

Date	September 5, 1997	Court	Tokyo District Court
Case number	1991 (Wa) 3682		

– A case in which the court ruled that: the "pamphlets" (as provided in Article 47 of the Copyright Act) mean small catalogs, lists, or picture books, etc. for the purpose of explaining or introducing an exhibited work for persons viewing it, and it should be considered necessary that they consist mainly of the explanation of the work or include a considerable number of elements of being a material for the work; if a pamphlet has the same value as one that is traded on the market as a book for the purpose of appreciating a reproduced work in consideration of paper quality, format, and the form of reproduction of the work, etc., it is substantially nothing less than an art collection book and does not fall under the pamphlets prescribed in said Article.

References: Article 47 of the Copyright Act

Number of related rights, etc.: None

Summary of the Judgment

1. The plaintiff, which is a Dutch corporation, alleged that while in preparation for its incorporation, its representative concluded a contract with Salvador Dali who was then alive, and under this contract (the "Contract"), it acquired through transfer from Dali the copyrights for all of his works for a limited period of time. Based on this allegation, the plaintiff filed this action against one of the defendants, The Asahi Shimbun Company, which held an exhibition titled "Spanish Fantasy: World of Gaudi and Dali" at the spaces in the stores of another defendant, The Daimaru, Inc., and produced a catalog by reproducing and printing Dali's paintings (the "Catalog"). The plaintiff also filed an action against Defendant Daimaru, which sold the Catalog at said spaces as consigned by Defendant Asahi Shimbun. In this case, the plaintiff alleged that the defendants' acts of producing and selling the Catalog infringed the copyrights held by the plaintiff, and accordingly, it sought an injunction against these acts and claimed payment of damages.

2. In this judgment, the court partially upheld the plaintiff's claim against Defendant Asahi Shimbun and entirely dismissed its claim against Defendant Daimaru due to absence of intent or negligence, making the findings and determinations as follows.

(1) The Contract is a contract for the temporal transfer of copyrights, which is also legitimate under the Copyright Act of Japan. It is not a contract for mandate even though its purpose is for the transferor to entrust the transferee with the management of copyrights, but rather the copyright holder chose to transfer his copyrights as a means to accomplish such purpose. Hence, the copyrights covered by the Contract

were perfectly transferred to the transferee for a period of time defined by the Contract.

Consequently, based on the effect of the Contract, the plaintiff holds the status of the transferee of the copyrights for Dali's paintings.

(2) The pamphlets for the purpose of explaining or introducing an artistic work or photographic work to persons viewing it as provided in Article 47 of the Copyright Act mean small catalogs, lists, or picture books, etc. for the purpose of explaining or introducing an exhibited work for persons viewing it. As long as they are for the purpose of explanation or introduction, it should be considered necessary that they consist mainly of the explanation of the work or include a considerable number of elements of being a material for the work. In addition, as such pamphlets are for the purpose of explaining or introducing a work for persons viewing it, who intend to appreciate the exhibited original copy of the work, it is considered that the quality of printed reproduction of the work is not the quality required for the purpose of appreciating the reproduction itself but is supposed to be only sufficient to visually make clear the correspondence between the exhibited original copy of the work and the explanation or introduction thereof. Even if a pamphlet is intended to be distributed to persons viewing a work, if it has the same value as one that is traded on the market as a book for the purpose of appreciating a reproduced work in consideration of paper quality, format, and the form of reproduction of the work, etc., it is substantially nothing less than an art collection book and does not fall under the pamphlets prescribed in said Article. It is meaningful from cultural and academic perspectives to issue a catalog, in which the high-quality reproductions of works that the general public cannot view in daily life, such as works lent from across Japan or around the world and works possessed by individuals, are printed, on the occasion of an exhibition with a certain theme, and provide it to enable persons viewing the works to appreciate and consider them and recall the original copies of the works at a later date. However, it is not reasonable to consider, based on such meaningfulness, those items similar to art collection books for appreciation that are sold on the market to fall within the scope of the pamphlets prescribed in Article 47 of the Copyright Act, to which the right of reproduction does not extend.

It is obvious from the form of printing that the Catalog contains few elements of being a material for the exhibited works and is focused on the appreciation of the printed reproductions of the works. In terms of the appearance of the Catalog, including paper quality, inclusion of many color printings, format, sizes of the printed works, the Catalog can be considered to be comparable to art collection books for

appreciation that are produced by reproducing works and are sold on the market. Therefore, the Catalog cannot be considered to fall under the "pamphlets" prescribed in Article 47 of the Copyright Act.

Judgment rendered on September 5, 1997

1991 (Wa) 3682

Judgment

Plaintiff: Demart Pro Arte B.V.

Defendant: The Asahi Shimbun Company

Defendant: The Daimaru, Inc.

