

Date	July 29, 2011	Court	Tokyo District Court, 40th Civil Division
Case number	2009 (Wa) 31755		
A case in which the court recognized a tattoo on a human body as having the nature of a work			

Plaintiff X is a tattoo artist who inked a tattoo (Tattoo) of a Buddha statue (Buddha Statue) on the left femoral region of defendant Y<sub>2</sub> at his/her request. Y<sub>2</sub> is a person who wrote a book titled "*Goukaku! Gyoseishoshi Namuirezumikanzeon* (Success in the administrative scrivener examination; tattooed Goddess of Mercy)" (Book), which includes a record of him/her taking an administrative scrivener examination together with his/her autobiography. The Tattoo image (Image; the shadow of the Tattoo was inverted and the color thereof was converted to sepia-toned monochrome) is placed on the cover (Cover) and inside cover (Inside Cover) of the Book, respectively. Defendant Y<sub>1</sub> is the publisher of the Book. In addition, Y<sub>1</sub> and Y<sub>2</sub> have placed the photograph of the Cover on their own websites on the Internet, respectively.

In this case, X asserted (i) that the act of Y<sub>1</sub> and Y<sub>2</sub> of placing the Image in two places, on the Cover and the Inside Cover, without X's permission constitutes infringement of X's moral rights of author (right to make the work public, right to determine the indication of the author's name, and right to maintain integrity) for the Tattoo, (ii) that the Book includes statements that harm X's personality and fame and statements concerning X's privacy, which infringe X's personal rights and right of privacy, and (iii) that the act of Y<sub>1</sub> and Y<sub>2</sub> of placing the photograph of the Cover on their own websites on the Internet, respectively, constitutes infringement of X's aforementioned moral rights of author. Based on these assertions, X demanded that Y<sub>1</sub> and Y<sub>2</sub> jointly and severally pay solatium for (i) and (ii) above and pay solatium for their own act, respectively, for (iii) above.

The major issues of this case are (i) whether the Tattoo has the nature of a work, (ii) whether infringement of the moral rights of author is established, (iii) whether infringement of the personal rights and the right of privacy is established, and (iv) the amount of damage. With regard to (i), Y<sub>1</sub> and Y<sub>2</sub> disputed over the nature of the Tattoo as a work, asserting that the Tattoo is a mere mechanical reproduction or mere imitation of the photograph of the Buddha statue used as the model (Buddha Statue's Photograph) and is not recognized as having the nature of a work. However, the court affirmed the nature of the Tattoo as a work, holding as follows: "It is possible to see difference in expression between the Tattoo and the Buddha Statue's Photograph. For example, though the Tattoo is modeled on the Buddha Statue's Photograph, X made

changes to the Buddha Statue's Photograph, such as narrowing the scope down to the part above the chest region of the Buddha Statue, changing the direction of the face from right to left, and changing expression in the Buddha Statue's eyebrows and eyes to a placid one. In addition, the Buddha Statue's Photograph is planar and the color of the Buddha Statue is expressed as it is, while the Tattoo is stereoscopic using the roundness of the human femoral region. For color, a unique three-dimensional appearance is expressed by the thickness of India ink on the basis of the color of human skin"; "The aforementioned difference in expression is recognized as the result of the act of the plaintiff, who is the creator of the Tattoo, of creating the Tattoo by making the best use of inventiveness for making a composition and the facial expression of the Buddha Statue, etc. when preparing the rough drawing, using various tools when tattooing the outline, inking in lines and blurring, etc., and exercising his/her techniques. The difference can be evaluated as creatively expressing the plaintiff's thought and feeling." Then, regarding (ii), the court denied the establishment of infringement of the right to make the work public, based on the finding that X had placed a photograph of the Tattoo in the advertising column of a magazine before the Book was published. However, the court affirmed the establishment of infringement of the right to determine the indication of the author's name and the right to maintain integrity. For (iv), the court recognized 240,000 yen in total, consisting of 200,000 yen in solatium and 40,000 yen in attorney's fees, as damage caused by the Book and also recognized 120,000 yen in total, consisting of 100,000 yen in solatium and 20,000 yen in attorney's fees, as damage caused by placement on the websites by Y<sub>1</sub> and Y<sub>2</sub>, respectively. Incidentally, the court did not recognize the establishment of infringement of the personal rights and the right of privacy mentioned in (iii).

Judgment rendered on July 29, 2011, the original of the judgment was received by the court clerk on the same day

2009 (Wa) 31755, Case of Seeking Compensation for Damages

Date of conclusion of oral argument: July 6, 2011

#### Judgment

Plaintiff: X

Defendant: Honnoizumisya Publishing Co.

Defendant: Y

#### Main text

1. The defendant Honnoizumisya Publishing Co. and the defendant Y shall pay to the plaintiff, jointly and severally, 240,000 yen and money accrued at the rate of 5% per annum on the first-mentioned amount for the period from July 2, 2007 until the date of completion of the payment.
2. The defendant Y shall pay to the plaintiff 120,000 yen and money accrued at the rate of 5% per annum on the first-mentioned amount for the period from May 30, 2009 until the date of completion of the payment.
3. The defendant Honnoizumisya Publishing Co. shall pay to the plaintiff 120,000 yen and money accrued at the rate of 5% per annum on the first-mentioned amount for the period from February 26, 2010 until the date of completion of the payment.
4. The other claims made by the plaintiff shall be dismissed.
5. The court costs shall be divided into four portions, one of which shall be borne by the defendant Honnoizumisya Publishing Co. and the defendant Y while the rest shall be borne by the plaintiff.
6. This judgment may be provisionally executed as far as paragraphs 1 to 3 of the main text are concerned.

