

Date	December 22, 2011	Court	Intellectual Property High Court, Second Division
Case number	2011 (Ne) 10008		

–A case in which the court held that a manufacturer, etc., does not have a legal obligation to collect from the purchaser an amount equivalent to the compensation for private visual recording in relation to the product in question and to pay it to the designated management association, as the obligation of cooperation by manufacturers, etc. as provided for in Article 104-5 of the Copyright Act, but that, when a manufacturer, etc. violates the obligation of cooperation, there may be cases where the manufacturer, etc. will be required to compensate for the damages suffered by the designated management association, depending on the circumstances which led to the violation or the mode of such violation.

–A case in which the court found that a DVD recorder with no analog tuner did not fall under the recording medium provided for in Article 1, paragraph (2), item (iii) of the Order for Enforcement of the Copyright Act, and that the business operator that manufactured and sold such DVD recorders had not violated the obligation of cooperation as provided for in Article 104-5 of the Copyright Act.

References:

Article 30, paragraph (2) and Article 104-5 of the Copyright Act, and Article 1, paragraph (2), item (iii) of the Order for Enforcement of the Copyright Act

1. Background

In this case, the appellant, which is the designated management association as provided for in Article 104-2, paragraph (1), item (ii) of the Copyright Act, claimed against the appellee, which manufactured and sold DVD recorders with no analog tuner (hereinafter referred to as the “appellee’s product”), the payment of an amount equivalent to the compensation for private visual recording in relation to the appellee’s product, by alleging that the appellee had a legal obligation to collect such amount from the purchaser and to pay it to the appellant as the obligation of cooperation by manufacturers, etc. as provided for in Article 104-5 of the Copyright Act, on the basis of its argument that DVD recorders with no analog tuner fell under the scope of machines possessing functions to make digital sound or visual recordings “as specified by Cabinet Order (i.e. Article 1, paragraph (2), item (iii) of the Order for Enforcement of the Copyright Act)” (hereinafter referred to as a “designated recording medium”).

2. Summary of the Court Decision

(1) What was recommended as appropriate in the report of the 10th subcommittee

of the Copyright Council and specifically expected to be the substance of the “cooperation” by the manufacturer, etc. of a designated recording medium under Article 104-5 of the Copyright Act in the Diet deliberation was “to market the designated recording medium by adding an amount equivalent to the compensation for private visual recording to the wholesale price of said designated recording medium, and thereby collect such compensation from the users and pay money in an amount equivalent to such compensation to the designated management association” (hereinafter referred to as the “increased collection and payment method”). Article 104-5 of the Copyright Act may be recognized as a provision stipulated by mainly taking into account the cooperation to be provided by such increased collection and payment method, but it is not unambiguously clear from its wording whether such recognition is correct. Thus, although the appellant claims the payment of compensation in an amount approved in accordance with Article 104-6 of the Copyright Act as a performance of the obligation of cooperation on the basis of the “increased collection and payment method,” this claim is groundless.

Nevertheless, as long as the obligation of cooperation by manufacturers, etc. is legally provided for in Article 104-5 of the Copyright Act and it is provided for in Article 104-6, paragraph (3) of the Copyright Act that a designated management association shall seek the opinions of the manufacturers in receiving the approval, if there are any facts suggesting the relevant manufacturer’s noncooperation with the “increased collection and payment method” in the actual situation, where the appellant had been collecting the compensation for private visual recording by the so-called “increased collection and payment method” since July 1, 1999, the day on which Article 1, paragraph (2) of the Ordinance for Enforcement of the Copyright Act, which stipulates the designated recording medium for private sound and visual recording, came into force, and where there are no facts to find that the appellant used any other method, it cannot be denied that the relevant manufacturer may be obliged to pay the damages for such violation. Moreover, when a manufacturer, etc. has violated the obligation of cooperation, even if such violation may not result in a direct obligation to the designated management association (in this case, the appellant), the manufacturer, etc. may be obliged to compensate for the damages suffered by the designated management association, depending on the circumstances that led to the violation and the mode thereof.

(2) The scope of sound or visual recording medium as designated by Cabinet Order (i.e. designated recording medium) under Article 30, paragraph (2) of the Copyright Act had been specified, based on the sound or visual recording source and the sound or

visual recording standard covered by the recording mediums used at that time, by examining the dissemination and actual usage of such sound or visual recording medium and taking into consideration the degree of agreement reached among the relevant parties through discussions, etc. At the time when item (iii) was added to Article 1, paragraph (2) of the Order for Enforcement of the Copyright Act, the addition of said item was approved by the Cabinet on the grounds that a general agreement was reached among the relevant parties that, on the basis that the visual recording source will be analog TV broadcasts, the recording medium which performs recording in DVDs from such visual recording source will be subject to the payment of compensation for visual recording. The requirement of a recording medium possessing a function to serially fix the “analog-to-digital converted” images as provided for in said item is a stipulation that recording shall be conducted by digitally converting analog TV broadcasts. Moreover, this conversion is supposed to be made for analog signals from analog tuners which are installed in DVD recorders, and thus, analog-to-digital conversion is not supposed to be performed in a DVD recorder with no analog tuner, and such device will not fall under the scope of recording medium provided for in said item (iii). Consequently, the appellee’s product which is not equipped with an analog tuner does not fall under Article 1, paragraph (2), item (iii) of the Order for Enforcement of the Copyright Act and the appellee cannot be found to have violated the obligation provided for in Article 104-5 of the Copyright Act. The main points of the reasons therefor are as follows.

Taking into account that a political motive is involved in the decision on the scope of payment of compensation, it is obvious that the Copyright Act limited the machines subject to the payment of compensation within the framework of machines possessing functions to make “digital” sound or visual recording but left further decisions within such framework to future discussions upon each revision to the Cabinet Order, in light of the purpose of establishment of Article 30, paragraph (2) of the Copyright Act. Accordingly, the provision of the Order for Enforcement of the Copyright Act, which was added by the revision thereto, should be interpreted in line with the actual conditions that were taken into account at the time of revision, and especially, the decision on whether or not the relevant recording medium falls under the scope of designated recording medium, which will serve as the basis for the violation of the obligation of cooperation provided for in Article 104-5 of the Copyright Act, should be made in a strict sense, if the language of the Order for Enforcement of the Copyright Act is ambiguous.

At the time when Article 1, paragraph (2), item (iii) of the Order for Enforcement

of the Copyright Act (hereinafter simply referred to as the “item (iii)”) was added to said Order (which was in 2000), digital broadcasting was not in full use, and thus, there were hardly any discussions on the interpretation of the requirement provided in said item in cases where digital broadcast waves were introduced in the recording medium without any conversion and various digital information including the information on copyright protection technology was included therein, or on the sampled frequency of the digital broadcast which will become the original standard broadcasting, or on the compatibility of the digital broadcasting standard with the DVD recording standard. Accordingly, at the time when the abovementioned item (iii) was added to the Cabinet Order, DVD recording of digital broadcasts was not taken into consideration, and thus said item cannot be found to have covered DVD recording of digital broadcasts. The addition of item (iii) was based on anything but the actual conditions at that time when the recording source was analog broadcasts.

