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Date of the judgement

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2011.01.18  
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Case Number

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2009(Ju)653  
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Reporter

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Minshu Vol. 65, No. 1  
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Title

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Judgment concerning, where a device which, when connected with a telecommunications line provided for use by the public, functions to automatically transmit, upon request by the receiver, the information input into said device, but said device only functions to perform transmission to a single designated apparatus, whether or not such device falls within the category of automatic public transmission server  
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Case name

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Case to seek injunction against copyright infringement, etc.  
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Result

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Judgment of the Third Petty Bench, quashed and remanded  
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Court of the Second Instance

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Intellectual Property High Court, Judgment of December 15, 2008  
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Summary of the judgement

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1. A device which, when connected with a telecommunications line provided for use by the

public, functions to automatically transmit, upon request by the receiver, the information input into said device, is regarded as an automatic public transmission server even if the device only functions to perform transmission to a single apparatus designated in advance, as far as the transmission performed by said device can be said to constitute automatic public transmission.

2. Where a device which, when connected with a telecommunications line provided for use by the public, functions to automatically transmit, upon request by the receiver, the information input into said device, is connected with a telecommunications line provided for use by the public, and information is continuously input into said device, the person who inputs information into said device is considered to be the party who performs transmission.

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#### References

(Concerning 1 and 2) Article 2, paragraph (1), item (vii)-2, item (ix)-4, item (ix)-5, Article 2, paragraph (5), Article 23, paragraph (1), and Article 99-2 of the Copyright Act

Article 2, paragraph (1), item (vii)-2, item (ix)-4, item (ix)-5 of the Copyright Act

(1) In this Act, the meanings of the terms listed in the following items shall be as prescribed respectively in those items:

(vii)-2 "public transmission" means the transmission, by wireless communications or wire-telecommunications, intended for direct reception by the public; excluding, however, transmissions (other than transmissions of a computer program work) by telecommunication facilities, one part of which is located on the same premises where all remaining parts are located or, if the premises are occupied by two or more persons, all parts of which are located within the area (within such premises) occupied by the same person(s);

(ix)-4 "automatic public transmission" means the form of public transmission which occurs automatically in response to a request from the public, excluding, however, public transmissions falling within the term "broadcast" or "wire-broadcast";

(ix)-5 "to make transmittable" means making an automatic public transmission possible by any of the acts set out below:

(a) to record information on public transmission recording medium of an automatic public transmission server already connected with a telecommunications line that is provided for use by the public; to add to such an automatic public transmission server, as a public transmission recording medium thereof, a recording medium which stores information; to convert a recording medium that stores information into a public transmission recording medium of such an automatic public transmission server; or to input information into such an automatic public

transmission server. For the purpose of this item (ix-5), " automatic public transmission server" means a device which, when connected with a telecommunications line provided for use by the public, functions to perform automatic public transmission of information which is either recorded on the public transmission recording medium of the transmission recording medium of such device or is inputted into such automatic public transmission server; and in this item (ix-5) and below, "public transmission recording medium" means such part of the recording medium of an automatic public transmission server as is provided for automatic public transmission use.

(b) to connect with a telecommunications line that is provided for use by the public, an automatic public transmission server the public transmission recording medium of which stores information or into which information has been inputted. For the purpose of this provision, if connection with a telecommunications line that is offered for use by the public is made through a series of acts, such as wiring, starting of the automatic public transmission server and putting into operation computer programs for transmission or reception the last to occur of such series of acts shall be considered to constitute the act of connection.

Article 2, paragraph (5) of the Copyright Act

(5) As used in this Act, "the public" includes a large number of specified persons.

Article 23, paragraph (1) of the Copyright Act

(1) The author shall have the exclusive right to effect a public transmission of his work (including, in the case of automatic public transmission, making his work transmittable).

Article 99-2 of the Copyright Act

The broadcasting organization shall have the exclusive right to make transmittable its broadcasts following reception thereof or of wire-broadcasts made following reception of said broadcasts.

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Main text of the judgement  
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The judgment in prior instance is quashed.

The case is remanded to the Intellectual Property High Court.

