

Copyright / Unfair Competition	Date	December 7, 2023	Court	Tokyo District Court, 40th Civil Division
	Case number	2023 (Wa) 70139		
- A case in which the court determined that, in a serial novel consisting of one-episode long stories in which a certain character is described repeatedly, the characteristics of the character are not specific expressions and are not creatively produced expressions of thoughts or sentiments.				

Summary of the Judgment

In this case, the Plaintiffs allege that the Defendant's act of manufacturing and selling the goods stated in the List of Defendant's Goods attached to this judgment (hereinafter referred to as the "Defendant's Goods") with the artwork stated in the List of Defendant's Artwork attached to this judgment (hereinafter referred to as the "Defendant's Artwork") and the word "紋次郎 (Monjiro)" affixed thereto and transmitting the images of the goods to the public constitutes infringement of the right of reproduction or adaptation right, right to transmit to the public, and right of transfer relating to the Plaintiffs' works. The Plaintiffs also allege that the act of manufacturing and selling the Defendant's Goods with the Defendant Artwork, etc. affixed thereto falls under "unfair competition" stated in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act. Based on these allegations, under Article 112, paragraphs (1) and (2) of the Copyright Act and Article 3, paragraphs (1) and (2) of the Unfair Competition Prevention Act, the Plaintiffs demand that the Defendant suspend the manufacturing, sale and otherwise handling of the Defendant's Goods and destruct the Defendant's Goods, and under Article 709 of the Civil Code, Article 114, paragraph (3) of the Copyright Act, and Article 4 and Article 5, paragraph (3), item (i) of the Unfair Competition Prevention Act, the Plaintiffs demand that the Defendant pay 151,261,000 yen and delay damages accrued thereon.

In this judgment, the court held as summarized below and ruled that in the case of alleging copyright infringement pertaining to a serial novel consisting of one-episode long stories, it is necessary to specifically specify what copyrights for which written expression in which episode of the serial novel were infringed.

The Copyright Act defines a work as a "creatively produced expression of thoughts or sentiments" (Article 2, paragraph (1), item (i) of the same Act). Regarding a serial novel consisting of one-episode long stories in which a character with characteristics, including a fixed name, appearance, and role, is described repeatedly, each written

expression in each episode in which the character is described falls under a work. What is called the characteristics of a character as mentioned above are abstract concepts that should be considered as the personality of the character which is derived from specific expressions in the novel, and they are not specific expressions and cannot be considered themselves to be creatively produced expressions of thoughts or sentiments. Consequently, a character that appears in a serial novel consisting of one-episode long stories cannot be considered to be a work referred to in Article 2, paragraph (1), item (i) of the Copyright Act (see the judgment regarding a serial cartoon, 1992 (O) 1443, the judgment of the First Petty Bench of the Supreme Court of July 17, 1997, Minshu Vol. 51, No. 6, at 2714).

When this determination is applied to this case, in alleging copyright infringement pertaining to the serial novel consisting of one-episode long stories, the Plaintiffs do not specifically specify what copyrights for which written expression in which episode of the serial novel were infringed. Therefore, the Plaintiffs' allegation itself must be considered to be unreasonable.

For the reasons described above, in this judgment, the court dismissed all the Plaintiffs' claims.

Judgment rendered on December 7, 2023 Original issued on the same date to the court clerk

2023 (Wa) 70139, Case of seeking injunction against copyright infringement

Date of conclusion of oral argument: September 22, 2023

Judgment

Plaintiff: A

(hereinafter referred to as "Plaintiff A")

Plaintiff: SOON Inc.

(hereinafter referred to as the "Plaintiff Company")

Defendant: Ichijuuchinkaidou Ltd.