If the requirement of being “analog-to-digital converted,” which is neither objectively nor unambiguously clear, is interpreted from a comprehensive viewpoint taking into account the background that DVD recorders were included in the scope of designated recording medium under the Order for Enforcement of the Copyright Act, it may be construed that the requirement provides for the analog-to-digital conversion of the broadcast waves on the basis that such broadcast waves are analog, but not that it has a meaning beyond this construction. That is to say, the stipulation of the requirement of being “analog-to-digital converted” means, in terms of Article 1, paragraph (2), item (iii) of the Order for Enforcement of the Copyright Act, that the broadcast waves, the recording source which were taken into account as the actual conditions at the time of adding said item (the broadcast waves which were mainly used at the time of establishment of item (iii)) must be “analog-to-digital converted.” Based on this interpretation of the requirement of being “analog-to-digital converted,” with regard to a recording medium equipped only with a digital tuner, no analog-to-digital conversion will be made for digital recordings of analog broadcasts therein, and thus it would be denied that such recording medium falls under item (iii), under the practical interpretation of the wording of the provision of item (iii).

Furthermore, based on the fact that there were various mode of infringement of the right of reproduction of the TV broadcasts, which are the recording source covered by item (iii), and there were even some difference in quality between analog broadcasts and digital broadcasts, if the requirement of being “analog-to-digital converted” as provided for in Article 1, paragraphs (1) and (2) of the Order for Enforcement of the Copyright Act, though neither objectively nor unambiguously clear, is interpreted

within the minimum possible scope, it is difficult to construe that the DVD recorders, whose recording source is limited to digital broadcasts, fall under the scope of designated recording medium, without taking into consideration the fact that the analog broadcast waves were the actual recording source used at the time when item (iii) was added and for which a general agreement was reached among the relevant parties including the manufacturers.

Judgment rendered on December 22, 2011

2011 (Ne) 10008, Appeal Case of Seeking Damages (Court of prior instance: Tokyo District Court; 2009 (Wa) 40387)

Date of conclusion of oral argument: September 13, 2011

Judgment

Appellant (plaintiff): Society for Administration of Remuneration for
Video Home Recording (general incorporated
association)

(Name before transition: Society for
Administration of Remuneration for Video Home
Recording (incorporated association))

Appellee (defendant): Toshiba Corporation

Main Text

This appeal shall be dismissed.

The appellant shall bear the cost of appeal.

Facts and reasons

No. 1 Objects of the appeal

1. The judgment in prior instance shall be revoked.
2. The appellee shall pay to the appellant 146,885,550 yen, as well as the amount accrued on 32,645,550 yen out of said amount at the rate of 5% per annum for the period from October 1, 2009, to the date of completion of the payment and the amount accrued on 114,240,000 yen out of said amount at the rate of 5% per annum for the period from April 1, 2010, to the date of completion of the payment.

No. 2 Outline of the case

1. The appellee manufactures and sells the DVD visual recording machines without an analog tuner ("Appellee's Products") as described in Product Lists 1 to 5 attached to the judgment in prior instance. The appellant, which is a designated association referred to in Article 104-2, paragraph (1), item (ii) of the Copyright Act, alleges that the appellee assumes the legal obligation to collect the amount equivalent to the compensation for private visual recording pertaining to the Appellee's Products from purchasers of the Appellee's Products and pay the collected amount to the appellant as the obligation of cooperation by manufacturers, etc. prescribed in Article 104-5 of the Copyright Act, on the premise of the allegation that the Appellee's Products fall under the "machines specified by Cabinet Order" with digital sound or

visual recording functions (specified machines) prescribed in Article 30, paragraph (2) of the Copyright Act. Based on this allegation, the appellant claims the payment of the amount equivalent to the compensation for private visual recording as described in the objects of the appeal.

The court of prior instance determined that the Appellee's Products fall under the specified machines though they are equipped only with a digital tuner and are not equipped with an analog tuner, but ruled as follows: As the obligation of cooperation assumed by manufacturers, etc. of the specified machines provided for in Article 104-5 of the Copyright Act is understood not as a specific legal obligation as alleged by the appellant but as an abstract obligation that is not accompanied by legal binding power, the appellee cannot be recognized as assuming the obligation to pay money in the amount equivalent to compensation for private visual recording pertaining to the Appellee's Products as its obligation of cooperation; therefore, establishment of a tort as alleged by the appellant is also not recognized. Based on this ruling, the court of prior instance dismissed the appellant's claims.

2. The external facts are as described in "2. Outline of laws and regulations concerning the system of compensation for private sound and visual recording, etc." and "3. Facts for which the parties have no dispute , etc." in "No. 2 Outline of the case" in "Facts and reasons" in the judgment in prior instance, except for the point that "Exhibit Otsu 6-1" in line 24 of page 11 is altered to "Exhibit Ko 6-1." Incidentally, the appellant made a transition from an incorporated association to a general incorporated association on April 1, 2011.

3. The provisions of related law and regulation are as follows.

(1) Article 30, paragraph (2) of the Copyright Act

"A person who, for private use, records the sound or visuals of a work in a digital format, on a digital sound or visual recording medium that is provided for by Cabinet Order, by means of a machine with digital sound or visual recording functions (excluding a machine with special performance capabilities for use in the broadcasting business or other special performance capabilities that are generally not offered for private use, and also excluding a telephone with a sound recording function or any other machine with sound or visual recording functions incidental to its primary function) which is provided for by Cabinet Order shall pay a reasonable amount of compensation to the copyright owner."

(2) Article 104-5 of the Copyright Act

"If a designated association requests the payment of compensation for private sound and visual recording pursuant to the provisions of paragraph (1) of the preceding Article, a person that manufactures or imports specified machines or specified recording media in the course of trade (referred to as a "manufacturer, etc." in paragraph (3) of the following Article) must cooperate with the designated association in connection with the request for the payment of compensation

for private sound and visual recording and in connection with its receipt."

(3) Article 1, paragraph (2) of the Order for Enforcement of the Copyright Act

"Out of the machines specified by Cabinet Order as referred to in Article 30, paragraph (2) of the Act, those with visual recording function shall be the following machines (excluding machines with video camera function) which are mainly provided for visual recording purposes (including machines that also have digital sound recording function).

(Items (i) and (ii) are omitted.)

(iii) machines with a function that makes it possible to successively fix images that were subjected to analog-digital conversion at a specified sampling frequency, or images that were subjected to analog-digital conversion at any sampling frequency, on a 120-mm diameter optical disc (limited to those for which the distance from the surface irradiated with laser beam to the recording layer is 0.6 mm), which falls under any of the following, by an optical method:

(a) those in which the spiral groove on the recording layer is neither rolling nor continuous;

(b) those in which the spiral groove on the recording layer is rolling and continuous; and

(c) those in which the spiral groove on the recording layer is rolling and is not continuous."

(hereinafter, the Copyright Act is referred to as the "Act," and the Order for Enforcement of the Copyright Act is referred to as the "Enforcement Order")

No. 3 Issues

The major issues of this case on which this court makes a determination are as follows.

(i) Whether DVD visual recording machines without an analog tuner fall under the specified machines (Issue 1)

(ii) Legal nature of the obligation of cooperation prescribed in Article 104-5 of the Act (Issue 2)

(iii) Whether there is the obligation to compensate damages based on a tort (Issue 3)

Other issues are (iv) whether the copyright owner, etc. has granted authorization for visual recording by the Appellee's Products and (v) the amount equivalent to compensation for private visual recording or the amount of damages which the appellee should pay. The allegations of the parties concerning these issues are as described in the relevant parts in the judgment in prior instance.

