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Title

Judgment upon the period of subsistence of copyright of a cinematographic work which has originality and was published in 1953 in the name of an organisation as the author

Case name

Case to seek injunction against infringement of copyright

Result

Judgment of the Third Petty Bench, dismissed

Court of the Second Instance

Intellectual Property High Court, Judgment of March 27, 2007

Summary of the judgement

A cinematographic work with originality which was published in 1953 with an organisation as the author does not fall within the category of "cinematographic works have a copyright based upon the Copyright Act before the revision at the time the present Act was put into force" eligible for the extension of the period of subsistence by the Act on the Partial Revision to the

Copyright Act (Act No.85 of 2003), which came into effect on January 1, 2004, as provided by Art.2 of the supplementary provisions of this Act and the period of subsistence of the copyright expired on the end of the December 31, 2003.

References

Article 54, para.1 of the Copyright Act (prior to revision by Act No.85 of 2003), the provision revising Article 54, para.1 of the Copyright Act and Article 1 and Article 2 of the supplementary provisions of the Act for Partial Revision to the Copyright Act (Act No.85 of 2003), Article 54, para.1 and Article 57 of the Copyright Act, Article 6, Article 22-3 and Article 52, para.2 of the previous Copyright Act (prior to revision by Act No.48 of 1970)

Article 54, para.1 of the Copyright Act (prior to revision by Act No.85 of 2003)

(The period of protection of cinematographic works)

1. Copyright of cinematographic works subsists for the period of 50 years after its publication (if the work was not published within 50 years of its creation, 50 years from its creation).

The provision revising Article 54, para.1 of the Copyright Act in the Act for Partial Revision to the Copyright Act (Act No.85 of 2003)

The Copyright Act (Act No.48 of 1970) shall be partially revised as follows:

"50 years" in Article 54, para.1 shall be revised to "70 years".

Article 1 of the supplementary provisions of the Act for Partial Revision to the Copyright Act (Act No.85 of 2003)

(Effective date)

This Act shall enter into force on January 1, 2004

Article 2 of the supplementary provisions of the Act for Partial Revision to the Copyright Act (Act No.85 of 2003)

(Transitional measures regarding the period of protection of copyright over cinematographic work)

Article 54, para.1 of the Copyright Act after the revision (in the subsequent provision, "the new Act") is applicable to cinematographic work works where a copyright existed under the Copyright Act before the revision at the time this Act came into force, and for those cinematographic works where the copyright under the Act before the revision, had extinguished, the provisions then in force shall remain applicable.

Article 54, para.1 of the Copyright Act

(The period of protection of cinematographic works)

1. Copyright of cinematographic works subsists for the period of 70 years after its publication (if the work was not published within 70 years of its creation, 70 years from its creation).

Article 57 of the Copyright Act

(Method of calculation of the period of protection)

In cases of Article 51, para.2, Article 52, para.1, Article 53, para.1, or Article 54, para.1, when calculating the end of the period of 50 years from the death of the author, 50 years from the creation or publication of the work, or 70 years from publication or creation, the period is counted from the next year of the date of the death of the author, or the date of the publication or creation of the work.

Article 6 of the previous Copyright Act (prior to revision by Act No.48 of 1970)

Copyright over works published or performed in the name of public agencies, schools, temples and shrines, associations, companies etc. shall subsist for 30 years from the time of their publication or performance.

Article 22-3 of the previous Copyright Act (prior to revision by Act No.48 of 1970)

Authors of cinematographic works or works created in a similar way are protected by the present Act in the same way as the authors of the works within the scope of literature, science or art. As for the period of subsistence, for those works with originality, Article 3 to Article 6, and Article 9 are applicable, and for those without originality, Article 23 shall be applicable.

Article 52 of the previous Copyright Act (prior to revision by Act No.48 of 1970)

In respect of the period of 30 years as provided by Article 6, the period of subsistence shall be 33 years for the time being, except for copyrights over performances and songs and those copyrights provided in Art.22-7.

Article 141 of the Civil Code

(Expiration of period)

In the case referred to in the preceding Article, the period shall expire at the end of the last day of such period.

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Main text of the judgement

The appeal shall be dismissed.

