

## **Judgments of Intellectual Property High Court, Second Division**

**Date of the Judgment: 2006.2.27**

**Case Number: 2005 (Ne) No.10100, 2005 (Ne) No.10116**

### **Title (Case):**

A case wherein the court held as follows: (1) In the process of creating a clay figure of the bronze statues in dispute, only the plaintiff of the first instance engaged in the work that involved creative expression, and the defendant of the first instance only made some preparation and only participated in the work of putting some clay onto the figures as an assistant of the plaintiff of the first instance.. Therefore, the creator of the statues is the plaintiff of the first instance. (2) The parties cannot be considered to have agreed to announce the name of the defendant of the first instance as the creator of the statues in view of the circumstances surrounding the creation of the statues. Even if the parties had agreed to do so, such agreement should be invalidated because it violates Article 19 and Article 121, etc. of the Copyright Act. (3) Even if the notification of the true creator is sent to the owners of the statues, neither of them has a legal obligation to comply with the notification because neither of them is a party to this lawsuit. However, if this judgment requires the defendant of the first instance, whose name is inscribed in the statues as the creator thereof, to send such notification, it would become easier for the owners of the statues to correct the inscription. Therefore, the said notification is considered to be an appropriate measure to restore the honor of the plaintiff of the first instance

Reference: Regarding the holding (1), Article 2, para. 1, item 2 and Article 14 of the Copyright Act; Regarding the holding (2), Article 19 and Article 121 of the said Act; Regarding the holding (3), Article 115 of the said Act

### **Summary of the Judgment:**

(Outline of the case)

A bronze statue of Manjiro Nakahama (commonly known as John Manjiro), who was a prominent figure during the period from the end of the Edo Period to the early Meiji Period, was unveiled on July 11, 1968 in the Ashizuri Misaki Park in Tosashimizu-shi, Kochi. On the base of the statue and other parts, the pseudonym of the defendant of the first instance, “Ken Otani,” was inscribed. In the meantime, the bronze statue of Takeo Okano, a former president of Suruga Bank, was erected in 1970 in Okano Park in Aono, Numazu-shi, Shizuoka. On the base of the statue, the name, “K.OTNI” (correctly “OTANI” ), was inscribed as the name of the sculptor.

In the first instance, the plaintiff of the first instance, who was a sculptor, argued that the name “Ken Otani” was shown on the bases of the bronze statues of John

Manjiro and Takeo Okano despite the fact that he created the statues based on an order from the defendant of the first instance. Based on this allegation, the plaintiff demanded the following: (1) the declaration that the plaintiff of the first instance has the moral right (right to determine the indication of the creator's name) to the said statues, (2) notifications by the defendant to the owner and manager of the statues, the mayor of Tosashimizu-shi and Suruga Bank, Ltd., respectively, to inform them that the true creator of the statues is the plaintiff of the first instance and ask them to correct the inscription to "Tsuneo Nishi" (the plaintiff of the first instance), and (3) an apology advertisement.

On June 23, 2005, the court of the first instance, the Tokyo District Court, accepted the plaintiff's claim (1). The court also accepted claim (2) only to such an extent that the plaintiff would be allowed to have the defendant of the first instance send the notifications shown in the list of notifications attached to the judgment of the first instance. The court dismissed the rest of Claim (2) and Claim (3).

Dissatisfied with the part of the judgment that was handed down in favor of the plaintiff of the first instance, the defendant of the first instance instituted this appeal and newly filed a counterclaim to demand declaration that the defendant of the first instance had the moral right (right to determine the indication of the creator's name) to the said statues.

The major issues in this case were as follows: (1) Who is the creator of the said statues, either the plaintiff or the defendant of the first instance? Were the statues created jointly by the plaintiff and the defendant?; (2) Did the plaintiff and the defendant of the first instance agree to announce the name of the defendant as the creator of the statues?, and; (3) Is it appropriate to accept the demand for notifications as an "appropriate measure" to restore the honor of the plaintiff under Article 115 of the Copyright Act?

(Summary of the reasons for the judgments)

This court dismissed both the appeal and the counterclaim submitted by the defendant of the first instance by holding as follows.

