

Judgments of Intellectual Property High Court, Fourth Division

Date of the Judgment: 2006.9.13

Case Number: 2005 (Ne) No.10076

Title (Case):

A case wherein the court found that the maker of a documentary film has assigned its copyright on the film to a third party

Reference: Article 2, item 10, Article 16, and Article 29 of the Copyright Act

Summary of the Judgment:

In this case, with respect to the documentary film of a music group's final concert which was directed by Plaintiff X, the representative person of Plaintiff Company, and was shot by Plaintiff Company (hereinafter referred to as the "Work"), the plaintiffs allege that the DVDs, etc. manufactured and sold by Defendant Company infringe Plaintiff Company's copyright (right of reproduction and right of adaptation) as well as Plaintiff X's moral rights of author (right to maintain integrity and right to indicate name), and they seek an injunction against Defendant Company's reproduction and distribution of the DVDs, etc., payment of damages, and publication of an apology.

The court of the first instance made a judgment ordering Defendant Company to stop reproduction and distribution of the DVDs, etc. and pay damages. Both parties filed appeals against this judgment.

This court, as the court of the first instance had, recognized Plaintiff X as the author of the Work and Plaintiff Company as the copyright holder of the Work, but found Plaintiff Company to have assigned its copyright to a third party. Based on these findings, this court quashed the judgment of the first instance with regard to the part relating to Plaintiff Company and dismissed Plaintiff Company's claim (the court maintained the judgment of the first instance with regard to the part related to Plaintiff X).

The court's findings regarding the author and copyright holder of the Work are as follows.

1. Author of the Work

Article 16 of the Copyright Act provides as follows: "The authorship of a cinematographic work shall be attributed to those who, by taking charge of producing, directing, filming, art direction, etc., have creatively contributed to the creation of such cinematographic work as a whole..."

It is true that the Work was made under the circumstances where a number of people were involved in the project without making any particular agreement, and the relationships between such people seemed complicated and tangled. However,

comprehensively taking into consideration Plaintiff X' s role in making the Work, namely, taking part in the entire process of making the Work from planning to completion, serving as the director of the Work, making decisions on highly creative parts of the Work including inclusion shots of the ardent fan group and interviews with fans, and giving directions for all operations in shooting and editing, it is appropriate to recognize Plaintiff X as the only person "who has creatively contributed to the creation of the Work as a whole."

2. Ownership of the copyright in the Work

In light of the language of the provision of Article 2, item 10 of the Copyright Act and the purpose of the provision of Article 29, para.1 of the same Act, the term "maker of a cinematographic work" should be construed to mean the person who has the intention of making the cinematographic work and has legal rights and obligations in the making of a cinematographic work, and who, for this reason, makes economic profit from and disbursements for making the work.

In this case, we can find that it is Plaintiff Company that has the intention of making the cinematographic work and has legal rights and obligations in the making of the cinematographic work, and that for this reason, makes economic profit from and disbursements for making the work.

3. Assignment of the copyright

For holding the final concert, the company in charge of the management of the music group made all arrangements and bore all expenses, and the representative person of the management company, E, took charge of the producer for the concert as a whole. Therefore, it is generally difficult to presume that E might have authorized Plaintiff X to shoot the final concert, if it is supposed that the copyright in the work recording the concert would not belong to E or the management company. Plaintiff Company, after finishing making the Work, made no assertion as the copyright holder, except that it assigned the right to exclusively broadcast the Work on television to a television station and received 1.5 million yen as a value for the television broadcast right. The predecessor company of Defendant Company paid the charges to Plaintiff Company for shooting the final concert and received the delivery of the master tape of the Work from Plaintiff X.

Taking into consideration all of these circumstances, it can be found that although Plaintiff Company should be regarded as the maker of the Work and as the original copyright holder of the Work, it also should be regarded that the copyright was assigned to E afterwards.

(The copyright for this English material was assigned to the Supreme Court of Japan by Institute of Intellectual Property.)

2005 (Ne) 10076, Appeal Case of Seeking an Injunction against Exploitation of a Work

Judgment rendered on September 13, 2006

Date of conclusion of oral argument: May 10, 2006

(Court of prior instance: Tokyo District Court; 2003 (Wa) 3184; judgment rendered on March 15, 2005)

Judgment

Appellant and appellee (plaintiff in the first instance):

Kabushiki Kaisha TELL Director's Family

Appellant and appellee (plaintiff in the first instance): X

Counsel attorney for both of the above: NAITO Atsushi

Same as above: OHASHI Takao

Appellee and appellant (defendant in the first instance):

Universal Music Kabushiki Kaisha

Counsel attorney: NAKANO Kenichi

Same as above: MIYAGAKI Satoshi

Supporting intervener for the appellee and appellant (defendant in the first instance):

United Kingdom Angels Limited

Counsel attorney: TATSUMURA Zen

Same as above: KUSUMOTO Masayuki

Main Text

1. The part of the judgment in prior instance concerning Kabushiki Kaisha TELL Director's Family, the appellant and appellee (plaintiff in the first instance), where the appellee and appellant (defendant in the first instance) lost the case shall be revoked.
2. The claims made by Kabushiki Kaisha TELL Director's Family, the appellant and appellee (plaintiff in the first instance), pertaining to the revoked part mentioned in the preceding paragraph shall be dismissed.
3. All of the appeals filed by the appellants and appellees (plaintiffs in the first instance) and other appeals filed by the appellee and appellant (defendant in the first instance) shall be dismissed.
4. Additional claims made by Kabushiki Kaisha TELL Director's Family, the appellant and appellee (plaintiff in the first instance), in this instance shall be dismissed.
5. For both the first and second instances, Kabushiki Kaisha TELL Director's Family, the appellant and appellee (plaintiff in the first instance), shall bear the court

costs that arose between Kabushiki Kaisha TELL Director's Family, the appellant and appellee (plaintiff in the first instance), and the appellee and appellant (defendant in the first instance) and those that arose from supporting intervention. The court costs that arose in both instances between X, the appellant and appellee (plaintiff in the first instance), and the appellee and appellant (defendant in the first instance) shall be divided into 30, and X, the appellant and appellee (plaintiff in the first instance), shall bear twenty-nine-thirtieths thereof and the appellee and appellant (defendant in the first instance) shall bear the remaining.

Facts and reasons

Hereinafter, Kabushiki Kaisha TELL Director's Family, the appellant and appellee (plaintiff in the first instance), is referred to as "Plaintiff Company in the First Instance," X, the appellant and appellee (plaintiff in the first instance) is referred to as "Plaintiff X in the First Instance," and the appellee and appellant (defendant in the first instance) is referred to as "Defendant in the First Instance."

No. 1 Gist of the appeal

1. Plaintiffs in the first instance

- (1) The part of the judgment in prior instance where the plaintiffs in the first instance lost the case shall be revoked.
- (2) Defendant in the First Instance shall neither reproduce nor distribute a video cassette product titled "Moetsukiru(Flaming out)=Carol Last Live!"
- (3) Defendant in the First Instance shall pay to Plaintiff Company in the First Instance 72,020,760 yen as well as the amount calculated by multiplying 16,987,426 yen out of said amount by six percent per annum for the period from February 22, 2003 to the date of full payment and the amount calculated by multiplying 55,033,334 yen out of said amount by five percent per annum for the period from February 22, 2003 to the date of full payment.
- (4) Defendant in the First Instance shall pay to Plaintiff Company in the First Instance 12,001,403 yen and the amount calculated by multiplying said amount by five percent per annum for the period from November 3, 2005 to the date of full payment (additional claim made in this instance).
- (5) Defendant in the First Instance shall pay to Plaintiff X in the First Instance 4,000,000 yen and the amount calculated by multiplying said amount by five percent per annum for the period from February 22, 2003 to the date of full payment.
- (6) Defendant in the First Instance shall place the apology advertisement described in Attachment 1 attached to the judgment in prior instance in the national editions of Asahi Shimbun, the Nikkei, and Yomiuri Shimbun as well as Sports Nippon and Sankei Sports.

