

Date	October 19, 2016	Court	Intellectual Property High Court, Fourth Division
Case number	2016 (Ne) 10041		
– A case in which the court ruled that the operators of a club with live music, etc. fall under infringers in relation to the infringement of copyrights committed by bands that appear on stage at said club with live music.			

References: Article 22 and Article 112, paragraph (1) of the Copyright Act

Summary of the Judgment

1. The plaintiff in the first instance alleged that the act of the defendants in the first instance of putting on live shows in the club which they jointly operate (the "Club") without concluding a license agreement with the plaintiff in the first instance and having works managed by the plaintiff in the first instance be musically performed (including singing) constitutes infringement of the copyrights (musical performance rights) of the plaintiff in the first instance. Based on this allegation, the plaintiff in the first instance demanded that the defendants in the first instance suspend the use of the aforementioned works by musical performance and singing and that they jointly and severally pay the amount that corresponds to the royalties for the period from May 23, 2009 (the date of opening of the Club) to October 31, 2015 (5,602,787 yen), the attorney's fees (560,277 yen), and the monthly amount (63,504 yen) for the period from November 1, 2015, to the date of the end of use of the aforementioned works, principally as a claim for compensation for damage based on a tort of infringement of copyrights and alternatively as a claim for return of unjust enrichment against malicious beneficiaries.

The court of prior instance determined that the defendants in the first instance fall under infringers in relation to the infringement of the copyrights at the Club, and upheld the claims for an injunction and compensation for damage, etc. consisting of 2,124,412 yen, which is the amount of compensation for damage that corresponds to the royalties for the period until the date of conclusion of oral argument in the prior instance or the amount of unjust enrichment, and the attorney's fees of 400,000 yen. However, the court dismissed the claim for the payment of the amount for the period beginning after the day following the date of conclusion of oral argument in the prior instance, by ruling that said claim does not fulfill the requirements for action for future performance.

Therefore, the plaintiff in the first instance and the defendants in the first instance filed an appeal, respectively, against the sections in which they lost the case.

2. In this judgment, the court determined as follows in relation to whether or not the

defendants in the first instance fall under infringers. In detail, it is reasonable to determine whether or not a person falls under the user of a work in consideration of the subject matter of the used work, the method of use, the details and degree of involvement in the use of the work, and other elements and based on whether or not the person commits an important act in the realization of musical performance under his/her supervision and control that goes beyond mere creation of an environment, etc. to make it easier for a third party to conduct musical performance, in the operation of a club with live music, even though he/she is not a person who directly musically performs the work. Then, the following facts are recognized: [i] The Club is a club with live music that was opened mainly for the purpose of putting on live shows, and performers at the Club, including Defendant B in the first instance, who is a musician, musically perform the works managed by the plaintiff in the first instance at a considerable frequency, and the works managed by the plaintiff in the first instance are musically performed on a daily basis at the Club; [ii] The Club should be considered to go beyond merely creating an environment, etc. to make it easier for performers to conduct musical performance in relation to the works managed by the plaintiff in the first instance, taking into consideration that: the defendants in the first instance jointly established and opened the Club for the purpose of providing musicians with an opportunity to freely conduct musical performance; the stage and equipment for musical performance, etc. are installed at the Club and performers can use the installed equipment, etc., including a drum set and amplifier, if they wish to do so; and the Club collects no use fees from performers but tries to attract guests by putting on live shows and collects at least 1,000 yen from guests who visit the Club to listen to live music as wining and dining expenses; [iii] Defendant A in the first instance is the operator of the Club, and Defendant B in the first instance is also recognized as being deeply engaged in the operation of the Club with Defendant A in the first instance as a joint operator of the Club by taking the following facts into account, though he/she does not recognize him/herself as the operator of the Club: [a] Defendant B in the first instance actively engaged in the opening of the Club, for example, by providing finance for the opening and operation of the Club, serving as a joint and several guarantor for a lease contract for the Club, installing a fixed-line phone, for which he/she bought a telephone subscription, at the Club, deciding to use the name of his/her own band as the name of the Club, and providing the Club with sound facilities, etc. that are essential for live shows without charge in cooperation with his/her musician companions; [b] Defendant B in the first instance actively engages in the operation of the Club, which is apparent in the facts that he/she communicated the opening of a bar with live music to his/her

musician companions, such as those in about 20 bands and groups, and approached them to appear on stage at the Club before the opening of the Club and independently conducted the booking of live shows at the beginning, that he/she conducts public relations activities for the Club and live shows to be put on there and also places articles about the recruitment of part-time workers at the Club and articles, etc. that introduce live shows at the Club in his/her blog, etc., and that the show business company to which the rock band of Defendant B in the first instance belongs prints the flyers of the Club; [c] The Club is operated in line with the intention of Defendant B in the first instance, that is, allowing performers to freely conduct musical performance; [d] Furthermore, in the conciliation in question, Defendant B in the first instance behaved as a person who hosts live shows at the Club, which is apparent in the facts that he/she said that he/she wanted to adopt a mechanism whereby the royalties arising on and after June 11, 2012 are distributed to the musically performed works and also said that the musically performed works would be reported by stating them in a "report of works used at a drinking establishment" and payments would be made based on a "comprehensive license agreement based on calculated assessed value," and that he/she negotiated with the plaintiff in the first instance about the desirable way of filling in a "report of works used at a drinking establishment." Comprehensively considering these facts, both of the defendants in the first instance are recognized as managing and controlling the musical performance of the works managed by the plaintiff in the first instance at the Club, committing important acts in the realization of musical performance, and obtaining profits from those acts. Therefore, it is reasonable to recognize the defendants in the first instance as falling under those who musically perform the works managed by the plaintiff in the first instance (infringers of the copyrights).

Then, the court increased the amount, which the court of prior instance admitted as damages incurred by the plaintiff in the first instance that corresponds to royalties or the amount of unjust enrichment, to 4,965,101 yen. The court also ruled that the plaintiff's claim for payment of money for the period beginning after the day following the date of conclusion of argument in this instance does not fulfill the requirements for action for future performance, and dismissed this claim.

Judgment rendered on October 19, 2016

The original received on the same day Court Clerk

2016 (Ne) 10041 Appeal Case of Seeking Injunction against Copyright Infringement

Court of prior instance: Tokyo District Court; 2013 (Wa) 28704

Date of conclusion of oral argument: September 12, 2016

Judgment

Appellant and appellee: Japanese Society for Rights of Authors, Composers and Publishers

(hereinafter referred to as the "plaintiff in the first instance")

Appellee and appellant: Y1

(hereinafter referred to as the "defendant in the first instance, Y1")

Appellee and appellant: Y2

(hereinafter referred to as the "defendant in the first instance, Y2")

Main text

1. Based on the appeal by the plaintiff in the first instance, paragraphs 2 to 4 of the main text of the judgment in prior instance shall be modified as follows:
 - (1) The action seeking payment of compensation for damage or unjust enrichment to arise on and after September 13, 2016 shall be dismissed without prejudice;
 - (2) The defendants in the first instance shall jointly and severally pay the plaintiff in the first instance money in the amount of 5,465,101 yen as well as money accruing from the respective amounts listed in the column of compensation for damage equivalent to royalties in Attachment 4 to this judgment at the rate of 5% per annum from each day listed in the column of the initial date, or from April 1, 2016 in the amount of 500,000 yen, until the day on which each payment has been made in full;
 - (3) Other claims of the plaintiff in the first instance for payment of money shall be dismissed.
2. Both appeals by the defendants in the first instance shall be dismissed.
3. Court costs for both the first and second instances shall be divided into five, one of which shall be borne by the plaintiff in the first instance, and the others shall be borne by the defendants in the first instance jointly and separately.

4. This judgment may be provisionally executed only to the extent of paragraph 1 (2).

Facts and reasons

No. 1 Objects of the appeal

1. The plaintiff in the first instance

(1) Paragraphs 2 to 4 of the main text of the judgment in prior instance shall be modified as follows:

(2) The defendants in the first instance shall jointly and severally pay the plaintiff in the first instance money in the amount of 6,512,336 yen as well as money accruing from the respective amounts listed in the column of the principal in Attachment 1 to this judgment at the rate of 5% per annum from each day listed in the column of the initial date, or from April 1, 2016 in the amount of 592,029 yen, until the day on which each payment has been made in full (the plaintiff in the first instance has extended its claim as such in this instance);

(3) The defendants in the first instance shall jointly and severally pay the plaintiff in the first instance money in the amount of 63,504 yen per month from April 1, 2016 until the day on which the use of the musical works listed in the Attachment 2 to the judgment in prior instance, the music list (issued on April 1, 2008), and Attachment 3 thereto, the music list (addendum) has been discontinued in the clubs listed in the Attachment 1 thereto, the club list (1);

(4) Court costs for both the first and second instances shall be borne by the defendants in the first instance.

