| Date | May 16, 2000 | Court | Tokyo District Court |
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| Case number | 1998 (Wa) 17018 | | |
| – A case in which the court found that the act of transmitting music contained in commercial phonograms to the public for a fee by using digital signals through a communications satellite broadcasting service does not constitute infringement of the neighboring rights (the right of reproduction of producers of phonograms). | | | |

Reference: Article 96, Article 102, paragraph (1), Article 44, paragraph (1), Article 2, paragraph (1), item (viii), Article 30, paragraph (1) and Article 2, paragraph (1), item (xv) of the Copyright Act

Number of related rights, etc.:

Summary of the Judgment

1. The plaintiffs are record companies while the defendants are engaged in the business of transmitting to the public for a fee a radio program titled "STAR digio 100" (the "Program"), which mostly features music, by using digital signals through the communications satellite broadcasting service "SKY PerfecTV." The plaintiffs alleged against the defendants that the following acts conducted in association with the transmission to the public of music recorded in the commercial phonograms (the "Phonograms") produced by the plaintiffs in the Program constitute infringement of the plaintiffs' neighboring rights (the right of reproduction of producers of phonograms): [i] the act of storing digital signals for the performance of the songs (the "Sound Sources") fixed to the Phonograms on a storage server; and [ii] the act of transmitting the Sound Sources to the public in the Program and thereby having receivers store digital signals for the Sound Sources in the RAM in their receiving tuners. Based on these allegations, the plaintiffs sought an injunction against the transmission to the public and payment of damages.

2. In this judgment, the court mainly determined as follows and dismissed the plaintiffs' claims by finding that neither of the acts mentioned in [i] and [ii] constitute infringement of the right of reproduction.

(1) Article 44, paragraph (1) of the Copyright Act stipulates that broadcasters' ephemeral sound recordings of phonograms for broadcasting do not constitute infringement of the right of reproduction of phonogram producers initially for the purpose of permitting the use of phonograms in broadcasting freely without requiring the obtainment of consent from the phonogram producers. On the other hand, sound or visual recordings of broadcast materials are generally used in broadcasting. Thus, the purpose of the aforementioned provision can also be interpreted to guarantee the

freedom of making sound recordings of phonograms to the extent necessary for specific broadcasting in the same way that the freedom of broadcasting per se is guaranteed. Therefore, in order to make a determination as to whether a certain act of recording can be regarded as "ephemeral sound recording" of phonograms "for broadcasting" under said provision, it is necessary to examine whether said recording falls within the scope that is usually considered to be necessary for transmitting specific broadcasts in light of the characteristics of the intended broadcasts.

The storage of music data in the storage server for the Program can be considered to be "ephemeral" in the sense that the storage is made under a system that will eventually delete the music data in light of the operation practices of the system. Furthermore, since such recording is made only to the extent that is usually necessary for specific forecasts, the recording can be considered to be "ephemeral sound recording for broadcasting" specified in Article 44, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, paragraph (1) of said Act.

(2) The Copyright Act specifies that, in principle, an act of reproducing a work in a physical form shall constitute infringement of the exclusive right of the author even if such reproduction merely means making only a single copy of the work without any plan for exploitation in public. Unlike the case of an act of exploitation in a nonphysical form, the author is given a very powerful right. This can be interpreted that, since any reproduction of a work in a physical form could be exploited repeatedly in the future, it is considered to be reasonable, as a preventive measure, to extend the author's right to an act of making reproduction itself, which could be exploited repeatedly, even if said reproduction itself is not exploited in public.

In light of the purpose of the provisions of the Copyright Act concerning reproduction right as described above, it should be interpreted that an act of reproduction would be considered to be "reproduction" specified in the Copyright Act, in other words, "reproduction in a physical form," only if the reproduction is made in such a form that could be exploited repeatedly in the future. Since the storage of data, etc. in a RAM has an ephemeral, transitional nature, it is obvious, in light of social norms, that the data stored in a RAM cannot be considered to be a reproduction that could be exploited repeatedly in the future. Thus, the storage of data, etc. in a RAM cannot be considered to be "reproduction" under the Copyright Act.

(3) The aforementioned conclusion is supported from the perspective of the provision of the Copyright Act concerning the author's right for a program (Article 2, paragraph (1), item (x)-2 of the Copyright Act).

It can be interpreted that the Copyright Act presumes that an act of using a program

and an act of storing a program in a RAM, which is inseparable from an act of using a program, are not illegal except for the case specified in Article 113, paragraph (2) of said Act. It is reasonable to interpret that the aforementioned presumption was made on the grounds that an act of storing data in a RAM has an ephemeral, transitional nature as mentioned above and does not constitute "reproduction" under the Copyright Act.

The standard to differentiate the concept "reproduction in a physical form" from the opposite concept "reproduction in a nonphysical form" is not necessarily unambiguously clear. It should be interpreted that the storage of data in a RAM cannot go so far as to be regarded as "reproduction in a physical form" under the Copyright Act due to its ephemeral, transitional nature. Even though the Copyright Act does not impose any conditions concerning the length of time during which a reproduced work should remain perceivable in its provision that defines the term, "reproduction," the absence of such conditions does not conflict with the interpretation that the storage of data in a RAM does not constitute "reproduction."

Judgment rendered on May 16, 2000
1998 (Wa) 17018, Case of Seeking Injunction, etc. against Infringement of Neighboring Rights
(Date of conclusion of oral argument: January 25, 2000)

Judgment

Plaintiff: Victor Entertainment Corp.
Plaintiff: KING RECORD CO., LTD.
Plaintiff: Toshiba-EMI Ltd.
Plaintiff: NIPPON CROWN Co., Ltd.
Plaintiff: Warner Music Japan Inc.
Plaintiff: BMG Funhouse, Inc. (formerly, FUN HOUSE, INC. Successor: BMG JAPAN, INC.)
Plaintiff: Universal Victor, Inc.
Plaintiff: Axev Inc.
Plaintiff: Recording Industry Association of Japan
Defendant: DAIICHIKOSHO CO., LTD.
Defendant: Japan Digital Broadcast Service Co., Ltd.

Main text

1. All of the claims of the plaintiffs shall be dismissed.
2. The supporting intervener shall bear such part of the court costs that was generated as a result of supporting intervention. The plaintiffs shall bear the rest of the court costs.

Facts and reasons

No. 1 Objects of claims

1. The defendants shall not digitalize and transmit to the public the sound sources specified in the Attached Sound Source List by using the public transmission service offered by Defendant DAIICHIKOSHO CO., LTD. under the service name "STAR digio 100" (Channels 400 to 499 as a part of the satellite broadcasting service named "SKY PerfecTV!" offered by Defendant Japan Digital Broadcast Service Co., Ltd.
2. Defendant DAIICHIKOSHO CO., LTD. shall not produce any medium containing any of the sound sources specified in the Attached Sound Source List.
3. Defendant DAIICHIKOSHO CO., LTD. shall destroy every medium containing any of the sound sources specified in the Attached Sound Source List.

