

Date	February 29, 2000	Court	Tokyo District Court, 46th Civil Division
Case number	1998 (Wa) 5887		
<p>– A case in which the court examined an act of selling or otherwise handling a book that falls under the genre of so-called biography and determined that, even if a large photographic portrait of a person is used on the first page, or the front cover of the book, as long as it is a portrait of the person described in the text of the book, such act would not constitute infringement of the publicity right of that person.</p>			

References: Articles 709 and 710 of the Civil Code

Numbers of related rights, etc.:

Summary of the Judgment

In this judgment, the court examined the following facts stated in 1 (1) to (7) and determined, by holding as stated in 2 below in summary, that, in the case of a book that falls under the genre of so-called biography, even if a large photographic portrait of a person is used on the first page, or the front cover of the book, as long as it is a portrait of the person described in the text of the book, the act of selling or otherwise handling the book would not constitute infringement of the publicity right of that person because the book cannot be considered to depend solely on the customer appeal of the portrait, etc.

1. (1) X is a professional football player who concluded an agreement with a football team in the J-League in 1995.

(2) Y1 authored the book titled "X Nihon o furansu ni michibiita otoko" (X, A man who led Japan to France)" (B6-size book; the "Book"). Y2 started selling the Book from around March 1998.

(3) The Book describes X's life history by presenting various episodes about his private life with a focus on his connection to football starting from the time of his birth to the time immediately prior to the participation in the finals of the World Cup in France.

(4) The middle part of the front cover of the Book displays a color photograph showing the entire body of X playing football.

(5) The Book consists of a four-page, glossy-paper gravure part and a 237-page, regular-paper body (including the introduction, the table of contents, etc.). On the pages stated in the following items, the photographs of X stated in the corresponding items were published respectively, occupying almost all of the space on each page.

(i) The upper section of the second page: the plaintiff in his early childhood attending a wedding reception

- (ii) The lower part of the second page: the plaintiff in a school uniform
 - (iii) The upper section of the third page: the plaintiff in a football club uniform in his junior high school days
 - (iv) The lower section of the third page: the plaintiff in a football club uniform in his high school days
 - (v) The fourth page: the plaintiff playing football as a member of the World Team
 - (vi) Page 13 in the body of the Book: the plaintiff in his early childhood attending a wedding ceremony
 - (vii) Page 35 in the body of the Book: the plaintiff around the time of the enrollment in a junior high school
 - (viii) Pages 43 and 53 in the body of the Book: the plaintiff in a football club uniform in his junior high school days
 - (ix) Page 57 in the body of the Book: the plaintiff in a school uniform
 - (x) Page 83 in the body of the Book: the plaintiff in a football club uniform in his high school days
 - (xi) Page 99 in the body of the Book: the plaintiff in a uniform of the U-17 team of Japan
 - (xii) Page 107 in the body of the Book: the plaintiff playing football as a member of the U-17 team of Japan
 - (xiii) Pages 119 and 159 in the body of the Book: the plaintiff in a high school uniform
 - (xiv) Page 195 in the body of the Book: the plaintiff playing football as a member of Japan's national team in an Olympic qualifier
 - (xv) Page 213 in the body of the Book: the plaintiff in a uniform in a World Cup qualifier
 - (xvi) Page 215 in the body of the Book: the plaintiff playing football as a member of the Japan's national team in said World Cup qualifier
 - (xvii) Pages 219 and 21 in the body of the Book: the plaintiff as a member of the World Team
 - (xviii) Page 231 in the body of the Book: the plaintiff in plain clothes photographed recently
- (7) X had not authorized Y1 and Y2 to use his name, portraits, etc. for the Book.

2. It can be said that the Book is designed to appeal to potential purchasers by taking advantage of the customer appeal of the name and portraits of the plaintiff. For example, the major part of the title contains the name of the plaintiff. The front cover and spine of the Book indicate his name in a large font. The middle part of the front cover shows a large color photograph showing the entire body of the plaintiff.