(omitted)

No. 9 Court decision

1. Legal meaning of the obligation of cooperation (regarding Issue 2)

(1) Private sound or visual recording (reproduction) was originally permitted as "small use" within a closed scope, for example, within a family (Article 30, paragraph (1) of the Act), but a large amount of sound and visual recordings had come to be made in society as a whole.

Furthermore, high-quality sound recordings, which are just like commercially available CDs, had come to be made thanks to the emergence of digital machines. On these bases, there has been an emerging idea that the provisions of Article 30, paragraph (1) of the Act have become less conformed to the international standard prescribed in the proviso to Article 9, paragraph (2) of the Berne Convention, specifically, "It shall be a matter for legislation in the countries of the Union... to permit the reproduction of such works ... provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Therefore, the Copyright Council, etc. discussed the designing of the system of the right to request remuneration for private sound and visual recording while referring to such systems of other countries. As a result, the Copyright Act was amended by Act No. 106 of 1992 to add Article 30, paragraph (2) and Articles 104-4 and 104-5 [of the Act], and the amended Act came into effect on June 1, 1993.

Article 30, paragraph (2) of the Copyright Act is to the effect that a person who makes a private sound or visual recording (user) assumes the obligation to pay compensation for each act of exploitation, and Article 104-5 of the Act provides for a system that complements said effect. Under the system of compensation for private sound and visual recording, it is a person who makes a private sound or visual recording by using a specified machine that assumes the obligation to pay compensation (Article 30, paragraph (2) of the Act), and it is the copyright owner, etc. (right holder) that receives payment of compensation. However, as special provisions, a person who purchases a specified machine, if so requested by a designated association provided in Article 104-2, paragraph (1) of the Act, must pay compensation at the time of the purchase as a lump-sum payment representing compensation (Article 104-4, paragraph (1) of the Act). Where a designated association requests a person who purchases a specified machine for the payment of compensation, the manufacturer and importer (manufacturer, etc.) of the specified machine must cooperate with the designated association in connection with the request for compensation and the receipt thereof (Article 104-5 of the Act). In the case of Article 30, paragraph (2) of the Act, which is the principle for the payment of compensation, a person who assumes the obligation to pay compensation is a person who records visuals by means of a specified machine (user) while in the case of Article 104-4, paragraph (1) of the Act, which provides for special provisions, such person is a person who purchases a specified machine. A designated association must exercise the right to request the payment of compensation (request the payment of compensation) against the purchaser of a specified machine on behalf of the right holder (copyright owner, etc.) while a manufacturer, etc. of a specified machine must cooperate with a designated association in connection with a request for the payment of compensation and the receipt thereof in the case of the special provisions (where a designated association requests a purchaser of a specified machine, etc. for

the payment of compensation).

"Collecting compensation for private visual recording from users by shipping specified machines while adding the amount equivalent to the compensation for private visual recording to the shipping prices of the specified machines and paying, to the relevant designated association, money in an amount equivalent to the compensation" ("added collection and payment" method) is recognized as a method that was suggested as an appropriate method in the report of the 10th Subcommittee of the Copyright Council (Exhibits Ko 44 and Otsu 1), which served as a premise of the aforementioned amendment to the Copyright Act, and was also specifically assumed as the content of "cooperation" by manufacturers, etc. of specified machines under Article 104-5 of the Act in the deliberation at the Diet. There is no sign of other methods having been considered. Article 104-5 of the Act can be understood as having been provided while mainly keeping cooperation in the form of such added collection and payment in mind, but this point is not unambiguously clear in terms of the text of law. The compensation requested in this action is based on this "added collection and payment method." However, the following methods are also assumed as other examples of the obligation of cooperation referred to in Article 104-5 of the Act: [i] a method wherein a manufacturer, etc. of specified machines indicates, on the packages of the specified machines, the fact that purchasers of the machines assume the obligation to pay compensation to a designated association, as well as the amount of the compensation and the recipient of the payment, etc. and [ii] a method wherein a manufacturer, etc. itself or a distributor who is entrusted by the manufacturer, etc. collects compensation from those who purchase specified machines at the sales floor of the specified machines. Therefore, there is no unambiguous ground for alleging that the appellant can claim the payment of the added amount from the appellee.

(2) The appellant first claims the amount of compensation approved pursuant to Article 104-6 of the Act as performance of the obligation of cooperation on the grounds of the allegation concerning Issue 2. However, there is no reason for this appellant's claim in light of the aforementioned instruction.

(3) However, since the enforcement of Article 1, paragraph (2) of the Enforcement Order, which provides for specified machines for private visual recording, on July 1, 1999, the appellant has collected compensation for private visual recording by a method that should be considered as the aforementioned "added collection and payment" method (chart of "Plaintiff's collection of compensation and distribution of collected compensation" attached to the judgment in prior instance), and there is no fact showing that the appellant used any other methods. Looking back on the purpose of imposing the obligation of cooperation on manufacturers, etc., persons who make a private sound or visual recording using specified machines pay compensation under the compensation system (Article 30, paragraph (2) of the Act), but there are quite a lot of such

users all over Japan. Therefore, it is difficult under the current circumstances for right holders, such as copyright owners, to understand the actual conditions of individual sound or visual recording and exercise the right to request compensation, or for users to pay compensation to individual right holders in each case of private sound or visual recording. Consequently, the Act established a system wherein a designated association intensively manages requests for and receipts of compensation in order to secure the effectiveness of the compensation system, and provided that a person who purchases a specified machine must, if so requested by a designated association provided in Article 104-2, paragraph (1) of the Act as a lump-sum payment representing compensation, pay compensation at the time of the purchase (Article 104-4, paragraph (1) of the Act). Then, as there is no direct contact between a purchaser of a specified machine and a designated association, cooperation of a third party who is in the position of being able to understand the act of purchase is required in requesting the payment of compensation for the purpose of the realization of the system. It is considered that manufacturers, etc. who provide sound or visual recording machines are requested to cooperate for the realization of right holders' obtainment of remuneration in terms of the concept of impartiality because the development and dissemination of sound or visual recording machines is resulting in an increase in private sound or visual recording. It is considered that manufacturers, etc. of specified machines are provided for as assuming the obligation to cooperate for "requests for the payment of compensation and receipt thereof" for such reasons (pages 4480 to 4481 in Exhibit Ko 44; pages 5 to 6 in Exhibit Ko 45).

As long as Article 104-5 of the Act provides for the obligation of cooperation by a manufacturer, etc. and Article 104-6, paragraph (3) of the Act provides that, before receiving approval, a designated association must hear the opinions of manufacturers, it is undeniable that there are the cases where a manufacturer, etc. should assume the obligation to compensate damages in relation to a violation if there is the fact that the manufacturer, etc. does not cooperate for the "added collection and payment method" under the aforementioned actual conditions. It is also assumed that where a manufacturer, etc. violates the obligation of cooperation, it must compensate damages incurred by a designated association in relation to the violation depending on the background to the violation and the form of the violation though the violation does not become a direct debt to the designated association (appellant in this case). There is the possibility of establishment of a claim on the premise of the appellant's allegation concerning a violation of Article 104-5 of the Act or Issue 3 (whether a tort by the appellee is established).

