| Copyright | Date | July 13, 2023 | Court | Intellectual Property High Court, Second Division |
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| | Case number | 2023 (Ne) 10001<br>2023 (Ne) 10017 | | |
| - A case in which the court determined that an act of making available to the public on a blog, posts in which still images captured from videos posted on a video-sharing website were pasted infringes on the copyright (the right of reproduction and the right to transmit to the public) for the videos, due to such grounds as that the act does not constitute lawful quotation of the videos, and found the amount of damage by taking into account the royalties for photographs captured from moving pictures as specified by a service provider, among other factors. | | | | |

Case type: Appeal Case of Claiming Compensation for Damage, Incidental Appeal Case
Result: Modification of the prior instance judgment
References: Article 2, paragraph (1), item (i), item (vii)-2, and item (xv), Article 21, Article 23, paragraph (1), Article 32, paragraph (1), Article 41, and Article 114, paragraph (3) of the Copyright Act, and Article 1, paragraph (3) of the Civil Code
Judgment of the prior instance: Tokyo District Court 2021 (Wa) 24148

## Summary of the Judgment

1. The Appellee is the copyright owner of videos posted on a video-sharing website (Videos 1 through 8), and the Appellant is a person that uploaded posts in which still images captured from Videos 1 through 8 (the Videos) were pasted (Blog Posts 1 through 8) on a blog set up by the person. The Appellee asserted that the Appellant's act above infringes on the Appellee's copyright (the right of reproduction and the right to transmit to the public) for the Videos, and demanded the Appellant to pay 9,849,845 yen as compensation for damage, with delay damages accrued thereon, based on Article 709 of the Civil Code.

The court of prior instance determined as follows: [i] the Appellant's act infringes on the Appellee's copyright (the right of reproduction and the right to transmit to the public) for the Videos; [ii] the exploitation of the Videos in Blog Posts 1 through 8 (the Blog Posts) does not constitute the quotation prescribed in Article 32, paragraph (1) of the Copyright Act; [iii] uploading the Blog Posts does not constitute the reporting of current events prescribed in Article 41 of the same Act; and [iv] the Appellee's exercise of copyright against the Appellant does not constitute abuse of right. Then, by [v] taking into account the royalties for moving pictures specified by television stations and other service providers, among other factors, the court of prior instance found the amount of

damage incurred by the Appellee to be 2,420,000 yen, and upheld the Appellee's claim to the extent of seeking payment of 2,420,000 yen (of which 2,000,000 yen is the amount of damage based on Article 114, paragraph (3) of the Copyright Act), with delay damages accrued thereon, and dismissed the rest of the claim. Dissatisfied with the respective parts of the judgment in prior instance that were ruled against them, the Appellant and the Appellee respectively filed an appeal and an incidental appeal.

2. In this judgment, the court determined to the same effect as the determinations by the court of prior instance in relation to 1. [i], [iii], and [iv] above, and determined to the same effect in conclusion as the determination by the court of prior instance in relation to 1. [ii] above. With regard to 1. [v] above, the court, by taking into account the royalties for photographs captured from moving pictures as specified by a service provider, among other factors, found the amount of damage incurred by the Appellee to be 1,924,405 yen (of which 1,500,000 yen is the amount of damage based on Article 114, paragraph (3) of the Copyright Act), and based on the appeal filed by the Appellant, modified the judgment in prior instance to that extent, and dismissed the incidental appeal filed by the Appellee. The summary of the determinations made in this judgment with regard to 1. [v] above (the part concerning an amount equivalent to the amount of money that the right owner should have received in connection with the exercise of the copyright) is as follows.

(1) Regarding the Videos, it is inferred that the authorization to exploit their clipped videos has been granted and that earnings from the exploitation have been distributed to the Appellee, but the details, including the distribution status, are not specifically clear from evidence. Apart from this, the authorization to exploit the Videos has never been granted to third parties in the past. Thus, in calculating an amount equivalent to the amount of money that the Appellee should have received in connection with the exercise of the copyright for the Videos (Article 114, paragraph (3) of the Copyright Act), it is reasonable to take into account the royalties for photographs captured from moving pictures or the royalties for moving pictures specified by television stations and other service providers, as they can be regarded to be similar to the exploitation fee based on an agreement on the authorization to exploit the Videos.

