

Date	September 26, 2014	Court	Osaka High Court, 8th Civil Division
Case number	2013 (Ne) 2494		
– A case in which the court determined that the act of using a display font, which was produced to be used for television broadcasting, etc., for captions displayed on the screen in television programs cannot be deemed to constitute a tort or unjust enrichment.			

References: Articles 703 and 709 of the Civil Code

Summary of the Judgment

1. The appellant, which is a font vendor, produced a display font intended to be used for television broadcasting, etc. (hereinafter referred to as the "Font") and was selling this with the indication that it would be necessary to obtain authorization to use the Font and pay a royalty in relation to each individual television program in order to use it in a television program, etc.

In this case, the appellant alleged that: [i] Appellee TV Asahi produced, broadcasted and distributed the programs in which the Font is used for captions on the screen (hereinafter referred to as the "Programs"), and sold DVDs on which the Programs are recorded; and [ii] Appellee IMAGICA conducted the editing of the Programs by using the Font. The appellant then alleged that these acts constitute a tort or unjust enrichment, and based on these allegations, the appellant sought payment of an amount equivalent to the royalties with delay damages, principally based on a tort and alternatively as return of unjust enrichment.

The court of prior instance found neither a tort nor unjust enrichment mentioned above, and dismissed both of the appellant's claims. Dissatisfied with this, the appellant filed this appeal with the high court.

2. In this judgment, the court determined that the appellees' acts cannot be deemed to constitute a tort or unjust enrichment and hence both of the appellant's claims are groundless, and dismissed the appeal. In making this judgment, the court held as summarized below.

(1) Regarding the Font or interests in relation to its licensing

Under current laws, the Copyright Act, the Design Act, and other intellectual property rights-related laws aim at protecting rights in relation to the use of created designs by way of granting exclusive rights to use them to persons within a certain scope based on certain requirements, and in certain cases, created designs may be protected by the Unfair Competition Prevention Act. However, said laws also make clear the scope and limitation to which exclusive rights to use, etc. extend by

stipulating the cause of occurrence, content, scope, cause of extinguishment of each intellectual property right in order to prevent granting of a right to use, etc. from excessively restricting the freedom of the people's economic or cultural activities. In consideration of the objectives and purposes of the aforementioned laws, if a created design is not subject to protection under the aforementioned laws, the right to exclusively use said design is not subject to legal protection. Therefore, it is reasonable to understand that the act of using said design does not constitute a tort unless there are special circumstances, such as where said act constitutes infringement of legally protected interests which differ from interests in relation to the use of a creation that are subject to discipline of said laws.

(2) Regarding whether Appellee TV Asahi's act constitutes a tort

Appellee TV Asahi has been aware that the appellant conducts business activities that involve developing, selling, and giving authorization to use fonts, and has taken the position that there are no copyrights for such fonts, but it has adopted a policy of avoiding conflicts with the appellant's business by trying not to use the appellant's fonts and has actually taken actions in line with said policy. Regarding the Programs for which Appellee TV Asahi outsourced production of captions, it is not recognized as having purposefully continued to use the produced captions while being aware that the Font is used therein. Taking this into account, Appellee TV Asahi's act of producing, broadcasting, and delivering the Programs in which the Font is used for captions as well as manufacturing and selling the relevant DVDs cannot be recognized as one that goes beyond the scope of free competition and is based on an abuse of the freedom of business.

(3) Regarding whether Appellee IMAGICA's act constitutes a tort

Appellee IMAGICA only inserted captions into image materials by operating editing equipment in the editorial room based on the image data of captions, which Appellee TV Asahi had outsourced to some caption production companies and had received the delivery of. In addition, Appellee IMAGICA had no part in the manufacturing of the DVDs in question. The aforementioned Appellee IMAGICA's act cannot be considered to be one that goes beyond the scope of free competition and is based on an abuse of the freedom of business in consideration of the following points: [i] Appellee IMAGICA is not recognized as having been aware that the font used in the caption image data brought to it is the Font and that the Font was used without obtaining authorization from the appellant, and it is not recognized that there were any special circumstances to question this point; [ii] After receiving an indication of the unauthorized use of the Font from the appellant, Appellee IMAGICA conducted an

internal investigation and deleted the Font Software that had been installed on the computer, and also asked Appellee TV Asahi not to use the appellant's fonts in television programs, for which it conducts editing, and after that, neither the Font nor any of the appellant's old fonts was used in the Programs.

