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Date of the judgement

2011.01.20

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Case Number

2009(Ju)788

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Reporter

Minshu Vol. 65, No. 1

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Title

Judgment concerning the case where the provider of the service of making it possible to acquire reproductions of broadcast programs, etc. is considered to be the party who performs reproduction

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Case name

Case to seek injunction against copyright infringement, etc.

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Result

Judgment of the First Petty Bench, quashed and remanded

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Court of the Second Instance

Intellectual Property High Court, Judgment of January 27, 2009

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Summary of the judgement

In terms of the service of making it possible to acquire reproductions of broadcast programs, etc., where the person who provides such service, under the person's management and control, inputs the broadcasts received by the television antenna into an apparatus that functions to

perform reproduction, so that said apparatus, upon receiving a command of recording, automatically reproduces broadcast programs, etc., such person who provides said service should be considered to be the party who performs reproduction, even if the command of recording is issued by the user of the service.
(There is a concurring opinion.)

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References

Articles 21 and 98 of the Copyright Act

Article 21 of the Copyright Act
The author shall have the exclusive right to reproduce his work.

Article 98 of the Copyright Act
A broadcasting organization shall have the exclusive right to make sound or visual recordings and/or otherwise reproduce by means of photography or other similar processes, the sounds or images incorporated in its broadcast following reception of the broadcast or the wire-broadcast made following reception of the broadcast.

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Main text of the judgement

The judgment in prior instance is quashed.
The case is remanded to the Intellectual Property High Court.

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Reasons

Concerning the reasons for petition for acceptance of final appeal argued by the appeal counsels for Appellant X1, UMEDA Yasuhiro, et al., and the reasons for petition for acceptance of final appeal argued by the appeal counsels for Appellants X2 and X3, MATSUDA Masayuki, et al., the appeal counsels for Appellants X4 and X5, OKAZAKI Hiroshi, et al., the appeal counsels for Appellants X6 and X7, MAEDA Tetsuo, et al., the appeal counsels for Appellants X8 and X9, ITO Makoto, et al., and the appeal counsels for Appellant X10, OZAKI Yukimasa, et al. (except for the reasons excluded)
1. In this case, the appellants of final appeal, who are broadcasting organizations, sue the appellee of final appeal, who provides a service using hard disk recorders with an Internet communication function, called Rokuraku II (hereinafter referred to as "Rokuraku II"), alleging

that said service infringes the appellants' right of reproduction with regard to the broadcast programs that they have produced, which are categorized copyrighted works, and the sounds or images incorporated in the broadcasts that they provide (these broadcasts and sounds or images incorporated in the broadcasts shall hereinafter be collectively referred to as the "broadcast programs, etc.") (Articles 21 and 98 of the Copyright Act); based on this allegation, the appellants seek injunction against the appellee's reproduction of the broadcast programs, etc., while also seeking payment of damages.

The appellants argue that it is the appellee that performs reproduction in terms of said service, whereas the appellee contends that it is not the appellee that performs reproduction because the users of the service perform legal reproduction for their private use.

2. The outline of the facts determined by the court of prior instance is as follows.

(1) Appellants X1, X2, X4, X8, and X10, as indicated in the list of copyrighted works attached hereto, respectively have the right of reproduction with regard to the broadcast programs indicated in said list. The appellants (except for Appellant X6) are broadcasting organizations, and as indicated in the list of broadcasts attached to the judgment in first instance, they respectively have the right of reproduction with regard to the sounds or images incorporated in the broadcasts indicated in said list (the broadcast programs indicated in the list of copyrighted works attached hereto and the sounds or images incorporated in the broadcasts indicated in the list of broadcasts attached to the judgment in first instance shall hereinafter be collectively referred to as the "Programs, etc.").

P was a broadcasting organization, and as indicated in the list of copyrighted works attached hereto, it had the right of reproduction with regard to the broadcast programs indicated in said list, and as indicated in the list of broadcasts attached to the judgment in first instance, it also had the right of reproduction with regard to the sounds or images incorporated in the broadcasts indicated in said list. Appellant X6 is a broadcasting organization, and on October 1, 2008, it succeeded to rights and obligations in relation to all of P's businesses, except for the group management business, as a result of a company split.

(2) The appellee manufactures Rokuraku II, and sells or leases this product.