(7) Defendant in the First Instance shall bear the court costs for both the first and second instances.

(8) Declaration of provisional execution in relation to (2) to (5) above

2. Defendant in the First Instance

(1) The part of the judgment in prior instance where Defendant in the First Instance lost the case shall be revoked.

(2) The claims made by the plaintiffs in the first instance pertaining to the revoked part mentioned in (1) above shall be dismissed.

(3) The plaintiffs in the first instance shall bear the court costs for both the first and second instances.

No. 2 Background

1. Background of this case (facts recognized based on the evidence listed below and entire import of argument as well as undisputed facts; (1) to (5) are the same as those stated in "1. Undisputed facts, etc." in "No. 2 Background" in section "Facts and reasons" in the judgment in prior instance except for the designations of the parties having been altered.

(1) Parties

Plaintiff Company in the First Instance is a stock company established in 1975 that runs the business of producing videos, mainly television programs (Exhibit Ko No. 27). Plaintiff X in the First Instance was a director belonging to TV Man Union, Inc., which is a television program production company. However, Plaintiff X in the First Instance became independent from said company in 1974, and established Plaintiff Company in the First Instance in 1975. Since then, Plaintiff X in the First Instance has been the representative director of Plaintiff Company in the First Instance.

Defendant in the First Instance is a stock company that engages in the business of planning, producing, and selling, etc. sound and visual recordings. The predecessor of Defendant in the First Instance is Nippon Phonogram Co., Ltd. (hereinafter referred to as "Nippon Phonogram"). Nippon Phonogram was a record company to which "Carol," a rock band consisting of A (hereinafter referred to as "A"), B, C, and D, had belonged. It changed its trade name to *Mercury Music Entertainment Co., Ltd.* in 1995, and Mercury Music Entertainment Co., Ltd. transferred music-related business to Defendant in the First Instance in 2000. Thereby, Defendant in the First Instance succeeded to the copyrights and all the other music-related rights previously held by Nippon Phonogram (Exhibit Otsu No. 14).

(2) Making and broadcasting of the Work

The farewell concert of Carol was held on April 13, 1975. At that time, a documentary cinematographic work (Exhibit Ken Ko No. 2; hereinafter referred to as the "Work") centering on the scenes, etc. of said concert, titled "Goodbye Carol," of which content is as shown in

Attachment 2 attached to the judgment in prior instance, was made. The Work was filmed by Plaintiff Company in the First Instance and was directed by Plaintiff X in the First Instance.

The Work was broadcasted under the title of "Goodbye Carol" in a program of Tokyo Broadcasting System, Inc. (hereinafter referred to as "TBS") titled "Tokuban Ginza Now!" (Exhibit Ko No. 1-1).

(3) Sale of the Video

Around 1984, Nippon Phonogram reedited the Work into a work with the content as shown in Attachment 3 attached to the judgment in prior instance, and made and sold it as a video cassette product titled "Moetsukiru=Carol Last Live!" (hereinafter referred to as the "Video"). In doing so, Nippon Phonogram switched the sound source from monaural to stereo, and edited the video image in order to address the deterioration of the video image and the problem of portrait rights, etc. Nippon Phonogram entrusted Plaintiff Company in the First Instance to conduct this editing work, and Plaintiff Company in the First Instance conducted it.

Regarding the release of the Video, Nippon Phonogram did not make an offer of payment of a royalty to Plaintiff X in the First Instance.

(4) Sale of the DVD

Defendant in the First Instance made and sold a DVD product titled "Moetsukiru=Carol Last Live!" (Exhibit Ken Ko No. 3; hereinafter referred to as the "DVD") on January 22, 2003. The DVD was made by putting the content of the Video on a DVD, and it is identical with the Video in terms of the video image. The content thereof is as shown in Attachment 3 attached to the judgment in prior instance.

Defendant in the First Instance had not obtained an explicit authorization to make and sell the DVD from Plaintiff Company in the First Instance.

(5) Sale of the Bonus DVD

Defendant in the First Instance released a greatest hits CD of Carol titled "The★Best" (hereinafter referred to as the "CD") at the same time as the release of the DVD. Defendant in the First Instance intended to make a promotion video image in order to promote both of these products, and made a promotion video image for "Funky Monkey Baby" (hereinafter referred to as the "Promotion Video") by synthesizing some parts of the Work and by conducting editing so that said parts look as though they were cut through wipe processing. Defendant in the First Instance advertised the CD and the DVD by broadcasting the Promotion Video on television (using it in TV spots and as an ending theme of a program) and by showing it on large street televisions, in the front of record shops, and at the information desk, etc. of the head office. In addition, Defendant in the First Instance included the Promotion Video in a DVD (hereinafter referred to as the "Bonus DVD") as a benefit for purchasing the first version of the CD, and sold said DVD by adding it to the CD (Exhibit Ken Ko No. 4).

Defendant in the First Instance has not obtained an explicit authorization to make and exploit the Promotion Video and the video in the Bonus DVD from Plaintiff Company in the First Instance. Moreover, there is no statement on the Promotion Video and the Bonus DVD that the director of the original video images is Plaintiff X in the First Instance.

(6) The plaintiffs in the first instance alleged in prior instance that the Video and the DVD which Defendant in the First Instance made and sold infringe the right of reproduction of Plaintiff Company in the First Instance and that the Promotion Video and the Bonus DVD which Defendant in the First Instance made infringe the right of adaptation of Plaintiff Company in the First Instance and the moral rights of author (right to maintain integrity and right to determine the indication of the author's name) of Plaintiff X in the First Instance. Based on this allegation, the plaintiffs in the first instance claimed the following against Defendant in the First Instance: [i] in relation to Plaintiff Company in the First Instance, an injunction against the reproduction and distribution of the Video, the DVD, and the Bonus DVD, an injunction against the reproduction, showing, broadcasting, etc. of the Promotion Video, destruction of the Bonus DVD and the master tape of the Promotion Video, payment of compensation for damages of 241,608,890 yen in total (37,069,851 yen pertaining to the Video, 170,562,779 yen pertaining to the DVD, 18,488,100 yen pertaining to the Bonus DVD, and 15,488,160 yen pertaining to the Promotion Video) or, as a preliminary claim, payment of compensation for damages of 124,241,236 yen (17,830,616 yen pertaining to the Video, 82,029,675 yen pertaining to the DVD, 8,892,785 yen pertaining to the Bonus DVD, and 15,488,160 yen pertaining to the Promotion Video), and placement of the apology advertisement; and [ii] in relation to Plaintiff X in the First Instance, an injunction against the reproduction and distribution of the Bonus DVD, an injunction against the reproduction, showing, broadcasting, etc. of the Promotion Video, destruction of the Bonus DVD and the master tape of the Promotion Video, payment of compensation for damages of 20,000,000 yen as a solatium, and placement of the apology advertisement.

(7) The court of prior instance ruled that the author of the Work is Plaintiff X in the First Instance and the copyright holder is Plaintiff Company in the First Instance. Then, the court of prior instance ruled as follows: The Video does not infringe the right of reproduction of Plaintiff Company in the First Instance as the plaintiffs in the first instance had authorized Defendant in the First Instance to make and sell the Video; however, the DVD infringes the right of reproduction of Plaintiff Company in the First Instance and the Promotion Video and the Bonus DVD infringe the right of adaptation of Plaintiff Company in the First Instance and the moral rights of author (right to maintain integrity and right to determine the indication of the author's name) of Plaintiff X in the First Instance. Based on this ruling, the court of prior instance upheld the following claims made by the plaintiffs in the first instance: [i] in relation to Plaintiff

Company in the First Instance, an injunction against the reproduction and distribution of the DVD and the Bonus DVD, an injunction against the reproduction, showing, broadcasting, etc. of the Promotion Video, destruction of the Bonus DVD and the master tape of the Promotion Video, and payment of compensation for damages of 49,132,214 yen in total (48,287,709 yen pertaining to the DVD, 544,505 yen pertaining to the Bonus DVD, and 300,000 yen pertaining to the Promotion Video); and [ii] in relation to Plaintiff X in the First Instance, an injunction against the reproduction and distribution of the Bonus DVD, an injunction against the reproduction, showing, broadcasting, etc. of the Promotion Video, destruction of the Bonus DVD and the master tape of the Promotion Video, and payment of compensation for damages of 1,000,000 yen as a solatium.

