

**Judgments of Intellectual Property High Court, Fourth Division**

**Date of the Judgment: 2006.3.29**

**Case Number: 2005 (Ne) No.10094**

**Title (Case):**

A case wherein the court found copyrightability in the photographs taken for advertisement and sale of products

Reference: Article 2, para.1, item 1, Article 10, para.1, item 8, Article 21 of the Copyright Act

**Summary of the Judgment:**

This is a case where the appellant, who had, by means of assignment, acquired the business (goodwill) of Corporation A, which had advertised and sold products through its website, claimed against the appellees to pay, jointly and severally, damages and delayed damages, arguing that the appellant had also obtained from Corporation A the right to demand compensation for damage (under Article 709 of the Civil Code) caused by a copyright infringement committed through the appellees' unauthorized use of the photographs and sentences which were copyrighted works owned by Corporation A.

Corporation A, which had been advertising and selling products for sick house syndrome through its website ( "the Website" ), which carried a photograph of a solid-stationary-type product (Photograph 1) and a photograph of a spray-type product (Photograph 2) for the purpose of advertisement and sale of these products. The appellees, which were also companies advertising and selling products through their website, used the said photographs on their own websites (the Appellees' Websites) without Company A' s authorization.

The court examined whether the photographs were copyrightable and whether the appellees' acts amounted to a copyright infringement, and judged as follows:

1. Photographs are a form of expression consisting of various elements such as the choice, combination, and positioning of photographic subjects, the composition and camera angle, the timing of the release of the shutter, the relations between the subject and the light (front lighting, back lighting, oblique lighting), the shading technique, the color combination, the emphasis and omission of parts, and the choice of the background.

In some cases, such expressions are the result of careful use of various photographing techniques including the choice of lens, adjustment of exposure, choice of shutter speed, decision of the depth of field, and adjustment of lighting. In other cases, such expressions results from the use of automatic functions of auto focus cameras and

digital cameras. While it seems that some elements of photographing, such as composition and shutter timing, depend largely on the photographer's skill, even those elements could be determined by an event beyond the control of the photographer such as a case where the photographer releases a shutter at the right moment by coincidence.

It is often difficult to identify the photographing techniques used to take a photograph by just looking at the photograph. One can only see the results of those techniques, i.e. the expression presented in the form of a photograph. Regardless of what is chosen as the subject for a photograph, even of a still object or a landscape, the photograph often expresses its originality in, for example, its composition, lighting or background. In such a case, the photograph may be regarded as showing originality in its expression and could be regarded as a creative work, regardless of the photographing techniques used or not used to take the photograph.

Needless to say, even if a photograph is considered as a creative work, the degree of the creativity differs greatly depending on the level of originality found in the photographic expression. The scope of copyright protection conferred to a photograph, and how a photograph should be protected, should be determined based on such degree of creativity. Accordingly, in the case of a photograph which displays only little creativity, an infringement of the reproduction right should be found almost exclusively only if the infringer made an exact copy of the photograph.

2. From the above-mentioned viewpoint, we examined the copyrightability of the photographs in dispute in the following sections.

(1) The photographs in dispute were taken for the purpose of advertisement and sale of products through the Website. The details of those photographs were as follows:

Photograph 1 was taken for advertisement and sale of solid-stationary-type products by a camera placed in an elevated position in such an angle that allowed the camera to look down obliquely to the front side of a small-size product and a large-size product positioned side by side with their labels facing slightly inward. The lighting was cast obliquely from an elevated position on the right, causing the formation of a short shadow toward the lower left. The background was pale blue.

Photograph 2 was taken for advertisement and sale of spray type products by a camera placed in an elevated position in such an angle that allowed the camera to look straight down to two products horizontally laid down side by side, positioned at an oblique angle against the vertical sides of the photograph. The lighting was cast from the right, causing the formation of a shadow toward the left. The background was off-white.

Therefore, it was fair to conclude that the photographs showed originality to some extent in the combination and positioning of the subjects, composition and camera angle, lighting and shadowing, and background, etc.

(2) A comparison between the disputed photographs and the photographs of similar products taken by the appellees revealed that they were different in terms of the combination and positioning of the subjects, composition and camera angle, color combination, and background, etc. These photographs looked different in terms of their overall impressions as a form of expression created by use of all of those photographing techniques.

