Date	September 29, 2004	Court	Osaka High Court,
Case number	2003 (Ne) 3575		8th Civil Division
– A case in which the court determined whether or not a house for the public falls under an "architectural work" under the Copyright Act.			

References: Article 10, paragraph (1), item (v) of the Copyright Act

Number of related rights, etc.:

Summary of the Judgment

1. In the first case subject to the appeal by the appellant (plaintiff), the plaintiff claimed against the defendant an injunction, etc. against the construction, etc. of the defendant's building based on Article 112, paragraphs (1) and (2) of the Copyright Act by alleging as follows: [i] the plaintiff's building falls under an architectural work (Article 10, paragraph (1), item (v) of the Copyright Act); [ii] the plaintiff is the copyright holder of the plaintiff's building; and [iii] the defendant's building is a reproduction or adaptation of the plaintiff's building. In the prior instance, the court dismissed all of the plaintiff's claims with respect to the first case.

In this judgment, the court denied the copyrightability of the plaintiff's building by making the following determinations and dismissed the appeal filed with respect to the first case.

2. Architecture is a kind of formative activity, just like creating paintings, woodblock prints, and sculptures. However, architectural structures (structures) constructed on the ground through architecture are not articles and are produced for the purpose of being actually used as a residence, hostel, business office, school building, public office building, etc. rather than for the purpose of aesthetic appreciation, while paintings, woodblock prints, and sculptures are articles that are produced exclusively for the purpose of aesthetic appreciation. For this reason, the Copyright Act is considered to protect "architectural works" as those that fall under an independent type of work, separately from "paintings, woodblock prints, sculptures, and other works of fine art" (Article 10, paragraph (1), item (iv) of the Copyright Act).

In light of the definition of a work in Article 2, paragraph (1) item (i) of the Copyright Act, structures protected as "architectural works" are required to be the outcomes of intellectual or cultural mental activities and to have creativity in aesthetic expressions, that is, artistic property as works of formative art. Ordinary common structures should not be considered to fall under "architectural works" protected under said Act.

In that case, it is reasonable to understand that a house for the public can be

considered to be an "architectural work" set forth in Article 10, paragraph (1), item (v) of said Act only where it is objectively and apparently recognized as having a higher level of aesthetic creativity than that ordinarily added to the buildings of houses for the public and as having artistic property as a work of formative art sufficiently enough to become subject to aesthetic appreciation independently, separately from usefulness and functionality as a building for residence, and to have people sense the cultural spirits, such as thoughts or sentiments, of the architect or designer.

The plaintiff's building is neither objectively and apparently recognized as having a higher level of aesthetic creativity than that ordinarily added to the buildings of houses for the public nor recognized as having artistic property as a work of formative art sufficiently enough to become subject to aesthetic appreciation independently, separately from usefulness and functionality as a building for residence, and to have people sense the cultural spirits, such as thoughts or sentiments, of the architect or designer. Therefore, it cannot be considered to fall under an "architectural work" under the Copyright Act.

Judgment rendered on September 29, 2004

2003 (Ne) 3575 Appeal Case of Seeking an Injunction against Copyright Infringement

(Prior instance: Osaka District Court, 2002 (Wa) 1989 [first case], 2002 (Wa) 6312 [second case])

Judgment

Appellant (plaintiff in the first instance in both cases): Sekisui House, Ltd.

Appellee (defendant in the first instance in both cases): Kabushiki Kaisha Sanwa Home

Main Text

1. This appeal shall be dismissed.

2. The secondary claim made by the appellant in this instance shall be dismissed.

3. The appellant shall bear the court costs in this instance.

Facts and reasons

No. 1 Objects of the appeal

1. The judgment in prior instance concerning the first case shall be revoked.

2. The appellee shall not construct, sell, or exhibit for sale the building stated in the Allegedly Infringing Item List 1 attached to the judgment in prior instance.

3. The appellee shall destroy brochures for houses that include a photograph of the front of the building, as stated in the Allegedly Infringing Item List 1 attached to the judgment in prior instance.

4. The appellee shall pay to the appellant 35,185,000 yen with the amount accrued thereon at the rate of 5% per annum for the period from March 7, 2002 (date of service of the complaint) to the date of completion of the payment.

5. The appellee shall bear the court costs for both the first and second instances.

(Hereinafter the appellant is referred to as the "plaintiff" and the appellee is referred to as the "defendant," and other abbreviations are as those in the judgment in prior instance.)