(8) Defendant in the First Instance filed an appeal against the judgment in prior instance on March 17, 2005, and after that, the plaintiffs in the first instance also filed an appeal against the judgment in prior instance on the 29th of the same month.

In this instance, the plaintiffs in the first instance sought the following in addition to the claims upheld by the court of prior instance: [i] in relation to Plaintiff Company in the First Instance, an injunction against the reproduction and distribution of the Video, payment of compensation for damages of 81,777,706 yen in total, and placement of the apology advertisement; and [ii] in relation to Plaintiff X in the First Instance, payment of compensation for damages of 4,000,000 yen as a solatium and placement of the apology advertisement. On the other hand, Defendant in the First Instance sought the dismissal of the claims upheld by the court of prior instance. Plaintiff Company in the First Instance changed its claim for payment of money pertaining to the Video from a claim for damages based on the infringement of the right of reproduction to a claim for a royalty for authorization to use the copyright. Along with this, Plaintiff Company in the First Instance reduced the amount of the claim for compensation for damages from 64,790,288 yen to 55,033,334 yen (51,584,798 yen pertaining to the DVD and 3,448,536 yen pertaining to the Bonus DVD), and after that, also added a claim for compensation for damages of 12,001,403 yen in total (1,378 yen pertaining to the DVD, 25 yen pertaining to the Bonus DVD, and attorney's fees of 12,000,000 yen).

The plaintiffs in the first instance set the claims in this instance as above, and sought the following in addition to the claims upheld by the court of prior instance: [i] in relation to Plaintiff Company in the First Instance, an injunction against the reproduction and distribution of the Video, payment of a royalty for the copyright to the Video of 16,987,426 yen, payment of compensation for damages of 67,034,737 yen in total (51,586,176 yen pertaining to the DVD, 3,448,561 yen pertaining to the Bonus DVD, and attorney's fees of 12,000,000 yen), and placement of the apology advertisement; and [ii] in relation to Plaintiff X in the First Instance, payment of compensation for damages of 4,000,000 yen as a solatium and placement of the

apology advertisement.

(9) United Kingdom Angels Limited intervened in this action as a supporting intervener for Defendant in the First Instance on November 7, 2005, alleging that it might become subject to a claim for compensation for damages, etc. by Defendant in the First Instance if Defendant in the First Instance loses the case.

2. Issues

- (1) Who are the author and copyright holder of the Work?
- (2) Did Plaintiff Company in the First Instance authorize Defendant in the First Instance to reproduce the Video for value?
- (3) Does the DVD infringe the copyright of Plaintiff Company in the First Instance?
- (4) Do the Bonus DVD and the Promotion Video infringe the copyright of Plaintiff Company in the First Instance and the moral rights of author of Plaintiff X in the First Instance?
- (5) Existence of damages and the amount thereof
- (6) Necessity of placement of the apology advertisement
- (7) Abuse of rights

3. Allegations of the parties concerning the issues

In addition to the additions, corrections, and deletions as follows, the allegations of the parties concerning the issues are as stated in "No. 3 Allegations of the parties concerning the issues" in section "Facts and reasons" in the judgment in prior instance (line 5 of page 6 to line 24 of page 34 of the judgment in prior instance). Therefore, the relevant part is cited.

(1) The following is added by starting a new line following the end (line 8 of page 12 of the judgment in prior instance) of [Allegations of the defendant] in "1. Regarding Issue (1) (author and copyright holder)."

"(5) Acquisition of a copyright, etc. due to acquisition prescription

Nippon Phonogram had broadcasted the Work many times on local television stations nationwide during the period from July 25, 1975 to May 1, 1976, and also has sold the Video since around 1984. Nippon Phonogram exercised the copyright to the Work quietly and publicly, acting for itself. As of July 25, 1975, Nippon Phonogram was in good faith and faultless. It then acquired the copyright to the Work on July 25, 1985, after 10 years had passed. Even if Nippon Phonogram was at fault, it acquired the copyright to the Work on July 25, 1995, when 20 years had passed since the original date.

Moreover, even if acquisition of the copyright to the Work by prescription is not recognized, Nippon Phonogram has exercised the right of reproduction for the Work quietly and publicly, acting for itself since around 1984. Therefore, Nippon Phonogram was in good faith and faultless as of 1984. Consequently, it acquired the right of reproduction for the Work in 1994, after 10 years had passed.

[Allegations of the supporting intervener for Defendant in the First Instance]

(1) Author of the Work

Bauhaus, the predecessor of the supporting intervener for Defendant in the First Instance, engaged in planning, production, direction, etc. of the farewell concert, and paid production costs for the Work. It thus creatively contributed to the creation of the Work as a whole. Therefore, Bauhaus is the author of the Work. Even if Plaintiff X in the First Instance mainly engaged in the production of the Work through filming, Bauhaus also engaged in the production, etc. of the Work jointly with Plaintiff X in the First Instance. Consequently, Plaintiff X in the First Instance and Bauhaus should be regarded as co-authors.

(2) Copyright holder of the Work

The Work is a cinematographic work. It was originally planned by E, who was the representative of Bauhaus, with the intention to hand down the video image of the farewell concert in some form. In addition, it was produced by having others pay costs therefor as advanced payment to Bauhaus or through Bauhaus's own raising of funds. Consequently, Bauhaus is the maker of the cinematographic work, and the copyright thereto belongs to Bauhaus."

(2) "2. Regarding Issue (2) (the Video)" (line 9 of page 12 to line 16 of page 13 of the judgment in prior instance) is altered as follows.

"2. Regarding Issue (2) (the Video)

[Allegations of the plaintiffs in the first instance]

(1) Establishment of a contract for the authorization to use the copyright for value

In 1984, A intended to release the video image of his concert as a video cassette product through Warner-Pioneer Corporation at that time. A wanted to use part of the video image in the Work at the beginning thereof. A negotiated personally with the president of Nippon Phonogram, and obtained consent for using part of the video image in the Work for a video to be released by Warner-Pioneer Corporation, that is, consent for exclusive release. In exchange for this, A authorized Nippon Phonogram to release the Work itself as a video cassette product.

Plaintiff X in the First Instance was informed of this background by A, and approved the release of the Work by Nippon Phonogram as a video cassette product. However, this approval was based on a natural premise that Nippon Phonogram pays a royalty to Plaintiff Company in the First Instance, which is the copyright holder of the Work.

Therefore, Plaintiff Company in the First Instance, which is the copyright holder, authorized Nippon Phonogram to reproduce the Work for value.

Based on this, if Plaintiff Company in the First Instance gives such authorization for value, consideration therefor should be in the form of a royalty for the matrix. When a record company relies on supply from television stations and other external right holders for the live images, etc.

of artists, the rate of a royalty paid to a right holder will be from 20 to 26% of the retail price of the videogram. In this case, it is presumably possible to recognize that the royalty rate of 25% was set, taking into account that the Work is a video work of a high-profile artist, Carol.

In relation to the Video, Defendant in the First Instance has sold 6,901 products (including 1,479 laser disc products) at a retail price of 3,689 yen (3,873 yen including tax) and 17,508 products at a retail price of 2,427 yen (2,548 yen including tax) since 1993. Therefore, the royalty for the copyright to the Video is 16,987,426 yen as shown below.

$$(3,689 \text{ yen} \times 6,901 \text{ products} + 2,427 \text{ yen} \times 17,508 \text{ products}) \times 25\% = 16,987,426 \text{ yen}$$

(2) Cancellation of the contract for the authorization to use the copyright

As Defendant in the First Instance had not paid any of the aforementioned royalty for the copyright, Plaintiff Company in the First Instance indicated its intention to cancel the contract for the authorization to use the copyright to Defendant in the First Instance by a written statement of reasons for appeal dated on May 19, 2005, which was serviced to Defendant in the First Instance on the 20th of the same month.

