

Date	May 10, 2011	Court	Intellectual Property High Court, Second Division
Case number	2011 (Ne) 10010		
– A case in which the court dismissed the claim of infringement of the copyright for the photographs where the alleged infringer took the photographs of the same subjects.			

References: Article 27 of the Copyright Act, Article 709 of the Civil Code

Summary of the Judgment

1. The appellant (plaintiff) is a photographer who takes photographs of "ruins" and a photo collection featuring the photographs taken by the appellant (the "appellant's photographs") was published. In this case, the appellant alleged that, among others, the appellee created the appellee's photographs of the same subjects as those of the appellant's photographs and further published and distributed the appellee's books in which the appellee's photographs are printed, and such acts of the appellee infringe the copyright and moral rights of author held by the appellant for the appellee's pictures or infringe the appellant's interests that deserve legal protection, which arise from being acknowledged as the first person who chose "ruins" as subjects. Based on these allegations, the appellant made the following claims against the appellee: [i] an injunction against the production of additional copies or distribution of the appellee's books and partial destruction thereof based on Article 112, paragraphs (1) and (2) of the Copyright Act; [ii] compensation for damages on the grounds of tort of infringement of the copyright and moral rights of author, and infringement of interests that deserve legal protection; and [iii] publication of an apology as measures for restoration, etc. of honor based on Article 115 of the Copyright Act.

The court of prior instance dismissed all of the appellant's claims.

In this judgment, the court found all of the appellant's claims to be groundless and dismissed the appeal, holding as follows.

2. In order to find a work as an adaptation, it is required, in the first place, that the work is based on an existing work and is produced by amending the specific expressions of the existing work, increasing or decreasing any expressions thereto or changing such specific expressions, while maintaining the essential features of the expressions used in the existing work (judgment of the First Petty Bench of the Supreme Court of June 28, 2001, Minshu Vol. 55, No. 4 at 837 (Esashi Oiwake Case)). This logic is basically applicable to the photographic works of this case. The subjects of the appellant's photographs are existing abandoned buildings and the photographer has not arranged the subjects in an intended fashion nor has he/she added by him/herself any subject article. Thus, the subjects themselves cannot be found to have

essential features of the expressions and it should be said that essential features of the expressions may be found in the expression techniques such as the season, angle, coloration and angle of view selected for the photographing.

The appellee's photographs differ from the appellant's photographs in terms of the photographing direction, composition, etc., and they cannot be regarded as adaptations of the appellant's photographs.

3. As the interests that deserve legal protection with respect to the appellant's photographs, the appellant first mentions the business interests derived from being acknowledged by the public as the pioneer who chose ruins as the subjects of photographic works. However, although it is obvious that the appellant's photographs fall within the category of art, they cannot be found to be the object of business interest beyond the bounds of such nature, for example, photographs created as industrial design for mass production. As long as ruins are existing buildings, it should be said that, in principle, photographs of ruins that can be freely photographed cannot enjoy legal protection beyond the scope of copyright or moral rights of author. Taking into account various circumstances that appeared in this case, such as the nature of the "ruins" as the subjects, the contents of the interests alleged by the appellant, and the inconvenience that may arise if such interests are protected, it is determined that the tort alleged by the appellant is not established in this case.

Judgment rendered on May 10, 2011, Original of the judgment document received on the same day, court clerk

2011 (Ne) 10010, Appeal Case of Seeking Compensation for Damages, etc. (Court of prior instance: Tokyo District Court 2009 (Wa) 451)

Date of conclusion of oral argument: March 24, 2011

Judgment

Appellant (plaintiff): X

Counsel attorney: NOMA Kei

Same as above: OGURA Hideo

Appellee (defendant): Y

Counsel attorney: NOMA Yoriko

Same as above: ITO Ayako

Main text

The appeal in question shall be dismissed.

The costs of the appeal shall be borne by the appellant.

Facts and reasons

No. 1 Object of the appeal

1. The judgment in prior instance shall be revoked.
2. The appellee shall not by him/herself produce copies or distribute or have a third party produce copies or distribute the books stated in Attached Lists of Books 1 to 4 of the judgment in prior instance that contain any of the pictures or images shown in items 1-D, 2-D, 3-D, 4-D and 5-D in Attached List of Pictures (1) of the judgment in prior instance.
3. The appellee shall destruct part of the books referred to in the preceding paragraph that prints the pictures or images referred to in the preceding paragraph.
4. The appellee shall pay to the appellant 6,287,117 yen and money accrued thereon at the rate of 5% per annum for the period from February 5, 2009 until the completion of payment.
5. The appellee shall publish an apology for each of the contents stated in Attached List of Public Apology 1 of the judgment in prior instance on the conditions stated in Attached List of Public Apology 2 of the judgment in prior instance.