Main text

1. All the Plaintiffs' claims shall be dismissed.
2. The Plaintiffs shall bear the court costs.

Facts and reasons

No. 1 Claims

1. The Defendant shall be prohibited from manufacturing, transferring or delivering the goods stated in the List of Defendant's Goods attached to this judgment, transmitting the images of the same goods to the public or exhibiting the same goods for the purpose of transferring or delivering them.
2. The Defendant shall destruct the goods stated in the List of Defendant's Goods attached to this judgment which are in its possession.
3. The Defendant shall pay to each of the Plaintiffs 151,261,000 yen and an amount accrued thereon at the rate of 3% per annum for the period from April 8, 2023, until the completion of the payment.

No. 2 Outline of the case

1. (1) B, who is known as the late SASAZAWA Saho (hereinafter referred to as the "late B"), wrote a serial novel of the "*Kogarashi Monjiro* (Cold winter wind Monjiro)" series (including the books stated in 1. and 2. in the List of Books attached to this judgment [hereinafter referred to as the "Books"]). After that, the Books were made into cartoons with pictures drawn by C, and an independent book containing four works, "*Shamenbana wa chitta* (Cyrtomium flowers have fallen)," "*Yukemuri ni tsuki wa kudaketa* (The moon was broken by steam rising from a hot spring)," "*Nyoninkō no yami wo saku* (Rend the darkness of the women's lecture)," and "*Kawadome no mizu wa nigotta* (The water at a

river stop became cloudy)" (hereinafter referred to as the "Cartoon Works") was published. Then, the Books were made into a television program with D playing the lead. A television series from the first story "*Kawadome no mizu wa nigotta*" to the 18th story "*Nagarebune wa kaerazu* (A drifting boat does not return)" (hereinafter referred to as the "Television Works") was broadcasted. Furthermore, the Books were made into movies with E playing the lead, and a movie titled "*Kogarashi Monjiro* (Cold winter wind Monjiro)" and its sequel titled "*Kogarashi Monjiro: kakawari gozansen* (Cold winter wind Monjiro: It's none of my business)" (hereinafter referred to as the "Movie Works," and the Cartoon Works, the Television Works, and the Movie Works are collectively referred to as the "Works") were released nationwide.

Plaintiff A inherited all copyrights relating to the Works and other works created by the late B and granted the Plaintiff Company exclusive authorization to exploit all of the aforementioned copyrights.

(2) In this case, the Plaintiffs allege that the Defendant's act of manufacturing and selling the goods stated in the List of Defendant's Goods attached to this judgment (hereinafter referred to as the "Defendant's Goods") with the artwork stated in the List of Defendant's Artwork attached to this judgment (hereinafter referred to as the "Defendant's Artwork") and the word "紋次郎 (Monjiro)" affixed thereto and transmitting the images of the goods to the public constitutes infringement of the right of reproduction or adaptation right, right to transmit to the public, and right of transfer relating to the Works. The Plaintiffs also allege that the act of manufacturing and selling the Defendant's Goods with the Defendant's Artwork, etc. affixed thereto falls under "unfair competition" set forth in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act. Based on these allegations, under Article 112, paragraphs (1) and (2) of the Copyright Act and Article 3, paragraphs (1) and (2) of the Unfair Competition Prevention Act, the Plaintiffs demand that the Defendant suspend the manufacturing, sale and otherwise handling of the Defendant's Goods and destruct the Defendant's Goods, and under Article 709 of the Civil Code, Article 114, paragraph (3) of the Copyright Act, and Article 4 and Article 5, paragraph (3), item (i) of the Unfair Competition Prevention Act, the Plaintiffs demand that the Defendant pay 151,261,000 yen (total amount of 137,511,000 yen for damages and 13,750,000 yen as attorney's fees) and delay damages accrued thereon at the rate of 3% per annum as prescribed in the Civil Code for the period from the day following the date of service of a complaint, April 8, 2023, until the completion of the payment.