Rokuraku II can be used as a pair of units, one functioning as a master unit and the other functioning as a slave unit (hereinafter Rokuraku II used as a master unit and Rokuraku II used as a slave unit shall be referred to as "Rokuraku Master Unit" and "Rokuraku Slave Unit," respectively). A Rokuraku Master Unit incorporates a television tuner for terrestrial analog broadcasting, and functions to record the received broadcast programs, etc. by converting them into digital data, and also functions to transmit the data of recordings via the Internet. A Rokuraku Slave Unit functions to command a Rokuraku Master Unit to record via the Internet

and then receive the data of recordings from the Rokuraku Master Unit and play those recordings.
A user of Rokuraku II, through one-on-one correspondence via the Internet between the Rokuraku Master Unit and the Rokuraku Slave Unit, can view the broadcast programs, etc. recorded by the Rokuraku Master Unit, by means of the Rokuraku Slave Units installed at a place remote from where the Rokuraku Master Unit is installed. The specific process of this system is as follows. (i) A user operates a Rokuraku Slave Unit at hand and commands the recording of a specific broadcast program, etc. (ii) The command is transmitted to the corresponding Rokuraku Master Unit via the Internet. (iii) The Rokuraku Master Unit, into which terrestrial analog broadcasts received by the television antenna are continuously input, upon receiving said command of recording, automatically records the broadcast program, etc. under command by converting them into digital data, which is then transmitted to the Rokuraku Slave Unit via the Internet. (iv) The user operates the Rokuraku Slave Unit at hand and plays said data to view the broadcast program, etc.
(3) Around March 2005, the appellee launched a service of leasing a pair of a Rokuraku Master Unit and Rokuraku Slave Unit, or selling a Rokuraku Slave Unit while leasing only a Rokuraku Master Unit, with an initial registration fee of 3,150 yen and a monthly rental fee of 6,825 yen to 8,925 yen (such service shall hereinafter be collectively referred to as the "Service").
Users of the Service can view the broadcast programs, etc. aired in the areas where the Rokuraku Master Units are installed, by operating their Rokuraku Slave Units and issuing a command of recording of those broadcast programs, etc.

3. The court of prior instance ruled that, even where the Rokuraku Master Units are installed at places under the management and control of the appellee, the appellee does nothing more than provide users of the Service with an environment, etc. making it easy for them to perform reproduction, and in this respect, the appellee itself cannot be deemed to be reproducing the Programs, etc.

4. However, we cannot affirm the rulings of the court of prior instance, on the following grounds.
In terms of the service of making it possible to acquire reproductions of broadcast programs, etc., where the person who provides such service (hereinafter referred to as the "service provider"), under the person's management and control, inputs the broadcasts received by the television antenna into an apparatus that functions to perform reproduction (hereinafter referred to as "reproduction apparatus"), so that the reproduction apparatus, upon receiving a command of recording, automatically reproduces broadcast programs, etc., it is appropriate to construe

that the service provider is the party who performs reproduction, even if the command of recording is issued by the user of the service. More specifically, when identifying the party who performs reproduction, it is reasonable to examine who it is that reproduces the copyrighted work in question, while taking into consideration various factors such as the object to be reproduced, the method of reproduction, and the details and extent of involvement in performing reproduction. In the case assumed above, the service provider does not only develop the environment, etc. for making it easy to perform reproduction, but also carries out the essential actions in the process of reproducing broadcast programs, etc. with the use of a reproduction apparatus, that is, under its management and control, receiving broadcasts and inputting the information concerning the broadcast programs, etc. into the reproduction apparatus. But for such actions carried out by the service provider at the time of reproduction, it would be impossible for the users of the service to reproduce broadcast programs, etc. even if they issue a command of recording. In this context, there are sufficient grounds for regarding the service provider as the party who performs reproduction.

5. The court of prior instance, without making any findings as to the status of management of the Rokuraku Master Units in terms of the Service, dismissed the appellants' claims on the grounds that the appellee cannot be deemed to be reproducing the Programs, etc. even though the Rokuraku Master Units are installed at places under the appellee's management and control. According to our reasoning shown above, such determination of the court of prior instance contains violation of laws and regulations that apparently affects the judgment. The appeal counsels' arguments are well-grounded, and the judgment in prior instance should inevitably be quashed. For further examination as to matters including the status of management of said apparatuses, we remand the case to the court of prior instance.

Therefore, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices. There is a concurring opinion by Justice KANETSUKI Seishi.

The concurring opinion by Justice KANETSUKI Seishi is as follows.
As for the criterion for identifying the party who performs reproduction, etc. in the meaning under the Copyright Act, this case is connected with issues such as the relation with this court's past judgments. I would like to state my views on these issues.
1. When identifying the party who performs reproduction, the criterion generally called the "karaoke rule" has been frequently applied since it was indicated in this court's past decisions, i.e. the judgment of the Third Petty Bench of the Supreme Court of March 15, 1988 (Minshu Vol. 42, No. 3, at 199). There are not a few lower court decisions, including the judgment in first

instance of the present case, which made a finding of the party who performs reproduction, etc. in accordance with this rule. Under the "karaoke rule," a person who physically or naturally cannot be regarded as performing a certain act is identified as the party who performs the act from a normative perspective, and an overall determination should be made, focusing on two factors, namely, management and control over the act, and attribution of profits. At the same time, this rule faces criticisms for its lack of a definite legal basis or its ambiguous requirements and unclear scope of applicability. However, in the course of identifying the party who performs acts set forth in Article 21 and the subsequent clauses in the Copyright Act, namely, "reproduction," "performance," "exhibition," "distribution," etc., it is not sufficient just to observe these acts from physical or natural aspects?although it must be avoided to put an interpretation that is far from the ordinary meaning of the respective terms in the legal text?, but it is necessary to observe those acts comprehensively, including social and economic aspects. This is a matter-of-course requirement in making a determination on a legal issue, because the use of a copyrighted work is an act that has both social and economic aspects.