Moreover, the plaintiff's photographs are presented at the beginning of the Book and also in many parts of the body of the Book. However, about 200 pages of the Book, in other words, the pages excluding the pages presenting those photographs, his autograph, the Poem, etc., describe his life history and his words and actions based on the information gathered from the interviews with people who were close to him at some point in time and also from other sources. These pages should be considered to be the main part of the Book. The photographs of the plaintiff presented in the body of the Book can be found to be related to the plaintiff in a certain life stage described in the corresponding part of the text and should therefore be considered to be used for the purpose of supplementing the content of the text. On the other hand, the name and photographic portraits of the plaintiff used on the front cover, spine, wrapper band, and gravure pages can be considered to be used independently from the text and should therefore be considered to be used for the purpose of taking advantage of the customer appeal of the name, etc. of the plaintiff. However, the name and portraits of the plaintiff used in such manner comprise only a small part of the entirety of the Book. Thus, such use should not be considered to be the same as the use of photographic portraits of the plaintiff for such products as calendars and photographs for sale, which consist mostly of his name, portraits, etc. and do not have any other features and depend mostly on the customer appeal of his name, portraits, etc. Meanwhile, since an act of writing and publishing a book for the purpose of reporting about, criticizing, or otherwise describing a celebrity should be permitted to guarantee freedom of expression and the press, any person should be permitted to write or publish such book without obtaining consent from that celebrity. In such case, it would be quite possible to use the name, portraits, etc. of the person for the title or the front cover, etc. of the book in order to indicate that the book is about that person. Thus, celebrities have to tolerate such use of their names, portraits, etc. in principle.

Judgment rendered on February 29, 2000
1998 (Wa) 5887 Case of Seeking Payment of Damages

Judgment

Plaintiff: X

Defendant: Kabushiki Kaisha Rain Bukkusuu

Representative of said company: Y

Defendant: Y

Main text

1. The defendants shall not sell or distribute the book stated in Attachment 1 "Book List."
2. The defendants shall jointly pay the plaintiff 3,850,000 yen and the amount accrued thereon at the rate of 5% per annum for the period from April 15, 1998, to the date of completion of the payment.
3. Any other claims of the plaintiff shall be dismissed.
4. The court costs shall be divided into two equal portions, one of which shall be borne by the plaintiff, while the other one shall be jointly borne by the defendants.
5. This judgment may be provisionally executed as far as the first and second paragraphs are concerned.

Facts and reasons

No. 1 Claims of the plaintiff

1. The same as the first paragraph of the main text.
2. The defendants shall jointly pay the plaintiff 47,002,754 yen and the amount accrued thereon at the rate of 5% per annum for the period from April 15, 1998, to the date of completion of the payment.

No. 2 Outline of the case

This is a case where the plaintiff alleged against the defendants that the book stated in Attachment 1 "Book List" published by the defendants (the "Book") infringed the plaintiff's publicity right, privacy right, and moral right of author (right to make a work public), and copyright (reproduction right), and sought an injunction against the publication of the Book and demanded payment of damages.

I. Facts undisputed by the parties (including the facts clearly found based on the evidence (Exhibits Ko 1, 3, and 18))

1. The plaintiff is a professional football player who concluded a professional player agreement with one of the football teams in the Japan Professional Football League (so-called J-League), "Bellmare Hiratsuka," in 1995. Currently, the plaintiff plays football as a member of one of the teams in the Italian Republic's professional football league, Serie A. The plaintiff participated in the Atlanta Olympics in 1996, the World Cup France qualifiers in 1997, and the World Cup finals in 1998 as a member of Japan's national team. In 1997, the plaintiff was selected and played as a member of the World Team. Furthermore, the plaintiff was featured by various media such as TV programs, newspapers, and magazines and appeared in TV commercials. In this way, the plaintiff is one of the star athletes not only in the current world of football in Japan but also in the world of sports as a whole. The name and portraits of the plaintiff have been widely known in Japan.

2. Kabushiki Kaisha Rain Bukkusu (the "defendant company") is a company that publishes, sells, or otherwise handles books and magazines in the course of trade. Defendant Y ("Defendant Y") is the representative of said company.

3. The defendant company is the publishing company of the Book and Defendant Y is the author and publisher of the Book. The defendant company started publishing and selling the Book from around March 1998.