(3) On the date of the first oral argument, this court asked, for the purpose of clarification, the Plaintiffs whether they would further specify the works and indications of goods or business pertaining to their allegations. The Plaintiffs then alleged that they specify the

work as a part indicating a person as a *toseinin* (meaning an unfettered wanderer) who [i] wears a flat-shaped traditional Japanese bamboo hat (*sandogasa*) which is bigger than normal, low over his eyes, [ii] wears a traveler's rain cape (*dōchūgappa*) which is longer than normal, [iii] holds a long bamboo toothpick between his teeth, and [iv] has a long short sword (*nagawakizashi*). The Plaintiffs also said that they do not intend to specify the work as any individual photograph or artwork, etc. and have no plan to make any other allegation. In response to this, the Defendant answered that it understands as stated above. Therefore, both parties were supposed to make up for their allegations and proof on the premise of the aforementioned specification (see the record of the first oral argument).

2. Basic facts (there is no dispute between the parties regarding points for which no evidence, etc. is stated; incidentally, when evidence is indicated, branch numbers are included unless otherwise described)

(1) Parties

A. Plaintiff A is the wife of the late B, who created the novels of the "*Kogarashi Monjiro*" series, and inherited copyrights pertaining to all works of the late B, including the Books, from the late B (Exhibits Ko 3, 4, 11, and 12 and the entire import of oral arguments).

B. The Plaintiff Company is a stock company intended to engage in advertising agency business and planning and otherwise handling character goods and has received exclusive authorization to exploit the copyrights pertaining to all works of the late SASAZAWA, including the Books, from Plaintiff A (Exhibits Ko 1 and 13 and the entire import of oral arguments).

C. The Defendant is a stock company engaging in the business of manufacturing, selling, and otherwise handling food.

(2) The Books

The Books contain period novels created by the late B with "*Monjiro*" as the main character and fall under the category of literary works (Exhibits Ko 3 and 4 and the entire import of oral arguments).

(3) Making the Books into cartoons, a television program, and movies

In 1972, the Books were made into cartoons with pictures drawn by C, and the Cartoon Works were published. In January 1972, the Books were made into a television program with D playing the lead, and the Television Works were broadcasted. Furthermore, the Books were made into movies with E playing the lead, and the Movie Works were released nationwide (Exhibits Ko 5 to 9 and the entire import of oral arguments).

(4) Manufacturing and sale of the Defendant's Goods

On June 25, 1972, the Defendant started manufacturing and selling a food product, which is made by threading the legs of sagittated calamaries boiled with sugar onto bamboo skewers, under the product name of "*Monjiro Ika* (Monjiro squid)" with the Defendant's Artwork affixed to its package. Moreover, after that, the Defendant manufactured and sold "*Genkotsu Monjiro* (Fisted hand Monjiro)" and other Defendant's Goods with the Defendant's Artwork affixed thereto.

3. Issues

- (1) Whether the Defendant's act constitutes copyright infringement (Issue 1)
- (2) Whether the Defendant's act falls under unfair competition (Issue 2)
- (3) Amount of damage (Issue 3)

No. 4 Judgment of this court

1. Issue 1 (whether the Defendant's act constitutes copyright infringement)

(1) The Copyright Act defines a work as a "creatively produced expression of thoughts or sentiments" (Article 2, paragraph (1), item (i) of the same Act). Regarding a serial novel consisting of one-episode long stories in which a character with characteristics, including a fixed name, appearance, and role, is described repeatedly, each written expression in each episode in which the character is described falls under a work. What is called the characteristics of a character as mentioned above are abstract concepts that should be considered as the personality of the character which is derived from specific expressions in the novel, and they are not specific expressions and cannot be considered to be creatively produced expressions of thoughts or sentiments. Consequently, a character that appears in a serial novel consisting of one-episode long stories cannot be considered to be a work referred to in Article 2, paragraph (1), item (i) of the Copyright Act (see the judgment regarding a serial cartoon, 1992 (O) 1443, the judgment of the First Petty Bench of the Supreme Court of July 17, 1997, Minshu Vol. 51, No. 6, at 2714).

Therefore, it is reasonable to consider that in the case of alleging copyright infringement pertaining to a serial novel consisting of one-episode long stories, the copyright owner needs to specifically specify what copyrights for which written expression in which episode of the serial novel were infringed.