(4) Regarding whether the appellees' act constitutes unjust enrichment

Taking into account that interests in relation to the exclusive use of the Font are not subject to legal protection, even if the appellees use the Font for the Programs, it is not possible to immediately say that the act of use lacks a legal cause and that the appellees gained enrichment while the appellant incurred loss.

Judgment rendered on September 26, 2014; the original was issued on the same day; court clerk 2013 (Ne) 2494 Appeal Case of Seeking Compensation for Damages, etc.

(Court of prior instance: Osaka District Court, 2010 (Wa) 12214)

Date of conclusion of oral argument: July 9, 2014

Judgment

Appellant (plaintiff in the first instance): Visual Design Laboratory, Inc.

Appellee (defendant in the first instance): TV Asahi Holdings Corporation

(Old trade name: TV Asahi Corporation)

Appellee (defendant in the first instance): IMAGICA Corp.

Main Text

1. All of the appeals in question shall be dismissed.
2. The appellant shall bear the appeal costs.

Facts and reasons

No. 1 Objects of the appeals

1. Objects of the primary appeal

(1) The judgment in prior instance is revoked.

(2) The appellee, TV Asahi Holdings Corporation (hereinafter referred to as "Appellee TV Asahi"), is to pay the appellant 8,044,575 yen (however, it is to pay the amount up to 7,293,825 yen jointly and severally with the appellee, IMAGICA Corp. [hereinafter referred to as "Appellee IMAGICA"]) with delay damages accrued on 7,293,825 yen in said amount, which is calculated at the rate of 5% per annum for the period from April 8, 2010 to the date of completion of the payment, those accrued on 675,675 yen in said amount, which is calculated at the rate of 5% per annum for the period from December 11, 2011 to the date of completion of the payment, and those accrued on 75,075 yen in said amount, which is calculated at the rate of 5% per annum for the period from March 25, 2012 to the date of completion of the payment.

(3) Jointly and severally with Appellee TV Asahi, Appellee IMAGICA is to pay the appellant 7,293,825 yen with delay damages accrued thereon, which is calculated at the rate of 5% per annum for the period from April 8, 2010 to the date of completion of the payment.

(4) The appellees bear the court costs for both the first and second instances.

(5) Declaration of provisional execution

2. Objects of the secondary appeal

(1) The judgment in prior instance is revoked.

(2) Appellee TV Asahi is to pay the appellant 7,313,250 yen and the amount accrued on

6,630,750 yen in said amount, which is calculated at the rate of 5% per annum for the period from April 8, 2010 to the date of completion of the payment, the amount accrued on 614,250 yen in said amount, which is calculated at the rate of 5% per annum for the period from December 11, 2011 to the date of completion of the payment, and the amount accrued on 68,250 yen in said amount, which is calculated at the rate of 5% per annum for the period from March 25, 2012 to the date of completion of the payment.

(3) Appellee IMAGICA is to pay the appellant 6,630,750 yen and the amount accrued thereon, which is calculated at the rate of 5% per annum for the period from April 8, 2010 to the date of completion of the payment.

(4) The appellees bear the court costs for both the first and second instances.

(5) Declaration of provisional execution

No. 2 Outline of the case

1. Summary of the case

(1) In this case, the appellant, which is a font vendor, alleged as follows: The appellant produced a display font intended to be used for television broadcasting, etc. and was selling this with the indication that it would be necessary to obtain authorization to use the font and pay a royalty in relation to each individual program in order to use it in a program, etc.; however, despite no evidence that the appellant had granted authorization to use to Appellee TV Asahi, [i] Appellee TV Asahi [A] produced and broadcasted the programs described in "Program List" attached to the judgment in prior instance and "List of Additional Five Programs" attached to the same, in which the aforementioned font is used for captions on the screen, [B] distributed those programs described in "Distribution List" attached to the same and "Distribution List of Additional Five Programs" attached to the same, and [C] sold DVDs described in "DVD List" attached to the same, on which the programs described in "Program List" attached to the same are recorded, and DVDs described in "List of Additional DVDs" attached to the same, on which the programs described in "List of Additional Five Programs" attached to the same are recorded; [ii] Appellant IMAGICA also conducted the editing of the programs described in "Program List" attached to the judgment in prior instance by using the aforementioned font. The appellant then alleged that these acts [a] primarily constitute, intentionally or negligently, a joint tort of infringing the appellant's interests in relation to its property right for the font or interests in relation to licensing business and [b] secondarily constitute unjust enrichment because the appellees obtained interests in relation to the use of the font without any legal basis and resulted in the loss incurred by the appellant. Based on these allegations, the appellant filed this appeal against the appellees to seek payment of the following amount equivalent to the royalties with delay damages, which are calculated at the rate of 5% per annum, as prescribed in the Civil Code, for the period from the date on which each act was committed to the date of completion of the