4. The Book describes the life history of the plaintiff from the time of birth up to the time immediately prior to the participation in the finals of the World Cup in France with a focus on his connection to football, while presenting various episodes about his private life. The middle part of the front cover of the Book displays a photographic portrait of the plaintiff. Moreover, the body of the book includes 23 photographs showing the plaintiff's portraits taken in his early childhood, school days, and recent years (14 photographs taken prior to the conclusion of the professional player agreement and 9 photographs taken after the conclusion of said agreement). The total number of pages of the Book that contain these photographs is 21. A poem titled "Goal" (the "Poem") created by the plaintiff when he was a junior high student was presented on page 65 of the Book.

5. The plaintiff did not attend any interview conducted by the defendants, and did not even receive a prior notice from the defendants about the project of writing, publishing, selling, and advertising the Book and did not authorize the defendants to use the name, portraits, etc. of the plaintiff for the Book.

II. Issues

1. Whether the defendants' act of publishing and selling the Book constitutes infringement of the plaintiff's publicity right

2. Whether the aforementioned act of the defendants constitutes infringement of the plaintiff's privacy right
3. Whether the aforementioned act of the defendants constitutes infringement of the plaintiff's moral right of author (right to make a work public)
4. Whether the aforementioned act of the defendants constitutes infringement of the plaintiff's copyright (reproduction right)
5. The amount of damage suffered by the plaintiff as a result of the defendants' act

(omitted)

No. 3 Determination on the issues

I. Issue 1 (Infringement of the plaintiff's publicity right)

1. The plaintiff alleged that the defendants' act of publishing and selling the Book constitutes infringement of the plaintiff's publicity right, which is the plaintiff's proprietary right to exclusively control the economic benefit or value of his name, portraits, etc. Regarding the so-called publicity right, it can be interpreted as follows.

It is widely known that an act of affixing the name or a portrait of a celebrity who has gained distinctive fame, social reputation, public recognition, etc. to goods would generate a positive effect on the promotion of the sale of the goods. Regarding the customer appeal of the name, portraits, etc. of a celebrity, some people interpret that the customer appeal should be recognized as the independent economic benefit or value generated from the fame, social reputation, public recognition, etc. of the celebrity and that the celebrity has a proprietary right (so-called publicity right) to exclusively control the economic value of said customer appeal. Consequently, there is a view that, based on the aforementioned proprietary right, the celebrity may seek an injunction against any third party's use of his/her name, portraits, etc. and demand payment of damages for the use.

However, a celebrity attracts strong public attention, and as a result, it is inevitable for everything about the celebrity such as his/her personality, daily routine, ordinary activities, to become a target of reporting, criticisms, comments, etc. by the mass media or ordinary people. In modern society, it is undeniable that a person becomes famous thanks largely to the reporting, etc. by the mass media. In consideration of the fact that the right of the mass media, etc. to cover celebrities should be guaranteed as the freedom of speech, the press, and the media, it should be interpreted that, even if it is reasonable to support the view that the economic value of the customer appeal of a celebrity should be legally protected as the so-called publicity right, the celebrity is not

permitted, in some cases, to forbid the mass media, etc. to criticize him/her on the grounds of his/her publicity right.

Thus, even if it can be said that a publicity right deserves legal protection, a determination as to whether the use of the name, portraits, etc. of another person constitutes an act of tort, i.e., infringement of his/her publicity right, should be made on a case-by-case basis after a comprehensive and objective examination of the purpose, method, and manner of using his/her name, portraits, etc. in consideration of whether such use was made solely for the purpose of taking advantage of the customer appeal of his/her name, portraits, etc.

2. If this case is examined from this perspective, according to the evidence (Exhibit Ko 1), the appearance and content of the Book can be found as follows.

(I) The Book is a B6-size hardcover book with a cover with the title "X Nihon o furansu ni michibiita otoko" (X, A man who led Japan to France). On the front cover, spine, half title, etc. of the Book, the "X" part of the aforementioned title is indicated in a larger font to make it easily noticeable. The middle part of the aforementioned front cover displays a color photograph showing the entire body of the plaintiff playing football. On the right side of the photograph, the name "X" is indicated, while, on the left side, the rest of the title "Nihon o furansu ni michibiita otoko" is indicated. Below the aforementioned name "X," the statement "X the Road to France" is indicated.