[Allegations of Defendant in the First Instance]

(1) Before selling the Video, Nippon Phonogram authorized A to use the video image in the Work for a video work that A would release through another company, titled "A's History," in exchange for A's obtaining approval for the sales of the Video from the former members of Carol. In addition, money was paid to the members of Carol and a certain member of Cools in terms of practice. Nippon Phonogram made these payments.

The Video cannot be regarded as being substantially identical with the Work because it was made by replacing the monaural sound source of the Work with the stereo sound source, which Nippon Phonogram had recorded, by changing the sound source of "East of Eden" that is used at the end to a different orchestra performance, by newly inserting the photographs of the members of Carol, and by adding certain edition to the video image in the Work. Nippon Phonogram carried out the handling of rights for the sound source of "East of Eden" and for the newly inserted photographs. Nippon Phonogram entrusted Plaintiff Company in the First Instance to edit the video image in the Work, and Plaintiff X in the First Instance conducted the editing work. At that time, Nippon Phonogram paid an editing fee to Plaintiff Company in the First Instance. At that time and thereafter, the plaintiffs in the first instance had made no claims. Although there was an indication, "Production and copyright: Nippon Phonogram Co., Ltd.," on the package of the Video, the plaintiffs in the first instance made no protest against it.

As mentioned above, the plaintiffs in the first instance did not get involved in the making of the Video as a whole in the same manner as in the case of the making of the Work, and they merely received entrustment of the editing work alone. It is Nippon Phonogram that planned the making of the Video, bore the costs therefor, and carried out necessary handling of rights, as the

maker of the Video, which is a cinematographic work. Therefore, the copyright holder of the Video is Nippon Phonogram, and the copyright was transferred to the defendant along with the transfer of the business.

(2) It is not fact that an agreement was made to the effect that Nippon Phonogram would pay to the plaintiffs in the first instance consideration for making the Work available on videotape. In addition, the plaintiffs in the first instance had never made a claim for a royalty for the copyright against either Nippon Phonogram or Defendant in the First Instance in relation to the Video during the period from the release of the Video to the end of 2002.

Therefore, even if Plaintiff Company in the First Instance is the copyright holder of the Work, no royalty for the copyright arises in relation to the Video because Plaintiff Company in the First Instance authorized Nippon Phonogram to reproduce the Work without value."

(3) In both [Allegations of the plaintiffs] and [Allegations of the defendant] in "5. Regarding Issue (5) (damages)," the section "(2) Damages from the Video" (line 4 of page 17 to line 22 of page 18 and line 24 of page 26 to line 9 of page 27 of the judgment in prior instance) is deleted, respectively, and the section "(3) Damages relating to the DVD" and subsequent sections are brought forward.

(4) The following is added by starting a new line following the end (line 24 of page 34 of the judgment in prior instance) of "6. Regarding Issue (6) (apology advertisement)."

"7. Regarding Issue (7) (abuse of right)

[Allegations of Defendant in the First Instance]

The plaintiffs in the first instance had made no claim against either Nippon Phonogram or Defendant in the First Instance based on the copyright over a long period of time, about 20 years. Therefore, Defendant in the First Instance had disposed of most of the important documentary evidence.

Therefore, even if Plaintiff Company in the First Instance is the copyright holder of the Work, it is not permitted to exercise the copyright to the Work because such exercise falls under an abuse of right.

[Allegations of the plaintiffs in the first instance]

The plaintiffs in the first instance dispute this issue."

No. 3 Court decision

1. Assumed facts

(1) The following facts are recognized according to Exhibits Ko No. 1-1 to 1-4, No. 2 to No. 4, No. 6 to No. 11, No. 23 to No. 27, No. 29, No. 33, No. 34, No. 35-1, No. 35-2, No. 38 to No. 40, No. 42, No. 52, No. 56, No. 61, No. 62, No. 64 to No. 66, No. 68, No. 70-1 to No. 70-3, and No. 71, Exhibits Otsu No. 1, No. 2-1 to No. 2-4, No. 3 to No. 9, No. 17 to No. 20, No. 23-1, No. 23-2, No. 24-1, No. 24-2, No. 25-1, No. 25-2, No. 26-1 to No. 26-3, No. 27 to No. 30, No. 126

to No. 129, No. 131, No. 132-1 to No. 132-3, and No. 134, Exhibits Hei No. 1, No. 2, and No. 7, Exhibits Ken Ko No. 1 to No. 4, the testimony of Witness E in this instance, the results of examination of Plaintiff X in the First Instance, who is also the representative of Plaintiff Company in the First Instance, in prior instance, and the entire import of argument.

A. Carol decided to disband, and played their final concert at the Nihon University Hall on January 19, 1975 (Nippon Phonogram released a documentary-style long-play record titled "GOOD-BYE CAROL," on which the live sound source, etc. of the aforementioned concert is recorded, on March 25 of the same year). However, as there was a great response to the aforementioned concert, E, the representative of Bauhaus that was the management company of Carol, further planned a farewell concert tour at 12 locations nationwide for the period from March 16 to April 5, and the final farewell concert to be played at Hibiya Open Air Concert Hall on April 13. Nippon Phonogram decided to release a long-play record on which the live sound source, etc. of the farewell concert is recorded. Moreover, E decided to take a video of the farewell concert on the assumption that the video of the farewell concert could be used for the purpose of promotion of the aforementioned long-play record through television broadcasting and that it may also come to have some sort of utility value in the future.

Plaintiff X in the First Instance discovered information about the final farewell concert of Carol by chance, and wanted to take a video thereof as their first work after becoming independent from TV Man Union, Inc. because Plaintiff X in the First Instance had been interested in Carol.

Plaintiff X in the First Instance consulted with E of Bauhaus and G of Nippon Phonogram. As a result of the consultation, it was decided that Plaintiff X in the First Instance would take a video of the farewell concert. Plaintiff X in the First Instance thought that it would be better to have some leads on production costs in advance, and consulted with TBS's producers, H and I, with whom Plaintiff X in the First Instance had been acquainted, bringing a written plan prior to taking the video. Then, H and I said that they would broadcast the edited video if they considered it as good. Therefore, Plaintiff X in the First Instance decided to take and edit, etc. a video at his/her own expense.

B. Bauhaus conducted all operations relating to management of the farewell concert, such as selection of the venue, making of posters and leaflets, conclusion of an insurance contract, burden of costs for the venue and equipment, and payment of rewards to the members of Carol and concert staff members, and bore all costs required therefor. E decided the composition of the stage and produced the farewell concert as a whole. There is a description, "Planned and produced by Bauhaus," on a leaflet for the farewell concert (Exhibit Otsu No. 27).

Plaintiff X in the First Instance established Plaintiff Company in the First Instance intending to make videos, mainly television programs, on April 9, 1975, and took up a post as the

representative director thereof. Plaintiff Company in the First Instance forwarded an order to Pavic Co, Ltd. (hereinafter referred to as "Pavic"), which is a television technology company, for staff members, such as camera operators and sound operators, and filming and sound equipment, etc. Pavic had a meeting with Plaintiff X in the First Instance in advance, and took videos at the concert venue according to the instructions of Plaintiff X in the First Instance. Specifically, Pavic installed one fixed camera on the scaffold behind the drums in the rear of the stage, one handheld camera on the stage, and two fixed cameras on the scaffold in the audience sheet area, and took a video of the performance scenes by connecting these cameras to a relay mobile and by integrating the video images taken by these cameras through switching (of cameras). In addition, Pavic also took a video of interviews with the members of Carol, the members of Cools (bodyguards), and their fans at the concert venue by connecting a handheld camera to a car on which a large video tape recorder was mounted. Moreover, Pavic, while driving the aforementioned car on which a large video tape recorder was mounted, took a video of the scenes of each of the members of Carol in a convertible talking about their feelings on the disbandment and the scenes of the members of Cools (bodyguards) talking about the disbandment of Carol while driving motorcycles side-by-side with said convertible on the way to the concert venue.