The circumstances of exploitation of the Videos by the Appellant are that the Appellant pasted still images captured from the Videos to the Blog Posts, and made the Blog Posts available to the public by uploading them to a blog set up by the Appellant. It follows that, in calculating the amount equivalent to royalties for such exploitation, it is reasonable to take into account the provisions of NHK Enterprises, as long as there is no other evidence concerning royalties for photographs captured from moving

pictures.

Meanwhile, Blog Posts 1 through 7 were created by using about 30 to 70 still images each, pasting these images in a chronological order as they appear in respective Videos 1 through 7, and between each still image, providing a summary of the content of respective Videos 1 through 7 that corresponds to the immediately following still image in text of one to a few lines, so that the viewers can understand almost the entire content of Videos 1 through 7, each of which is slightly over 30 minutes to slightly over 50 minutes in length, by merely viewing the content of Blog Posts 1 through 7. Thus, they can be construed to be equivalent to the moving pictures themselves in substance. However, if the royalties for photographs captured from moving pictures and the royalties for moving pictures specified by television stations and other service providers, as found from evidence are taken into account, the amount of royalties (the royalties for photographs captured from moving pictures) should become high as the number of still images (photographs) used increases, but once that number increases further to a level where the substance of the content exploiting the still images becomes equivalent to moving pictures, the royalties for moving pictures are taken into account instead and the amount of royalties conversely becomes low, which would be unreasonable. Therefore, even if the abovementioned content of Blog Posts 1 through 7 is considered, it is reasonable to take into account the provisions of NHK Enterprises concerning the royalties for photographs captured from moving pictures with regard to the Blog Posts, as mentioned above.

(2) According to the provisions of NHK Enterprises concerning the royalties for photographs captured from moving pictures, the royalties based on the provisions come to a total of 7,245,000 yen (20,000 yen × 362 images + 5,000 yen). However, it cannot be regarded reasonable to adopt the above mentioned amount as it is in consideration of the magnitude of the differences between NHK and the channel set up by the Appellee on a video-sharing website (the scale, business details, social impact, etc.) and the differences between the moving pictures produced by NHK and the Videos produced by the Appellee (the media on which the content is distributed, the number of viewers, the cost, labor, and time required for producing the moving pictures or videos, the social value of content, etc.). In addition, "the amount of money that the right owner should have received in connection with the exercise of the copyright" (Article 114, paragraph (3) of the Act), which is to be fixed ex-post facto if copyright infringement occurs, would naturally be higher than the ordinary rate of royalties. If taking into account these circumstances, it is reasonable to find that "the amount of money that the right owner should have received in connection with the exercise of the copyright" for the Videos

with regard to the Appellee is 1,500,000 yen.

Judgment rendered on July 13, 2023
2023 (Ne) 10001, Case of appeal for seeking compensation for damage
2023 (Ne) 10017, Case of incidental appeal
(Court of prior instance: Tokyo District Court, 2021 (Wa) 24148)
Date of conclusion of oral argument: May 16, 2023

Judgment

List of parties: as specified in Attachment 1 "List of Parties"

Main text

1. Based on the Appeal to the Court of Second Instance, the judgment in prior instance shall be changed as follows.

(1) The Appellant shall pay to the Appellee 1,924,405 yen and an amount accrued thereon at 3% per annum for the period from May 11, 2020 until the completion of payment.

(2) The remaining requests of the Appellee shall be dismissed.

2. The Appeal incidental to this case shall be dismissed.

3. Court costs in the first and second instances shall be divided into five and the Appellant shall bear one-fifth of the costs and the Appellee shall bear the rest.

4. This judgment may be executed provisionally only for paragraph 1. (1).

Facts and reasons

No. 1 Judgment Sought by Parties

1. Object of the appeal

(1) The part of the judgment in prior instance which is against the Appellant shall be rescinded.

(2) The Appellee's requests for the aforementioned part shall be dismissed.

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

2. Object of the incidental appeal

(1) The part of the judgment in prior instance which is against the Appellee shall be rescinded.