The lower part of the Book is covered by a red wrapper band. On the front cover-side of the wrapper band, the statements "Shuku! Wārudo kappu shutsujō" (Congratulations! World Cup entry), "Kokyō Yamanashi no onshi to yūjin ga kataru kūru na tensai shireitō no sugao no seishun sutōri" (The real life of the cool-headed, talented commander in his adolescent days, as described by his teachers and friends in his homeland, Yamanashi), etc. are indicated. On the back cover-side of the band, the statement "X no 21nen no ayumi o otta hikken no issatsu" (21 years of X's life history, Must-read), etc. is indicated.

For these reasons, from the appearance of the Book, it is easy to understand that the Book is about the plaintiff.

(II) The Book consists of a four-page, glossy-paper gravure part and a 237-page, regular-paper body (including the introduction, the table of contents, etc.).

In the gravure part, the first page presents a photograph showing the plaintiff in a uniform of Japan's national team, the upper section of the second page shows the plaintiff in his early childhood attending a wedding reception, the lower part of the second page shows the plaintiff in a school uniform, the upper section of the third page shows the plaintiff in a football club uniform in his junior high school days, the lower

section of the third page shows the plaintiff in a football club uniform in his high school days, and the fourth page shows the plaintiff playing football as a member of the World Team. In the body of the Book, page 13 shows the photograph of the plaintiff in his early childhood attending a wedding ceremony, page 35 shows the plaintiff around the time of enrollment in a junior high school, pages 43 and 53 show the plaintiff in a football club uniform in his junior high school days, page 57 shows the plaintiff in a school uniform, page 83 shows the plaintiff in a football club uniform in his high school days, page 99 shows the plaintiff in a uniform of the U-17 team of Japan, page 107 shows the plaintiff playing football as a member of the U-17 team of Japan, pages 119 and 159 show the plaintiff in a high school uniform, page 195 shows the plaintiff playing football as a member of Japan's national team in an Olympic qualifier, page 213 shows the plaintiff in a uniform in a World Cup qualifier, page 215 shows the plaintiff playing football as a member of Japan's national team in said World Cup qualifier, pages 219 and 221 show the plaintiff as a member of the World Team, and page 231 shows the plaintiff in plain clothes photographed recently. Each of these photographs occupies almost all of the space on the corresponding pages.

Furthermore, the Book carries the plaintiff's autograph on page 61, which was given as of the time when he was a member of Japan's youth national team, and also carries the Poem on page 65. Both the autograph and the Poem were published in the Book by a photoengraving process and occupy almost all of the space on the corresponding pages.

(III) The body of the Book consists of a 3-page "Introduction" and 11-chapter text as stated in Attachment 2 "Table of Contents."

The aforementioned "Introduction" explains the purpose of writing the Book by stating as follows: "21 years old. The life of J-leaguer X is so dynamic and invigorating. This one young man pushes through difficulties and never loses his way. What nurtured him and what brought him to football? Even though he is a talented football player, he did not grow to be a great football player all by himself. Kofu City, Yamanashi Prefecture is famous as a football-loving city second only to the neighboring Prefecture, Shizuoka. The author went to Kofu and visited Nirasaki, where his high school is located, in order to track the footsteps of talented football player, X."

The outline of the content of the body of the Book is as stated in Attachment II "Table of Contents." The Book focuses on X's life as a football player (his attitude as a member of a football club in his primary school days, his performance as a football player in the football clubs of his junior high school and high school, his performance as a member of Japan's national team for the Under-17 World Championship, the World

Youth Championship, the Olympic qualifiers and finals, and the World Cup qualifiers, the details of the games in which he played and the results of the games, his football philosophy and approach, etc.). The Book also describes the circumstances surrounding his birth, his characteristics in his childhood, evaluation by his former teachers, academic achievements, and other matters that are not directly related to football. The Book covers his backgrounds as well as his words and actions from the time of his birth until the time immediately prior to the participation in the finals of the World Cup in France in a chronological manner. In the main text, many remarks allegedly by the plaintiff are stated in parentheses, suggesting that those remarks are exact quotations.

(IV) In the Book, a large part of the first half section in particular (the section concerning the plaintiff's words and actions in his early childhood, junior high school days, and high school days) presents the episodes told by people who directly interacted with the plaintiff, such as the plaintiff's aunts, housewives who are neighbors of the plaintiff's parents, teachers and classmates of the schools that the plaintiff attended, the instructors of the sports club to which the plaintiff belonged in his primary school days, the head coaches, coaches, supervisors, teammates, and managers of the football clubs of his junior high school and high school, and the manager of the selected team of Yamanashi Prefecture. The rest of the Book can be presumed to have been written based on articles about the plaintiff published in newspapers, magazines, etc. (including third parties' remarks presented in those articles) and news reports, etc. about the details and results of games. However, the Book does not clarify the source of the information and provide data about the referential materials.

