Judgment rendered on May 23,2000

1999 (Ne) 5631 Appeal Case of Seeking Injunction Against Publication of Work, etc. (Court of prior instance: Tokyo District Court, 1998 (Wa) 8761)

Date of conclusion of oral argument: March 14, 2000

Judgment

Appellant: Bungeishunju, Ltd.

Representative and representative director of the above: [A]

Appellant: [B]

Appellant: [C]

Appellee: [D]

Appellee: [E]

Main text

All of the appeals in question shall be dismissed.

The cost of the appeal shall be borne by the appellants.

No. 1 Judicial decisions sought by the parties

1. Appellant

(1) The part of the judgment in prior instance for which the appellants lost the case shall be revoked.

(2) All of the claims made by the appellees with respect to the abovementioned part shall be dismissed.

(3) The court cost shall be borne by the appellees for both the first and second instances.

2. Appellee

Same as the main text.

No. 2 Outline of the case

The following shall be added to the outline of the case. In addition, since the facts and reasons in the judgment in prior instance are as stated in the part "No. 2 Outline of the case," this part shall be quoted. This court shall use the terms "[F]," "Book," "Appellant Company," "Appellant [C]," "Letter (xv)," and "Letters" in accordance with the use in the judgment in prior instance.

(Main points of the appellant's allegations in this instance)

1. Regarding whether or not tort can be found

There are no express provisions regarding the copyrightability of letters, and although there is a court decision that denied it (judgment of the Takamatsu High Court of April 26, 1996, *Hanrei Times* Vol. 926 at 208), there is no court decision that affirmed it. In addition, there are few theories that have dealt with the issue of copyrightability of letters; and one exceptional theory

that did deal with it lists letters along with catalogues, advertisements, theater programs, and albums and defines the issue of copyrightability thereof as a borderline case where copyrightability may arise. It states, "Of course, in reality, it is necessary to determine whether or not there is copyrightability for each case, and the catalogues and others listed here as generality cannot all be regarded as works." ("Chosakuken (Copyright)" written by [G] and [H]). Moreover, this issue has only be discussed in detail in the book "Gaisetsu Chosakukenho (Overview of the Copyright Act)" written by [I].

At the time that the Letters were printed in the Book, it was impossible for non-professionals and experts to have a concrete view (prediction of judicial decision) regarding the copyrightability of letters. Under these circumstances, it was equal to a state where nobody knew of copyrightability of letters, and the laws on which the citizen should rely did not exist as a matter of practice.

As described above, there were no express provisions in laws or court decisions regarding the copyrightability of letters. Moreover, theories dealing with this issue were rare or minor; there was no monographic paper discussing it; the conclusion of this issue was only mentioned in one or two lines in a textbook at best and no compelling theory had been formed. In this situation, it would be too harsh for the court, which rendered an official decision for the first time in Japan, to bring a charge of negligence liability against the acts of the parties that were against the decision based on its views. No intention or negligence can be found on the part of the appellants.

2. Regarding injunction

(1) Application of the proviso to Article 60 of the Copyright Act

Since the following circumstances are found in this case, the act of printing the Letters does not harm the intention of [F]. Thus, it should not be allowed to claim for the publication of an apology. Moreover, as long as the claim is based on harm to the intention of [F], it is impossible to claim an injunction.

[i] The Letters contain nothing for [F] to be ashamed of even if he/she were alive; [ii] The Letters were sent to Appellant [C] as personal letters and Appellant [C] quoted the letters he/she received in his/her work (absence of sense of guilt); [iii] The Letters are quoted in a serious literary work, which was published by the Appellant Company, which has a long history and actual performance in literary publishing; [iv] The Letters were used in a natural way in accordance with the storyline and no impoliteness can be found; [v] Appellant [C], who is even now praying for [F] to rest in peace in front of the Buddhist altar every evening, used the letters received from [F] for his/her own story; using the letters is a sort of prayer and there were no intentions to cause damage to [F]; [vi] 28 years since the death of [F], about 37 years since the first letter was written, and 31 years since the last letter was written have passed; and [vii] it is

doubtful whether the Letters can be regarded as work.

2. Absence of allegations or proof of knowledge in relation to distribution

The statement of claim in the complaint does not contain a statement claiming an injunction against distribution. Moreover, the appellees have failed to make allegations or to show proof regarding knowledge in relation to the distribution. Thus, the appellees should be regarded as not alleging the requirement of "with knowledge" with respect to the claims for an injunction against distribution. However, it has been clearly prescribed in Article 113, paragraph (1), item (ii) of the Copyright Act that a distribution will be prohibited only in cases where such distribution was made "with knowledge."