No. 2 Outline of the case

1. Summary of the case

(1) In the first case, [i] the plaintiff alleges that the plaintiff's building stated in the judgment in prior instance falls under works of architecture (Article 10, paragraph (1), item (v) of the Copyright Act), that the plaintiff is the copyright owner of the plaintiff's building, and that the defendant's building stated in the judgment in prior instance is a reproduction or adaptation of the plaintiff's building. Based on this allegation, the plaintiff demands that the defendant cease to construct, etc. the defendant's building and destroy brochures that include a photograph of the front of the defendant's building under Article 112, paragraphs (1) and (2) of the Copyright Act,

and also demands that the defendant pay damages under Article 709 (tort through copyright infringement) of the Civil Code. In addition, [ii] the plaintiff alleges that the defendant's building is an imitation of the configuration of the plaintiff's building (Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act). Based on this allegation, the plaintiff demands that the defendant pay damages under Article 4 (tort through an act of unfair competition) of the Unfair Competition Prevention Act. (Allegations [i] and [ii] are in a selective relationship in terms of the claim for payment of damages.)

In the second case, the plaintiff alleges that the plaintiff's photograph stated in the judgment in prior instance falls under photographic works (Article 10, paragraph (1), item (viii) of the Copyright Act), that the plaintiff is the copyright owner of the plaintiff's photograph, and that the defendant's photograph stated in the judgment in prior instance is a reproduction or adaptation of the plaintiff's photograph. Based on this allegation, the plaintiff demands that the defendant cease printing and replicating the defendant's photograph and distributing printed matters (fliers and other printed matters) that include said photograph and that the defendant destroy the data, etc. of the defendant's photograph (the defendant's photograph, its data, and fliers and other printed matters using the defendant's photograph) under Article 112, paragraphs (1) and (2) of the Copyright Act. The plaintiff also demands that the defendant pay damages under Article 709 (tort through copyright infringement) of the Civil Code.

(2) The court of prior instance upheld the entire claim for an injunction and part of the claim for payment of damages among the claims made by the plaintiff in the second case, but dismissed all of the plaintiff's claims in the first case and all of the plaintiff's other claims for payment of damages in the second case.

(3) In response to this, the plaintiff filed this appeal in relation to the first case. In this instance, the plaintiff alleged that the defendant gets a free ride from the outcome of the plaintiff's intellectual activities by using the defendant's building, whose front is an imitation of the front of the plaintiff's building, as a model house in its own business activities, thereby attracting customers in a sales area that competes with the plaintiff. The plaintiff then alleged that said defendant's act infringes the business interests of another person, which is worthy of being legally protected, by using a remarkably unfair means in the trading society, which is established based on the fair and free competition principle. Based on this allegation, the plaintiff secondarily added a claim for the payment of damages under Article 709 (tort through an act of illegal imitation) of the Civil Code.

(omitted)

3. Issues

(1) Whether or not the construction, sale, and exhibition of the defendant's building constitutes infringement of the plaintiff's copyright for the plaintiff's building

A. Whether or not the plaintiff's building falls under works of architecture (Article 10, paragraph (1), item (v) of the Copyright Act)

B. Whether or not the defendant's building is a reproduction or adaptation of the plaintiff's building

(2) Whether or not the defendant's building can be considered to be an imitation of the configuration of the plaintiff's building (Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act)

(3) Whether or not the defendant's business activities, which are conducted by using the defendant's building as a model house, fall under an act of illegal imitation that infringes the plaintiff's business interests (tort set forth in Article 709 of the Civil Code)

(4) Damages incurred by the plaintiff

A. Damages from copyright infringement or an act of unfair competition

B. Damages from an act of illegal imitation

(omitted)

(6) The part from the beginning of line 7 of page 27 to the end of line 24 of page 28 is altered as follows.

"B(A) The Copyright Act defines a work mentioned therein as 'a production in which thoughts or sentiments are creatively expressed and which falls within the literary, academic, artistic or musical domain' (Article 2, paragraph (1), item (i) of said Act), and cites 'works of architecture' in the illustrative example of works (Article 10, paragraph (1), item (v) of said Act).

Architecture is a kind of formative activity, just like creating paintings, woodblock prints, and sculptures. However, architectural structures (structure) constructed on the ground through architecture are not articles and are produced for the purpose of being actually used as a residence, hostel, business office, school building, public office building, etc. rather than for the purpose of aesthetic appreciation, while paintings, woodblock prints, and sculptures are articles that are produced exclusively for the purpose of aesthetic appreciation. For this reason, said Act is considered to protect 'works of architecture' as those that fall under an independent type of work, separately from 'paintings, woodblock prints, sculptures, and other works of fine art' (Article 10, paragraph (1), item (iv) of said Act). Incidentally, Article 20, paragraph (2), item (ii) of said Act limits the author's right (right to integrity) to a certain extent from the perspective of coordinating the right to economic use of the owner of a structure and the author's right, and

permits the modification of an architectural work by means of extension, rebuilding, repair, or remodeling.