Main Text

1. The defendant The Asahi Shimbun Company shall not reproduce the paintings described in List 1 attached to this judgment in the catalog described in List 2 attached to this judgment.
2. The defendant The Asahi Shimbun Company shall not distribute the catalog described in List 2 attached to this judgment in which the paintings described in List 1 attached to this judgment are printed.
3. The defendant The Asahi Shimbun Company shall destroy the original plates for printing the paintings described in List 1 attached to this judgment from amongst the original plates for printing the catalog described in List 2 attached to this judgment and the catalog described in List 2 attached to this judgment.
4. The defendant The Asahi Shimbun Company shall pay to the plaintiff 200,000 yen and the amount accrued thereon at the rate of 5% per annum for the period from April 16, 1991, to the date of completion of the payment.
5. All the other claims of the plaintiff against the defendant The Asahi Shimbun Company and all the claims of the plaintiff against the defendant The Daimaru, Inc. shall be dismissed.
6. For the court costs, in the relationship between the plaintiff and the defendant The Asahi Shimbun Company, the defendant The Asahi Shimbun Company shall bear one-fourth of the costs incurred by the plaintiff and one-half of the costs incurred by the defendant The Asahi Shimbun Company, and the plaintiff shall bear the remaining amount. In the relationship between the plaintiff and the defendant The Daimaru, Inc., the plaintiff shall bear all of the court costs.
7. Paragraphs 1 to 4 of this judgment may be provisionally executed.

Facts

No. 1 Judicial decision sought by the parties

1. Objects of claims

(1) The defendant The Asahi Shimbun Company shall not reproduce the paintings described in List 1 attached to this judgment in the catalog described in List 2 attached to this judgment.

(2) The defendants shall not distribute the catalog described in List 2 attached to this judgment in which the paintings described in List 1 attached to this judgment are printed.

(3) The defendant The Asahi Shimbun Company shall destroy the original plates for printing the paintings described in List 1 attached to this judgment from amongst the original plates for printing the catalog described in List 2 attached to this judgment.

(4) The defendants shall destroy the catalog described in List 2 attached to this judgment.

(5) The defendants shall jointly and severally pay to the plaintiff 1,250,000 yen and the amount accrued thereon at the rate of 5 % per annum for the period from April 16, 1991, to the date of completion of the payment.

(6) The defendants shall bear the court costs.

(7) Declaration of provisional execution

2. Answers to the objects of claims

(1) All of the plaintiff's claims shall be dismissed.

(2) The plaintiff shall bear the court costs.

No. 2 Allegations of the parties

1. Statements of claims

(1) Plaintiff's rights

(i) Copyrights

Salvador Dali (hereinafter referred to as "Dali"; deceased since January 23, 1989), who is a Spanish national, is the author of the paintings described in List 1 attached to this judgment (hereinafter referred to as the "Paintings").

(ii) Conclusion of the contract in question (transfer of copyrights)

[1] On June 13, 1986, Dali concluded a contract including the following provisions (hereinafter referred to as the "Contract"; Exhibit Ko 3, which is the contract document for the Contract, is referred to as the "Contract Document") with Robert Descharnes, who is the representative of the plaintiff that was a Dutch corporation in preparation for its establishment at that time, at Torre Galatea in Figueres (Gerona), Spain:

Article 1 Provisional Transfer of Right to Copyrights

Salvador Dali shall here transfer to the plaintiff the right to the complete and smooth exercise of all the intellectual property rights that currently exist for all of his works or derive from said works all over the world, irrespective of whether the works are known at this time and irrespective of the types of the works, specifically, literature, art, drama, music, film, and other. The plaintiff shall receive the transfer thereof. Said right shall

include the following rights:

1. (omitted);
2. right to permit or prohibit the reproduction and printing of the works by any form, ground, method or medium;
3. right to call claims.

(the rest omitted)

Article 3 Period of Transfer

The right defined and described above shall be transferred to the plaintiff without being rescinded (cancelled) during the period that ends on May 11, 2004. Said right shall be attributed to Dali or his heir, or other successor, at the time when the period of the Contract expires unless otherwise specifically agreed in writing.

The parties shall have agreed that the right that is provisionally transferred to the plaintiff by this document imposes no burden.

Article 9 Conditions for Suspension

1. The Contract shall come into force on condition of obtaining explicit authorization from the competent Spanish administrative agency.
2. In addition, the Contract shall come into force on condition that [i] the plaintiff is completely established in the proper way within six months from the conclusion of the Contract and that [ii] within said period, Robert Descharnes proves, to Dali and the competent agencies, the final establishment of said company and the formal qualification therefor, as well as the fact that he has sufficient authority to sign the Contract as the representative of the plaintiff, and issues a proper official document that should be attached to the Contract as part thereof.

