

judgedate

May 30, 1986

caseid

1983 (O) 516

casename

Case of seeking compensation for damages

casetitle

Judgment regarding a claim for compensation on the basis of copyrights that are economic rights, and a claim for compensation on the basis of moral rights of author, which are made on the grounds that a single act infringed on copyrights that are economic rights and on moral rights of author for the same work, and regarding the number of subject matters of the suit.

summary\_judge

1. A claim for compensation on the basis of copyrights that are economic rights, and a claim for compensation on the basis of moral rights of author, which are made on the grounds that a single act infringed on copyrights that are economic rights and on moral rights of author for the same work, are separate claims with different subject matters.
2. An author's reputation or honor, as stipulated in Article 36-2 of the former Copyright Act (Act No. 39 of 1899), refers to the objective evaluation which an author receives from society for the author's value as a person such as his or her character, virtue, honor, and fame, and does not include the feeling of honor.

court second

Tokyo High Court, Judgment of February 23, 1983

references

Article 18 of the former Copyright Act (Act No. 39 of 1899); Article 29 of the former Copyright Act (Act No. 39 of 1899); Article 36-2 of the former Copyright Act (Act No. 39 of 1899); Article 186 of the Code of Civil Procedure; Article 224, paragraph (1) of the Code of Civil Procedure

#### Main text

The judgment in prior instance shall be reversed.

The present case shall be remanded to the Tokyo High Court.

#### Reasons

I. The preface, and Reasons No. 2.1, No. 3., and No. 4 for the final appeal according to Appellant's attorneys, ●●●● and ●●●●.

The fact situation lawfully confirmed in the trial of the prior instance is as follows.

1. On April 27, 1966, in the mountain range of the Alps in St. Christoph, Tyrol, Austria, Appellee, as a photographer, created a color photograph, which is attached to the judgment in prior instance as "Photograph 1", of a shot of a scene in which skiers are skiing down a slope on a snow-covered mountain, leaving wavy tracks (hereinafter referred to as "Photograph"), and acquired copyrights that are economic rights, and moral rights of author for Photograph. Next, Appellee exhibited a reproduction of the Photograph, by indicating Appellee's name thereon, in a photo collection titled "SKI '67 Vol. 4" dated January 1, 1967 and published by Kabushiki Kaisha D. Later, a reproduction of the Photograph was published, with Appellee's permission, in a calendar made by Company F without indicating Appellee's name.
2. Appellant is a graphic designer by the pen name of "G", and he exploited the Photograph, which was published in the above calendar, by creating a black-and-white reproduction of the same by cutting out the left part of the Photograph, and by combining a photograph of a snow tire for a car, which was used in an ad for H Kabushiki Kaisha, and placing it in the upper right corner of the Photograph to create a black-and-white photograph, which is attached to the judgment in prior instance as "Photograph 2" (hereinafter referred to as "Montage Photo"). Next, Appellant exhibited Montage Photo in its own photo collection titled "I", which was published around 1970, and also exhibited the same in a special issue featuring mostly pictures under the title, "G-no-kimyona-sekai", in the magazine, "Shukan Gendai", which is dated June 4 of the same year and published by Kabushiki Kaisha J. In either case, Appellee's name was not indicated as the author for the part of the Photograph that was exploited, and Appellee's consent was not obtained for the exploitation of the Photograph.
3. From the Montage Photo, one can feel the essential features of the Photograph; specifically, the part in which six skiers are skiing down a slope on a snow-covered mountain, leaving wavy tracks, and the characteristic part of the mountain

scenery.

Under the fact situation described above, the judgment of the court of prior instance to the effect that Appellant's act is illegal because Appellant's creation and exhibition of Montage Photo, which were conducted without Appellee's consent, are such that even if Montage Photo may be evaluated as a parody, it is an modification which infringes on Appellee's right to integrity for the Photograph, which is held by Appellee as the author, and furthermore, that there is also infringement of the right of attribution in that Appellant failed to indicate Appellee's name as the author, can be approved as justifiable, and there is no illegality with the process as per the asserted opinion. The assertion made in the asserted opinion as to unconstitutionality, based on the premise that the judgment in prior instance is illegal as described above, lacks its premise. The gist of the argument cannot be accepted.