4. The defendants shall jointly pay 15 million yen to each of the plaintiffs and the amount accrued thereon at the rate of 5% per annum for the period from August 7, 1998, to the date of completion of the payment.

No. 2 Outline of the case

I. Underlying facts (the facts presented with the indication of the evidence number, etc. within the parentheses at the end have been proven by the corresponding evidence, etc., while the facts presented without such indication are undisputed by the parties concerned)

1. Parties concerned

(I) All of the plaintiffs are stock companies established for the purpose of planning, manufacturing, selling, or otherwise handling the master recordings of phonograms (the entire import of the oral argument).

(II) Defendant DAIICHIKOSHO CO., LTD. ("Defendant Daiichikosho") is a stock company established for the purpose of conducting the business of transmitting audio, images, codes, etc. by use of telecommunications facilities and the business of managing those facilities.

(III) Defendant Japan Digital Broadcast Service Co., Ltd. ("Defendant Japan Digital") is a stock company established for the purpose of conducting broadcasting business commissioned under the Broadcast Act.

2. Rights of the plaintiffs

The plaintiffs are the persons who were the first to fix the performance of the songs (the "Sound Sources") specified in the Attached Sound Source List, which are fixed to the phonograms specified in said list (the "Phonograms"). Thus, it is the plaintiffs that have neighboring rights (the rights of the producers of phonograms) for the Phonograms (Exhibits Ko 40 and 41-1 to 41-9, the entire import of the oral argument).

3. Acts of the defendants

(I) As a commissioning broadcaster specified in the Broadcast Act (Article 2, item (iii)-5 of said Act), Defendant Daiichikosho digitally transmits to the public for a fee a radio program (Title: "Daiichikosho STAR digio 100"; the "Program"), which is mostly about music, through Channels 400 to 499 of the communications satellite broadcasting service "SKY PerfecTV" (the commissioned broadcaster specified in the Broadcast Act (Article 2, item (iii)-4 of said Act) is non-party Japan Satellite Systems Inc. ("Non-party Japan Satellite") ). Defendant Daiichikosho also transmits the Sound Sources to the public through the Program.

(II) In connection with the transmission of the Program to the public, Defendant Japan Digital conducts the operations specified in (IV) below as commissioned by Defendant

Daiichikosho, which is a commissioning broadcaster, or by Non-party Japan Satellite, which is a commissioned broadcaster.

(III) The following processing is carried out before the music recorded in commercial phonograms containing the Sound Sources is transmitted to the public.

(1) Playing in analog and converting into digital signals

Music CDs are played in analog and converted into digital signals.

(2) Compression

The aforementioned digital signals are compressed (the data is combined and reduced in size) on a computer in accordance with the predetermined standards.

(3) Storage on a storage server

The aforementioned compressed digital signals are stored on a storage server.

Defendant Daiichikosho leased the storage server from a lease company (Exhibit Otsu 16) and manages and uses it as its own facilities.

(4) TV programming and input to the programming server

After programming is carried out for each channel, the details of the programming are input to a programming server in the form of program data.

(5) Transmission to and storage in transmission servers

The programming server accesses the storage server and has the storage server transmit necessary music data to multiple transmission servers in accordance with the input programming data. The transmission servers store the aforementioned music data transmitted from the storage server.

(6) Multiplexing

The music data transmitted from the transmission servers is multiplied. In other words, while each channel makes one stream of data (elementary stream), thirteen streams are combined to make one stream of data (transport stream).

As a result, it becomes possible to transmit a large amount of data to the public by using a limited range of radio waves.

(7) Scramble processing

The aforementioned multiplexed music data goes through scramble processing.

(8) Addition of error correction codes and the process of interleaving

To the aforementioned scrambled music data, error correction codes are added. Also, the music data goes through the process of interleaving.

Error correction codes are codes designed to be added for the purpose of automatically correcting the data gap that may occur due to noise, etc. in the process of digital data transmission. The process of interleaving is a technology to switch the order of data in advance in order to improve the accuracy of data correction by use of the

aforementioned error correction codes.

(9) Modulation

The aforementioned music data is modulated. In other words, the digital data is converted to radio waves.

(10) Transmission to a satellite (Uplink)

The radio waves created through modulation are transmitted to a communication satellite from the antenna of an earth station.

(11) Amplification and transmission to the public by a satellite

The radio waves transmitted from the antenna of an earth station are received by the receiving antenna of a communication satellite, amplified by the repeater in the satellite, and transmitted to Earth.

(IV) Defendant Daiichikosho, a commissioning broadcaster, is in charge of a part of the processing specified in (III) above, more specifically, the processing specified in (1) to (5) and (7). Defendant Daiichikosho itself conducts the processing specified in (1) to (5). Defendant Japan Digital is commissioned by Defendant Daiichikosho to conduct the task of monitoring the facilities used to conduct the processing specified in (3) to (5) and also to conduct the processing specified in (7).

Furthermore, Non-party Japan Satellite, a commissioned broadcaster, is in charge of the processing specified in (6) and (8) to (11) of (III) above. Defendant Japan Digital is commissioned by Non-party Japan Satellite to conduct the processing specified in (6) and (8) to (10). Non-party Japan Satellite itself conducts the processing specified in (11).

4. Signal processing by the receiving tuner

(I) In the Program, the music data transmitted to the Earth after going through the processing specified in (III) above is received by the receiving antenna owned by each receiver and goes through the following process in the receiving tuner also owned by each receiver, and eventually output from a speaker, etc. as music.

(1) The radio waves are demodulated to digital data.

(2) Errors are detected and corrected based on the error correction codes and the process of interleaving.

(3) The date is descrambled.

(4) The data is demultiplexed. The signals are taken out for each channel.

(5) The data is decompressed.

(6) The digital signals are converted into analog signals.

(II) When the processing specified in (2) to (5) is conducted as a part of the processing specified in (I) above in the receiving tuner, the music data is stored in the random

access memory (the "RAM") in the receiving tuner (Exhibits Ko 39-1 and 39-2, the entire import of the oral argument).

II. Plaintiffs' claim and the grounds therefor

1. Plaintiffs' allegation about infringement of the neighboring rights by the defendants

(I) Infringement of the reproduction rights at the storage server

In order to transmit the Sound Sources to the public through the Program, Defendant Daiichikosho stores the digital signals of the Sound Sources on the storage server (I, 3, (III) (3) above). The aforementioned act of Defendant Daiichikosho infringes the reproduction rights (Article 96 of the Copyright Act) that the plaintiffs respectively have for the Phonograms as phonogram producers.