#### Facts and reasons

##### No. 1 Claims

1. The defendant Honnoizumisya Publishing Co. and the defendant Y shall pay to the plaintiff, jointly and severally, 1,100,000 yen and money accrued at the rate of 5% per annum on 1,000,000 yen among the first-mentioned amount for the period from July 2, 2007 until the date of completion of the payment.
2. The defendant Y shall pay to the plaintiff 350,000 yen and money accrued at the rate of 5% per annum on 300,000 yen among the first-mentioned amount for the period from May 30, 2009 until the date of completion of the payment.

3. The defendant Honnoizumisya Publishing Co. shall pay to the plaintiff 350,000 yen and money accrued at the rate of 5% per annum on 300,000 among the first-mentioned amount for the period from February 26, 2010 until the date of completion of the payment.

No. 2 Outline of the case

1. The outline of this action is as follows.

(1) Claim No. 1-1

In regards to a book titled "Goukaku! Gyoseishoshi Namuirezumikanzeon (Success in the administrative scrivener examination; tattooed Goddess of Mercy)" (first edition printed on July 1, 2007; hereinafter referred to as "Book") which was written by the defendant Y (hereinafter referred to as "Y<sub>2</sub>") and issued and sold by Defendant Honnoizumisya Publishing Co. (hereinafter referred to as "Y<sub>1</sub>"), the plaintiff (hereinafter referred to as "X") asserts as follows:

A. The act by Y<sub>1</sub> and Y<sub>2</sub>, without X's permission, of placing an image of a tattoo (hereinafter referred to as "Tattoo") of a standing statue of the eleven-faced Goddess of Mercy (hereinafter referred to as "Buddha Statue"), which was inked by X on the left femoral region of Y<sub>2</sub> (although in the image, the shadow is inverted and the color thereof is converted to sepia-toned monochrome; hereinafter referred to as "Image"), in the two places of the cover of the Book (Attachment 1; hereinafter referred to as "Cover") and the inside cover (Attachment 2; hereinafter referred to "Inside Cover"), constitutes infringement of X's moral rights of author (right to make the work public, right of attribution, right to integrity) for the Tattoo; and

B. The Book contains statements that harm X's personality and fame as well as statements concerning X's privacy, and these statements constitute infringement of X's personal rights and the right of privacy.

Accordingly, X demands that Y<sub>1</sub> and Y<sub>2</sub> pay [i] 770,000 yen (700,000 yen in solatium, 70,000 yen as the fee for attorneys) in damages pursuant to the right to seek damages for an act of tort of infringement of moral rights of author, as well as delay damages accrued on 700,000 among the first-mentioned amount at the rate of 5% per annum provided by the Civil Code for the period from July 2, 2007, which is the day after the act of tort, until the date of completion of the payment and [ii] 330,000 yen (300,000 yen in solatium, 30,000 yen as the fee for attorneys) in damages pursuant to the right to seek damages for an act of tort of infringement of personal rights and the right of privacy, as well as delay damages accrued on 300,000 yen among the first-mentioned amount at the rate of 5% per annum provided by the Civil Code for the period from the first-mentioned date until the date of completion of the payment,

respectively.

(2) Claim No. 1-2

X asserts that the posting by Y<sub>2</sub>, since July 1, 2007, of a photograph of the Cover on Y<sub>2</sub>'s own website on the Internet (hereinafter referred to as "Website 1") constitutes infringement of X's moral rights of author (right to make the work public, right of attribution, right to integrity) for the Tattoo, and demands that Y<sub>2</sub> pay to X, pursuant to the right to seek damages for an act of tort of infringement of moral rights of author, 350,000 yen in damages (300,000 yen in solatium, 50,000 yen as the fee for attorneys), as well as delay damages accrued on 300,000 yen among the first-mentioned amount at the rate of 5% per annum provided by the Civil Code for the period from May 30, 2009, which is the day after the act of tort, until the date of completion of the payment.

(3) Claim No. 1-3

X asserts that the posting by Y<sub>1</sub>, since July 1, 2007, of a photograph of the Cover on Y<sub>1</sub>'s own website on the Internet (hereinafter referred to as "Website 2", and as "the Websites" collectively with "Website 1") constitutes infringement of X's moral rights of author (right to make the work public, right of attribution, right to integrity) for the Tattoo, and demands that Y<sub>1</sub> pay to X, pursuant to the right to seek damages for an act of tort of infringement of moral rights of author, 350,000 yen in damages (300,000 yen in solatium, 50,000 yen as the fee for attorneys), as well as delay damages accrued on 300,000 yen among the first-mentioned amount at the rate of 5% per annum provided by the Civil Code for the period from February 26, 2010, which is the day after the act of tort, until the date of completion of the payment. Incidentally, X has made it clear that in this action, X will not demand compensation for the infringement of moral rights of author (right of reproduction, adaptation rights, right to transmit to the public [including the right to make the work available for transmission]) for the Tattoo.

2. Facts on which the decision is premised (facts that are supported by evidence, etc. and facts undisputed by the parties)

(1) Parties, etc.

A. X engages in the business of a tattoo artist under the trade name, "X1," at X's domicile. As described later, he inked the Tattoo on the left femoral region of Y<sub>2</sub> who requested X to do so.

B. Y<sub>1</sub> is a company engaging in businesses such as planning, editing, and publishing publications, mostly on healthcare. As described later, Y<sub>1</sub> issued and sold the Book and posted the photograph of the Cover on its website.

C. Y<sub>2</sub> had the Tattoo inked by X. As described later, Y<sub>2</sub> wrote the Book and posted a photograph of the Cover on his website.

## (2) The Tattoo

On October 19, 2001, X was requested by Y<sub>2</sub> to ink a tattoo on Y<sub>2</sub>. From November 1 until December 25 of the same year, X inked the Tattoo on the left femoral region of Y<sub>2</sub> over the course of six appointments.

