Date	November 2, 2016	Court	Intellectual Property High Court, Fourth Division
Case number	2016 (Ne) 10029, 10064		

– Given that the appellant sold the CD made by reproducing the master to rental shops and distributed the musical pieces based on the subcontract with Company X, which had been in contract with the appellee who holds neighboring rights as a phonogram producer and as a performer, the appellant had the duty of care under the rule of reason to confirm whether the appellee had granted authorization for such sale and distribution.

– A case in which, under Article 114-5 of the Copyright Act, the court determined the number of times of unauthorized distribution of the musical pieces, based on the entire import of oral argument and the results of examination of evidence.

References: Article 92-2, paragraph (1), Article 96, Article 96-2, Article 97-2, paragraph (1), Article 97-3, paragraph (1), Article 114, paragraph (2), and Article 114-5 of the Copyright Act

Summary of the Judgment

1. In this case, the appellee alleged against the appellant that the appellant sells the CD made by reproducing the master in question ("Master") to rental shops and distributes the musical pieces ("Musical Pieces") and thereby infringes the neighboring rights held by the appellee as a phonogram producer (right of reproduction, right to rent out, right of transfer, and right to make available for transmission) regarding the Master and the neighboring right held by the same as a performer (right to make available for transmission) regarding the Musical Pieces, and based on these allegations, the appellee sought: [i] payment of damages under Article 709 of the Civil Code (Article 114, paragraph (2) of the Copyright Act); [ii] payment of damages under Article 709 of the Civil Code for discontinuing the production of the CD and infringing the appellee's ownership for the Master, the CD (including its jacket), and posters, etc.; and [iii] payment of the total damages concerning the legal fees payable for consultation regarding the claims in [i] and [ii] under Article 709 of the Civil Code, with delay damages accrued thereon.

The court of prior instance partially upheld the claim in [i] on the grounds that the appellant infringed the neighboring rights held by the appellee as a phonogram producer, while dismissing all the other claims of the appellee.

Dissatisfied with this, the appellant filed an appeal to the higher court. The appellee filed an incidental appeal and expanded its claim in the appellate instance.

2. In this judgment, the court, holding as summarized below, determined that the

appellant, jointly with Company X and others, infringed the right of reproduction, right of transfer, right to rent out, and right to make available for transmission held by the appellee as a phonogram producer, as well as the right to make available for transmission held by the same as a performer, and thus they are liable for joint tort, and dismissed the appellant's appeal. Based on the appellee's incidental appeal, the court modified the amount of damage awarded by the court of prior instance, while dismissing all the other claims of the appellee.

(1) In light of the fact that the proposal in question ("Proposal") prepared by Company X upon entering into the subcontract in question ("Subcontract") contains statements of "Copyright: to be settled" and "Master producer: Kabushiki Kaisha Noah Corporation," it can be presumed that the appellant, at the time of entering into the Subcontract, knew that Company X did not have the copyright or neighboring rights for the Master.

The appellant's acts of selling the CD to rental shops and distributing the Musical Pieces constitute acts of infringing the copyright or neighboring rights unless authorized by the holder of the copyright or neighboring rights. Since the appellant is one of the largest general satellite broadcasting companies in Japan, it is supposed to sell CDs to rental shops and distribute musical pieces, as part of its routine business activities, with authorization of the respective holders of copyrights or neighboring rights. On the other hand, Company X is a stock company engaged in making proposals on sound sources of music contents, and it is a relatively small company capitalized at 4 million yen. Taking into consideration the time of concluding the Subcontract, it is presumed that the appellant and Company X had only had a few transactions with each other by the time they entered into the Subcontract. In addition, it is considered that the appellant could have confirmed the licensing relationship regarding the Master between the appellee, which is indicated as the master producer in the Proposal, and Company X, and if the appellant had confirmed this, it could have clearly learned that the appellee had not granted authorization for the sale of the CD to rental shops or to distribute the Musical Pieces, and could have avoided infringing the appellee's neighboring rights by subsequently refraining from engaging in such sale and distribution.

According to the above, it is appropriate to construe that the appellant, when engaging in selling the CD to rental shops and distributing the Musical Pieces, has the duty of care under the rule of reason to confirm whether the appellee had granted authorization for such sale and distribution.

It is not found from the evidence of the case that the appellant, when engaging in

selling the CD to rental shops and distributing the Musical Pieces, confirmed whether the appellee had granted authorization for such sale and distribution.

Consequently, the appellant, in breach of its duty of care under the rule of reason, sold the CD made by Company X by reproducing the Master to rental shops, and distributed the Musical Pieces via online music distribution companies, and thus the appellant is at least found to have committed negligence by engaging in such reproduction, sale, and distribution without the appellee's authorization.

(2) Under Article 114-5 of the Copyright Act, the court found that the number of times of unauthorized distribution of the Musical Pieces until the date of conclusion of oral proceedings in the fact-finding instance is 400, based on the entire import of oral argument and the results of examination of evidence.

It is presumed that the amount of sales proceeds from the distribution of the Musical Pieces differs for each distribution company (based on the commissioned examination), and also differs depending on the distribution method.

Based on the result of the commissioned examination, the court found that the average amount of money received by the appellant per distribution is around 146 yen.

Consequently, the amount of damage from unauthorized distribution of the Musical Pieces comes to 39,071 yen, as calculated by deducting 19,329 yen (the amount already paid) from 58,400 yen (146 yen multiplied by 400).

Under Article 114, paragraph (2) of the Copyright Act, the amount of damage from infringement of the right of reproduction and right of transfer held by the appellee as a phonogram producer is presumed to be 4,952 yen, and the amount of damage from infringement of the right to rent out held by the same as a performer is presumed to be 2,000 yen, respectively.