(II) Infringement of the reproduction rights by an act of inducing and facilitating illegal reproduction for private use

The defendants' act of jointly transmitting the Sound Sources to the public through the Program has been inducing and facilitating the receivers' act of recording the Sound Sources in MDs. Such act of inducement and facilitation infringes the reproduction rights (Article 96 of the Copyright Act) that the plaintiffs respectively have for the Phonograms as phonogram producers.

(III) Infringement of the reproduction rights at the receiving tuner

When jointly transmitting the Sound Sources to the public through the Program, the defendants store the digital signals of the Sound Sources in the RAM in the receiving tuner owned by each receiver (I, 4, (II) above). The aforementioned act infringes the reproduction rights (Article 96 of the Copyright Act) that the plaintiffs respectively have for the Phonograms as phonogram producers.

2. Plaintiffs' claims

The plaintiffs made the claim specified in each paragraph of the section titled "Objects of claims" against the defendants on the following grounds.

(I) Claim specified in paragraph (1) of the section "Objects of claims"

As a claim for the cessation of infringement against the infringement of the reproduction rights specified in 1, (II) and (III) above (Article 112, paragraph (1) of the Copyright Act), the plaintiffs sought an injunction against the defendants' act of transmission of the Sound Sources to the public as specified in paragraph (1) of the section "Objects of claims," which constitutes the aforementioned acts of infringement.

(II) Claim specified in paragraph (2) of the section "Objects of claims"

Against Defendant Daiichikosho,

(1) As a claim for the cessation or prevention of infringement against the act of infringement of the reproduction rights specified in 1 (I) above (Article 112, paragraph

(1) of the Copyright Act), the plaintiffs sought an injunction against the production of any medium specified in paragraph (2) of the section "Objects of claims," which constitutes the aforementioned act of infringement.

(2) As a claim for measures necessary for the cessation or prevention of infringement against the acts of infringement of the reproduction rights specified in 1 (II) and (III) above (Article 112, paragraph (2) of said Act), the plaintiffs sought an injunction against the production of any medium specified in paragraph (2) of the section "Objects of claims" that is used in the course of the aforementioned acts of infringement.

(III) Claim specified in paragraph (3) of the section "Objects of claims"

Against Defendant Daiichikosho,

(1) Against the act of infringement of the reproduction rights specified in 1 (I) above, the plaintiffs demanded destruction of the medium as specified in paragraph (3) of the section "Objects of claims" as a claim for destruction of objects made through an act of infringement (Article 112, paragraph (2) of the Copyright Act).

(2) Against the acts of infringement of the reproduction rights specified in 1 (II) and (III) above, the plaintiffs demanded destruction of the medium as specified in paragraph (3) of the section "Objects of claims" as a claim for destruction of objects used solely for the aforementioned acts of infringement (Article 112, paragraph (2) of said Act).

(IV) Claim specified in paragraph (4) of the section "Objects of claims"

(1) Against Defendant Daiichikosho, the plaintiffs demanded payment of 15 million yen to each of the plaintiffs as damages for the acts of infringement of the reproduction rights specified in 1 (I) to (III) above and the amount accrued thereon at the rate of 5% per annum as specified in the Civil Code for the period from August 7, 1998 (the date following the date of the service of a statement of claim), to the date of completion of the payment.

(2) Against Defendant Japan Digital, the plaintiffs demanded payment of 15 million yen to each of the plaintiffs as damages for the acts of infringement of the reproduction rights specified in 1 (II) and (III) above and the amount accrued thereon at the rate of 5% per annum as specified in the Civil Code for the period from August 7, 1998 (the date following the date of the service of a statement of claim), to the date of completion of the payment.

III. Issues

1. Whether Defendant Japan Digital is the entity that transmits the Program to the public

2. Whether Defendant Daiichikosho committed infringement of the reproduction rights at the storage server (Applicability of Article 44, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, paragraph (1) of said Act)

(I) Whether an act of transmitting the Program to the public constitutes "broadcasting"
(II) Whether Defendant Daiichikosho can be regarded as a "broadcaster"
(III) Whether an act of storing music data in the storage server for the Program constitutes an act of making an "ephemeral sound recording"
3. Whether the defendants' act of inducing and facilitating illegal reproduction for private use constitutes infringement of the reproduction rights or not
(I) Whether a receiver's act of recording the Sound Sources transmitted through the Program in an MD constitutes an act of reproduction for private use permitted under Article 30, paragraph (1) of the Copyright Act
(II) Whether the defendants induce or facilitate recording of the Sound Sources in an MD by a receiver of the Program
(III) Whether it is possible to seek an injunction against a person who induces or facilitates reproduction
4. Whether the defendants infringe the reproduction rights at the receiving tuner (Whether the storage of the music data in the RAM in the receiving tuner constitutes "reproduction")
5. Amount of damage suffered by the plaintiffs

(omitted)

No. 3 Court decision

We are going to examine Issues 1 to 5 below. Since examination of Issue 1 would be unnecessary depending on the results of the examination of Issues 3 and 4, we are going to examine Issues 2 to 4 first.

I. Issue 2 Whether the reproduction rights were infringed at the storage server

1. It is clear that Defendant Daiichikosho's act of storing the music data of the Sound Sources in the storage server in order to transmit the Sound Sources to the public through the Program constitutes "reproduction" of the Phonograms.

2. Applicability of Article 44, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, paragraph (1) of said Act

(I) Whether the transmission of the Program constitutes "broadcasting" under the Copyright Act

(1) Article 2, paragraph (1), item (vii)-2 of the Copyright Act defines "making a transmission to the public" as "making a transmission of wireless communications or wired telecommunications with the objective of allowing the public to receive them directly (excluding transmission (unless this constitutes the transmission of a work of

computer programming) with telecommunications facilities one part of which is installed on the same premises as the other parts (or, excluding, if two or more persons occupy the same premises, transmission with telecommunications facilities both ends of which are installed within the area the same person occupies))." Also, Article 2, paragraph (1), item (viii) defines "broadcasting" as "making a transmission to the public of wireless communications with the objective of allowing the public to simultaneously receive transmissions with the same content." In light of the manner of transmission (No. 2, I, 3 above), it is clear that the transmission of the Program through multiple channels constitutes a transmission of wireless communications made with the aim of allowing the public to directly receive a transmission of the same content at the same time. Since the transmission of the Program falls under the definition of "broadcasting" specified in Article 2, paragraph (1), item (viii) of the Copyright Act, the transmission of the Program also falls under "broadcasting" specified in Article 44, paragraph (1) of said Act.