C. Plaintiff X in the First Instance conducted editing work a few days after the farewell concert, and composed the performance scenes recorded by integrating video images through switching and the scenes of interviews, etc. recorded by using a handheld camera according to his/her own directorial policy. Thereby, Plaintiff X in the First Instance made a work (Exhibit Ken Ko No. 1) which is slightly longer than the time predetermined for a television program (net 51 minutes without commercial messages). The credit for the work was as follows: "Technique: Pavic," "Producers: J (employee of Plaintiff Company in the First Instance) and E," "Director: X," and "Cooperation for production: TELL Director's Family."

Plaintiff X in the First Instance brought the work completed through such editing (no superimposed telop etc. indicating the staff members of TBS has been inserted) into TBS and conducted a preview thereof. As a result, it was decided to broadcast the work on TBS.

Plaintiff X in the First Instance reedited the work to make the length thereof to be the length predetermined for a television program (net 48 minutes without commercial messages) according to the instructions of TBS, and thereby made the Work (Exhibit Ken Ko No. 2) and delivered it to TBS. In doing so, Plaintiff X in the First Instance got confirmation from H, who also engaged in programming, and inserted black screens for commercial messages according to H's instructions (in order to insert commercial messages, it is necessary to insert black screens for the messages according to the television stations' commercial message format; for that purpose, it was necessary to contact with H to confirm the number of times and the number of

seconds of commercial messages). According to the instructions of TBS, Plaintiff X in the First Instance inserted a superimposed telop indicating "Production and copyright: TBS" as well as the name of H. The credit for the Work is as follows: "Technique: Pavic," "Producers: H and J," "Director: X," "Cooperation for production: TELL Director's Family," and "Production and copyright: TBS."

D. Nippon Phonogram released a long-play record, on which the live sound source, etc. of the farewell concert is recorded, on May 15, 1975.

E. Plaintiff Company in the First Instance and TBS made a "contract for the transfer of the right to broadcast (Goodbye Carol)" (Exhibit Ko No. 39) dated June 19, 1975. The contract stipulates that [i] Plaintiff Company in the First Instance shall transfer to TBS the exclusive right to broadcast the Work on television (including the right to distribute the Work that is necessary for Internet broadcasting) and TBS shall pay a fee for the right to broadcast the Work on television of 1,500,000 yen as consideration therefor and that [ii] the transferred right to broadcast the Work includes a single broadcast on TBS and via TBS's simultaneous microwave broadcast all over Japan before July 13 of the same year.

TBS paid to Plaintiff Company in the First Instance a fee for the right to broadcast the Work on television of 1,500,000 yen, and broadcasted the Work under the title of "Goodbye Carol" in a program titled "Tokuban Ginza Now!" that was broadcasted from 16:00 to 16:55 on July 12, 1975.

Articles introducing the aforementioned program were placed in the July 8, 1975 issue of Tokyo Shimbun (Exhibit Ko No. 1-1), the July 10, 1975 issue of Mainichi Shimbun (Exhibit Ko No. 1-3), and the July 11 and 12, 1975 issues of Daily Sports (Exhibits Ko No. 1-2 and No. 1-4). The article in Tokyo Shimbun describes it as follows: "This work was produced by TELL Director's Family, a group of five persons which Director X, etc. inaugurated in April after leaving TV Man Union, Inc. This is its first work." In addition, prior to the aforementioned broadcast, Plaintiff Company in the First Instance sent to relevant persons a direct mail (Exhibit Ko No. 2) stating "Goodbye Carol; To be broadcasted on TBS-affiliated television stations from 16:00 to 17:00 on July 12; Carol disbanded: the band's youth revealed; This is our first program."

F. Nippon Phonogram received the delivery of the master tape (2-inch tape) and the partially-edited tape that is one step before the tape processed for broadcasting on TBS (the tape in which the superimposed telop, etc. indicating the staff members of TBS as mentioned in C. above has not been inserted) from Plaintiff X in the First Instance. Using the latter tape, Nippon Phonogram authorized local television stations nationwide to broadcast it (local television stations broadcasted it respectively during the period from July 25, 1975 to May 1, 1976), and held film concerts throughout the country.

G. Regarding the costs for filming the Work, the technical fee for Pavic considerably exceeded 2,000,000 yen, but it was discounted to 2,000,000 yen because the Work was the first work made by Pavic. Plaintiff Company in the First Instance paid the fee to Pavic. In addition, a fire broke out on the stage just before the end of the farewell concert, and filming equipment provided by Pavic was damaged. The amount of compensation therefor was 1,017,000 yen. Together with other editing fees and personnel expenses, about 4,000,000 yen in total was required for making the Work.

E of Bauhaus had considered bearing costs that were required for making the Work, but Bauhaus did not have sufficient funds. Therefore, E asked Nippon Phonogram to make advance payment to Plaintiff Company in the First Instance. In response to this, Nippon Phonogram paid about 4,000,000 yen in total that was required for making the Work to Plaintiff Company in the First Instance. Nippon Phonogram offset the amount it paid to Plaintiff Company in the First Instance with the royalty for cooperation in making the matrix which it should pay to E. Thereby, Nippon Phonogram collected the entire amount of about 4,000,000 yen in total which it paid to Plaintiff Company in the First Instance.

H. Plaintiff Company in the First Instance and Comestock Limited for which A had taken up a post as the representative director made up a contract dated July 1, 1983 (Exhibit Ko No. 52), and agreed to jointly make a video cassette product, etc. titled "A's History." In making the aforementioned work, Plaintiff X in the First Instance desired to insert the scenes of the farewell concert in the Work. Therefore, A met President K of Nippon Phonogram. A gave approval for Nippon Phonogram to commercialize the Work as a performer, and also promised to obtain approval therefor from B, C, and D, who are the former members of Carol (A obtained approval therefor from B, C, and D thereafter). In exchange for this, A was authorized to insert the scenes of the farewell concert in the Work in the video cassette product titled "A's History." A informed Plaintiff X in the First Instance of the progress of the negotiations with President K of Nippon Phonogram.

The video cassette product titled "A's History" was released in 1984. Incidentally, the following is indicated on the package of the aforementioned product (Exhibit Ko No. 56): "Director: X," "Planning and production: Comestock and TELL Director's Family," "Technical cooperation: Onkio Haus," and "Making and copyright: Comestock and TELL Director's Family."

I. Around 1983, Nippon Phonogram planned to make and sell the Video. In order to address the deterioration of the video image and the problem of portrait rights, etc., Nippon Phonogram entrusted Plaintiff Company in the First Instance to edit the video image. Plaintiff X in the First Instance conducted editing of the video image by using the master tape, which Nippon Phonogram had stored, and the tape that was broadcasted on TBS, which Plaintiff Company in

the First Instance had stored (Nippon Phonogram paid a reward therefor to Plaintiff Company in the First Instance). Furthermore, Nippon Phonogram conducted sound editing, including replacement of the monaural sound source with the stereo sound source, by using the sound source of the long-play record, which it had stored by itself. Although Nippon Phonogram tried to confirm the content of the master tape in advance of the sound editing, it borrowed a half-inch tape, which was made by copying the master tape, from Plaintiff Company in the First Instance for in-house inspection because Plaintiff X in the First Instance was using the master tape to edit the video image (in doing so, the employee of Nippon Phonogram entered the prescribed matters in a prepared IOU (Exhibits Ko No. 70-1 and No. 70-2) according to the instructions of Plaintiff Company in the First Instance).

As is clear through comparison between Attachments 2 and 3 attached to the judgment in prior instance, as a result of these editing works, interviews with fans, scenes of Cools driving motorcycles, and monologues of some participants in Cools were trimmed, and the photographs of Carol were inserted in places. In addition, the order of tracks was changed from that in the Work, and the monaural sound source was replaced with the stereo sound source.

