Decided on	December 24, 2008	Court	Intellectual Property High Court, Fourth Division
Case number	2008 (Ne) 10011		
- A case, with respect to a work (film) authored by nationals (corporate body) of a state that Japan does not recognize (a state affiliated with the Berne Convention), in which claims for damages were partly accepted on the grounds that broadcasting the film on television without permission illegally infringed interests that could be enjoyed with the use of the film, even though the film was not protected under the Japanese Copyright Act			

Reference: Article 6, item (iii) of the Copyright Act and Article 709 of the Civil Code

I Concerned parties

1 Korea Film Export and Import Company, the appellant (hereinafter "the Appellant Export and Import Company"), is an administrative agency under the umbrella of the Ministry of Culture of North Korea, which is registered and protected in compliance with the constitution of the Democratic People's Republic of Korea (hereinafter "North Korea").

2 Canario Planning, a limited liability company and another appellant (hereinafter "Appellant Canario Planning"), is a limited liability company that, concerning films produced in North Korea where the Appellant Export and Import Company holds copyright, signed a basic contract with the Appellant Export and Import Company on film copyrights in which the Appellant Export and Import Company allowed Appellant Canario Planning to exclusively release, reproduce and distribute the films in Japan.

3 The withdrawing respondent was formerly a stock corporation formed for the purpose of television broadcasting etc. in compliance with the Broadcast Act.

4 The respondent is a stock corporation formed for the purpose of television broadcasting etc. in compliance with the Broadcast Act, and is an entity that inherited rights and obligations concerning broadcasting businesses etc. from the withdrawing respondent after the judgment in prior instance was announced.

II Claims

1 The Appellant Export and Import Company

(1) Claim for injunction of copyright-based broadcasting of the films (films subject to be injunction were added in the trial)

(2) Claim for damages based on the allegation that the withdrawing respondent's act of broadcasting certain images from the film relevant to this case (hereinafter "the

Film") infringed the relevant copyright (the claim was reduced in the trial)

(3) Claim for damages based on the allegation that the withdrawing respondent's act of broadcasting certain images from the Film infringed the interests that the Appellant Export and Import Company could have with respect to the Film and that deserve to be legally protected (preliminarily added in the trial)

2 The Appellant Canario Planning

(1) Claim for damages based on the allegation that the withdrawing respondent's act of broadcasting certain images from the Film infringed the right to permit use of the Film (the claim was reduced in this trial)

(2) Claim for damages based on the allegation that the withdrawing respondent's act of broadcasting certain images from the Film infringed the interests that the Appellant Canario Planning could have with respect to the Film and that deserve to be legally protected (preliminarily added in this trial)

III Court decision

After broadly citing the reason of the judgment in prior instance (Tokyo District Court, (Wa) No. 6062 of 2006, announced on December 14, 2007), the court determined the claim by the Appellant Canario Planning mentioned in 2 (2) of II above to be partly reasonable and accepted the claim made by the Appellant Canario Planning to the extent that it would be deemed to be reasonable, while ruling that neither the Appellant Export and Import Company's claims mentioned in 1 of II above nor the Appellant Canario Planning's claim mentioned in 2 (1) of II above was acceptable, based on the following grounds:

1 About the Appellant Export and Import Company's claim for injunction and the appellants' claims for damages (main claim)

(1) Major corrections to the reason in the judgment in prior instance

A. Text from the 20th line on page 16 to the 7th line on page 17 of the judgment in prior instance shall be altered as follows:

"(1) The Appellant Export and Import Company's claim for injunction involves negotiations in that the appellant is a juridical person based in North Korea and that the claim is based on copyright for a work of North Korea. The law applicable to the claim needs to be determined.