(3) As explained above, the disputed photographs were taken for the purpose of advertisement and sale of products through the Website. In comparison with other photographs of similar products, some people might say that the disputed photographs do not give such a special impression that the products are particularly fancy but rather give an ordinary impression as photographs of products.

However, as explained earlier, the disputed photographs had originality to some extent in terms of the combination and positioning of the subjects, composition and camera angle, lighting and shadowing, and background, etc. Therefore, the disputed photographs should be found to be a copyrightable creative work. However, as described above, the degree of creativity was so small that this was a borderline case of copyrightability.

3. Based on these facts, the court judged that even though the degree of creativity found in the photographs in dispute was extremely small, the defendants' act of making exact copies of the disputed photographs and using them on the Appellees' Websites (The parties concerned agreed in this respect) constituted an infringement on the reproduction right of the photographs.

(The copyright for this English material was assigned to the Supreme Court of Japan by Institute of Intellectual Property.)

2005 (Ne) 10094 Appeal Case of Seeking Payment under a Service Contract

Judgment rendered on March 29, 2006, Date of conclusion of oral argument: February 22, 2006

(Judgment in prior instance: Yokohama District Court, 2004 (Wa) 2788 of May 17, 2005)

#### Judgment

Appellant (Plaintiff): Yūgen Kaisha Toraiaru

Appellee (Defendant): Plus-Marks Co.,Ltd.

Appellee (Defendant): TMP Plus Co. Ltd

Counsel attorney of the appellees: OKAZAWA Hideyo

#### Main Text

1. Judgment in prior instance shall be modified as follows.

(1) The appellees shall jointly pay the appellant 10,000 yen and delay damages accrued thereon at a rate of 5% per annum from June 28, 2003 until the date of full payment.

(2) Any other claims of the appellant shall be dismissed.

2. The court costs for the first and second instances shall be divided into five portions. Four of those portions shall be borne by the appellant, while the remaining one shall be borne by the appellees.

#### Facts and reasons

##### No. 1 Judicial decision sought by the appellant

1. The Judgment in prior instance shall be revoked.

2. The appellees shall jointly pay the appellant 2,100,000 yen and delay damages accrued thereon at a rate of 6% per annum from June 28, 2003 until the date of full payment.

3. The court costs for the first and second instances shall be borne by the appellees.

##### No. 2 Background

1.株式会社ラフィーネ ("Rafine"), which is a company engaged in advertising and selling goods through its Internet site, assigned its business (goodwill) to the appellant, and the appellant alleged that the appellees' act of using Rafine's works, namely, photographs and statements, without due authorization constitutes infringement of the appellant's copyright and that Rafine also assigned to the appellant

its right to seek damages (Article 709 of the Civil Code) for said infringement. Based on these allegations, the appellant demanded that the appellees shall jointly pay damages and delay damages accrued thereon.

While the appellant had filed the lawsuit to seek the payment of 6,930,000 yen as damages and delay damages accrued thereon at a rate of 6% per annum, the court of prior instance handed down a judgment to dismiss all of the appellant's claims. Dissatisfied with this, the appellant filed this appeal. In this instance, the appellant ultimately reduced its claims to the payment of 2,100,000 yen as damages and delay damages accrued thereon at a rate of 6% per annum.

2. Facts recognized as premises (the facts not disputed between the parties concerned and the facts that may be easily found based on the entire import of oral argument)

(1) From October 2001, Rafine started advertising and selling products for the sick house syndrome, i.e., "スメルゲット" (Sumeru getto) and "ホルムゲット" (Horumu getto) (the "Goods") on the Internet. This website created for advertisement and sale of the Goods (the "Website") contains photographs titled "スメルゲットジェル・ハワイアンブルー (固形据え置きタイプ)" (Sumeru getto jeru hawaian burū (solid stationary type)) and "スメルゲットエマルジョン (霧吹きタイプ)" (Sumeru getto emarujyon (spray type)) (the former shall be hereinafter referred to as "Photograph 1" and the latter as "Photograph 2," and these two photographs shall be collectively referred to as the "Photographs"). The Website also contains the following statements (Exhibit Ko No. 1; the statement presented in [i] below shall be hereinafter referred to as "Statement 1," the statement presented in [ii] below as "Statement 2," and the statement presented in [iii] below as "Statement 3," and these three statements shall be hereinafter collectively referred to as the "Statements").