(B) On the other hand, the Copyright Act first cites 'paintings, woodblock prints, sculptures, and other works of fine art' in the illustrative example of works (Article 10, paragraph (1), item (iv) of said Act), and then provides that an 'artistic work' includes a 'work of artistic craftsmanship' (Article 2, paragraph (2) of said Act). Therefore, it is obvious that 'artistic works' are not limited to pure art (aesthetic creations that are created exclusively for the purpose of appreciation, such as paintings and sculptures). However, it is not necessarily clear in the text of said Act whether works of applied art (aesthetic creations applied to articles that are used for practical purposes) other than one-of-a-kind works of artistic craftsmanship fall under 'artistic works.'

Works of applied art can be classified into [i] cases where a work of pure art is applied to an article of practical use (for example, a case where a painting is made into a folding screen and the a where a sculpture is used as a pattern of an article of practical use), [ii] cases where a one-of-a-kind work is produced by putting more emphasis on the pursuit of beauty than usefulness while applying a technique of pure art to an article used for practical purposes, and [iii] cases where a sense or technique of pure art is applied to machine production or mass production. Taking this into account with the following, it is reasonable to understand that protection under the Copyright Act does not extend in principle to works of applied art: [a] Designs of articles of practical use that are industrially mass-produced, including works of applied art, should be subject to protection under the Design Act, which is intended to contribute to the development of industry (Article 1 of said Act); on the other hand, the purpose of the Copyright Act is to contribute to the development of culture (Article 1 of said Act), and the idea of including works of applied art, which are protected under the Design Act, in the subject matter of protection under the Copyright Act was not adopted in the process of enacting the current Copyright Act; [b] If protection under the Copyright Act extends to overall works of applied art beyond the scope of one-of-a-kind works of artistic craftsmanship, significance of existence of the Design Act can be lost due to differences in the degree of protection under those Acts. (Protection under the Design Act requires registration of establishment, which is a means of public notice, and the term of protection (duration) is 15 years from the date of registration of establishment; on the other hand, protection under the Copyright Act does not require registration of establishment, and the term of protection (duration) is from the time a work is created to fifty years after the death of the author, and to fifty years after the work is made public for a work attributed to a corporation, etc.)

However, a work of applied art may also be considered to be subject to protection under the Copyright Act as an 'artistic work' if it is an outcome of the intellectual or cultural mental activities of a person who has made it and is objectively and apparently recognized as having

sufficient aesthetic creativity (esthetic creativity) to equate it with a work of pure art and the reason for such recognition is because the work has come to have sufficient artistic property to independently become subject to aesthetic appreciation, separately from usefulness and functionality, beyond the scope of ordinary creative activities and to be evaluated as a work of formative art.

(C) A structure is an architectural structure constructed on the ground. For example, if a building is constructed, it is treated as real property, which is a fixture on the land. Therefore, a building is not considered to be an article under the Design Act, and its configuration (design) is not subject to protection under the Design Act. In addition, although structures are not industrially mass-produced in general, they have similarities to one-of-a-kind works of artistic craftsmanship in the sense that they are provided for various practical uses, as mentioned in (A) above. Moreover, as found in A. above, the plaintiff's building is a high-end custom-built house, but it is a model house for structures that are planned by a construction company as a series and are scheduled to be constructed to the same design in large quantity as houses for the public. There have also recently been structures that are scheduled to be mass-produced like the plaintiff's building. Therefore, architecture has similarities to applied art in terms of articles. If so, consideration in (B) above basically applies to structures. Consequently, in light of the definition of a work in Article 2, paragraph (1) item (i) of the Copyright Act, structures protected as "works of architecture" under said Act are required to be the outcomes of intellectual or cultural mental activities and to have creativity in aesthetic expressions, that is, artistic property as works of formative art. Ordinary common structures should not be considered to fall under "works of architecture" protected under said Act.

Even houses for the public are ordinarily designed and constructed by adding not only usefulness and functionality (comfortable living, convenience, economic efficiency, etc.) but also aesthetic elements (good appearance) in relation to the entire structure, roof, pillars, walls, windows, entrance, etc. thereof and their layout, etc. Where the building of a house for the public is recognized as having aesthetic creativity that is ordinarily added, granting protection under the Copyright Act thereto by affirming the 'copyrightability of the building' causes an excessively wide scope of protection in light of the provisions of Article 2, paragraph (1), item (i) of said Act, and it is considered to be unfit for the actual conditions of housing construction in society in general. That is, the purpose of protecting structures as 'works of architecture' under said Act is to protect the aesthetic figures of structures from misappropriation by imitative buildings. If even ordinary and common houses for the public are protected as works, due to their nature of having usefulness and functionality, subsequent construction of ordinary houses, in particular, buildings such as ready-built houses for sale, which have recently been standardized and mass-produced by on-site assembly of factory-made materials, etc., is likely to

constitute infringement of the right of reproduction.