II. Regarding the part, from among Reason No. 1, which concerns the claim for compensation

1. Copyrights that are economic rights, which cover the right of reproduction, and moral rights of author, which cover the right to make a work public, the right of attribution, and the right to integrity, concern different legal interests to be protected, and the two types of copyrights are also different in the manners of legal protection; for example, in that while copyrights that are economic rights can be transferred and inherited, and a term of protection is set for this type of copyright (Articles 2 through 10, Article 23, etc. of the former Copyright Act (prior to the amendment by Act No. 48 of 1970; hereinafter referred to as "Act")), moral rights of author cannot be transferred or inherited, and a term of protection is not set for this type of copyright. Accordingly, even in the case where a single act made against the work concerned infringes on copyrights that are economic rights and on moral rights of author, the non-economic damage resulting from infringement on copyrights that are economic rights, and the non-economic damage resulting from infringement on moral rights of author can coexist, so that in order to make claims for compensation for both cases of damages in a single lawsuit, the claims should be made by identifying the amount of compensation, which is based on infringement of copyrights that are economic rights, and the amount of compensation, which is based on infringement of moral rights of author, according to the difference in the interests being infringed, given that two claims of different subject matters have been jointed.

2. On the premise of the points above, it is acknowledged that the background to the lawsuit of the present case concerning the claim for compensation, which is made by Appellee against Appellant, is as follows.

- (1) In the trial of the first instance, Appellee asserted that Appellant's creation and exhibition of Montage Photo infringed on Appellee's copyrights that are economic rights and on Appellee's moral rights of author, and that the compensation amounts to several millions of yen, and demanded against Appellant for payment of 500,000 yen, which is part of the compensation, along with delay damages accruing therefrom for the period from October 7, 1971 until full payment at the rate of 5% per annum, and the above claims by Appellee were entirely approved in the trial of the first instance.
- (2) In the trial of the second instance before the judgment was remanded, Appellee lawfully withdrew a claim for compensation, which was based on infringement of copyrights that are economic rights, and made a claim for compensation on the basis of infringement of moral rights of author, seeking payment of 500,000 yen and the money accruing therefrom for the period from October 7, 1971 until full payment at the rate of 5% per annum.
- (3) In the trial of the prior instance, Appellee once again made a claim for compensation on the basis of copyrights that are economic rights, seeking payment of a total of 500,000 yen and the money accruing therefrom for the period from October 7, 1971 until full payment at the rate of 5% per annum, as a claim for compensation on the basis of infringement of copyrights that are economic rights, and as a claim for compensation on the basis of moral rights of author. Then, in the trial of the prior instance, the court dismissed a claim for compensation, which is based on infringement of copyrights that are economic rights, by determining that it is unreasonable, and as for a claim for compensation, which is based on infringement of moral rights of author, the court held that a claim for payment of 500,000 yen and the money accruing therefrom for the period from October 7, 1971 until full payment at the rate of 5% per annum, as prescribed in the Civil Code, is reasonable, and thus the court rendered a judgment to the effect of dismissing the appeal.

In this way, in the trial of the prior instance, the court, resultingly, only identified the total amount of the amount of compensation, which is based on infringement of copyrights that are economic rights, and the amount of compensation, which is based on infringement of moral rights of author, as well as the delay damages accruing therefrom, and rendered a judgment to the

effect of dismissing the appeal with regard to Appellee's claim whose breakdown is not specified. As such, the judgment of the first instance, which was maintained in the above judgment which dismissed the appeal, is one which only identified the total amount of the amount of compensation, which is based on infringement of copyrights that are economic rights, and the amount of compensation, which is based on infringement of moral rights of author, as well as the delay damages accruing therefrom, and which entirely approved the claim whose breakdown is not specified (however, as for the part pertaining to a claim for compensation which is based on infringement of copyrights that are economic rights, such part lapsed with the withdrawal of the claim in the trial of the second instance prior to the remanding of the judgment).

3. Accordingly, it must be said that in the trial of prior instance, the court should have asked Appellee to explain about the breakdown of the amount of compensation pertaining to the claim, as well as about the delay damages accruing therefrom, and should have made a ruling after the amount was confirmed and examined. However, in the trial of the prior instance, the court did not ask for any explanation concerning the above point and rendered a judgment as described above, it must be said that the court failed to exercise the authority to ask for explanation, and, furthermore, committed an illegality in regards to inexhaustive examination and inadequacy of reason. Since it is clear that this illegality would have influence on the conclusion of the judgment, the gist of the argument is reasonable, and the part which pertains to the claim for compensation from among the judgment in prior instance cannot avoid being reversed. As such, concerning the aforementioned part, it is necessary to conduct further examination by asking for further explanation.

