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Date of the judgement

2011.12.08

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Case Number

2009 (Ju) No. 602, 603

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Reporter

Minshu Vol. 65, No. 9

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Title

Judgment concerning, in the case where a country that Japan does not recognize as a State has acceded to the Berne Convention for the Protection of Literary and Artistic Works, which is already effective in relation to Japan, whether or not the films which are works of nationals of such country fall within the category of works set forth in Article 6, item (iii) of the Copyright Act

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Case name

Case to seek an injunction against copyright infringement, etc.

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Result

Judgment of the First Petty Bench, partially quashed and decided by the Supreme Court, partially dismissed without prejudice, partially dismissed with prejudice on the merits

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Court of the Second Instance

Intellectual Property High Court, Judgment of December 24, 2008

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Summary of the judgement

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1. Where a country that Japan does not recognize as a State has acceded to the Berne Convention for the Protection of Literary and Artistic Works, which is already effective in relation to Japan, if Japan takes the standpoint that this does not give rise to any rights or obligations under the Convention between Japan and said country, the films which are works of nationals of said country cannot be regarded as falling within the category of works set forth in Article 6, item (iii) of the Copyright Act only because of said country's accession to the Convention.

2. An act of using a work that does not fall within any of the categories of works under the items of Article 6 of the Copyright Act does not constitute a tort, unless there are special circumstances such as that said act infringes any legally protected interest, other than the interest to be enjoyed through the use of works that is subject to regulation under said Act.

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References

(Concerning 1) Article 6, item (iii) of the Copyright Act, Article 3(1)(a) of the Berne Convention for the Protection of Literary and Artistic Works; (Concerning 2) Article 6 of the Copyright Act, Article 709 of the Civil Code

Article 6 of the Copyright Act

Only those works falling under one of the following items shall receive protection under this Act:

(i) works of Japanese nationals ("Japanese nationals" includes juridical persons established under the laws and regulations of Japan and those who have their principal offices in Japan; the same shall apply hereinafter);

(ii) works first published in this country, including those first published outside this country and thereafter published within this country within thirty days from the date from their first publication;

(iii) works in addition to those listed in the preceding two items, with respect to which Japan has the obligation to grant protection under an international treaty.

Article 3(1)(a) of the Berne Convention for the Protection of Literary and Artistic Works

(1) The protection of this Convention shall apply to:

(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;

Article 709 of the Civil Code

A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

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Main text of the judgement

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1. Based on the final appeal filed by the appellant of final appeal in 2009 (Ju) No. 602/appellee of final appeal in 2009 (Ju) No. 603, the judgment in prior instance is quashed with respect to the part for which the appellant of final appeal in 2009 (Ju) No. 602/appellee of final appeal in 2009 (Ju) No. 603 lost the case.

2. The claim made by the appellee of final appeal in 2009 (Ju) No. 602/appellant of final appeal in 2009 (Ju) No. 603 with respect to the part mentioned in the preceding paragraph is dismissed with prejudice on the merits.

3. The final appeal filed by the appellee of final appeal in 2009 (Ju) No. 602/appellant of final appeal in 2009 (Ju) No. 603 and the final appeal filed by the appellant of final appeal in 2009 (Ju) No. 603 with respect to the part of the judgment in prior instance which relates to their alternative claims are dismissed without prejudice.

4. The remaining parts of the final appeal filed by the appellee of final appeal in 2009 (Ju) No. 602/appellant of final appeal in 2009 (Ju) No. 603 and the final appeal filed by the appellant of final appeal in 2009 (Ju) No. 603 are both dismissed with prejudice on the merits.

5. The cost of the appeal to the court of second instance and the cost of the final appeal incurred between the appellant of final appeal in 2009 (Ju) No. 602/appellee of final appeal in 2009 (Ju) No. 603 and the appellee of final appeal in 2009 (Ju) No. 602/appellant of final appeal in 2009 (Ju) No. 603 shall be borne by the appellee of final appeal in 2009 (Ju) No. 602/appellant of final appeal in 2009 (Ju) No. 603, and the cost of the final appeal incurred between the appellant of final appeal in 2009 (Ju) No. 602/appellee of final appeal in 2009 (Ju) No. 603 and the appellant of final appeal in 2009 (Ju) No. 603 shall be borne by the appellant of final appeal in 2009 (Ju) No. 603.

