Date	June 29, 2004	Court	Tokyo High Court
Case number	2003 (Ne) 2467, 3787, 3810		
– A case in which the court denied the applicability of Article 114, paragraphs (1) and (2) of the Copyright Act and applied paragraph (3) of said Article in the process of calculating the amount of damage due to the act of tort committed by the publishing companies that used the works created by individual authors and translators in Japanese language tests prepared as supplementary study materials to be used in primary schools, thereby infringing the copyright of these authors and translators.			

References: Article 114 of the Copyright Act

Summary of the Judgment

1. The plaintiffs in first instance, who own copyrights for the works presented in government authorized textbooks used in primary schools (the "Works"), filed this action against the defendants in first instance that printed, published, and sold Japanese language tests to be used as supplementary study materials in primary schools which contained all or a part of the text of the Works (the "Japanese Language Tests"), alleging that such act of the defendants in first instance was conducted based on a mutual agreement and constitutes infringement of the reproduction rights, moral rights of authors (right to integrity, right of attribution) held by the plaintiffs in first instance for the Works, and, based on the reproduction rights for the Works, the plaintiffs in first instance sought an injunction against the act of printing, publishing, selling, or otherwise handling the Japanese Language Tests conducted by the defendants in first instance, and also demanded, based on their rights to request the payment of damages for the act of tort, i.e., infringement of the reproduction right and moral rights of authors for the Works, that the defendants in first instance should jointly and severally pay compensation equivalent to the amount of damage, etc.

The judgment in prior instance accepted the claim for an injunction filed by the plaintiffs in first instance except for the part concerning a portion of the Works and partially accepted their claim for payment of damages.

The plaintiffs in first instance filed this appeal against the judgment in prior instance except for the part concerning the aforementioned claim for an injunction. The defendants in first instance also filed this incidental appeal against the judgment in prior instance except for the part concerning the aforementioned claim for an injunction.

In this judgment, the court denied that the defendants in first instance committed a

joint tort, but increased the amount of compensation for damage to be awarded to all except one of the plaintiffs in first instance, holding as follows.

2. (1) Claim for damage under Article 114, paragraph (2) of the Copyright Act

Article 114, paragraph (2) of the Copyright Act can be interpreted to be based on the idea that, as long as an infringer actually gains certain benefits by using a work, the copyright owner could have gained the same benefits if the copyright owner uses the work in the same manner. According to the evidence and the entire import of the oral argument, the plaintiffs in first instance are authors and translators and do not have facilities and technology to produce and sell the Works by themselves. Under such circumstances, it is impossible for them to produce and sell the Works. Therefore, the plaintiffs in first instance would not obtain benefits by using the works presented in textbooks in the same manner as the defendants in first instance. Thus, it should be interpreted that said provision is inapplicable to this case.

(2) Claim for damage under Article 114, paragraph (1) of the Copyright Act

Article 114, paragraph (1) of the Copyright Act specifies that the quantity of goods that the infringer transferred should be considered to be equivalent to the quantity that the copyright owner, etc. could have sold by selling the goods in the same manner as the infringer within the limits of an amount proportionate to the ability of the owner of the copyright, etc. to sell said goods or engage in other related acts. However, as mentioned in (1) above, the plaintiffs in first instance cannot be considered to have the ability to produce and sell the same goods as the Japanese Language Tests by themselves.

Furthermore, the phrase "objects that the owner of the copyright, etc. could have sold if there had been no act of infringement" referred to in said paragraph means goods that can be substituted for the goods produced by the infringer. According to the entire import of the oral argument, the hardcover books pertaining to the claims by the plaintiffs in first instance contain the entire Works respectively without any omissions and are sold in regular bookstores, etc., whereas the Japanese Language Tests consist of part of the Works and questions and are directly delivered, bypassing regular bookstores, to primary schools either by the defendants in first instance or via distribution agents. In this way, the aforementioned hardcover books are greatly different from the Japanese Language Tests in terms of the purpose and manner of use of the Works and the sales route. Since the aforementioned hardcover books cannot substitute Japanese Language Tests containing the Works, the hardcover books pertaining to the claims by the plaintiffs in first instance cannot be considered to be "objects that the owner of the copyright, etc. could have sold if there had been no act

of infringement" as specified in said paragraph.

Thus, it should be concluded that Article 114, paragraph (1) of the Copyright Act is not applicable to this case.

(3) Claim for damage under Article 114, paragraph (3) of the Copyright Act

Regarding the act of infringing the copyrights by presenting the Works in the Japanese Language Tests, the amount of money equivalent to the royalties that the plaintiffs in first instance should have received by exercising their copyrights should be calculated by multiplying the numbers of copies of the Japanese Language Tests containing the Works by the price per copy and further by the ratio of each of the Works authored by the respective plaintiffs in first instance to an entire copy of the Japanese Language Test and by the ratio of the amount equivalent to royalties for the aforementioned presentation of the relevant Work to the total price per copy. In order to determine the numbers, etc. of copies of the Japanese Language Tests based on which the aforementioned calculation should be conducted, it is necessary to take into consideration the purpose and manner of using the Works in the Japanese Language Tests and sales method, etc. thereof.

Judgment rendered on June 29,2004
2003 (Ne) 2467, 2003 (Ne) 3787, 2003 (Ne) 3810 Appeal Case of Seeking Injunction against Publication, Incidental Appeal Cases (Court of prior instance: Tokyo District Court 1999 (Wa) 13691)
Date of conclusion of oral argument: March 1, 2004

Judgment

Appellant/Appellee of Incidental Appeal ("First Instance Plaintiff"):
A
Appellant/Appellee of Incidental Appeal ("First Instance Plaintiff"):
B
Appellant/Appellee of Incidental Appeal ("First Instance Plaintiff"):
C
Appellant/Appellee of Incidental Appeal ("First Instance Plaintiff"):
D
Appellant/Appellee of Incidental Appeal ("First Instance Plaintiff"):
E
Appellant/Appellee of Incidental Appeal ("First Instance Plaintiff"):
F
Appellant/Appellee of Incidental Appeal ("First Instance Plaintiff"):
G
Appellant/Appellee of Incidental Appeal ("First Instance Plaintiff"):
H
Appellee/Appellant of Incidental Appeal ("First Instance Defendant"):
Aoba Publishing Co., Ltd.
Appellee/Appellant of Incidental Appeal ("First Instance Defendant"):
Kyoikudojinsha. Co., Ltd.
Appellee/Appellant of Incidental Appeal ("First Instance Defendant"):
NIPPONHYOJUN Co., Ltd.
Appellee/Appellant of Incidental Appeal ("First Instance Defendant"):
KOBUNSHOIN PUBLISHING Co., Ltd.
Appellee/Appellant of Incidental Appeal ("First Instance Defendant"):
Shingakusha Co., Ltd.
Appellee/Appellant of Incidental Appeal ("First Instance Defendant"):
BUNKEIDO CO., LTD.