The third sentence of Article 5 (2) of the Berne Convention, with which Japan is affiliated, says "Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." This provision may be interpreted as the rules of

conflict specifying the applicable law as mentioned in a statement that reads “shall be governed exclusively by the laws of the country where protection is claimed” concerning a group of legal issues as mentioned in “the extent of protection” and “the means of redress afforded to the author to protect his rights.” Characteristics of the copyright-based claim for injunction may be determined to be “the means of redress afforded to the author to protect his rights.” So the ordinances of an affiliated state where protection is required or namely the copyright act of the state applies to the copyright-based claim for injunction concerning works protected by the Berne Convention in accordance with Article 5 (2) of the Convention. In this case, the major issue is whether the work of North Korea falls under a work to be protected in a relationship with Japan and under Article 3 (1)(a) of the Berne Convention. Whether the rule of conflict of Article 5 (2) of the Berne Convention applies to the determination of the law applicable to such a case could be the major issue. As of December 2008, the Berne Convention has 163 affiliated states around the world. For relationships between Japan and many other affiliated states, it is reasonable that the rules of conflict provided in Article 5 (2) of the Convention applies to such legal issues as the copyright-based claim for injunction, that the rules of conflict are part of the international private law applicable in many affiliated states, and that, considering the regional characteristics of copyright, ordinances of the state where protection is required should be the applicable law. Considering this, works unprotected under the Berne Convention should also involve application or analogical application of the aforementioned rules of conflict and designation of ordinances of the state where protection is required, as the applicable law.

Whether the North Korean work falls under a work to be protected under the Berne Convention is argued. The rules of conflict provided by Article 5 (2) of the Berne Convention apply or analogically apply to the copyright-based claim for injunction of the North Korean copyrighted work. Therefore, the Copyright Act of Japan should be deemed to be applicable to the Appellant Export and Import Company’s claim for injunction.

The infringed interests asserted by the appellants in their claims for damages involve negotiation in that they are legal interests (preliminary claim) that need to be protected and could be enjoyed with the use of copyright or the right to permit use of the North Korean work (main claim) or the use of the intellectual property of the North Korean work. So the law applicable to such profits needs

to be determined. Because the characteristics of the aforementioned legal issues are illegal acts, the decision of the applicable law should be based on the rules concerning the application of the provisions of Article 11, paragraph (1) (provisions of the rules apply on the assumption that previous examples are followed in accordance with Article 3, paragraph (4) of supplementary provisions of the Act on General Rules for Application of Laws). “The land in which the causal fact has arisen” in this article should be interpreted as our country in which the right to the appellants or infringement of legal interests is asserted to have arisen. Therefore, Article 709 of the Civil Code applies to both the main and preliminary claims for damages in this case.

B. The statement from the 10th line to the 26th line on page 26 of the judgment in prior instance shall be altered as follows:

“Like the prevention of genocide in Article 1 of the Genocide Convention (“Convention on the Prevention and Punishment of the Crime of Genocide”) and the prevention of physical torture in Article 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, certain provisions of multinational conventions are designed to realize universal values in international society and to set forth obligations for international society as a whole, going beyond the mere compatibility of convenience among the parties concerned in the Convention. Where such conventions go beyond the convenience of each state and provide obligations for international society as a whole, universal values, the main theme of the obligations, are very important for international society as a whole, and all states are deemed to have legal interests in the protection of those values. The application of such provisions is deemed to be exceptionally acceptable in relations with unrecognized states. If the relevant provisions go beyond the relationships among the signatories to the conventions and include universal values that specify issues concerning the rights and obligations of international society as a whole, observing such conventions would be obligatory for all agents of international law. This would require protection of the universal value irrespective of whether a specific state is recognized.”

(2) Examiner’s view on the appellants’ claims in this trial

A. The effects of an unrecognized state joining a multinational convention with respect to international law

(a) According to the judgment in prior instance, an unrecognized state and other

states that do not recognize the unrecognized state cannot be deemed to have right-obligation relations with each other as agents of international law, though the unrecognized state having certain rights in the context of international law is not denied. The appellants argue that the aforementioned decision is obviously an erroneous interpretation of the international law on the grounds that ① in principle, no international customary law provides that no right or obligation with respect to multinational conventions arises in relations with unrecognized states; and ② some renowned scholars of international law generally express the idea that, according to the common view of international law, an unrecognized state's joining a multinational convention does not immediately lead other affiliated states that do not recognize such states to deny the existence of rights and obligations between the states with respect to the convention because the other party is an unrecognized state: rather, even an unrecognized state shall shoulder obligations with respect to other states that do not recognize the unrecognized state with respect to the relevant convention.