2. The defendants in the first instance

(1) In the judgment in prior instance, the sections in which the defendants in the first instance have lost shall be revoked;

(2) All claims of the plaintiff in the first instance concerning the aforementioned part revoked shall be dismissed;

(3) Court costs for both the first and second instances shall be borne by the plaintiff in the first instance.

No. 2 Outline of the case (hereinafter abbreviations are as in the judgment of prior instance unless otherwise noted)

1. The plaintiff in the first instance, a copyright management business operator, alleged that while the defendants in the first instance were jointly operating the clubs

listed in Attachment 1 to the judgment in prior instance (the "Club;" the club in the same list (1) corresponding to the sixth floor of the Club and the club in the same list (2) corresponding to the fifth floor of the Club), the act of the defendants in the first instance of putting on live shows in the Club without concluding a license agreement with the plaintiff in the first instance and having works managed by the plaintiff in the first instance be musically performed (including singing) constituted an infringement of the copyrights (musical performance rights) of the plaintiff in the first instance. Based on this allegation, the plaintiff in the first instance demanded that the defendants in the first instance should: [i] suspend the use of the aforementioned works by musical performance and singing; and [ii] principally as a claim for compensation for damage based on a tort of infringement of copyrights and alternatively as a claim for return of unjust enrichment against malicious beneficiaries, pay: [a] an amount equivalent to royalties for the period from May 23, 2009 (date of opening of the Club) to October 31, 2015 in the amount of 5,602,787 yen; [b] attorneys' fees in the amount of 560,277 yen; and [c] liquidated delay damages for the aforementioned amount equivalent to royalties or interest thereon in the amount of 872,455 yen, the total amount of 7,035,519 yen accruing up to October 31, 2015, as well as delay damages for or interest on 6,163,064 yen (total amount of the above [a] and [b]) at the rate of 5% per annum as prescribed in the Civil Code from November 1, 2015 until such payment has been made in full; and also jointly and severally pay: [d] an amount equivalent to royalties in the amount of 63,504 yen per month from November 1, 2015 until the day on which the use of the aforementioned works has been discontinued.

In the judgment in prior instance, determining that the defendants in the first instance fell under the music performers of works managed by the plaintiff in the first instance, [i] the injunction suspending the use of the aforementioned works by musical performance and singing was upheld; [ii] the claim for compensation for damage based on a tort of infringement of copyrights or for return of unjust enrichment against malicious beneficiaries was upheld to the extent of demanding that the defendants in the first instance should jointly and severally pay [a] compensation for damage or unjust enrichment that corresponded to royalties from May 23, 2009 to October 31, 2015 in the amount of 2,030,513 yen; [b] attorneys' fees in the amount of 400,000 yen; [c] liquidated delay damages for or interest on the amount equivalent to royalties as stated in the above [a] accruing up to October 31, 2015 in the amount of 306,858 yen; [d] delay damages for or interest on the total amount of 2,430,513 yen in the above [a] and [b] on and after November 1, 2015; and [e] compensation for damage or unjust enrichment corresponding to royalties from the same day to February 10, 2016 (date of

conclusion of oral argument in the prior instance) in the amount of 93,899 yen; however, other matters of the claim stated up to February 10, 2016 were dismissed, and [iii] a claim for compensation for damage equivalent to royalties on and after February 11, 2016 was dismissed without prejudice by ruling that the claim did not fulfill requirements for an action to seek future performance.

Therefore, the plaintiff in the first instance and the defendants in the first instance filed an appeal against each other, against the sections in which they lost the case. The plaintiff in the first instance has extended its claim for payment of an amount equivalent to attorneys' fees in this instance, demanding that the defendants in the first instance should jointly and severally pay, [a] with respect to an amount equivalent to royalties from May 23, 2009 (date of opening of the Club) to March 31, 2016 in the amount of 5,920,307 yen and delay damages for or interest on the respective amounts listed in the column of the principal in the attachment 1 to this judgment at the rate of 5% per annum as prescribed in the Civil Code from each day listed in the column of the initial date until the day on which each payment has been made in full, [b] attorneys' fees therefor in the amount of 592,029 yen and delay damages therefor at the rate of 5% per annum as prescribed in the Civil Code from April 1, 2016 until the day on which such payment has been made in full, as well as [c] an amount equivalent to royalties in the amount of 63,504 yen per month from April 1, 2016 until the day on which the use of the aforementioned works has been discontinued.

(omitted)

No. 4 Judgment of this court

This court also determines that the injunction demand against the defendants in the first instance should be upheld, since the defendants in the first instance fall under infringers of copyrights in the works managed by the plaintiff in the first instance. With respect to a claim for damages, this court determines that the claim arising in the future at and after the time of conclusion of oral argument in this instance should be dismissed without prejudice due to an insufficient legal interest for litigation, and for the claim for damages having arisen prior thereto, the amount of damages upheld in the prior instance should be increased.

Reasons therefor are as follows:

1. The found facts

In addition to the following amendments, facts are as stated in the judgment in prior instance from the beginning of the 26th line of the 23rd page to the end of the

15th line of the 40th page and these are cited herein:

- (1) The term "applications" in kanji characters in the 18th line of the 26th page of the judgment in prior instance shall be corrected;
- (2) The term "all" in hiragana characters in the 22nd line of the 27th page of the judgment in prior instance shall be revised to that in kanji characters;
- (3) The term "procedure" in kanji characters in the 11th line of the 28th page of the judgment in prior instance shall be corrected;
- (4) The term "discussions" in kanji characters in the 24th line of the 28th page of the judgment in prior instance shall be corrected;
- (5) The term "take" in hiragana characters in the 5th line of the 31st page of the judgment in prior instance shall be revised to that in kanji characters;
- (6) The phrase "not be found" in hiragana characters in the 8th line of the 32nd page of the judgment in prior instance shall be revised to that in kanji characters;
- (7) The term "fault" in kanji characters in the 4th line of the 34th page of the judgment in prior instance shall be corrected;
- (8) The term "Attachment 8" in the 9th line of the 36th page of the judgment in prior instance shall be revised to "Attachment 8 to the judgment in prior instance;"
- (9) At the end of the 17th line of the 36th page of the judgment in prior instance, a new paragraph shall be added as follows:
"Furthermore, the defendant in the first instance, Y1, deposited money in the total amount of 129,900 yen on May 30, 2016 as royalties for the period from November 1, 2015 to March 31, 2016 (Exhibit Otsu 96-1 to 96-5)";
- (10) At the end of the 13th line of the 37th page of the judgment in prior instance, new paragraphs shall be added as follows:
"(Article 11) "Trustors (excluding music publishers) may impose reservations or restrictions listed in the following items with the prior consent of the trustees on the scope of the trusted management of trust copyrights provided for in Article 3, paragraph (1), Article 4, Article 5, and Article 10:
(1) Trustors to use works (including works transferred to music publishers as provided for in item (ii) of the preceding Article) by themselves in Japan with the unanimous agreement of all right holders related to the works (meaning the related right holders set forth in Article 2, item (i) of the royalties distribution rules; hereinafter the same shall apply) for the development of usages of such works; provided, however, that this shall not apply to the case where a trustor receives a fee in compensation for the presentation of any work";
- (11) The term "Attachment 9" on the 4th line and the term "Attachment 10" on the

5th line of the 39th page of the judgment in prior instance shall be revised to "Attachment 9 to the judgment in prior instance" and "Attachment 10 to the judgment in prior instance," respectively;

(12) The term "per" in hiragana characters in the 19th line of the 39th page of the judgment in prior instance shall be revised to that in kanji characters; and

(13) The sentence starting from "Note that" in the 7th line and ending at period "." in the 8th line of the 40th page of the judgment in prior instance shall be deleted.

2. Issue 1 (applicability of the defendants in the first instance to music performers)

(1) Users of works subject to copyright

In most cases in the Club, those who perform (perform using musical instruments or sing) the works managed by the plaintiff in the first instance are performers. In such cases, it is reasonable to determine whether or not a person falls under the user of a work in consideration of the subject matter of the used work, the method of use, the details and degree of involvement in the use of the work, and other elements, and based on whether or not the person performs an important act in the realization of musical performance under his/her supervision and control that goes beyond mere creation of an environment, etc. to make it easier for a third party to conduct musical performance, in the operation of a club with live music, even though he/she is not a person who directly musically performs the work (refer to Minshu Vol. 42, No. 3, page 199 of the judgment of the third petty bench for the case number 1984 (O) 1204 of the Supreme Court on March 15, 1988, and Minshu Vol. 65, No. 1, page 399 of the judgment of the first petty bench for the case number 2009 (Ju) 788 of the Supreme Court on January 20, 2011).