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Reasons  
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Concerning the reasons for petition for acceptance of final appeal argued by the appeal counsels for Appellant X1, UMEDA Yasuhiro, et al., and the reasons for petition for acceptance of final appeal argued by the appeal counsels for Appellant X2, MATSUDA Masayuki, et al., the appeal

counsels for Appellant X3, OKAZAKI Hiroshi, et al., the appeal counsels for Appellant X4, MAEDA Tetsuo, et al., the appeal counsels for Appellant X5, ITO Makoto, et al., and the appeal counsels for Appellant X6, OZAKI Yukimasa, et al. (except for the reasons excluded)

1. In this case, the appellants of final appeal, who are broadcasting organizations, sue the appellee of final appeal, who provides a service, called "Maneki TV," using a device which functions to automatically transmit broadcast programs upon request by users (hereinafter referred to as the "Service"), alleging that the Service infringes the appellants' right to make transmittable (Article 99-2 of the Copyright Act) with regard to the broadcasts that they provide, and their right of public transmission (Article 23, paragraph (1) of said Act) with regard to the broadcast programs that they have produced; based on this allegation, the appellants seek injunction against the appellee's making their broadcasts transmittable and performing public transmission of their broadcast programs, while also seeking payment of damages.

2. The outline of the facts determined by the court of prior instance is as follows.

(1) The appellants (except for Appellant X4) are broadcasting organizations, and as indicated in the list of broadcasts attached to the judgment in prior instance, they respectively have the right to make transmittable with regard to the broadcasts listed in said list (the broadcasts indicated in said list shall hereinafter be collectively referred to as the "Broadcasts"). P was a broadcasting organization, and as indicated in said list, it had the right to make transmittable with regard to the broadcasts listed in said list.

The appellants (except for Appellant X4) and P, as indicated in the list of broadcast programs attached hereto, respectively produced the broadcast programs indicated in said list (hereinafter collectively referred to as the "Programs").

Appellant X4 is a broadcasting organization, and on October 1, 2008, it succeeded to rights and obligations in relation to all of P's businesses, except for the group management business, as a result of a company split.

(2) The Service uses a product sold by Q, called Location Free (hereinafter referred to as "Location Free"). As its core component, Location Free has a device which incorporates a television tuner for terrestrial analog broadcasting and functions to convert the received broadcasts into digital data and automatically transmit such data upon the request of a user (this device shall hereinafter be referred to as the "base station").

A user of Location Free, through one-on-one correspondence via the Internet between a base station and a terminal (e.g. dedicated monitor) at hand, can view the broadcasts that are converted into digital data at the base station and then transmitted to the terminal at hand, by means of such terminal. The specific process of this system is as follows. (i) A user operates a terminal at hand and commands the transmission of a specific broadcast. (ii) The command is

transmitted to the corresponding base station via the Internet. (iii) The base station, into which terrestrial analog broadcasts received by the television antenna are continuously input, automatically converts the requested broadcast into digital data upon receiving said command of transmission. (iv) Then, the digital data is automatically transmitted to the user's terminal at hand via the Internet. (v) The user operates the terminal at hand and views the broadcast thus received.

(3) When providing the Service, the appellee receives 31,500 yen as a membership fee and 5,040 yen as a monthly service fee from each user. In its place of business, the appellee installs base stations owned by users, which users have sent to the appellee in order to receive the Service, and connects the base stations to the television antenna via a distributor, etc., while connecting the base stations to the Internet.

Users of the Service (hereinafter simply referred to as "users") can view the broadcasts aired in the areas where the base stations are installed, by operating the terminals at hand that form pairs with the corresponding base stations.

3. The appellants argue that the appellee has made the Broadcasts available for viewing by users, by inputting the Broadcasts into the base stations or connecting the base stations, into which the Broadcasts are input, to the Internet, and such conduct of the appellee constitutes an action of making the Broadcasts transmittable and infringes the appellants' right to make transmittable. The appellants also argue that the appellee's transmitting the Programs to the terminals of users, who are the public, constitutes an action of performing public transmission of the Programs and infringes the appellants' right of public transmission.

4. The court of prior instance dismissed all of the appellants' claims, ruling as follows.

(1) "To make transmittable" assumes the use of an automatic public transmission server (Article 2, paragraph (1), item (ix)-5 of the Copyright Act). An "automatic public transmission server" must be a device which performs transmission, by wireless communications or wired telecommunications, that can be received directly by the public (unspecified or a large number of persons). Each base station only functions to perform transmission to a single apparatus designated in advance, and in this respect, it cannot be regarded as an automatic public transmission server. Consequently, the appellee's inputting the Broadcasts into the base stations and thereby making the Broadcasts available for viewing by users does not constitute an action of making the Broadcasts transmittable, and therefore such conduct does not infringe the appellants' right to make transmittable.

(2) As explained above, each base station is not an automatic public transmission server. Consequently, the appellee's transmitting the Programs to the users' terminals does not constitute

an action of performing automatic public transmission, and therefore such conduct does not infringe the appellants' right of public transmission.