(b) Considering the above, no convention or no established international law or regulation specifying the characteristics of state recognition and their effects in international law is deemed to exist. Japan does not recognize North Korea as a state. According to the evidence, Japan and North Korea has no relationship as agents of international law because of the following reasons: Japan regards the meaning of state recognition as recognizing a state with respect to international law; an agent of international law generally means an agent to which the rights or obligations of international law directly belong and a typical example of such an agent is considered to be a state; and the Japanese government does not recognize North Korea to be a state. With consideration to the fact that "management of foreign affairs" and "conclusion of treaties" (Article 73, items (ii) and (iii) of the Constitution of Japan) are part of the authority of the Japanese Cabinet, the court believes the aforementioned view of the government should be respected in relation to the meaning of state recognition and right-obligation relations between Japan and North Korea, an unrecognized state, with respect to international law. This means that North Korea, an unrecognized state, is deemed to be neither a legal agent in international law nor having the general capacity of rights in international law. However, even an unrecognized state may be deemed to have the capacity of rights in international law within the scope that is limited in accordance with the significance of its existence in politics.

Considering the above presumptions, the judgment in prior instance's ruling that an unrecognized state has no right-obligation relations with other states that do not recognize such an unrecognized state as agents of international law although an unrecognized state undeniably holds certain rights with respect to international law is reasonable. The appellants' assertion that the abovementioned ruling is based on an erroneous interpretation of international law is not accepted.

(c) According to the appellants, no international customary law provides that no rights or obligations regarding multinational conventions would basically arise in a relationship with an unrecognized state. This assertion by the appellants can be interpreted as follows: in principle, North Korea's joining the Berne Convention, a multinational convention, means rights and obligations in the convention arises between Japan and North Korea as long as the aforementioned international customary law emphasized by the appellants does not exist, even if an unrecognized state and another state that does not recognize the unrecognized state have no right-obligation relationship with each other as agents of international law. This assertion cannot be accepted for the following reasons.

The Berne Convention is an open-type convention (Article 29 of the Berne Convention) and North Korea is permitted to join the Berne Convention by taking predetermined procedures. Japan cannot go so far as to deny North Korea's membership of the Berne Convention. However, North Korea's joining the Berne Convention and Japan's recognizing North Korea as a state are separate issues (as mentioned above, the appellants also insist that, according to the common view of international law, an unrecognized state's joining a multinational convention does not immediately mean that existing affiliated states should implicitly recognize the new member as a state). Even if North Korea is affiliated with the Berne Convention, Japan's regarding North Korea as an unrecognized state remains unchanged. On the assumption that, in principle, an unrecognized state and other states that do not recognize it as a state have no right-obligation relations as agents of international law, no right-obligation relations should arise between Japan and North Korea with respect to the Berne Convention. Nevertheless, the argument that North Korea joining the Berne Convention gives birth to right-obligation relations between Japan and North Korea with respect to the Berne Convention is equal to regarding North Korea's joining the Berne Convention as Japan's recognizing it as a state. This is contradictory to the assumption that North Korea's joining the Berne

Convention and Japan's recognizing North Korea as a state is a different matter. This conclusion has nothing to do with the availability of an international customary law applicable to the appellants' assertion.

Therefore, the aforementioned assertion by the appellants cannot be accepted.