Main text

1. Based on the incidental appeal filed by First Instance Defendant Shingakusha Co., Ltd., the following modifications shall be made to the judgment in prior instance with respect to the part for which said First Instance Defendant lost the case with regard to the claims other than the First Instance Plaintiff A's claim for an injunction against said First Instance Defendant.

(1) First Instance Defendant Shingakusha Co., Ltd. shall pay First Instance Plaintiff A 997,469 yen as well as the amount of money specified in the "Delay Damages List Concerning Shingakusha" attached to this judgment.

(2) Any other claims of First Instance Plaintiff A against First Instance Defendant Shingakusha Co., Ltd shall be dismissed.

2. Based on the appeal filed by the First Instance Plaintiffs excluding First Instance Plaintiff A, the following modifications shall be made to the judgment in prior instance with respect to the claims other than the claim of said First Instance Plaintiffs for an injunction against First Instance Defendant Shingakusha Co., Ltd.

(1) First Instance Defendant Shingakusha Co., Ltd. shall pay First Instance Plaintiff B 1,422,521 yen as well as the amount of money specified in the "Delay Damages List Concerning Shingakusha" attached to this judgment.

(2) First Instance Defendant Shingakusha Co., Ltd. shall pay First Instance Plaintiff C 2,215,220 yen as well as the amount of money specified in the "Delay Damages List Concerning Shingakusha" attached to this judgment.

(3) First Instance Defendant Shingakusha Co., Ltd. shall pay First Instance Plaintiff D 606,901 yen as well as the amount of money specified in the "Delay Damages List Concerning Shingakusha" attached to this judgment.

(4) First Instance Defendant Shingakusha Co., Ltd. shall pay First Instance Plaintiff E 1,260,043 yen as well as the amount of money specified in the "Delay Damages List Concerning Shingakusha" attached to this judgment.

(5) First Instance Defendant Shingakusha Co., Ltd. shall pay First Instance Plaintiff F 1,784,847 yen as well as the amount of money specified in the "Delay Damages List Concerning Shingakusha" attached to this judgment.

(6) First Instance Defendant Shingakusha Co., Ltd. shall pay First Instance Plaintiff G 945,385 yen as well as the amount of money specified in the "Delay Damages List Concerning Shingakusha" attached to this judgment.

(7) First Instance Defendant Shingakusha Co., Ltd. shall pay First Instance Plaintiff H 776,247 yen as well as the amount of money specified in

the "Delay Damages List Concerning Shingakusha" attached to this judgment.

(8) Any other claims of First Instance Plaintiffs excluding First Instance Plaintiff A against First Instance Defendant Shingakusha Co., Ltd. shall be dismissed.

3. The court dismissed both the appeal filed by First Instance Plaintiff A and the appeal filed by the First Instance Plaintiffs excluding First Instance Plaintiff A against the First Instance Defendants (excluding First Instance Defendant Shingakusha Co., Ltd.).

4. The court dismissed both the incidental appeal filed by First Instance Defendant Shingakusha Co., Ltd. against the First Instance Plaintiffs excluding First Instance Plaintiff A and the incidental appeal filed by other First Instance Defendants excluding First Instance Defendant Shingakusha Co., Ltd.

5. The court costs excluding the costs of the incidental appeals for the first and second instances shall be divided into ten portions, one of which shall be borne by the First Instance Defendants, while the remaining nine of which shall be borne by the First Instance Plaintiffs. The costs of the incidental appeals shall be borne by the First Instance Defendants.

6. Paragraph 1(1) and Paragraph 2 (1) to (7) of this judgment can be provisionally executed.

Facts and reasons

(omitted)

No. 2 Outline of the case

1. The First Instance Plaintiffs, who own copyrights for the works specified in Works Lists 1 and 2 attached to the judgment in prior instance and Joint Plaintiff I of the prior instance, who is the copyright owner of the 50% of the copyrights for the works specified in Section K of said Lists 1 and 2, and Intervener J, etc. alleged that, while the First Instance Defendants printed, published, and sold Japanese language tests used as supplementary study materials in primary schools, which contained all or a part of the text of the aforementioned works, such act was conducted based on a mutual agreement and constitutes infringement of the First Instance Plaintiffs' reproduction rights, moral rights of authors (right to integrity, right of attribution) for the aforementioned works, and, based on the reproduction rights for the works specified in Works List 1 attached to the judgment in prior instance, sought an injunction against the First Instance Defendants' act of printing, publishing, selling, or otherwise handling the

aforementioned Japanese language tests containing those works, and also demanded, based on their rights to request the payment of damages for the act of tort, i.e., infringement of the reproduction right and moral rights of authors for the works specified in Works List 2 attached to the judgment in prior instance, that the First Instance Defendants should jointly pay compensation equivalent to the amount of damage and delay damages accrued thereon, and, furthermore, as a secondary claim for the latter claim, based on the right to request the return of unjust enrichment on the grounds of the unauthorized use of the aforementioned works, demanded that the First Instance Defendants should pay compensation equivalent to the amount of loss and delay damages accrued thereon.

The judgment in prior instance accepted the aforementioned First Instance Plaintiffs' claim for an injunction except for the part concerning some of the works of First Instance Plaintiff A and partially accepted the aforementioned First Instance Plaintiffs' claim for payment of damages.

The First Instance Plaintiffs and Joint Plaintiff I of the prior instance were dissatisfied with the judgment in prior instance with respect to the part for which the First Instance Plaintiffs lost the case concerning the claims other than the aforementioned claim for an injunction and filed this appeal (Subsequently, Joint Plaintiff I of the prior instance withdrew this appeal). The First Instance Defendants were also dissatisfied with the judgment in prior instance with respect to the part for which the First Instance Defendants lost the case concerning the claims other than the aforementioned claim for an injunction and filed this incidental appeal.

2. Facts undisputed by the parties, etc.

(1) All of the First Instance Plaintiffs are poets or authors of fairy tales. All of the First Instance Defendants are companies selling supplementary study materials used in primary schools.

(2) The First Instance Plaintiffs are authors or translators of the works ("Work 1-1," etc. Collectively referred to as the "Works") specified in the section of First Instance Plaintiffs in Works Lists 1 and 2 attached to the judgment in prior instance and are the owners of the copyrights for these works (based on the entire import of the oral argument, the year of creation, the title, the name of publisher, and the price of each book can be found).

(3) All of the Works are presented in government authorized textbooks used in primary schools.

(4) The First Instance Defendants have been printing, publishing, and selling primary school Japanese language tests produced based on the aforementioned textbooks, for

example, the tests (the "Japanese Language Tests") stated in Comparison Lists 1 to 4 attached to the judgment in prior instance.