Regarding this point, as found in No. 2, IV, 2 (II) (1) [iii] above, the plaintiffs pointed out the fact that the Program allocates music into multiple channels and repeatedly transmits the same set of music through each channel many times, and alleged that since the Program allows listeners to receive their favorite songs according to their preferences, the Program is the same as transmission upon request in substance (transmission of each song upon request from an individual listener), and therefore that the Program cannot be considered to "allow the public to simultaneously receive transmissions with the same content." However, the aforementioned allegation of the plaintiffs merely described the characteristic of the Program as mentioned above and pointed out the fact that listeners can receive and listen to their favorite songs at their preferred time within the framework of the Program. This fact does not affect the manner of transmission and reception of the Program, more specifically, the manner wherein the public can simultaneously receive a transmission of the same content from each channel. Therefore, the aforementioned allegation of the plaintiffs is unacceptable.

(2) Whether the plaintiffs' allegations specified in No. 2, IV, 2, (II), (1), [i] and [ii] are acceptable or not

The plaintiffs' allegation can be summarized as follows. In the Copyright Act, two provisions (Article 102, paragraph (1) and Article 44, paragraph (1)) were established in order to limit the reproduction rights that phonogram producers might exercise against broadcasting based on the understanding that "broadcasting" is conducted by NHK or private TV stations and radio stations that existed at that time and that, in light of the fact that "broadcasting" by such companies [i] is strongly required to serve the public

interest and simultaneously transmit the same data, [ii] merely uses phonograms as a part of programs, [iii] transmits analog data and does not provide high-quality music data that can serve as an alternative to phonograms sold at stores, and [iv] could increase the demand of consumers and promote the sales of phonograms, the aforementioned limitation is justifiable from the perspective of reasonable adjustments between phonogram producers and broadcasters. The plaintiffs also alleged that, in the case of a telecommunication company that cannot fit into the picture of the balance of interests on which the aforementioned decision was premised, even if said company transmits wireless communications, said company cannot be considered to be conducting "broadcasting," which limits the reproduction rights of phonogram producers. The plaintiffs further alleged that the transmission of the Program conducted in the aforementioned manner (No. 2, IV, 2, (II) (1) [ii] (a) to (d) above) does not fit into the aforementioned picture of the balance of interests and therefore cannot be considered to be "broadcasting" under the Copyright Act.

The aforementioned allegation of the plaintiffs is examined below. The Copyright Act, since its establishment in 1970, has always defined "broadcasting" as "the transmission of wireless communications with the objective of allowing the public to directly receive transmissions" (Article 2, paragraph (1), item (viii) of the Copyright Act prior to amendment by Act No. 86 of 1997) and had provisions (Article 102, paragraph (1) and Article 44, paragraph (1) of the Copyright Act) to limit the exercise of the reproduction rights of phonogram producers against "broadcasting" as described above. Subsequently, through the amendment by Act No. 86 of 1997, the right to make available for transmission was newly established in connection with automatic public transmission, and the provisions to define the terms, "automatic public transmission," "broadcasting," "cablecasting," and a concept higher than these terms, "transmission to the public," were developed anew. Under these circumstances, the Copyright Act always has a provision to define "broadcasting" as mentioned in (1) above and has the aforementioned provisions to limit the exercise of reproduction rights of phonogram producers against "broadcasting." In light of how "broadcasting" is stipulated in the Copyright Act, even if the balance of interests between broadcasters and phonogram producers that had existed around the time of the establishment of the Copyright Act was taken into consideration upon legislation as alleged by the appellants, it can be said that the Copyright Act makes a determination as to whether a transmission can be regarded as "broadcasting" or not solely from the perspective of the manner of transmission and reception described in the definition clause. It is unreasonable to interpret that a determination as to whether transmission can be regarded as

"broadcasting" should be made in consideration of whether the conditions specified in [i] to [iv] above are satisfied or not as alleged by the plaintiffs. In light of how "broadcasting" is stipulated in the Copyright Act, it is unambiguously clear that a determination as to whether a transmission can be regarded as "broadcasting" under the Copyright Act should be made solely from the perspective of the manner of transmission and reception described in the definition clause. Thus, any transmission that satisfies the definition must be considered to be "broadcasting" under the Copyright Act. Since the transmission of the Program satisfies the aforementioned definition as described in (1) above, the transmission of the Program should be considered to be "broadcasting" under the Copyright Act regardless of the manner of transmission of the Program as alleged by the plaintiffs (No. 2, IV, 2, (II) (1) [ii] (a) to (d) above). Therefore, the aforementioned allegation of the plaintiffs is groundless.

The plaintiffs alleged that, in light of the manner of transmission of the Program (No. 2, IV, 2, (II) (1) [ii] (a) to (d) above), the transmission of the Program is not different, in substance, from a push-type Internet broadcasting, which is included in automatic public transmission, for which phonogram producers have the right to make available for transmission. The plaintiffs further alleged that, for the aforementioned reason, it is unreasonable to differentiate the transmission of the Program from a push-type Internet broadcasting and to consider such transmission as "broadcasting," for which phonogram producers cannot exercise their rights against an act of free transmission or an act of ephemeral fixation. However, in view of the facts that the Copyright Act has a provision to define "automatic public transmission" (Article 2, paragraph (1), item (ix)-4 of the Copyright Act) and a provision to define "broadcasting," respectively, as a clearly different concept, the same holding as stated above is applicable and it is impossible to say that the transmission of the Program cannot be considered to be "broadcasting" based solely on the aforementioned practical argument in view of the fact that it is unambiguously clear that the transmission of the Program falls not under the definition of "automatic public transmission" but under the definition of "broadcasting." The aforementioned allegation of the plaintiffs is also groundless.

(II) Whether Defendant Daiichikosho can be regarded as a "broadcaster" under the Copyright Act

Based on the status as a commissioning broadcaster under the Broadcast Act (Article 2, item (iii)-5 and Article 52-13, paragraph (1) of said Act), Defendant Daiichikosho commissioned the broadcasting and took the initiative in the transmission of the Program, which can be regarded as "broadcasting" under the Copyright Act as stated in (I) above, as mentioned in No. 2, I, 3 above. Thus, Defendant Daiichikosho can

be regarded as a person that does broadcasting in the course of trade, in other words, "broadcaster" specified in Article 2, paragraph (1), item (ix) of the Copyright Act. Therefore, Defendant Daiichikosho can naturally be considered to be a "broadcaster" specified in Article 44, paragraph (1) of said Act.