(2) The applicability of the defendants in the first instance to music performers

As per the found facts stated in the above 1. ("facts and reasons" No. 4, 1. (1) to (3) of the judgment in prior instance according to the citation), the Club is a club with live music that has been opened mainly for the purpose of putting on live shows, while it is sometimes opened as a bar without live music, and performers in the Club, including the defendant in the first instance, Y2, musically perform the works managed by the plaintiff in the first instance at a considerable frequency, and the works managed by the plaintiff in the first instance are musically performed on a daily basis in the Club (on April 8, 2016, the defendants in the first instance notified potential performers that the operation policy of the Club was revised to have the Club be opened mainly as a bar, and no performer would be allowed to perform any work managed by the plaintiff in the first instance on and after that day, unless the performer individually obtained

the consent of the plaintiff in the first instance; however, as stated in 7. (2) below, the works managed by the plaintiff in the first instance have been performed on and after the same day).

Also, as per the found facts stated in the above 1. ("facts and reasons" No. 4, 1. (1) to (3) of the judgment in prior instance according to the citation), the Club should be considered to go beyond merely creating an environment, etc. to make it easier for performers to conduct musical performance in relation to the works managed by the plaintiff in the first instance, taking into consideration that: the defendants in the first instance have jointly established and opened the Club for the purpose of providing musicians with an opportunity to freely conduct musical performance; the stage, equipment for musical performance, etc. are installed at the Club and performers can use such sets of installed equipment as drums and amplifiers, if they wish to do so; and the Club collects no use fees from performers but tries to attract guests by putting on live shows and collects at least 1,000 yen from guests who visit the Club to listen to live music as wining and dining expenses.

The defendant in the first instance, Y1, is the operator of the Club, and as per the found facts stated in the above 1 ("facts and reasons" No. 4, 1. (1) to (3) and (5) of the judgment in prior instance according to the citation), the defendant in the first instance, Y2, is also recognized as being deeply engaged in the operation of the Club with the defendant in the first instance, Y1, as a joint operator of the Club by taking the following facts into account, although he/she does not recognize him/herself as the operator of the Club: [a] the defendant in the first instance, Y2, has actively engaged in the opening of the Club, for example, by providing finance for the opening and operation of the Club, serving as a joint and several guarantor for a lease contract for the Club, installing a fixed-line phone, for which he/she bought a telephone subscription, at the Club, deciding to use the name of his/her own band as the name of the Club, and providing the Club with sound facilities, etc. that are essential for live shows without charge in cooperation with his/her musician companions; [b] the defendant in the first instance, Y2, actively engages in the operation of the Club, which is apparent in the facts that he/she communicated the opening of a bar with live music to his/her musician companions, such as those in about 20 bands and groups, and approached them to appear on stage at the Club before the opening of the Club and independently conducted the booking of live shows (operations of receiving applications for performance by means such as e-mail) at the beginning, that he/she conducts public relations activities for the Club and live shows to be put on there and also places articles about the recruitment of part-time workers at the Club and articles,

etc. that introduce live shows at the Club in his/her blog, etc., and that the show business company to which the rock band of the defendant in the first instance, Y2 belongs prints the flyers of the Club; [c] the Club is operated in line with the intention of the defendant in the first instance, Y2; that is, allowing performers to freely conduct musical performance; [d] furthermore, in the conciliation in question, the defendant in the first instance, Y2, behaved as a person who hosted live shows at the Club, which was apparent in the facts that he/she said that he/she wanted to adopt a mechanism whereby the royalties arising on and after June 11, 2012 are distributed to the musically performed works and also said that the musically performed works would be reported by stating them in a "report of works used at a drinking establishment" and payments would be made based on a "comprehensive license agreement based on calculated assessed value," and that he/she negotiated with the plaintiff in the first instance about the desirable way of filling in a "report of works used at a drinking establishment."

Comprehensively considering these facts, both of the defendants in the first instance are recognized as managing and controlling the musical performance of the works managed by the plaintiff in the first instance in the Club, performing important acts in the realization of musical performance, and obtaining profits from those acts. Therefore, it is reasonable to recognize the defendants in the first instance as falling under those who musically perform the works managed by the plaintiff in the first instance (infringers of the copyrights).

(3) Allegations of the defendants in the first instance

A. The defendants in the first instance allege that the criteria of determinations in the judgment in prior instance with respect to infringers in relation to copyrights are unreasonable for this case, since they refer to the judgment rendered by the Supreme Court on a case, the subject matter of which is different from that of this case, and it does not properly answer to the general legal proposition of the judgment by the Supreme Court.

However, when determining infringers in relation to copyrights, it is reasonable to examine and determine whether or not a person falls under the agent of any act from a normative perspective even if the person cannot be physically or naturally regarded as the agent, which conforms to the gist of the aforementioned judgment by the Supreme Court. From such perspective, it is reasonable to make determinations as aforementioned, and there is no reason for the allegation of the defendants in the first instance.

B. The defendants in the first instance allege that the organizer of live shows in the

Club is a third party other than persons related to the Club, and the defendants in the first instance merely provide a space for live shows and do not decide musical programs or the amount of music charges, and accordingly, not fall under music performers.

However, as per the found facts stated in the above 1. ("facts and reasons" No. 4, 1. (1) to (3) of the judgment in prior instance according to the citation), taking into account that: the stage, equipment for musical performance, etc. are installed at the Club and performers can use such sets of installed equipment as drums and amplifiers, if they wish to do so; the Club is a club with live music where it is expected that the works managed by the plaintiff in the first instance are performed; once the staff members of the Club receive data from performers such as the name, advertising messages, and photos of a live show, they post such data on the website of the Club, as well as place on the Club or distribute flyers on which a live show schedule is printed; and the Club collects no use fees from performers but tries to attract guests by putting on live shows and collects wining and dining expenses from guests who visit the Club to listen to live music, even if the performers, musical programs, and amount of music charges at each live show are decided not by the defendants in the first instance or the staff members of the Club but by performers themselves, such fact is not deemed to preclude the above fact (2) from being found. Consequently, the above allegation of the defendants in the first instance cannot be accepted.

C. Furthermore, the defendants in the first instance allege that while the important acts in the realization of musical performance of the works managed by the plaintiff in the first instance shall be: [i] the selection of the works managed by the plaintiff in the first instance; and [ii] the actual performance of the selected works managed by the plaintiff in the first instance, the defendants in the first instance do not fall those who musically perform the works managed by the plaintiff in the first instance (infringers in relation to copyrights) since they have not performed either of these acts.

However, as indicated in the above, when determining applicability to infringers in relation to copyrights, it is reasonable to examine and determine whether or not a person falls under the agent of any act from a normative perspective, not only from a physical or natural perspective. Taking into account that: the Club is a club with live music where it is expected that the works managed by the plaintiff in the first instance are performed; the Club tries to attract guests by putting on live shows and collects wining and dining expenses from guests; and sets of equipment for musical performance such as amplifiers, speakers, and drums are installed at the Club, it is reasonable to evaluate that the defendants in the first instance have performed

important acts in the realization of musical performance of the works managed by the plaintiff in the first instance even if they have never actually selected or performed any piece on a musical program.

D. The defendants in the first instance also allege that if the defendants in the first instance are found to be music performers, both performers and the defendants in the first instance come to fall under music performers and accordingly, the defendants in the first instance are allowed to receive duplicate benefits, which is unreasonable.

However, if performers play musical instruments or sing in the Club without obtaining any license, it is considered that such performers and the defendants in the first instance shall be liable for a non-authentic joint and several obligation to the plaintiff in the first instance as joint tortfeasors, which indicates that compensation for damage in an amount equivalent to royalties for the works managed by the plaintiff in the first instance will not be collected in duplicate. Consequently, the above allegation of the defendants in the first instance cannot be accepted.

E. The defendants in the first instance also allege that they have changed the type of the operation of the Club in April 2016 after rendition of the judgment in prior instance, and the works managed by the plaintiff in the first instance have no longer been performed. However, as stated in 7. (2) below, the works managed by the plaintiff in the first instance have actually been musically performed thereafter, and it is doubtful whether the defendants in the first instance have really changed the type of operation. Therefore, this allegation does not have any influence over the aforementioned determination that the defendants in the first instance are infringers of the works managed by the plaintiff in the first instance.

(4) Summary

Consequently, the defendants in the first instance are found to be the music performers of (infringers in relation to copyrights in) the works managed by the plaintiff in the first instance in the Club.

3. Issue 2 (applicability of an infringement of copyrights by performances of original pieces of music)

(1) The defendants in the first instance allege that their performances of original pieces of music they have produced does not fall under a tort since the author of such pieces of music who has left them in trust with the plaintiff in the first instance for the management of copyrights therein grants him/herself a license to use them.

However, as per the found facts stated in the above 1. ("facts and reasons" No. 4, 1. (7) B. of the judgment in prior instance according to the citation), the trustor who has

entered into a copyright trust agreement with the plaintiff in the first instance has transferred all copyrights including those which are to be acquired in the future to the plaintiff in the first instance as trust property during the term of the agreement, which indicates that the copyright holder in relation to the works managed by the plaintiff in the first instance shall be the plaintiff in the first instance. In that case, no matter who uses the works managed by the plaintiff in the first instance, if such user does not obtain a license to use them from the plaintiff in the first instance, there is no other choice but to say that such use falls under an infringement of copyrights.