3. Issues

The issues related to the claim for payment of damages are as follows, of which (1) to (5) are related to the issue of whether an act of tort has been committed or not.

(1) Whether the First Instance Defendants' act of presenting the Works constitutes "quotation" permitted under Article 32, paragraph (1) of the Copyright Act

(2) Whether the First Instance Defendants' act of presenting the Works in the Japanese Language Tests constitutes reproduction as "examination questions" specified in Article 36, paragraph (1) of the Copyright Act

(3) Whether the moral rights of authors have been infringed

A. Whether the First Instance Defendants' act of printing, publishing, and selling the Japanese Language Tests constitutes infringement of the moral rights of authors (right to integrity) of First Instance Plaintiffs A, C, D, E, F, G, and H

B. Whether the First Instance Defendants' act of printing, publishing, and selling the Japanese Language Tests constitutes infringement of the moral rights of authors (right of attribution) of the First Instance Plaintiffs mentioned in A above and First Instance Plaintiff B

(4) Whether the First Instance Plaintiffs' act of alleging that their copyrights for the Works have been infringed constitutes abuse of rights

(5) Whether the alleged act of infringement was committed intentionally or by negligence

(6) Whether an act of joint tort has been committed

(7) Whether return of unjust enrichment can be claimed

(8) Whether extinctive prescription can be claimed

(9) Whether any damage occurred and the amount thereof

(omitted)

6. Issue (9) (Whether any damage occurred and the amount thereof)

(1) Principal claim (Claim for damage under Article 114, paragraph (2) of the Copyright Act)

Article 114, paragraph (2) of the Copyright Act can be interpreted to be based on the idea that, as long as an infringer actually gains certain benefits by using a work, the copyright owner could have gained the same benefits if the copyright owner uses the work in the same manner. According to the evidence (Exhibits Ko 15-1 to 15-9, 75, and

77) and the entire import of the oral argument, the First Instance Plaintiffs are authors and translators and do not have facilities and technology to produce and sell the Works by themselves. Under such circumstances, it is impossible for them to produce and sell the Works. Therefore, the First Instance Plaintiff would not obtain benefits by using the works presented in textbooks in the same manner. Thus, it should be interpreted that said provision is inapplicable to this case.

(2) Alternative claim (1) (Claim for damage under Article 114, paragraph (1) of the Copyright Act)

Article 114, paragraph (1) of the Copyright Act specifies that, if a copyright owner, etc. claims compensation for damage incurred due to infringement, against a person that, intentionally or due to negligence, infringes the owner's copyright, etc., and the infringer has transferred an object that was made through the relevant act of infringement, the amount calculated by multiplying the number of objects so transferred by the amount of profit per unit from objects that the owner of the copyright, etc. could have sold if there had been no act of infringement, may be fixed as the amount of damage that the owner of the copyright, etc. has incurred, within the limits of an amount proportionate to the ability of the owner of the copyright, etc. to sell said objects or engage in other related acts.

The aforementioned provision specifies that the quantity of goods that the infringer transferred should be considered to be equivalent to the quantity that the copyright owner, etc. could have sold by selling the goods in the same manner as the infringer within the limits of an amount proportionate to the ability of the owner of the copyright, etc. to sell said objects or engage in other related acts. However, as mentioned in (1) above, the First Instance Plaintiffs cannot be considered to have the ability to produce and sell the same goods as the Japanese Language Tests by themselves.

Furthermore, the phrase "objects that the owner of the copyright, etc. could have sold if there had been no act of infringement" in the aforementioned provision means goods that can be substituted for the goods produced by the infringer. According to the entire import of the oral argument, the hardcover books pertaining to the claims by the First Instance Plaintiffs contain the entire Works respectively without any omissions and are sold in regular bookstores, etc., whereas, as found in 1 and 3(1) of the section titled "No. 3 Court decision" in the "Facts and reasons" section in the judgment in prior instance cited above, the Japanese Language Tests consist of part of the Works and questions and are directly delivered, bypassing regular bookstores, to primary schools either by the First Instance Defendants or via distribution agents. In this way, the aforementioned hardcover books are greatly different from the Japanese Language Tests

in terms of the purpose and manner of use of the Works and the sales route. Since the aforementioned hardcover books cannot substitute Japanese Language Tests containing the Works, the hardcover books pertaining to the claims by the First Instance Plaintiffs cannot be considered to be "objects that the owner of the copyright, etc. could have sold if there had been no act of infringement" specified in said provision.

Thus, Article 114, paragraph (1) of the Copyright Act is not applicable to this case.

(3) Alternative claim (2) (Claim for damage under Article 114, paragraph (3) of the Copyright Act)

A. Article 114, paragraph (3) of the Copyright Act specifies that the copyright owner, etc. may fix the amount of damages incurred as being equivalent to the amount of money that the owner should have received in connection with the exercise of the copyright, etc., and may claim compensation therefor against a person that, intentionally or due to negligence, infringes the owner's copyright, etc.

The amount of money that the First Instance Plaintiffs should have received in connection with the exercise of their copyrights for the Works should be calculated as follows. As found in 1 and 3(1) and (3) of "No. 3 Court decision" in the "Facts and reasons" section in the judgment in prior instance cited above, it can be stated as follows. One Japanese language test is prepared for each segment of Japanese language textbooks (plus semester-end tests). A test is held six to eight times in each semester by using the Japanese Language Tests. The number of copies that need to be made for each test is equivalent to the number of pupils plus a couple of extra. At the beginning of each semester, all the copies of the tests that are scheduled to be conducted during one semester are delivered directly to primary schools by the First Instance Defendants or via a distributor. In the Japanese Language Tests, the Works are presented in almost the entire part of the upper section of the two facing pages of the Japanese Language Tests in such manner that one of the Works is enclosed in a box with an illustration or a photograph, usually showing at least 15 lines of text, leaving a half or all of the lower section of the two facing pages to be used to present three to ten multiple-choice and free-response questions relevant to said Work presented in the upper section. Those tests are designed to be used at an appropriate time in accordance with the progress of study of pupils to enable teachers to grasp each pupil's level of academic achievement under Article 21, paragraph (2) of the School Education Act, which permits the use of "books other than textbooks as well as other study materials that are appropriate and beneficial."

Under these circumstances, regarding the act of infringing the copyrights by presenting the Works in the Japanese Language Tests, the amount of money equivalent

to the royalties that the First Instance Plaintiffs should have received by exercising their copyrights (the "amount equivalent to royalties") should be calculated by multiplying the numbers of copies of the Japanese Language Tests containing the Works by the price per copy and further by the ratio of each of the Works authored by the respective First Instance Plaintiffs to an entire copy of the Japanese Language Tests (the "use ratio") and by the ratio of the amount equivalent to royalties for the aforementioned presentation of the relevant Work to the total price per copy (the "royalty rate"). In order to determine the numbers, etc. of copies of the Japanese Language Tests based on which the aforementioned calculation should be conducted, it is necessary to take into consideration the purpose, manner, sales method, etc. of using the Works in the Japanese Language Tests.