The plaintiffs alleged as follows: The concepts of "commissioned broadcaster" (broadcasters that actually transmit radio waves) and "commissioning broadcaster" (broadcasters that commission "commissioned broadcasters" to transmit programs) were introduced to the Broadcast Act through the amendment of said Act in 1989; When the Copyright Act was established in 1970, such concepts did not exist; The only type of broadcasters imagined by said Act were broadcasters that actually transmit radio waves and that term "broadcasters" used in the Copyright Act only covers "commissioned broadcasters," which actually transmit radio waves, and does not cover "commissioning broadcasters" such as Defendant Daiichikosho. However, if a law has a definition clause about a certain concept, even a thing that did not exist and was not concretely imagined at the time of the establishment of the law would be considered to fall under said concept and could be subject to the law as long as it satisfies the definition. It is impossible to conclude that a certain thing does not fall under such concept just because the thing did not exist and was not concretely imagined at the time of the establishment of the law. In view of the fact that Defendant Daiichikosho itself conducts major parts of the process of the transmission of the Program, such as collecting materials and organizing programs to be transmitted, as described in No. 2, I, 3 above, it can be said that Defendant Daiichikosho is the entity that transmits the Program (since the plaintiffs seek an injunction against Defendant Daiichikosho's act of transmitting the Sound Sources to the public on the premise that Defendant Daiichikosho is the entity that transmits the Program, it can be said that there is no dispute between the parties concerned about the understanding that it is Defendant Daiichikosho that transmits the Program). Therefore, even if Defendant Daiichikosho itself does not transmit radio waves, it would preclude Defendant Daiichikosho from being considered as "a person that does broadcasting in the course of trade." Thus, the aforementioned allegation of the plaintiffs is unacceptable.

(III) Whether an act of storing music data on the storage server in the process of transmitting the Program constitutes "ephemeral sound recording for broadcasting"

(1) Regarding the meaning of the requirement "ephemeral sound recording" "for broadcasting" specified in Article 44, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, paragraph (1) of said Act, since the wording of the aforementioned provision cannot be considered to be unambiguously clear due

especially to the possibility of multiple interpretations of the term "ephemeral," the interpretation of the wording should be made in consideration of the purpose of establishing said Article. The aforementioned provision stipulates that broadcasters' ephemeral sound recordings of phonograms for broadcasting do not constitute infringement of the reproduction rights of phonogram producers initially for the purpose of permitting the use of phonograms in broadcasting freely without requiring the obtainment of consent from the phonogram producers (it should be noted that, if a commercial phonogram is used in broadcasting, a secondary use fee must be paid to the phonogram producer). On the other hand, sound or visual recordings of broadcast materials are generally used in broadcasting. Thus, the purpose of the aforementioned provision can also be interpreted to guarantee the freedom of making sound recordings of phonograms to the extent necessary for specific broadcasting in the same way that the freedom of broadcasting per se is guaranteed. Therefore, in order to make a determination as to whether a certain act of recording can be regarded as "ephemeral sound recording" of phonograms "for broadcasting" under said provision, it is necessary to examine whether said recording falls within the scope that is usually considered to be necessary for transmitting specific broadcasts in light of the characteristics of the intended broadcasts.

(2) According to the evidence (Exhibit Otsu 18) and the entire import of the oral argument, Defendant Daiichikosho's act of storing music data in the storage server for the Program is conducted in accordance with the following operation practices.

[i] The songs to be broadcast in the Program are determined about 1 or 1.5 months prior to the scheduled broadcast week (in the case of a new song, a decision to add the new song might sometimes be made immediately before the scheduled broadcast). In the case of a song that is not currently stored on the storage server, it will be stored on the storage server by the Friday immediately before the scheduled broadcast week after specifically deciding a list of songs for the broadcasting as described above.

[ii] The storage server has 1 terabyte storage capacity. On the assumption that one song takes five minutes, the storage server can store music data equivalent to about 100,000 songs. In reality, the aforementioned storage space will not be used to its limit, but usually stores 40,000 to 70,000 songs.

[iii] A computer linked to the storage server is equipped with a program designed to search for songs that need to be deleted. Upon input of a certain date, it is possible to list all the songs that were broadcast for the last time before a certain date and to delete them at once.

[iv] In order to change the content of the Program every week, it is necessary to delete

the existing music data from the storage server and store the music data of new songs in the storage server due to the capacity limitations specified in [ii] above. The system specified in [iii] above is used to delete as many songs as necessary starting from the song older than others in terms of the last broadcast date.

[v] From the end of August 1998, the storage server is checked at least every three weeks. The system specified in [iii] above is used to search for songs that were last broadcast back over three months and to delete them at once.

(3) [i] The aforementioned operation practices indicate that an act of storing music data in the storage server for the Program would not be conducted based on a specific, concrete broadcasting schedule. Moreover, under these operation practices, only a limited number of songs can be stored on the storage server. The songs that are not scheduled to be broadcast will be eventually deleted. Thus, it can be said that music data is stored on the storage server only to the extent necessary for specific broadcasts.

Under the aforementioned system, a song that is scheduled to be broadcast frequently could be left undeleted after a specific broadcast and remain stored until the next broadcast. However, such situation is a mere result of the repeated use of said song in specific broadcasts scheduled for the future. Thus, the storage of data can be considered to be made within the extent necessary for specific broadcasts. Even if such situation occurs consequently, it cannot be said that the aforementioned operation system itself is inherently designed to store music data for a long period of time. (As mentioned above, if the storage consequently continues for a period longer than six months after the date of recording or the last broadcast date, Article 44, paragraph (3) of the Copyright Act would apply, making the recording illegal ex posto facto. However, in this case, this is not an issue because the plaintiffs do not claim the application of the aforementioned provision to the recording of the Sound Sources.)

Therefore, the storage of music data in the storage server for the Program can be considered to be "ephemeral" in the sense that the storage is made under a system that will eventually delete the music data in light of the operation practices of the system. Furthermore, since such recording is made only to the extent that is usually necessary for specific forecasts, the recording can be considered to be "ephemeral sound recording for broadcasting" specified in Article 44, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, paragraph (1) of said Act.

[ii] The plaintiffs alleged that storage of music data in the storage server for the Program cannot be considered to be "ephemeral sound recording for broadcasts" because, from the beginning, the storage is made to use the music data for general purposes in multiple different programs for general broadcasts.

However, as described above, the storage of music data in the storage server for the Program is made based on a specific broadcasting schedule and not for general broadcasts.

As mentioned above, such storage is made under a system wherein music data will be eventually deleted if it is not necessary for a specific broadcast. Thus, it cannot be said that the storage is made for general purposes from the beginning. In this respect, it is undeniable that some songs are stored for a certain period of time because they are repeatedly broadcast in the Program through multiple channels, but it has to be said that such situation is a mere result of a subsequently determined broadcasting schedule and is not the consequence expected when the storage was made. In the case of some songs, at the time when the storage is made, such consequence might be predictable. However, generally speaking, it cannot go so far as to say that the storage of music data in the storage server is made for general purposes from the beginning.