The Video was released on March 19, 1984. The following was indicated on the package of the Video (Exhibit Otsu No. 134): "Production and copyright: Nippon Phonogram Co., Ltd." and "Selling agency: Nippon Phonogram Co., Ltd." In addition, the credit on the lyric sheet (Exhibit Ko No. 6) attached to the Video indicates that the director is Plaintiff X in the First Instance and that the producer is Plaintiff Company in the First Instance.

Nippon Phonogram had never made up a contract with the plaintiffs in the first instance in relation to its making and selling the Video. Moreover, there is no sign of their having had a conversation on this particular matter. Furthermore, Plaintiff Company in the First Instance had neither asked Nippon Phonogram a question nor raised a protest against it in relation to the indications on the package of the Video, such as "Production and copyright: Nippon Phonogram Co., Ltd." In addition, Plaintiff Company in the First Instance had never demanded a royalty for the authorization to use.

J. Defendant in the First Instance planned to make and sell the DVD, and communicated that effect to Plaintiff X in the First Instance around December 2002. Plaintiff X in the First Instance saw the Promotion Video being broadcasted on television by chance and discovered that the Work was reformed without authorization, and then asked the counsel in this case to communicate that the DVD and the Bonus DVD infringe the copyright of Plaintiff Company in the First Instance and the Bonus DVD infringes the moral rights of author of Plaintiff X in the First Instance, by a document dated December 26, 2002 (Exhibit Ko No. 7).

The counsel for the plaintiffs in the first instance and Defendant in the First Instance negotiated about this case thereafter. However, they could not reach a conclusion. Therefore, the

plaintiffs in the first instance filed this action on February 14, 2003.

(2) Although the facts as mentioned in (1) above can be recognized, the allegations of the plaintiffs in the first instance where there is dispute over these facts are examined just in case.

A. The plaintiffs in the first instance alleged that as of 1975, there was no idea of a record company taking a video of an artist for the purpose of promotion and that this is also proven by the fact that "Draft Promotion for A (I)" (Exhibit Otsu No. 127) does not refer to any schedule for television broadcasting of the Work. Exhibits Ko No. 5 (L's written statement), No. 12 (written statement of M who was the Production Department Chief in the Western Music Division of Warner-Pioneer Corporation), and No. 27 (written statement of Plaintiff X in the First Instance) and the results of the examination of Plaintiff X in the First Instance accord with the aforementioned allegation in part.

However, as held in the judgment in prior instance, it cannot be said that no record company had taken a video of an artist for the purpose of promotion as of 1975, taking into account that, for Western music, records had already been advertised by using the video images of artists as of 1975 (Exhibits Otsu No. 6 and No. 13) and that video tape recorders for household use had been sold in 1975 (Exhibit Otsu No. 11). Then, at least those on the Nippon Phonogram's side, including E, can be recognized as having intended to use the video image for the purpose of promotion of the long-play record, taking into account that A, who was a member of Carol, was also aware that the concert would be filmed for the purpose of advertising and promotion of the long-play record on which the performance in the farewell concert is recorded (Exhibit Otsu No. 20), that the long-play record was actually released (Exhibit Otsu No. 7), and that the Work was broadcasted on local television stations nationwide through Nippon Phonogram and the film concerts of the Work were held throughout the country (Exhibit Ko No. 40; the testimony of Witness E in this instance). Incidentally, "Draft Promotion for A (I)" (Exhibit Otsu No. 127) describes the schedule for the period from the second half of January 1975 to July of the same year. It contains statements about "Carol Last Album" that was scheduled to be released in the second half of March (according to (1)A. above, the album is recognized as a documentary-style long-play record titled "GOOD-BYE CAROL" on which the live sound source, etc. of the concert held at the Nihon University Hall on January 19, 1975 is recorded), but does not contain any statement about a long-play record on which the live sound source, etc. of the farewell concert held on April 13 is recorded. Therefore, it is not unreasonable even if "Draft Promotion for A (I)" does not refer to the schedule for the television broadcasting of the Work for the purpose of the promotion of said long-play record.

B. The plaintiffs in the first instance allege as follows: Taking into account that Nippon Phonogram was not a company with financial strength (Exhibit Ko No. 5), the purchase amount of 4,000,000 yen was large, and it is considered natural to prepare a document if Nippon

Phonogram purchased the Work at 4,000,000 yen; however, there is no such document, and it is not stipulated in the contract for the matrix of the farewell concert, including the Work, concluded with E (Exhibit Otsu No. 7) that 4,000,000 yen paid to Plaintiff Company in the First Instance on behalf of E would be offset with the royalty for cooperation in making the matrix which should be paid to E; this immediately means that Nippon Phonogram had not paid 4,000,000 yen.

In L's written statement (Exhibit Ko No. 5), there is a statement that "The record company, Nippon Phonogram, is also not a company with much financial strength." However, no specific ground therefor is stated therein. Therefore, it is impossible to speculatively determine whether or not Nippon Phonogram paid 4,000,000 yen. In addition, as the farewell concert was held about 31 years before the present date (at the time of the conclusion of oral argument), it is not unnatural even if relevant documents, etc. were lost. Moreover, the contract concluded with E (Exhibit Otsu No. 7) certainly does not stipulate that 4,000,000 yen paid to Plaintiff Company in the First Instance on behalf of E would be offset with the royalty for cooperation in making the matrix which should be paid to E. However, Plaintiff X in the First Instance stated that "4,000,000 yen was not necessary at the time of taking a video, as payments are basically made afterward. Filming fees and editing fees are paid afterward, specifically, a few months later" (page 7 of the written statement in prior instance). In light of this, it can hardly be considered that the entire amount paid to Plaintiff Company in the First Instance by Nippon Phonogram had been fixed as of the date of preparation (May 15, 1975) of the contract concluded with E (Exhibit Otsu No. 7). Therefore, it cannot be regarded as unreasonable even if the contract concluded with E (Exhibit Otsu No. 7) does not stipulate that the amount paid would be offset with the royalty for cooperation in making the matrix.

Therefore, even in consideration of the aforementioned allegation of the plaintiffs in the first instance, it is not sufficient to reverse the finding in (1) above to the effect that Nippon Phonogram paid about 4,000,000 yen in total that was required for making the Work to Plaintiff Company in the First Instance.

2. Regarding Issue (1) (author and copyright holder)

(1) Author of the Work

A. Article 16 of the Copyright Act provides that "The authorship of a cinematographic work shall be attributed to those who, by taking charge of producing, directing, filming, art direction, etc., have creatively contributed to the creation of such cinematographic work as a whole,"

According to the facts mentioned in 1. above, the situation in which the Work was made was certainly somewhat confusing and interconnected, with many persons mutually related to each other in a complicated manner without any clear agreement. However, it is reasonable to recognize that Plaintiff X in the First Instance is the only person who "has creatively contributed

to the creation" of the Work "as a whole," comprehensively taking into account that Plaintiff X in the First Instance was involved in the entire making process from the planning to completion of the Work, served as the director for the Work, decided the highly-creative content of the Work, such as filming of Cools and inclusion of interviews with fans, and gave instructions about all aspects of filming and editing work.

B. Defendant in the First Instance and the supporting intervener for Defendant in the First Instance allege that E or Bauhaus is the author of the Work.

However, as mentioned in 1.(1) above, Bauhaus conducted all operations relating to management of the farewell concert, such as selection of the venue, making of posters and leaflets, conclusion of an insurance contract, burden of costs for the venue and equipment, and payment of rewards to the members of Carol and concert staff members, and bore all costs required therefor. In addition, E decided the composition of the stage, and produced the farewell concert as a whole. Both of them merely engaged in the planning and management of the farewell concert itself. However, the Work goes far beyond the mere filming of the farewell concert. Therefore, as mentioned in A. above, it is reasonable to recognize that the person "who ... has creatively contributed to the creation" of the Work "as a whole" is Plaintiff X in the First Instance and that the Work is not a work of joint authorship of Plaintiff X in the First Instance and Bauhaus.