payment, primarily based on a tort and secondarily as return of unjust enrichment.

(omitted)

3. Issues

(1) In relation to the primary claim (tort)

A. Use of the font in question (the "Font") by the appellees and whether said use constitutes a tort (Issue 1)

B. Existence and amount of damages (Issue 2)

(2) In relation to the secondary claim (unjust enrichment)

Whether the relevant acts constitute unjust enrichment (Issue 3)

(omitted)

No. 4 Court decision

(omitted)

3. Regarding Issue 1 (use of the Font by the appellees and whether said use constitutes a tort)

(1) Regarding the Font or interests in relation to its licensing business as alleged by the appellant

A. Under current laws, the Copyright Act, the Design Act, and other intellectual property rights-related laws aim at protecting rights in relation to the use of created designs by way of granting exclusive rights to use them to persons within a certain scope based on certain requirements, and in certain cases, created designs may be protected by the Unfair Competition Prevention Act. However, said laws also make clear the scope and limitation to which exclusive rights to use, etc. extend by stipulating the cause of occurrence, content, scope, cause of extinguishment of each intellectual property right in order to prevent granting of a right to use, etc. from excessively restricting the freedom of the people's economic or cultural activities.

In consideration of the objectives and purposes of the aforementioned laws, if a created design is not subject to protection under the aforementioned laws, the right to exclusively use said design is not subject to legal protection. Therefore, it is reasonable to understand that the act of using said design does not constitute a tort unless there are special circumstances, such as where said act constitutes infringement of legally protected interests which differ from interests in relation to the use of a creation that are subject to discipline of said laws (see 2001 (Ju) 866 and 2001 (Ju) 867, judgment of the Second Petty Bench of the Supreme Court of February 13,

2004, Minshu, Vol. 58, No. 2, at 311 and 2009 (Ju) 602 and 2009 (Ju) 603, judgment of the First Petty Bench of the Supreme Court of December 8, 2011, Minshu, Vol. 65, No. 9, at 3275, though the court does not directly hold the aforementioned point in these judgments).

B. In this case, the appellant made clear that it would not make a claim on the grounds of infringement of the copyright for the Font, and also did not allege protection under the Design Act or the Unfair Competition Prevention Act at all. Therefore, the interests under property law for the Font as alleged by the appellant must be alleged as legally protected interests which differ from interests in relation to the use of a creation that are subject to the discipline of the aforementioned intellectual property rights-related laws.

In this case, the appellant alleges that the Font is intellectual property and falls under legally protected interests (Article 709 of the Civil Code). Although the content and substance of the legal interests alleged by the appellant here are not necessarily clear, according to the appellant's allegation concerning a tort, the appellant's allegation is understood as meaning that if another person uses the Font without authorization, the act of this use immediately constitutes an illegal act as one that constitutes infringement of the legal interests of the Font and it constitutes a tort if there is an intention or negligence in relation to the unauthorized use. However, this allegation is equivalent to saying that the appellant can freely decide on whether another person can lawfully use the Font. In that sense, it is equivalent to saying that the appellant has interests in relation to the exclusive use of the Font. Nevertheless, such interests cannot be considered to be legally protected interests which differ from interests in relation to the use of a creation that are subject to discipline of the aforementioned intellectual property rights-related laws even if the Font was created at great cost and effort. Consequently, such interests are not considered to be subject to legal protection as mentioned above.