2. Whether DVD recording machines without an analog tuner fall under specified machines (regarding Issue 1)

Therefore, considering whether there is a violation of this obligation in this case, this court

found as follows: In determining the scope of sound or visual recording machines (specified machines) under Article 30, paragraph (2) of the Copyright Act, the status of dissemination and actual conditions of use of sound or visual recording machines were considered on the premise of sound or visual recording sources subject to machines that were used at that time and sound or visual recording standards applicable at that time, and the degree of agreement based on consultation, etc. among persons concerned was taken into consideration; as of the time when item (iii) was added to Article 1, paragraph (2) of the Order for Enforcement of the Copyright Act, analog TV programs were kept in mind as visual recording sources, and persons concerned reached rough agreement to make machines for the DVD recording of such recording sources subject to compensation for visual recording; based on this rough agreement, addition of said item was decided by the Cabinet. The requirement of being a machine with a function that makes it possible to successively fix images "that were subjected to analog-digital conversion" as prescribed in said item provides that visual recording must be conducted by converting analog broadcasting into a digital format. In addition, as this conversion is directed to analog signals from an analog tuner mounted on a DVD visual recording machine, analog-digital conversion is not conducted in a DVD visual recording machine without an analog tuner. Therefore, this court determines that such DVD visual recording machine does not fall under item (iii). Consequently, the Appellee's Products do not fall under Article 1, paragraph (2), item (iii) of the Enforcement Order, and this court thus determines that the appellee cannot be recognized as violating the obligation referred to in Article 104-5 of the Act or having tort liability. The reasons therefor are as follows.

(1) Background to the Enforcement Order

The background to the establishment and addition of the related provisions of the Order for Enforcement of the Copyright Act is as follows.

- [i] Sound recording machines were specified by Cabinet Order as specified machines prescribed in Article 104-4 of the Act in Article 1, paragraph (1) in "Chapter 1 Specified Machines and Specified Media pertaining to Compensation for Private Sound or Visual Recording" in the Order for Enforcement of the Copyright Act, which was added by Cabinet Order No. 147 of 1993. That is, machines with a function that makes it possible to fix sound that was subjected to analog-digital conversion at a specified sampling frequency on a specified magnetic tape or magnetic optical disc were designated in items (i) to (iii). Out of sound recording machines that had already been commercialized at that time, the provisions of items (i) to (iii) are made applicable respectively to each of the sound recording machines for DAT, DCC, and MD.
- [ii] Item (iv) was added to paragraph (1) by Cabinet Order No. 324 of 1998, and is made applicable to sound recording machines for CD-R and CD-RW as machines with a function that makes it possible to fix sound that was subjected to analog-digital conversion at a specified

sampling frequency on an optical disc.

[iii] Visual recording machines were added as Article 1, paragraph (2) by Cabinet Order No. 210 of 1999. Item (i) provides for DVCR, which is provided as a machine with a function that makes it possible to fix visuals on a magnetic tape at a specified sampling frequency. Item (ii) provides for visual recording machines using D-VHS and is made applicable to visual recording machines with a function that makes it possible to fix images that were subjected to analog-digital conversion at any sampling frequency on a magnetic tape.

[iv] Item (iii), which is the issue of this case, was added to Article 1, paragraph (2) by Cabinet Order No. 382 of 2000. According to the deliberation record of the draft Cabinet Order (Exhibit Ko 170), said item is made applicable to visual recording machines for MVDISC (put on sale by NEC), as well as for DVD-RW (put on sale by Pioneer and Sharp) and DVD-RAM (put on sale by Matsushita and Hitachi), that is, visual recording machines with a function that makes it possible to fix images that were subjected to analog-digital conversion at a specified sampling frequency, or images that were subjected to analog-digital conversion at any sampling frequency, on an optical disc for which the diameter and distance from the surface irradiated with laser beam to the recording layer are specified.

Out of those types of DVD, only DVD-RW and DVD-RAM had already been commercialized at the time of this addition. Therefore, the deliberation record of Exhibit Ko 170 only included an explanation that said item is applicable to visual recording machines for these types of DVD. However, the appellee also agrees on the point that DVD-R, DVD+R, and DVD+RW are also included in the subject of item (iii) because they fulfill the requirement. DVD in the form of DVD-RAM was provided as item (iii)(c), while those in the form of DVD-R, DVD-RW, etc. were provided as item (iii)(b). Incidentally, those provided as item (iii)(a) are MVDISCs (multimedia video discs) that differ from DVD and were independently standardized by NEC.

[v] Blue-ray disc visual recording machines were added by Cabinet Order No. 137 of 2009. The relevant provision is Article 1, paragraph (2), item (iv), and is made applicable to visual recording machines with a function that makes it possible to fix images that were subjected to analog-digital conversion at a specified sampling frequency, or images that were subjected to analog-digital conversion at any sampling frequency, on a blue-ray disc.

[vi] Looking at the deliberation record of Cabinet Order for each addition of specified machines by the Enforcement Order (in particular, Exhibits Ko 167 to 170), there is the hint that sound or visual recording sources, which are related to sound or visual recording standards and media, also involved important matters of concern. When specified machines for sound recording were provided in the items of Article 1, paragraph (1) of the Enforcement Order, digital sound recording and reproduction from CDs were also especially kept in mind as the subject matter of

compensation (page 4430 in Exhibit Ko 44), in addition to sound recording from LP records and sound recording of analog broadcasting (FM radio, etc.). On the other hand, when specified machines for visual recording were provided in paragraph (2) in 1999, VHS tapes and DVDs existed as goods for recording images. However, both of them ordinarily were accompanied by copy control signals, and therefore, their reproduction by circumventing technological protection measures became outside the scope of private reproduction by the 1999 amendment of the Act (Article 30, paragraph (1), item (ii) of the Act that was added by Act No. 77 of 1999). Because of this, not visual recording of commercially available video tapes and DVDs but visual recording from television broadcasting was kept in mind. Television broadcasting was mostly in the analog form at the time of addition of paragraph (2), item (iii) (digital terrestrial broadcasting did not yet exist). Therefore, DVD visual recording machines for general households were those for analog broadcasting that are equipped with an analog tuner.

(2) Guidelines for interpretation

The Fifth Subcommittee of the Copyright Council, which was established within the Agency for Cultural Affairs, started considering the relationship between private sound or visual recording through progress of technology and infringement of the right of reproduction in October 1977, but it made no specific suggestion. The 10th Subcommittee started considering this matter in August 1987 and compiled a report in December 1991 (Exhibits Ko 44 and Otsu 1). In the report, the subcommittee indicated the following conclusion in "Section 1, 2." in "Chapter 5 Conclusion" (page 4491; page 43 in Exhibit Otsu 1): "It is appropriate to promote coordination of interests between the development of sound and visual recording technologies and the protection of copyrights, etc. while giving consideration to consumers' interests in relation to enjoyment of works, etc. with receipt of benefits from the development of technology and to introduce a system of the right to request remuneration as indicated in the previous chapter as a kind of compensation measure from the perspective of also giving consideration to international trends." In addition, there is the following statement in "1.(1) Sound or visual recording machines and equipment subject to a request for remuneration" in "Section 2 Future plan" (page 4495; page 45 in Exhibit Otsu 1).

"Scope of sound or visual recording machines and equipment subject to a request for remuneration and scope of the exemption from payment, etc.

In this regard, there is no theoretical reason for distinguishing between sound or visual recording in an analog format and that in a digital format from the perspective of exploitation of a work. However, in the case of considering smooth introduction of a system with the understanding and cooperation of users, manufacturers, etc. in light of future technological innovations and market trends regarding sound or visual recording machines and equipment, it is actually considered desirable to make sound or visual recording machines and equipment in a

digital format be the specific subject matter of a request for remuneration in the specific operation of the system.

Incidentally, it is necessary to specify specific subject machines and equipment in consideration of the actual conditions."