B. Importance of copyright protection in the Berne Convention

Article 9, paragraph (1) of the TRIPS Agreement has extended the scope of application of the Berne Convention to sovereign states and independent customs regions where ratification of the Berne Convention is impossible. According to the appellants, this fact means a belief that WTO regards copyright protection as having universal value in international society as a whole. The appellants assert that, in accordance with the convention, obligations and responsibilities shall be borne by the states that signed the Berne Convention on the assumption that copyright protection has universal value in international society as a whole, irrespective of whether a specific state is recognized or not.

Concerning the WTO Agreement including the TRIPS Agreement, Article 9, paragraph (1) of the TRIPS Agreement specifying the obligations to observe a certain provisions of the Berne Convention is not the only provision that allows an independent customs region to join the WTO Agreement. Recognizing an independent customs region as a member state concerns the WTO Agreement as a whole. Even if the TRIPS Agreement, part of the WTO Agreement, specifies the obligation to observe certain provisions of the Berne Convention and applies to independent customs regions, this does not immediately lead to the estimation that WTO regarded copyright protection as having universal value in international society as a whole. As the citation of the judgment in prior instance explains (statements from the 17th line on page 27 to the 17th line on page 28 of the judgment in prior instance), the Berne Convention cannot be interpreted as saying that copyright protection has universal value in international society as a whole.

Therefore, the aforementioned assertion by the appellants cannot be accepted.

C. Application of Article 6, item (iii) of the Copyright Act

Concerning the application of Article 6, item (iii) of the Copyright Act, the appellants argue the rights to work of North Korean people under the Copyright Act should be protected if North Korea is recognized as a member of the Berne Convention.

As explained in A above, however, recognizing North Korea as a member of the Berne Convention alone is not enough for a work authored by a North Korean

national to fall under “works… with respect to which Japan has the obligation to grant protection under an international treaty” as stated in Article 6, item (iii) of the Copyright Act because a state’s joining the Berne Convention does not lead to a formation of right-obligation relations between the state and Japan with respect to the Berne Convention unless Japan officially recognizes the other party as a state.

For this reason, the judgment in prior instance that works of North Korea do not fall under Article 6, item (iii) of the Copyright Act on the grounds that the relevance of North Korean works to Article 6, item (iii) of the Copyright Act boils down to a question of whether Japan should bear obligations to North Korea, an unrecognized state, with respect to the Berne Convention, and that Japan is not deemed to be obliged to protect North Korean works in accordance with the Berne Convention is justifiable. Therefore, the aforementioned assertion by the appellants cannot be accepted.

2 About the appellants’ claims for damages (preliminary claim)

As explained in 1 above, the copyrighted films relevant to this case (hereinafter “the Copyrighted Films”) do not fall under works to be protected under the Copyright Act. Even if the Copyrighted Films are not protected under the Copyright Act, the appellants have interests that can be legally protected under Article 709 of the Civil Code concerning the use of the relevant works and the withdrawing respondent’s broadcasting any of the films without prior permission infringes the appellants’ legal interests and is therefore an illegal act. This assertion is discussed as follows.

(1) Collectively considering the aforementioned undisputed facts and the gist of all evidence and pleas, the following facts are recognized and are not refuted by any evidence:

A. The Appellant Export and Import Company is an administrative agency under the umbrella of the North Korean Ministry of Culture. It is confirmed that the Ministry gives the appellant business authority concerning the “export and import of films, collaborative and order-based production of films and technical assistance” and that the appellant holds copyrights for the North Korean films.

B. On September 30, 2002, the Appellant Export and Import Company and the Appellant Canario Planning signed a basic copyright agreement (hereinafter “the Basic Copyright Agreement”) to, for example, allow the Appellant Canario Planning to exclusively release, reproduce and distribute in Japan North Korean films whose copyright is held by the Appellant Export and Import Company. As mentioned above, the agreement says that the right given to the Appellant

Canario Planning concerns “release, reproduction and distribution.” In fact, however, the appellant allowed television stations to onerously use in their broadcasts the North Korean films the use of which was permitted by the Appellant Export and Import Company in accordance with the aforementioned agreement. The scope of the right that the Appellant Export and Import Company gave to the Appellant Canario Planning in accordance with the aforementioned agreement included “broadcasting.”