In this regard, the appellant alleges that the typeface in question (the "Typeface") or the Font falls under the "intellectual property" under the Intellectual Property Basic Act (Article 2, paragraph (1) of said Act) and that the appellant holds an "intellectual property right" (paragraph (2) of said Article). However, the "intellectual property right" under said Act means a right that "is stipulated by laws and regulations" or legal interests. Taking into account the fact that discussions are still ongoing on the desired legal protection of typefaces (Exhibit Otsu No. 28), even if the Typeface or the Font falls under the "intellectual property" under said Act, it cannot be considered that the "intellectual property right" arises thereunder.

Moreover, the appellant alleges that the appellees are those who first gave shape to the Font in broadcast programs and DVDs and that even if legal protection based on a tort is given against the act of unauthorized use committed by such persons, it will not be equal to legal protection given by a copyright. The same opinion is also mentioned in Professor F's written opinion (Exhibit Ko No. E8). However, taking into account the fact that the Font is originally

assumed to be used commercially for advertising, logotypes, webpages, television programs, etc. (1.(1)D.(C) in the judgment in prior instance amended and cited as above), even based on this opinion, if there is the act of unauthorized use of the Font by an ordinarily assumed medium, it immediately has illegality as a tort. Therefore, the fact remains that it is equivalent to saying that the appellant can freely decide on whether another person can lawfully use the Font. Consequently, such interests in relation to exclusive use cannot be considered to be legally protected interests which differ from interests in relation to the use of a creation that are subject to the discipline of the aforementioned intellectual property rights-related laws. Therefore, such interests cannot be considered to be subject to legal protection. In addition, the aforementioned allegation is intended to consider the act of unauthorized use of the Font to be illegal only in relation to the act of using the Font by giving it shape in broadcast programs and DVDs for the first time. Consequently, even if the allegation is intended to allege protection of interests which differ from interests that are subject to discipline of the Copyright Act, to what extent the act of using a creation is entrusted to the creator's authorization is just a matter that is stipulated by intellectual property rights-related laws from various perspectives. Therefore, it cannot be said, based on the aforementioned point, that the subject interests are legally protected interests which differ from interests in relation to the use of a creation that are subject to discipline of the aforementioned intellectual property rights-related laws.

C. On the other hand, the appellant also alleges interests in relation to licensing business as legally protected interests (Article 709 of the Civil Code) in this case. This allegation is considered to mean that the business which the appellant conducts by selling and giving authorization to use the Font was hindered by the appellees and that the appellant's business interests were infringed. If the allegation is to that effect, the appellant can be considered to allege legally protected interests which differ from interests in relation to the use of a creation that are subject to the discipline of the aforementioned intellectual property rights-related laws.

However, taking into account that the freedom of business is guaranteed in Japan under the Constitution of Japan and that each person is guaranteed to conduct business activities under the principle of free competition, it is not reasonable to immediately evaluate infringement of one's business interests by another person's business act as illegal in terms of a tort. Rather, it is reasonable to understand that such infringement is recognized as constituting a tort as one that is illegal only where there are special circumstances where said another person's act can be considered to be one that goes beyond the scope of free competition and is based on an abuse of the freedom of business.

(2) Regarding whether Appellee TV Asahi's act constitutes a tort

A. As found above, various fonts are distributed by many font vendors under a variety of conditions in present-day Japan. However, for many fonts, such as the Font, that were produced

in anticipation of commercial use for television programs and advertising, etc., restrictions are imposed on their commercial use in contracts for authorization to use them, although the content of such contracts varies. Many companies use fonts by paying a value therefor. According to this, the business activities of developing and selling or giving authorization to use a font are widely accepted in commercial society, and it cannot be said that relevant business interests are not to be protected only because fonts do not fall under works, etc. However, taking into account that various font vendors sell various fonts under a variety of conditions, the appellant's business policy that commercial use of a font requires individual payments of a royalty cannot be recognized as having become a commercial practice or having come to form a social norm.

B. As found above, Appellee TV Asahi has adopted a policy of trying not to conclude a contract by itself in order to avoid problems while taking the position that no copyright is established for any fonts including those of the appellant since it was required by the appellant to pay a royalty for the unauthorized use of the old font for the first time in 2002.

In this case, Appellee TV Asahi also entrusted Company P1 and other caption production companies with the preparation of captions for the programs in question (the "Programs") and only edited the Programs after receiving the delivery of the outcomes. Appellee TV Asahi is not recognized as having prepared captions by itself by using the font software in question (the "Font Software").