3. In view of the facts found above, it can be said that the Book is designed to appeal to potential purchasers by taking advantage of the customer appeal of the name and portraits of the plaintiff. For example, the major part of the title contains the name of the plaintiff. The front cover and spine of the Book indicate his name in a large font. The middle part of the front cover shows a large color photograph showing the entire body of the plaintiff. Moreover, the plaintiff's photographs are presented at the beginning of the Book and also in many parts of the body of the Book.

However, about 200 pages of the Book, in other words, the pages excluding the pages presenting those photographs, his autograph, the Poem, etc., describe his life history and his words and actions based on the information gathered from the interviews with people who were close to him at some point in time and also from other sources. These pages should be considered to be the main part of the Book. The photographs of the plaintiff presented in the body of the Book can be found to be related to the plaintiff in a certain life stage described in the corresponding part of the text and should

therefore be considered to be used for the purpose of supplementing the content of the text.

On the other hand, the name and photographic portraits of the plaintiff used on the front cover, spine, wrapper band, and gravure pages can be considered to be used independently from the text and should therefore be considered to be used for the purpose of taking advantage of the customer appeal of the name, etc. of the plaintiff. However, the name and portraits of the plaintiff used in such manner comprise only a small part of the entirety of the Book. Thus, such use should not be considered to be the same as the use of photographic portraits of the plaintiff for such products as calendars and photographs for sale, which consist mostly of his name, portraits, etc. and do not have any other features and depend mostly on the customer appeal of his name, portraits, etc. Meanwhile, since an act of writing and publishing a book for the purpose of reporting about, criticizing, or otherwise describing a celebrity should be permitted to guarantee freedom of expression and the press, any person should be permitted to write or publish such book without obtaining consent from that celebrity. In such case, it would be quite possible to use the name, portraits, etc. of the person for the title or the front cover, etc. of the book in order to indicate that the book is about that person. Thus, celebrities have to tolerate such use of their names, portraits, etc. in principle.

On these grounds, based on a comprehensive and objective examination of the purpose, method, and manner of the defendants' use of the name, portraits, etc. of the plaintiff for the Book, such use cannot be considered to have been made solely for the purpose of taking advantage of the customer appeal of his name, portraits, etc. Even if the plaintiff is found to have the publicity right that deserves legal protection, it cannot be said that the defendants' act of publishing the Book would constitute infringement of the plaintiff's publicity right.

4. Therefore, the plaintiff's claim made on the grounds of infringement of the plaintiff's publicity right is groundless.

II. Issue 2 (Infringement of the plaintiff's privacy right)

1. It should be found that the benefit or right to prohibit unauthorized disclosure of the data or information about private life (so-called privacy right) deserves legal protection as the moral interests indispensable for the life of each individual. In order to find the occurrence of infringement of a privacy right, it is reasonable to interpret that the disclosed information must be [i] revealing some matters related to the private life or presumed to be revealing some matters related to the private life, [ii] revealing matters that any ordinary person would not want to disclose to other people, [iii] not known to the public yet, and [iv] causing the victim to feel uncomfortable or worried.

2. If this case is examined from this perspective, according to the evidence (Exhibits Ko 1 and 18), the following facts can be found in addition to the facts found in I, 2 above.

(I) The outline of the content of the Book is as stated as I, 2, (III) above. More specifically, the Book provides the following data about the private life of the plaintiff: the circumstances surrounding his birth, his family structure, his father's personality, his family's educational policy, his siblings, the results of the personality assessment conducted by his mother, his physical characteristics from his early childhood to school days, his personality, his remarks, his friends, his physical capabilities, the result of a physical fitness test on him, conversations with his former teachers, his former teachers' comments about him, his academic achievements, his most and least favorite academic subjects, his approach to the entrance examinations, his decision about a future career, circumstances of a parent-teacher-student meeting, the level of his power of memory and concentration, the evaluation by his former teacher at the time of graduation, job hunting efforts, etc.

