Decided on	December 15, 2008	Court	Intellectual Property High Court, Fourth Division
Case number	2008 (Ne) 10059		

- A case in which the court ruled that the following acts of the respondent do not constitute public transmission: (1) installing a large number of "base stations" in the respondent's place of business, and then; (2) supplying power to this large number of "base stations," starting them, and making necessary settings including change of the port number; (3) connecting an television antenna with this large number of "base stations" using a wired telecommunications line via the booster and distributor procured by the respondent to supply the programs in question received by the television antenna to this large number of "base stations;" (4) connecting this large number of "base stations" to the Internet using a connected line procured by the respondent via routers, LAN cables, and hubs that were procured by the respondent and for which the necessary settings were made by the respondent, and; (5) maintaining the aforementioned state.
- It is reasonable to understand that the "direct reception by the public" pertaining to the provisions of Article 2, paragraph (1), item (vii-2) of the Copyright Act means a state in which each member of the public who received transmissions intended for the public (unspecified or many persons) (regardless of whether the individual members of the public receive them at the same time or not) can perceive the content of the works by viewing them, for example.
- A case in which the court ruled that a device that has a function of performing "one-on-one" transmissions only (the "base station") cannot be said to constitute an automatic public transmission server, a device that has a function of performing transmission by wireless communications or wired telecommunications intended for direct reception by unspecified persons or a large number of persons

References: Article 2, paragraph (1), item (vii-2) and item (ix-5), Article 23, paragraph (1), and Article 99-2 of the Copyright Act

In this case, the appellants, who are broadcasting organizations engaging in terrestrial television broadcasting at frequencies stated in the separate Lists of Broadcasts 1 to 7 (omitted) (hereafter, the broadcasts stated in the separate Lists of Broadcasts 1 to 7 are collectively referred to as "the Broadcast"), against the respondent who provides services that enable persons who concluded contracts with the respondent to watch television programs via an Internet connection under the name "Maneki television" (hereafter, "the Services"), asserted that the Services provided by the respondent infringe on the right to make transmittable (neighboring

right; Article 99-2 of the Copyright Act) held by the appellants as broadcasting organizations pertaining to the Broadcasts and the rights of public transmission (copyright; Article 23, paragraph (1) of the Copyright Act) held by the appellants as copyright holders pertaining to individual works stated in the separate Lists of Broadcasts 1 to 7 (omitted) (hereafter, the programs stated in the separate Lists of Broadcasts 1 to 7 are collectively referred to as "the Programs"), thereby seeking injunction of the acts of making the Broadcasts transmittable and of public transmission of the Programs in accordance with Article 112, paragraph (1) of the Copyright Act and demanding payment of compensation of damages caused by the infringement of the copyright and neighboring right (and incidentally demanding payment of delay damages at 5% per year for the period from the date after the tortious act, which is March 15, 2007, until the date of completion of the payment) in accordance with Article 709 of the Civil Code and Article 114, paragraph (2) of the Copyright Act.

The judgment in prior instance rejected the respondent's assertion that the action in question constitutes an abuse of the right to take legal action, but dismissed the requests from the appellants, holding that the acts of the respondent in the Services do not constitute an act of enabling transmission prescribed in Article 2, paragraph (1), item (ix-5), (a) or (b) of the Copyright Act and do not constitute the act of public transmission prescribed in Article 2, paragraph (1), (vii-2) of the Copyright Act, either.

In the court of second instance, the appellants made the assertions summarized as follows and the respondents disputed these assertions.

1. About the act of public transmission

(1) The judgment in prior instance, on the grounds that "it is apparent in light of common general knowledge that: the antenna (terminal) does not have a function to transmit to other machines on its own, but constitutes part of receiving equipment by being connected to a receiver thereof; although the booster has a function to amplify electric signals, its role is only to communicate broadcast waves from the antenna terminal, and the booster itself does not function to transmit to other machines on its own, and; the distributor does not function to transmit to other machines on its own but only splits a single electric supply line from the antenna to connect it to a plurality of electric supply lines and adjusts the resistance for the connection in order to allow multiple receivers to share the antenna, and the distributor itself does not

function to transmit to other machines on its own," ruled that "it is reasonable to recognize that the defendant's act of connecting the antenna terminal with the base stations via the booster and distributor is an act of merely providing physical equipment aimed at having the base stations receive broadcast waves, and therefore, does not constitute an act of transmission."

However, the respondent's act of amplifying broadcast signals received by the antenna (terminal) with the booster and transmitting the said amplified broadcast signals to a large number of base stations using a wired telecommunications line via the distributer, which was performed in the Services, constitutes the "transmission by wired telecommunications" stated in Article 2, paragraph (1), item (vii-2) of the Copyright Act, and therefore, there is an error the judgment in prior instance which determined that the said act by the respondent does not constitute an act of transmission.

(2) The judgment in prior instance states, based on the determination that the actor of transmission from the base station to each user's personal computer is each user, that "the defendant, so to say, is only transporting the broadcast waves (electric signals) of the Broadcasts by connecting between the plaintiffs and each user as the actor of transmission to the receiver (dedicated monitors or personal computers of the users), and the said act by the defendant is not 'intended for direct reception by the public'."