Incidentally, on the right side of the Tattoo, as seen by an observer, are the words, " 觀世音菩薩 常願常守護 我為不要似 愛御名 A" (Goddess of Mercy, please give hope and protection not for me but for the beloved A), which X tattooed at the request of Y<sub>2</sub> using twenty Chinese characters that are written vertically (hereinafter this part is referred to as "Letter Part"), but the Letter Part is not a part of the work which is the cause of this action.

## (3) The Book

The Book was written by Y<sub>2</sub> and issued and sold by Y<sub>1</sub>, and the first edition of the Book was issued on July 1, 2007. The first edition of the Book was printed in 1,500 copies, and 243 copies of the Book were sold through June 12, 2011. (Exhibit Otsu 10-1 to 10-4; the entire import of the oral argument)

The Book contains an autobiography of Y<sub>2</sub> along with a record of him studying for an administrative scrivener examination. The Image is posted on the Cover, as per Attachment 1, and on the Inside Cover, as per Attachment 2, respectively. (Exhibit Ko 9)

The Image was created by Y<sub>2</sub>, to whom X gave some photographs for free after inking the Tattoo on Y<sub>2</sub> and taking several photographs of the Tattoo. Y<sub>2</sub> selected one of these photographs (of the photographs posted on Exhibit Otsu 8-2, the one in the lower right corner) and processed the photograph to create the Image. (The entire import of the oral argument)

## (4) Website 1

Y<sub>2</sub> has a website on the Internet under the title, "Gyoseishoshi Y1 Houmujimusyo (Legal Affairs Office of Administrative Scrivener Y1)." Since July 1, 2007, he has posted a photograph of the Cover on the website. (Exhibit Ko 2-1; the entire import of the oral argument).

## (5) Website 2

Y<sub>1</sub> has a website on the Internet. Since July 1, 2007, Y<sub>1</sub> has posted a photograph of the Cover as one of the articles of the publisher which are listed in a corner of the website. (Exhibits Ko 10, 19, Exhibit 10-1; the entire import of the oral argument)

## 3. Issues

(1) Whether the Tattoo has the nature of a work

(2) Whether infringement of moral rights of author is established

(3) Whether infringement of personal rights and the right of privacy is established

(4) Amount of damage

(omitted)

### No. 3 Court decision

#### 1. Concerning Issue (1) (Whether the Tattoo has the nature of a work)

According to evidences (Exhibits Ko 11, 12-1 to 12-3, 13-1, 13-2, 17) and the entire import of the oral argument, the court finds as follows.

##### (1) Typical process of creating a tattoo

###### A. Creation of a rough drawing

When a customer requests for a tattoo, the tattoo artist first creates a rough drawing by drawing the outline of the design requested by the customer.

The rough drawing is drawn on a white sheet of paper with a mechanical pencil or a ballpoint pen.

When the rough drawing is complete, the tattoo artist asks the customer for consent.

###### B. Creation of a trace

A copier is used to make a duplicate of the rough drawing on a sheet of translucent paper. Once this is done, a special machine for transcription is used to transfer the rough drawing on a thin sheet of Japanese paper, thereby creating a trace.

###### C. Transfer of the outline using a trace

Glue called "speed stick" is applied to the skin where the tattoo will be inked, and a trace is pasted on the skin, followed by another layer of speed stick. Through this process, drawn lines of the trace are transferred to the skin.

###### D. Inserting India ink into the outline

The outline is drawn along the transferred lines using a machine for tattoos (an instrument which can be held by hand and has a needle head attached to the tip; hereinafter referred to as "Tattoo Machine"). This process of work is also referred to as "sujibori" of the outline, or outlining. The Tattoo Machine has either a single-needle head or three-needle head attached to it. Usually, a machine with a three-needle head is used, but for carving fine lines, a machine with a single-needle head is used. Special black ink that is not harmful to the human body is used for inserting ink into the skin.

In a single instance, human skin can be carved for about 7 to 8 cm long, and a Tattoo Machine works like a sewing machine in that the needle jumps up and down in a repetitive movement. A machine with a single-needle head inserts the needle into

the skin for about 2 to 3 mm deep, and about 3 mm deep in the case of a machine with a three-needle head. A machine with a single-needle head can be held like a pen as the ink is inserted into the skin along the outline in the same manner as one would draw lines on a sheet of paper at an angle of 75 to 90 degrees. However, a machine with a three-needle head is not used in the same way as when lines are drawn; instead, circles are drawn in small motions at an angle of 35 to 45 degrees, and the areas are colored in black for every 2 mm squares.

A tattoo is not colored by inserting ink into the flesh (muscle tissue) but by using a needle to insert special ink for tattoos into the subcutaneous tissue between the skin and the muscle tissue. In light of the pain caused and the physical strength required, the work of tattooing can last only about two to three hours in a single instance. Since the wound must heal before the tattoo artist moves onto the next step, it takes one week to ten days before the next step is undertaken.

#### E. Blurring with India ink

India ink of light black color is used to create "blurs," or gradations between the drawn lines. The Tattoo Machine used for this process has a five-needle head or twelve-needle head attached to it.

A Tattoo Machine with a five-needle head is designed to blur fine parts, and a needle repeatedly sticks in and out of a pipe for about 5 mm long. Unlike a machine with a single-needle head, the movement of a machine with a five-needle head is different in that circles are drawn in small motions at an angle of 35 to 45 degrees, and areas are blurred for every 2 to 5 mm squares. The needle enters the skin for as deep as about 5 mm.

In a Tattoo Machine with a twelve-needle head, the needle repeatedly sticks in and out of a pipe for about 7 mm long, circles are drawn in small motions at an angle of 35 to 45 degrees, and the areas are blurred for every 5 to 10 mm squares. The needle enters the skin for as deep as about 2 to 5 mm. When the needle is inserted shallowly, the coloring is light, and when the needle is inserted deeply, the coloring changes to a deeper tone.

Blurring with India ink is a process in which artistic sense is important, and depending on which ink to use and how to insert the ink, the resultant coloring can vary.