The Photographs and the Statements are created by X, who is the director of Rafine and the representative of the appellant, as Rafine's employee works.

[i] "Child started suffering atopic dermatitis

Mr. K's family living in Kawasaki City won a lottery for prefectural housing and moved into a newly built apartment. Soon after, his 6 year-old daughter started suffering atopic dermatitis and became extremely allergic."

[ii] "Elderly started suffering asthma

Mrs. S (aged 65) living in Yokohama City started living with her daughter and son-in-law after her husband had passed away. After her daughter and son-in-law renovated their house, Mrs. S moved in. Although Mrs. S had rarely caught a cold and

had been living an active life until then, she started suffering asthma three months after moving in, was repeatedly hospitalized, and finally became bedridden.

[iii] "Hay fever, insomnia, and depression

Mr. H living in Chiba Prefecture purchased a new condominium which he always wanted to buy. Immediately after moving in, he lost the sense of smell and started suffering from fever, insomnia, and depression, and finally saw a psychiatrist, etc."

(2) The appellees are also companies engaged in advertising and selling goods through their websites on the Internet. During the period from November 2002 to June 27, 2003, the appellees displayed, without Rafine's authorization, the Photographs on their websites (the "appellees' websites") (Exhibits Ko No. 8 to No. 10).

The appellees have displayed the following statements on the appellees' websites since November 2002 (Exhibit Ko No. 8; the statement presented in [i] below shall be hereinafter referred to as "Appellees' Statement 1," the statement presented in [ii] below as "Appellees' Statement 2," and the statement presented in [iii] below as "Appellees' Statement 3," and these three statements shall be hereinafter collectively referred to as the "appellees' statements").

[i] "I moved into a newly built apartment. Then, my daughter started suffering atopic dermatitis and became allergic..."

[ii] "I had rarely caught a cold and had been living an active life. But, after renovating my house, I started suffering asthma."

[iii] "I purchased a new condominium and moved in. Immediately after moving in, I lost the sense of smell. Also, I started having such symptoms as loss of sleep and not feeling well...."

(3) On June 28, 2004, Rafine assigned to the appellant its business (goodwill) as well as the copyrights to the Photographs and the Statements and all of the claims that Rafine had acquired against the appellees. Rafine notified the appellees to that effect.

### 3. Issues

(1) Copyrightability of the Photographs, the Statements, and the Website, and the existence or non-existence of copyright infringement

(2) The damage caused by the appellees' act.

(omitted)

### No. 3 Court decision

1. Issue (1) (Copyrightability of the Photographs, the Statements, and the Website, and the existence or non-existence of copyright infringement)

(1) Copyrightability of the Photographs, and the existence or non-existence of copyright infringement

A. Photographs are a form of expression consisting of various elements such as the choice, combination, and positioning of photographic subjects, the composition and camera angle, the timing of the release of the shutter, the relations between the subject and the light (front lighting, back lighting, oblique lighting), the shading technique, the color combination, the emphasis and omission of parts, and the choice of the background.

In some cases, such expressions are the result of careful use of various photographing techniques including the choice of lens, adjustment of exposure, choice of shutter speed, decision of the depth of field, and adjustment of lighting. In other cases, such expressions result from the use of automatic functions of auto focus cameras and digital cameras. While it seems that some elements of photographing, such as composition and shutter timing, depend largely on the photographer's skill, even those elements could be determined by an event beyond the control of the photographer such as a case where the photographer releases a shutter at the right moment by coincidence.

It is often difficult to identify the photographing techniques used to take a photograph by just looking at the photograph. One can only see the results of those techniques, i.e. the expression presented in the form of a photograph. Regardless of what is chosen as the subject for a photograph, even of a still object or a landscape, the photograph often expresses its originality in, for example, its composition, lighting or background. In such a case, the photograph may be regarded as showing originality in its expression and could be regarded as a creative work, regardless of the photographing techniques used or not used to take the photograph.