Regarding issue (1)

"The defendant of the first instance argues that, in a case where more than one party claims that he/she has contributed to the development of creative expression of a work, if any one of them is presumed to be the creator of the work under Article 14 of the Copyright Act, any other party that desires to claim its sole creatorship of the work is required to assert and prove that he/she is the true creator of the said work and also that the party presumed to be the creator of the work is not the true creator, as long as there is a possibility of joint creatorship of the copyright.

Under Article 14 of the Copyright Act, which specifies “A person whose name or appellation (hereinafter referred to as “true name”), or whose widely known pen name, abbreviation or other substitute for his true name (hereinafter referred to as “pseudonym”), is indicated as the name of the creator in the customary manner on the original of his work or when his work is offered to or made available to the public, shall be presumed to be the creator of such work,” the defendant of the first instance is presumed to be the creator of the said statues because the statue of John Manjiro and the statue of Takeo Okano have inscriptions of “Ken Otani” which is a pseudonym of the defendant of the first instance, and “K. OTNI,” respectively.

The said provision provides that a person whose true name is indicated as the name of the creator of a work shall be presumed to be the creator of the work and shall not be required to prove that the work is his/her creation. The purpose of this provision is to reduce the burden of proof born by the creator of a work who intends to enforce his/her copyright on the work. However, this provision merely provides the “presumption” of creatorship. Therefore, it is possible for the court to find a fact contrary to the presumption if a person who disputes the validity of the presumption succeeds in rebutting it. The same shall apply to a case where more than one party claims that he/she has contributed to the development of creative expression of a work. For this reason, this court concluded that the argument of the defendant of the first instance is unfounded, and therefore, unacceptable.

···Having examined all of the evidence submitted in the first instance and this instance, this court finds that, in the process of creating a clay figure of the bronze statues in dispute, only the plaintiff of the first instance engaged in the work involved and that the defendant of the first instance only made some preparation and only participated in the work of putting some clay onto the figures as an assistant of the plaintiff of the first instance. Therefore, the plaintiff of the first instance successfully rebuts the presumption and is allowed to claim his creatorship of the work against the defendant of the first instance notwithstanding the said provision.”

Regarding issue (2)

“While the plaintiff of the first instance noticed, immediately after the creation of the statue, that the statue of John Manjiro has an inscription of the signature of the defendant of the first instance on the base of the statue and also that the slate next to the statue also has an inscription of the name of the defendant, the plaintiff has not raised any opposition simply because he did not want to disturb relationships with the orderer and the defendant of the first instance. With regard to the statue of Takeo Okano, on the other hand, the plaintiff of the first instance left his signature “T.NISI” on the top of the head of the statute in an attempt to leave evidence that he is the true creator of the said statue and in protest against the nonpayment of compensation for the

creation of the statue of John Manjiro. Based on these facts, this court cannot accept the claim of the defendant of the first instance that the two parties agreed to announce the name of the defendant of the first instance as the creator of the statues either implicitly or explicitly.

In addition, regarding a right to determine the indication of the creator's name (Article 19 of the Copyright Act), the Copyright Act does not have a provision that allows a creator to publicize his/her work under the name of any other person, but has a provision specifying that any person who infringes a right to determine the indication of the creator's name by distributing a reproduction of a work with the indication of the name of any person other than the original creator shall be subject to a criminal penalty for an act of deceiving the public (Article 121 of the said Act). In consideration of these provisions, it is appropriate to interpret that a creator is not allowed to freely determine whose name is to be indicated on the work as its creator and that the true creator's name is required to be indicated on the work or its reproductions in order to protect public interests. For this reason, even if the defendant and the plaintiff of the first instance had agreed to unveil the statues to the public under the name of the defendant, such agreement should be regarded as invalid because it is against the said provisions which are designed to protect the public order (mandatory provisions)."

Regarding issue (3)

"Even if the required notification is sent to the mayor of Tosashimizu-shi and Suruga Bank, neither of them has a legal obligation to comply with the notification because neither of them is a party to this lawsuit. However, if this judgment requires the defendant of the first instance, whose name is inscribed on the statues as the creator thereof, to send such notification, it would become easier for the mayor and the bank to correct the inscriptions (if the defendant of the first instance does not voluntarily perform the obligation to send such notification, such notification would be constrictively regarded to be made under Article 174 of the Civil Execution Act). Based on these grounds, the said notification is considered to be an appropriate measure to restore the honor of the plaintiff of the first instance. Therefore, the claim for the issuance of such notification accepted by the court of the first instance should be regarded as an "appropriate measure" under Article 115 of the Copyright Act."