F. After the above processes of C through E, about 6 to 7 days are required for the tattoo to be finally completed. Furthermore, the wound must be completely healed for the coloring to become fixed.

#### (2) Process of creating the Tattoo



#### A. Selection of a design and creation of Rough Drawing

On October 19, 2001, Y<sub>2</sub> visited X's workplace and requested to have a Buddha statue and some letters tattooed on the left femoral region of Y<sub>2</sub>.

Y<sub>2</sub> wanted the Buddha statue to have a soft expression on its face; thus X selected the Buddha Statue's Photograph from a book titled "Nihonnobutsuzo 100-sen" (Selection of 100 Buddha Statues of Japan) as a recommendation. Y<sub>2</sub> originally wanted to have a tattoo of the entire Buddha Statue, but X explained that it is better to have a tattoo of only the torso of the Buddha Statue, with only the face shown in a large size so that the facial expressions of the many smaller faces placed above the head of the Buddha Statue can also show well, and that, although the Buddha Statue's Photograph shows the statute as facing right when seen from an observer, if the Statue is tattooed on the left femoral region of Y<sub>2</sub> in the same direction, the Buddha Statue will be facing its back to Y<sub>2</sub>, which is disrespectful to the Buddha Statue, and therefore it was necessary to change the direction of the Buddha Statue to face to the left when preparing a rough drawing. Also, when Y<sub>2</sub> pointed out that the facial expression of Y<sub>2</sub> is somewhere between stern and kind, and that Y<sub>2</sub> wanted to entrust to the Buddha Statue, not yet made, with the prayer that a certain woman be under the protection of the Buddha Statue, X promised to prepare a rough drawing by changing the expressions of the eyebrows, eyes, and the like for a more placid look.

As for letters, since Y<sub>2</sub> wanted the letters, "觀世音菩薩 常願常守護 我為不要似愛御名 A" (the Letter Part), written in a calligraphy font in two vertical lines, ten letters each, on the side of the Buddha Statue, and since X learned that the part, "A," is the name of the woman, X asked Y<sub>2</sub> if he is certain that he will not regret having a tattoo which, once inked, cannot be undone, and Y<sub>2</sub> expressed his strong desire to have the letters tattooed, and thus it was determined that the Letter Part would be tattooed just like Y<sub>2</sub> requested.

By November 1 of the same year, or the date of the first appointment, X prepared the rough drawing, keeping the Buddha Statue's Photograph close by for reference. X created the Rough Drawing using a mechanical pencil (0.5 mm in width). In doing so, X, as explained above and based on the promise with Y<sub>2</sub>, changed the direction of the Buddha Statue to face left, and completed the work by giving the statue a facial expression which is softer than the one shown on the Buddha Statue Photograph.

#### B. First appointment (Outlining of the Buddha Statue)

On November 1, 2001, X showed the finished Rough Drawing to Y<sub>2</sub>, who gave his consent, and prepared a trace pursuant to the steps described in above (1)B.

X shaved the left femoral region of Y<sub>2</sub>, removed oil from the skin using a mild acid

solution, and pasted the trace of the Buddha Statue thereon. Next, after taking a break for about five minutes until the ink from the trace was transferred to the skin of Y<sub>2</sub> and dried, who was then laid on a bed, his face upward, for tattooing, X attached a needle head to a Tattoo Machine and began the work of tattooing the outline of the Buddha.

It took a total of approximately two hours and 30 minutes for X to carve the outline of the Buddha Statue. Once it was done, the excess ink was cleansed in a sink, and as ointment was applied to the carved wound, the work for the first appointment ended.

C. Second appointment (Outlining of letters)

On November 10, 2001, X worked on tattooing the outline of the Letter Part on the left femoral region of Y<sub>2</sub>.

D. Third appointment (Rough drawing and inking of lines)

On November 20, 2001, X worked on drawing fine lines inside the outline of the Buddha Statue which was tattooed on the left femoral region of Y<sub>2</sub>.

The work involved opening the book, "Nihonnobutsuzo 100-sen" (Selection of 100 Buddha Statues of Japan), to the page with the Buddha Statue's Photograph, keeping it open with large clips, and looking at the photograph for reference as X drew the interior lines (drawn lines) of the statue by hand, using a special pen for tattooing, followed by inserting ink into the drawn lines using a Tattoo Machine with a single-needle head. The work took about two hours.

E. Fourth appointment (Inking of letters)

On December 5, 2001, X worked on coloring the Letter Part, which is tattooed on the left femoral region of Y<sub>2</sub>, in black. The work used a Tattoo Machine with a three-needle head and took about three hours.

F. Fifth appointment (Blurring of the Buddha Statue with India ink)

On December 12, 2001, X worked on inserting India ink, for blurring, into the Buddha Statue which is tattooed on the left femoral region of Y<sub>2</sub>.

The work involved X looking at the Buddha Statue's Photograph for reference, diluting the thickness of the black ink for tattooing with thinner, creating different tones of black ink from a light tone to a dark tone, and making gradations using a Tattoo Machine with a five-needle head and a Tattoo Machine with a twelve-needle head in the manner of ink-wash painting. The work took about three hours.

G. Sixth appointment (Completion)

On December 26, 2001, X confirmed the conditions of how the Tattoo came about. In order to further emphasize the stereoscopic effect of the Buddha Statue, X worked on completing the overall conditions of the Tattoo by making the sides of the Tattoo darker. The work took about two hours, and with this, the Tattoo was complete.

### (3) Comparison between the Buddha Statue's Photograph and the Tattoo

The Buddha Statue's Photograph (Exhibit Ko 16-2) is a colored photograph of the entire Buddha Statue, taken diagonally in front from the left when seen by an observer, and the photograph captures the facial expressions of the Buddha Statue as well as the black or brown coloring of the statue, almost exactly as is.