This is also supported by the provisions of Article 11 of the terms and conditions of the copyright trust agreement stating that with respect to the self-use of a musical work composed by oneself with the unanimous agreement of all right holders related to the musical work (excluding the case where a trustor obtains a fee in compensation for the presentation of the work), reservations or restrictions may be imposed on the scope of trusted management with the prior consent of the trustee.

As stated in the above, even if a performer performs a piece of music he/she has left with the plaintiff in the first instance in trust for copyright management, the performance of the piece of music without a license to use it to be granted by the plaintiff in the first instance obviously falls under the infringement of the copyright held by the plaintiff in the first instance, and it is found that a loss in an amount equivalent to royalties has been incurred by the plaintiff in the first instance; therefore, such act of the defendants in the first instance constitutes a tort of infringement of copyrights.

(2) The defendants in the first instance allege that the plaintiff in the first instance is not allowed to pursue a liability for a tort committed by an author by performing his/her own piece of music by reason of non-grant of any license to use the piece of music, while operating the copyright management system in an illegal manner not permitting authors to apply for performance of their own pieces of music, contrary to the purpose of the management trust agreement.

However, even if a license to perform a musical work is granted to the author of the work, it is necessary to distribute royalties to be obtained by other related right holders in relation to the musical work. Thus, it cannot be said that the collection of an amount equivalent to royalties by pursuing a liability for the tort committed by the author by his/her own performance of the work is contrary to the purpose of the management trust agreement, and there is no reason for the allegation of the defendants in the first instance.

(3) Therefore, the above allegation of the defendants in the first instance cannot be

accepted.

4. Issue 3 (intentional or negligent act of the defendants in the first instance)

(1) The defendants in the first instance have recognized each fact stated in the above 2. (2), and as per the found facts stated in the above 1. ("facts and reasons" No. 4, 1. (4) A. of the judgment in prior instance according to the citation), the defendants in the first instance have also recognized that they have to pay a copyright fee to the plaintiff in the first instance after they have opened the Club. Thus, it is obvious that the defendants in the first instance have recognized themselves being infringers in relation to copyrights, and there is no other choice but to say that the defendants in the first instance have committed an intentional or negligent infringement of copyrights.

(2) The defendants in the first instance allege that they have no intention of infringement since they do not know which pieces of music will be performed in the Club or whether or not performers have obtained licenses to perform such pieces of music from right holders.

However, in determining whether or not there is an intention of infringement of copyrights, it is sufficient if there is recognition that a person uses a piece of music in which another person has a right, and recognition of the specific name of any piece of music or right holder is not required. There is no dispute between the parties as to the facts that: the defendants in the first instance have not entered into a license agreement for the works managed by the plaintiff in the first instance; and that in many live shows in the Club, the works managed by the plaintiff in the first instance have been performed although their specific number is unknown. In addition, it is not common that performers in live shows obtain licenses from the plaintiff in the first instance by themselves, and as per the found facts stated in the above 1. ("facts and reasons" No. 4, 1. (4) A. of the judgment in prior instance according to the citation), the defendant in the first instance, Y2, has also performed pieces of music in live shows in other clubs than the Club without obtaining any license from the plaintiff in the first instance. In this light, recognition of pieces of music performed in the Club or whether or not performers have obtained licenses to perform such pieces of music from right holders does not have any influence over the determination of subjective requirements for the defendants in the first instance in this case.

(3) The defendants in the first instance also allege that the intention of infringement of copyrights shall exist upon performance by each performer, as the direct agent, of each piece of music, and the content of such intention shall be the recognition or admission that such performers perform another's musical works without any licenses

and the defendants in the first instance jointly perform such pieces of music by providing a space with the performers.

However, the defendants in the first instance have recognized the facts based on which they are infringers in relation to copyrights at the time of performance of a piece of music by each performer, neither the defendants in the first instance nor the Club have/has never entered into a license agreement for the works managed by the plaintiff in the first instance with the plaintiff in the first instance, and such performers have performed another's music works. It should be said that there are sufficient intentional acts as infringers from a normative perspective.

(4) Therefore, the above allegation of the defendants in the first instance cannot be accepted.

5. Issue 4 (grant of a license by the plaintiff in the first instance)

(1) The defendants in the first instance allege that on the second date for conciliation proceedings for this case on June 11, 2012, an agreement between the plaintiff in the first instance and the defendants in the first instance has been reached, which causes the defendants in the first instance or the defendant in the first instance, Y1, to pay the plaintiff in the first instance a royalty in the amount of 140 yen per piece of music, and the plaintiff in the first instance has expressed its intention to grant the defendants in the first instance a license to use the works managed by the plaintiff in the first instance.

It is certainly found that, as per the found facts stated in the above 1. ("facts and reasons" No. 4, 1. (5) of the judgment in prior instance according to the citation), on the second date for conciliation proceedings, the defendant in the first instance, Y2, has stated that he/she will report pieces of music to be performed in the future by filling in the "report of works used at a drinking establishment" and pay royalties pursuant to the "comprehensive license agreement based on calculated assessed value," and a staff member of the plaintiff in the first instance has stated that a royalty per piece of music is 140 yen.

However, as per the found facts stated in the above 1. ("facts and reasons" No. 4, 1. (5) of the judgment in prior instance according to the citation), [i] on the third date for conciliation proceedings thereafter, an attorney at law representing the defendant in the first instance, Y2, Suzuki, has proposed a license agreement on the future use of the works managed by the plaintiff in the first instance, which adopts the method of grant of a comprehensive license to use pieces of music and post adjustment for payment of a royalty per piece of music; [ii] on the fifth date for conciliation proceedings, the

plaintiff in the first instance has submitted a conciliation plan proposing entering into a comprehensive license agreement and the attorney at law, Suzuki, has submitted a brief stating that it is necessary to have final discussions about the terms of the agreement based on de facto consent on the second date for conciliation proceedings; [iii] on the sixth date for conciliation proceedings, the attorney at law, Suzuki, has submitted the terms of conciliation proposing that the parties mutually acknowledge that an agreement on the distribution of royalties by the plaintiff in the first instance based on the "report of works used at a drinking establishment" has been reached on June 11, 2012, but the plaintiff in the first instance has not agree thereto; and [iv] on the seventh date for conciliation proceedings, such proceedings for this case have been unsuccessfully concluded after all. Comprehensively considering these facts, at any time during the conciliation proceedings for this case, it cannot be said that between the plaintiff in the first instance and the defendants in the first instance or the defendant in the first instance, Y1, a consensus of intent has been developed as to the important part of an agreement such as the use terms with respect to the use of the works managed by the plaintiff in the first instance, nor can it be found that the plaintiff in the first instance and the defendants in the first instance have recognized that the agreement has been concluded as of June 11, 2012. Consequently, it cannot be found that a license agreement for the works managed by the plaintiff in the first instance has been concluded between the plaintiff in the first instance and the defendants in the first instance or the defendant in the first instance, Y1, on the same day.

(2) The defendants in the first instance also allege that in this case, it is a matter whether or not the plaintiff in the first instance has expressed its intention to grant a license as a unilateral act.

However, the grant by the plaintiff in the first instance of a license to use the works managed by the plaintiff in the first instance is not unconditional, and a person who has obtained the license shall be liable at least for the payment of a royalty. Thus, the license shall be granted by the plaintiff in the first instance pursuant to a bilateral agreement with the defendants in the first instance. Consequently, for the grant of a license by the plaintiff in the first instance, a consensus of intent between the parties should be required, and there is no reason for the above allegation of the defendants in the first instance.

(3) In addition, the defendants in the first instance allege that seeing the correspondence of the plaintiff in the first instance during the period from the second date for conciliation proceedings to the third date therefor, it is obvious that a license has been granted expressly or impliedly on the second date for conciliation

proceedings (June 11, 2012).

However, the aforementioned conciliation proceedings have been unsuccessfully concluded after all, and it is difficult to believe that the plaintiff in the first instance has granted the representing attorney at law authority to enter into a copyright license agreement not through an internal approval process. Thus, even though the allegation of the defendants in the first instance is taken into account, it cannot be found that a copyright license agreement has been expressly or impliedly concluded between the plaintiff in the first instance and the defendants in the first instance.

6. Issue 5 (acceptability of defenses including an abuse of rights)

(1) The defendants in the first instance allege that the plaintiff in the first instance has compelled them to enter into a comprehensive agreement illegally in violation of the Anti-Monopoly Act and negotiated with them in a unfaithful manner, and for these reasons, each claim or demand by the plaintiff in the first instance falls under an abuse of rights and/or violation of the principle of good faith.