From this viewpoint, the figures such as the numbers of copies of the Japanese Language Tests based on which the aforementioned calculation should be conducted can be determined as follows.

B. Numbers of copies, etc.

(A) The First Instance Plaintiffs are requesting payment of damages on the grounds that their reproduction rights, which are included in their copyrights for the Works, have been infringed. Therefore, it is reasonable to use the numbers of printed copies of the Japanese Language Tests containing the Works as a basis for calculation of the amount equivalent to royalties.

The First Instance Defendants alleged that the aforementioned numbers of copies include [i] sample copies, [ii] copies for teachers, copies to replace damaged copies, etc., and extra copies for transfer students, etc., and [iii] extra copies produced in the process of manufacturing and that, since these copies are not for sale for a fee, the calculation of the amount equivalent to royalties should be conducted based not on the numbers of printed copies, but on the numbers of copies purchased by the primary schools that had adopted the Japanese Language Tests containing the Works (the numbers of adopted copies). However, since the copies of the Japanese Language Tests specified in [i] to [iii] above are not different from reproductions of the Works and should be considered to have infringed the copyrights for the Works, it would be reasonable to interpret in the manner as mentioned above. Thus, the allegation of the First Instance Defendants is unacceptable.

(B) According to the evidence (Exhibits Ko 57-1 to 57-4, 81 to 91, and 95-97) and the entire import of the oral argument, it can be found that, during the period from FY1988 to FY2000 in the case of First Instance Defendant NIPPONHYOJUN Co., Ltd., during the period from FY1989 to FY2000 in the case of First Instance Defendant

BUNKEIDO CO., LTD., during the period from the second semester in FY1989 to FY2000 in the case of First Instance Defendant Shingakusha Co., Ltd., during the period from FY1990 to FY2000 in the case of First Instance Defendant Aoba Publishing Co., Ltd., First Instance Defendant Kyoikudojinsha. Co., Ltd., and First Instance Defendant KOBUNSHOIN PUBLISHING Co., Ltd., said companies respectively printed the Japanese Language Tests containing the Works. The numbers of copies thus printed are as specified in the section titled "Number of Printed Copies" in Damage Calculation Tables 1 and 2 attached to the judgment in prior instance in the case of the First Instance Defendants excluding First Instance Defendant Shingakusha Co., Ltd., and as specified in the section titled "Number of Printed Copies" in Damage Calculation Table 1 Concerning Shingakusha attached to the judgment in this instance in the case of First Instance Defendant Shingakusha Co., Ltd. (the numbers of printed copies were calculated by adding the numbers of actually sold copies and the numbers of returned copies, etc.). Also, it can be found that the numbers of adopted copies in those fiscal years are as shown in the section titled "Number of Adopted Copies" in Damage Calculation Tables 1 and 2 attached to the judgment in prior instance and in the section titled "Number of Adopted Copies" in Damage Calculation Table 1 Concerning Shingakusha attached to the judgment in this instance. Furthermore, it can be found that, in FY1988 and FY1989 in the case of First Instance Defendant Aoba Publishing Co., Ltd., and in FY1989 in the case of First Instance Defendant KOBUNSHOIN PUBLISHING Co., Ltd., they respectively printed, published, and sold the Japanese Language Tests containing the Works in such numbers of adopted copies as shown in the section titled "Number of Adopted Copies" in Damage Calculation Tables 1 and 2 attached to the judgment in prior instance. However, there is no sufficient evidence to prove how many copies of the Japanese Language Tests containing the Works were printed by First Instance Defendant Aoba Publishing Co., Ltd. in FY1988 and FY1989 and by First Instance Defendant KOBUNSHOIN PUBLISHING Co., Ltd. in FY1989.

The First Instance Plaintiffs alleged that, regarding the fiscal years for which only the numbers of adopted copies are clear as mentioned above, the numbers of printed copies should be calculated by multiplying the aforementioned numbers of adopted copies by 1.2 (the First Instance Defendants generally print supplementary study materials such as the Japanese Language Tests at a rate of about 20% larger than the numbers of adopted copies thereof). However, regarding some fiscal years for which both the numbers of printed copies and the numbers of adopted copies are clear, as shown in Damage Calculation Table 1 attached to the judgment in prior instance and Damage Calculation Table 1 Concerning Shingakusha attached to the judgment in this

instance, even in the case where the numbers of printed copies are larger than the numbers of adopted copies, it cannot be said that the numbers of printed copies are always larger than those of adopted copies uniformly by a certain proportion. There were some cases where the number of printed copies is smaller than the number of adopted copies and where the two numbers were almost the same. Therefore, the allegation of the First Instance Plaintiffs cannot be accepted immediately. In light of the fact that, regarding the fiscal years for which only the numbers of adopted copies are clear as mentioned above, the First Instance Plaintiffs must bear the burden of proof, and it would be reasonable to use the numbers of adopted copies as they are.

(C) There is no sufficient evidence to directly prove the allegation that the First Instance Defendants printed the Japanese Language Tests containing the Works from FY1980 until the fiscal years found in (B) above respectively, as well as the numbers of printed copies, and the numbers of copies adopted by primary schools.

However, according to the evidence (Exhibits Ko 92 to 94) and the entire import of the oral argument, it can be found that the Works were presented in the primary school textbooks stated in Textbook Lists 1 to 8 attached to the judgment in prior instance from 1980, that the First Instance Defendants produced the Japanese Language Tests based on the primary school textbooks from 1980 until the fiscal years found in (B) above as well, respectively, and that the Works of the First Instance Plaintiffs excluding those mentioned below were presented in the Japanese Language Tests in the fiscal years mentioned in (B) above. In view of these facts, it can be presumed that the First Instance Defendants printed, published, and sold the Japanese Language Tests containing the Works from 1980 until the fiscal years found in (B) above as well, respectively.