Article 30, paragraph (2) of the Act was legislated in light of the aforementioned report of the 10th Subcommittee (Exhibit Ko 42).

According to the background stated in (1) above, it is clear that the scope of provisions for the addition of subject machines has been expanded in consideration of the status of interests of manufacturers, right holders, and viewers and listeners, as needed, in accordance with the actual conditions of the sound or visual recording machines and sources of the time. In consideration of the aforementioned legislative background of Article 30, paragraph (2) of the Act, it is understood that said paragraph provided that the scope of machines that fulfill the "visual recording in a digital format" requirement, which are made subject to payment of compensation, shall be specified by Cabinet Order on the basis of the legislative intention of taking actions on a case-by-case basis, as needed, in light of ever-changing music and image media, such as LP records, CDs, and video tapes, that are commercialized and subjected to the issue of infringement of the right of reproduction, as well as the status of broadcast waves and the actual conditions of sound or visual recording machines and recording media. At the 17th meeting of the 10th Subcommittee held on November 29, 1991, a member indicated an opinion that the draft of the aforementioned report (Exhibit Ko 116) can be valued in that it indicates the idea that "specific subject machines and equipment will be specified in consideration of the actual conditions" (Exhibit Ko 133). Taking these into account, all the digital sound or visual recording machines that will be commercialized in the future are not to be made subject to the payment of compensation referred to in Article 30, paragraph (2) of the Act, but subject machines will be added in light of the status of interests of persons concerned on a case-by-case basis, as needed, in comprehensive consideration of various situations. This idea can be considered as having been kept in mind from the very start of legislation of Article 30, paragraph (2) of the Act. As there is no particular limitation on the actual conditions mentioned as above, regarding the forms of machines, specifications concerning subject sound or visual recording sources are also not out of mind.

The following is stated as a basic idea of Cabinet Order on page 11 of the deliberation record of Exhibit Ko 167: "Although this Cabinet Order covers only machines and recording media for sound recording, necessary actions will be taken in relation to visual recording in consideration of the status of development and dissemination of digital visual recording machines in the field of people's livelihood and consultation among persons concerned, etc." The following is stated as the second reason for designation on page 19 of the deliberation

record of Exhibit Ko 168: "As a result of discussions on the release of CD-R among right holders, manufacturers, and other persons concerned since 1993, persons concerned have reached agreement to include CD-R and CD-RW in the subject of the payment of compensation this time." That is, the content of the provisions of Cabinet Order under Article 30, paragraph (2) of the Act, on which Article 104-5 of the Act is premised, has been provided in conformity to the actual conditions of machines and sound or visual recording media of the time. However, it has been recognized at each time of amendment to the Enforcement Order that rough agreement among machine manufactures needs to be obtained in order to add any new sound or visual recording machines because the addition will result in imposing the obligation of cooperation on persons who do not originally assume such obligation.

On second thought, taking into account the background where some argued that even sound or visual recording in an analog format should be made subject to compensation (the aforementioned statement in "Section 2, 1.(1)" in the aforementioned report of the 10th Subcommittee of the Copyright Council), it is not that only digital sound or visual recording necessarily becomes subject to compensation in terms of the institutional design. Even regarding digital sound or visual recording, various forms thereof, including sound or image sources, sound or visual recording media, and machines for such media, are changing every second according to the progress of technology, product development concepts, and viewers' needs. Therefore, Article 30 of the Act itself plans that the necessity of compensation is to be formulated in the form of policy according to each sound or visual recording sources, sound or visual recording machines, and sound or visual recording media. Taking also into account that the definition of the scope of payment of compensation has a very political meaning in such a manner, it is furthermore clear that the Act first limits the subject of compensation within the framework of sound or visual recording in a "digital format" and then provides that a further specific scope should be considered on each occasion of amendment to Cabinet Order in light of the purpose of the establishment of Article 30, paragraph (2) of the Act. Consequently, the provisions of the Enforcement Order that were added by amendment must be interpreted in line with the scope of the actual conditions that were kept in mind in making the amendment. In particular, whether a machine falls under specified machines needs to be considered strictly as a premise of questioning a violation of the obligation of cooperation prescribed in Article 104-5 of the Copyright Act if the text of the Enforcement Order is thought to be ambiguous.

(3) "Subjected to analog-digital conversion" requirement

Items of Article 2, paragraphs (1) and (2) of the Enforcement Order provide for specified machines as machines with a function that makes it possible to fix sound or images that "were subjected to analog-digital conversion." This court interprets the "subjected to analog-digital conversion" requirement from a comprehensive perspective as indicated below. In comparison

with the provisions of Article 30, paragraph (2) of the Copyright Act that specified machines shall be machines with a function of sound or visual recording in a "digital format," the meaning of this requirement in the Enforcement Order cannot be considered to be objectively and unambiguously clear, as is shown in the fact that the allegations of the parties in this action are sharply opposed to each other, particularly in relation to where sound or visual recording is conducted.

Regarding the "one that fixes sound that was subjected to analog-digital conversion," Exhibit Ko 167, which is the initial deliberation record (as of April 1993) of Article 1 of the Enforcement Order, states that the requirement was set in such manner on the grounds that sound is recorded on a recording medium. In said Exhibit, it is also stated that "Whether analog-digital conversion is conducted in or outside a machine is not an essential element." On the other hand, in said deliberation record, the section titled "Mechanism and kinds of digital sound recording machines (outline)" in the explanation before the aforementioned part describes only a route wherein an analog signal is input from outside (which is understood as outside seen from a listener who records sound) and is subjected to analog-digital conversion processing outside a sound recording machine (whether the conversion is conducted by a machine in the hand of a person who records sound or outside the hand of the viewer is not specified, but in consideration of the addition of a handwritten note to the effect that the processor is separately sold, it seems that a machine in the hand of a person who records sound was mainly kept in mind) and is digitally recorded and a route wherein digital signals are received from another digital audio machine (for example, CD player) and are digitally recorded, as well as a route wherein analog-digital conversion processing is conducted within a machine. However, Exhibit Ko 167 graphically illustrates a form wherein signals from a CD player are digitally recorded with a MD sound recording machine as they are. On the other hand, Exhibit Ko 167 also states as an explanation of MD that MD has the same sampling frequency as CD. Therefore, it can be said that digital sound recording in the case of receiving digital signals to this effect was kept in mind in setting the provisions, and a form of sound recording by receiving analog signals and going through analog-digital conversion at a prescribed sampling frequency is also graphically illustrated. Sound recording from FM broadcasting or LP records falls under this category.

Incidentally, in Article 1, paragraph (1) of the Enforcement Order, the provisions of item (iii) that define MD sound recording machines are as follows:

"(iii) machines with a function that makes it possible to fix sound that was subjected to analog-digital conversion at a sampling frequency of 44.1 kHz on a 64-mm diameter magnetic optical disc by a magnetic and optical method"

In the deliberation record of Exhibit Ko 168 (the record was prepared when CD-R and CD-RW were added to the subject recording media by Article 1, paragraph (1), item (iv) of the

Enforcement Order), it is also stated that the "fix sound that was subjected to analog-digital conversion" requirement is based on the fact that sound is recorded on a recording medium (as digital signals). The sampling frequency was provided when originally setting Article 1, paragraph (1), items (i) to (iii) of the Enforcement Order while keeping in mind the standards for digital sound recording adopted by commercialized media and machines of the time. Those that were provided by the Enforcement Order were the results of narrowing down the requirements by having digital sound recording within a machine be consistent with the sound recording method of the machines of the time. The explanation about "one that fixes sound that was subjected to analog-digital conversion" in the section 1.(1) on page 10 of the deliberation record of Exhibit Otsu 168 is also in line with this purpose.