When this determination is applied to this case, in the argument to specify the work for which copyrights were allegedly infringed, the Plaintiffs specified the work only as a description of a *toseinin* [i] who wears a flat-shaped traditional Japanese bamboo hat which is bigger than normal, low over his eyes, [ii] wears a traveler's rain cape which is longer than normal, [iii] holds a long bamboo toothpick between his teeth, and [iv] has a long short sword (hereinafter referred to as the "*Toseinin*"; see the List of Indications of

Monjiro attached to this judgment). The Plaintiffs also stated that they do not intend to specify the *Toseinin* as any individual photograph or artwork, etc. and have no plan to make any other allegation (see the record of the first oral argument).

Consequently, in alleging copyright infringement pertaining to the serial novel consisting of one-episode long stories, the Plaintiffs do not specifically specify what copyrights for which written expression in which episode of the serial novel were infringed.

Therefore, on the premise of the Plaintiffs' allegation pertaining to the argument for specification, the Plaintiffs are considered not to specifically specify the work in the Books for which copyrights were infringed, and the allegation itself must be considered to be unreasonable. This reasoning also remains the same in relation to the *Toseinin*, who is alleged as the consistent central character of the Cartoon Works, the Television Works, and the Movie Works.

Even if the Plaintiffs specify the work as an expression referring to the consistent central character of the Books, the Cartoon Works, the Television Works, and the Movie Works, in addition to a description of the *Toseinin*, the aforementioned central character represents an abstract concept that should be considered as the personality of the character that was derived from expressions in the Books, the Cartoon Works, the Television Works, and the Movie Works. Therefore, what is specified by the Plaintiffs is not a specific expression itself and cannot be considered to be a creatively produced expression of thoughts or sentiments. Consequently, that cannot be found to be a work.

Furthermore, for confirmation, looking at the statement about the *Toseinin* itself, the *Toseinin* alleged by the Plaintiffs is described as a *toseinin* [i] who wears a flat-shaped traditional Japanese bamboo hat which is bigger than normal, low over his eyes, [ii] wears a traveler's rain cape which is longer than normal, [iii] holds a long bamboo toothpick between his teeth, and [iv] has a long short sword. According to evidence (Exhibits Otsu 1 to 15) and the entire import of oral arguments, the statement that a *toseinin* wears a flat-shaped traditional Japanese bamboo hat low over his eyes, wears a traveler's rain cape, and has a long short sword merely describes a common fact regarding the appearance of a *toseinin* of the Edo period. Even if the expression "holds a long bamboo toothpick between his teeth" is added, the statement itself is obviously a common statement from the perspective of whether it is a creatively produced expression that should be protected under the Copyright Act, setting aside the question of whether the expression has uniqueness as an idea. Even further examining the statement in consideration of the expressions, a flat-shaped traditional Japanese bamboo hat "which is bigger than normal" and a traveler's rain cape "which is longer than normal," based on the Plaintiffs' allegation

that the relevant expressions that were subsequently added to the *Toseinin* in the Television Works fall under derivative works, these expressions are also extremely common. Without the need to determine the adequacy of the aforementioned allegation of the Plaintiffs, the aforementioned statement pertaining to the *Toseinin* as a whole merely describes a common fact, a *toseinin* of the Edo period, with a common statement, and it cannot be found to be a creatively produced expression.