However, while transmission to a "receiving apparatus" used by the public is required for recognition as "intended for direct reception by the public," based on the logic that the actor of reception from and transmission to the base station is each user, which applies in the judgment in prior instance, it is apparent that, because the respondent transmits, for the Services, the Broadcasts to base stations as the receiving apparatuses used by individual users, the respondent's act of transmission from the antenna to the base stations, which is performed in the Services, is "intended for direct reception by the public," and therefore, the determination of the judgment in prior instance is erroneous.

(3) While it is apparent that the transmission by the respondent from the antenna to the base stations is a "transmission by wired telecommunications" that is "intended for direct reception by the public," even if the respondent's act of transmission constitutes a "transmission by wired telecommunications" that is "intended for direct reception by the public," there is expected to be a counterargument that the said act does not constitute a "public transmission" stated in Article 2, paragraph (1), item (vii-2) of the Copyright Act on the ground that the said act falls under "transmissions … by telecommunication facilities, one part of which is located on the same premises

where all remaining parts are located or, if the premises are occupied by two or more persons, all parts of which are located within the area (within such premises) occupied by the same person(s)" which is stated in the proviso of the said item. However, this interpretation is impossible because the above proviso is an exceptional provision set up in consideration of the fact that, in a concert venue, for example, it is unreasonable to define a performance with two different concepts by dividing it into an act of delivering sounds directly from the musical instruments to the ears, which is defined as performance, and an act of delivering sounds via speakers, which is defined as public transmission.

2. About the act of enabling transmission

(1) In examining the actor of transmission in the Services, the judgment in prior instance did not directly examine who engages in the acts of "inputting" and "connection," but made comprehensive considerations by referring to other secondary, indirect circumstances.

However, the Services have caused a state in which the Broadcasts are automatically transmitted upon request from each user through the acts prescribed in Article 2, paragraph (1), item (ix-5), (a) or (b) of the Copyright Act (that is, "inputting" and "act of connection"). Therefore, in determining the actor of the transmission of the Broadcasts in the Services, it necessary to examine, first of all, who engages in the acts of "inputting" and "connection" that are prescribed in Article 2, paragraph (1), item (ix-5), (a) and (b) of the Copyright Act.

The respondent's acts of amplifying broadcast signals received by the antenna with the booster and transmitting the said amplified broadcast signals to a large number of base stations by using a wired telecommunications line via the distributor constitute an act of transmission by the respondent, and it is apparent that the inflow of broadcast signals to the base stations, which is caused by this act of transmission by the respondent, should be recognized as an act of "inputting" by the respondent (this is also apparent, in the first place, from the fact that a typical act of "inputting" for making broadcasts transmittable is performed by connecting an automatic public transmission server directly to an antenna or an antenna terminal simply via a single cable without using a booster or a distributor.).

And, because there is no dispute over the point that the respondent engages in an act of "connection" to the Internet, which is prescribed in Article 2, paragraph (1), item (ix-5), (b) of the Copyright Act, the respondent is engaging in the acts prescribed in Article 2, paragraph (1), item (ix-5), (a) and (b) of the Copyright Act.

The part of the judgment in prior instance that examines the “imputing” and “connection” is unreasonable in the first place in that it overlooks the point that these acts fall under the acts stated in the provisions defining “to make transmittable”. In addition, in examining the actor of the transmission in the lawsuit in question as part of the examination processes, the judgment in prior instance makes comprehensive consideration by referring particularly to other meaningless circumstances, and therefore, is unreasonable on this point, too.

(2) The judgment in prior instance ruled that:

“Automatic public transmission of broadcast data is possible only when the broadcast data has been converted into digital data, and as long as the data remains analogue broadcast waves, it cannot be “transmitted” via the Internet connection. Therefore, even if the connection between the antenna terminal and the base stations causes the inflow of analogue broadcast waves into the base stations, the said inflow of the broadcast waves cannot be said to have enabled the automatic public transmission. In addition, in light of the fact that, in the Services, the analogue broadcast waves are converted into digital data and made ready to be transmitted only when selected by a user, it cannot be said that the defendant is inputting broadcast data for automatic public transmission to the base stations.”

However, according to the provisions defining automatic public transmission and “to make transmittable” (Article 2, paragraph (1), item (ix-4) and item (ix-5), (a) of the Copyright Act), “to make transmittable” by the “inputting” of “information” means “creating a state in which information can be automatically transmitted to the public in response to a request from the public by means of inputting information into an automatic public transmission server”

Therefore, even if the “input” information takes the form of analogue broadcast waves, the “information” (programs that are works and content of broadcasts) is not changed at all but remains completely identical before and after conversion to digital data, and as long as the said information is “automatically” converted into digital data and transmitted at the request of each user, it completely matches the definition of “to make transmittable” prescribed in detail in Article 2, paragraph (1), item (ix-5), (a) of the Copyright Act.

