contrary to the requirement of permanence nor would it serve as a reasonable ground for rejecting the application of said provision. In conclusion, the plaintiff's allegation made in this regard is groundless.

The plaintiff also alleges that the term "installed" should be construed as requiring an artistic work to be firmly fixed to real property, such as lands and buildings, or fixed

at a certain place, and thus, in this case where the Bus moves, the act of drawing paintings on the Bus does not fall under the act of installation. It is true that, typically, said provision shall be applied to bronze statues placed at parks or public roads. However, in light of the abovementioned purpose of said provision such that it is preferable, from the perspective of ensuring the public's liberty of action, to widely allow the public to freely exploit artistic works that are placed in open places where many and unspecified persons may freely see it, it should be said that it is unreasonable to construe the meaning of the term "installation" by limiting the relevant work to fall under typical ones that are fixed to real property or at certain places. Thus, the plaintiff's allegation in this regard is also groundless.

3. Regarding Issue (3)

(1) The court shall determine whether or not the act of printing the pictures of the Bus whose body is painted with the plaintiff's work in the defendant's book and selling such book falls under the instance prescribed in Article 46, item (iv) of the Act.

Article 46, item (iv) of the Act prescribes that the public may not freely use the relevant artistic work in the case of "a reproduction of an artistic work exclusively for the purpose of selling its reproductions and the sale of such reproductions." While the main clause of Article 46 of the Act allows the general public to freely exploit a work by taking into consideration factors such as avoidance of excessive constraints on the action of the general public, respect for social practice and reasonable intention of the author as mentioned above, item (iv) of said Article provided exceptions for the general rule prescribed in the main clause of said Article for the following reasons: if it is allowed to freely exploit a work with respect to the act of reproduction of a work made exclusively for the purpose of selling its reproductions, the copyright holder may suffer serious economic disadvantages.

As such, the issue of whether or not the defendant's act falls under Article 46, item (iv) of the Act should be determined by examining whether or not such act falls under the exceptional instance of a reproduction of an artistic work "exclusively" for the purpose of selling its reproductions and the sale of such reproductions by taking into consideration in an objective manner the look and contents of the book, etc. in which the relevant work is exploited, the mode of exploitation of the work and purpose thereof.

(2) Based on the abovementioned standpoint, the court will examine this point.

(A) Look and contents of the defendant's book

As shown in the copy of the attached list of books, the defendant's book consists of 46 pages and is a relatively small book, sized about 14.8 centimeters by 14.8

centimeters. In its front cover, the title of the series "なかよし絵本シリーズ⑤ (Nakayoshi Ehon Shirīzu ⑤ (Picture Book Series No. 5))" is in small print on the upper left part, and the main title, "まちをはしる－はたらくじどうしゃ (Machi wo Hashiru – Hataraku Jidōsha (Working Cars that Run Around the Town)," is in bigger print under the first-mentioned title.

The defendant's book explains in an easy-to-understand manner for infants various types of automobiles that run around the town by using pictures and illustrations. On its back cover, the following remark of the editorial supervisor is stated: "Although children may see a lot of bullet trains and automobiles, surprisingly, they are unable to draw them precisely. Point out to your child entertainingly some points to focus on, such as shapes and positions. [...]."

With respect to the contents, the defendant's book provides explanations on the following 24 types of automobiles by using a two-page spread (two pages facing each other) as one unit and by showing a picture of each type of automobile and providing easy explanations: patrol car, ambulance, fire engine, squirt, mail car, sanitation vehicle, bus, taxi, car carrier trailer, rescue vehicle, snow plow, moving stall, farmer's market truck, pole-construction truck, wheel loader, dump truck, crane vehicle, cement-mixer truck, high-lift work vehicle, TV car, restroom trailers, TV-relay car, boarding ramp vehicle, and food loader.

For example, on pages 1 and 2 of the text, a "patrol car" is introduced by printing [a] a large two-page picture of a patrol car; [b] a small picture of an "unmarked patrol car" on the upper left of page 2; [c] an explanatory text for children that reads "This car patrols the town by driving around to provide security to citizens"; and [d] an explanatory text for parents that reads "There are two types of patrol car: a patrol car that drives around the town and provides safety and an unmarked patrol car that looks like a public vehicle on the surface but changes into a patrol car in emergencies." In addition, on pages 3 and 4 of the text, an "ambulance" is introduced by printing [a] a large two-page picture of an ambulance; [b] a small picture of the "state inside" on the upper left and a small picture of a "blood delivery vehicle" on the lower left of page 4; [c] an explanatory text for children that reads "Hurry up! Hurry up! We have to bring sick and injured people to the hospital"; and [d] an explanatory text for parents that reads "An ambulance transports sick and injured people to hospitals. In the car, nursing care may be provided and in many cases, people's lives are saved by the emergency medical care provided by emergency life-saving technicians."

(B) Mode of exploitation of the plaintiff's work, etc.

The mode of publication on the front cover is as follows. As stated above, on the

front cover, the title of the series "なかよし絵本シリーズ⑤" is in small print on the upper left part while the main title, "まちをはしるーはたらくじどうしゃ," is in bigger print under the first-mentioned title. Under the main title, the picture of the Bus, whose body is painted with the plaintiff's work, is printed largely (about 8 centimeters by about 14 centimeters). The rear part of the Bus is slightly cut off.