(II) The plaintiff submitted a statement, pointing out that, among the information disclosed by the Book, what he felt particularly uncomfortable about are the circumstances surrounding his birth, the result of the physical fitness test conducted at the junior high school, his former teachers' comments on his school days and academic achievements, the conversations with the head coaches of the football clubs, the Poem, and the photographs taken in his early childhood up to his high school days. He also pointed out that the law should not permit an act of disclosing a lot of information about his life starting from the date of birth to primary school days, junior high and high school days and thereby creating his "life history" or "public image," without letting him know about it, in disregard of the intention of the plaintiff. Moreover, he pointed out that nine facts described in the Book are untrue.

(III) Basically, the plaintiff thinks that anything he did or anything that happened around him prior to his debut as a professional football player or any photograph taken prior to his debut should be kept as private matters of the plaintiff and should not be disclosed to the public. He would be displeased by the disclosure of any information about his pre-debut life. In an interview, he never talked about anything about his pre-debut life.

3. In view of the facts found above, based on an examination of the information, photographs, etc., disclosed in the Book, it can be said that those concerning his post-debut life and even those concerning his pre-debut life, in particular, those showing his performance as a member of Japan's national team for the Junior Youth World Championship and his performance in the football clubs of his junior high school and high school, can be interpreted to have been reported by newspapers, magazines, etc. at

least to a certain extent. In consideration of the fact that the plaintiff is a professional football player, since the aforementioned information cannot be considered to be related to the matters that an ordinary person would not want to disclose to the public, the aforementioned information disclosed in the Book cannot be found to constitute infringement of his privacy right.

On the other hand, the information not directly related to football such as the circumstances surrounding his birth, his physical characteristics, his family structure, his personality, his academic achievements, and his former teachers' evaluations on him should be found to be about his private life and considered to be the matters that an ordinary person would not want to disclose to the public. It can be said that such information had not been known to the public yet and that its disclosure caused him serious discomfort. The same can be said about the Poem and the photographs not directly related to football such as the photographs of a wedding reception party that he attended in his early childhood.

Therefore, the defendants' act of publishing such information in the Book should be considered to constitute infringement of the plaintiff's privacy right.

4. Regarding this point, the defendants alleged that the plaintiff is a public figure, and that the information disclosed in the Book falls within the scope of information for which the plaintiff's consent can be presumed to have been given, and that the information disclosed in the Book would not tarnish the social reputation of the plaintiff. Since the defendants made these allegations and disputed the occurrence of the infringement of the plaintiff's privacy right, further examination is made below.

In the case of a celebrity, his/her private life could be a target of public attention. Thus, as far as the nature of attention is reasonable, the disclosure of some information about his/her private life should be permitted in some cases from the perspective of the protection of the people's right to know and freedom of expression. However even a celebrity has the right to forbid unauthorized invasion of his/her private life and prevent unwanted disclosure of information about his/her private life. The fact that a certain person is a celebrity would not provide sufficient grounds to justify unlimited disclosure of his/her private life. However, in the case of a member of the Diet or a local assembly or any other officeholder or a candidate thereof, there is a particularly strong demand for protection of the freedom of expression from the perspective of providing sufficient information to facilitate public judgment on various issues, which is a building block of the foundations of democracy. For this reason, in the case of such people working for the public, a relatively broader scope of information about their private life should be made available to the public on the grounds that it is reasonable for voters to pay

attention to such information. However, the same cannot be said about a professional athlete like the plaintiff.

In the case of a professional athlete, his/her performance would be reported by the mass media. Since it is natural that his/her private life becomes a target of public attention, it can be said that, when he/she chose the profession, he/she gave a comprehensive consent to the disclosure of his/her private life to a certain extent. However, it cannot be said that he/she gave a general consent to the disclosure of any part of his/her private life prior to debut as a professional athlete, other than his/her achievements, etc. in the relevant area of sport. Furthermore, in this case, the plaintiff has a long-standing belief that any information or photograph about his pre-debut life should not be disclosed to the public. In light of the fact that he did not talk about his pre-debut life in any interview, the plaintiff's consent for information disclosure cannot be presumed to have been given.

Since the benefit to a person of not having his/her private life disclosed has nothing to do with the enhancement or deterioration of the social reputation of that person, the fact that the Book would not tarnish the social reputation of the plaintiff does not provide sufficient grounds to conclude that the defendants' act does not constitute infringement of the plaintiff's privacy right.