(2) The Appellant shall pay to the Appellee 7,429,845 yen and an amount accrued thereon at 3% per annum for the period from May 11, 2020 until the completion of payment.

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

(4) Declaration of provisional execution

No. 2 Outline of the case

1. In this case, the Appellee alleged that the Appellant posted articles on which still

images capturing videos listed in Attachment to the Judgment in Prior Instance "List of Videos" for which the Appellee has the copyright (hereinafter videos stated in 1-1 through 1-3 of said List are referred to as "Video 1," videos stated in 2-1 through 2-3 of said List are referred to as "Video 2," videos stated in 3-1 through 3-3 of said List are referred to as "Video 3," videos stated in 4-1 through 4-3 of said List are referred to as "Video 4," videos stated in 5-1 through 5-3 of said List are referred to as "Video 5," videos stated in 6-1 through 6-3 of said List are referred to as "Video 6," videos stated in 7-1 through 7-3 of said List are referred to as "Video 7," videos stated in 8-1 through 8-3 of said List are referred to as "Video 8," and Videos 1 through 8 are collectively referred to as the "Videos") were pasted on a blog that was set up by the Appellant and thereby infringed the Appellee's copyright (reproduction right and right to transmit to the public). Based on this allegation, the Appellee demanded that the Appellant pay compensation for damages, 9,879,845 yen, and an amount accrued thereon at 3% per annum for the period from May 11, 2020, which is the last posting date of the aforementioned articles, until the completion of payment, based on Article 709 of the Civil Code.

The judgment in prior instance approved the Appellee's claim to the extent of seeking payment of 2,420,000 yen and the aforementioned delay damages thereon, and dismissed the remaining part. Then, both the Appellant and Appellee were dissatisfied with the parts against them and filed the Appeal to the Court of Second Instance and the Incidental Appeal, respectively.

2. Basic facts, issues, and arguments of the parties on the issues

The details are as stated in No. 2, 1. through 3. in the "Facts and reasons" section of the judgment in prior instance, and therefore they are cited, except for the following alterations.

(1) The phrase "they are collectively" in page 2, line 14 of the judgment in prior instance is altered to "individual articles are referred to as 'Article 1,' etc. by corresponding to numbers in said List and Articles 1 through 8 are collectively".

(2) The phrase "Articles stated in 6. through 8. of the Attachment 'List of Articles'" in page 2, line 16 of the judgment in prior instance is altered to "Articles 6 through 8".

(3) The phrase "Articles stated in 1. through 5. of the Attachment" in page 2, line 18 of the judgment in prior instance is altered to "Articles 1. through 5.".

(4) The term "(Exhibit Ko 2)" in page 2, line 26 through page 3, line 2 of the judgment in prior instance are all deleted.

(5) The phrase "approximately 30 sheets to 60 sheets in chronological order" in page 3, line 10 to line 11 of the judgment in prior instance is altered to "approximately 7 sheets

to 70 sheets".
(6) The phrase "posted" in page 3, line 12 to line 13 of the judgment in prior instance is altered to "posted and made available to the public (Exhibit Ko 7)".
(7) The phrase "Articles" in page 3, line 15 of the judgment in prior instance is altered to "Articles 1 through 5".
(8) The part after the phrase "with the Tokyo District Court" to the end of this paragraph in line 22 is altered to "filed a case of demanding disclosure of identification information of the senders (Tokyo District Court, 2020 (Wa) 15010) against the Defendant, J:COM Chiba Co., Ltd., which is an internet service provider, (hereinafter referred to as "J:COM Chiba") and the court rendered the judgment on March 26, 2021, that J:COM Chiba shall disclose identification information of the senders related to posts of Articles 1 through 5".
(9) After the phrase "still images" in page 5, line 16 of the judgment in prior instance, the phrase "in Videos" is added.
(10) After the phrase "current" in page 6, line 15 of the judgment in prior instance, the phrase "events" is added.
(11) The section in page 13, line 19 of the judgment in prior instance is altered as follows.

"C. Regarding the costs for the procedures for petition for disclosure of identification information of senders, the Defendant makes a denial and disputes.