Moreover, when P of a program production company purchased the Font Software, Appellee TV Asahi did not use the Font Software for its programs based on the aforementioned policy. In addition, when employee E purchased the Font Software and applied for the authorization to use it for a program, Appellee TV Asahi followed the aforementioned principle and used it for the program after having a program production company conclude a contract and obtain the authorization to use it.

According to the above, Appellee TV Asahi can be considered to have adopted a policy of avoiding the situation where it conflicts with the appellant's business activities pertaining to the Font.

C. As found above, Company P1, which received outsourcing pertaining to No. 3 of Programs 1 of Appellee TV Asahi, had produced captions for the programs of Appellee TV Asahi by using the old font software since the time when there was no restriction on commercial use thereof. Appellee TV Asahi also had designated fonts to be used by merely describing them as "Logo Circle B," which is also the name of the old font, or otherwise in caption order sheets. In some captions in No. 3 of Programs 1, for which Company P1 actually produced captions, the Font and the old font are used in a mixed manner. However, the Font is one produced merely by applying slight design alteration and version upgrade to the old font to the extent that the identity of the typeface is not impaired. In the case of Logo G, the shape was changed only for

343 characters of 7,725 characters of the old font to the extent that the change is visible to the naked eye. Taking this into account, it is recognized that it was also very difficult even for the responsible person at Appellee TV Asahi to distinguish the Font and the old font. Taking into account that the Font and the old font are used in a mixed manner in other programs of Programs 1, it is presumptively recognized that these circumstances also applied to other caption producers.

Based on the above, it is difficult to find that Appellee TV Asahi, which received the delivery of the image data of captions that is the outcome using the Font, recognized that the Font is used in the caption outcome produced by Company P1 while distinguishing the Font and the old font. In that case, it cannot be said that Appellee TV Asahi purposefully produced the programs by using captions while recognizing that the Font is used in the captions.

D. However, the appellant alleges that Appellee TV Asahi continued to use the Font in its programs despite the appellant's repeated indication of the unauthorized use of the Font.

However, as found above, the appellant had never indicated the unauthorized use of the appellant's font while specifying programs in which the font is used during the period from the start of sale of the Font Software in May 2003 up to October 26, 2009. Even if the appellant's representative informed B of the fact of the unauthorized use of the appellant's font in programs on March 26, 2009, as alleged by the appellant, it is presumptively recognized as only a simple indication that does not stand out in B's memory. As long as there is no hint that a program in which the Font is alleged to be used was specified, even if Appellee TV Asahi does not immediately take actions, such as internal investigation, in response to such an indication, it cannot be considered to have purposefully continued to use the Font for programs while recognizing the fact of the unauthorized use of the Font.

Rather, Appellee TV Asahi ceased to use either the Font or the old font (except for No. 5 "Futari no shokutaku" (A couple's dining table) of Programs 2 whose production was entrusted to UCOM) since the broadcasting of a program on December 3, 2009 after Appellee TV Asahi received a formal notice from the appellant on October 26 of the same year, and a notice of the same sort was given to Appellee IMAGICA on November 20 of the same year. Therefore, Appellee TV Asahi also can be considered here to have taken action to avoid the situation where it conflicts with the appellant's business activities pertaining to the Font.

Moreover, regarding the aforementioned program "Futari no shokutaku," the use of the Font for captions started thereafter on October 9, 2010. However, Appellee TV Asahi outsourced the production of said program to UCOM, and was only in the position of receiving the delivery of the completed program. UCOM was supposed to conduct rights handling associated with the production of the program. Consequently, Appellee TV Asahi is recognized as having believed that UCOM conducted appropriate rights handling associated with the used fonts (witness in

prior instance E, page 24). Therefore, with regard to "Futari no shokutaku," Appellee TV Asahi also cannot be recognized as having continued to use the Font while knowing about the unauthorized use of the Font.

Incidentally, before the release of the Font, the appellant indicated to Appellee TV Asahi the unauthorized use of the old font while specifying a relevant program. However, for the old font software before then, no restriction was set on its commercial use in a contract for authorization to use it that was concluded at the time of purchase. Therefore, even if the appellant later restricts its commercial use unilaterally, it cannot change the legal status of purchasers. Consequently, Appellee TV Asahi's act of continuing to use the old font for captions in its programs cannot be considered to be an unjust act.