While the First Instance Plaintiffs alleged that the Works were presented in the Japanese Language Tests from 1980 until the fiscal years found in (B) above respectively, there is no sufficient evidence to prove that some of those works, namely, Works 1-8, 1-10, 1-18, 1-20, and 1-21 of First Instance Plaintiff A, Work 2-6 of First Instance Plaintiff B, Works 3-9 to 3-11 of First Instance Plaintiff C, Work 6-11 of First Instance Plaintiff F, and Work 7-4 of First Instance Plaintiff G, were presented in the Japanese Language Tests in the relevant fiscal years found in (B) above respectively. Also, there is no sufficient evidence to prove that Work 9-2 of First Instance Plaintiff H was presented in the Japanese Language Tests produced based on the textbooks published by Dainippon Tosho Co., Ltd. in the relevant fiscal years found in (B) above. Furthermore, there is no sufficient evidence to prove that Work 9-4 of First Instance Plaintiff H was presented in the Japanese Language Tests produced based on the

textbooks published by Mitsumura Tosho Publishing Co., Ltd. in the relevant fiscal years found in (B) above. Therefore, it cannot be presumed that the aforementioned works were presented in the Japanese Language Tests from 1980 until the fiscal years found in (B) above respectively.

It is reasonable to consider the numbers of printed copies to be the same as the smallest numbers of printed copies of the Japanese Language Tests containing the Works in any of the fiscal years for which the numbers of printed copies are clear as mentioned in (B) above (if two types or three types of the Japanese Language Tests were printed in and after FY1998, the total number should be used. However, if the relevant number of printed copies is smaller than that of adopted copies in the fiscal year for which the number of printed copies is found to be the smallest, the number of adopted copies should be used).

Regarding the numbers of printed copies from FY1980 to the fiscal years found in (B) above respectively, the First Instance Plaintiffs alleged that the respective number of printed copies should be calculated by [i] first calculating the number of copies of textbooks published by each textbook publisher for each grade from FY1980 to FY1988 (the number calculated by multiplying the number of pupils in each grade by the ratio of the number of copies of textbooks published by each textbook publisher to the total number of pupils for each fiscal year), [ii] then calculating the ratio (study material ratio) of the number of adopted copies of the Japanese Language Tests produced by each of the First Instance Defendants to the number of copies of textbooks published by each textbook publisher for each grade in FY1991, and [iii] after obtaining the number of adopted copies by multiplying [i] the number of copies of textbooks published by each textbook publisher for each grade by [ii] the study material ratio, finally calculating the number of printed copies by multiplying the obtained number of adopted copies by 1.2 (the First Instance Defendants generally print supplementary study materials such as the Japanese Language Tests at a rate of about 20% larger than the numbers of adopted copies thereof). However, according to the evidence (Exhibit Otsu 57) and the entire import of the oral argument, it can be found that the aforementioned study material ratio varies among the First Instance Defendants every fiscal year. There is no reasonable grounds to believe that the aforementioned study material ratio stays at the same level in each fiscal year. Thus, it is impossible to presume the numbers of printed copies of the Japanese Language Tests containing the Works based on the numbers of copies of textbooks and the aforementioned study material ratio.

The First Instance Plaintiffs alleged as follows. The number of pupils entering primary schools where the Japanese Language Tests are used peaked in FY1983 and has

started to decline since then. The number of pupils in FY1999 was equivalent to about 58.5% of the number of pupils in FY1980, and it would be unreasonable to reject the aforementioned method of calculating the number of copies proposed by the First Instance Plaintiffs because such rejection would prevent a factor, i.e., a reduction in the number of pupils, which would greatly affect the numbers of copies of the Japanese Language Tests used in primary schools, from being taken into consideration. However, as mentioned above, it is impossible to adopt the aforementioned method proposed by the First Instance Plaintiffs for calculation of the numbers of copies. In view of the fact that the First Instance Plaintiffs have to bear the burden of proof concerning the amount equivalent to royalties (the amount of damage), in order to calculate the correct numbers of printed copies, etc. of the Japanese Language Tests containing the Works for each fiscal year during the period from FY1980 until the fiscal years found in (B) above respectively, it is inevitable to make a presumption in a manner mentioned above in an attempt to calculate as accurately as possible.

Furthermore, there is no sufficient evidence to believe that the numbers of printed copies of the Japanese Language Tests containing the Works during the period from FY1980 until the fiscal years found in (B) above respectively are larger than the numbers of printed copies stated above.

C. Base prices

The First Instance Plaintiffs alleged that the price of a hardcover book containing each of the Works should be used as a base price. However, this allegation of the First Instance Plaintiffs is about the amount equivalent to royalties that could have been received for the act of publishing and selling the Japanese Language Tests produced by reproducing the Works. As explained in (2) above, the hardcover books mentioned in the allegation of the First Instance Plaintiffs and the Japanese Language Tests containing the Works are greatly different from each other in terms of characteristics and are not interchangeable. Therefore, the amount equivalent to royalties should not be calculated by using the price of the hardcover book containing each of the Works as a base price.

On the other hand, the First Instance Defendants alleged that a base price should be calculated by subtracting a consumption tax from the price of the Japanese Language Tests. However, since a consumption tax is a part of the sales price included in the price, there is no reason to subtract a consumption tax in order to determine a base price based on which the amount equivalent to royalties should be calculated.

According to the evidence (Exhibits Ko 3-3, Otsu 56) and the entire import of the oral argument, the regular price of a copy of the Japanese Language Tests delivered by

First Instance Defendant NIPPONHYOJUN Co., Ltd. to primary schools was 140 yen in FY1980 and 270 yen (Test A, Test S) in FY1999. The price can be considered to have gradually increased between FY1980 and FY1999. In view of this fact and the entire import of the oral argument, it is reasonable to find that the aforementioned price gradually increased to 150 yen in FY1981, 160 yen in FY1983, 170 yen in FY1984, 180 yen in FY1986, 190 yen in FY1987, 200 yen in FY1989, 220 yen in FY1991, 240 yen for both Test A and Test B in FY1992, 250 yen in FY1993, 260 yen in FY1996, 270 yen in FY1997, and 270 yen for both Test A and Test S in FY1998 and FY2000 (In FY1992 and from FY1998, two types of the Japanese Language Tests were produced by NIPPONHYOJUN Co., Ltd.).