The costs for the procedures for petition for disclosure of identification information of senders tend to be reduced to a considerably low amount in court precedents.

D. Regarding the attorney's fees related to the procedures for disclosure of identification information of senders, the Defendant makes a denial and disputes.

The amount of 550,000 yen that the Appellee paid to attorneys on April 26, 2021, out of 1,650,000 yen, is not the attorney's fees related to the procedures for disclosure of identification information of senders, but the attorney's fees for filing this case. In addition, concerning the attorney's fees, a reasonable amount (approximately 50,000 yen) alone should be approved, not the amount actually paid.

E. The attorney's fees for filing this case are denied and disputed.

The attorney's fees for filing this case should be lower than 550,000 yen stated in D. above. In addition, the attorney's fees also tend to be reduced to a considerably low amount in court precedents."

No. 3 Judgment of this court

The court determines that the claim of the Appellee has grounds to the extent of demanding that the Appellant pay 1,924,405 yen and delay damages accrued thereon

and that the rest is groundless. The grounds are as stated below.

1. Reproduction and transmission to the public of the Videos

As stated in No. 2, 1. (3) of the judgment in prior instance that is cited after alteration, the Appellee has the copyright to the Videos that are works. In addition, as stated in No. 2, 1. (4) of the judgment in prior instance that is cited after alteration, the Appellant pasted the Still Images captured from the Videos on the Articles and made them available to the public by posting them on the blog in question (the "Blog") for the period from the dates and times stated in 1. through 8. in the field for "Posting date and time (time stamp)" stated in the Attachment to the Judgment in Prior Instance "List of Posts" until May 11, 2020.

Based on the above, at least due to negligence, the Appellant reproduced the Still Images captured from the Videos in the Appellant's terminal device, pasted them on the Articles, posted them on the Blog, and made them available to the public, and thereby, the Appellant disclosed them on the website. Consequently, it is found that the Appellant reproduced the Videos that are works for which the Appellee has the copyright, and transmitted them to the public.

2. Issue (1) (Whether the defense of citation is established)

(1) In order to allow the use of another person's works by citation, the method and mode of use through citation are required to conform to fair practices and to be within the justifiable scope in relation to the purpose of the citation, that is, within the reasonable scope in light of social conventions (second sentence of Article 32, paragraph (1) of the Copyright Act).

(2) Applying the above to this case, according to the evidence (Exhibits Ko 2-1 through Ko 2-7, Exhibits Ko 7-1 through Ko 7-7, and Exhibits Ko 8-1 through Ko 8-7), it is found that Videos 1 through 7 are videos of slightly over 30 minutes or slightly over 50 minutes long; all of Articles 1 through 7 use approximately 30 to 70 sheets of the Still Images; they are pasted in chronological order in Videos 1 through 7 respectively; between the still images, summaries are stated in which the details of Videos 1 through 7 that correspond to immediately following still images are compiled in one line through several lines, respectively; and at the end, the comments of video viewers and comprehensive impressions and comments of the Appellant on Videos 1 through 7 are posted. Based on the above, it is undeniable that Articles 1 through 7 have the aspect that the Appellant cited Videos 1 through 7 therein for the purpose of expressing their impressions and comments on Videos 1 through 7. However, the pasted approximately 30 sheets through 70 sheets of the Still Images, along with the summaries stated between the still images, make it possible for viewers of Articles 1 through 7 to almost

identify all of Videos 1 through 7 of slightly over 30 minutes or slightly over 50 minutes long only by viewing the details of Articles 1 through 7. The method and mode of citation of Videos 1 through 7 in Articles 1 through 7 are not within a reasonable scope under social conventions in relation to the purpose of expressing the Appellant's impressions and comments on Videos 1 through 7.