However, even though all pieces of evidence for this case are reviewed, it is insufficient to find the fact that the plaintiff in the first instance has compelled the defendants in the first instance to enter into a comprehensive agreement.

In the light of the circumstances of the found facts stated in the above 1, ("facts and reasons" No. 4, 1. (4) and (5) of the judgment in prior instance according to the citation), it is understandable that the defendants in the first instance: believe the comprehensive agreement inappropriate, under which royalties are not accurately distributed to right holders; feel that the plaintiff in the first instance has compelled them to enter into the comprehensive agreement and to prepare the "report of works used at a drinking establishment" on pieces of music performed in the past, which is difficult, and then pointed out errors in a way finding fault with them; and have come to distrust the plaintiff in the first instance. On the other hand, the plaintiff in the first instance has, in the course of negotiations prior to and during the conciliation proceedings for this case, explained to the defendants in the first instance that there are other agreement methods than entering into the comprehensive agreement, and delivered to them the form of the "report of works used at a drinking establishment" required where an agreement is made in any way other than entering into the comprehensive agreement. Thus, it cannot passively be found that the plaintiff in the first instance has compelled the defendants in the first instance to enter into the comprehensive agreement. In addition, since the plaintiff in the first instance shall collect royalties based on the royalty rules notified to the Commissioner of the Agency

for Cultural Affairs as provided for in the Copyright Management Business Act, it is not unreasonable by any means that the plaintiff in the first instance encourages users of the works managed by it to enter into an agreement in the way stated in the royalty rules.

Should it be found that the comprehensive agreement into which the plaintiff in the first instance has requested the defendants in the first instance to enter is illegal, it cannot be said that such illegality causes the use by the defendants in the first instance of the works managed by the plaintiff in the first instance without any license to be changed to legal use, nor can it be said that the illegality falls under the reason for imposing restrictions on a claim for compensation for damage equivalent to royalties or an injunction demand against use with no license.

In this regard, the defendants in the first instance allege that, citing Minshu Vol. 69, No. 3, page 518 of the judgment of the third petty bench for case number 2014 (Gyo-Hi) 75 of the Supreme Court on April 28, 2015, the holdings of the aforementioned judgment shall apply to cases of clubs putting on live shows, and the comprehensive agreement into which the plaintiff in the first instance has requested the defendants in the first instance to enter is an illegal agreement in violation of the Anti-Monopoly Act, thus each claim or demand is not allowed to be made in this case.

However, even though an agreement is held to violate the Anti-Monopoly Act, it should not be construed that the validity of the agreement under private law immediately ceases (refer to Minshu Vol. 31, No. 4, page 449 of the judgment of the second petty bench for the case number 1973 (O) 1113 of the Supreme Court on June 20, 1977). The aforementioned judgment cited by the defendants in the first instance finds that the act of the plaintiff in the first instance to enter into a license agreement with almost all broadcasting organizations, which grants them blanket authorization to exploit musical works, and to collect broadcasting fees from them using the method of calculating the amount to be collected wherein the ratio of use in broadcasting of musical works is not reflected excludes business activities of other copyright management business operators. It is not determined in this judgment that a comprehensive license agreement with clubs putting on live shows is illegal, thus it is obvious that this judgment does not apply to this case and the summary of this judgment does not have any influence over this case.

Therefore, the above allegation of the defendants in the first instance cannot be accepted.

(2) The defendants in the first instance also allege that the plaintiff in the first instance has refused to receive royalties for performances in the past in the Club, and

accordingly, the claim made by the plaintiff in the first instance falls under a violation of the principle of good faith.

However, while a dispute has arisen as to the amount of compensation for damage equivalent to royalties in the past between the plaintiff in the first instance and the defendants in the first instance, if the plaintiff in the first instance refuses to receive payment made by the defendant in the first instance, Y1, considering that such payment does not fall under the tender of the performance of his/her payment obligation consistent with the main purport of such obligation, it cannot be said that such attitude of the plaintiff in the first instance is extremely unfaithful and that its claim in this case falls under a violation of the principle of good faith.

(3) The defendants in the first instance allege that the plaintiff in the first instance has not answered their questions about the amount and rate of distribution to trustors, and accordingly, the claim made by the plaintiff in the first instance falls under a violation of the principle of good faith.

However, it cannot be said that such attitude of the plaintiff in the first instance falls under a violation of the principle of good faith against the defendants in the first instance in terms of the relationship between the plaintiff in the first instance as a right holder intending to enter into a license agreement on the use of works and the defendants in the first instance as users.

(4) The defendants in the first instance allege that the plaintiff in the first instance has operated its system frequently in a manner not making applications or distributing royalties by piece of music, contrary to the main objective as a management business operator distributing collected royalties to original right holders in pieces of music actually used, and thus made a claim or demand in an abused manner in this case.

However, the plaintiff in the first instance is required to collect royalties from persons using the works managed by it and to distribute such royalties to original right holders. Even if the plaintiff in the first instance has operated its system with respect to the distribution of royalties to original right holders in a manner questioned by the defendants in the first instance, it cannot be said that a claim or demand against users of the works managed by the plaintiff in the first instance is not allowed to be made as an abuse of rights in terms of such operation.

(5) The defendants in the first instance allege that while they have requested in conciliation proceedings that the plaintiff in the first instance should operate its system in a manner correctly distributing royalties to original right holders in pieces of music actually used, the plaintiff in the first instance have unjustly made the conciliation proceedings be unsuccessfully concluded and made a claim for damages in an

excessive amount that will never be properly distributed to original right holders, which is significantly contrary to good faith and unreasonable.

However, it cannot be said that the non-acceptance by the plaintiff in the first instance of the conciliation plan proposed by the defendants in the first instance is illegal or unreasonable. It also cannot be said that, even if the plaintiff in the first instance has operated its system with respect to the distribution of royalties to original right holders in a manner questioned by the defendants in the first instance, the plaintiff in the first instance is not allowed to make a claim for compensation for damage equivalent to royalties against the defendants in the first instance in violation of the principle of good faith, since the defendants in the first instance have used the works managed by the plaintiff in the first instance without any license.

(6) As stated in the above, there is no reason for all allegations of the defendants in the first instance concerning an abuse of rights and violation of the principle of good faith.

7. Issue 6 (legality of an injunction demand and necessity of an injunction)

(1) The defendants in the first instance allege that the subject of the injunction demand has not been specified on the grounds that the term "cause" or "use" is used in the object of the demand, and in the injunction demand sought by the plaintiff in the first instance, no statement of the demand is alleged and thereby it cannot be regarded to be the demand seeking an injunction suspending or preventing an infringement of musical performance rights.

However, it is obvious, from the allegation of the plaintiff in the first instance on the statement and facts of the demand, that the plaintiff in the first instance seeks an injunction suspending the use by the defendants in the first instance of the works managed by the plaintiff in the first instance pursuant to paragraph 1 of the object of the demand on the premise of the current mode of use of the works managed by the plaintiff in the first instance. It cannot be said that the subject of the injunction demand has not been specified, nor can it be said that the allegation for the statement of the demand is insufficient.

(2) The defendants in the first instance allege that in April 2016, the operation policy of the Club has been revised to have the Club be opened mainly as a bar, and in principle, pieces of music performed on live there are limited to original ones (works not managed by the plaintiff in the first instance). If a performer desires to perform any work managed by the plaintiff in the first instance, the performer should submit an application for grant of a license to use the work to the plaintiff in the first instance by

him/herself. The works managed by the plaintiff in the first instance are not and will not be performed completely without the grant by the plaintiff in the first instance of a license to use such works, thus there is no need to order an injunction.

In this regard, according to evidence (Exhibits Otsu 94 and 95), it is found that on April 8, 2016 after the rendition of the judgment in prior instance, the defendants in the first instance have given notice on the website of the Club and by e-mail to each performer, informing that the Club is planned to be closed around April 2017 due to planned demolition of the building in which the Club is located; that the Club will be opened mainly as a bar; and that performers who play their original pieces of music (excluding the works managed by the plaintiff in the first instance) only will be allowed to perform such original ones in the same manner as before. In addition, according to evidence (Exhibits Otsu 87, and 89 to 92, including those with branch numbers of these exhibits), it is seen that the plaintiff in the first instance has a policy under which it will not accept an individual application from each performer for grant of a license while an action against the defendants in the first instance is pending, and it is found that there are performers who have cancelled their live shows in the Club since they have failed to obtain licenses from the plaintiff in the first instance. On the other hand, according to evidence (Exhibit Ko 75), it is found that live shows have been put on on the sixth floor of the Club on April 10 and May 8, 2016, during which the works managed by the plaintiff in the first instance have been performed.

As indicated in the above, in the Club, infringements of copyrights in the works managed by the plaintiff in the first instance have been repeatedly committed after the opening of the Club on May 23, 2009, and even after April 8, 2016 on which the defendants in the first instance should have changed the type of operation, infringements in relation to the works managed by the plaintiff in the first instance have been actually committed during live shows put on in the Club. Therefore, it cannot be said that an injunction is no longer required.