(omitted)

No. 3 Court decision

This court determines that the appellees' claims in the principal action are well-grounded to the extent allowed in the judgment in prior instance and the remaining parts are groundless. The reasons are as stated in the part "No. 3 Determination on the issues" in the facts and reasons of the judgment in prior instance in addition to the following, and thus the abovementioned part will be quoted.

(Determination on the appellants' allegations in this instance)

1. Regarding whether or not tort can be found

The appellants allege that: at the time that the Letters were printed in the Book, it was impossible even for experts, not to mention non-professionals, to have concrete views (prediction of judicial decision) regarding the copyrightability of letters. Under these circumstances, it was equal to a state where nobody knew of copyrightability of letters, and the laws on which the citizens should rely did not exist as a matter of practice. Thus, no intention or negligence can be found on the part of the appellants.

(1) The Copyright Act defines that a work means "a production in which thoughts or sentiments are creatively expressed and which falls within the literary, academic, artistic, or musical domain" and does not especially exclude "letters." Thus, as long as a production falls under the abovementioned category, it is obvious that even letters can be works. In this regard, it is impossible to argue that nobody knew of copyrightability of letters or that the laws on which the citizen should rely did not exist as a matter of practice.

(2) According to Exhibit Ko 17, it is found that the Shūkan Bunshun magazine dated July 10, 1975 (p. 141) contains the following statements with respect to the printing of private letters written by [F] to his/her boyfriend/girlfriend and offered by the recipient to the publishing company in "Shūkan Asahi" magazine: [i] "It is said to be a commonly accepted theory based

on the interpretation of laws that the copyright of authors is effective against private letters, and thus it is indeed necessary to obtain consent from the wife to disclose the 'letters.'"; [ii] "The negotiations between the parties will continue endlessly until Asahi (the company that published the magazine) delivers a signed memorandum acknowledging infringement of copyright" on March 10.; and [iii] "Since Asahi did not obtain consent from the copyright owner, the odds seem to be against it." Since it is of particular note for this court that Shūkan Bunshun magazine is published for the public by the Appellant Company, which is recognized by the appellees as a leading publishing company (line 5 of page 4 of the written answer in this instance), the abovementioned statements are presumed to have been written based on appropriate proof.

According to the facts found above, around 1975, the following facts were found to be issues that could each be explained as "a commonly accepted theory based on the interpretation of laws" even in a magazine published for the public such as Shūkan Bunshun: [i] letters, such as private letters to a boyfriend/girlfriend, are works (a production in which thoughts or sentiments are creatively expressed and which falls within the literary, academic, artistic or musical domain); and [ii] the copyright of the author is also effective against the letters mentioned above. (In addition, the following statements explaining the copyrightability of letters and describing that the copyright of such letters is held by the author (sender) are found in the introductory books and operational books placed on the bookshelf of the 6th Civil Division of the Tokyo High Court: [i] "Question 17: Does the publication of diaries and letters constitute infringement of moral rights of authors? […] Since diaries and letters are often regarded as works, as long as they are works, the issue of moral rights arises. In principle, as in the case of ordinary works, consent must be obtained from the author to make it public. If the author is dead, the bereaved family's approval must be obtained. […] Of course, the copyright is held by the person who sent the letter. […] The recipient should not use the letter in a book without permission even if the letter was sent to him/her. This means that the recipient is likely to be subject to both the infringement of right of reproduction and infringement of moral rights." ("Shin Chosakuken Hou Mondou" (New questions and answers concerning the Copyright Act) written by [J] and [K] at p. 80, second print published by Shinjidaisha, Co., Ltd. on December 10, 1972); [ii] "When the contents of the letter are those in which the sender's thoughts or sentiments are creatively expressed, a copyright emerges for the letter as a work of document. […] The copyright owner of the copyrighted letter is the sender, […] and if the letter is to be made public by a person other than the sender (including the recipient), the sender's authorization must, of course, be obtained." ("Chosakuken Jiten Kaiteiban" (Revised Edition of the Encyclopedia of Copyrights) edited by the Association of Copyright Information at 162, published by Shuppan News, Co., Ltd. on October 25, 1985); [iii] "Q. 58 Can diaries and private papers be made public without obtaining permission from the author? How about