(3) In addition, according to the evidence (Exhibits Ko 2-8, Ko 7-8, and Ko 8-8), it is found that Video 8 is slightly over 40 minutes long; at the beginning of Article 8, the attribution of the cast members in Video 8 (persons who are called "Applicants" who request investment from investors who are called "Tigers") and the relationship between the cast members and the representative of the Appellee are introduced; 3 sheets of still images related to Video 8 are pasted; subsequently, the same statements as Articles 1 through 7 and 4 sheets of still images are pasted to the closing part of Video 8; and, at the end, the Appellant's comprehensive impressions and comments on Video 8 are stated. Based on the above, it is also undeniable that Article 8 has an aspect that the Appellant cited Video 8 therein for the purpose of expressing their impressions and comments on Video 8. However, the pasting of still images related to the attribution of the cast members and the relationship, etc. between the cast members and the representative of the Appellee is not necessary at least in relation to the aforementioned purpose of expressing the Appellant's impressions and comments on Video 8. In this regard, the method and mode of citation of Video 8 is not within a reasonable scope under social conventions in relation to the purpose of expressing the Appellant's impressions and comments on Video 8.

(4) In this regard, the Appellant argued that the citation of the Videos fulfilled five requirements: [i] clarity of a subordinate-superior relationship; [ii] clear segmentation; [iii] necessity of citation; [iv] clear indication of source; and [v] no alteration, and, therefore, it is lawful. However, as stated in (2) and (3) above, the citation of the Videos is not conducted within the lawful scope in relation to the purpose of the citation, and therefore, even premised on the Appellant's argument, the citation of the Videos lacks the necessity of citation.

(5) As stated above, the citation of the Videos by the Appellant is not allowed pursuant to Article 32, paragraph (1) of the Copyright Act.

3. Issue (2) (Whether the defense of current news reporting is established)

The details are as stated in the section from page 15, line 14 through page 16, line 4 in the judgment in prior instance, and therefore they are cited, except for the following alterations.

(1) The phrase "use of the Videos in the Articles" on page 15, line 14 of the judgment

in prior instance is altered to "posting of the Articles using the Videos".
(2) The phrase "the details as a whole" on page 15, line 25 of the judgment in prior instance is altered to "all or part of".
(3) The phrase "only expressed" on page 15, line 26 of the judgment in prior instance is altered to "only expressed, etc."
(4) Before the phrase "the Articles" on page 16, line 2 of the judgment in prior instance, the phrase "the posting of" is added.
(5) Before the phrase "cannot be said" on page 16, line 3 of the judgment in prior instance, the phrase "the use of the Videos in the Articles" is added.
(6) The following is added as a new line after the end of page 16, line 4 of the judgment in prior instance.

"In this regard, the Appellant argued in this instance as follows: The business plans covered in the video ("Reiwa no Tora (Tigers in the Reiwa Period)") distributed through the Plaintiff's channel actually exist; Some of the business plans were realized as real businesses; In cases where a business plan was realized and a new business was started, such business may be covered by online news, etc. in some cases; Therefore, the posting of the Articles constitutes current news reporting (with details on events that had occurred at the time or recently) where investors invested in business plans presented by applicants based on their judgment that those plans would be successful in the future as a business.

It is true that, in the evidence (Exhibits Otsu 14-1 and Otsu 14-2) invoked by the Appellant, concerning the business (a so-called service to support self-represented litigations) covered by the video ("Bengoshi ni Tayorazutomo Saiban wo Tatakaeruyouni Shitai! (We support you so that you can stand trial without the support of an attorney-at-law!) [A] [356th person] Reiwa no Tora (Tigers in the Reiwa Period)," there is a statement that the provision of the service was started. However, the aforementioned video is different from the Videos and even if the business plans covered in the Videos actually exist and there are business plans that were realized later, that fact does not have an impact on the aforementioned details and characters of the Videos, that is, they were produced as a program to provide viewers with the processes, etc., as entertainment, where general business entrepreneurs present their business plans to investors, undergo questions and answers, and investors eventually determine whether to make an investment in those business plans. Therefore, the aforementioned argument of the Appellant does not have an impact on the aforementioned conclusion that the posting of the Articles does not fall under current news reporting."

4. Issue (3) (Whether the defense of abuse of the right is established)

The details are as stated in the section from page 16, line 6 through line 22 in the judgment in prior instance, and therefore they are cited, except for the following alterations.

(1) After the phrase "for the use of the Videos" on page 16, line 16 of the judgment in prior instance, the phrase ", including production of 'clipped videos'" is added.