Therefore, the aforementioned allegation of the defendants is unacceptable.

5. On these grounds, the defendants' act of publishing and selling the Book constitutes infringement of the plaintiff's privacy right. Since the plaintiff can be considered to have suffered great damage, it is reasonable to find that the plaintiff is entitled to seek an injunction against the defendants' act of infringement and demand payment of damages from the defendants as mentioned below.

While the information, photographs, etc. that can be found to infringe the plaintiff's privacy right are limited only to some parts of the Book, it is impossible to clearly differentiate the infringing parts from the rest of the Book. In light of the facts that the infringing parts are important to the Book and that the Book would not function as a book if such parts are removed, it is reasonable for the plaintiff to seek an injunction against the defendants' act of publishing, selling, and distributing the Book as a whole.

III. Issue 3 (Infringement of the plaintiff's right to make a work public)

1. A right to make a work public can be considered to be infringed if a work not yet made public or a work made public without the author's consent is made available or presented to the public (Article 18 of the Copyright Act).

Since the Poem is a literary work (Article 10, paragraph (1), item (i) of said Act), the publication of the Poem can constitute an act of making it public (Article 4, paragraph

(1) of said Act). The aforementioned term "publication" means an act of making and distributing copies of a work in quantities that are reasonably sufficient for meeting public demand, commensurate with the nature of the work (Article 3, paragraph (1) of said Act). The term "the public" includes exclusive groups made up of many persons (Article 2, paragraph (5) of said Act).

2. If this case is examined from this perspective, according to the evidence (Exhibits Otsu 1 and 4), the Poem was published in the graduation works collection of Kofu City Kita Junior High School for FY1991. A total of more than 300 copies thereof were distributed to the teachers of said junior high school and the graduates of said fiscal year.

In consideration of the facts found above, the Poem can be considered to have been made public since the Poem was distributed in such quantities that are reasonably sufficient for meeting the demand of more than 300. Since the plaintiff gave a consent to the publication of the Poem in the graduation works collection, the plaintiff can be presumed to have given his consent to the aforementioned act of making the Poem public.

3. Thus, the plaintiff's claim made on the grounds of the occurrence of infringement of the plaintiff's right to make a work public is groundless.

IV. Issue 4 (Infringement of the plaintiff's reproduction right)

1. It is clear that the defendants' act of publishing the Poem in the Book without any modification constitutes infringement of the plaintiff's reproduction right for the Poem.

2. The defendants alleged that their act of publishing the Poem in the Book is an act of quoting and exploiting a work that has been made public and does not constitute infringement of the plaintiff's copyright under Article 32, paragraph (1) of the Copyright Act.

Since the Poem falls under "a work that has been made public" as stated in III above, the following section examines whether the defendants' act in this case falls under "quotation" specified in the aforementioned provision.

The term "quotation" means an act of using another person's work, whether in whole or in part, in one's work for the purpose of information provision, reference, criticism, etc. In order for an act of quotation to satisfy the requirement as specified in said provision, "the work must be quoted consistent with fair practices and within a scope that is justified by the aim of the news report, critique, study, or other place in which the work is quoted," it should be interpreted that a work containing quotations should adopt such manner of expression that allows readers to clearly distinguish the work making quotations from the work being quoted and exploited and that ensures the dominance of

the former work over the latter work.

If this case is examined from this perspective, according to the evidence (Exhibits Ko 1 and Otsu 1), it can be said that the entire Poem, which consists of 15 lines, is published in the Book, that the Poem was handwritten by the plaintiff and published in the aforementioned graduation works collection by a photoengraving process, that its exact copy was published on page 65 of the Book, that said page only presents the comment stating "This poem was written by X for the graduation works collection of the junior high school. His strong determination can be felt through the poem." and the rest of the page is left blank, and that the body text of the Book does not contain any statement regarding the Poem.

In light of the facts found above, since the readers of the Book can appreciate the Poem as an independent work, it is inevitable to interpret that the reason for the defendants' use of the Poem in the Book was not to quote and exploit the Poem in the course of the defendants' creative activities, but simply to present the Poem in the Book.