C. On November 1, 2006, the Appellant Export and Import Company signed an agreement with a French filmmaker for four North Korean films. Both parties agreed to buy and sell copyrights for limited periods, regions etc. Reproduction of the original films was provided to the aforementioned filmmaker. This agreement applies to films including “Flower Girl,” a film that was made in North Korea in 1972. The Basic Copyright Agreement also applies to this film.

D. Running more than two hours, the Film was made at Korea Art Studio in North Korea in 1978. The Appellant Export and Import Company possesses an original film. The Appellant Canario Planning was given reproduction of the Film and keeps it for use in accordance with permission for its use in Japan as well as the Basic Copyright Agreement.

E. The broadcasting without prior notice occurred in a news program titled “Super News” broadcast by the withdrawing respondent. Under a title that reads “a beautiful actress that knew too much” in Japanese, the approximately six-minute segment features the leading actress talking about memories of making the Film. The segment focused on the use of the Film to brainwash North Korean people. The images in question lasted for little more than two minutes and were cited from the Film.

F. On February 27, 2004, the Appellant Canario Planning and Nippon Skyway Co., Ltd. signed an agreement on the marketing of the VHS or DVD reproduction of two films included in the Copyrighted Films. The withdrawing respondent’s broadcasting the aforementioned images without prior permission gave rise to doubts about the legal protection of North Korean films and has prevented the aforementioned VHS and DVD reproduction under the aforementioned agreement from being marketed.

(2) According to the recognized fact mentioned in (1) above, the Film is deemed to have objective value as a work because it runs longer than two hours and considerable amounts of money, labor and time were spent in it. The North Korean Ministry of Culture regards the Appellant Export and Import Company as holding

copyright for North Korean films. The Appellant Export and Import Company possesses the original film and provides its reproduction to the Appellant Canario Planning. The Appellant Export and Import Company signed, as copyright holder, an agreement with a French filmmaker to buy and sell copyrights for “Flower Girl,” a film that was made in 1972 and to which the Basic Copyright Agreement applies. The Appellant Export and Import Company also provides the French filmmaker with reproductions of the film. These facts suggest that leaving aside 1978 when the Film was created, the exclusive control is deemed to have exclusively controlled the Film in North Korea in 2002 when the Basic Copyright Agreement was signed, at the latest.

In accordance with the Basic Copyright Agreement, the Appellant Export and Import Company gave the Appellant Canario Planning exclusive right to permit the release, reproduction, distribution and broadcasting of the Copyrighted Films, including the Film, in Japan. In fact Appellant Canario Planning received reproduction of the Film. The Appellant Canario Planning may be deemed to have been in a position possibly enabling it to exclusively control the use of the Film in Japan. As explained above, the Film has objective value as a work and also has economic value for use. In fact, the Appellant Canario Planning earned interests by permitting the television station to broadcast the Copyrighted Films. Considering these facts, the interests that the Appellant Canario Planning enjoys by using the Film in the aforementioned position should be regarded as deserving legal protection.

On the other hand, the Appellant Export and Import Company has no sales office or equivalent in Japan. The use of the Copyrighted Films in Japan is exclusively left to the Appellant Canario Planning. The Export and Import Company promised the other appellant that it would not exercise any rights to use. For this reason, the Appellant Export and Import Company cannot be deemed to have interests that deserve to be legally protected regarding the use of the Film in Japan.

(3) Considering the above explanation as the premise, whether the withdrawing respondent’s act of broadcasting without permission can be deemed to illegally infringe interests that the Appellant Canario Planning could enjoy by using the Film is discussed.