(2) The term "serve as a basis" on page 16, line 20 of the judgment in prior instance is altered to "serve as a ground".

(3) The following is added as a new line after the end of page 16, line 22 of the judgment in prior instance.

"In this regard, the Appellant argued in this instance as follows: [i] the Appellee started to solicit for the "clipped videos" as stated in Exhibit Ko 29 after the Articles were posted, and such solicitation was not conducted when the Articles were posted; [ii] when starting the aforementioned solicitation, the Appellee intentionally discontinued the means of contact (Twitter, etc.) with the Appellant and did not give opportunities to the Appellant to apply for a license for the Videos; it is highly possible that the Appellee started the aforementioned solicitation intentionally in order to make the Appellant alone a person who does not have a license; and therefore, it is not reasonable to determine that the exercise of the Appellee's copyright against the use of the Videos by the Appellant does not fall under the abuse of the right only based on the fact that the Appellant does not have a license for the "clipped videos."

However, even if there are the circumstances stated in [i] above as argued by the Appellant, there is not enough evidence to find that there were circumstances that the Appellant argued (circumstances where the Appellee had the intention to proactively use the spread of the Videos by producers of the "clipped videos" and to facilitate increasing the number of subscribers to the Plaintiff's channel and, actually, the Appellee enjoyed the benefit of the spread of the Videos by the producers of the "clipped videos") at the time before the aforementioned solicitation was conducted. In addition, concerning [ii] above, even if the Appellee discontinued the means of contact (Twitter, etc.) with the Appellant as argued by the Appellant, there is not enough evidence to find that the Appellant could not access the website, such as that shown in Exhibit Ko 29 (meaning the website where an application form for the license for the creation of the "clipped videos" related to the Plaintiff's channel is linked). In addition, there is not enough evidence to find that if the Appellant requested the license through the application form, the Appellee would refuse the request. Furthermore, even if the Appellee no longer has the intention to give a license for the creation of the "clipped videos" to the Appellant, who had infringed the Appellee's copyright by posting the

Articles without permission of the Appellee, and the Appellee discontinued the means of contact with the Appellant, it is not appropriate to consider that the Appellee is not allowed to argue copyright infringement against the Appellant based on that fact. Based on the above, the aforementioned argument of the Appellant does not have an impact on the aforementioned conclusion that it is not considered that the exercise of the Appellee's copyright against the use of the Videos by the Appellant falls under abuse of the right."

5. Issue (4) (Damages to the Appellee and the amount of the damages)

The details are as stated in the section from page 16, line 24 through page 21, line 22 in the judgment in prior instance, and therefore they are cited, except for the following alterations.

(1) The phrase "including NHK" on page 17, line 13 of the judgment in prior instance is deleted.

(2) After the phrase "2,000 yen" on page 18, line 10 (excluding ruled lines) of the judgment in prior instance, "(in cases of SD)" is added.

(3) The section from page 19, 6th line from the bottom through page 20, line 14 in the prior instance is altered as follows.

"The circumstances of exploitation of the Videos by the Appellant are that the Appellant pasted the Still Images captured from the Videos to the Articles, posted them on the Blog, and made them available to the public. It follows that, in calculating the amount equivalent to royalties for such exploitation, it is reasonable to take into account the rules of NHK Enterprises as stated in A. (A) above, as long as there is no other evidence concerning royalties for photographs captured from moving pictures.

Articles 1 through 7 use approximately 30 sheets to 70 sheets of the Still Images; they are pasted in chronological order in Videos 1 through 7, respectively; between the still images, summaries are stated in which the details of Videos 1 through 7 that correspond to immediately following still images are compiled in one line through several lines, respectively so that viewers of Articles 1 through 7 can almost identify all of Videos 1 through 7 of slightly over 30 minutes or slightly over 50 minutes long only by viewing the details of Articles 1 through 7. Articles 1 through 7 can be understood to be substantially equivalent to moving pictures. However, according to the royalties stated in A. above, if the number of sheets of still images (photographs) used increases, the royalties (royalties for photographs captured from moving pictures) also increase. If the number of sheets used increases further to the level where the content using the still images substantially is equivalent to moving pictures, the royalties for moving pictures are taken into account and the amount of royalties

conversely decreases, which would be unreasonable. Therefore, even in consideration of the aforementioned content of Articles 1 through 7, it is reasonable, as mentioned above, to take into account the rules of NHK Enterprises concerning the royalties for photographs captured from moving pictures with regard to the Articles.