5. However, we cannot affirm the rulings of the court of prior instance, on the following grounds.

(1) Concerning infringement of the right to make transmittable

A. "To make transmittable" refers to an action of making automatic public transmission possible by any of the methods set forth in Article 2, paragraph (1), item (ix)-5, (a) or (b) of the Copyright Act, such as by inputting information into an automatic public transmission server that is connected with a telecommunications line provided for use by the public. An "automatic public transmission server" refers to a device which, when connected with a telecommunications line provided for use by the public, functions to perform automatic public transmission of information which is either recorded on part of the recording medium thereof as is used for automatic public transmission, or is input into such automatic public transmission server (Article 2, paragraph (1), item (ix)-5 of the Copyright Act).

"Automatic public transmission" is one of the forms of public transmission (item (ix)-4 of said paragraph). As viewed from the position of the party who performs transmission, "public transmission" refers to transmission intended for direct reception by the public (item (vii)-2 of said paragraph). The Copyright Act included an action of making transmittable in the scope of actions subject to regulation. This was because the form of public transmission to be performed automatically upon request of the public (subsequently defined as "automatic public transmission") was already subject to regulation, and under such circumstances, regulation should be enforced against a preparatory action to be carried out before performing automatic public transmission. In light of such legislative purpose and objective, a device which, when connected with a telecommunications line provided for use by the public, functions to automatically transmit, upon request by the public, the information that is input into said device, should be regarded as an automatic public transmission server even if the device only functions to perform transmission to a single apparatus designated in advance, as far as the transmission performed by said device can be said to constitute automatic public transmission.

B. Considering that automatic public transmission assumes the use of a device which functions to automatically transmit, upon request by the receiver, the information that is input into said device, it is appropriate to construe that the party who performs automatic public transmission is the person who creates a condition in which such device can automatically transmit information upon request by the receiver. Where such device is connected with a telecommunications line provided for use by the public and information is continuously input into said device, it is appropriate to consider the person who inputs information into said device to be the party who

performs transmission.

C. In this case, each base station, when connected to the Internet, functions to automatically convert the input information into digital data and transmit such data upon request by the receiver. In terms of the Service, the base stations are connected to the Internet, and information is continuously input into the base stations. The appellee connects the base stations to the television antenna under its management via the distributor, etc. so that the Broadcasts received by the television antenna are continuously input into the base stations, and while making such arrangements, the appellee installs the base stations in its place of business and manages them. In view of this, even where the users are the owners of the base stations, it is the appellee that inputs the Broadcasts into the base stations, and therefore it is appropriate to consider the appellee to be the party who performs transmission using the base stations. Any person, irrespective of matters such as his/her relationship with the appellee, is able to use the Service by entering into a contract with the appellee for the use of the Service. In this respect, when viewed from the position of the appellee or the party who performs transmission, users of the Service are unspecified persons, that is, the public, and accordingly, the transmission performed using the base stations constitutes automatic public transmission, and therefore the base stations fall within the category of automatic public transmission server. Consequently, the appellee's inputting the Broadcasts into the base stations, which are connected to the Internet and are categorized as automatic public transmission server, constitutes an action of making the Broadcasts transmittable.

(2) Concerning infringement of the right of public transmission

It is obvious that in terms of the Service, it is the appellee that performs transmission from the television antenna to the base stations, and in addition, as explained in (1)C above, it is also the appellee that performs transmission from the base stations to the users' terminals. Consequently, the appellee's transmitting the Programs from the television antenna to the users' terminals constitutes an action of performing public transmission of the Programs.

6. The court of prior instance determined that the base stations were not categorized as automatic public transmission server, only on the grounds that each base station was to only function to perform transmission to a single apparatus designated in advance, and rejected the appellants' claims against the infringement of their right to make transmittable or right of public transmission committed by the appellee. According to our reasoning shown above, such determination of the court of prior instance contains violation of laws and regulations that apparently affects the judgment, and the appeal counsels' arguments are well-grounded. The judgment in prior instance should inevitably be quashed, and for further examination, we remand the case to the court of prior instance.

Therefore, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices.

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Presiding judge

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Justice TAHARA Mutsuo

Justice NASU Kohei

Justice OKABE Kiyoko

Justice OTANI Takehiko

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(Attachment)

List of broadcast programs

1. X1

Title: "Baraeti Seikatsu Shohyakka"

Title: "Fukushi Nettowaku"

2. X2

Title: "Odoru! Sanma Goten!!"

3. X3

Title: "Sekiguchi Hiroshi no Tokyo Furendo Paku II"

4. P

Title: "MUSIC FAIR21"

5. X5

Title: "Ikinari! Ogondensetsu."

6. X6

Title: "Haro! Moningu."

(This translation is provisional and subject to revision.)