No. 2 Outline of the case

1. The appellant (plaintiff) who is a photographer that takes pictures of "ruins" as a photographic subject (these pictures are generally called "ruins pictures") made the following allegations: [i] the appellee's (defendant's) act of preparing the defendant's pictures by photographing the same ruins as those photographed in the plaintiff's

pictures taken by the appellant and further publishing and distributing the defendant's books in which the defendant's pictures are printed constitutes infringement of the copyright (right of adaptation, right of reproduction as the copyright holder of the original work and right of ownership transfer) and moral rights of author (right to determine the indication of the author's name) held by the appellant for the plaintiff's pictures or infringes the appellant's interests that are eligible for legal protection that arise in association with the fact that the appellant is recognized as the person who took up "ruins" as a photographic subject for the first time; and [ii] that the appellee's remarks stated in the photo collection titled "亡骸劇場" (Nakigara Gekijō (JAPAN DEATHTOPIA SERIES)) causes defamation of the appellant. Based on these allegations, the appellant made the following claims against the appellee: [a] an injunction against the production of copies or distribution of the defendant's books and partial destruction thereof based on Article 112, paragraphs (1) and (2) of the Copyright Act; [b] compensation for damages on the grounds of tort of infringement of the copyright and moral rights of author, defamation and infringement of interests eligible for legal protection; and [c] publication of an apology as measures for restoration, etc. of honor based on Article 115 of the Copyright Act and Article 723 of the Civil Code.

2. In the judgment in prior instance, the court dismissed all of the appellant's claims by finding as follows: [i] with respect to the allegation of infringement of copyright, the court found that the essential features of the expressions used in plaintiff's pictures 1 through 5 cannot be directly perceived from defendant's pictures 1 through 5 and thus defendant's pictures 1 through 5 are not adaptations of plaintiff's pictures 1 through 5 and infringement of other copyrights may also not be found to have been established; [ii] with respect to the tort of defamation, the court denied the establishment thereof on the grounds that no facts of defamation were indicated; and [iii] the court denied the establishment of the tort of infringement of interests eligible for legal protection on the grounds that business interests that arise as a result of being recognized as the first person who took up "ruins" as the photographic subject cannot be found to be interests eligible for legal protection.

(omitted)

No. 4 Court decision

This court also determines that all of the appellant's claims made in this action are groundless. The reasons are as follows.

1. Regarding the issue of whether or not the copyright (mainly the right of adaptation)

is infringed

(1) In order to find a work as an adaptation, it is required, in the first place, that the work relies on existing works and is produced by amending the specific expressions of existing works, increasing or decreasing any expressions thereto or changing such specific expressions while maintaining the essential features of the expressions used in the existing works (judgment of the First Petty Bench of the Supreme Court of June 28, 2001, Minshu Vol. 55, No. 4 at 837 (Esashi Oiwake Case)). This logic is basically applicable to the photographic works of this case. The photographic subjects of plaintiff's pictures 1 through 5 are existing abandoned buildings and the photographer has not arranged the subjects in an intended fashion nor has he/she added by him/herself any photographic subject article. Thus, the photographic subjects themselves cannot be found to have essential features of the expressions and it is assumed such essential features of the expressions may be found in the expression techniques such as the season, angle, coloration and angle of view selected for the photographing.

(2) In examining whether or not defendant's picture 1 is an adaptation of plaintiff's picture 1, it is found that plaintiff's picture 1 is a photograph of the inside of the Maruyama Substation of the Old Japan National Railways located in Matsuida-machi, Gunma prefecture and is a high contrast photograph created by emphasizing monochrome photography, which is also used in plaintiff's book 1 titled "棄景" (Kikei (Abandoned scenery)) as the overall tone. Meanwhile, defendant's picture 1, which the appellant alleges as the adaptation of plaintiff's picture 1, is included in defendant's book 1 titled "廃墟遊戯" (Haikyo Yūgi (Deathtopia)) and defendant's book 4 titled "廃墟遊戯-Handy Edition" (Haikyo Yūgi Handy Edition (Deathtopia-Handy Edition))" and is a color picture based on the color of withered leaves as with the case of the defendant's books that use such color as the basic tone. Likewise plaintiff's picture 1, the inside of the Maruyama Substation of the Old Japan National Railways is the photographic subject of defendant's picture 1.