C. Consequently, the author of the Work is Plaintiff X in the First Instance.

(2) Regarding allegations under Article 15 (work made by an employee in the course of his/her duties) of the Copyright Act

A. Article 15, paragraph (1) of the Copyright Act provides that the authorship of a work prescribed in said paragraph shall be attributed to a juridical person, etc., taking into account the existence of the actual conditions where a work is made, on the initiative of a juridical person, etc., by an employee engaging in the business of the juridical person, etc. in the course of the performance of his/her duties under the direction and supervision of the juridical person, etc. and it is made public under the name of the juridical person, etc. In order that the authorship of a work is attributed to a juridical person, etc. pursuant to the provisions of said paragraph, a person who has made a work must be an "employee engaging in the business of the juridical person, etc." It is obvious that a person who is in the employment relationship with a juridical person, etc. falls under such a person. However, if existence of an employment relationship is disputed, it is reasonable to consider that whether a person falls under an "employee engaging in the business of the juridical person, etc." set forth in said paragraph should be decided by determining the following issue in comprehensive consideration of the form of business, existence of direction and supervision, the amount of consideration, and specific circumstances concerning payment method, etc.: substantially observing the relationship between the juridical

person, etc. and a person who made the work, whether the person actually provides labor under the direction and supervision of the juridical person, etc. and whether the money paid to said person by the juridical person, etc. can be evaluated as consideration for the provision of the labor (judgment of the Second Petty Bench of the Supreme Court; 2001 (Ju) 216; April 11, 2003; Saibanshu minji, No. 209, at 469).

B. There is no sufficient evidence to recognize that there is an employment relationship between Nippon Phonogram and Plaintiff X in the First Instance.

In addition, as mentioned in (1) above, Plaintiff X in the First Instance was involved in the entire making process from the planning to completion of the Work, decided the content of the Work, and gave instructions about all aspects of filming and editing work. Nippon Phonogram was not involved in the making of the Work at all. Therefore, it cannot be said that Plaintiff X in the First Instance was under the direction and supervision of Nippon Phonogram in relation to the making of the Work and took charge only of filming on behalf of Nippon Phonogram as Nippon Phonogram says. Moreover, there is no sufficient evidence to recognize that Nippon Phonogram paid any money to Plaintiff X in the First Instance in relation to the making of the Work (incidentally, although Nippon Phonogram paid about 4,000,000 yen to Plaintiff Company in the First Instance, this payment was made not as consideration for the provision of labor but as the technical fee for Pavic and compensation for damages to Pavic, etc.). If so, it is impossible to say that Plaintiff X in the First Instance actually provided labor under the direction and supervision of Nippon Phonogram and that there was money to be paid to Plaintiff X in the First Instance by Nippon Phonogram as consideration for the provision of labor.

C. Therefore, Plaintiff X in the First Instance does not fall under an "employee engaging in the business" of Nippon Phonogram, and therefore, it cannot be said that the Work is a work made by an employee of Nippon Phonogram in the course of his/her duties.

(3) Ownership of the copyright to the Work

A. Article 29, paragraph (1) of the Copyright Act provides that "The copyright to a cinematographic work ... shall belong to the maker of said cinematographic work, provided that the authors of the cinematographic work have undertaken to participate in the making of the same." Then, Article 2, item (x) of said Act provides that a maker of a cinematographic work means "the person who takes the initiative in, and the responsibility for, the making of a cinematographic work."

Article 29 of the Copyright Act was established because it was considered reasonable to make the copyright to a cinematographic work belong to the maker of the cinematographic work, taking into account the following: [i] In relation to the exploitation of a cinematographic work, there have been actual conditions where the maker of the cinematographic work exercises the copyright under a contract between the maker of the cinematographic work and the author;

[ii] A cinematographic work is a work with a special character which is made and made public by the maker thereof as a corporate activity by inputting huge amount of costs; and [iii] There are many persons involved in a cinematographic work who can be in the position of the author thereof, and if all such persons are permitted to exercise the copyright, it will inhibit smooth circulation of the work in the market.

According to the text of Article 2, item (x) of the Copyright Act and the aforementioned purpose, the "maker of a cinematographic work" should be considered as a person with the intention of making a cinematographic work to which legal rights and obligations relating to the making of the work belong and who also becomes subject to economic income and expense relating to the making of said work as a reflection thereof.

B. As mentioned in (1) above, Plaintiff X in the First Instance got involved in the entire making process from the planning to completion of the Work, decided the content of the Work, and gave instructions about all aspects of filming and editing work. According to the facts mentioned in 1. above, it is E of Bauhaus that hosted the farewell concert and bore costs therefor. However, the following are recognized: [i] Plaintiff Company in the First Instance handled all the matters concerning filming, such as payment to Pavic in relation to the Work and procurement of equipment, including external procedures; [ii] Nippon Phonogram and Bauhaus were not at all involved in the filming policy, etc. for the Work; and [iii] Plaintiff Company in the First Instance negotiated with TBS by itself, and had TBS broadcast the Work and received a payment of 1,500,000 yen as a fee for the right to broadcast the Work on television.

In light of these facts, Plaintiff Company in the First Instance can be regarded as follows: [i] in terms of its relationship with Pavic, it is an actor who concluded a contract as one that orders filming and was subject to economic expense relating to filming costs, etc.; and [ii] in particular, in terms of its relationship with TBS, it is an actor who concluded a contract as one to which the rights relating to the Work belong and was subject to economic income relating to a fee for the right to broadcast the Work. Then, in this case, the person with the intention of making a cinematographic work to which legal rights and obligations relating to the making of the work belong and who also becomes subject to economic income and expense relating to the making of said work as a reflection thereof is recognized as Plaintiff Company in the First Instance and is not recognized as either Nippon Phonogram or Bauhaus.

C. Therefore, the maker of a cinematographic work in relation to the Work is Plaintiff Company in the First Instance.

(4) Receipt of the transfer of the copyright

A. According to the fact mentioned in (1) above, the following is recognized.

(A) E thought that E would take a video of the farewell concert, as the video might be used for the purpose of the promotion of a long-play record, on which the live sound source, etc. of the

farewell concert would be recorded, through television broadcasting and might also come to have some sort of utility value in the future. Therefore, E is considered as having ensured that E or Bauhaus acquire the copyright to the Work so that there would be no obstacle to the promotion of the long-play record and the exploitation of the video in the future. In addition, Bauhaus conducted all operations concerning the management of the farewell concert and bore all costs therefor, and E produced the farewell concert as a whole. Therefore, it can hardly be considered that E permitted Plaintiff X in the First Instance to take a video of the farewell concert on the premise that the copyright to the work made by taking a video of the farewell concert would not belong to either E or Bauhaus at all (if E considered it as a premise that the copyright to the Work would not belong to either E or Bauhaus at all, E is supposed to have confirmed said purpose with the plaintiffs in the first instance so that there would be no obstacle to the promotion of the long-play record and the exploitation of the Work in the future; however, there is no sign of E's having had a conversation on this particular matter with the plaintiffs in the first instance about the ownership of the copyright to the Work and exploitation thereof before filming the farewell concert).

(B) Plaintiff Company in the First Instance decided to take and edit, etc. a video at its own expense, and took and edited a video of the farewell concert. It brought the completed work to TBS, and transferred the exclusive right to broadcast the Work on television to TBS and thereby received payment of 1,500,000 yen from TBS as a fee for the right to broadcast the Work on television. Therefore, it can be said that Plaintiff Company in the First Instance was the maker of a cinematographic work in relation to the Work to this extent, as mentioned in (3) above.

However, the plaintiffs in the first instance delivered the master tape of the Work to Nippon Phonogram. In addition, they did not regard the broadcasting of the Work on local television stations nationwide based on Nippon Phonogram's authorization and holding of film concerts by Nippon Phonogram throughout the country as special problems. They have neither made up a contract with Nippon Phonogram nor have had a conversation on this matter with it in relation to the sale, etc. of the Video by Nippon Phonogram from 1984. In addition, they have neither asked Nippon Phonogram a question nor raised a protest against it in relation to the indication on the package of the Video, "Production and copyright: Nippon Phonogram Co., Ltd." Moreover, they have never demanded a royalty for the authorization to use. Around December 2002, Plaintiff X in the First Instance came to allege to Defendant in the First Instance that Plaintiff X in the First Instance is the author of the Work and that Plaintiff Company in the First Instance is the copyright holder thereof, only after seeing the Promotion Video.