(3) The defendants in the first instance allege that there is no reason for the injunction demand on the premise of the refusal of grant of a license by the plaintiff in the first instance.

However, the injunction demand in this case is made on the premise that no license agreement concerning the works managed by the plaintiff in the first instance has been entered into between the plaintiff in the first instance and the defendants in the first instance (as stated in the above 5., a license shall be granted by the plaintiff in the first instance pursuant to a bilateral agreement, and for the conclusion of such agreement, a consensus of intent between the parties is required), not on the premise of the refusal of

grant of a license by the plaintiff in the first instance.

As provided in Article 16 of the Copyright Management Business Act that a copyright management business operator shall not refuse the grant of a license to use the works handled by it without justifiable grounds, the plaintiff in the first instance cannot refuse an application for grant of a license from a user without justifiable grounds. Accordingly, it should be said that if the defendants in the first instance apply for grant of a license by the method prescribed in the royalty rules, the plaintiff in the first instance cannot refuse such application. The defendants in the first instance should be able to easily enter into a license agreement concerning the works managed by the plaintiff in the first instance with the plaintiff in the first instance, and after entering into the agreement, to use the works managed by the plaintiff in the first instance in accordance with the same agreement.

Incidentally, it is construed that the defendants in the first instance allege that the plaintiff in the first instance has refused to grant a license to use the works on the grounds that it has not accepted the application for grant of the license proposing that the defendant in the first instance, Y1, will collect 140 yen per use of a work managed by the plaintiff in the first instance from each performer of live shows in the Club and pay the accumulated amount of such fee to the plaintiff in the first instance, and the plaintiff in the first instance will distribute such amount to legitimate copyright holders. Such method is not the method prescribed in the royalty rules, and it is considered that the plaintiff in the first instance has not agreed to enter into an agreement adopting any method other than the method prescribed in the royalty rules notified to the Commissioner of the Agency for Cultural Affairs as the reasonable action required to avoid complicated administrative processing and to keep fees inexpensive. Thus, there are justifiable grounds for the refusal of the application for grant of a license by the plaintiff in the first instance.

The defendants in the first instance also allege that since there is the provision in the royalty rules that if it is difficult to follow this provision in the light of the mode of use of works performed in a drinking establishment, a royalty for such use will be determined through consultation with the user within the scope of the amount provided herein (Exhibit Ko 3, page 42), the plaintiff in the first instance should accept an application not adopting the method prescribed in the royalty regulations but using another method. In the light of the wording in the aforementioned provision, it is considered that such provision is an exceptional provision to deal with the case where it is not reasonable to apply the method prescribed in the royalty rules since the "mode of use" of the works managed by the plaintiff in the first instance is different from the

mode of use in general drinking establishments. Thus, it cannot be said that the plaintiff in the first instance is obligated to grant a user a license using any method other than the method provided for in the royalty rules as desired by such user on the premise of the existence of such provision.

(4) Therefore, there is a reason for the injunction demand made by the plaintiff in the first instance against the defendants in the first instance.

8. Issue 7 (advisability of a claim in an action seeking future performance)

(1) The plaintiff in the first instance has made a claim for damages based on a tort in the future, alleging that a tort by the defendants in the first instance would certainly continue even after the conclusion of oral argument in this case.

While an action to seek future performance is allowed to be filed only where it is necessary to make a claim therefor in advance (Article 135 of the Code of Civil Procedure), with respect to a claim for damages for any loss or damage that should arise in the future based on a continuing tort, even if such unlawful act is now going on and it is presumed that the same type of act will continue in the future, it is reasonable to construe that the claim for future damages is not valid as a claim in the action seeking future performance under the following conditions; it is impossible to ascertain at present whether the act constitutes an unlawful act, based on which the right to claim damages is recognized and to what extent damages should be compensated, and it is possible to recognize the right to claim damages based on the unlawful act only after they actually arise; the obligee should prove the fulfillment of requirements for the establishment of such right, and it is unreasonable to allocate the burden to prove the requirements in the event that changes in the circumstances have occurred, which can be grasped as the occurrence of a new impediment to the establishment of the right to be solely proved by the obligee (refer to Minshu Vol. 35, No. 10, page 1369 of the judgment of the full bench for the case number 1976 (O) 395 of the Supreme Court on December 16, 1981, Saibanshu Minji No. 224, page 391 of the judgment of the third petty bench for the case number 2006 (Ju) 882 of the Supreme Court on May 29, 2007, and so on).

(2) With regard to this case, in the Club, performers themselves decide which pieces of music they perform on live shows, and the number of the works managed by the plaintiff in the first instance as used by the defendants in the first instance varies on a daily basis. In such case, it is impossible to ascertain at present whether the act constitutes an unlawful act, based on which the right to claim damages is recognized and to what extent damages should be compensated, and it is possible to recognize the

right to claim damages based on the unlawful act only after they actually arise. The defendants in the first instance allege that they have changed the type of operation of the Club in and after April 2016 and are planning to close the Club around spring in 2017, and actually, a lease agreement for the Club will expire on May 31, 2017 (Exhibit Otsu 98). Taking into account such allegation and fact, it is further difficult to ascertain at present whether the act constitutes an unlawful act, based on which the right to claim damages is recognized, and to what extent damages should be compensated on and after the date of conclusion of oral argument. Furthermore, the plaintiff in the first instance as a right holder should be liable to allege and prove the fulfillment of requirements for the establishment of such right.

Then, the claim for damages in this case is not valid as a claim in the action seeking future performance, and accordingly, with respect to the claim for payment of money from the defendants in the first instance, there is no other choice but to say that the part demanding the payment of compensation for damage to arise on and after September 13, 2016 as the day immediately following the date of conclusion of oral argument is unlawful. This shall apply to the case where the claim made by the plaintiff in the first instance is construed to be a demand for the return of unjust enrichment in the future.

Therefore, it cannot be prevented that all actions concerning the aforementioned part are dismissed without prejudice.

9. Issue 8 (occurrence of any damage or loss and the amount thereof)

(1) Number of times of performances

A. The plaintiff in the first instance alleges that the defendants in the first instance have used: [i] 15 works managed by the plaintiff in the first instance per day for 28 days per month on the fifth floor of the Club during the period from May 23, 2009 to January 31, 2010; [ii] 13 works managed by the plaintiff in the first instance per day for 6 days per month on the fifth floor of the Club and 15 works managed by the plaintiff in the first instance per day for 28 days per month on the sixth floor of the Club during the period from February 1, 2010 to October 31, 2015; and [iii] 15 works managed by the plaintiff in the first instance per day for 28 days per month on the sixth floor of the Club on and after November 1, 2015. With respect to the amount of compensation for damage equivalent to royalties, the plaintiff in the first instance alleges, as stated in Attachment 1 to this judgment, it to be: for the period in [i], 17,924 yen in May 2009 and 61,740 yen per month for the period from June 2009 to January 2010, which amount to 511,844 yen in total; for the period in [ii], 73,206 yen per

month (61,740 yen per month for the sixth floor of the Club and 11,466 yen per month for the fifth floor of the Club) for the period from February 2010 to March 2014, and 75,297 yen per month (63,504 yen per month for the sixth floor of the Club and 11,793 yen per month for the fifth floor of the Club) for the period from April 2014 to October 2015, which amount to 5,090,943 yen in total (4,293,576 yen in subtotal for the sixth floor of the Club and 797,367 yen in subtotal for the fifth floor of the Club); for the period in [iii], 63,504 yen per month.

In response to the above, the defendants in the first instance allege that the plaintiff in the first instance has never alleged or proven anything by identifying infringed pieces of music although they are identifiable, and it is unreasonable that such plaintiff in the first instance has made a claim for damages.

However, like this case, where a claim for damages is made with respect to an infringement of copyrights that is repeatedly committed in a specific place, it cannot be said that a claim for damages is not allowed to be made if infringed pieces of music are not individually and specifically identified, and there is no reason for the allegation of the defendants in the first instance.

In addition, even in the case of a performance of an original piece of music the performer has produced by him/herself, such act constitutes a tort of infringement of copyrights as stated in the above 3.

B. While the plaintiff in the first instance has carried out fact-finding surveys of the Club 10 times during the period from September 24 to December 14, 2010; 8 times during the period from June 9 to August 11, 2011; and 7 times during the period from February 20 to September 20, 2013 (Attachments A and D to Exhibits Ko 15 and 36), in the light of the method of each fact-finding survey (Exhibit Ko 55), there are no special circumstances due to which the credibility of the result of each fact-finding survey is specifically doubtful.

In response to the above, the defendants in the first instance allege that there are self-declared statements of performers and submit each "report of works used at a drinking establishment" (Exhibits Otsu 18, 23, and 97).