The mode of publication on page 14 of the text is as follows. On pages 13 and 14 of the text, "various buses" are introduced by printing [a] a large two-page picture of a "kindergarten bus"; [b] small pictures of a "route bus," "metropolitan double deck bus" and the "state of the driver's seat" on the left column on page 14; [c] an explanatory text for children that reads "The bus drops and picks up everyone"; and [d] an explanatory text for parents that reads "A kindergarten bus is a bus exclusively used for transporting kindergarteners. A route bus is a circular bus bound for Pacifico Yokohama. The metropolitan double deck bus runs from Kasai Rinkai-koen Park." Among these pictures, the picture of the Bus whose body is painted with the plaintiff's work is printed in a small size (about 3 centimeters by about 7 centimeters) as a "route bus."

(3) According to the facts found above, it is true that, in the defendant's book, the pictures of the Bus whose body is painted with the plaintiff's work are printed in a manner by which the characteristics of the plaintiff's work may be perceived in a large size in the center of the front cover and in a small size on the upper left of page 14 of the text. However, taking into consideration the following circumstances in a comprehensive manner, it should be said that the defendant's act of printing the pictures of the Bus, whose body is painted with the plaintiff's work, in the defendant's book and selling such book does not fall under the act of reproduction of an artistic work exclusively for the purpose of selling its reproductions and the sale of such reproductions: [i] the defendant's book was created for the purpose of explaining to children various types of automobiles that travel around the town by using pictures, and explanations on the appearance and role of each of the 24 types of automobiles in total are provided; [ii] the defendant's book may be construed to have been edited from the perspective of early childhood education, such as developing observation skills and enhancing curiosity, which will be the basis for their future education, by having children see the pictures of various types of automobiles; and [iii] the method of publication used in the front cover and page 14 of the text cannot be found to be exceptionally unnatural in light of the purpose mentioned above. Thus, the person who looks at the Book would receive the impression that the Bus is cited as one of the examples of the various types of automobiles that are introduced in the text. Therefore, the plaintiff's allegation in this regard is groundless.

4. As found above, the plaintiff's claims are groundless.

The defendant's book does not contain an indication of the name of the author of the plaintiff's work. However, as stated above, in light of the purpose and mode of exploitation of the work in the defendant's book, it may be found that the author's interests would not be damaged even if the name of the author is not indicated. Therefore, the defendant's act does not constitute infringement of the moral rights of an author held by the plaintiff.

Tokyo District Court, 29th Civil Division

Presiding Judge: IIMURA Toshiaki

Judge: IMAI Hiroaki

Judge: ISHIMURA Satoshi

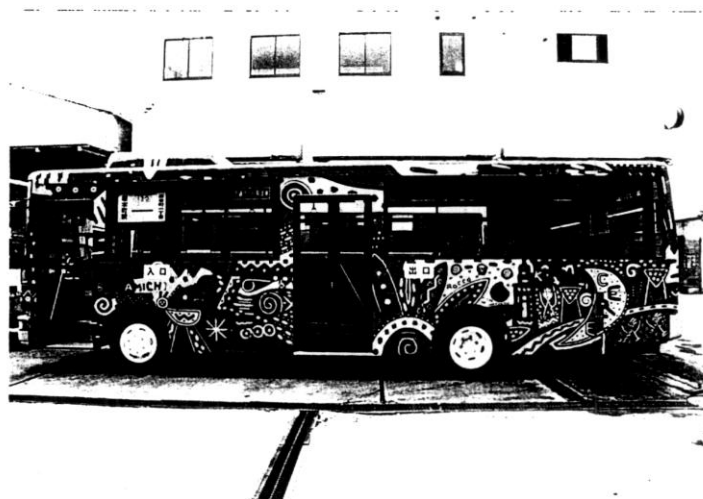
Attachment

List of works

The drawings painted on the left and right sides, the top surface and the rear surface of the body of the bus, whose fleet number is "横浜 2 2 か 6 6 4 6 "

As shown in the attached picture of the plaintiff's work

Picture of the Plaintiff's Work



Attachment

List of books

Title: "なかよし絵本シリーズ ⑤ まちをはしる はたらくじどうしゃ"

Publication: Published in 1998

Publisher: Nagaoka Shoten


The mode of publication on the front cover and pages 13 and 14 of the text is as stated in the copy of the "Attached defendant's book."

なかにし絵本シリーズ ⑤

まちははる—
はたらくじどうしゃ


監修—多湖 輝


千葉大学名誉教授
（前）池田短期大学学長




なかにし絵本シリーズ ⑤ まちははる—はたらくじどうしゃ 永岡書店

ISBN4-522-21739-0
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■監修の言葉
多湖 輝



新幹線や自動車など、
中見ているようですが、子ど
もは、意外に正確な絵がかけ
ます。お父さま、お母さまが
こいつに、形や位置など見
るポイントを楽しく指導し
てあげてください。
この本で、観察力が鋭くなれ
ば、勉強の基礎になる好奇心も、
ぐんと高まっていくでしょう。

⑤ まちははる—はたらくじどうしゃ 1998年発行 ④
監修者/多湖 輝
編集協力/絵本：はらくじどうしゃ
写真提供/フジオカーチ/OPPO
イラスト/岩崎由貴
表紙デザイン/杉本デザイン室
発行人/永岡書店
発行所/永岡書店
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