A. Because the withdrawing respondent’s broadcasting the aforementioned segment without permission of the Appellant Canario Planning for profit is inevitably regarded as socially unjustifiable, the broadcasting without permission should be regarded as illegally infringing interests that the Appellant Canario Planning could enjoy by using the Film, considering the following facts: controlled by the

Appellant Canario Planning, the Film itself is valuable objectively and economically. Making the Film required considerable amounts of money, labor and time; the Appellant Canario Planning allowed works included in the Copyrighted Films licensed by the Appellant Export and Import Company to be broadcast on television and gained royalties even after North Korea joined the Berne Convention. It is also estimated that permitting the use of the Film will gain royalties; the Appellant Canario Planning is not allowed to sell VHS or DVD reproductions of any works included in the Copyrighted Films due to the said broadcasting without permission; the broadcasting without permission occurred in a news program and, to the withdrawing respondent, is a business to gain profits from sponsors; the broadcasting without permission was run for 128 seconds, which is very short in comparison with the total length of the Film. However, a segment longer than two minutes in a six-minute program is a considerable ratio.

B. Provided that a copyrighted work unprotected under the Copyright Act is in principle available freely and using it could induce general illegal acts, the respondent asserts that the limitation should extend over mere use of such work to situations where a strong anti-social nature and/or illegality are recognizable to the extent that it is deemed to be against public order and morality.

Works are intangible creations by human beings and include many different things. Some such works require considerable cost, labor and time in the process of making them. They also have objective value and can be profitable through economic use. So it is not reasonable to understand that works unprotected under the Copyright Act shall enjoy no legal protection (though the respondent asserts that lawmakers intended to ensure that the protection under the Tort Law did not extend to the use of works unprotected under the Copyright Act, such a legislative fact is not recognizable). If an act of using a copyrighted work is regarded as socially unjustifiable with consideration to the objective and economic value of the copyrighted work used, the purpose and form of such use and its influence, such an act should be deemed to violate the Tort Law.

Therefore, the respondent's assertion that the only situation in which an illegal act is officially recognized is when a work is used against public order and morality cannot be accepted.

(4) The withdrawing respondent asked the Appellant Canario Planning for permission to use certain images from a North Korean film in the broadcasting of "Super News" on February 11, 2003. The withdrawing respondent paid 189,000 yen (tax included)

for that permission. Because North Korea joined the Berne Convention, however, the North Korean Ministry of Culture expressed its view that Japan had no protection obligation with North Korea with respect to the Berne Convention. Following this view, the Appellant Canario Planning was informed of the intention to use North Korean works without any restriction or reservation from then on. Despite recognizing the economic value of the North Korean work, the withdrawing respondent allowed the broadcast without permission based only on the interpretation of the Berne Convention. In that regard, the withdrawing respondent cannot deny its negligence at least.

(5) As discussed above, the broadcasting without permission is deemed to be an illegal act against the Appellant Canario Planning. The appellants assert that the broadcasting without permission inflicted on them damages in the amount that is equivalent to royalties.

However, damages equivalent to royalties cannot be recognized without the infringement of copyright, an exclusive right to use. Damages equivalent to those incurred by a copyrighted work should not be recognized in a Film that is not protected under the Copyright Act. The damages incurred by the Appellant Canario Planning in this case are, due to their nature, deemed to entail considerable difficulty in verifying a numerical figure. Therefore, Article 248 of the Code of Civil Procedure applies and the amount of damages is determined to be 100,000 yen.

Considering the nature, difficulty, tolerable amount and other factors apparent in this case, the amount of attorney's fee with a considerable causal relationship to the illegal act by the withdrawing respondent should be deemed to be worth 20,000 yen.

(6) Based on the above, the Appellant Canario Planning's preliminary claim for damages is well-grounded as long as the payment of 120,000 yen and delay damages at an annual rate of 5% (specified by the Civil Code) for the period between March 30, 2006 (right after the illegal act) and the completion of payment is claimed.

The Appellant Export and Import Company's preliminary claim for damages is not well-grounded because, as explained above, the existence of infringed profits is unrecognizable and none of the other issues concerning this requires further discussion.