Furthermore, while the storage is made for the purpose of using the music data in multiple broadcasts, it cannot provide sufficient grounds to interpret that the storage should not be considered as "ephemeral sound recording for broadcasting." While Article 44, paragraph (1) of the Copyright Act permits "ephemeral sound or visual recording," Article 44, paragraph (3) of said Act specifies that such recording shall be considered to be illegal if the storage continues for a certain period of time after the recording was made with the proviso that, if a broadcast containing a sound or visual recording is transmitted within six months from the time of recording, the storage of sound or visual recording for future broadcasts shall not be considered to be illegal as long as the storage period is six months or shorter from the time of the last broadcast. This means that Article 44 of the Copyright Act was established on the premise that the storage of a sound or visual recording that is not deleted after being used in a broadcast and is scheduled to be used again in a subsequent broadcast could be permitted as "ephemeral sound or visual recording for broadcasting." Moreover, if it is assumed that the storage of music data that is scheduled to be used for multiple broadcasts cannot be considered to be "ephemeral sound recording for broadcasting," a broadcaster that transmits music broadcasts such as the Program has to delete songs after they are used in each broadcast even though there is a concrete plan to use those songs for subsequent broadcasts in order to avoid the risk of making illegal reproductions of phonograms. After the deletion, the broadcaster has to store the same songs once again. Such situation would force broadcasters to shoulder extremely complex administrative burdens and would not bring any particular benefits to phonogram producers either. It would only bring about unreasonable social and economic consequences. Thus, it

should be said that, even if the storage of music data for the Program is made for the purpose of using the music data for multiple broadcasts, it would not provide sufficient grounds to conclude that such storage cannot be regarded as "ephemeral sound recording for broadcasting." (The plaintiffs alleged that the fact that multiple broadcasts of the Program will be made not only through one channel but also through multiple channels provides sufficient grounds to conclude that the storage of music data cannot be considered as "ephemeral sound recording for broadcasting." However, in the case of the Program, which is a music broadcast in which a broadcaster uses multiple channels for different music genres respectively and manages those channels in an integrated manner, it is impossible to find grounds to conclude that the applicability of the aforementioned interpretation should be determined depending on whether a recorded song is broadcast repeatedly through one channel or through multiple channels.)

On these grounds, the aforementioned allegation of the plaintiffs is groundless.

(IV) On a comprehensive evaluation of the facts mentioned above, Defendant Daiichikosho's act of storing the music data of the Sound Sources in the storage server in preparation for transmitting the Sound Sources to the public through the Program can be regarded as a broadcaster's act of making ephemeral sound recordings of phonograms by using its own means (No. 2, I, 3, (III) (3) above) for its own broadcasts. Thus, Article 44, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, Paragraph (1) of said Act can be applied. Consequently, Defendant Daiichikosho's act mentioned above cannot be considered to constitute infringement of the reproduction rights that the plaintiffs respectively have for the Phonograms as phonogram producers.

II. Issue 3 Whether the defendants' act of inducing and facilitating illegal reproduction for private use constitutes infringement of the reproduction rights or not

1. According to the entire import of the oral argument, it can be presumed that many of the receivers of the Sound Sources transmitted through the Program make sound recordings in digital MDs by using a recording device connected to a receiving tuner. It is clear that such act of recording constitutes an act of reproduction of the Phonograms by the receivers.

2. Whether Article 30, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, paragraph (1) of said Act is applicable or not

(I) It is clear that, generally speaking, receivers record the Sound Sources in MDs as described above "for personal or family use or for any other use of a similarly limited scope" (there is no dispute between the parties concerned in substance with regard to the aforementioned fact). Since it is also clear that the aforementioned recording is not

made by use of an automated duplicator installed for the purpose of providing said recording to the public, the aforementioned act of recording by individual receivers can be considered to be "reproduction for private use" specified in Article 30, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, paragraph (1) of said Act (while some individual receivers might record the Sound Sources in MDs for purposes other than the aforementioned purpose of use, such receivers do not have to be taken into consideration in this case because there is no evidence to prove that the defendants take any specific measures to induce and facilitate such recording).

(II) Acceptability of the allegation of the plaintiffs (No. 2, IV, 3, (I) (1))

The plaintiffs alleged that, since Article 30, paragraph (1) of the Copyright Act was established based on the main text of Article 9 (2) of the Berne Convention, on the premise that an act of reproduction can be regarded as "reproduction for private use" specified in Article 30, paragraph (1) of said Act only if said act satisfies the condition "provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author" as specified in the proviso of Article 9 (2) of the Berne Convention, an act of the receivers of the Program of recording the Sound Sources in MDs can be considered to conflict with the normal exploitation of phonograms by the phonogram producers in light of the situation described in No. 2, IV, 3, (I), (1) [ii] and [iii] with regard to the transmission of the Program to the public. On these grounds, the plaintiffs alleged that the aforementioned receivers' act of recording cannot be considered to be "reproduction for private use" specified in Article 30, paragraph (1) of the Copyright Act. This allegation of the plaintiffs is examined below.

First, with regard to the relationship between Article 9 (2) of the Berne Convention and Article 30, paragraph (1) of the Copyright Act, in response to the main text of Article 9 (2) of the Berne Convention, which leaves it up to legislation of countries of the Union to limit the reproduction rights of authors, etc. in special cases, Article 30, paragraph (1) of the Copyright Act was established to specify an example case where reproduction rights can be limited. Thus, in relation to Article 9 (2) of the Berne Convention, Article 30, paragraph (1) of the Copyright Act needs to satisfy the condition specified in the proviso of Article 9 (2) of the Berne Convention. However, since said Convention does not clearly specify what manners of reproduction satisfy the aforementioned condition, it has to be said, after all, that it is left up to legislation in the countries of the Union. It can be said that Article 30, paragraph (1) of the Copyright Act, which was established to embody Article 9 (2) of the Berne Convention as mentioned above, should be considered to specify that the exercise of reproduction rights against

an act of reproduction conducted on the conditions specified in (I) above shall be limited on the premise that an act of reproduction satisfies the conditions specified in the proviso of Article 9 (2) of the Berne Convention. Therefore, in order to determine whether an act of reproduction constitutes reproduction for private use permitted under the Copyright Act, it would be sufficient to determine whether such act of reproduction falls under Article 30, paragraph (1) of said Act. It would not be necessary to directly refer to the provision of the Berne Convention that provides a basis for Article 30, paragraph (1) of the Copyright Act in order to determine whether such act of reproduction falls under the provision of said Article. Thus, it has to be said that the aforementioned allegation of the plaintiffs contains a mistake in the very premise for their argument.

As mentioned above, the act of individual receivers of the Program of recording the Sound Sources in MDs is generally conducted for such purpose in such manner as described in (I) above. Thus, even if the details about the transmission of the Program to the public as described in No. 2, IV, 3, (I), (1), [ii] and [iii] and alleged by the plaintiffs above is taken into consideration, it would not affect the purpose and manner of recording conducted by individual receivers and, therefore, would not affect the aforementioned conclusion. Moreover, the situation alleged by the plaintiffs, i.e., the situation where the transmission of the Program to the public "conflicts with the normal exploitation of phonograms by the phonogram producers," arises only due to the manner of the transmission of the Program to the public as described in No. 2, IV, 3, (I), (1), [ii] and [iii] above. Persons who merely receive the Program should not be held responsible for the manner of the transmission of the Program to the public. While the act of individual receivers of recording the Program should be considered to be "reproduction for private use" specified in Article 30, paragraph (1) of the Copyright Act in terms of the purpose and manner of recording, if it is concluded that such act of receivers constitutes an illegal act that cannot be regarded as "reproduction for private use" specified in Article 30, paragraph (1) of the Copyright Act on the grounds of the manner of transmission of the Program to the public as described above, it would consequently lead to the conclusion that is equivalent to saying that individual receivers should be held responsible for an act of another person that does not fall within the scope of their liability. Such conclusion should be considered to be unreasonable in substance.