letters? All of them cannot be made public without obtaining permission from the author. The decision on whether or not to make public the created work is left to the author's free will. […] In the case of letters, the recipient is only an owner of the letter, and the copyright owner is the sender. Thus, the letter cannot be made public only by obtaining consent from the recipient." ("Shinpan Q&A Chosakuken Nyūmon (New Edition of the Introductory Q&A regarding Copyright)" edited by [L] at p. 146 (written by [M]), published by Sekaishisosha, Co., Ltd. on October 1, 1991); [iv] "Letters and diaries are also works. Unless authorization is obtained from the author, reprinting is not allowed. […] in many cases, the owners of letters and diaries are not the authors nor are they the copyright owners." ("Chosakuken Jitsumu Hyakka" (Practical Encyclopedia of Copyrights) edited and written by [N] at pp. 1194 to 1195, published by Gakuyo Shobo on November 5, 1992); [v] "Daily messages including letters, season's greetings, change of address notices and inquiries of attendance or absence, as well as business letters such as orders of goods and reminders of payment cannot be regarded as works. However, other letters that are found to fall within the literary and academic domain will be protected as works. In this case, […] unless there are special agreements, the copyright shall be held by the sender. Accordingly, the addressee cannot make the letters public without obtaining consent from the sender." ("Chosakuken Hou Gaisetsu" (Outline of the Copyright Act) written by [I], pp. 87 to 88, first print published by Ichiryusha, Co., Ltd. on May 20, 1997).

3. By reading the Letters (the pages in which the Letters are printed in the Book (Exhibit Ko 12) are as stated in pages 7 and 8 of the judgment in prior instance), it is obvious that a reasonable person can easily recognize that the Letters do not fall within the scope of daily messages, such as mere season's greetings, and that they are texts in which the thoughts or sentiments of [F] are creatively expressed. It is also obvious that the appellants could read the Letters. As long as that is the case, the appellants could have easily recognized the copyrightability of the Letters. Thus, the appellants' allegations of absence of negligence cannot be accepted.

2. Regarding injunction

(1) Regarding the allegation of the application of the proviso to Article 60 of the Copyright Act

The appellants allege that the act of making the Letters public does not harm the intent of [F] by raising various circumstances.

However, the circumstance mentioned in [vii] above in relation to the appellants' allegation cannot be accepted as mentioned in 1. above and section 1.(2) of part "No. 3 Court decision" in the facts and reasons of the judgment in prior instance. In addition, in light of the fact that the Letters were private letters written with no expectation of being made public (for example, in Letter (xv) it is written, "Please keep it strictly confidential that you received this kind of warning from me"; so it is obvious that the abovementioned statement was written because the letter is a private one written with no expectation of being made public), it cannot be found that

the act of making the Letters public does not harm the intent of [F] even if other circumstances alleged by the appellants are taken into consideration.

(2) Regarding the allegation of absence of allegations and proof of knowledge in relation to an injunction against distribution

The appellants allege that the appellees have failed to allege the requirement of "with knowledge" with respect to the claims for an injunction against distribution, although it is clearly prescribed in Article 113, paragraph (1), item (ii) of the Copyright Act that distribution will be prohibited only in cases where such distribution was made "with knowledge."

However, it should be construed as follows: when any products have been prepared by the act of infringement of copyright, act of infringement of moral rights of author, or acts in violation of the provision of Article 60 of the Copyright Act and have once been placed in the process of distribution, it is questionable to charge every person who resells or lends such products for infringement of rights; and therefore, Article 113, paragraph (1), item (ii) of the Copyright Act provides the requirement of "with knowledge" to be applicable only in such case of reselling or lending. Since the appellants themselves printed the Letters in the Book and published the Book and are not persons who further resold or lent them after the relevant products were once placed in the process of distribution, the appellants' act is not a matter that should be treated as an issue of "distribution" as prescribed in Article 113, paragraph (1), item (ii) of said Act.

Since the appellants should not have printed the Letters in the Book and published the Book, it is self-evident that they are not allowed to distribute the products they prepared by conducting the abovementioned illegal act. In other words, the appellants' series of acts in whole, i.e., the acts of printing the Letters in the Book and publishing and distributing the Book, in whole or in part, are acts that infringe the right of reproduction and acts in violation of the provision of Article 60 of the Copyright Act.

(omitted)

No. 4 Conclusion

As found above, the judgment in prior instance is appropriate and the Appeal shall be dismissed for being groundless, and thus the judgment shall be rendered in the form of the main text by applying Articles 61, 65 and 67 of the Code of Civil Procedures with respect to the burden of the court costs.

Tokyo High Court, 6th Civil Division

Presiding Judge: YAMASHITA Kazuaki

Judge: YAMADA Tomoji

Judge: SHISHIDO Mitsuru