Even if the Plaintiffs allege copyright infringement, for example, on the premise that they hold a copyright for a portrait pertaining to part of a video of the Television Works (see the List of Indications of Monjiro) without regard to the aforementioned allegation in the argument to specify the work for which copyrights were infringed, the part for which the identicalness with the Defendant's Artwork (see the List of Defendant's Artwork) can be examined is, after all, only the aforementioned statement pertaining to the *Toseinin*. The relevant statement merely describes a common fact, a *toseinin* of the Edo period, with a common statement and does not fall under a creatively produced expression as explained above. Consequently, taking into account the fact that the part for which the identicalness between the portrait pertaining to part of a video of the Television Works and the Defendant's Artwork can be examined is only a part that clearly does not include any creatively produced expression, production of the Defendant's Artwork obviously does not fall under reproduction or adaptation (see 1999 (Ju) 922, the judgment of the First Petty Bench of the Supreme Court of June 28, 2001, Minshu Vol. 55, No. 4, at 837). In addition, looking at the appearance of a *toseinin* described in the Defendant's Artwork, the flat-shaped traditional Japanese bamboo hat is huge with almost the same length as his height, and his appearance differs from the appearance of a *toseinin* of the Edo period. Moreover, what he holds between his teeth is around several times as long as his face, and it cannot be said that this can be immediately recognized as a bamboo toothpick. Consequently, taking into account the fact that a *toseinin* of the Edo period like the *Toseinin* cannot be detected directly from the description of the Defendant's Artwork itself, the Defendant's Artwork can also be considered to originally lack the identicalness with the *Toseinin* in relation to the part for which the identicalness can be examined according to the above as a result of detailed examination from the perspective of the Copyright Act.

(2) In response, the Plaintiffs allege that the Defendant's Artwork maintains the essential characteristics of the expression of the *Toseinin*. However, the characteristics of a character, Monjiro, cannot be considered to be a work separately from specific expressions of the Books. Looking at a portrait pertaining to part of a video of the Television Works, the part for which the identicalness with the Defendant's Artwork can

be examined merely describes a common fact, the appearance of a *toseinin* of the Edo period, with a common statement, and cannot be considered to be a creatively produced expression. The part for which the identicalness can be examined can also be considered to originally lack the identicalness, as explained above.

Therefore, the substance of the Plaintiffs' allegations merely alleges that Monjiro, a character who consistently appears in the Books, the Cartoon Works, the Television Works, and the Movie Works should be protected. The Plaintiffs' allegations cannot be considered to be based on the correct understanding of the explanations made in the aforementioned judgments of the Supreme Court, as well as the purport and purpose of the Copyright Act, which grants protection only to creatively produced expressions for a certain period of time from the perspective of guaranteeing the freedom of expression and the freedom of creation.

Therefore, the Plaintiffs' allegations cannot be considered to affect the aforementioned findings, and none of them is acceptable.

2. Issue 2 (whether the Defendant's act falls under unfair competition)

The "indication of goods or business" referred to in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act means a name, trade name, trademark, marks, containers or packaging for goods belonging to a person's business, or any other indication of a person's goods or business.

When this is applied to this case, the indication of goods or business pertaining to the Plaintiffs' allegations refers to an indication pertaining to the *Toseinin* that has the characteristics mentioned in [i] to [iv] above (see the record of the first oral argument). The *Toseinin* only refers to a common *toseinin* of the Edo period, as explained above. Therefore, the indication pertaining to the *Toseinin* originally cannot be considered to fall under the "indication of goods or business" referred to in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act.

Even if the Plaintiffs' allegations refer to an indication in which the name "Monjiro" is affixed to an artwork or photograph of the *Toseinin*, they lack specific specification as an indication of goods or business. In addition, the name "Monjiro" is identification information of a character, which indicates the central character who appears in the Books, the Cartoon Works, the Television Works, and the Movie Works, and it does not inherently have the function to indicate the source of goods or business. Even with all pieces of evidence in this case, the aforementioned indication pertaining to the Plaintiffs' allegations cannot be found to have a secondary meaning as an indication of the Plaintiffs' business beyond being identification information relating to the character. Beyond that, it is obviously impossible to find that the aforementioned indication pertaining to the

Plaintiffs' allegations is well-known and famous as an indication of the Plaintiffs' business, etc. even in light of all pieces of evidence in this case.