Article 10 Governing Law and Arbitration

1. Any dispute or lawsuit arising between the parties from the interpretation or performance of the Contract or any dispute or lawsuit arising between them from the Contract shall be governed by Spanish law.

(the rest omitted)

[2] The conditions provided in Article 9 of the Contract were satisfied shortly after the conclusion of the Contract.

(iii) The plaintiff obtained copyrights for the Paintings based on the Contract.

(2) Defendants' act

The defendant The Asahi Shimbun Company (hereinafter referred to as "Defendant Asahi") produced at least 10,000 copies of the catalog described in List 2 attached to this judgment (hereinafter referred to as the "Catalog"), in which the Paintings are reproduced and printed, for the purpose of distributing them at the venues for an exhibition titled "Spanish Fantasy World

Exhibition of Gaudi and Dali" (hereinafter referred to as the "Exhibition"), which was hosted by Defendant Asahi at the venues in the following four stores of the defendant The Daimaru, Inc. (hereinafter referred to as "Defendant Daimaru"). On consignment from Defendant Asahi, Defendant Daimaru sold two catalogs, the Catalog and the catalog of Antoni Gaudi's works, as a unit at the venues during the Exhibition.

Notes

(i) Venue: Daimaru Museum Tokyo

Term: From September 27 to October 8, 1990

(ii) Venue: Daimaru Museum Umeda

Term: From October 10 to October 22, 1990

(iii) Venue: Daimaru Museum Kyoto

Term: From October 25 to November 6, 1990

(iv) Venue: Tenjin Daimaru

Term: From November 15 to November 20, 1990

(omitted)

Reasons

1. The parties agree on the facts stated in statements of claims (1)(i). Both Japan and Spain have concluded the Berne Convention for the Protection of Literary and Artistic Works, revised in Paris. Therefore, the Paintings, which are the works of Dali, who was a Spanish national, are subject to protection under the Japanese Copyright Act pursuant to Article 3, paragraph (1)(a) of said Convention and Article 6, item (iii) of the Japanese Copyright Act.

2. Regarding statements of claims (1)(ii) (conclusion of the Contract)

(1) According to Exhibit Ko 3, which is recognized as having been authentically established based on the entire import of the oral argument, and the entire import of the oral argument, the following facts are recognized: [i] On June 13, 1986, Dali concluded the Contract with Robert Descharnes (current representative of the plaintiff) as the representative of the plaintiff that was in preparation for establishment under Dutch law at that time, at Torre Galatea in Figueres (Gerona), Spain; [ii] The Contract Document included the provisions to the effect as stated in statements of claims (1)(ii)[1].

(omitted)

(5) As mentioned above, the Contract should be considered as a contract for the temporal transfer of the copyrights. As mentioned in (4)(ii)[3] above, Spain, which has the position of the

worldwide free successor to all the properties, rights, and art works of Dali, that is, a testamentary donee by universal succession, succeeded to the properties in the state that the copyrights for Dali's works are temporally transferred to the plaintiff. As the effect of the Contract, the plaintiff still has the position of the transferee of the copyrights for Dali's works.

3. Regarding statements of claims (2) (defendants' act)

The parties agree on the following facts: [i] Defendant Asahi that hosted the Exhibition produced the Catalog, in which the Paintings are reproduced and printed, for the purpose of distributing copies thereof at the venues, and on consignment from Defendant Asahi, Defendant Daimaru sold two catalogs, the Catalog and the catalog of Gaudi's works, as a unit at the fixed price of 2,500 yen at the venues during the Exhibition and [ii] the venues and terms of the Exhibition. The parties also agree that the number of copies of the Catalog produced is up to 8,000 and that the number of the copies sold is up to 7,374. According to Exhibit Hei 1, whose establishment is agreed on by the parties, it is recognized that the remaining 626 copies were donated or provided as material. There is no evidence sufficient to recognize the fact that more copies of the Catalog than said number were produced and sold.

4. Regarding a defense (pamphlets for the purpose of explaining or introducing exhibited works)

(1) The pamphlets for the purpose of explaining or introducing an artistic work or photographic work to persons viewing it as provided in Article 47 of the Copyright Act mean small catalogs, lists, or picture books, etc. for the purpose of explaining or introducing an exhibited work for persons viewing it. As long as they are for the purpose of explanation or introduction, it should be considered necessary that they consist mainly of the explanation of the work or include a considerable number of elements of being a material for the work. In addition, as such pamphlets are for the purpose of explaining or introducing a work for persons viewing it, who intend to appreciate the exhibited original copy of the work, it is considered that the quality of printed reproduction of the work is not the quality required for the purpose of appreciating the reproduction itself but is supposed to be only sufficient to visually make clear the correspondence between the exhibited original copy of the work and the explanation or introduction thereof. Even if a pamphlet is intended to be distributed to persons viewing a work, if it has the same value as one that is traded on the market as a book for the purpose of appreciating a reproduced work in consideration of paper quality, format, and the form of reproduction of the work, etc., it is substantially nothing less than an art collection book and does not fall under the pamphlets prescribed in said Article. It is meaningful from cultural and academic perspectives to issue a catalog, in which the high-quality reproductions of works that the general public cannot view in daily life, such as works lent from across Japan or around the world and works possessed by individuals, are printed, on the occasion of an exhibition with a