Summing up the aforementioned statements in the deliberation records, including Exhibit Ko 167, and taking into account the way of the provisions of Article 1, paragraph (1), items (i) to (iii) of the Enforcement Order, the "subjected to analog-digital conversion" requirement that is provided in relation to sound recording can be understood as having been provided for the purpose of specifying the necessary sampling frequency in conformity to the standards of the subject sound recording machines and media while keeping in mind the major ones of various sound recording sources. Although there is no literal limitation on whether analog-digital conversion must be conducted within a sound recording machine, it can be said that analog-digital conversion must be conducted in line with the standards of the relevant sound recording machines or the standards of the subject sound recording media.

Considering the meaning of the phrase "that were subjected to analog-digital conversion" at the time when specified machines for visual recording were added as paragraph (2), there are no different circumstances from the aforementioned circumstances in the case of sound recording. Therefore, the "subjected to analog-digital conversion" requirement should also be considered as having been used to define the sampling frequency adopted by digital sound or visual recording media in sound or visual recording machines. That is, it should be said that it has been provided that the prescribed analog-digital conversion shall be conducted for the purpose of sound or visual recording by relevant sound or visual recording machines.

The deliberation record of Cabinet Order that was additionally amended at the time when digital visual recording machines and recording media for DVCR and D-VHS were put on sale (1999; Exhibit Ko 169) indicates a flow chart of analog-digital conversion at a broadcast station as a D-VHS visual recording method. However, this chart indicates a limited case, that is, digital visual recording for limited viewers from CS digital broadcasting (only one broadcast station, specifically, PerfecTV, as of the time of the formulation of the draft Cabinet Order) received by a mounted tuner. It is possible to presume that D-VHS visual recording machines that were sold as products became subject to compensation without the emergence of the awareness of the

problem of whether such machines independently become subject to compensation in relation to the aforementioned flow because such machines attracted attention of persons concerned as they are for digital visual recording because they were also equipped with a terrestrial analog broadcast tuner though analog-digital conversion is not conducted therein for visual recording. It should be considered here that the persons concerned reached rough agreement to make only such visual recording machines subject to compensation for private visual recording in consideration of the actual conditions of visual recording sources of the time. It is impossible to find any fact that is sufficient to prove the following: It had already been universally recognized at that time that broadcast waves would be accompanied by copyright protection technology, and digital visual recording from terrestrial digital broadcasting, which later became the standard broadcasting for all households, would also be subject to compensation as it is, and this universal recognition served as a premise of the future rough agreement. In fact, the deliberation record prepared at the time of addition of item (iii) (Exhibit Ko 170) does not include any explanation on the point that broadcast waves are digital.

When Article 1, paragraph (2), item (iii) of the Enforcement Order was added and DVD visual recording machines were included in specified machines, relevant provisions were set based on the specifications of DVD visual recording. That is, as a standard in the case where analog-digital conversion is conducted, the provisions define cases "at a specified sampling frequency" and cases "at any sampling frequency" in an alternative manner with the aim of covering all DVD standards used by DVD visual recording machines.

This court understands, in consideration of the aforementioned background and from a comprehensive perspective, that the "subjected to analog-digital conversion" requirement, which is neither objectively nor unambiguously clear, provides that broadcast waves are subjected to analog-digital conversion on the premise that they are analog. This court determines that said requirement cannot be understood as meaning the scope beyond this.

(4) Application to the Appellee's Products

In order that the Appellee's Products fulfill the requirement referred to in Article 1, paragraph (2), item (iii) of the Enforcement Order, the subject of visual recording must be "images that were subjected to analog-digital conversion." The appellant alleges that the Appellee's Products fulfill this requirement on the premise that analog-digital conversion is not required to be conducted within the Appellee's Products. This court also cannot determine that there is no reason for this allegation of the appellant in so far as literally interpreting the provisions of Article 1, paragraph (2), item (iii) of the Enforcement Order because there is no literal limitation in said item concerning the point whether analog-digital conversion is conducted within a visual recording machine.

Furthermore, regarding the "images that were subjected to analog-digital conversion"

requirement in Article 1, paragraph (2), item (iii) of the Enforcement Order, the appellant alleges that such images remain to be "images that were subjected to analog-digital conversion" (image by digital signals) even if some sort of editing act is committed thereon after the analog-digital conversion and the images after the editing are broadcasted. That is, the appellant alleges that even a visual recording machine equipped only with a digital tuner cannot be considered as not falling under Article 1, paragraph (2), item (iii) of the Enforcement Order because terrestrial digital broadcasting is also originated from analog images, which are converted into digital images for transmission.

The appellant's allegation is based on the premise that "whether a visual recording machine is equipped with an analog tuner" is nothing more than a kind of the "specifications of a visual recording machine" adopted independently by each manufacturer and that DVD visual recording machines naturally fulfill the requirement referred to in item (iii) without exception. According to this, as long as analog-digital conversion is conducted at any stage, the requirement referred to in item (iii) is fulfilled even if said conversion is conducted only in relation to part of continuous images. However, according to the appellant's allegation, it should be said that it was sufficient to only provide in item (iii) that specified machines shall be "machines with a function that makes it possible to successively fix images (at a sampling frequency according to the standards of a DVD) in a digital format by an optical method." The minimum analog-digital conversion as alleged by the appellant is a program editing work, or a work before it. If the "subjected to analog-digital conversion" requirement is construed to cover even work at such preliminary stages, it is equivalent to the situation where the Enforcement Order sets no limitation to the content specifying the "machines with digital visual recording function" referred to in Article 30, paragraph (2) of the Act. This will make the provisions excessively unambiguous and must be considered to cause loss of the meaning of having narrowed down specified machines from those provided by the Act through addition of the "subjected to analog-digital conversion" requirement. Moreover, the explanation to the effect that even analog-digital conversion in such limited situation falls under the requirement prescribed in item (iii) is not apparent in the deliberation record at the time when the Enforcement Order, etc. was amended, and there is no evidence proving that visual recording machine manufacturers, who assume the obligation of cooperation for the payment of compensation, and consumers, who originally assume the obligation, reached rough agreement on that point.

Incidentally, there is a phrase "a person who conducts AD conversion (= conversion is not necessarily conducted by a machine) (= a broadcast station also conducts it)" in the deliberation progress note that was written in a text comparing new and old provisions in the deliberation record (Exhibit Ko 170). Combined with a note before said phrase to put a cross mark to the

term "discretionary," and a note following it, "understood as the 'discretion' of ...," it is reasonable to understand that the first mentioned note is one meaning that the expression "discretion" causes misunderstanding in specifying a sampling frequency. This note is not sufficient to prove that persons concerned had actively recognized even the possibility that analog-digital conversion would be conducted at a broadcast station when the Enforcement Order was established.

Another explanation about visual recording of digital broadcasting in the deliberation record of the draft Cabinet Order is a conceptual diagram of visual recording in Exhibit Ko 171, which was prepared at the time when paragraph (2), item (iv) (Blu-ray disc visual recording machines) was added. It is reasonable to understand that said conceptual diagram is based on the premise of the concurrent existence of analog broadcasting, taking into account that it is indicated together with a conceptual diagram of visual recording of analog broadcasting. Incidentally, this conceptual diagram indicates that digital signals transmitted to a Blu-ray disc visual recording machine are converted into an analog form within a video camera, etc., but does not clearly indicate conversion at a broadcast station.