The cost for appeal to the Supreme Court shall be borne by the appellant.
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Reasons

On the grounds for certiorari, items 2 and 3 of the representatives for the appeal to the Supreme Court, TOYAMA Tomohiro and others:

1. In the present case, (1) appellant X1, who is the copyright holder of the film "Shane" which is in the list of films attached to the judgment of the first instance court (hereinafter, "the Film") demanded the termination of sale etc. and the abandonment of the master film which contains the Film and the DVD products from the appellee Y1, who produced and sold the master film, and Y2, who produced and sold DVDs which duplicated the Film from the master film, on the ground of infringement of his rights to duplicate and distribute the Film, and (2) appellant X2, who has an exclusive right over the Film in Japan claims compensation based upon tort against the appellees on the ground of infringement of the above license. In response, the appellees argue that the copyright over the Film has extinguished by the expiration of the period of subsistence.

2. The summary of the relevant laws and regulations involving the protection of copyright of the Film is as follows:

(1) The Film has the appellant X1, a US juridical person as an author, and in its name, the Film was first published in the United States in 1953. Since both Japan and the United States are signatories to the Berne Convention on the Protection of Literary and Artistic Works, the Film, by virtue of Article 3(1) of the Berne Convention and Article 6, item 3 of the Copyright Act, is protected by the Copyright Act of Japan, and Japanese law is applicable to the period of protection (main text of Article 7(8) of the Convention).

(2) The summary of the Japanese laws and regulations on the period of protection of cinematographic works is as follows:

a. The previous Copyright Act (Act No.39 of 1900) provided for different periods of protection of cinematographic works in accordance with the existence or absence of originality (Art.22-3, second sentence), whether the author was indicated by the real name, no name, pseudonym, or the name of an organisation (Article 3, Article 5, and Article 6). The period of protection for a cinematographic work like this Film, which has originality and was published in the name of an organisation, was set at 33 years after the publication (publication or performance) (Article 22-3, Article 6, and Article 52, para.2).

b. The previous Copyright Act was totally replaced by the new Copyright Act (Act No.48 of 1970, hereinafter may be called "the current Copyright Act") which entered force on January 1, 1971 and is still in effect. The current Copyright Act (before the revision as explained in "c" below) sets the period of protection of cinematographic work at 50 years after the publication as a rule (Art.54, para.1), and in addition, in the Article 2, para.1 of the supplementary provisions, a transitional provision sets out that the "provisions on copyright in the Copyright Act after its revision are not applicable to works where the entire copyright had been extinguished in accordance with the Copyright Act before the revision at the time this Act entered force".

Incidentally, both in the previous and current Copyright Acts, when calculating the end of the above period of protection, the period is counted from the next year of the date of publication (Article 9 of the previous Copyright Act, Article 57 of the current Copyright Act), and the period ends on the last day of the year after expiration of the number of years set in the law (Article 141 of the Civil Code).

c. The Act on the Partial Revision of the Copyright Act which provides for the extension of the protection period for cinematographic works (Act.No.85, 2003, hereinafter, "the Revision Act", and the revision made, "the Revision") was enacted on June 12, 2003 and entered force on January 1, 2004. As a result, the period of protection of cinematographic works was set, as a rule, at 70 years from the publication (Art.54, para.1 of the Copyright Act after the Revision). Concerning the application of this extension of protection period, Article 2 of the supplementary provisions of the Revision Act provides that "Article 54, para.1 of the Copyright Act after the revision is applicable to cinematographic works where copyright existed under the Copyright Act before the revision at the time this Act came into force, and to those works where the copyright based upon the Copyright Act before the revision had been extinguished, the provisions then in force shall remain applicable. (hereinafter, the Transitional Provision)

(3) Those cinematographic works, including the Film, that were published in the name of an organisation in 1953 and had originality, were supposed to be protected by the previous Copyright Act for 33 years from publication, i.e. until December 31, 1986. With the current Copyright Act entering force on January 1, 1971, these works came to be protected until 50 years after the publication, i.e. until December 31, 2003. If Article 54, para.1 of the Copyright Act after the Revision is applicable to the Film as "cinematographic works where copyright based upon the Copyright Act before the revision existed at the time this Act came into force", the period of protection shall be extended until December 31, 2023, while if Article 54, para.1 of the Copyright Act after the Revision is not applicable to the Film, since it was a "cinematographic work where copyright based upon the Copyright Act before the revision had been extinguished at the time this Act came into force", the period of protection shall not be extended and the copyright has already extinguished.

3.The original instance court ruled that while the cinematographic works to which Article 54, para.1 is applicable are those where copyright based upon the Copyright Act before the revision existed on January 1, 2004, which is the date the Revision Act took effect, the period of protection by copyright over of the Film had extinguished after December 31, 2003, and therefore, Article 54, para.1 of the Copyright Act after the Revision was not applicable, and thus, dismissed the claim of the appellants. In response, the appellants argued that the expression "at the time this Act came into force" in the transitional provision should be construed to indicate the state of affairs immediately before the taking of effect of the Act, but nevertheless, the court construed it as "on the date of the taking of effect", and denied the application of Article 54, para.1 of the Copyright Act after the Revision. This ruling is against the law in the construction and application of the transitional provision.