According to the rules of NHK Enterprises related to the royalties for photographs captured from moving pictures, the basic fee in cases where the intention of use is "telecommunications (including mobile)" is determined to be 5,000 yen; and royalties for photographic materials in cases where photographs are "in color," "general photographs" and "photographed in Japan" are determined to be 20,000 yen per photograph. In addition, according to the evidence (Exhibits Ko 7-1 through Ko 7-8 and Exhibits Ko 8-1 through 8-8) and the entire import of oral arguments, the number of the Still Images used by the Appellant is found to be 362 sheets in total (59 sheets for Episode# 054, 45 sheets for Episode# 044, 54 sheets for Episode# 043, 29 sheets for Episode" 042, 57 sheets for Episode# 041, 73 sheets for Episode# 040, 38 sheets for Episode# 039, and 7 sheets for Episode# 037). Therefore, based on the above, the royalties based on said rules are 7,245,000 yen in total (20,000 yen × 362 sheets + 5,000 yen).

The differences between NHK (it is found to be the producer of moving pictures handled by NHK Enterprises, according to Exhibit Ko 12) and the Plaintiff's channel (in terms of size, content of business, social impact, etc.) and the differences between moving pictures produced by NHK and the Videos (in terms of the media through which the content is distributed, the number of viewers, costs, labor, and time required for the production of moving pictures and videos, social value as content, etc.) that are found by the entire import of oral arguments are significant. Therefore, it is not reasonable to adopt the aforementioned amount without any change. If the copyright is infringed, "the amount of money that the right owner should have received in connection with the exercise of the copyright" (Article 114, paragraph (3) of the Copyright Act) that should be determined ex-post facto tends to be naturally higher than regular royalties. In consideration of these circumstances, it is reasonable to find that "the amount of money that the right owner should have received in connection with the exercise of the copyright" for the Videos with regard to the Appellee is 1,500,000 yen."

(4) The phrase "取ろうとする (intends to take)" on page 21, line 3 of the judgment in prior instance is altered to "執ろうとする (intends to take)".

(5) The section from page 21, line 13 through line 17 of the judgment in prior instance is altered as follows.

"In this case, as stated in No. 2, 1. (5) of the judgment in prior instance that is cited

after alterations, the Appellee paid costs for the procedures for disclosure of identification information of senders of 24,405 yen in total and attorney's fees of 1,650,000 yen in total. It is reasonable to find that the full amount of the former costs is found to be damages to the Appellee and 200,000 yen out of the latter costs is found to be damages to the Appellee. None of the arguments of the Appellant and the Appellee against the above can be accepted."

(6) After the phrase "the procedures of this instance" on page 21, line 19 of the judgment in prior instance, the phrase ", the amount approved" is added.

(7) The term "220,000 yen" on page 21, line 21 of the judgment in prior instance is altered to "200,000 yen".

(8) The following is added as a new line after the end of page 21, line 22 of the judgment in prior instance.

"(4) Total: 1,924,405 yen"

6. Conclusion

Consequently, the judgment in prior instance that is partially different from the aforementioned determination of this court is partially unreasonable. Therefore, the judgment in prior instance is changed based on the Appeal to the Court of Second Instance as stated in paragraph 1. of the main text. The Incidental Appeal is groundless and dismissed. The judgment is rendered as stated in the main text.

Intellectual Property High Court, Second Division
Presiding judge HONDA Tomonari
Judge: ASAI Ken
Judge: KATSUMATA Kumiko

(Attachment)

List of Parties

| | |
|---|---|
| Appellant and incidental Appellant | Y<br>(hereinafter referred to as the "Appellant") |
| Appellee and incidental Appellee | MONOLITH Japan co., ltd.<br>(hereinafter referred to as the "Appellee") |