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Judgment rendered on February 27, 2006

Principal Action: 2005 (Ne) 10100, Appeal Case of Seeking Declaratory Judgment on Moral Rights of Author, etc. (Court of prior instance: Tokyo District Court, 2003 (Wa) 13385)

Counterclaim: 2005 (Ne) 10116

Date of conclusion of oral argument: December 1, 2005

### Judgment

Appellant/plaintiff in the case of counterclaim in this instance X  
(hereinafter referred to as the "defendant in the first instance" in some cases)  
Appellee/defendant in the case of counterclaim in this instance Y  
(hereinafter referred to as the "plaintiff in the first instance" in some cases)

### Main text

1. The appeal shall be dismissed.
2. The counterclaim filed in this instance shall be dismissed.
3. The appellant shall bear the court cost for this instance.

### Facts and reasons

No. 1 Judicial decision sought by the defendant in the first instance (appellant/plaintiff in the case of counterclaim in this instance)

#### 1. Object of the appeal

- (1) The judgment in prior instance shall be revoked with respect to the part against the appellant.
- (2) All of the claims filed by the appellee shall be dismissed.

#### 2. Object of the counterclaim filed in this instance

The court declares that the plaintiff in the case of counterclaim in this instance holds moral rights of the author (right of attribution) for the bronze statues indicated in Sections 1 and 2 in the list of articles attached to the judgment in prior instance.

3. The appellee (the defendant in the case of counterclaim in this instance) shall bear the court costs for both the first and second instances.

#### No. 2 Outline of the case

1. The bronze statue of NAKAHAMA Manjiro (generally called John Manjiro), who played an active role during the period from the closing days of the Tokugawa regime into the Meiji era, was built on July 11, 1968, and it now stands in the Ashizuri-Misaki Cape Park in Tosashimizu City, Kochi Prefecture. On its base and other parts is inscribed the commonly known name of the defendant in the first instance, "X," as its

creator.

On the other hand, the bronze statue of the former president of Suruga Bank, P, was built in 1970, and it now stands in the Okano Park in Ono, Numazu City, Shizuoka Prefecture. On its base is inscribed "X" as its creator.

2. In this action, the plaintiff in the first instance, who is a sculptor, alleges that although he created, upon the request of the defendant in the first instance, clay statues for the bronze statue of NAKAHAMA Manjiro indicated in Section 1 in the list of articles attached to the judgment in prior instance (completed in 1968; hereinafter referred to as the "John Manjiro Statue") and the bronze statue of P indicated in Section 2 in said list (completed in 1970; hereinafter referred to as the "P Statue"; these two bronze statues are hereinafter referred to as the "Bronze Statues"), the name "X" is inscribed on the bases of the Bronze Statues as mentioned above. Based on this allegation, the plaintiff in the first instance filed claims to [i] seek a declaration that the plaintiff in the first instance holds moral rights of the author (right of attribution) regarding the Bronze Statues, [ii] demand that the defendant in the first instance send a notice to the owner or administrator (hereinafter referred to as the "owner, etc.") of each of the Bronze Statues, i.e., the mayor of Tosashimizu City and Suruga Bank Ltd., to notify that the creator of the Bronze Statues is the plaintiff in the first instance and request the credit of the creator to be corrected to Y (the plaintiff in the first instance), and [iii] request the defendant in the first instance to publish an apology to the plaintiff in the first instance.

3. On June 23, 2005, the Tokyo District Court, the court of prior instance, upheld the claim mentioned in [i] entirely and upheld the claim mentioned in [ii] partially to the extent of demanding that the defendant in the first instance send a notice to the relevant parties as indicated in Sections (1) and (2) in the list of notices attached to the judgment in prior instance, while dismissing the other claims.

Accordingly, the defendant in the first instance filed this appeal against the part of the judgment in first instance that is against him and also filed a counterclaim in this instance to seek a declaration that the defendant in the first instance holds moral rights of the author (right of attribution) for the Bronze Statues.