Accordingly, it should be said that, even if analogue broadcast waves are transmitted after being converted into digital data, the act by the respondent constitutes the “inputting” of the “information” as stated in Article 2, paragraph (1), item (ix-5), (a) of the Copyright Act, and the interpretation by the judgment in prior instance is in error.

(3) With respect to whether or not a device falls under an automatic public transmission server, the judgment in prior instance adopted the stance that a determination would be made for each case in which the said device is used, and then ruled that the base stations do not constitute "automatic public transmission servers."

However, it should be said that the actor of "to make transmittable" and acts of transmissions thereafter in Services is the respondent, and from the viewpoint of the respondent as the actor of the said "to make transmittable" and acts of transmissions, there are "unspecified" and "a large number of" users as the destinations of the transmissions.

Accordingly, the base stations in the Services constitute "automatic public transmission servers" even when taking the same stance as the judgment in prior instance with respect to whether or not a device falls under an automatic public transmission server, that is, the stance that determinations are to be made for individual cases in which the said device is used.

(4) With regard to the plaintiff's selective assertion that "the entire system in the defendant's place of business constitutes an automatic public transmission server, and the defendant has been controlling it to engage in an act of enabling transmission," the judgment in prior instance ruled that:

"The transmissions performed by each base station are directed from the base station owned by each user to an address specified in advance by the said user, at the request of each user, and transmissions from each base station are performed independently. Therefore, even if the machines related to the Services are seen as a whole, it cannot be said that transmissions are performed to unspecified persons or a large number of specified persons."

However, if the machines related to the Services are seen as a single device, as stated in the judgment in prior instance, transmissions are performed from a single device to a large number of specified persons (74 persons as of July 29, 2007, in accordance with the findings of the judgment in prior instance). Therefore, it should be impossible to deny the fact that automatic public transmissions are being performed, and the determination of the judgment in prior instance is inconsistent.

In this judgment, the court dismissed the appeal by ruling as follows.

1. About the act of enabling transmission

(1) While "to make transmittable" assumes use of an automatic public transmission server, the "automatic public transmission server" means a device which, when connected with a telecommunications line provided for use by the public, functions

to perform automatic public transmission of information which is either recorded on the public transmission recording medium of the transmission recording medium of such device or is inputted into such automatic public transmission server (Article 2, paragraph (1), item (ix-5), (a) of the Copyright Act), and "automatic public transmission" means "public transmission" (that is, the transmission, by wireless communications or wired telecommunications, intended for direct reception by the public) which occurs automatically in response to a request from the public (Article 2, paragraph (1), item (vii-2) and item (ix-4) of the Copyright Act). Therefore, in light of the meaning of "public transmission," an "automatic public transmission server" must be a device which performs transmission, by wireless communications or wired telecommunications, intended for direct reception by the public (unspecified persons or a large number of specified persons; see Article 2, paragraph (5) of the Copyright Act).

In the Services, there exists one base station per user, which is under the ownership of each user, and each base station only has a function of performing transmissions to a single address specified in advance. The said address is set in a dedicated monitor or a personal computer that has been separately installed by the user who owns each base station, and the base station performs transmissions, at the instruction of each user, only to a dedicated monitor or a personal computer that was installed by the said user (in each base station, analogue broadcast waves that flow in via the television antenna are converted into digital data at the instruction of the said user, and the said digital data pertaining to the broadcast is transmitted from each base station only to a dedicated monitor or a personal computer that was installed by the said user). In other words, each base station can perform transmissions only to a specified single dedicated monitor or personal computer, and the base station only has a function of performing so-called "one-on-one" transmissions. This means that each base station cannot be said to be a device that performs transmission, by wireless communications or wired telecommunications, intended for direct reception by unspecified persons or a large number of specified persons, and therefore, the base station cannot be said to constitute an automatic public transmission server.

(2) About the assertions by the appellants

A. The appellants assert that, while whether a transmission is made to the "public" or not is determined not by whether or not the transmission is made to unspecified persons or a large number of specified persons from the viewpoint of the machine such as a server but by whether or not the transmission is made to unspecified persons or a large number of specified persons from the viewpoint of the person who

engages in the act of transmission, it is the respondent who transmits the broadcast programs to the users in the Services, and such users are unspecified by the respondent and therefore constituting the "public," and therefore, the fact that the base station is only capable of performing "one-on-one" transmissions does not provide grounds for denying that the base station constitutes an automatic public transmission server.

As mentioned above, however, an automatic public transmission server must be a device with a function of performing transmissions intended for direct reception by the public, and "to perform transmissions intended for direct reception by the public (unspecified persons or a large number of specified persons)" is required as a function of an automatic public transmission server. Therefore, whether or not they are unspecified persons or a large number of specified persons should be determined from the viewpoint of the person who engages in the act of transmission. In addition, even if it is assumed that, in the Services, the broadcast programs are transmitted to users by the respondent, if each base station is compared to an automatic public transmission server, each base station must be recognized as having a function of performing transmissions intended for direct reception by persons who are unspecified by the respondent or a large number of specified persons for the respondent. And, as mentioned above, the base station performs transmissions, at the instruction of the user who owns the said base station, only to a dedicated monitor or a personal computer that was installed by the said user, and ... the said user (the owner of the said base station) is a person who has concluded a contract concerning the Services with the respondent, and as a part of the said contract, has brought in or sent the said base station to the respondent's place of business (the "data center"). Therefore, it is apparent that such a person cannot be said to be an unspecified person or a large number of specified persons. Accordingly, the assertion by the appellants is unreasonable.