Sampling frequency, DVD, and Blu-ray disc were minutely defined on a case-by-case basis and the addition of subject machines was provided at each time of several amendments to Cabinet Order. However, the reference to "analog-digital conversion" has remained unchanged (only referring to "subjected to analog-digital conversion"), and the meaning thereof has been continuously provided in a manner that is neither objectively nor unambiguously clear. This is because actions have been taken only according to the sound sources and broadcast waves as well as commercialized sound or visual recording media and machines of the time, merely keeping them in mind as the subject of compensation for sound or visual recording as the actual conditions of the time, and amendments have remained to be based on an ambiguous concept of analog-digital conversion.

At the time of addition of Article 1, paragraph (2), item (iii) of the Enforcement Order (2000) when digital broadcasting had yet to be in full-scale, no discussion was held on the way of interpreting this requirement supposing the case where digital broadcast waves are incorporated in a visual recording machine as they are and information about copyright protection technology and other various kinds of digital information are incorporated. Also, no discussion was held on a sampling frequency of digital broadcasting that would become full-scale standard broadcasting. Therefore, no discussion was held on the issue of how the standards of digital broadcasting correspond to the standards of DVD visual recording. Consequently, DVD visual recording of digital broadcasting was not kept in mind at the time of addition of item (iii), and item (iii) cannot be recognized as being designed for DVD visual recording of digital broadcasting. Item (iii) was added based on the actual conditions that visual

recording sources are all from analog broadcasting ((vi) in (1) above).

Considering the Appellee's Products in light of this, looking back at the "subjected to analog-digital conversion" requirement mentioned in paragraph (2), item (iii) once again through comprehensive evaluation of the flow seen in (1) above, it is also considered reasonable [there] to understand that digital visual recording referred to in Article 30, paragraph (2) of the Act was limited in adherence with the recognition at the time of the initial establishment of Cabinet Order in April 1993, that is, the recognition that the "subjected to analog-digital conversion" requirement is provided for the purpose of conformity to the sampling frequency standards of digital recording by sound recording machines. That is, in terms of paragraph (2), item (iii), the fact that the "subjected to analog-digital conversion" requirement was provided means that it is necessary that broadcasting waves (which are broadcasting waves that were dominant at the time of establishment of item (iii)), which are visual recording sources that were actually kept in mind at the time of addition of the provisions, was "subjected to analog-digital conversion." On the premise of such interpretation of the "subjected to analog-digital conversion" requirement, analog-digital conversion is not conducted in a machine equipped only with a digital tuner in order to visually record analog broadcasting in a digital format. Therefore, such machine does not fall under item (iii) in terms of the substantial interpretation of the provisions of item (iii). If it is considered that the "subjected to analog-digital conversion" requirement is fulfilled where analog-digital conversion is conducted on part of images and those images are used for digital broadcasting, it is impossible to deny the possibility that visual recording of those images does not fulfill the "successively fixed" requirement, as alleged by the appellee. Therefore, at any rate, it must be said that it is an impermissible interpretation of item (iii), which is neither objectively nor unambiguously clear, to consider that DVD visual recording machines without an analog tuner also fulfill the requirement referred to in said item.

(5) Background information

As it is also clear from the statements in the deliberation record found in (2) above, consultations among persons concerned have been gone through before any sound or visual recording machines that have been newly disseminated are designated as specified machines by Cabinet Order based on the provisions of Article 30, paragraph (2) of the Copyright Act. Then, at the time of the initial designation of sound recording machines, commercially available CDs and LP records and radio broadcasting were recognized as the major subjects of sound recording subject to compensation (it is imaginable that the sampling frequency of MD is identical with that of CD because sound recording from CD was mainly kept in mind, and this point was strongly recognized in terms of sound recording source at the time of establishment of Article 1, paragraph (1), item (iii) of the Enforcement Order, as is indicated in the deliberation record). However, it is clear that analog television broadcasting was a major visual recording source as

of the time of designation of DVD visual recording machines (2000). At that time, it was assumed that digital broadcasting would shift into full swing in the future, but it actually became full-scale a few years later than then (started on December 1, 2003). If digital broadcasting was also assumed as a major visual recording source, the deliberation record prepared at the time of addition of item (iii) should have included an explanation about digital broadcasting. However, the deliberation record does not include such explanation as indicated above.

Consultations among persons concerned are accompanied by compromise, but, on the other hand, it can be said that the system of compensation for visual recording is never applicable to any form of visual recording for which persons concerned have yet to make compromise. Regarding whether DVD visual recording machines without an analog tuner fall under specified machines, the following was confirmed by a document which the Ministry of Education, Culture, Sports, Science and Technology and the Ministry of Economy, Trade and Industry jointly prepared in June 2008 (Exhibit Otsu 8): The Ministry of Education, Culture, Sports, Science and Technology recognized that existence of copyright protection technology was not provided as a requirement for the payment of compensation for visual recording by viewers under Article 30, paragraph (2) of the Act while the Ministry of Economy, Trade and Industry recognized that visual recording machines for terrestrial digital broadcasting would not become subject to the payment of compensation under Article 30, paragraph (2) of the Act if it is technically possible to protect copyrights for such machines. Based on this, it was confirmed that Blu-ray disc visual recording machines would be added to Cabinet Order as a tentative measure in light of the fact that such machines are equipped with an analog tuner. The following is also stated in a notice addressed to related bodies ("Regarding partial amendment to the Order for Enforcement of the Copyright Act, etc." dated May 22, 2009), which was issued under the name of the Deputy Commissioner for Cultural Affairs at the time of this amendment to Cabinet Order (amended Order for Enforcement of the Copyright Act that came into effect on May 22, 2009): "There is the possibility that sufficient cooperation for request for and receipt of the payment of compensation for private visual recording cannot be obtained from manufacturers, etc. if recorders, etc. without an analog tuner are shipped, or on and after July 24, 2011, when analog broadcasting is terminated, because of the manifestation of differences in the opinions of persons concerned. Both ministries are sufficiently aware of such problem of the current compensation system, and in establishing Cabinet Order this time, the ministries have also decided to consider the handling of differences in the opinions of persons concerned and take necessary measures, including the review of Cabinet Order, in an appropriate manner if such differences become apparent in the future." (Exhibit Ko 24).

In consideration of such background, it is clear that persons concerned, including consumers,

let alone manufacturers and the Ministry of Economy, Trade and Industry, had not reached rough agreement at least on the issue of whether Blu-ray disc visual recording machines without an analog tuner become subject to compensation. Back at the time of establishment of Article 1, paragraph (2), item (iii) of the Enforcement Order, manufacturers can be recognized as having reached a compromise on the point that they assume the obligation of cooperation for DVD visual recording machines with an analog tuner and such machines become subject to compensation for private visual recording, but their compromise was only to that extent. As considered in (6) below, it is difficult to recognize, unless special facts are recognized, that persons concerned had reached rough agreement even in relation to DVD visual recording machines without an analog tuner without any discussion about the issue of to what extent analog and digital broadcasting, which show different qualitative aspects in terms of the form of infringement of the right of reproduction, should be made subject to compensation for private visual recording as visual recording sources despite the fact that clear discussion on said issue must be carried out.