Therefore, the aforementioned allegation of the plaintiffs is groundless.

(III) On these grounds, the act of individual receivers of receiving the music data of the Sound Sources transmitted through the Program and recording it in MDs by using audio equipment connected to the receiving tuners can be generally considered to be

"reproduction for private use" permitted under Article 30, paragraph (1) of the Copyright Act applied mutatis mutandis under Article 102, paragraph (1) of said Act. Thus, such act of the receivers cannot be considered to constitute infringement of the reproduction rights of the plaintiffs as the producers of the Phonograms.

3. The plaintiffs alleged that, on the premise that the individual receivers' act of recording the Sound Sources in MDs constitutes an act of illegal reproduction of the Phonograms, the defendants' act of transmitting the Sound Sources to the public through the Program constitutes an illegal act of inducing and facilitating the illegal reproduction by individual receivers as described above. As mentioned in 2 above, since the individual receivers' act of recording the Sound Sources in MDs cannot be considered to be illegal reproduction of the Phonograms, the plaintiffs' allegation must be considered to lack premises.

Therefore, the plaintiffs' allegation that the defendants' act induces and facilitates an illegal act of reproduction for private use is groundless without needing to examine any other factors.

III. Issue 4 Whether an act of infringing the reproduction rights is committed at the receiving tuners

1. Whether an act of storing data, etc. in a RAM constitutes "reproduction" under the Copyright Act

(I) The term "reproduction" in the Copyright Act means "reproducing a work in a physical form through printing, photography, or replication, by recording its sound or visuals (Article 2, paragraph (1), item (xv) of the Copyright Act). It is clear that the aforementioned "reproduction" includes an act of electronically recording a program or data on a magnetic disk or CD-ROM and making it ready to be played by an output device, etc. of a computer.

A RAM (Random Access Memory) is an integrated circuit to store work data, etc. in a computer and is generally called "memory." Usually, when data, etc. is processed in the computer, the data, etc. is transferred from a file on a hard disk, etc. to a RAM. When a task is carried out, the data, etc. on the RAM is processed by the Central Processing Unit (CPU) of a computer. When the file is closed upon completion of the processing, the aforementioned data, etc. is transferred back to the hard disk, etc. In this way, data, etc. is stored in a RAM only during the time of processing on the computer. A computer must be kept switched on in order to store data, etc. in a RAM. If it is switched off, all of the data in the RAM would disappear. In the sense stated above, the storage of data, etc. in a RAM can be considered to be ephemeral and transitional. Thus, it can be said that a RAM has characteristics different from those of a magnetic disk or

CD-ROM, which can keep data, etc. even if it is not kept switched on.

In consideration of the aforementioned characteristics of the storage of data, etc. in a RAM, the issue of whether the storage of data, etc. in a RAM can be regarded as "reproduction" under the Copyright Act is examined below.

(II) The Copyright Act specifies that, in the case of an act of exploiting the work in a nonphysical form, the author has the exclusive right to conduct such act as long as it is conducted in public (Article 22 to Article 26-2 of said Act). On the other hand, the Copyright Act specifies that, in the case of an act of reproducing a work in a physical form (reproduction), the author has the exclusive right to conduct such act regardless of whether it is conducted in public or not (Article 21 of said Act). In short, the Copyright Act specifies that, in principle, an act of reproducing a work in a physical form shall constitute infringement of the exclusive right of the author even if such reproduction merely means making only a single copy of the work without any plan for exploitation in public. Unlike the case of an act of exploitation in a nonphysical form as mentioned above, the author is given a very powerful right. This can be interpreted that, since any reproduction of a work in a physical form could be exploited repeatedly in the future, it is considered to be reasonable, as a preventive measure, to extend the author's right to an act of making reproduction itself, which could be exploited repeatedly as mentioned above, even if said reproduction itself is not exploited in public.

In light of the purpose of the provisions of the Copyright Act concerning reproduction right as described above, it should be interpreted that an act of reproduction would be considered to be "reproduction" specified in the Copyright Act, in other words, "reproduction in a physical form," only if the reproduction is made in such a form that could be exploited repeatedly in the future. Since the storage of data, etc. in a RAM has an ephemeral, transitional nature as stated in (I) above, it is obvious, in light of social norms, that the data stored in a RAM cannot be considered to be a reproduction that could be exploited repeatedly in the future. Thus, the storage of data, etc. in a RAM cannot be considered to be "reproduction" under the Copyright Act.

(III) The aforementioned conclusion is supported from the perspective of the provision of the Copyright Act concerning the author's right for a program (Article 2, paragraph (1), item (x)-2 of the Copyright Act) as follows.

In order to use a program on a computer, since it is indispensable to store the program (loading) in a RAM in the computer, it can be said that an act of using a program is inseparable from an act of storing the program in a RAM. However, the Copyright Act does not have a provision concerning a work of computer programming specifying that the author has the exclusive right to use such work. Moreover, Article

113, paragraph (2) of said Act specifies that "The use of a copy made through an act that infringes the copyright to a work of computer programming on a computer in the course of business is deemed to constitute an infringement of the copyright, but only if the person using such copy had knowledge of such infringement at the time that the person acquired the title to use the copy." Since this provision specifies that an act of using a program shall be deemed to infringe the copyright for the program only if certain conditions are satisfied, this provision can be considered to have been established based on the presumption that an act of using a program in general does not constitute copyright infringement under the Copyright Act in principle. Thus, it can be interpreted that the Copyright Act presumes that an act of using a program and an act of storing a program in a RAM, which is inseparable from an act of using a program, are not illegal except for the case specified in Article 113, paragraph (2) of said Act. It is reasonable to interpret that the aforementioned presumption was made on the grounds that an act of storing data in a RAM has an ephemeral, transitional nature as mentioned above and does not constitute "reproduction" under the Copyright Act.

The plaintiffs alleged, on the premise that an act of storing music data in a RAM inherently constitutes "reproduction," that Article 113, paragraph (2) of the Copyright Act should be interpreted as a provision established for the purpose of limiting the cases where an act of using a program and an ensuing act of storing the program in a RAM are considered to be illegal in order to protect program users. In consideration of the style of said provision, in other words, the use of a legal term "deem," which is used to treat an inherently different thing as an identical thing, said provision specifies that an act that is inherently different from an act of infringing the copyright shall be exceptionally treated as an act of copyright infringement. It is clear that the plaintiffs are wrong to allege that the purpose of the aforementioned provision is to limit the cases where an act that inherently infringes a copyright can be considered to be illegal. Therefore, the aforementioned allegation of the plaintiffs is unacceptable.