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Reasons

I. Outline of the case

1. The appellee of final appeal in 2009 (Ju) No. 602/appellant of final appeal in 2009 (Ju) No. 603 and the appellant of final appeal in 2009 (Ju) No. 603 (hereinafter referred to as "Plaintiff X1" and "Plaintiff X2," respectively, and as "plaintiffs" collectively) allege as follows against the appellant of final appeal in 2009 (Ju) No. 602/appellee of final appeal in 2009 (Ju) No. 603

(hereinafter referred to as the "defendant"), which succeeded to P that had broadcasted part of the film produced in the Democratic People's Republic of Korea (hereinafter referred to as "North Korea"), indicated in 1, n, of the list of films attached to the judgment in prior instance (hereinafter referred to as the "Film"), without obtaining authorization from the plaintiffs. (i) As their principal claims, the plaintiffs allege that the Film and other films produced in North Korea, indicated in 1 to 3 of said list (hereinafter referred to as the "Films"), are works of nationals of North Korea and fall within the category of works set forth in Article 6, item (iii) of the Copyright Act, with respect to which Japan has the obligation to grant protection under the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as the "Berne Convention"), and accordingly, Plaintiff X2 seeks an injunction to stop the broadcasting of the Films on the grounds of the risk of infringement to its right of public transmission (Article 23, paragraph (1) of said Act) with regard to the Films, and the plaintiffs also argue that P's act of broadcasting as mentioned above infringed Plaintiff X2's right of public transmission and Plaintiff X1's exclusive right to use, etc. in Japan with regard to the Films and they claim damages for infringement of these rights. (ii) In the prior instance, as their alternative claims, the plaintiffs additionally alleged that even if the Film does not fall within the category of works to be protected under the Copyright Act, said act of broadcasting constitutes infringement of the plaintiffs' interest that deserves legal protection for the Film, and based on this allegation, they seek payment of damages in tort.

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

(1) All of the Films are works produced in North Korea, and among them, the Film is a photoplay which is more than two hours, produced in 1978 by Q.

(2) Plaintiff X2 is an administrative organ under the umbrella of the Ministry of Culture of North Korea, which is vested with legal capacity under the civil law of North Korea, and it has been confirmed by said ministry to hold copyrights for the Films under the laws and regulations of North Korea.

On September 30, 2002, Plaintiff X1 concluded a master contract with Plaintiff X2 with respect to copyrights for films (hereinafter referred to as the "Contract"), and obtained exclusive authorization to present the Films on screen, broadcast them, and license them to third parties in Japan.

(3) On December 15, 2003, on the TV news show titled "Super News," P broadcast a section of about six minutes which comprised a combination of an extract from the Film with the scene in which the actress, who had played the leading role in the Film, talked about her memories about the production of the Film, for the purpose of reporting the conditions of brainwashing education implemented in North Korea targeting its nationals, with the use of films. This section

used images totaling two minutes and eight seconds extracted from the Film (hereinafter said broadcasting part of the Film in this section shall be referred to as the "Broadcasting"). P had not obtained authorization for the Broadcasting from the plaintiffs.

(4) On October 1, 2008, as a result of a company split, the defendant succeeded to rights and obligations relating to the entire business of P, except for the corporate group management business.

(5) The Berne Convention took effect in relation to Japan as of April 24, 1975.

On January 28, 2003, North Korea deposited with the Director General of the World Intellectual Property Organization its instrument of accession to the Berne Convention, and on the same day, the Director General notified other countries of the Union of this fact. Accordingly, the Convention took effect in relation to North Korea on April 28, 2003.

(6) The Berne Convention provides that the countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works (Article 1), and that authors who are nationals of one of the countries of the Union shall be protected under the Convention for their works (Article 3(1)(a)).

While the Convention provides that any country outside the Union may accede to the Convention and thereby become party to the Convention and a member of the Union (Article 29(1)), it does not specify any special requirements for accession to the Convention, such as obtaining consent from other countries of the Union.

(7) Japan does not recognize North Korea as a State. To date, when countries other than North Korea acceded to the Berne Convention and the Convention took effect in relation to these countries, the government of Japan gave public notice of such accessions; however, Japan has not given such public notice to announce that the Convention has taken effect in relation to North Korea.