### III. Regarding Reason No. 2.2 for the final appeal.

In the trial of the prior instance, the court held that Appellee's claim for an apology ad, which is based on moral rights of author, should be approved, and the reasons for this judgment are outlined below.

Since around 1960, Appellee has continuously created and exhibited photographs that are mostly related to mountains as a photographer, and even before the Montage Photo was exhibited, the artistic value of Appellee's works was recognized among photographers and photo enthusiasts, and Appellee's name had become widely known among photographers and photo enthusiasts. Appellee has continuously engaged in

the activities of taking photographs with the hope of appealing to people of the beauty of the earth through his photographs. Even upon creating the Photograph, he did so from this perspective by developing ideas, over many years, on how to express the harmonious way in which the beautiful nature is related to people, and he chose the place and method and the like for shooting by going there approximately two months in advance, and obtaining the approval of the Director of Bundes Ski Akademie concerning the intent to create the work of Photograph as well as the permission to shoot the same, in addition to having the school's ski instructors introduced as models, thereby succeeding with the shooting of the Photograph, which costed as much as 10,000,000 yen. After creating the Photograph, Appellee published a photo collection titled "ALPS" in 1969 covering the Alps, and a photo collection titled "Himalayas" and a photo collection titled "Kamigami-no-za" in 1971 covering the Himalayas, and in 1975, published a photo collection titled "America Tairiku" covering the Americas. In the meantime, Appellee received an award in June 1971 from Q Kyokai for his photo collection titled "ALPS" and other works, and for his photo collection titled "Himalayas", he received the Mainichi Art Award in January 1972 and the Minister of Education Award for Fine Arts in March of the same year, and these awards helped Appellee solidify his position as a photographer and become highly regarded. At the time of exhibition of Montage Photo, Appellee was basically paid a royalty of 200,000 yen per photographic negative film upon licensing negative films of his photographs, and provided in an agreement that a sum of 500,000 yen is payable in the event of loss of a negative film. When these facts are considered together with the manners of infringement of moral rights of author for Photograph by Appellant, as described above, it must be said that Appellant, by creating and exhibiting Montage Photo, infringed on Appellee's moral rights of author for Photograph, and significantly damaged Appellee's honor in society. As such, in order to restore Appellee's honor having been damaged, it is reasonable to acknowledge that an apology ad must be posted, as asserted by Appellee.

However, the above judgment of the court of prior instance cannot be approved, for the reasons described below.

Article 36-2 of the Act stipulates that an appropriate disposition may be requested against a person who infringes on moral rights of author in order to restore the author's reputation or honor. It should be interpreted that the reputation or honor of an author as stipulated therein refers to the objective evaluation which an author receives from society for his or her value as a person such as his or her character, virtue, honor, and fame, or in other words, reputation or honor in society, and does

not include the subjective evaluation which a person has about his or her own value as a person, or in other words, the feeling of honor (refer to Supreme Court Judgment 1968 (O) 1357; rendered on December 18, 1970 by Second Petty Bench, Minshu Vol. 24, No. 13, page 2151). When the above is considered for the present case, it must be said that the fact situation that was lawfully confirmed in the trial of the prior instance is such that not only is there no fact that Appellant's act, against Appellee, of infringement of moral rights of author in the present case damaged Appellee's reputation or honor in society, but also that it cannot be presumed from the above fact situation that Appellee's reputation or honor in the society was damaged as a fact. In that case, it must be said that the judgment in prior instance, which was rendered to the effect that a claim for an apology ad, which is based on Appellee's moral rights of author, should be approved, is one which found, contrary to the empirical rule, that Appellee's reputation or honor in society was damaged, or is one which incorrectly applied the interpretation of Article 36-2 of the Act, and since it is clear that the above illegality would have influence on the judgment, the gist of the argument is reasonable, and the part of the judgment in prior instance which pertains to a claim for an apology ad on the basis of moral rights of author cannot avoid being reversed. Furthermore, further examination of the above part is necessary in regards to the fact situation from the perspective described above.

IV Based on what is described above, the present case shall be remanded to the court of the prior instance for further examination to be conducted.

Therefore, by omitting the determination on other points of the gist the argument, the judgment of this court is rendered unanimously by all judges, as per the main text, by application of Article 407, paragraph (1) of the Code of Civil Procedure.

Supreme Court, Second Petty Bench

Presiding judge: FUJISHIMA Akira

Judge: OHASHI Susumu

Judge: MAKI Keiji

Judge: SHIMATANI Rokuro

Judge: KAGAWA Yasukazu