According to the evidence (Exhibits Ko 2, 3-1, 3-2, 3-4 to 3-6) and the entire import of the oral argument, the regular prices of respective copies of the Japanese Language Tests delivered by other First Instance Defendants to primary schools were as follows: 260 yen for First Instance Defendant Aoba Publishing Co., Ltd., 270 yen for First Instance Defendant Shingakusha Co., Ltd., 260 yen (six times) and 270 yen (eight times) for First Instance Defendant KOBUNSHOIN PUBLISHING Co., Ltd., 270 yen (Test A), 250 yen (Test B), and 260 yen (six times) for First Instance Defendant Kyoikudojinsha. Co., Ltd., and 270 yen (Test A) and 260 yen (Test B) for First Instance Defendant BUNKEIDO CO., LTD. According to the entire import of the oral argument, these Japanese Language Tests have also shown a gradual price increase as is the case with the price of the Japanese Language Tests produced by First Instance Defendant NIPPONHYOJUN Co., Ltd. (Two types of the Japanese Language Tests were produced by First Instance Defendant Kyoikudojinsha. Co., Ltd. and BUNKEIDO CO., LTD. from FY1998, while two types of the Japanese Language Tests were produced by First Instance Defendant KOBUNSHOIN PUBLISHING Co., Ltd. from FY1999). Also, according to the entire import of the oral argument, the following can be found. First Instance Defendant Shingakusha Co., Ltd. produced two types of the Japanese Language Tests from FY2000 and delivered them to primary schools at the price of 260 yen (Test A) and 250 yen (Test B). First Instance Defendant Aoba Publishing Co., Ltd. produced three types of the Japanese Language Tests from FY2000 and delivered them to primary schools at the price of 260 yen (Test A) and 250 yen (Test B and Test C). First Instance Defendant Kyoikudojinsha. Co., Ltd. produced two types of the Japanese Language Tests from FY1998 and delivered them to primary schools at the price of 270 yen (Test A) and 250 yen (Test B), and produced an additional type of tests, consequently producing three types of tests in total as mentioned above, and delivered the new tests to primary schools at the price of 260 yen. First Instance Defendant

Kyoikudojinsha. Co., Ltd. reduced the number of the types of tests to two from FY2000, and delivered them to primary schools at the price of 260 yen (Test A) and 250 yen (Test B). In consideration of this fact and the entire import of the oral argument, it is reasonable to find that the price or regular price at which the First Instance Defendants excluding First Instance Defendant NIPPONHYOJUN Co., Ltd. delivered the Japanese Language Tests to primary schools from FY1980 are as shown in the section titled "School Delivery Prices" in Damage Calculation Tables 1 and 2 attached to the judgment in prior instance (the data shown in the section titled "School Delivery Prices" in Damage Calculation Tables 1 and 2 attached to this judgment was copied from the section titled "School Delivery Prices" in Damage Calculation Tables 1 and 2 attached to the judgment in prior instance).

D. Use ratio

(A) Since only the upper section of the Japanese Language Tests is used to present a "reproduction" of one of the Works as mentioned in A above, the number of pages used to present the Works should be calculated as 50% of the number of pages containing the Works.

Thus, in order to calculate the amount equivalent to royalties, it is reasonable to use, as the use ratio, the study material occupancy ratio presented in Damage Calculation Tables 1 and 2 attached to the judgment in prior instance calculated respectively by dividing the number of pages used for presentation as mentioned above by the total number of pages included in one copy of the Japanese Language Tests (the data shown in the section titled "Study Material Occupancy Ratio" in Damage Calculation Tables 1 and 2 attached to the judgment in this instance was copied from the section titled "Study Material Occupancy Ratio" in Damage Calculation Tables 1 and 2 attached to the judgment in prior instance).

(B) The First Instance Plaintiffs alleged that the use ratio concerning the Japanese Language Tests should not be determined based solely on the area size ratio as mentioned above, which is merely a matter of formality, but, should take into consideration a more substantive factor, such as the importance of the reproductions of the Works used in the Japanese Language Tests, and also the content of other license agreements signed by the copyright owners such as the First Instance Plaintiffs for the Works and that, from this perspective, even if any of the Works presented in the Japanese Language Tests does not fully occupy one whole page of the tests, it should be calculated as one page.

It is true that the question part of the Japanese Language Tests could not have been created if the creativeness of the Works as copyrightable works is disregarded. As

mentioned in A above, the Japanese Language Tests are designed to be used at an appropriate timing in accordance with the progress of study of pupils to enable teachers to grasp each pupil's level of academic achievement under Article 21, paragraph (2) of the School Education Act, which permits the use of "books other than textbooks as well as other study materials that are appropriate and beneficial." According to the evidence (Exhibits Ko 57-1 to 57-4, Otsu 3, 22-1 to 22-3) and the entire import of the oral argument, it can be found that, in order to achieve the aforementioned goal, the questions were made in a creative manner. Therefore, it is an undeniable fact that the aforementioned question part itself exhibits creativeness and constitutes an integral part of the Japanese Language Tests. In order to produce the Japanese Language Tests, it is inevitable to use the Works presented in textbooks. Said use is made to the extent necessary to achieve the aforementioned purpose of the Japanese Language Tests produced based on textbooks. In this sense, the presentation of the Works in textbooks can be considered to be primary use, while the presentation thereof in the Japanese Language Tests can be simply regarded as secondary use. As mentioned in C above, the Japanese Language Tests containing the Works cannot be substituted by hardcover books of the Works. Under these circumstances, from a practical point of view, it is reasonable to determine the use ratio of the Works in the Japanese Language Tests as mentioned above.

According to the evidence (Exhibits Ko 45, 79, and 80) and the entire import of the oral argument, some of the license agreements concluded between study material production companies and the original authors of works presented in textbooks including the First Instance Plaintiffs and some organizations of those authors specify that, when study material production companies use the works presented in textbooks in their study materials, the study material production companies shall pay royalties to the authors based on the understanding that, even if the space presenting a work does not fully occupy one whole page, it should be deemed as one page, for which the specified royalty shall be paid. However, according to the evidence (Exhibits Otsu 1, 14-1, 14-2, 39-1 39-2), in the case of the agreement concluded on September 30, 1999 between the Shougakkou Kokugo Kyōkasho Chosakusha no Kai (Association of authors of works included in primary school Japanese language textbooks) (a federation of Nihon Jido Bungakusha Kyokai, Japan Juvenile Writers Association, and freelance authors who do not belong to these organizations) and Nihon Tosho Kyozai Kyokai, to which the First Instance Defendants belong, and, also, in the case of the agreement concluded on March 27, 2001, between the Japan Writers' Association and Nihon Tosho Kyozai Kyokai, there are provisions specifying that, in order to calculate the amount equivalent to

royalties for using a work in study materials, the use ratio shall be determined based on the understanding that the space presenting the work does not fully occupy one page, and it should be considered to be 50%, etc. Therefore, it can be said that the example presented by the First Instance Plaintiffs does not show a generally adopted custom as to how the study material production companies and the authors of literary works including juvenile literature calculate the use ratio and that said example does not affect the aforementioned finding with regard to the use ratio of the Works in the Japanese Language Tests.

Therefore, regarding this point, the allegation of the First Instance Plaintiffs is unacceptable.

E. Royalty rate

(A) (a) According to the evidence (Exhibit Otsu 66) and the entire import of the oral argument, it can be found that the royalty rate for the copyrights for hardcover books of general literary works is usually 10%, while the royalty rate for the copyrights for hardcover books of juvenile literature is about 4 to 5%. According to the evidence (Exhibits Ko 6-1 to 6-12, 7-1 to 7-4, 8-1 to 8-3, 9 to 11-1 to 11-3, 12-1, 12-2, 13, 14-1 to 14-3, and 57-1 to 57-4) and the entire import of the oral argument, it can be presumed that one of the reasons why the royalty rate of juvenile literature is lower than that of other general literary works is that hardcover books of juvenile literature tend to contain a lot of illustrations in addition to text, which play a great role in the books because most of the readers are juveniles.