In that case, it is reasonable to understand that a house for the public can be considered to be a 'work of architecture' set forth in Article 10, paragraph (1), item (v) of said Act only where it is objectively and apparently recognized as having a higher level of aesthetic creativity than that ordinarily added to the buildings of houses for the public and as having artistic property as a work of formative art sufficiently enough to become subject to aesthetic appreciation independently, separately from usefulness and functionality as a building for residence, and to have people sense the cultural spirits, such as thoughts or sentiments, of the architect or designer.

The plaintiff alleges that there is no way for houses for the public, such as the plaintiff's building, to become subject to protection under the Design Act because if they are constructed, they cannot be subject to design registration as real estate (buildings). However, whether or not design registration is granted for real estate is exclusively an issue of legislative politics. Therefore, it is impossible to recognize those that do not reach the aforementioned level as 'works of architecture,' which are protected under the Copyright Act, for that reason.

(D) According to the facts found in A. above, the plaintiff's building is recognized as being constructed by arranging and structuring elements popular for Japanese-style buildings, which can be considered to give Japanese people a sense of the beauty of Japanese-style buildings, such as a gable roof, deep eves that create shading, wing walls, and an overall horizontal line, together with the elements of western-style buildings, such as an inner balcony, terrace, and walls made by the header bond of natural stones, through a trial-and-error process. Therefore, it is undeniable that the plaintiff's building is a structure that has a certain level of creativity in terms of aesthetics, in addition to usefulness and functionality. In addition, the plaintiff, which is a construction company, had multiple persons with expertise and experience who were involved in deciding the design of the appearance of the plaintiff's building through a trial–and-error process. In that sense, there is no doubt that the plaintiff's building is an outcome of intellectual activities.

However, it is easily imaginable that the various elements mentioned above are typically arranged and structured through a trial-and-error process in the course of designing and construction when building a Japanese-style house for the public at the present day. Like in this case, where a construction company plans houses for the public (even though they are high-end custom-built houses) as a series, and attracts customers by presenting a model house to construct houses for the public in the same design in large quantity, such houses become more similar to industrially mass-produced articles of practical use than custom-built buildings for the public. Even if an ordinary extent of aesthetic creation is made in constructing the structure of said model house, the structure should not be considered to fall under 'works of architecture.' On

the other hand, in rare cases, if the building of a house for the public is objectively and apparently recognized as having a higher level of aesthetic creativity than that ordinarily added to the buildings of houses for the public and as having artistic property as a work of formative art sufficiently enough to become subject to aesthetic appreciation independently, separately from usefulness and functionality as a building for residence, and to have people sense the cultural spirits, such as thoughts or sentiments, of the architect or designer, the 'copyrightablility of the building' is affirmed.

(E) According to the facts found in A. above, instructions in (A) to (D) above, and the finding and determination in C. mentioned later, the plaintiff's building is neither objectively and apparently recognized as having a higher level of aesthetic creativity than that ordinarily added to the buildings of houses for the public nor recognized as having artistic property as a work of formative art sufficiently enough to become subject to aesthetic appreciation independently, separately from usefulness and functionality as a building for residence, and to have people sense the cultural spirits, such as thoughts or sentiments, of the architect or designer. Therefore, it cannot be considered to fall under 'works of architecture' under the Copyright Act."

(omitted)

5. Conclusion

On these bases, there is no reason for all the claims made by the plaintiff in the first case ([i] claim for an injunction based on copyright and claim for the payment of damages based on a tort through copyright infringement and [ii] claim for the payment of damages based on a tort through an act of unfair competition); and the judgment in prior instance that dismissed them is reasonable. Therefore, there is no reason for this appeal. In addition, there is no reason for the secondary claim made by the plaintiff in this instance (claim for the payment of damages based on a tort through an act of illegal imitation).

Therefore, both this appeal filed by the plaintiff and the secondary claim made by the plaintiff in this instance shall be dismissed. The judgment shall be rendered in the form of the main text.

(Date of conclusion of oral argument in this instance: June 23, 2004)

Osaka High Court, 8th Civil Division

Presiding judge: TAKEHARA Toshikazu

Judge: ONO Yoichi

Judge: NAGAI Koichi