4(1) The expression "at the time of" is occasionally used to include a certain time-span, and if one looks at this expression only, it cannot be definitely said that it means January 1, 2004 which is the date of the taking of effect of the Revision Act. However, generally when, in the transitional provision of the law, one finds the expression "at the time of this law entering force", which is identical to the Transitional Provision (hereinafter, "the Expression"), it is intended to clarify how the state of facts or law under the previous law is to be treated on the date of the new law taking effect in cases where there is a state of facts and law that are expected to continue on the date of the new law taking effect. Presupposing such a general use of the Expression (hereinafter, "the general use of the Expression"), the Expression cannot be interpreted to indicate the state of affairs immediately before the new law taking effect. Examples of laws quoted in the argument can be understood by the general use of the Expression, and do not support the argument of the appellants.

Therefore, in the general use of the Expression, "at the time of this law coming into force" cannot be interpreted to indicate the date of the law taking effect. Even though "at the time of" may be used to include some time-span, it cannot be understood to include the time immediately before the law taking effect.

Regarding the Expression in the Transitional Provision, there is no reason to believe that this was used in a way different from the general use of the Expression. "Cinematographic works where the copyright based upon the Copyright Act before the revision exists at the time of the present Act taking effect" means that the period of protection for the cinematographic works where the copyright based upon the Copyright Act before the Revision is continuing on the date of the Revision Act entering into force. In such construction, the Transitional Provision is intended to clarify that concerning the period of protection, Article 54, para.1 of the Copyright Act after the Revision is applicable, and as a rule, the period of protection is to be 70 years after the publication. The Transitional Provision provides that "to those cinematographic works

where the copyright under the Copyright Act before the revision had been extinguished, the provisions then in force shall remain applicable". This should be construed to mean that the period of protection as provided in the Copyright Act before the Revision is applicable to those works where the period of protection had already been extinguished on the date of the Revision Act entering force, and the period of protection under the Copyright Act after the Revision would not be applicable, and an express provision was therefore accommodated as a reminder. It is clear from this provision that the period of protection as provided by the Copyright Act after the Revision is not applicable to works where the copyright extinguishes immediately before the entering of force of the Revision Act. Therefore, cinematographic works, including the Film, that were published in 1953 in the name of an organisation and have originality are not eligible for the extension of the protection period by the Revision, and the copyright of the Film expired at the end of December 31, 2003.

(2) The appellants argue that after the entering of force of the Revision Act, "Copyright Act before the revision" does not exist any more. Therefore, unless the Expression is construed to indicate the state of affairs immediately before the entering of force of this Act, the provision "cinematographic works where copyright based upon the Copyright Act before the revision exists at the time the Act enters into force" will not logically stand. However, as explained above, the Expression is intended to clarify how the state of facts or law under the previous law are to be treated on the date of the new law taking effect in cases where there is a state of facts and law that are expected to continue on the date of the new law taking effect, and thus, there is no logical contradiction.

The appellants also argue that the legislature, at the time that the Revision Act was adopted, had an intention to extend the period of protection of cinematographic works published in 1953, and that the law should be construed in line with this intention of the legislature. However, if the intention of the legislature was to use this Expression of the Transitional Provision in a different way from its general usage, and further, that the law should be interpreted in this way, such an intention should be expressed in an explicit manner. It cannot be said that such an intention of the legislature was expressed on the occasion of the adoption of the Revision Act at the deliberation of Parliament or as an attached resolution of Parliament. It was only that the person in charge at the Cultural Agency, who prepared the submission of the bill to Parliament, had assumed that the works published in 1953 would be included in those works whose period of protection was to be extended. It cannot be said that because of this, the intention of the legislature was obvious.

5. As above, the ruling of the original instance court to the effect that the copyright over the Film has extinguished as a result of the expiration of the period of protection, can be upheld as justifiable. The arguments of the appellant cannot be accepted.

Therefore, the justices unanimously rule as the main text of the judgment.

Presiding judge

Justice FUJITA Tokiyasu

Justice Horigome Yukio

Justice NASU Kohei

Justice Tawara Mutsuo

Justice Kondo Takaharu

(Translated by Sir Ernest Satow Chair of Japanese Law, University College, University of London)