(6) Comprehensive consideration, including copyright protection technology

Both of the parties discuss the issue of whether the actual conditions of copyright protection technology are related to the applicability of Article 1, paragraph (2), item (iii) of the Enforcement Order to DVD visual recording machines without an analog tuner. First of all, it is undeniable that the existence and degree of copyright protection technology serve as the major policy background elements in defining the scope of application of compensation for visual recording, in light of the fact that private reproduction had already become easy and that was a major cause prompting the legal provision of the system of compensation for visual recording. Regarding the actual conditions of the broadcasting of the time when item (iii) was established, DVD visual recording was conducted from analog broadcasting, which was not accompanied by copyright protection technology (that is, a DVD on which images were visually recorded were in principle reproducible without any restriction on the number or generation). On the other hand, regarding the actual conditions of digital broadcasting, copyright protection technology which is effective and enforceable has been developed and adopted because digital broadcasting is based on digital technology. In digital visual recording from digital broadcasting, the degree of infringement of the right of reproduction may be high in the sense that clear images can be visually recorded with almost no deterioration in the image quality. However, the degree of infringement of the right of reproduction is low in that copyright protection technology makes it impossible for general viewers to conduct reproduction across generations, including re-reproduction (even if such reproduction is possible, it is outside the scope of reproduction permitted as private reproduction pursuant to Article 30, paragraph (1), item (ii) of the Act in many cases). On the other hand, digital visual recording from analog broadcasting can be freely

re-reproduced. However, a uniform conclusion cannot be drawn in relation to comparison of the content of private reproduction from both sources. Taking into account that infringement of the right of reproduction can be committed in the form of Internet delivery without any technical difficulty at least at present, even if such act of infringement is outside the scope of private reproduction, the degree of possibility of infringement of the right of reproduction through digital visual recording of analog broadcasting is serious. In this regard, such recording is qualitatively different from visual recording of digital broadcasting in terms of the form of infringement of the right of reproduction.

The subject of visual recording by DVD visual recording machines under item (iii) is television broadcasting, and there are many and various viewers as they are called mass media. The viewers of terrestrial digital television broadcasting probably watch television dramas, variety shows, and movies, enjoy sport programs, and follow news and media programs on a daily basis. The subject of visual recording by visual recording machines may be movies or interesting sport programs. Regarding sport programs, some viewers visually record such programs, for example, for the purpose of time-shift viewing at bedtime, or for the purpose of place-shift viewing at different places, such as on the way to work, and delete them after watching while others permanently keep them as historical matches. The purpose of visual recording differs for each viewer and depending on the kind of the visually recorded program, and therefore, elements considered in determining the necessity of compensation for private visual recording can be different (remarks [page 47] in B in "Zadankai 'shitekirokuon rokuga to hōshū seikyūken'" (Round-table talk "private sound or visual recording and the right to request remuneration"), *Jurist*, no. 1023 (1993): page 34 [Exhibit Ko 56]). It is impossible to accurately ascertain how much subject of visual recording is available for viewers from media other than television broadcasting, as well as to which scope and degree the right of reproduction is infringed by visual recording of television broadcasting. Although it is ordinary that the right holder of the content authorizes broadcasting thereof before television broadcasting, how the relationship between such authorization and the right of reproduction of a broadcasting business operator, which is the owner of neighboring rights, affects compensation for private visual recording has not been organized in relation to the situation of the visual recording of standard television broadcasting. Furthermore, for digital television broadcasting, various forms of viewing were probably assumed from the very beginning because digital signals are used for such broadcasting and because of the rapid progress of technology, and copyright protection technology, which is enforceable and effective and makes tracking possible, has evolved beyond the level of such technology for analog broadcasting. Time-shift and place-shift viewing by means other than DVD, such as visual recording on a hard disk and transfer of visual recording to a portable terminal, has been becoming extensively possible.

Television broadcasting was subject to visual recording by DVD visual recording machines and was the visual recording source that was mainly kept in mind when adding Article 1, paragraph (2), item (iii) of the Enforcement Order because most reproduction from commercially available video tapes and DVDs that are accompanied by copyright protection technology was outside the scope of reproduction that is permitted as private reproduction under Article 30, paragraph (1), item (ii) of the Act. It is not deniable that the issue of whether a visual recording source is accompanied by copyright protection technology is a major element in determining whether it is made subject to compensation for private visual recording. It is not recognized that the positioning of digital broadcasting in the system of compensation for private visual recording was discussed in the deliberation held at the time of establishment of Article 1, paragraph (2), item (iii) under the aforementioned actual conditions of digital broadcasting and DVD visual recording in the digital era, and there is even no explanation about visual recording sources in the deliberation record of the time. In terms of sound recording sources, regarding the form of sound recording from a commercially available or rental CD on an MD, which is clearly indicated in the deliberation record of Cabinet Order prepared at the time of establishment of Article 1, paragraph (1), most subject matters of sound recording are music CDs, and therefore, it was easy to forecast the forms of private reproduction. However, in applying the aforementioned current conditions of the visual recording of television programs for which the form of infringement of the right of reproduction actually differs between analog broadcasting and digital broadcasting as a premise in the interpretation of the scope of compensation for visual recording for which manufacturers, etc., which originally do not assume the obligation, are considered to uniformly assume the obligation of cooperation, such application must be strict in the case where the interpretation of Article 104-5 (Article 30) of the Act and the Enforcement Order in reaction to it, in particular, the determination of whether DVD visual recording machines for television programs fall under specified machines, is neither objectively nor unambiguously clear.

In the case of applying the "subjected to analog-digital conversion" requirement, which is provided in Article 1, paragraphs (1) and (2) though the provisions are neither objectively nor unambiguously clear, to the minimum interpretable scope on the premise that the forms of infringement of the right of reproduction of television broadcasting, which is a visual recording source covered by item (iii), are not uniform and, particularly, show qualitatively different aspects between analog and digital broadcasting, as mentioned above, it must be said to be difficult to understand that DVD visual recording machines for which digital broadcasting is the only visual recording source fall under specified machines, apart from analog broadcasting, which is the actual visual recording source of the time when item (iii) was added and which is a visual recording source concerning which persons concerned, including manufacturers, reached

rough agreement.

3. Conclusion

As explained above, visual recording machines equipped only with a digital tuner as a tuner cannot be recognized as falling under the specified machines prescribed in Article 1, paragraph (2), item (iii) of the Enforcement Order as they do not fulfill the requirement referred to in said item, that is, the subjects of visual recording are "images that were subjected to analog-digital conversion."

In order to determine that this case involves a violation of the obligation of cooperation prescribed in Article 104-5 of the Act, relevant machines must be recognized as the subject machines referred to in Article 1, paragraph (2) of the Enforcement Order. However, they are not recognized as such. Therefore, even if the appellee does not pay to the appellant compensation in relation to the Appellee's Products in accordance with the "added collection and payment" system, it cannot be considered as constituting violation of the obligation of cooperation prescribed in Article 104-5 of the Act. In addition, the claim concerning Issue 3 (whether a tort by the appellee is established) is also premised on the appellant's allegation concerning specified machines, and there is no reason therefor.

No. 10 Conclusion

Therefore, there is no reason for the appellant's claims without the need of making determinations concerning other issues. Consequently, the judgment in prior instance that dismissed the appellant's claims is reasonable in its conclusion.

Intellectual Property High Court, Second Division

Presiding judge: SHIOTSUKI Shuhei

Judge: MANABE Tomoko

Judge: TANABE Minoru