On the other hand, the Tattoo (Exhibit Ko 8-3), although it is modeled after the Buddha Statue's Photograph, has narrowed down the scope to the part above the chest region of the Buddha Statue, changed the direction of the face from right to left, and the eyebrows and eyes and the like are changed to give a softer facial expression. In addition, while the Buddha Statue's Photograph is planar and the coloring of the Buddha Statue is expressed exactly as the real one, the Tattoo is stereoscopic using the roundness of the human femoral region, and as for color, a unique three-dimensional appearance is expressed by the thickness of India ink on the basis of the color of human skin. As such, one can observe differences in expression between the Tattoo and the Buddha Statue's Photograph.

The aforementioned differences in expression are recognized as the result of the act by X, who is the creator of the Tattoo, of inking the Tattoo by making the best use of inventiveness for making a composition and the facial expression and the like of the Buddha Statue when preparing the rough drawing, using various tools and exercising his techniques when outlining the Tattoo, inserting ink along the drawn lines, and blurring, among other things. The difference can be evaluated as creatively expressing X's thoughts and feelings. Accordingly, it can be established that the Tattoo has the nature of a work.

(4) Y<sub>1</sub> and Y<sub>2</sub> asserted that the Tattoo does not have the nature of a work since the Tattoo is merely a mechanical duplicate or merely an imitation of the Buddhist Statue's Photograph, pointing out as reasons that [i] the Rough Drawing was created only by placing tracing paper on the Buddhist Statue's Photograph, tracing the drawn lines from above with a pencil, [ii] the process of preparing a trace from the Rough Drawing, pasting it on the part of the body where inking will be implemented, and causing the ink to be fixed to the body constitutes mechanical transposition entirely, and there is no room for creativity, [iii] the drawn lines of the outline are all based on the Rough Drawing, and the drawn lines which are not included in the Rough Drawing either appear in the Buddha Statue's Photograph on which such drawn lines are based, or they are of the level which any tattoo artist can come up with, therefore not amounting to something for which creativity can be recognized, and [iv] in the case of the Tattoo, blurs are almost identical to the shading of the Buddhist Statue's Photograph, which

means that the Tattoo is merely a copy of the photograph, not amounting to something for which creativity can be recognized.

However, the claim according above [i] is based on erroneous facts. Furthermore, as already explained above, X, upon creating the Tattoo, [i] made the best use of inventiveness for making a composition and the facial expression and the like of the Buddha Statute when preparing the rough drawing, and [ii] used various tools and exercised his techniques when outlining the Tattoo, inserting ink into drawn lines, and blurring, among other things, resulting in differences between the Tattoo and the Buddhist Statue's Photograph, and that the differences can be evaluated as creatively expressing X's thoughts and feelings. The Tattoo cannot be said to be a mechanical duplicate or mere imitation, and thus the above claims by Y<sub>1</sub> and Y<sub>2</sub> cannot be accepted.

## 2. Issue (2) (Whether infringement of moral rights of author is established)

As described in above 1, it is recognized that the Tattoo was created by X, who is the author. As such, X has moral rights of author for the Tattoo.

### (1) Whether infringement of the right to make the work public is established

A. The Image was created by processing a photograph of the Tattoo, and thus the Image is dependent on the Tattoo. When the Tattoo is compared with the Image, the shadow of the Image is inverted and the color thereof is converted to sepia-toned monochrome, but the expressions of the Tattoo are still identically reflected in the Image, and thus it is recognized that the Image is almost entirely a reproduction of the said expressions in terms of size and conditions, which are sufficient for the essential features in expression to be perceived directly. At the same time, it cannot be recognized that the above changes are creative. Accordingly, the Image is a reproduction of the Tattoo.

B. However, it is recognized that X posted photographs of the Tattoo, even prior to July 1, 2007, which is when the first print of the first edition of the Book was issued and also the date when the photograph of the Cover was posted on the Websites, in ad columns of the following magazines: "BURST," issue of March 2002, published by Core Magazine Co., Ltd. (Exhibit Otsu 4); "TATTOO BURST," issue of May 2002, also published by Core Magazine Co., Ltd. (Exhibit Otsu 6), and; "Monthly Jitsuwa Document" (Monthly Document of Real Stories), issue of April 2002, published by Takeshobo Co., Ltd. (Exhibit Otsu 5). As such, it is evident that X had personally made reproductions of the Tattoo, which is X's work, public prior to the work being made public by Y<sub>1</sub> and Y<sub>2</sub>.

Accordingly, since it cannot be said that the Tattoo is a work that has not yet been made public, it cannot be said that the above act by Y<sub>1</sub> and Y<sub>2</sub> constitutes infringement

of X's right to make the Tattoo public.

C. Regarding this point, X asserts that through which medium and in what format to make a work public is a right exclusively held by the author, and that posting a work on a medium for which the author has not given its permission constitutes infringement of the author's personal right to make a work public. However, because X personally made the Tattoo public, it cannot be said that the fact that the posting of the Tattoo by Y<sub>1</sub> and Y<sub>2</sub> on a medium for which X has not given its permission does not constitute infringement of the right to make a work public, and thus X's above claims cannot be accepted.

(2) Whether infringement of the right of attribution is established

A. As explained in above (1)(A), the Image can be recognized as being a reproduction of the Tattoo, and the parties are not in dispute over the fact that none of the Cover, the Inside Cover, and the Websites on which the photograph of the Cover was posted, indicates the name of X, who is the author of the Tattoo.

The Image was posted on the Cover and the Inside Cover by Y<sub>2</sub>, when writing the Book, and by Y<sub>1</sub>, when publishing the Book, as described above. As such, it is recognized that Y<sub>2</sub> and Y<sub>1</sub> jointly provided the Image to the public. Also, Y<sub>2</sub> posted the photograph of the Cover on Website 1, and Y<sub>1</sub> posted the photograph of the Cover on Website 2, both of which actions can be recognized as constituting the provision of the Image to the public.

