

Copyright	Date	June 26, 2024	Court	Intellectual Property High Court, Fourth Division
	Case number	2023 (Ne) 10102		
<p>- A case in which the court held that, under a mechanism that divides a file, that is, a copyrighted work of a video, into pieces, enables exchange, etc. of the pieces between terminals (peers) participating in a network, and ultimately achieves file sharing (BitTorrent), sender identification information identified by telecommunications through which a peer confirms with another peer that pieces can be uploaded (the sending of an UNCHOKE message) constitutes sender identification information relative to violation of a right (the right to make a work available for transmission), even if it is not possible to reproduce the possessed pieces themselves and even if the telecommunications do not constitute an action for making a work available for transmission (Article 2, paragraph (1), item (ix)-5, (a) and (b) of the Copyright Act) itself, and upheld the demand for disclosure of sender identification information based on the Provider Liability Limitation Act.</p>				

Case type: Disclosure of Identification Information of the Senders, Copyright

Result: Reversal of prior instance judgment

References: Article 5, paragraph (1) of the Act on the Limitation of Liability of Specified Telecommunications Service Providers for Damages and the Right to Demand Disclosure of Sender Identification Information (Provider Liability Limitation Act), and Article 2, paragraph (1), item (ix)-5, (a) and (b) and Article 23, paragraph (1) of the Copyright Act

Judgment of the prior instance: Tokyo District Court, 2023 (Wa) 70005

### Summary of the Judgment

#### 1. Summary of the case

BitTorrent, which is at issue in this case, is a peer-to-peer (P2P) file sharing protocol that divides a file into pieces, enables exchange, etc. of the pieces between terminals (peers) participating in a network, and ultimately achieves file sharing.

In this case, X, the copyright owner of a video, demanded from Y, an access provider, the disclosure of sender identification information relating to the sending of UNCHOKe messages (telecommunications through which a peer confirms with another peer that pieces can be uploaded), based on Article 5, paragraph (1) of the Provider Liability Limitation Act, asserting that unknown alleged violators obviously violated the right to make a copyrighted work of a video available for transmission by using

BitTorrent.

The court of prior instance determined that the sending of UNCHOKE messages does not constitute an action that makes a work available for transmission, and dismissed X's claim. Dissatisfied with this, X filed an appeal. In this judgment, the court revoked the judgment in prior instance, holding as follows, and upheld X's claim.

2. Regarding whether the violation of the right is obvious (Article 5, paragraph (1), item (i) of the Provider Liability Limitation Act)

(1) As each of the senders in this case (the "Senders") possessed pieces of a reproduction file of the video in question (the "Reproduction File") on their terminals participating in the BitTorrent network as of the date and time of the sending of the UNCHOKE messages, it can be said that the action for making a work available for transmission prescribed in either (a) or (b) of Article 2, paragraph (1), item (ix)-5 of the Copyright Act was conducted, and there was a state in which the pieces could be automatically transmitted to other peers (the public), that is, a state in which their automatic public transmission was possible.

Under a mechanism in which the original file is divided or encrypted in making an automatic public transmission of a file which is a copyrighted work, there can be cases where the target data itself cannot be restored or reproduced as a video or other file. Taking this aspect also into consideration, if it is found that the transmitted data are pieces that constitute a part of the original file which is found to be copyrightable, and that the pieces are transmitted and received as part of a system that enables restoration or reproduction of the original file by gathering these pieces, it should be evaluated that the right to transmit to the public (including the right to make a work available for transmission) was violated by the transmission of the pieces.

(2) In line with the purpose of ultimately acquiring all pieces that constitute the Reproduction File by transmitting or exchanging pieces of the Reproduction File with each other as peers forming the BitTorrent network, the Senders are transmitting and receiving pieces as part of such system. Even if it may not be possible to reproduce the pieces themselves, and the essential characteristics of the expression cannot be directly perceived from the pieces alone, this does not prevent the establishment of violation of the right to transmit to the public and the right to make a work available for transmission.

3. Regarding whether the sender identification information in this case constitutes "sender identification information relative to violation" (the main sentence of Article 5, paragraph (1) of the Provider Liability Limitation Act)

(1) It is construed that the Provider Liability Limitation Act amended by Act No. 27 of 2021 is not intended for a practice of easily applying the procedure for demanding

disclosure of sender identification information other than specified sender identification information to telecommunications which, in themselves, do not violate rights. However, in order to ensure the effectiveness of protection of the right to automatic public transmission, it is necessary to pay attention so as not to disregard the significance of the part in parentheses in Article 23, paragraph (1) of the Copyright Act, which includes an action of preparation prior to the actual transmission in the categories of actions of violation of the right to transmit to the public.

(2) Although the sending of an UNCHOKE message does not constitute an action for making a work available for transmission (Article 2, paragraph (1), item (ix)-5, (a) and (b) of the Copyright Act) itself, given that violation of the right to make a work available for transmission is positioned in the category of violation of the right to transmit to the public on the basis that preparation has been completed for an automatic public transmission that is assumed to be made in the future, it is reasonable to construe that the illegal state continues as long as a state in which automatic public transmission is possible continues.

In light of such characteristics of the right to make a work available for transmission, when seeking the disclosure of sender identification information due to violation of that right, "sender identification information relative to violation" should not be limited to sender identification information relating to telecommunications which constitute the very action for making a work available for transmission. The sender identification information relating to the respective communications in this case that was identified by each action of sending an UNCHOKE message, which clarifies that the pieces possessed by each Sender are ready to be made available for transmission, and that they continue to be in a state where their automatic public transmission is possible, constitutes "sender identification information relative to violation."