B. The appellants also assert that the entire system in the respondent's data center, including the base stations, constitutes a single "device" consisting of machines that were collected under a specific concept and are organically connected with each other, and with regard to the system in question, the entire system in the respondent's place of business constitutes an automatic public transmission server, which the respondent controls as a unit, while the transmissions that the respondent performs by using the system in question are intended for unspecified persons or a large number of specified persons (users) who made applications to, and sent their base stations to, the respondent, and therefore, the said transmissions constitute an act of

enabling transmission.

However, the base station, which becomes the source of transmissions of digital broadcast data pertaining to the Services and which is a machine that specifies a single address to perform the said transmissions to and generates data to be transmitted, does not have any organic relationship or inter-linkage with other base stations in the entire system in question (for example, eliminating a base station due to the termination of a contract, etc. with the user does not have any influence on the other base stations), and in that sense, transmissions from each base station are performed independently. Therefore, it should be said there is no reason at all to regard multiple base stations, which are originally separate machines, as being integrated into a single “device.”

C. The appellants, after asserting that whether a device constitutes an automatic public transmission server or not should be determined based only on the objective functions of the said device, asserted that, in a case in which persons who are regarded as unspecified persons or a large number of specified persons from the viewpoint of the person performing transmissions using base stations possess dedicated monitors or personal computers, etc. that are paired with the base stations, it means that automatic public transmissions are performed by the said base stations, and therefore, the base stations, as machines having such a function, constitute automatic public transmission servers, referring, as an example, to a service in which an entrepreneur purchases a large number of base stations and monitors to be paired with the base stations in advance, installs the base stations in its place of business, makes necessary settings, and lends the said monitor each time an application is made by a customer.

However, even in the case of the above example given by the appellants, transmissions from each base station are performed only to the corresponding monitor installed by a specified person who has concluded a lease contract (or a contract including leasing) with the said entrepreneur, and therefore, even if the actor of the transmissions is the said entrepreneur, it cannot be said that each base station functions to perform transmissions intended for direct reception by persons who are regarded as unspecified persons or a large number of specified persons from the viewpoint of the said entrepreneur, and the said each base station cannot be said to constitute an automatic public transmission server, which is the same as the aforementioned… . In addition, it is not clear what other examples can be assumed as examples of “a case in which persons who are regarded as unspecified persons or a large number of specified persons from the viewpoint of the person performing

transmissions by using base stations possess dedicated monitors or personal computers, etc. that are paired with the base stations" pertaining to the appellants' assertions. Accordingly, the above assertion by the appellants cannot be adopted.

(3) In light of the above, because "to make transmittable" assumes use of an automatic public transmission server, as mentioned above, the respondent is not recognized as engaging in an act of enabling transmissions in the Services, without making determinations concerning the other points.

2. About the act of public transmission

(1) The appellants assert that, in the Services, the respondent engages in the acts of (1) installing a large number of base stations in the respondent's place of business, and then; (2) supplying power to this large number of base stations, starting them, and making necessary settings including change of the port number; (3) connecting an television antenna with this large number of base stations by using a wired telecommunications line via the booster and distributor procured by the respondent in order to supply the Programs received by the television antenna to this large number of base stations; (4) connecting this large number of base stations to the Internet by using a connected line procured by the respondent via routers, LAN cables, and hubs which were procured by the respondent and for which necessary settings were made by the respondent, and; (5) maintaining the aforementioned state; and the entire transmission of the Programs from the television antenna to a large number of unspecified users, which is enabled by the aforementioned acts (1) to (5) by the respondent, constitutes an act of public transmission, as transmissions by wired telecommunications intended for direct reception by the public (hereafter referred to as the "Assertion about Public Transmission A"). The appellants also assert that, in the Services, the respondent amplifies the broadcast signals from the antenna terminal in the respondent's place of business, which is connected to the television antenna, by supplying the said signals to the booster procured by the respondent, and supplies the amplified broadcast signals to a large number of base stations by using the wired telecommunications line via the distributor procured by the respondent, in order to supply the Programs received by the television antenna to the large number of base stations, and these acts by the respondent themselves constitute an act of public transmission (hereafter referred to as the "Assertion about Public Transmission B").

While Article 23, paragraph (1) of the Copyright Act stipulates that "The author shall have the exclusive right to effect a public transmission of his work (including,

in the case of automatic public transmission, making his work transmittable).,” the Assertions about Public Transmission A and B by the appellants say that the above acts by the respondent infringe on the appellants’ rights over the Programs prescribed in the said paragraph (rights of public transmission).