B. Concerning the above actions of posting, Y<sub>1</sub> and Y<sub>2</sub> assert that they fall under the case in which indication of the author's name can be omitted pursuant to Article 19, paragraph (3) of the Copyright Act, pointing out as reasons that [i] the purpose of use of the Tattoo in the Book is not to increase the value of the Book by adding the artistic value of the Tattoo, but rather, Y<sub>2</sub> exhibited the Tattoo as a collection or symbol of his life, by writing about how he endured pain to have the Tattoo inked on him because of the strong feeling which he felt towards a certain woman in his life, [ii] the Image is a photograph given to him by X for free, and X had already given its permission, to a reasonable extent, regarding the use of the photograph, [iii] the posting of pictures and photographs and the like in a book as a collection or symbol of the what is written inside is compatible with fair practice, and thus except in cases in which failure to specifically indicate the author's name is recognized as being harmful to the author's interests, omission of the author's name should be permitted, and this particular case precisely falls under one of such cases.

However, in the Book, the Tattoo is used in the most conspicuous places of a book such as the Cover and the Inside Cover, and the Tattoo itself is posted almost entirely

on both the Cover and the Inside Cover, respectively, and furthermore, the Book is designed in such a way so that, together with the title, "Goukaku! Gyoseishoshi Namuirezumikanzeon (Success in the administrative scrivener examination; tattooed Goddess of Mercy)", the Tattoo is accentuated even more. Based on these reasons, it is recognized that the Tattoo is being used for the purpose of making the Book more intriguing and interesting to readers, and thus, in light of the purpose of the use of the Tattoo and the manner of such use, it cannot be recognized that there is no risk of harming the interests of X in claiming that he, as the author, is the creator of the Tattoo.

Also, although the photograph on which the Image is based was given to Y<sub>2</sub> for free, this act alone is not sufficient to recognize that X had given permission to the use of the Tattoo, and there is no other evidence to sufficiently support that X had given permission to the use of the Tattoo by Y<sub>1</sub> and Y<sub>2</sub>.

Furthermore, there is no evidence to sufficiently support that the omission of the indication of the author's name upon posting a photograph of a tattoo in a book is incompatible with fair practice (it is recognized that the photograph of the tattoo posted in the April 2002 issue of "Monthly Jitsuwa Document" (Monthly Document of Real Stories) issued on April 1, 2002 by Takeshobo Co., Ltd. (Exhibit Otsu 5), shows the trade name of the tattoo artist).

Accordingly, it cannot be recognized that the above-described act of posting by Y<sub>1</sub> and Y<sub>2</sub> falls under the case in which the indication of the author's name may be omitted pursuant to Article 19, paragraph (3) of the Copyright Act, and thus the above claims by Y<sub>1</sub> and Y<sub>2</sub> cannot be accepted.

C. From what is described above, the act by Y<sub>1</sub> and Y<sub>2</sub> of posting the Image, which is a reproduction of the Tattoo, in the Book and on the Websites, without showing the name of X, who is the author of the Tattoo, constitutes infringement of X's right of attribution for the Tattoo, and it is evident that, in regards to this point, Y<sub>1</sub> and Y<sub>2</sub> are recognized as being at fault, at least.

(3) Whether infringement of the right to integrity is established

A. When the Tattoo is compared with the Image, the shadow of the Image is inverted and the color thereof is converted to sepia-toned monochrome, as described in above (1)A. Y<sub>1</sub> and Y<sub>2</sub> created the Image by making the above-described changes to the Tattoo, which is a work of X, and posting the Image in the Book and on the Websites without X's permission. Such changes are recognized as being alterations which are against the will of X, who is the author, and thus they constitute infringement of X's right to integrity for the Tattoo.

B. Y<sub>1</sub> and Y<sub>2</sub> assert that the Image is a photograph given by X for free, and that,

since X did not impose any restrictions on how the photograph may be used, the act by Y<sub>1</sub> and Y<sub>2</sub>, upon posting the photograph which was given for free, in the Book, of inverting the negative into positive and making a monochrome image is within the scope of use permitted by X, and that such act does not constitute infringement of X's right to integrity.

However, while X gave the photograph for free, this act alone cannot be recognized as X giving permission for the above-described alterations, and there is no other evidence to support as such. Accordingly, the above claims by Y<sub>1</sub> and Y<sub>2</sub> cannot be accepted.

C. From what is described above, it is evident that the alterations as described in the above A constitute infringement of X's right to integrity for the Tattoo, and that, regarding this point, Y<sub>1</sub> and Y<sub>2</sub> are at fault, at least.

3. Issue (3) (Whether infringement of personal rights and the right of privacy is established)

(1) Whether infringement of personal rights is established

A. The parties are not in dispute over the fact that the Book contains the Descriptions. X asserts that the Descriptions contain negative evaluation of the Tattoo, which X created by devoting all of his energy, that this infringes on X's personal rights as a person of expertise, and that, in the first place, the Descriptions not only emphasize the point that the tattoo, which X had inked on Y<sub>2</sub>, is a negative existence to Y<sub>2</sub>, but they also announce to the readers in general that a tattoo, in itself, has the nature of something that should be hidden and overcome, which damages X's personal rights as a tattoo artist.

B. However, according to evidence (Exhibit Ko 9), the Book is recognized as containing the Descriptions as well as the following statements.

(a) "There are tattoos inked on both my thighs. On my left leg is an admirable statue of Goddess of Mercy" (page 3, line 5 of the Book)

(b) "The tattoo master who carved my tattoo was called X4 (pseudonym) and was in Tokyo. He was a wonderful person and very much skilled." (Page 136, lines 7 to 8 of the Book)

(c) "X4, the tattoo master whom I asked for a tattoo, not only had great skills but also had a wonderful personality which I cannot try to compete with." (Page 137, lines 12 to 13 of the Book)

(d) "The black-and-white portrait which was given on my entire left thigh was created by X4, a tattoo master who paid attention to minute details, so much so that his work exceeded any work possible by a human being, and it was exactly the same as the

photograph of the model, 'Goddess of Mercy', which I had brought. This is such a wonderful piece of 'horimono' (tattoo).