However, with respect to the respective statements in the above "report of works used at a drinking establishment," [i] there are significant deviations, as follows: on July 21, 2011, the result of the survey by the plaintiff in the first instance indicates that 28 pieces of music were performed (even if the length of musical performance is more than 5 minutes, it shall be calculated as 1 piece of music; hereinafter the same shall apply in this paragraph) while it is stated as 4 pieces of music; on March 8, 2013, the result of the survey by the plaintiff in the first instance indicates that 18 pieces of

music were performed while it is stated as 10 pieces of music; and on July 10, 2013, the result of the survey by the plaintiff in the first instance indicates that 15 pieces of music were performed while it is stated as 5 pieces of music; [ii] comparing the self-declared statements with blogs of individuals such as performers and fans, significant deviations in terms of the number of pieces of music performed are included to a considerable extent (Attachment B to Exhibit Ko 36); and [iii] the defendant in the first instance, Y2, him/herself has made a false declaration that the work(s) managed by the plaintiff in the first instance he/she has performed on live shows put during the period from July 2012 to July 2013 for 6 times in total, for which he/she has entered into an agreement with a music publisher, is/are not subject to payment of royalties (Exhibit Ko 68-1). Based on these, it is presumed that under-reporting is included to a considerable extent, and it is difficult to find that the works have been used as declared by performers.

C. According to the aforementioned fact-finding surveys by the plaintiff in the first instance conducted 25 times, the average number of the works managed by the plaintiff in the first instance which are performed on a live show (even if the length of musical performance is more than 5 minutes, it shall be calculated as 1 piece of music; hereinafter the same shall apply in this paragraph) is 14.4, but in detail, fewer than 10 pieces of music are performed for 2 times; 10 to 14 pieces of music were performed 14 times; 15 to 19 pieces of music were performed 7 times; and 20 pieces of music or more were performed 2 times, which indicates considerable dispersion. In the Club, since many bands appear on live shows, it is considered that the ratio of performance of the works managed by the plaintiff in the first instance depends on each band appearing on live shows. Actually, according to the "report of works used at a drinking establishment" submitted by the defendants in the first instance, the total number of pieces of music performed (including pieces of music that do not fall under the works managed by the plaintiff in the first instance; and on some days, records are modified according to the result of the fact-finding survey by the plaintiff in the first instance) is: 246 (25 live shows) in February 2013; 327 (29 live shows) in March 2013; 267 (23 live shows) in July 2013; and 311 (28 live shows) in September 2013, and the average number is only 10.9 per live show.

Therefore, even if under-reporting is included in the above "report of works used at a drinking establishment" to a considerable extent, there is no other choice but to say that it is difficult to presume that 14.4 works managed by the plaintiff in the first instance are performed per live show, which is the average value obtained as a result of fact-finding surveys by the plaintiff in the first instance.

D. In addition, the plaintiff in the first instance has determined that in cases where the use time of the work(s) managed by the plaintiff in the first instance exceeds 5 minutes, a royalty for one piece of music shall be added by every 5 excessive minutes. Therefore, the plaintiff in the first instance may demand a royalty in accordance with such determination (refer to Article 114, paragraph (3) of the Copyright Act).

In the fact-finding surveys by the plaintiff in the first instance, the number of pieces of music is calculated in accordance with the above determination. It is presumed that all pieces of music subject to addition are the works managed by the plaintiff in the first instance, and if such pieces of music are not performed in an original manner but in an ad lib or arranged manner, it does not have any influence over the fact that the works managed by the plaintiff in the first instance are used (Exhibit Ko 75). Thus, such addition in accordance with the above determination is reasonable.

E. Then, it is reasonable to infer the number of performances of the works managed by the plaintiff in the first instance based on the result of surveys by the plaintiff in the first instance (furthermore, it cannot be said that the number obtained through fact-finding surveys by the plaintiff in the first instance is too small as the basis of inference), but it should be fully considered that the rate of use of the works managed by the plaintiff in the first instance is different by live show to a considerable extent.

From such perspective, it is reasonable that a royalty is determined with the number of pieces of music obtained by multiplying the average number of pieces of music performed per live show by 0.7. The average number of pieces of music performed per live show is, based on the result of fact-finding surveys by the plaintiff in the first instance (Exhibit Ko 15), found to be 17.3 on the fifth floor in the case of use of both fifth and sixth floors of the Club, or 19.0 on the main live stage, which is the sixth floor of the aforementioned case or either of the floors if either one only is used, according to the calculation method of adding one piece of music by every 5 excessive minutes of the length of musical performance. Multiplying such average number by 0.7, the number of pieces of music is 12 on the fifth floor in the case of use of both fifth and sixth floors of the Club, or 13 on the main live stage (in both cases, fractions less than one shall be discarded).

F. As stated in the above, it is reasonable to presume that the number of the works managed by the plaintiff in the first instance to be performed per live show is 12 on the fifth floor in the case of use of both fifth and sixth floors of the Club, or 13 on the main live stage, which is the sixth floor of the aforementioned case or either of the floors if either one only is used.

(2) Royalties

According to the royalty rules of the plaintiff in the first instance, a royalty per one piece of music is to be calculated based on the objective number of seats and the average standard unit fee in each club, and it can be said that if the sum of music charges and wining and dining expenses is set as the standard unit fee, it reflects the actual situation and is reasonable in this case where each one of the defendants in the first instance and performers falls under the user of the works managed by the plaintiff in the first instance. Thus, it is reasonable to find such amount as 140 yen (exclusive of taxes).

In response to the above, the defendants in the first instance allege that there are a smaller number of guests on the fifth floor of the Club (Exhibit Otsu 32) and the unit price should be less than 140 yen, but such allegation does not have any influence over the aforementioned determination.

(3) An amount equivalent to royalties in each period

A. Period from May 23, 2009 to January 31, 2010

(a) The plaintiff in the first instance alleges that based on the survey result of the number of live shows put on in and after July 2010, the amount of damages for the aforementioned period should be inferred on the same frequency as the number of live shows clarified through these surveys.

However, since a smaller number of live shows have been put on in the Club at the time of its opening, it is difficult to find that live shows have been held at the same frequency as the period of fact-finding surveys. According to evidence (Exhibit Ko 74 and Exhibit Otsu 23), it is found that live shows have been held as follows: 2 times on weekdays in June 2009; 4 times on weekdays in July 2009; 6 times on weekdays in August 2009; 2 times on weekdays in the period from September 1 to 14, 2009; 13 times in the period from September 15 to 30, 2009 (including weekends; hereinafter the same shall apply in this paragraph); 16 times in October 2009; 14 times in November 2009; 17 times in December 2009; and 20 times in January 2010. In addition, on weekends (Saturday and Sunday) in the period from October to December 2009, live shows have been held 4 times a month on average. In the light of the above, it can be presumed that during periods prior thereto, live shows had been held at the same frequency on weekends. Comprehensively considering these facts, it is found that live shows have been held as follows: 2 times in May 2009; 6 times in June 2009; 8 times in July 2009; 10 times in August 2009; 16 times in September 2009 (3 times during the period from the 1st day to the 14th day, and 13 times during the period from the 15th day to the 30th day); 16 times in October 2009; 14 times in

November 2009; 17 times in December 2009; and 20 times in January 2010.

With respect to the number of pieces of music performed per live show, since only the fifth floor of the Club has been opened during these periods, it can be said that the fifth floor is the main live stage of the Club, and accordingly, it can be presumed that the same number as on the sixth floor of the Club that is the main live stage during the fact-finding survey period, 13 pieces of music have been performed.

(b) Therefore, the amount of damages for the aforementioned period is found as follows (although there are months in which the found amount below is less than the amount upheld in the judgment in prior instance, it is reasonable to determine as follows since: the defendants in the first instance have filed an appeal with respect to the part they have lost; and while the amount upheld in the judgment in prior instance is based on the estimation and allegation of the defendants in the first instance, it is not construed that the defendants in the first instance have admitted that the amount of damages is as the aforementioned estimated amount):

May 2009: $140 \text{ yen} \times 13 \text{ pieces of music} \times 2 \text{ times} \times 1.05$
 $= 3,640 \text{ yen} \times 1.05 = 3,822 \text{ yen}$

June 2009: $140 \text{ yen} \times 13 \text{ pieces of music} \times 6 \text{ times} \times 1.05$
 $= 10,920 \text{ yen} \times 1.05 = 11,466 \text{ yen}$

July 2009: $140 \text{ yen} \times 13 \text{ pieces of music} \times 8 \text{ times} \times 1.05$
 $= 14,560 \text{ yen} \times 1.05 = 15,288 \text{ yen}$

August 2009: $140 \text{ yen} \times 13 \text{ pieces of music} \times 10 \text{ times} \times 1.05$
 $= 18,200 \text{ yen} \times 1.05 = 19,110 \text{ yen}$

September 2009: $140 \text{ yen} \times 13 \text{ pieces of music} \times 16 \text{ times} \times 1.05$
 $= 29,120 \text{ yen} \times 1.05 = 30,576 \text{ yen}$

October 2009: $140 \text{ yen} \times 13 \text{ pieces of music} \times 16 \text{ times} \times 1.05$
 $= 29,120 \text{ yen} \times 1.05 = 30,576 \text{ yen}$

November 2009: $140 \text{ yen} \times 13 \text{ pieces of music} \times 14 \text{ times} \times 1.05$
 $= 25,480 \text{ yen} \times 1.05 = 26,754 \text{ yen}$

December 2009: $140 \text{ yen} \times 13 \text{ pieces of music} \times 17 \text{ times} \times 1.05$
 $= 30,940 \text{ yen} \times 1.05 = 32,487 \text{ yen}$

January 2010: $140 \text{ yen} \times 13 \text{ pieces of music} \times 20 \text{ times} \times 1.05$
 $= 36,400 \text{ yen} \times 1.05 = 38,220 \text{ yen}$

B. Period from February 1, 2010 to October 31, 2015

(a) During the aforementioned period, live shows were put on on the fifth floor and the sixth floor of the Club. And according to evidence (Exhibit Ko 15), it is presumed that the number of days per month, on which live shows have been put on during the

aforementioned period is 6 days on the fifth floor of the Club and 28 days on the sixth floor of the Club.