(IV) Moreover, the plaintiffs alleged that the Copyright Act defines "reproduction" simply as "reproducing a work in a physical form" and does not impose any conditions with regard to the length of time during which a reproduced work should remain perceivable and therefore that it cannot be interpreted that the storage of data in a RAM does not constitute "reproduction" just because the stored data in the RAM would disappear if the power is turned off. However, the standard to differentiate the concept "reproduction in a physical form" from the opposite concept "reproduction in a nonphysical form" is not necessarily unambiguously clear. In consideration of the facts described in (II) and (III) above, it should be interpreted that the storage of data in a

RAM cannot go so far as to be regarded as "reproduction in a physical form" under the Copyright Act due to its ephemeral, transitional nature as described above. Even though the Copyright Act does not impose any conditions concerning the length of time during which a reproduced work should remain perceivable, the absence of such conditions does not conflict with the interpretation that the storage of data in a RAM does not constitute "reproduction." Therefore, the aforementioned allegation of the plaintiffs is unacceptable.

Furthermore, the plaintiffs alleged that, since the provisions of the Berne Convention and the Universal Copyright Convention concerning reproduction rights define "reproduction" as "in any manner or form" ("by any means" in the Universal Copyright Convention), based on the interpretation of the concept of "reproduction" in the Copyright Act in accordance with the aforementioned conventions, the storage of data in a RAM should be interpreted as "reproduction" as well. However, the provisions of the aforementioned conventions (Article 9 (1) of the Berne Convention, Article IV bis, paragraph (1) of the Universal Copyright Convention) do not define the concept "reproduction" itself, but merely specify that authors have exclusive rights to authorize "reproduction," which is a term used therein to mean an already established concept, regardless of the manner or form of an act of "reproduction." Since the aforementioned conventions do not have any other provision that defines the concept "reproduction," it should be concluded that it is not necessary to make a determination as to whether the storage of data in a RAM constitutes "reproduction" under the Japanese Copyright Act or not in compliance with the aforementioned conventions. It can also be said that the aforementioned interpretation does not have to be made in compliance with the recommendation and consensus statements made in international conferences as alleged by the plaintiffs (No. 2, IV, 4, (I) (1) [iii] and [iv] above). Thus, the aforementioned plaintiffs' allegation is also unacceptable.

2. Storage of data in a RAM of a receiving tuner

The music data of the Program is stored in a RAM of a receiving tuner as described in No. 2, I, 4 above. Since it is clear that such storage is ephemeral and transitional as is the case with the storage of data, etc. in a RAM of a computer in general, an act of storing the Sound Sources received through the Program in a RAM of a receiving tuner does not constitute "reproduction" under the Copyright Act. Therefore, it does not infringe the reproduction rights that the plaintiffs respectively have for the Phonograms as phonogram producers.

IV. In light of the characteristics of this case, it should be said that the purpose of the allegation of the plaintiffs in this case (in particular, the plaintiffs' allegation about

"broadcasting" specified in Article 44, paragraph (1) of the Copyright Act in relation to Issue 2 and the plaintiffs' allegation about "reproduction for private use" specified in Article 30, paragraph (1) of said Act in relation to Issue 3) is to recommend substantive interpretation of the Copyright Act in order to avoid the situation where an imbalance in substantive benefits arises, more specifically where the direct application of the provisions of the Copyright Act to the Program, which is transmitted to the public in a manner not imagined by the Copyright Act, would unreasonably infringe the benefits of the plaintiffs, which are phonogram producers, and would unreasonably increase the benefits of the defendants, which run the Program at the sacrifice of the plaintiffs.

However, this court finds it reasonable to adopt the aforementioned conclusion as an interpretation theory of the Copyright Act. On the premise that the Program is transmitted to the public in the manner alleged by the plaintiffs, the plaintiffs' allegation that there is an imbalance between the plaintiffs sand Defendant Daiichikosho in terms of benefits in substance is understandable. However, it has to be said that the plaintiffs' allegation made in this case in order to reflect this idea in the interpretation of the Copyright Act as described above goes beyond the limit of a legal interpretation theory. It has to be said that the argument about an imbalance in terms of the substantive benefits as mentioned above should be made from a legislative perspective or at the time when a discussion is held in order to determine the amount of secondary use fee or when a request is filed to seek an award from the Commissioner for Cultural Affairs.

V. Conclusion

On these grounds, all of the plaintiffs' allegations that the defendants infringe the plaintiffs' neighboring rights (reproduction rights as phonogram producers) are unacceptable. Thus, the plaintiffs' claims are groundless without having to examine any other points including Issue 1.

The judgment shall be rendered in the form of the main text.

Tokyo District Court, 46th Civil Division

Presiding judge: MIMURA Ryoichi

Judge: NAKAYOSHI Tetsuro

Judge OONISHI Katsushige is not eligible to sign and seal this judgment due to transfer.

Presiding judge: MIMURA Ryoichi

Sound Source List

1.
Phonogram producer: Victor Entertainment Corp.
Song title: Yozora no mukou
Performer: SMAP
Time of production: November 1997
CD product number: VIDL-30188

2.
Phonogram producer: KING RECORD CO., LTD.
Song title: raging waves
Performer: Megumi Hayashibara
Time of production: April 1998
CD product number: KIDA-163

3.
Phonogram producer: Toshiba-EMI Ltd.
Song title: GET ON THE FLOOR
Performer: ICE
Time of production: May 1998
CD product number: TOCT-4105

4.
Phonogram producer: NIPPON CROWN Co., Ltd.
Song title: Naniwa Hanabi
Performer: Mika Tachiki
Time of production: March 1998
CD product number: CRDN-547

5.
Phonogram producer: Warner Music Japan Inc.
Song title: summer sunset
Performer: Ryoko Hirosue
Time of production: April 1998
CD product number: WPDV-7140

6.
Phonogram producer: FUN HOUSE, INC.
Song title: Natsu no Mahou
Performer: Pepperland Orange
Time of production: February 1998
CD product number: FHDF-1687

7.
Phonogram producer: BMG JAPAN, INC.
Song title: Heart
Performer: Masaharu Fukuyama
Time of production: December 1997
CD product number: BVCR-8819

8.
Phonogram producer: Universal Victor, Inc.
Song title: Otoshiana
Performer: Shonen Knife
Time of production: December 1997
CD product number: MVCH-29020

9.
Phonogram producer: Axev Inc.
Song title: FOREVER YOURS
Performer: Every Little Thing
Time of production: May 1998
CD product number: AVDD-20244