(2) The Copyright Act stipulates that the “public transmission” means the transmission, by wireless communications or wired telecommunications, intended for direct reception by the public (unspecified persons or a large number of specified persons) (Article 2, paragraph (1), item (vii-2)), and the said paragraph prescribes “broadcast” (item (viii)), “wired broadcast” (item (ix-2)), and “automatic public transmission” (item (ix-4)) as types of public transmission (this does not mean, however, that types of “public transmission” are limited to these three).

A. If the appellants’ Assertion about Public Transmission A focuses on the transmission from base stations to users and holds that such transmissions constitute an act of public transmission which is an “automatic public transmission,” each base station does not constitute an automatic public transmission server in the Services and the entire system pertaining the Services cannot be seen as a single “device” or said to be an automatic public transmission server, as explained in the above section 3, and therefore, it is apparent that transmissions from each base station used for the Services do not constitute acts of public transmission, which is an “automatic public transmission” and, with respect to each base station, an act of “enabling transmissions” cannot be said to be performed, either. Therefore, the appellants’ Assertion about Public Transmission A is unreasonable.

Even if the appellants’ Assertion about Public Transmission A, based on the assumption that the respondent is the actor of transmissions of the broadcast programs to users in the Services, perceives the Services as the respondent’s acts of transmission of the Programs received by the television antenna to a large number of users on the Internet via the booster, distributor, base stations, hubs, etc. and asserts that such acts constitute acts of public transmission, which is an “wired broadcast,” the presence or absence of the transmission of digital data from each base station located in the respondent’s place of business to corresponding dedicated monitor or personal computer of each user depends entirely on each user (it is naturally likely, however, that individual instructions by a large number of users result in simultaneous reception of identical digital data, ... but the respondent per se is not involved in the determination over whether to transmit digital data to a dedicated monitor or personal computer of each user or not, and therefore, it is apparent that the respondent cannot be said to be an actor of transmissions pertaining to wired

broadcast that is “the form of public transmission involving a transmission transmitted by wired telecommunications intended for simultaneous reception of identical content by the public”). Therefore, it must be said that the appellants’ Assertion about Public Transmission A is unreasonable.

B. It is understood that the “act of public transmission” pertaining to the appellants’ Assertion about Public Transmission B means wired broadcast.

(a) Article 2, paragraph (1), item (vii-2) of the Copyright Act defines “public transmission” as “the transmission, by wireless communications or wired telecommunications, intended for direct reception by the public; excluding, however, transmissions (other than transmissions of a computer program work) by telecommunication facilities, one part of which is located on the same premises where all remaining parts are located or, if the premises are occupied by two or more persons, all parts of which are located within the area (within such premises) occupied by the same person(s).”

However, while the Copyright Act has no provision defining the meaning of “transmission,” it can be thought to be transmission of information in signals in light of the conventional meaning of the word, and the said signals include not only analogue signals but also digital ones. In addition, it is reasonable to understand that “transmission” as mentioned in the Copyright Act includes not only the act of being the source of transmission of signals, but also the act of transmitting received signals to other receivers.

On the other hand, the Copyright Act has no provision defining the meaning of “reception,” either, but given that the word “reception” therein is used as the counterpart of the aforementioned “transmission” based on the idea that the concept of “reception” is the counterpart of that of “transmission,” it should be understood that “reception” means “to receive transmitted signals.”

Article 23, paragraph (2) of the Copyright Act stipulates that “The author shall have the exclusive right to communicate publicly any work of his which has been publicly transmitted, by means of a receiving apparatus receiving such public transmission.” Therefore, under the Copyright Act, the “receiving apparatus” is positioned as a means to “communicate publicly” and deemed to function to create a state in which information can be perceived through viewing, etc. in order to communicate the information publicly. However, it should be understood that the use of the words “to communicate publicly” in the said paragraph means that the necessary functions other than “receiving” are added to the “receiving apparatus” (in other words, limitation is given to the concept of “receiving apparatus”). Therefore,

the above provisions of the said paragraph does not allow it to be understood that some general limitation other than the aforementioned "to receive transmitted signals" is given to the concept of "reception" under the Copyright Act.

(b) Past changes to the provisions of the Copyright Act concerning the current "public transmission" show that ... while the Copyright Act has been stipulating since its establishment that the author shall possess the exclusive right to broadcast or wired broadcast any work of the author. Later, however, as a response to the dissemination of new forms of transmissions that are not categorized only as simultaneous transmissions such as broadcast and wired broadcast, which resulted from the development and diversification of communications technologies, the Copyright Act introduced the concept of "public transmission" in its amendment with Act No.86 of 1997 after the amendment with Act No.64 of 1986, and as the subordinate concepts of "public transmission," defined the transmission "involving a transmission intended for simultaneous reception of identical content by the public" as "broadcast" and "wired broadcast," defined the transmission "which occurs automatically in response to a request from the public" such as interactive transmission as "automatic public transmission," and at the same time, defined an act of completing preparations regarding the automatic public transmission server and making it ready to perform automatic public transmission as "to make transmittable" and stipulates that the author shall possess the exclusive right to perform public transmission (it is stipulated that public transmission therein includes "to make transmittable" as well as "broadcast," "wired broadcast," and "automatic public transmission" as defined originally) of any work of his.