(b) Therefore, the amount of damages per month is as follows:

[a] Period from February 1, 2010 to March 31, 2014:

$(140 \text{ yen} \times 12 \text{ pieces of music} \times 6 \text{ days} \times 1.05) + (140 \text{ yen} \times 13 \text{ pieces of music} \times 28 \text{ days} \times 1.05) = (10,080 \text{ yen} \times 1.05) + (50,960 \text{ yen} \times 1.05) = 10,584 \text{ yen} + 53,508 \text{ yen} = 64,092 \text{ yen};$

[b] Period from April 1, 2014 to October 31, 2015:

$(140 \text{ yen} \times 12 \text{ pieces of music} \times 6 \text{ days} \times 1.08) + (140 \text{ yen} \times 13 \text{ pieces of music} \times 28 \text{ days} \times 1.08) = (10,080 \text{ yen} \times 1.08) + (50,960 \text{ yen} \times 1.08) = 10,886 \text{ yen} + 55,036 \text{ yen} = 65,922 \text{ yen}$ (Fractions less than one yen shall be discarded; hereinafter the same shall apply.)

C. Period from November 1, 2015 to April 8, 2016

(a) During the aforementioned period, live shows have been put on only on the sixth floor of the Club.

(b) Therefore, the amount of damages per month is as follows:

$140 \text{ yen} \times 13 \text{ pieces of music} \times 28 \text{ days} \times 1.08 = 55,036 \text{ yen}$

The amount for the period from April 1 to 8, 2016 is 14,676 yen.

$55,036 \text{ yen} \div 30 \text{ days} \times 8 \text{ days} = 14,676 \text{ yen}$

D. Period from April 9, 2016 to September 12, 2016

(a) As stated in the above 7. (2), on April 8, 2016, the defendants in the first instance have notified performers in the Club that the type of operation is changed and unless an individual license is obtained from the plaintiff in the first instance, original pieces of music (excluding the works managed by the plaintiff in the first instance) only are allowed to be performed, and there are performers who have cancelled their live shows in the Club since they have failed to obtain licenses from the plaintiff in the first instance.

Therefore, it is difficult to find that live shows where the works managed by the plaintiff in the first instance are performed have been put on in the Club on and after April 9, 2016 on the same frequency as before. Since it is found that on April 10 and May 8, 2016, live shows where the works managed by the plaintiff in the first instance are performed have been put on on the sixth floor of the Club (Exhibit Ko 75), it is presumed that live shows where the works managed by the plaintiff in the first instance are performed have been put on in the Club approximately once in a month, for 5 times in total during the period from April 8 to September 12, 2016.

(b) Therefore, the amount of damages is as follows:

140 yen × 13 pieces of music × 5 days × 1.08 = 9,100 yen × 1.08 = 9,828 yen

E. On and after September 13, 2016

As stated in the above 8., the claim on and after the date of conclusion of oral argument in the instance of examination of facts does not fulfill requirements for an action to seek future performance, and accordingly, it cannot be prevented that such claim is dismissed without prejudice.

(4) Extinctive prescription

On the date for preparatory proceedings in prior instance on February 24, 2014, the defendants in the first instance invoked against the plaintiff in the first instance the extinctive prescription for a claim for damages based on a tort arising for the period from May 23, 2009 (the date of opening of the Club) to October 30, 2010. Consequently, it is found that the aforementioned claim has been extinguished by prescription.

The defendants in the first instance is obligated to pay royalties to the plaintiff in the first instance as performers of the works managed by the plaintiff in the first instance, and have not been made such payment despite the fact that they have been aware of their obligation. It should be said that the defendants in the first instance have obtained unjust enrichment in an amount equivalent to royalties, and have acted in bad faith. Accordingly, it is reasonable to find that the defendants in the first instance are liable for the obligation to return unjust enrichment to the plaintiff in the first instance with respect to the use of the works managed by the plaintiff in the first instance in the period from May 23, 2009 to October 30, 2010 in the same amount as the obligation for damages based on a tort, as well as the obligation of payment of interest on the payment of return of unjust enrichment at the rate of 5% per annum as prescribed in the Civil Code from the day on which they have used the works managed by the plaintiff in the first instance until the day on which such payment has been made in full. It is obvious that this obligation to return unjust enrichment has not been extinguished by prescription.

The defendants in the first instance allege that they have no enrichment since they have not received music charges, but the defendants in the first instance have obtained enrichment by non-payment of royalties concerning the use of the works managed by the plaintiff in the first instance as stated above, and the fact that performers have received music charges in full does not have any influence over the above determination.

(5) Deposit

While the defendant in the first instance, Y1, has deposited 1,199,120 yen in total,

the deposit results from the refusal by the plaintiff in the first instance of receipt of payment under mutual agreement between the plaintiff in the first instance and the defendant in the first instance, Y1 on June 11, 2012 (Exhibits Otsu 58 and 59, and the entire import of the oral arguments). Based on the above, it cannot be said that the aforementioned deposit falls under the performance of the obligation for damages in this case, and the fact of the aforementioned deposit does not prevent delay damages for damages based on a tort from arising.

The defendants in the first instance also allege that delay damages will not arise since they have a justifiable right to withhold the delivery to the plaintiff in the first instance of money to be delivered to the true right holders so as to secure proper distribution of royalties to the true right holders. However, it is different if the method of distribution to trustors by the plaintiff in the first instance is extremely unreasonable and on that grounds, there is no other choice but to say that the exercise of the right is illegal, but in this case, the plaintiff in the first instance merely intends to exercise the right to the defendants in the first instance as users of the works managed by the plaintiff in the first instance based on the terms and conditions of the copyright trust agreement and the royalty rules notified to the Commissioner of the Agency for Cultural Affairs, and taking other circumstances into consideration, it cannot be found that there are justifiable grounds for the defendants in the first instance to withhold the payment of royalties to the plaintiff in the first instance.

(6) Summary

As stated in the above, the plaintiff in the first instance may demand payment of the following money from the defendants in the first instance:

A. Compensation for damage equivalent to royalties or unjust enrichment

The total amount of compensation for damage equivalent to royalties or unjust enrichment concerning the use of the works managed by the plaintiff in the first instance during the period from May 23, 2009 to September 12, 2016 is 4,965,101 yen as stated in the column of compensation for damage equivalent to royalties in the attachment 4 to this judgment.

B. Attorneys' fees

It is reasonable to find that attorneys' fees within the scope of reasonable causal relationship with the tort of infringement of copyrights in this case are 500,000 yen taking into consideration the amount upheld concerning the tort, the fact that the injunction demand has been upheld, the progress of this litigation, and any other circumstances appearing in this case.

C. Settlement

Therefore, there is a reason for a claim for payment of money made by the plaintiff in the first instance against the defendants in the first instance to the extent of seeking joint and several payment from the defendants in the first instance of 5,465,101 yen, as well as delay damages for or interest on the respective amounts listed in the column of compensation for damage equivalent to royalties in Attachment 4 to this judgment at the rate of 5% per annum as prescribed in the Civil Code from each day listed in the column of the initial date, or from April 1, 2016 on the amount of 500,000 yen, until the day on which each payment has been made in full.

10. Conclusion

Therefore, since there is a reason in part for an appeal filed by the plaintiff in the first instance, paragraphs 2 to 4 of the main text of the judgment in prior instance are modified, and since there is no reason for all appeals filed by the defendants in the first instance, it is reasonable that such appeals are dismissed without prejudice.

Consequently, the judgment is rendered as stated in the main text.

Intellectual Property High Court, Fourth Division

Presiding judge: TAKABE Makiko

Judge: FURUKAWA Kenichi

Judge: SUZUKI Wakana