Therefore, the copyright to the Work belongs to Plaintiff Company in the First Instance that is the maker of the cinematographic work. However, after the completion of the Work, Plaintiff Company in the First Instance transferred the exclusive right to broadcast the Work on

television to TBS and has made no allegation as the copyright holder, except for receipt of payment of 1,500,000 yen as a fee for the right to broadcast the Work on television.

The plaintiffs in the first instance allege as follows: A gave approval for Nippon Phonogram to make and sell the Video in exchange for the insertion of the scenes of the farewell concert in the Work in the video cassette product titled "A's History"; however, the plaintiffs in the first instance hesitated to question A about the amount which they would be able to receive under the conditions A had set with Nippon Phonogram, and they did not dare to make an inquiry to Nippon Phonogram because they were concerned about A losing face by making an inquiry that contradicts the aforementioned conditions; consequently, they had risked not claiming their rights in deference to a friendship with A. However, as found in 1.(1) above, A gave approval for Nippon Phonogram to commercialize the Work as a performer in the Work in exchange for the authorization to insert the scenes of the farewell concert in the Work in "A's History" on the premise that the copyright to the Work belongs to Nippon Phonogram. It is not that A gave approval for Nippon Phonogram to make and sell the Video on the premise that the copyright to the Work belongs to Plaintiff Company in the First Instance. Therefore, the aforementioned allegation of the plaintiffs in the first instance originally differs in the premise. In addition, the claims made by Plaintiff Company in the First Instance in relation to the Video are based on the premise that the copyright to the Work belongs to Plaintiff Company in the First Instance. Therefore, there is no evidence that shows a sign indicating that the plaintiffs in the first instance investigated or confirmed the conditions that A set with Nippon Phonogram by questioning A before filing this action because making such claims itself could make A lose face in light of the aforementioned allegation of the plaintiffs in the first instance. Taking into account such attitude of the plaintiffs in the first instance, it is hardly considered that the plaintiffs in the first instance had not claimed their rights in deference to a friendship with A, and their excuse using the aforementioned allegation is unreasonable.

Moreover, the plaintiffs in the first instance allege as follows: Although Plaintiff X in the First Instance obtained the authorization (Exhibits Ko No. 33 and No. 34) to use the video image of the Work in "A's History" from B and C, who are the former members of Carol, on November 5, 1983, this is nothing other than the behavior of Plaintiff Company in the First Instance as the holder of the right for the Work. However, as mentioned above, A gave approval for Nippon Phonogram to commercialize the Work as a performer in the Work in exchange for the authorization to insert the scenes of the farewell concert in the Work in "A's History." This means that Plaintiff Company in the First Instance obtained the aforementioned authorization from B and C as a person who was authorized by Nippon Phonogram to insert the scenes in the Work in "A's History." In that case, even the existence of Exhibits Ko No. 33 and No. 34 is not sufficient to recognize said obtainment of the authorization as a behavior as the copyright holder

of the Work.

(c) According to Exhibits Otsu No. 23-1, No. 23-2, and No. 126 and the testimony of Witness E, E prepared a note (Exhibit Otsu No. 23-2) about subsequent work after the ending of the farewell concert. It is recognized that this note includes the following statements: "4,000,000 yen" and "On 18th; tape; edit; completed work; video; purchase." In light of those statements on the aforementioned note, the "tape" and the "video" stated therein are considered as those on which the video image of the farewell concert is recorded. As found in 1.(1) above, Nippon Phonogram paid filming fees, etc. to Plaintiff Company in the First Instance, and received the delivery of the master tape from Plaintiff X in the First instance. Then, through negotiations with A, Nippon Phonogram authorized A to insert the scenes of the farewell concert in the Work in "A's History," and also started making and selling the Video on March 19, 1984 with the approval of the former members of Carol.

B. In consideration of the circumstances mentioned in A. above, it is recognized that the maker of a cinematographic work in relation to the Work is Plaintiff Company in the First Instance and that Plaintiff Company in the First Instance subsequently transferred the copyright to the Work to E though the copyright to the Work first belonged to Plaintiff Company in the First Instance. Then, according to Exhibit Otsu No. 7, Nippon Phonogram, E, and A made up a contract (Exhibit Otsu No. 7) dated May 15, 1975, and thereby agreed that the ownership of the matrix pertaining to the farewell concert, matrix rights, and all rights under the Copyright Act belong to Nippon Phonogram and that Nippon Phonogram pay prescribed royalties to E and A if it releases sound and visual recordings. Consequently, it is recognized that E further transferred the copyright to the Work, of which transfer E received from Plaintiff Company in the First Instance, to Nippon Phonogram.

(5) According to the above, the author of the Work is Plaintiff X in the First Instance, and the copyright holder thereof is, in the end, Defendant in the First Instance who succeeded copyrights and all other music-related rights previously held by Nippon Phonogram.

In that case, there is no ground for the claims made by Plaintiff Company in the First Instance without the need for a ruling on other issues.

3. Regarding Issue (4) (the Bonus DVD and the Promotion Video)

This court also determines that both the Bonus DVD and the Promotion Video in which the Bonus DVD is played infringe the right to maintain integrity and the right to determine the indication of the author's name of Plaintiff X in the First Instance. The reasons therefor are as stated in "5. Regarding Issue (4) (the Bonus DVD and the Promotion Video)" in "No. 4 Court decision" in section "Facts and reasons" in the judgment in prior instance (line 16 of page 53 to line 10 of page 55 of the judgment in prior instance). Therefore, the relevant part is cited.

4. Regarding Issue (5) (damages)

Plaintiff X in the First Instance is the author of the Work. However, Defendant in the First Instance modified the Work without authorization. The modified Work was sold as the Bonus DVD without the name of Plaintiff X in the First Instance being indicated, and the Promotion Video was broadcasted on television, etc. Therefore, Plaintiff X in the First Instance is recognized as having incurred non-economic damages therefrom.

It is reasonable to recognize a solatium for this infringement of the moral rights of author (right to determine the indication of the author's name and right to maintain integrity) as 1,000,000 yen in consideration of all circumstances that appeared in this case.

5. Regarding Issue (6) (apology advertisement)

Plaintiff X in the First Instance demands apology advertisements as a measure for restoration of honor. However, damages caused by the infringement of the moral rights of author of Plaintiff X in the First Instance are compensated by the payment of the aforementioned solatium. There is no evidence sufficient to recognize that any further measure for restoration of honor is necessary.

Consequently, there is no ground for the claim for a measure for restoration of honor made by Plaintiff X in the First Instance.

No. 4 Conclusion

According to the above, there is no reason for all the claims made by Plaintiff Company in the First Instance. There is no ground for the claims made by Plaintiff X in the First Instance, except for an injunction against the reproduction and distribution of the Bonus DVD, an injunction against the reproduction, showing, broadcasting, etc. of the Promotion Video, destruction of the Bonus DVD and the master tape of the Promotion Video, and compensation for damages of 1,000,000 as a solatium.

Consequently, there is a ground for the appeal filed by Defendant in the First Instance in relation to the part that upheld the claims made by Plaintiff Company in the First Instance in the part relating to Plaintiff Company in the First Instance in the judgment in prior instance. Therefore, said part is revoked, and the claims pertaining to this are dismissed. The appeal filed by Plaintiff Company in the First Instance in relation to the part that dismissed the claims made by Plaintiff Company in the First Instance is dismissed because there is no reason therefor. The additional claim made by Plaintiff Company in the First Instance in this instance is dismissed because there is no reason therefor. In addition, the appeals filed by Plaintiff X in the First Instance and by Defendant in the First Instance are dismissed because the part relating to Plaintiff X in the First Instance in the judgment in prior instance is reasonable.

Intellectual Property High Court, Fourth Division

Presiding judge: TSUKAHARA Tomokatsu

Judge: TAKANO Teruhisa

Judge: SATO Tatsubumi