On the other hand,... since its establishment, the Copyright Act has been defining broadcast and wired broadcast as being "intended for direct reception by the public," and when the Copyright Act introduced the concept of "public transmission" in its amendment with Act No. 86 of 1997 after the amendment with Act No. 64 of 1986, it organized "broadcast," "wired broadcast," and "automatic public transmission" as subordinate concepts of "public transmission" and defined "public transmission," which is the superordinate concept, as being "intended for direct reception by the public." This means that "being intended for direct reception by the public" refers to the characteristics common to public transmissions including the newly added "automatic public transmission" as well as "broadcast" and "wired broadcast," which has been defined as being "intended for direct reception by the public" from the beginning.

(c) The aforementioned ... amendment of the Copyright Act with Act No.86 of

1997 was made as a response to the provisions of Article 8 of the WIPO Copyright Treaty, which reads "Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wired or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

Further, when the part of the aforementioned provisions of the of Article 8 of the WIPO Copyright Treaty, which reads "authors ... shall enjoy the exclusive right of authorizing any communication to the public of their works, by wired or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them," are compared with the aforementioned process of organization of concepts in the Copyright Act ..., it is apparent that the content of the provisions of Article 8 of the WIPO Copyright Treaty should be referred to sufficiently when interpreting the provisions of items in Article 2, paragraph (1) and Article 23, etc. of the Copyright Act after its amendment with Act No. 86 of 1997.

However, as mentioned above, the proviso of Article 8 of the WIPO Copyright Treaty expresses completion of the act of preparations for public transmission (reception and transmission) pertaining to interactive transmission as "the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." If this is the case, the communication to the public (reception and transmission) itself pertaining to interactive transmission should mean "access to works from a place and at a time individually chosen by the public." Therefore, access to the said works by the public is a necessary result of communication to the public (transmission and reception), and it can be understood that this means the occurrence of a state in which each member of the public who received the transmission is capable of perceiving the content of the said works by viewing, etc. the works. Further, there is no reason that such an implication pertaining to communication to the public (reception and transmission) should be limited to communication to the public (reception and transmission) pertaining to interactive transmission, and communication to the public (reception and transmission) pertaining to broadcast and wired broadcast should be understood in the same manner. Therefore, after all, it is reasonable to understand that the "communication to the public of their works, by

wired or wireless means" stated in the said Article refers to the occurrence of a state in which each member of the public who received the transmission to the public by wired or wireless means (regardless of whether the individual members of the public receive the transmission at the same time or not) is capable of perceiving the content of the said works by viewing, etc. the works. It can be understood that the occurrence of a state in which each member of the public who received the transmission is capable of perceiving the content of the said works by viewing etc. the works is a characteristics that is common across broadcast, wired broadcast, and interactive transmission.

(d) As mentioned above, the content of the provisions of Article 8 of the WIPO Copyright Treaty should be referred to sufficiently when interpreting the provisions of items in Article 2, paragraph (1) and Article23, etc. of the Copyright Act after its amendment with Act No. 86 of 1997. It can also be said from the above that the provisions of the Copyright Act after its amendment with Act No. 86 of 1997 that the author shall have the exclusive right to effect a public transmission of his work correspond to the provisions of Article 8 of the WIPO Copyright Treaty that the author has the rights to exclude concerning the "communication to the public by wired or wireless means" in general with regard to their works. Further, in Article 8 of the WIPO Copyright Treaty, it is stipulated that the occurrence of a state in which each member of the public who received the transmission is capable of perceiving the content of the said works by viewing, etc. the works is a common characteristics of "communication to the public of their works, by wired or wireless means" via broadcast, wired broadcast, and interactive transmission, and on the other hand, as mentioned above, under the Copyright Act, being "intended for direct reception by the public" is stipulated as a common characteristics of public transmissions via broadcast, wired broadcast, and automatic public transmission. Therefore, it is reasonable to understand that "direct reception by the public" pertaining to Article 2, paragraph (1), item (vii-2) of the Copyright Act refers to the occurrence of a state in which each member of the public who received the transmission to the public (unspecified persons or a large number of persons) by wired or wireless means (regardless of whether the individual members of the public receive the transmission at the same time or not) is capable of perceiving the content of the said works by viewing, etc. the works (on reflection, the same interpretation should be made of the meaning of "direct reception by the public" stated in the provisions of Article 2, paragraph (1), item (viii) of the Copyright Act concerning the definition of "broadcast" and provisions of item (xvii) of the said paragraph concerning the

definition of “wired transmission” prior to its amendment with Act No. 86 of 1997, and the provisions of Article 2, paragraph (1), item (xvii) concerning the definition of “wired broadcast” prior to its amendment with Act No. 64 of 1986. The same applies to the meaning of “direct reception by the public” pertaining to the definition of “wired broadcast” stated in the part in proviso of Article 2, paragraph (1) of the Cable Television Broadcast Act.