Needless to say, even if a photograph is considered as a creative work, the degree of the creativity differs greatly depending on the level of originality found in the photographic expression. The scope of copyright protection conferred to a photograph, and how a photograph should be protected, should be determined based on such degree of creativity. Accordingly, in the case of a photograph which displays only little creativity, an infringement of the right of reproduction should be found almost exclusively only if the infringer made an exact copy of the photograph.

B. From the above-mentioned viewpoint, we examined the copyrightability of the

Photographs in the following sections.

(A) The Photographs were taken for the purpose of advertisement and sale of products through the Website. The details of the Photographs were as follows (Exhibit Ko No. 1):

Photograph 1 was taken for advertisement and sale of solid-stationary-type products by a camera placed in an elevated position in such an angle that allowed the camera to look down obliquely to the front side of a small-size product and a large-size product positioned side by side with their labels facing slightly inward. The lighting was cast obliquely from an elevated position on the right, causing the formation of a short shadow toward the lower left. The background was pale blue.

Photograph 2 was taken for advertisement and sale of spray-type products by a camera placed in an elevated position in such an angle that allowed the camera to look straight down to two products horizontally laid down side by side, positioned at an oblique angle against the vertical sides of the photograph. The lighting was cast from the right, causing the formation of a shadow toward the left. The background was off-white.

Therefore, it was fair to conclude that the Photographs showed originality to some extent in the combination and positioning of the photographic subjects, composition and camera angle, lighting and shadowing, and background, etc.

(B) For the purpose of comparison, the court examined the photographs of the same type of goods taken by the appellees and found as follows.

In the case of the solid stationary-type goods, the following photographs were taken. The photographs presented in Exhibits Ko No. 2 and No. 6 show one large-size product and one small-size product positioned side by side with their labels facing the front. These photographs were taken from a nearly front position with background colors of dark blue or pale blue respectively. The photograph presented in Exhibit Ko No. 7 shows two same-size products positioned side by side. This photograph was taken almost from the front with a background color of dark blue. The photographs presented in Exhibits Ko No. 4 and No. 7 show one product. These photographs were taken almost from a nearly front position with a background color of pale blue. The photograph presented in Exhibit Ko No. 4 shows two products, one positioned in the front with the other in the back. This photograph was taken from a nearly front position with the background colors of ocher for the upper half side and gray for the lower side. Photograph 1 differs from any of the aforementioned photographs in terms of combination and positioning of photographic subjects, the composition and camera angle, etc. Furthermore, the color of the goods in Photograph 1 is blue, which is



similar to the color of the background. On the other hand, the color of the goods in the aforementioned photographs taken by the appellees is green, which is different from the color of the background.

In the case of the spray-type goods, the following photographs were taken. The photograph presented in Exhibit Ko No. 4 shows one spray-type product positioned in a standing position in combination with a stationary-type product. The photograph presented in Exhibit Ko No. 6 shows two spray-type products positioned in a standing position side by side with a background color of pale blue. The photograph presented in Exhibit Ko No. 7 shows one spray-type product positioned in a standing position with a background color of pale blue. Photograph 2 differs from any of these photographs in terms of combination and positioning of photographic subjects, background, etc.

As described above, a comparison between the disputed photographs and the photographs of similar products taken by the appellees revealed that they were different in terms of the combination and positioning of the photographic subjects, composition and camera angle, color combination, and background, etc. These photographs look different in terms of their overall impressions as a form of expression created by use of all of the above photographing techniques.

(C) As explained above, the Photographs were taken for the purpose of advertisement and sale of products through the Website. In comparison with other photographs of similar products, some people might say that the Photographs do not give such a special impression that the products are particularly fancy but rather give an ordinary impression as photographs of products. However, as explained earlier, the Photographs had originality to some extent in terms of the combination and positioning of the photographic subjects, composition and camera angle, lighting and shadowing, and background, etc. Therefore, the Photographs should be found to be copyrightable creative works. However, as described above, the degree of creativity was so small that this was a borderline case of copyrightability.

C. With regard to whether or not there was an infringement of the right of reproduction of the Photographs, the court judged that even though the degree of creativity found in the Photographs was extremely small, the defendants' act of making exact copies of the Photographs and using them on the appellees' websites (the parties concerned agreed in this respect) constituted such infringement.