Moreover, according to evidence (Exhibits Otsu 20 to 28) and the entire import of oral arguments, the Defendant's Artwork, "紋次郎いか" (Monjiro ika), and "げんこつ 紋次郎" (Genkotsu Monjiro) were registered as a trademark in 1977, 1982, and 2008, respectively, and the Defendant has sold the Defendant's Goods with these trademarks affixed thereto and accumulated trust for many years. In light of such actual circumstances and performance, the likelihood of misleading or causing confusion with the Plaintiffs' business, etc. cannot be immediately found even based on the Plaintiffs' allegations. There is also no evidence sufficient to reverse this determination.

Consequently, even if certain financial value is embodied in the identification information relating to the aforementioned character, the Defendant's act of manufacturing and selling the Defendant's Goods with the Defendant's Artwork affixed thereto cannot be considered to fall under "unfair competition" stated in Article 2, paragraph (1), item (i) or (ii) of the Unfair Competition Prevention Act, setting aside an allegation of infringement of the right of publicity as an actual person.

Therefore, none of the Plaintiffs' allegations is acceptable.

3. Other

Even considering other allegations of the Plaintiffs again, the Plaintiffs' allegations merely seek protection of financial value pertaining to the character called "Monjiro," and as explained above, the Plaintiffs' allegations cannot be considered to be based on the correct understanding of the purport and purpose of the Copyright Act and the Unfair Competition Prevention Act, apart from legislative theory. Therefore, the Plaintiffs' allegations cannot be considered to affect the aforementioned determination, and none of them is acceptable.

No. 5 Conclusion

Accordingly, all the Plaintiffs' claims shall be dismissed as they are groundless, and the judgment is rendered as indicated in the main text.

Tokyo District Court, 40th Civil Division

Presiding judge: NAKASHIMA Motoyuki

Judge: ODA Yotaro

Judge: KOGA Chihiro

(Attachment)

List of Defendant's Goods

1. Product name: Monjiro Ika



2. Product: Monjiro Ika



3. Product name: Genkotsu Monjiro



4. Product name: Tongari Ika



5. Product name: Tongari Ika



6. Product name: Teppou Ika



(Attachment)

List of Books

1. Name of book: *Shamenbana wa chitta* (Cyrtomium flowers have fallen)
Author: SASAZAWA Saho
Publisher: Kadokawa Shoten Publishing Co., Ltd.
First printing date: February 20, 1973
Works contained:
Shamenbana wa chitta (Cyrtomium flowers have fallen)
Nagarebune wa kaerazu (A drifting boat does not return)
Yukemuri ni tsuki wa kudaketa (The moon was broken by steam rising from a hot spring)
Warabeuta wo ame ni nagase (Throw a traditional children's song into rain)
Sujinsai ni shi wo yonda (Invited death at a water god festival)
2. Name of book: *Nyoninkō no yami wo saku* (Rend the darkness of the women's lecture)
Author: SASAZAWA Saho
Publisher: Kadokawa Shoten Publishing Co., Ltd.
First printing date: April 10, 1973
Works contained:
Nyoninkō no yami wo saku (Rend the darkness of the women's lecture)
Ichirizuka ni kaze wo tatsu (Cut the wind at a milestone)
Kawadome no mizu wa nigotta (The water at a river stop became cloudy)
Ōedo no yoru wo hashire (Run in Oedo at night)
Tsuchikemuri ni ema ga mau (Wooden plaque flying in a cloud of dust)

(Attachment)

List of Defendant's Artwork



The word "紋次郎 (Monjiro)" is affixed to the artwork above.

(Attachment)

List of Indications of Monjiro

An expression of a person who [i] is the consistent central character of the Books, the Cartoon Works, the Television Works, and the Movie Works and [ii] has a feature of a *toseinin* who wears a flat-shaped traditional Japanese bamboo hat which is bigger than normal, low over his eyes, wears a traveler's rain cape which is longer than normal, holds a long bamboo toothpick between his teeth, and has a long short sword in terms of appearance, which is, [iii] for example, like the photograph below in terms of the Television Works

Note