(b) According to the evidence (Exhibits Otsu 1, 14-1, 14-2, 39-1, 39-2, 44, 45, 60, 61, 62-1 to 62-3, and 64 to 66), the following can be found. While an agreement titled "Shougakkou kokugo kyoukasho junkyo kyouzai ni okeru sakuhin shiyou ni tsuiteno kyoutei" (Agreement on the use of works in study materials produced based on primary school Japanese language textbooks) was concluded on September 30, 1999, between the Shougakkou Kokugo Kyōkasho Chosakusha no Kai (Association of authors of works included in primary school Japanese language textbooks) (a federation of Nihon Jido Bungakusha Kyokai, Japan Juvenile Writers Association, and freelance authors who do not belong to these organizations) and Nihon Tosho Kyozai Kyokai, to which the First Instance Defendants belong, said agreement specifies that study material production companies including the First Instance Defendants are obliged to pay royalties for the use of works presented in textbooks in their study materials after obtaining the original authors' consent, starting from the study materials published in FY2000. Said agreement specifies that the royalties for works shall be calculated based on the understanding that the royalty rate should be 5% in consideration of the

proportion of the space presenting works to the entire pages. While an agreement titled "Shougakkou, chugakkou, oyobi koutougakkouyou toshokyouzai tou ni okeru bungei chosakubutsu shiyou ni tsuiteno kyoutei" (Agreement on the use of works of literature in study materials, etc. for primary schools, junior high schools, and high schools) was concluded on March 27, 2001, between the Japan Writers' Association and Nihon Tosho Kyozai Kyokai, said agreement specifies the conditions applicable to the use of works of literature presented in textbooks in study materials, etc., starting from FY2002, setting detailed rules about enforcement thereof stating that the royalties for works shall be calculated based on the understanding that the royalty rate should be 5% in consideration of the proportion of the space presenting works to the entire pages of the study materials, whereas the royalty rate shall be 2.5% in the case of a translation of a work. On March 25, 2002, Nihon Tosho Kyozai Kyokai offered to Shougakkou Kokugo Kyōkasho Chosakusha no Kai and also to the Japan Writers' Association that Nihon Tosho Kyozai Kyokai would compensate royalties for the use of works in study materials under the same conditions specified in the aforementioned agreements for the period of the past 10 years. Shougakkou Kokugo Kyōkasho Chosakusha no Kai and the Japan Writers' Association accepted this offer and agreed to make a proposal to each of the original authors based on this offer. The Japan Writers' Association agreed to hold a sincere discussion if an unexpected situation arises (such as the case where there is a great difference with the amount of damages determined in a court judgment, etc.), but some of the original authors disagree to the idea of solving the problem by accepting such offer.

According to the evidence (Exhibit Otsu 69), the royalty rate regulations of the Japan Literary Copyright Protection Association specify that the royalties for use of a work for study materials, etc. shall not exceed 5% of the sales price multiplied by the number of issues.

The aforementioned royalty rate specified in each of the aforementioned agreements was set to calculate the amount of royalties for future use of any work in supplementary study materials such as the Japanese Language Tests. As mentioned in A above, supplementary study materials such as the Japanese Language Tests are used at an appropriate timing in accordance with the progress of study of pupils to enable teachers to grasp each pupil's level of academic achievement under Article 21, paragraph (2) of the School Education Act and play an important role in school education, and it is inevitable to use works presented in textbooks to produce such supplementary study materials, as found in 3 (1) A of the section titled "No. 3 Court decision" in the "Facts and reasons" section in the judgment in prior instance as cited

above. Since the cost of the supplementary study materials such as Japanese Language Tests has to be borne by the parents of pupils in principle, in accordance with the evidence (Exhibit Otsu 66) and the entire import of the oral argument, it is presumed that the aforementioned agreements were drafted to be educationally appropriate in consideration of the aforementioned points. Furthermore, a provision concerning the maximum limit of the royalty rate was also established in the royalty rate regulations of the Japan Literary Copyright Protection Association in order to ensure educational appropriateness as mentioned above.

(c) In accordance with the evidence (Exhibits Ko 45, 79, and 80) and the entire import of the oral argument, it can be found that some of the license agreements concluded between study material production companies and the original authors of works presented in textbooks including the First Instance Plaintiffs and some organizations of those authors specify that any study material production company that uses a work presented in a textbook to produce study materials shall pay 8% royalty based on the understanding that any page carrying a work should not be divided into upper and lower sections, but should be counted as one page.

(B) The issue in this case is not the royalty rate for the future, but the royalty rate to calculate the amount equivalent to royalties that should be paid to compensate copyright infringement that occurred in the past. There is no other way but to presume that the royalty rate in this sense will be determined through the agreement between the study material production companies, which produce supplementary study materials for profit, and the original authors of works presented in textbooks after freely negotiating the rate. It can be found that there is a substantial need for supplementary study materials such as the Japanese Language Tests to use works presented in textbooks and, given that works are often presented in supplementary study materials such as Japanese Language Tests only after making modifications such as deletions, the original authors would often have to face an undesirable situation where the creativeness of their original works has been damaged. Moreover, it can be found that each section of the aforementioned supplementary study materials that presents a work occupies less than half of the two facing pages, and that the royalties paid to the original author as a compensation can be presumed to be small as a result. Based on an evaluation of a neutral balance of interests, with reference to the royalty rate specified in the agreements, etc. concluded between the industry associations of study material production companies and the organizations of authors found in (A) above and also the agreements concluded between study material production companies and respective authors, the royalty rate to be used to calculate the amount equivalent to royalties should

be determined as 8%, which is lower than the regular royalty rate of 10% applicable to hardcover books of literary works and higher than the royalty rate of 5%, which is set for the future use of works in study materials as far as the Works excluding the following translations are concerned. Since Works 1-1, 1-2, 1-4, 1-6, 1-12, 1-22, and 5-2 are translated works (Exhibits Ko 6-1, 6-2, 6-4, 6-6, 6-12, 57-1, 57-2, and 57-4), according to the facts found in (A) above and the entire import of the oral argument, in the case of a book translated from a foreign work, it is necessary to obtain consent from both the original author and the translator and pay royalties to both of them in principle. Consequently, it is common to set a royalty rate that is about 50% lower than the rate set for regular works. Therefore, in the case of the aforementioned translated works, it is reasonable to set the royalty rate at 4%, which is a half of the aforementioned royalty rates applicable to non-translation works.