(omitted)

No. 4 Court decision

(omitted)

(3) Whether or not the demand for the notices in question is appropriate

A. The defendant in the first instance alleges that the court of prior instance upheld the demand for the notices in question (the "Notices") on the premise that the plaintiff in the first instance is the author of the Bronze Statues, which is erroneous, or, even if the defendant in the first instance is a co-author of the Bronze Statues and the plaintiff in the first instance is also an author of the Bronze Statues, the content of the demand for the Notices upheld by the court of prior instance (the content of the descriptions indicated in Sections (1) and (2) of the list of notices attached to the judgment in prior instance) means that the defendant in the first instance is not the creator (co-author) of the Bronze Statues, which is also erroneous.

However, as found above, the author of the Bronze Statues is the plaintiff in the first instance, and the defendant in the first instance cannot be regarded even as a co-author of them, and hence the abovementioned allegations of the defendant in the first instance should inevitably be judged to rely on an erroneous premise.

B. The defendant in the first instance also alleges that the agreement in question (the "Agreement") [between the defendant in the first instance and the plaintiff in the first instance to make the Bronze Statues public in the name of the defendant in the first instance as the author], has the effect of prohibiting the plaintiff in the first instance from disclosing to a third party the fact that the plaintiff in the first instance is the author (or co-author) of the Bronze Statues. However, as mentioned in (2) C. above, the Agreement cannot be found to exist, and even if the existence of the Agreement is found, an agreement of this kind is void.

C. The defendant in the first instance further alleges that in this case, no such circumstances can be found as that upholding the demand for the Notices would not be more helpful for restoring the honor, etc. of the plaintiff in the first instance as compared to dismissing that claim, which means that even if said claim is upheld, this is not directly helpful for restoring the honor, etc. of the plaintiff in the first instance, and thus the demand for the Notices cannot be regarded as an "appropriate measure" referred to in Article 115 of the Copyright Act.

It is true that, since both Tosashimizu City and Suruga Bank, which are the owners, etc. of the Bronze Statues, are not a party to this action, they do not have a legal obligation to do what is requested by the Notices even though they received the Notices. However, if, as this judgment so orders, the Notices are sent from the defendant in the first instance, who is currently credited as the creator (if the defendant in the first instance does not perform this voluntarily, it may be possible to deem that the defendant has sent the Notices, as prescribed in Article 174 of the Civil Execution Act), it would

be easy for Tosasimizu City and Suruga Bank to correct the credit of the creator of the Bronze Statues, and in that case, sending the Notices would be considered to be an appropriate measure to restore the honor of the plaintiff in the first instance. Consequently, it should be construed that the demand for the Notices upheld by the court of prior instance is acceptable as an "appropriate measure" referred to in Article 115 of the Copyright Act.

D. The defendant in the first instance also alleges that the demand for an appropriate measure to restore the honor, etc. of the author under Article 115 of the Copyright Act would be upheld only if the infringer was "intentional or negligent" in committing infringement, but that the defendant in the first instance signed his name on the Bronze Statues while thinking that the Agreement existed, and he has a good reason to believe in the existence of the Agreement, and thus he is not found to have been intentional or negligent in infringing the moral rights of the author held by the plaintiff in the first instance.

However, as mentioned above, the Agreement cannot be found to have been validly formed. In light of the background that led to the creation of the Bronze Statues as found above (for the John Manjiro Statue, from line 8 from the top of page 26 to line 3 from the bottom of page 33 in the judgment in the prior instance; and for the P Statue, from line 12 from the top of page 48 to line 16 from the top of page 52 in said judgment), it is obvious that when the defendant in the first instance signed his name on the Bronze Statues, he could have known that the plaintiff in the first instance was the author of these statues, and yet, he signed his name on these statues that were supposed to be displayed to the public in the future. Thus, the defendant in the first instance is at least found to have been negligent in infringing the moral rights of the author (right of attribution) held by the plaintiff in the first instance. Consequently, the abovementioned allegations of the defendant in the first instance are also groundless.

(omitted)

### 3. Conclusion

Based on the grounds mentioned above, the judgment in prior instance is appropriate, and this court dismisses both the appeal and the counterclaim filed by the defendant in the first instance as they are groundless, and renders a judgment in the form of the main text.

Intellectual Property High Court, Second Division



Presiding judge: NAKANO Tetsuhiro

Judge: OKAMOTO Gaku

Judge: UEDA Takuya