

Abstract**Incidental Use of Artistic Works**

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When artistic works are used incidentally in other visual works, it is difficult to judge whether the permission of the copyright holder is necessary or free use is possible. In this review, I have reviewed the major considerations or criteria in judging it. The review consists of two steps: substantive similarity and grounds for limitation, the criteria being the same as in a general infringement judgment. However, in the case of incidental use, substantial similarity may be denied or copyright may be limited in that the portion used may be quantitatively or qualitatively small or accidental.

In judging the substantial similarity between visual works, it should be based on how the work is recognized as a whole from the point of view of the general consumer. Consideration should be given to the amount and quality of use, the scope of protection of the work used, and whether or not it has become a new work that cannot be recognized as a dependent work to the original one due to newly added elements. The creative expression of used work should be maintained and recognizable in the new work. Otherwise, the substantial similarity will be denied. However, there are cases where it is possible to deny substantive similarity even when the creative expression of the used work can be identified in the new work.

In cases where substantial similarity is recognized, it will often be necessary to judge whether the copyright is restricted by Article 35-3. The photographs in the *Be the Reds* case should be regarded as not having substantial similarity with the pictures, or copyrights of them are limited by applying 35-3.

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Keywords

Incidental Use, Be the Reds, Substantial Similarity, De minimis, Artistic Works

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