Based on this understanding, provisions of Article 23, paragraph (2) of the Copyright Act concerning the “right to communicate publicly any work of his which has been publicly transmitted, by means of a receiving apparatus receiving such public transmission” (rights of public communication) in light of the provisions of paragraph (1) of the same Article concerning rights of public transmission is understood as stipulating that the process until the occurrence of the state in which a member of the public who received public transmission becomes capable of perceiving the content of the work shall be the category that becomes the object of the rights of public communication, and an act by such member of the public of communicating the work publicly is regarded as the object of the rights of public communication, thereby expanding the author’s rights to exclude to cover such an act, and consequently, expanding the author’s rights to the end of the communication channel of the works.

(e) While, as the appellants assert, in the Services, the respondent engages in the acts of: (1) installing a large number of base stations in the respondent’s place of business, and then; (2) supplying power to this large number of base stations, starting them, and making necessary settings including change of the port number; (3) connecting an television antenna with this large number of base stations by using a wired telecommunications line via the booster and distributor procured by the respondent in order to supply the Programs received by the television antenna to this large number of base stations; (4) connecting this large number of base stations to the Internet by using a connected line procured by the respondent via routers, LAN cables, and hubs that were procured by the respondent and for which the necessary settings were made by the respondent, and; (5) maintaining the aforementioned state; and due to these acts, analogue broadcast waves pertaining to the Programs received by the television antenna flow into each base station via wired telecommunications lines, if the general meanings of “transmission” and “reception” mentioned in ... above are assumed, it should be said that the act of transmitting the analogue broadcast waves pertaining to the Programs from the television antenna to each base station via wired telecommunications lines constitutes the “transmission by wired

telecommunications" stated in Article 2, paragraph (1), item (vii-2) of the Copyright Act, and the reception of inflows of the aforementioned analogue broadcast waves by each base station itself constitutes the "reception" stated in the said item. And, it is apparent that the actor of the aforementioned "transmission by wired telecommunications" is the respondent.

However, the appellants assert that, based on the logic that the actor of reception from and transmission to the base stations is each user, which is applied by the judgment in prior instance, in the Services, the respondent is transmitting the Programs to the base stations used by individual users as receiving apparatuses, and therefore, the respondent's act of transmission from the antenna to base stations in the Services is "intended for direct reception by the public." And, ... while the number of users of the Services is 74 and the number of base stations installed in the respondent's place of business is also 74, as of July 29, 2007, if each user is the actor of reception of the aforementioned analogue broadcast waves with each base station, it can be said in light of the number of users mentioned above that the transmission of the aforementioned analogue broadcast waves from the television antenna to each base station constitutes the transmission by wired telecommunications intended for direct reception by a large number of specified persons (that is, the public).

However, as mentioned ... above, the base station incorporates a television tuner and, in response to instructions from the corresponding dedicated monitor or personal computer, etc., outputs the analogue broadcast waves input from the television antenna by converting them into digital data, and automatically transmits the said digital broadcast data to the said dedicated monitor or personal computer, etc. via the Internet, while it is only when each user sends an instruction for connection to the base station from a dedicated monitor or personal computer, etc. and has the dedicated monitor or personal computer, etc. receive the digital broadcast data transmitted by the base station in response to the said instruction that each user becomes capable of perceiving the content of the Programs by viewing them, etc. That is, the respondent's act of transmitting the analogue broadcast waves pertaining to the Programs from the television antenna to each base station and each user's act of receiving them with the base station of each do not, by themselves, create a state in which each user (each member of the public) is capable of perceiving the content of the Programs by viewing them, etc.

Therefore, the aforementioned act of transmission by the respondent cannot be said to be intended for "direct reception by the public," and therefore, cannot be said to be public transmission (wired broadcast). Accordingly, it must be said that the

appellants' Assertion about Public Transmission B is unreasonable.

(3) About the appellants' assertions

A. The appellants assert that, while the term "indirect" used in laws means that a third party is mediating, it is the respondent who performs "transmission by wired telecommunications" from the antenna to the base station in the Services, and in accordance with the judgment in prior instance, it is each user who is the actor of the acts of receiving the said transmission by wired telecommunications with the base station and of performing transmission from the base station to each user's personal computer, and therefore, no third party is mediating the transmission by wired telecommunications between the respondent and each user.

If the absence of a third party mediating the channel of transmission from the transmitter to the public as the receivers is the requirement for public transmission, as is asserted by the appellants, in the case, for example, that, in a simultaneous retransmission of a television broadcast via cable television as a solution for viewing difficulties (the appellants proactively assert that such an act constitutes public transmission), in the process of amplifying with the booster the broadcast signals received with the antenna and distributing the amplified broadcast signals with the distributer in several steps before the signals are finally transmitted to households, the cable operator as a third party has installed and is controlling the telecommunications line in the position immediately before the first step of distribution, it means that the cable operator as a third party is mediating the channel of transmission with regard to all receptions by all receivers, and it may mean that the requirement for public transmission will not be satisfied as long as the simultaneous transmitter recognizes the involvement of the cable operator, but in the case in which the telecommunications line installed and controlled by the cable operator as a third party is one of a plurality of lines branched in several steps and the number of receivers who receives transmissions via the other lines (transmissions not mediated by a third party) is large enough to allow the said receivers to be regarded as the public, the requirement for public transmission will be satisfied. However, it is apparent that the occurrence of such a situation in which a transmission is regarded or not regarded as a public transmission depending on the form of involvement of the cable operator is unreasonable as an interpretation of the Copyright Act. In the same way, according to the assertion by the appellants, transmission via the Internet, which assumes mediation by the network provider as a third party, may not be included in public transmission, but such an interpretation must also be said to be unreasonable (the appellants assert that the network providers