If distinctions are to be made strictly according to the industry rules, my 'irezumi' (tattoo) has no signature, which makes it a 'tattoo.' For me, however, this work is a 'horimono', and I am proud of it." (From page 139, line 13 to page 140, line 1 of the Book)

(e) "'Goddess of Mercy'. In her left hand, she holds a water jar with a red lotus flower in it. In her right hand, she takes the form of Semui-in (mudra for bestowing fearlessness). Her merits are various forms of 'bakkuyoraku' (a Buddha taking away suffering and conferring peace) and 'kunanjokyo' (removal of hardships), or in other words, the 'ten types of victories,' including not falling ill, having sufficient clothing, food, and housing, and escaping water and fire disasters, as well as the 'four types of good luck,' including being able to see various Buddha at the time of death, not going to hell, and going to heaven. This is my 'horimono' (tattoo) on my left thigh. This respectable Buddha was completed after nine instances of tattooing." (Page 142, lines 5 to 9 of the Book)

C. Also, as is pointed out by X, the Book is an autobiography of Y<sub>2</sub>, who passed the administrative scrivener examination in 2006, describing how he passed the examination after overcoming various hardships, scandals, and illnesses since birth. In summary, the Book describes [i] how, during childhood, he did not grow up in a happy home, [ii] how he did not succeed in the search for employment, [iii] how he found a job at a movie theater but was fired when he embezzled money, [iv] how he kept spending money on a woman but ended up being deceived by her, [v] how he was influenced by the woman and had the Tattoo, which has the woman's name (professional name) carved on one side, [vi] how he, in spite of having a tattoo inked on his body, realized that he was being deceived, suffered depression, went to see a psychiatrist and received treatment, and [vii] how, after overcoming the illness, passed the administrative scrivener examination, and the like (Exhibit Ko 9).

D. When the above-described contents of the entire Book and the descriptions of the above B(a) to (e), which positively evaluate X and the Tattoo, are taken into consideration, the Descriptions indicate how Y<sub>2</sub> had trusted a woman and had the Tattoo inked on his body, and yet, how he was deceived by said woman later and became emotionally confused, and how even the Tattoo, which reflected what he had believed in, became a burden to him emotionally. However, it cannot be recognized that the Descriptions have any more intention or effect of giving a bad name to X, who is the tattoo artist, or degrading the value or evaluation of the Tattoo, which is created



by X.

Accordingly, it cannot be recognized that the Descriptions constitute infringement of X's personal rights.

(2) Whether infringement of the right of privacy is established

A. X points out that, in the Book, a pseudonym is used to describe X as someone who inked the tattoo, but that there is one place where X is described as "X3, a tattoo master" (page 144, line 9), and X asserts that this description can make it known to others that the Tattoo was created by X.

In the first place, however, X is a tattoo artist who inks tattoos as a trade, and thus it cannot be said that the inking the Tattoo on Y<sub>2</sub> falls under a fact that belongs to one's private life, which is the subject of the right of privacy.

Also, the tattoo artist who appears in the Book is defined, at most, by four attributes, which are that his trade name is "X4," that he has a house or workplace in Tokyo, that there is someone who appears to be his wife, and that he has pet cats (Exhibit Ko 9). Although X is described in one place as "X3, a tattoo master" instead of "X4," it is difficult to acknowledge, based on this fact alone, that X can be identified even by those who are acquainted with X, let alone by general readers.

As such, it cannot be recognized that the above descriptions constitute infringement of X's right of privacy.

B. X points out that, in the Book, Y<sub>2</sub> describes the state of X's workplace/house, when Y<sub>2</sub> first visited X, as there being "someone who appears to be [X's] wife ..." and "two pet cats, one black and one white, ... were circling," and X asserts that these descriptions about him infringes his right of privacy because the first part harms the reputation of X and his wife, who are married, and the second part is disadvantageous to X, whose work requires him to be careful about sanitation, and who lives in a rented house where pets cannot be kept.

However, concerning the first part of the descriptions, the expression, "someone who appears to be [X's] wife," about X's wife when Y<sub>2</sub> first visited X, merely suggests that Y<sub>2</sub>, who visited X for the first time, was not immediately sure whether the woman who was with X was married to X or not, and it cannot be understood as there being anything more, for example there being some kind of malicious intent, such as specifically denying the marital relationship between X and his wife. Accordingly, it cannot be recognized that the above description can lower the social honor of X and his wife, and it cannot be recognized that the description defames X or his wife.

As for the second part of the descriptions, it does not specifically state that X keeps cats in a workplace or that X keeps cats in a rented house where he is not supposed to

keep pets. Instead, the description merely states that there were cats when Y<sub>2</sub> paid a visit, and the fact of having a pet cat per se is very common in social life. As such, it cannot be recognized that the matter is something which an ordinary person does not want to be made public. Even if, based on the circumstances asserted by X, the matters is something which X does not want to be made public, the description in the Book, per se, cannot at all identify X as being the tattoo artist who appears in the Book, as described above. It cannot be recognized from the description that the description is immediately disadvantageous to X, and thus it cannot be recognized that there is infringement of X's right of privacy.

From what is described above, it cannot be said that the Descriptions constitute infringement of X's right of privacy.

#### 4. Issue (4) (Amount of damage)

##### (1) Responsibility of Y<sub>1</sub> and Y<sub>2</sub>

According to the above 2(2) and 2(3), Y<sub>1</sub> and Y<sub>2</sub> are liable to X in tort to the extent described below.