certain theme, and provide it to enable persons viewing the works to appreciate and consider them and recall the original copies of the works at a later date. However, it is not reasonable to consider, based on such meaningfulness, those similar to art collection books for appreciation that are sold on the market as those to which the right of reproduction does not extend, as the pamphlets prescribed in Article 47 of the Copyright Act.

(2) Considering this in relation to the Catalog, according to Object of Observation Ko 1, for which the parties agree that it is the catalog titled "Spanish Fantasy 'World Exhibition of Gaudi and Dali,'" and the entire import of the oral argument, the following facts are recognized in relation to the Catalog.

The text of the Catalog consists of 67 pages, including a list of works. Those considered as Dali's works are printed on 45 pages, from page 11 to page 55, and before those pages, there are pages printing Defendant Asahi's greetings, an explanation of Dali's life and the outline of the trends of works in each period in his life (which does not mention individual works printed in the Catalog) which was written by Shinichi Segi and is titled "Salvador Dali: His Spirit of Art," a photographic portrait of Dali, and Dali's words. After the pages printing the works, there are a photograph of Dali wearing fur, an 8-page chronological history, and 2-page list of the exhibited works. The pages printing the works include 10 bronze sculptures (one sculpture per page), five tapestries (one of them is printed on a two-page spread, and others are printed one by one on one page), four oil paintings (one painting per page), seven water paintings (one painting per page), one sketch (one sketch per page), four block prints and a series consisting of 15 block prints (the four block prints are printed one by one on one page each, and for the block prints in the series, some are printed one by one on one page each, and others are printed two by two on one page), and four ceramic plates (one plate per page) (four of the water paintings, one of the block prints, and all of the block prints in the series (14 pages in total) are printed in black and white, and the others are printed in color). The Paintings are three oil paintings and one sketch out of those works, and all of them are printed in color. For 15 of those works, only the type, title, year of production, painting tool, and size of each work are briefly described as explanatory matters. Even for the works on which explanation is given, almost half of them are explained in only two or three lines. Out of the Paintings, the work stated in 1 in List 1 attached to this judgment is explained in 16 lines, but no explanation is given for the other three works. The format of the Catalog is approximately 27 cm by 22.5 cm in size. Most of the printed works are reproduced and printed in the size of almost entirety or two-thirds of a page, and some of them are printed on a two-page spread, as mentioned above. Out of the Paintings, one stated in 1 in List 1 attached to this judgment is printed in the size of approximately 15 cm by 15 cm, one stated in 2 in said List is printed in the size of 21 cm by 17 cm, one stated in 3 in said List is printed in the size of approximately 21 cm by 15.5 cm, and one stated in 4 in said List is printed

in the size of approximately 19 cm by 14.5 cm. Regarding the configuration of the Catalog, high-quality art paper is used for the text part, and high-quality thick paper is used for the front and back covers in bookbinding. Moreover, a cover using high-quality art paper is attached. The Catalog was sold in the state that it was put in one outer case as a set with a catalog of Gaudi's works.

According to the facts determined above, it is obvious from the form of printing that the Catalog contains few elements of being a material for the exhibited works and is focused on the appreciation of the printed reproductions of the works. In terms of the appearance of the Catalog, including paper quality, inclusion of many color printings, format, size of the printed works, the Catalog can be considered to be comparable to art collection books for appreciation that are produced by reproducing works and are sold on the market. Therefore, the Catalog cannot be considered to fall under the "pamphlets" prescribed in Article 47 of the Copyright Act.

(omitted)

8. Conclusion

On these bases, out of the plaintiff's claims against Defendant Asahi, the claims for which the court determined in 6 and 7(1) above that there is a reason shall be upheld, and all the other claims of the plaintiff against Defendant Asahi shall be dismissed. All the claims of the plaintiff against Defendant Daimaru shall be dismissed as there is no reason therefor. The judgment shall be rendered in the form of the main text by applying Article 89, the main clause of Article 92, and the main clause of Article 93, paragraph (1) of the Code of Civil Procedure in relation to the bearing of the court costs and Article 196, paragraph (1) of said Code in relation to a declaration of provisional execution, respectively.

Tokyo District Court

Presiding judge: NISHIDA Yoshiaki

Judge: TAKABE Makiko

Judge Morisaki Eiji is unable to sign and seal this judgment as he was reassigned. Presiding judge: NISHIDA Yoshiaki

(omitted)