While it can be found that the actual compensation rate for the use of works in textbooks is 3.60% (Exhibit Otsu 42) and that the royalty rate for books compiling university entrance examinations is set as 3.5% to 4% in an agreement concluded between the Japan Literary Copyright Protection Association and publishing companies (Exhibits Otsu 41-5 to 41-8), in consideration of the facts that the exercise of copyrights is restricted by the Copyright Act against the use of works in textbooks and university entrance examinations, that a book compiling university entrance examinations can be considered to be a secondary use of university entrance examinations, and that the manner of using works in university entrance examinations is greatly different from the manner of use adopted in the case of Japanese Language Tests, it is unreasonable to refer to these royalty rates when determining the aforementioned royalty rate.

The First Instance Plaintiffs alleged that, in consideration of various factors such as the purpose of revision of Article 114, paragraph (2) (Article 114, paragraph (3) of the current Act) of the Copyright Act by the Act No. 56 of 2000 and the royalty rate of 8%, which the First Instance Plaintiffs usually apply to regular licensees, it is reasonable to set a royalty rate at least higher than 15% to calculate the amount of damage under Article 114, paragraph (3) of the Copyright Act in this case. However, as admitted by the First Instance Plaintiffs themselves, it can be interpreted that the purpose of the aforementioned revision is to calculate the appropriate amount of royalties in consideration of specific factors in each case. The allegation of the First Instance Plaintiffs, as if to say that the purpose of said provision can be achieved by setting a royalty rate much higher than the royalty rate adopted for the calculation of the royalties under the license agreements concluded for their works, is actually against the purpose of the aforementioned revision. Thus, the royalty rate of 15% proposed by the

First Instance Plaintiffs is groundless and is therefore unacceptable.

(C) The First Instance Defendants alleged that, under Article 114, paragraph (2) of the Copyright Act prior to the revision by the Act No. 56 of 2000, it is impossible to accept a rate that is greatly different from the royalty rate widely used in reality.

However, the purpose of deleting the word "regular" from Article 114, paragraph (2) of the Copyright Act upon the aforementioned revision was to ensure that an appropriate amount of damage can be determined in consideration of specific factors related to the parties concerned without being bound by the existing royalty regulations, etc. Since there is no transitional provision concerning said provision, Article 114, paragraph (3) of the Copyright Act (Article 114, paragraph (2) of the former Copyright Act after the aforementioned revision) should be considered to be applicable to this case. As found in (B) above, the royalty rate found therein cannot be considered to be greatly different from the royalty rate widely used in reality.

F. On these grounds, it is reasonable to calculate the amount of damage that the First Instance Plaintiffs can claim against the First Instance Defendants on the grounds of the copyright infringement of the Works by multiplying the respective number of printed issues by the price (the school delivery price or the regular price for school delivery) by the use ratio (study material occupancy ratio) by the royalty ratio (8% or 4%) as shown in Damage Calculation Tables 1 and 2 attached to the judgment in prior instance with regard to the First Instance Defendants excluding First Instance Defendant Shingakusha Co., Ltd. and as shown in Damage Calculation Tables 1 and 2 attached to the judgment in this instance with regard to First Instance Defendant Shingakusha Co., Ltd.

The First Instance Plaintiffs alleged that the minimum royalty rate for one work per year should be 10,000 yen because the agreement with study material production companies specifies that the minimum amount of royalty shall be deemed to be 10,000 yen even if the royalty for one work per year is less than 10,000 yen. It can be found that some of the aforementioned license agreements concluded between study material production companies and the original authors of works presented in textbooks specify the minimum amount of royalty as alleged by the First Instance Plaintiffs (Exhibit Ko 79). However, these agreements merely show one method of future royalty payment. There is no evidence to believe that said method has become a practice widely adopted in the aforementioned case of licensing. Therefore, there are no reasons to justify the necessity to use the same method to calculate the amount equivalent to royalties.

(omitted)

7. Conclusion

On these grounds, without needing to examine any other factors, the First Instance Plaintiffs' claim for payment of damages is acceptable to the extent that each of the First Instance Plaintiffs is entitled to demand payment of money from the First Instance Defendants, excluding First Instance Defendant Shingakusha Co., Ltd., equivalent to the damage specified in the "Damage Amount Table" attached to the judgment in prior instance as well as the amount of money specified in the Delay Damages List attached to the judgment in prior instance, and also demand payment of money, from First Instance Defendant Shingakusha Co., Ltd., equivalent to the damage specified in the Damage Amount Table Concerning Shingakusha attached to the judgment in this instance as well as the amount of money specified in the Delay Damages List Concerning Shingakusha attached to the judgment in this instance. However, the remaining part of the First Instance Plaintiffs' claim is groundless.

Therefore, based on the incidental appeal filed by First Instance Defendant Shingakusha Co., Ltd., since the judgment in prior instance is partially different from the aforementioned conclusion, the judgment in prior instance with respect to the part for which First Instance Defendant Shingakusha Co., Ltd. lost the case with regard to the claims other than the claim of First Instance Plaintiff A for an injunction against First Instance Defendant Shingakusha Co., Ltd. shall be modified as shown in paragraph 1 of the main text of the judgment in this instance. Furthermore, based on this appeal filed by the First Instance Plaintiffs excluding First Instance Plaintiff A, since the judgment in prior instance is different from the aforementioned conclusion, the part of the judgment in prior instance with regard to the claims other than the claim of the First Instance Plaintiffs excluding First Instance Plaintiff A for an injunction against First Instance Defendant Shingakusha Co., Ltd. shall be modified as shown in paragraph 2 of the main text of the judgment in this instance. (There is a consensus between the parties concerned that, in case the First Instance Defendants are held liable to pay damages, the First Instance Defendants paid the First Instance Plaintiffs on March 31, 2003, such amount of damages that the First Instance Defendants were ordered by the court of prior instance to pay to the First Instance Plaintiffs as well as delay damages accrued thereon at a rate of 5% per annum until said date.) Since there are no grounds for this appeal filed by First Instance Plaintiff A, this appeal filed by the First Instance Plaintiffs excluding First Instance Plaintiff A against the First Instance Defendants (excluding First Instance Defendant Shingakusha Co., Ltd.), this incidental appeal filed by the First Instance Defendants excluding First Instance Defendant Shingakusha Co., Ltd., and this

incidental appeal filed by First Instance Defendant Shingakusha Co., Ltd. against the First Instance Plaintiffs excluding First Instance Plaintiff A, should be dismissed. The judgment shall be rendered in the form of the main text.

Tokyo High Court, First Intellectual Property Division

Presiding judge: KITAYAMA Motoaki

Judge: AOYAGI Kaoru

Judge: OKINAKA Yasuhito