Thus, the "karaoke rule" is a normative interpretation of a legal concept, and is nothing more than an ordinary approach of legal interpretation. It may be inappropriate to consider this rule as some special legal theory. Therefore, the factors to be taken into consideration would vary according to the type of act in question; the two conventional factors, i.e. management and control over the act, and attribution of profits, should not be treated as fixed factors. In most cases, these two factors have significance only in the course of examining who it is that performs the act from social and economic perspectives. Nevertheless, the "karaoke rule" appears to have taken on a life of its own, as if it were an original legal theory which involves fixed requirements, and this is exactly the point that I find in the "karaoke rule" that needs to be corrected.

2. When finding that it is not the appellee but the users that perform the recording, the judgment in prior instance presumably placed an emphasis on the point that the users freely issue commands to execute operations for recording, including selection of broadcast programs. This is an observation of the act of reproduction while focusing on the operation of the recording device, that is, the physical and natural aspect of the user's act. The judgment in prior instance determined that the act of reproduction is deemed to be legal private use if the users themselves manage the master units that they use, and even where the appellee manages the master units, the service provided by the appellee only work to develop, on behalf of the users, the environment, conditions, etc. that form the technical basis for enabling the master units to exert their functions smoothly, and that such legal private use would not change into illegal use due to the service in question. However, I find some questions with this point of view.

As pointed out by the court opinion, unless someone carries out actions of receiving broadcasts and inputting the information concerning the broadcast programs, etc. into the reproduction apparatus, it would be impossible for the users to reproduce broadcast programs, etc. even if they issue a command of recording. In this context, who it is that manages and controls the process of receiving and inputting broadcasts is an issue of extremely great importance in the course of identifying the party who performs recording. Therefore, even only for the purpose of observing the process of recording in question from physical or natural aspects, it may be inappropriate to place emphasis only on the point that the command of recording is issued by the users, as in the judgment in prior instance.

In addition, in view of the functions of Rokuraku II, it is obvious that the service provided by means of this system is of high value of utility for persons living outside Japan, who cannot directly receive Japanese television broadcasts in their home, etc. For such persons, it may be troublesome and costly and therefore not very easy for such persons to install and manage by themselves the master units in the areas where Japanese television broadcasts are receivable. This is what makes this type of business work, and it is inappropriate to make light of the social and economic significance peculiar to the management function of the master unit. It runs counter to reality to regard the system in dispute as an accumulation of acts of mere private use. Furthermore, it is also questionable to consider that the service provided by the appellee does not go beyond the bounds of the development of the necessary environment, conditions, etc., and the users pay fees in exchange for such benefits. What is provided by the appellee is a service designed specially for receiving and recording television broadcasts, which means that the appellee's business would not work unless broadcast television programs are available. It is natural to determine that the users pay fees in exchange for receiving the service by which they can record and view television programs. In this sense, it may be an affirmable view that economic profits arising from the use of the copyrights or neighboring rights are attributed to the appellee. Nevertheless, in this case, the determination as to the attribution of such profits does not affect the conclusion, because the appellee can be judged to be the party who performs the recording in question if it is found to exercise the power of management and control over the master units.

3. The judgment in prior instance stated that this case differs from the aforementioned leading case in terms of factual backgrounds. This determination is itself a matter of course, but in that leading case, this court probably based its conclusion on the view that when identifying the copyright infringer, it is appropriate not only to observe the act in question merely from physical and natural aspects, but also to make an overall observation including social and economic aspects. The determination of the court of prior instance lacks such an overall perspective and

cannot be accepted as a reasonable interpretation of the Copyright Act.

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Presiding judge

Justice KANETSUKI Seishi

Justice MIYAKAWA Koji

Justice SAKURAI Ryuko

Justice YOKOTA Tomoyuki

Justice SHIRAKI Yu

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(Attachment)

List of copyrighted works

1. X1

Title: "Baraeti Seikatsu Shohyakka"

Title: "Fukushi Nettowaku"

2. X2

Title: "Odoru! Sanma Goten!!"

3. X4

Title: "Sekiguchi Hiroshi no Tokyo Furendo Paku II"

4. P

Title: "MUSIC FAIR21"

5. X8

Title: "Ikinari! Ogondensetsu."

6. X10

Title: "Petto Daishugo! Pochi Tama"

(This translation is provisional and subject to revision.)