The Ministry of Foreign Affairs and the Ministry of Education, Culture, Sports, Science and Technology have presented the view that they do not consider that Japan has the obligation to grant protection under the Berne Convention with respect to works of nationals of North Korea as works of nationals of a country of the Union.

3. Given the facts mentioned above, the court of prior instance dismissed the plaintiffs' principal claims as well as Plaintiff X2's alternative claim, and partially upheld Plaintiff X1's alternative claim to the extent to seek payment of 120,000 yen with delay damages accrued thereon, holding as follows.

(1) As Japan does not have the obligation to grant protection under Article 3(1)(a) of the Berne Convention with respect to works of nationals of North Korea, a country that Japan does not recognize as a State (hereinafter referred to as a "country not recognized as a State"), the Films

cannot be regarded as "works with respect to which Japan has the obligation to grant protection under an international treaty," as provided in Article 6, item (iii) of the Copyright Act. Thus, the plaintiffs' principal claims have no basis and therefore they are groundless.
(2)A. The Broadcasting constitutes an act of illegally infringing the interest that Plaintiff X1 has acquired under the Contract, which is to be enjoyed through the use of the Film in Japan, and there is at least negligence on the part of P. Therefore, pursuant to Article 709 of the Civil Code, the defendant is liable to compensate for the damage sustained by Plaintiff X1.
B. However, Plaintiff X2 has entrusted Plaintiff X1 with the use of the Films in Japan, so Plaintiff X2 cannot be deemed to have any interest that deserves legal protection in terms of the use of the Films in Japan. Thus, Plaintiff X2's alternative claim is groundless.

II. Concerning the reasons for petition for acceptance of final appeal argued by appeal counsels in 2009 (Ju) No. 603, SAITO Makoto, KIM Sun-Sik, and ISHIKAWA Mitsuko
1. The appeal counsels argue that the court of prior instance misconstrued the provisions of Article 6, item (iii) of the Copyright Act in that it determined that the Films cannot be regarded as "works with respect to which Japan has the obligation to grant protection under an international treaty" set forth in said item.

2. In general, where a country not recognized as a State has acceded to a multilateral treaty which is already effective in relation to Japan, such country's accession to the treaty cannot be deemed to immediately give rise to the relationship between Japan and said country not recognized as a State in terms of rights and obligations under the treaty, unless the obligation to be assumed under the treaty by its contracting countries is an obligation under general international law which has universal value, so it is appropriate to construe that Japan has a choice of whether or not to give rise to the relationship with said country not recognized as a State in terms of rights and obligations under the treaty.
In the case of the Berne Convention, while protecting works whose authors are nationals of the countries of the Union (Article 3(1)(a)), the Convention does not generally protect works whose authors are nationals of countries outside the Union, but it protects the latter works only in the case where they were first published in one of the countries of the Union or simultaneously in a country outside the Union and in a country of the Union (Article 3(1)(b)). Thus, the Convention aims to ensure protection of works on the basis of the framework of States in the capacity of the countries of the Union, and it does not intend to require the countries of the Union to assume any obligation under general international law which has universal value.
According to the facts mentioned above, when North Korea, a country not recognized as a State, acceded to the Berne Convention, which was already effective in relation to Japan, the

government of Japan did not give public notice to announce that the Convention took effect in relation to North Korea. The Ministry of Foreign Affairs and the Ministry of Education, Culture, Sports, Science and Technology have presented the view that they do not consider that Japan has the obligation to grant protection under the Berne Convention with respect to works of nationals of North Korea as works of nationals of a country of the Union. In view of these facts, Japan takes the position that it has no relationship with North Korea, a country not recognized as a State, in terms of rights and obligations under the Berne Convention, irrespective of whether North Korea has acceded to the Convention or not.

Taking all of these circumstances into consideration, it is appropriate to construe that Japan does not have the obligation to grant protection under Article 3(1)(a) of the Berne Convention with respect to works of nationals of North Korea, and therefore the Films do not fall within the category of works set forth in Article 6, item (iii) of the Copyright Act. The judicial precedent, 1974 (Gyo-Tsu) No. 81, judgment of the Second Petty Bench of the Supreme Court of February 14, 1977, Saibanshu Minji No. 120, at 35, is irrelevant in this case because it addressed a different type of facts.