are not interpreted to be independent transmitters even if they formally engage in the acts listed in Article 2, paragraph (1), item (ix-5), (a) and (b) of the Copyright Act because fundamental transmitters of the works, etc. exist in the process of information distribution, and the said transmitters are understood to be direct transmitters to receivers, and if the appellants also assert that the same applies to the "direct reception by the public" in the item (vii-2) of the same paragraph and the network providers are not interpreted to be independent transmitters and are not deemed to have mediated in the process of information distribution, because the fundamental transmitters of the works, etc. exist, the meanings of "fundamental transmitters" and "independent transmitters," etc. pertaining to the assertion are unclear (in the case of simultaneous retransmission of television broadcast via cable television as a solution for viewing difficulties, for example, if the logic of the appellants is applied, it may be possible even to say that the cable television operators are not independent transmitters even if they mediate transmission in the process of information distribution, because there exist broadcasting organizations (television stations including the appellants) who are absolutely deemed to be fundamental transmitters) and after all, it must be said that arbitrary factors are applied for determining whether "direct reception by the public" is made or not). In the first place, if whether a transmission is a "public transmission" or not is determined by the absence or presence of mediation by a third party in the process before reception by the public when many steps in communication channels are assumed for transmissions today, it means that only the final-step transmitters (mediators) to the public can be the fundamental transmitters. But the result of this interpretation is not generally accepted as reasonable, and will make it difficult to identify public transmitters. The difficulty will apparently double if it needs to be determined individually whether or not a final-step transmitter is an "independent transmitter" and can be said to have "mediated."

Accordingly, the above assertion by the appellants cannot be adopted.

B. The appellants assert that prevention of retransmission of broadcast to areas outside the service area is the legitimate interests of the author that should be protected under the Copyright Act, and the Services that retransmit broadcasts simultaneously to persons residing outside the service area (users) are substantially unlawful services that harm the legitimate interests of the author, etc. that the Copyright Act intends to protect with the rights of public transmission.

However, ...while viewing the Broadcasts outside the service area such as overseas is enabled by the fundamental function of LocationFree, including the base stations

(NetAV function), the appellants do not assert in this case that use of the aforementioned function of LocationFree itself generally infringes on the rights of public transmission of the appellants, and the issue in this case is whether or not provision of the Services, whose system consists of a large number of LocationFree's (base stations), infringes on the rights of public transmission of the appellants. And, of the acts of transmission pertaining to analogue broadcast waves and digital data, etc. which may generate communications to many persons in many steps, those that satisfy specific requirements are deemed to be public transmission (including acts of enabling transmission) under the Copyright Act, and the said Act stipulates that the author has the exclusive right to perform such transmissions. The legitimate interests of the author, etc. that the Copyright Act intends to protect with the rights of public transmission originally exist within this scope from the first.

However, as already noted, the Services provided by the respondent do not satisfy the requirement for public transmission prescribed in the Copyright Act, and it is not justifiable to determine that the Services are substantially unlawful by expanding or inferring the concept of public transmission, in light of the fact that infringement of rights of public transmission constitutes a crime (Article 119, paragraph (1) of the Copyright Act).

C. The appellants assert that Article 11*bi*s, paragraph (1), item (ii) of the Berne Convention gives authors the exclusive right to communication to the public by wireless communications or wired telecommunications of the broadcast of the work by an organization other than the original broadcasting organization and it is required under the Berne Convention to understand that the Services constitute an act of public transmission.

However, the said Article of the Berne Convention stipulates that "Authors of literary and artistic works shall enjoy the exclusive right of authorizing: ... (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one...," and as a result of examination of the meaning of the requirement "intended for direct reception by the public" provided in Article 2, paragraph (1), item (vii-2) of the Copyright Act in light of the provisions of Article 8 of WIPO Copyright Treaty, which are stipulated without prejudice to the provisions of the Berne Convention, the acts of the respondent in the Services do not constitute public transmission, as mentioned above. Therefore, the above assertion by the appellants cannot be adopted.

(4) On the grounds of the above, even if the appellants respectively hold the copyrights concerning the Programs, it cannot be said that the respondent is engaging

in an act of public transmission of the works in question in the Services.

3. In light of the above, although this action is lawful, it cannot be said that the acts of the respondent in the Services infringe on the appellants' rights of public transmission or right to make transmittable. Therefore, the demands of the appellants lack grounds, the judgment in prior instance which dismissed the requests is reasonable, and this appeal lacks grounds.

Accordingly, the court dismisses this appeal and rules as the main text of judgment.