E. According to the above, Appellee TV Asahi has been aware that the appellant conducts business activities that involve developing, selling, and giving authorization to use fonts, and has taken the position that there are no copyrights for such fonts, but it has adopted a policy of avoiding conflicts with the appellant's business by trying not to use the appellant's fonts and has actually taken actions in line with said policy. Regarding the Programs for which Appellee TV Asahi outsourced production of captions, it is not recognized as having purposefully continued to use the produced captions while being aware that the Font is used therein. Taking this into account, Appellee TV Asahi's act of producing, broadcasting, and delivering the Programs in which the Font is used for captions as well as manufacturing and selling DVDs cannot be recognized as one that goes beyond the scope of free competition and is based on an abuse of the freedom of business.

However, the DVDs in question on which some of the Programs are recorded include those that were released in and after April 2010. Appellee TV Asahi is recognized as having been aware, as of the time when such DVDs were released, that the Font is used in the recorded programs and that the appellant has raised a protest against the unauthorized use of the Font. However, the use of the Font in those programs is not recognized as illegal as mentioned above. In addition, broadcast programs are produced on the assumption of their secondary use. Taking these points into account, the act of recording programs that could be lawfully produced on DVDs after their broadcasting and selling such DVDs cannot be considered to go beyond the scope of free competition and be based on an abuse of the freedom of business.

Moreover, even if a responsible person at Appellee TV Asahi prepares or edits a caption by using the Font in the editorial room in question (the "Editorial Room"), such act is considered to have been temporary or exceptional as mentioned above. Even if such act of use is committed, the act cannot be considered to go beyond the scope of free competition and be based on an abuse of the freedom of business.

F. With regard to these points, the appellant makes various allegations. Those allegations are

considered below.

(A) First of all, the appellant alleges that the Font Software and the old font software, which Company P1 and other caption production companies used, are illegal copies of the products sold by the appellant and the fact of having used captions which were produced by using such illegally copied software products provides a basis for the illegality of Appellee TV Asahi's act.

However, even if the Font Software and the old font software, which Company P1, etc. used, are unauthorized copies of the products sold by the appellant, Appellee TV Asahi is recognized as having believed that the specialized caption production companies, to which it outsourced the production of captions, appropriately conduct rights handling associated with the use of fonts (witness in prior instance E, page 7). In addition, there is no evidence that Appellee TV Asahi had known that Company P1, etc. were using the font software programs which are unauthorized copies of the appellant's products. This also applies to the program "Futari no shokutaku," whose production Appellee TV Asahi outsourced to UCOM as mentioned above. Consequently, it cannot be said, based on the point alleged by the appellant, that Appellee TV Asahi's act goes beyond the scope of free competition and is based on an abuse of the freedom of business.

In this regard, the appellant alleges that Appellee TV Asahi should be evaluated as the actor who produced captions because it directed and supervised caption production companies and program production companies as well as controlled and used them as subordinates. The appellant also alleges that even if an outsourcee is supposed to conduct rights handling in the case of outsourcing, the outsourcer should not be considered to be exempted from responsibility only based on the existence of such promise of the internal sharing of rights handling in the case where he/she is aware of the appellant's licensing business. However, whether Appellee TV Asahi's act goes beyond the scope of free competition and is based on an abuse of the freedom of business should be assessed based on said appellee's act and recognition. From that perspective, the instructions Appellee TV Asahi gave and the recognition based on which it gave the instructions should be considered to count. Even seeing Appellee TV Asahi's recognition and instructions to caption production companies, etc. from such perspective, said appellee's act cannot be considered to be one that goes beyond the scope of free competition and is based on an abuse of the freedom of business, as mentioned above.

(B) The appellant alleges that Appellee TV Asahi assumes the duty of care based on which it should first confirm whether the Font is used for the captions received from an outsourcee and then ascertain whether the outsourcee has obtained authorization to use the Font for the captions and that it had no difficulty in fulfilling said duty of care.

However, as mentioned above, Appellee TV Asahi is recognized as having believed that caption production companies and program production companies appropriately conduct rights

handling associated with the use of fonts, and it is not recognized as having continued to use captions in which the Font is used while being aware that the Font is used in the captions produced by caption production companies and the programs produced by program production companies. There are also no circumstances that make Appellee TV Asahi suspect that caption production companies and program production companies use the Font without obtaining authorization from the appellant. Therefore, even if Appellee TV Asahi did not confirm with caption production companies and program production companies whether they used the Font or obtained authorization to use it from the appellant under such circumstances, it cannot be considered to have gone beyond the scope of free competition and to have abused the freedom of business.