However, the two pictures differ in terms of the photographing direction (plaintiff's picture 1 is taken from the left direction while defendant's picture 1 is taken from the right direction) and the photographing season as well. Thus, the subjects photographed differ in the two pictures (i.e. while one of them includes some plants, the other does not) and the photographic subjects themselves cannot be found to have essential features. Taking into account these facts, it cannot be found that defendant's picture 1 is an adaptation of plaintiff's picture 1.

(3) In light of the relationship between defendant's picture 2 and plaintiff's picture 2, both pictures have photographed the ruin of Tsūdō Substation (the exterior of the

building), which is in the vicinity of the Ashio copper mine located in Ashio-machi, Tochigi prefecture, and are similar in terms of the composition in which the substation is photographed from the lower right direction. However, in light of the fact that the photographic subject is a ruin of a building that actually exists, even if the two pictures are similar in terms of the composition, if they differ in the overall impression expressed therein, it cannot be found that one of them is an adaptation of the other. It is particularly obvious that the two pictures were taken in different seasons due to the fact that while the silver grass that is characterized in white color among the sepia tone used in the picture appears on the lower left of plaintiff's picture 2, such silver grass does not appear in defendant's picture 2 that gives an impression that the building has been photographed without any change to the color sense thereof and instead a green plant appears in that position. In light of these differences found in the impression and photographed subjects, it cannot be said that defendant's picture 2 is an adaptation of plaintiff's picture 2.

(4) Both plaintiff's picture 3 and defendant's picture 3 are photographs of the exterior of a building which is in the vicinity of Ōhito gold mine located in Shuzenji-cho, Shizuoka prefecture, while both plaintiff's picture 4 and defendant's picture 4 are photographs of the inside of the machine room of Okutama ropeway located in Okutama-machi in Metropolitan Tokyo. However, all of the pictures are photographs of the exterior or inside of a building that actually exists and as long as the photographing direction is different, these defendant's pictures cannot be found to fall under the adaptation of the plaintiff's pictures. Both plaintiff's pictures 3 and 4 have monochrome or sepia tones and in particular, plaintiff's picture 4 has a strong contrast and a high impact which cannot be found in defendant's pictures 3 and 4, which give an impression that the photographer intended to show the photographic subjects just as they are.

Both plaintiff's picture 5 and defendant's picture 5 are photographs of bridge ruins of the Old Ōu line located in Odate city, Akita prefecture. However, since both of them have photographed a building that actually exists but have produced pictures with different compositions as with the other pictures mentioned above, it cannot be said that defendant's picture 5 is an adaptation of plaintiff's picture 5 in this regard.

(5) As found above, the appellant's allegations of infringement of the right of adaptation are all groundless and thus the appellant's allegations of infringement of the right of reproduction, right of ownership transfer and right to determine the indication of the author's name made with respect to the publication of the defendant's books in which defendant's pictures 1 through 5 are printed are groundless as well.

2. Regarding the establishment of defamation

The determination made by this court in this regard shall be as found and determined in the relevant part of the judgment in prior instance (the part "2. Regarding the establishment of tort of defamation (Issue 4)" stated from line 16 of page 58 in the judgment in prior instance).

3. Regarding the infringement of interests eligible for legal protection

The appellant names the business interests derived from being acknowledged by the public as the pioneer who took up ruins as the subject of works or pictures as the interests eligible for legal protection with respect to the plaintiff's pictures. However, although it is obvious that the plaintiff's pictures fall into the category of art, it cannot be found that they are pictures of an industrial design for mass production. Taking up ruins pictures as a work is merely an idea that a photographer thinks of and regardless of whether or not the appellant is the first to embody such idea in a photograph, as long as ruins are existing buildings, it should be said that, in principle, pictures of ruins which can be freely photographed cannot enjoy legal protection beyond the scope of copyright and moral rights of author. In addition, as stated in the part "3. Regarding establishment of tort based on infringement of interests eligible for legal protection (Issue 5)" stated from line 2 of page 60 in the judgment in prior instance, taking into account various circumstances that appeared in this case such as the nature of the "ruins" as a photographic subject, the contents of the interests alleged by the appellant and the inconvenience that arises if such interests are protected, it is determined that the tort alleged by the appellant is not established in this case. The abovementioned determination does not change even if the allegations made by the appellant in this instance are examined.

No. 5 Conclusion

Based on the abovementioned findings, the Appeal is groundless and thus shall be dismissed and the judgment shall be rendered in the form of the main text.

Intellectual Property High Court, Second Division

Presiding judge: SHIOTSUKI Shuhei

Judge: SHIMIZU Misao

Judge: FURUYA Kenjiro