As described above, as far as such part of the Book that presents the Poem is concerned, the dominance of the text of the Book over the Poem cannot be observed from the manner of expression adopted by the Book (on the contrary, the Poem can be found to be dominant). Thus, the defendants' act of publishing the Poem in the Book cannot be considered to constitute "quotation" permitted under the Copyright Act.

3. Therefore, having suffered infringement on the plaintiff's reproduction right, the plaintiff is entitled to seek an injunction against the defendants' act of reproducing the Poem (since infringement of the plaintiff's reproduction right occurs only with regard to the page on which the Poem was published, the plaintiff is entitled to seek an injunction only to the extent mentioned above on the grounds of the occurrence of said infringement; however, as described above, the plaintiff is entitled to seek an injunction for the Book as a whole on the grounds of the occurrence of the infringement of the plaintiff's privacy right) and also to demand payment of damages as mentioned below.

V. Issue 5 (Amount of damage)

1. As held above, the plaintiff is entitled to demand payment of damages for the proprietary damage suffered by the plaintiff as a result of infringement of the plaintiff's copyright (reproduction right) and also for the moral damage suffered by the plaintiff as a result of the infringement of the plaintiff's privacy right.

2. Regarding the proprietary damage, the plaintiff demands a payment equivalent to the amount of profits obtained by the defendants as a result of publishing and selling the Book under Article 114, paragraph (1) of the Copyright Act.

The defendants alleged that the amount of the aforementioned profits can be

calculated based on the amount of sales of 55,346 copies of the Book, i.e., 46,596,061 yen, and the costs of printing, travel expenses, etc., i.e., 9,593,307 yen. It is not clear whether the plaintiff disputes this allegation of the defendants. The defendants also alleged that, in addition to the aforementioned costs, the following costs should also be deducted from the aforementioned sales: 12,073,360 yen as the costs of cutting 69,654 copies of the Book and 11,668,534 yen as the distribution costs and general administration costs. The defendants concluded that the calculated amount of 13,260,860 yen is the amount of profits gained by the defendants. However, the defendants failed to clarify the reasons why each of the aforementioned costs should be deducted. Moreover, the evidence submitted by the defendants is not sufficient to clarify the details of these costs. Therefore, these alleged costs cannot be found to be the correct amounts that should be deducted from the sales.

Thus, it can be found that the amount of profits gained by the defendants as a result of publishing and selling the Book is 37,002,754 yen, which is calculated by deducting the cost of printing, etc. from the aforementioned amount of sales.

While the Poem was published only on a single page of the Book, which consists of a four-page gravure part and a 237-page body, in view of the facts that the Poem occupies almost all of the space on the page and gives a strong impression to the readers and that the poem handwritten by the plaintiff itself was presented in the Book by a photoengraving process, the amount of profits gained by the defendants as a result of reproducing the Poem can be found to be not lower than 1,850,000 yen, which accounts for about 5% of the aforementioned amount of profits.

3. The monetary amount of moral damage suffered by the plaintiff as a result of the infringement of the plaintiff's privacy right can be found to be not lower than 2,000,000 yen based on a comprehensive evaluation of the facts that the act of infringement was committed in the manner found in III above, that the plaintiff was displeased by the Book, and that the defendants gained about 37,000,000 yen as profits by publishing the Book.

4. The plaintiff is entitled to demand that the defendants shall jointly pay a total of 3,850,000 yen as stated in 2 and 3 above and the amount accrued thereon at the rate of 5% per annum as specified in the Civil Code for the period from April 15, 1998, which is after the act of tort, to the date of completion of the payment.

VI. On these grounds, the plaintiff's claims can be found to be well grounded to the extent that the plaintiff seeks an injunction against the publication, etc. of the Book and demands payment of such amount of damages found in V above. Thus, the judgment shall be rendered in the form of the main text.

(Date of conclusion of oral argument: December 14, 1999)

Tokyo District Court, 46th Civil Division

Presiding judge: MIMURA Ryoichi

Judge: HASEGAWA Koji

Judge: OONISHI Katsushige

(Attachment 1)

Book List

Title "X Nihon wo furansu ni mishiita otoko" (X, The man who led Japan to France)

Author: Z

Publisher: Z

Publishing company: Kabushiki Kaisha Rain Bukkus

(Attachment 2 "Table of Contents." is omitted.)