In this regard, the appellant points out 2000 (Ju) 222, judgment of the Second Petty Bench of the Supreme Court of March 2, 2001 (Minshu, Vol. 55, No. 2, at 185). However, in said judgment, the court held the duty of care in the cases where a leasing company delivers a karaoke console, which is used exclusively for having the public directly see or hear musical works by showing or playing them, after concluding a leasing contract thereon. The court found the duty of care of a person who supplies a device which is essential for the act of using a work and also has a high probability of causing infringement of copyright. This case should be considered to be different from the case in question in which the appellee merely ordered specialized caption production companies to produce captions or ordered program production companies to produce programs while designating the font to be used by the same name as that of the old font which had been used in the past.

G. Based on the above, Appellee TV Asahi's act does not constitute a tort.

(2) Regarding whether Appellee IMAGICA's act constitutes a tort

Regarding Appellee IMAGICA, the issue is whether Appellee IMAGICA's act of editing captions in Programs 1 constitutes a tort. However, as mentioned above, Appellee IMAGICA only inserted captions into image materials by operating editing equipment in the Editorial Room based on the image data of captions which Appellee TV Asahi ordered caption production companies to produce and received the delivery of. In addition, Appellee IMAGICA had no part in the manufacturing of the DVDs in question (as mentioned above, even if the Font Software is installed on a personal computer in the Editorial Room, Appellee IMAGICA is not recognized as having prepared captions by using the Font Software as routine and continuous operations when editing the Programs; even if captions are prepared or modified by using the Font Software, such preparation or modification is considered to be merely temporary or exceptional).

The aforementioned Appellee IMAGICA's act cannot be considered to be one that goes beyond the scope of free competition and is based on an abuse of the freedom of business in

consideration of the following points: [i] Appellee IMAGICA is not recognized as having been aware that the font used in the caption image data brought to it is the Font and that the Font was used without obtaining authorization from the appellant, and it is not recognized that there were special circumstances where this point should be questioned; [ii] After receiving an indication of the unauthorized use of the Font from the appellant on November 20, 2009, Appellee IMAGICA conducted an internal investigation and deleted the Font Software that had been installed on the computer, and also asked Appellee TV Asahi not to use the appellant's font in television programs, for which it conducts editing, and after that, neither the Font nor the old font was used in Programs 1.

Consequently, Appellee IMAGICA's act does not constitute a tort.

4. Regarding Issue 3 (whether the appellees' act constitutes unjust enrichment)

The appellant alleges that the appellees' act of using the Font for producing, broadcasting, and distributing the Programs as well as producing, selling, etc. the DVDs in question without obtaining authorization from the appellant constitutes unjust enrichment against the appellant.

However, if such unauthorized use of the Font is immediately considered to constitute unjust enrichment, it is equivalent to saying that the appellant can freely decide on whether another person can lawfully use the Font, and in that sense, it is also equivalent to saying that the appellant has interests in relation to the exclusive use of the Font. This point is the same as mentioned above in relation to a tort. Taking into account that such interests are not subject to legal protection, even if the appellees use the Font for the Programs, it is not possible to immediately say that the act of use lacks a legal cause and that the appellees gained enrichment while the appellant incurred loss.

Moreover, the appellant alleges that no payment of royalties for the use of the Font constitutes unjust enrichment because a contract for authorization to use the Font has been established between the appellant and Appellee TV Asahi. However, such a license contract is not recognized as having been established between the appellant and Appellee TV Asahi, as mentioned in 2.(4) above. Therefore, there is no reason for the appellant's allegation.

Consequently, the relevant act is not recognized as constituting unjust enrichment as alleged by the appellant.

5. Conclusion

On these grounds, all of the appellant's claims in this action shall be dismissed as there is no reason therefor, and the judgment in prior instance to the same effect is reasonable. Consequently, this appeal shall be dismissed, and the judgment shall be rendered in the form of the main text.

Osaka High Court, 8th Civil Division

Presiding judge: KOMATSU Kazuo

Judge: HONDA Kumiko

Judge: TAKAMATSU Hiroyuki