3. Consequently, without needing to make a determination on other points, the plaintiffs' principal claims are groundless in that they are made on the presupposition that the Films are eligible for protection under the Copyright Act, and the holdings of the court of prior instance mentioned in I-3(1) above can be affirmed as they go along with this reasoning. We cannot accept the plaintiffs' argument.

III. Concerning the reasons for petition for acceptance of final appeal argued by appeal counsels in 2009 (Ju) No. 602, MAEDA Tetsuo and NAKAGAWA Tatsuya (except for the reasons excluded)

1. The appeal counsels argue that the court of prior instance misconstrued the provisions of Article 709 of the Civil Code and Article 6 of the Copyright Act in that it found that the Broadcasting constitutes a tort against Plaintiff X1.

2. The Copyright Act vests a certain scope of persons with an exclusive right to use a work under certain requirements, and at the same time, for the purpose of ensuring the balance between such exclusive right and citizens' freedom in cultural life, the Act provides for the conditions under which a copyright comes into existence, the content and scope of a copyright, and the conditions under which a copyright is extinguished, thereby clarifying the scope and limit of the exclusive right. Article 6 of the Copyright Act, which defines the category of works to be protected under the Act, is deemed to be in line with such purpose; where a work does not

fall within any of the categories set forth in the items of said Article, the exclusive right to use the work would not be covered by legal protection. Therefore, it is appropriate to construe that an act of using a work that does not fall within any of the categories of works under the items of said Article does not constitute a tort, unless there are special circumstances such as that said act infringes any legally protected interest, other than the interest to be enjoyed through the use of works that is subject to regulation under said Act.

3. This reasoning can be applied to this case as follows. As explained above, the Film does not fall within the category of works set forth in Article 6, item (iii) of the Copyright Act. The interest to be enjoyed through the use of the Film, claimed by Plaintiff X1, is nothing other than the interest to be enjoyed through the exclusive use thereof in Japan that is subject to regulation under said Act, so even if such interest is infringed by the Broadcasting, the Broadcasting cannot be regarded as constituting a tort against Plaintiff X1.
It might be possible to construe that Plaintiff X1, in its claim, means to argue that the Broadcasting obstructed the business that Plaintiff X1 intended to conduct by concluding the Contract and thereby infringed its business interest. However, according to the facts mentioned above, the Broadcasting was conducted in a manner that in a section of about six minutes within a TV news shows, which was designed to introduce the present national situation of North Korea, only a small portion of the Film, i.e. two minutes and eight seconds in total out of more than two hours, was broadcasted within a justifiable extent for said purpose, and in light of these circumstances, the Broadcasting cannot at all be judged to go beyond the bounds of free competition and obstruct Plaintiff X1's business, so there is no room to consider the Broadcasting to have illegally infringed the aforementioned interest of Plaintiff X1.
Consequently, the Broadcasting does not constitute a tort against Plaintiff X1.

4. The holdings of the court of prior instance mentioned in I-3(2)A above, which go against this reasoning, contain violation of laws and regulations that apparently affects the judgment, and the defendant's arguments are well-grounded on this point. The judgment in prior instance should inevitably be quashed with respect to the part for which the defendant lost the case, and the claim made by Plaintiff X1 with respect to this part is groundless and therefore should be dismissed with prejudice on the merits.

IV. Conclusion
For the reasons stated above, based on the final appeal filed by the defendant, the judgment in prior instance should be quashed with respect to the part for which the defendant lost the case and the claim made by Plaintiff X1 with respect to this part should be dismissed with prejudice

on the merits. The plaintiffs filed a petition for acceptance of final appeal against the part of the judgment in prior instance which relates to their alternative claims, but they have not submitted any statement of reasons, so their final appeals against said part of the judgment in prior instance are unlawful. Accordingly, the final appeals filed by the plaintiffs against said part of the judgment in prior instance should be dismissed without prejudice, and the remaining parts of the final appeals filed by the plaintiffs should be dismissed with prejudice on the merits.

Therefore, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices.

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Presiding judge

Justice SAKURAI Ryuko

Justice MIYAKAWA Koji

Justice KANETSUKI Seishi

Justice YOKOTA Tomoyuki

Justice SHIRAKI Yu

(This translation is provisional and subject to revision.)