A. Since July 1, 2007, Y<sub>1</sub> and Y<sub>2</sub> posted the Image, which is an image of the Tattoo with certain alterations made thereto against X's will, without indicating the name of X, who is the author of the Tattoo, in the Book, thereby infringing X's right of attribution as well as the right to integrity for the Tattoo. As such, Y<sub>1</sub> and Y<sub>2</sub> are at fault, at least, for the above infringement, and thus the above act by Y<sub>1</sub> and Y<sub>2</sub> falls under a joint act of tort.

As such, Y<sub>1</sub> and Y<sub>2</sub> are responsible, jointly and severally, for compensating X for the damage caused by the above joint act of tort.

B. Since July 1, 2007, Y<sub>2</sub> posted a photograph of the Cover on Website 1, thereby infringing X's right of attribution and the right to integrity for the Tattoo. As such, it can be recognized that Y<sub>2</sub> is at fault, at least, for the above-described infringement, and thus the above-described act by Y<sub>2</sub> falls under an act of tort.

Accordingly, Y<sub>2</sub> is liable to X for compensating for the damage incurred by the above-described act of tort.

C. Since July 1, 2007, Y<sub>1</sub> posted a photograph of the Cover on Website 2, thereby infringing X's right of attribution and the right to integrity for the Tattoo. As such, Y<sub>1</sub> is at fault, at least, for the above-described infringement, and thus the above-described act by Y<sub>1</sub> falls under an act of tort.

Accordingly, Y<sub>1</sub> is liable to X for compensating for damage caused by the above-described act of tort.

##### (2) Damage due to the Book

A. Solatium for infringement of moral rights of author (right of attribution, right to integrity)

When all the circumstances, including the process of creating the Tattoo, the conditions of infringement by Y<sub>1</sub> and Y<sub>2</sub> of moral rights of author, the number of copies of the Book issued and the number of copies of the Book sold, and other circumstances shown in the present case, are taken into consideration, it is reasonable to recognize that the solatium for the emotional pain incurred by X as a result of the infringement by Y<sub>1</sub> and Y<sub>2</sub> of moral rights of author (right of attribution, right to integrity) is 200,000 yen.

B. Amount of the fee for attorneys

When the level of difficulty of this action, the content of the claims, the amount admitted, and various other circumstances are taken into consideration, it is reasonable to recognize 40,000 yen in damage for infringement by Y<sub>1</sub> and Y<sub>2</sub> of moral rights of author (right of attribution, right to integrity) and as the amount of the fee for attorneys having legally sufficient cause.

(3) Damage due to Website 1

A. Solatium for infringement of moral rights of author (right of attribution, right to integrity)

When the process of creating the Tattoo, conditions of infringement of moral rights of author by Y<sub>2</sub>, the period of posting of the photograph of the Cover on Website 1, and all other circumstances shown in the present case are taken into consideration, it is reasonable to recognize 100,000 yen in solatium for the emotional pain incurred by X as a result of infringement by Y<sub>2</sub> of moral rights of author (right of attribution, right to integrity).

B. Amount of the fee for attorneys

When the level of difficulty of this action, the content of claims, the amount admitted, and various other circumstances are taken into consideration, it is reasonable to recognize 20,000 yen in damage as the amount of the fee for attorneys having legally sufficient cause with the infringement by Y<sub>2</sub> of moral rights of author (right of attribution, right to integrity).

(4) Damage due to Website 2

A. Solatium for infringement of moral rights of author (right of attribution, right to integrity)

When the process of creating the Tattoo, the conditions of infringement of moral rights of author by Y<sub>1</sub>, the period of posting of the photograph of the Cover on Website 2, and all other circumstances shown in the present case are taken into consideration, it

is reasonable to recognize 100,000 yen in solatium for the emotional pain incurred by X as a result of the infringement by Y<sub>1</sub> of moral rights of author (right of attribution, right to integrity).

B. Amount of the fee for attorneys

When the level of difficulty of this action, the content of claims, the amount admitted, and other various circumstances are taken into consideration, it is reasonable to recognize 20,000 yen in damage as the amount of the fee for attorneys having legally sufficient cause with the infringement by Y<sub>1</sub> of moral rights of author (right of attribution, right to integrity).

5. Conclusion

From what is described above, X's claims are well-founded to the extent of seeking, [i] pursuant to the right to demand compensation for a joint act of tort described in above 4(1)A, payment by Y<sub>1</sub> and Y<sub>2</sub>, jointly and severally, to X of 240,000 yen and money accrued on the first-mentioned amount at the rate of 5% per annum provided by the Civil Code for the period from July 2, 2007, which is the day after the joint act of tort, until the date of completion of the payment, [ii] pursuant to the right to demand compensation for an act of tort as described in above 4(1)B, payment by Y<sub>2</sub> to X of 120,000 yen and money accrued on the first-mentioned amount at the rate of 5% per annum provided by the Civil Code for the period from May 30, 2009, which is the day after the act of tort, until the date of completion of the payment, and [iii] pursuant to the right to demand compensation for a joint act of tort as described in above 4(1)C, payment by Y<sub>1</sub> to X of 120,000 yen and money accrued on the first-mentioned amount at the rate of 5% per annum provided by the Civil Code for the period from February 26, 2010, which is the day after the act of tort, until the date of completion of the payment. Accordingly, these claims shall be admitted while the other claims shall be dismissed because they are groundless, and the judgment shall be rendered in the form of the main text.

Tokyo District Court, 40th Civil Division

Presiding Judge:	OKAMOTO Gaku
Judge:	SAKAMOTO Yasuhiro
Judge:	TERADA Toshihiko

(Attachment)

1. Cover



ISBN 978-4-7807-0324-5  
9784780703245  
C0065 ¥1824E  
定価：本体1524円＋税  
本の堂社  
1920095C15248



2. Inside Cover