## (2) Infringement or non-infringement of the copyrights for the Statements

A. The Statements are not exactly the same as the statements presented in the

appellees' websites. The appellees' statements presented in the appellees' websites contain some parts of the Statements. The court examined whether the common parts between them may be considered to be creative or not as follows.

B. The common parts between the Statements and the appellees' statements are as follows.

(A) The following parts of Statement 1: "moved into a newly built apartment," "daughter started suffering atopic dermatitis" "became allergic"

(B) The following parts of Statement 2: "had rarely caught a cold and had been living an active life," "renovated ... house," "started suffering asthma"

(C) The following parts of Statement 3: "purchased a new condominium," "Immediately after moving in, ... lost the sense of smell"

C. The aforementioned common parts are expressions consisting of commonly used ordinary words employed to describe cases where sick house syndrome is suspected and may not be regarded to involve special techniques to enhance expressions.

Therefore, since the Statements and the appellees' statements are identical only as far as the parts lacking creative expressions are concerned, the right of reproduction and the right of adaptation for the Statements may not be considered to have been infringed.

### (3) Infringement or non-infringement of the copyright for the Website

The appellant alleged that the Website is a compilation and that the disclosure of the appellees' websites constitutes infringement of the right of reproduction and the right of adaptation for the Website.

However, the common features between the Website and appellees' websites pointed out by the appellant are the common features found in the photographs and explanations of goods themselves. It may be interpreted that the appellant did not point out the common features in terms of selection and positioning of the materials used to create the website. A comparison between the Website and appellees' websites has revealed that the two websites have common features only in the respects that both websites present multiple cases where the sick house syndrome is suspected and that the photographs of goods are placed in the left side of the statements (Exhibits Ko No. 1 and No. 8). These features shared by the two websites in terms of selection and positioning of the materials are commonplace. Thus, the two websites may be considered to be identical only as far as the parts lacking creative expressions are concerned.

Therefore, the right of reproduction and the right of adaptation for the Website as

a compilation may not be considered to have been infringed.

## 2. Issue (2) (the damage caused by the appellees' act)

As described above, since the right of reproduction for the Photographs may be considered to have been infringed by the appellees, the amount of damage may be estimated as follows.

### (1) Lost earnings

The Photographs were created in order to advertise and sell goods through the Website. The appellees are companies engaging in advertising and selling goods through their websites in a similar manner. Their act of displaying the Photographs on the appellees' websites for eight months may be considered to have caused some lost earnings for Rafine.

In light of the facts that it was easy for the appellees to take photographs of the same goods and post them on the appellees' websites and that the Photographs are not particularly superior to the photographs taken by the appellees, it is unclear how much the appellees benefited from the display of the Photographs on the appellees' websites. Also, it is unclear how much royalty should be collected from a company licensed to use the Photographs.

For the reasons described above, since it is extremely difficult to prove the amount of lost earnings in this court case, there is no alternative other than to estimate the reasonable amount of damage under Article 114-5 of Copyright Act. It would be reasonable to estimate the amount to be 10,000 yen in view of the circumstances described above.

### (2) Solatium

The damage caused by the appellees' act of infringement of the right of reproduction may be remedied by the payment of damages for the damage described in (1) above. In consideration of the facts found in this court case, the right to demand the payment of solatium may not be considered to have arisen due to the infringement of a copyright. Even if the appellant's claim is interpreted to include a claim made based on the premise that the right to demand the payment of solatium for the infringement of Rafine's moral rights of author has been assigned to the appellant, there are no specific allegations to the effect that the appellees' act constitutes infringement of the right to make the work public, the right to determine the indication of the author's name, and the right to maintain the integrity of Rafine. Moreover, since it is also difficult to find, based on evidence, any fact that can prove the existence of

infringement of these rights, the right to demand the payment of solatium may not be considered to have arisen.

### 3. Conclusion

As described above, there are sufficient grounds for the appellant's claim to justify a court order against the appellees for payment of 10,000 yen as damages and delay damages accrued thereon at a rate of 5% per annum as specified in the Civil Code from June 28, 2003: which is after the occurrence of the act of tort, until the date of full payment. The court rendered a judgment in the form of the main text.

Intellectual Property High Court, Fourth Division

Presiding judge: TSUKAHARA Tomokatsu

Judge: TANAKA Masato

Judge: SHIMIZU Chieko