

Date	June 20, 2013	Court	Osaka District Court, 21st Civil Division
Case number	2011 (Wa) 15245		
<p>– A case in which the court ruled that the defendant, who provided a link to a video (cinematographic work) which had been uploaded on a video sharing website without the copyright holder's authorization, cannot be regarded as having made the work transmittable. Taking into consideration the circumstances such as where it is unclear, from its content or format, that the work was uploaded without the copyright holder's authorization, and where the defendant removed the link as soon as it became aware of the fact that the work had been uploaded without the copyright holder's authorization, the court also rejected the plaintiff's allegation that the defendant committed a tort by assisting a third party in infringing the plaintiff's right of public transmission.</p>			

The plaintiff distributed a video by a live streaming service named, "niconico live." A third party uploaded part of this video (hereinafter the "Video") on a video sharing website named, "niconico video," without the plaintiff's authorization. The defendant provided a direct link to the Video on its own website (hereinafter the "Website") and posted there an article that criticized the plaintiff as lacking common sense (hereinafter the "Article"). The plaintiff filed this action, alleging that the defendant defamed the plaintiff by posting the Article on its website and failing to remove the defamatory comments about the plaintiff (hereinafter the "Comments") from the comment section attached to the Article, and also alleging that the defendant, by doing so, infringed the plaintiff's copyright (right of public transmission) and moral rights of author (right to make the work public and right to determine the indication of the author's name) as well as his/her portrait right. Based on these allegations, the plaintiff demanded the removal of the Article and the Comments and claimed damages (as the link to the Video had already been removed, the plaintiff did not claim the removal of the Video in this action).

Among the major issues in this case, those relating to intellectual property were: (i) whether the Video meets the definition of cinematographic work under the Copyright Act; (ii) whether the plaintiff's right of public transmission was infringed; and (iii) whether the plaintiff's portrait right was infringed.

As for issue (i), the court found that the Video involved a certain degree of creativity, and determined that it was "fixed" because it was kept viewable by time shifting after being distributed by live streaming on niconico live. In conclusion, the court recognized the Video as meeting the definition of cinematographic work under the Copyright Act.

As for issue (ii), the court held that the defendant did nothing but provide a link to the Video, and since the data of the Video was sent from the server of niconico video directly to the viewers, not by way of the server of the Website, the defendant cannot be deemed to have transmitted the Video by automatic public transmission, or to have made the Video transmittable, although the Video was kept viewable on the Website from the viewers' terminals. The court further examined the plaintiff's allegation that the defendant committed a tort by assisting a third party in infringing the plaintiff's right of public transmission. On this point, the court held that although the Video is a copyrighted work, it is unclear, from its content or format, that the Video was uploaded without the copyright holder's explicit or implicit authorization, and it is therefore difficult to immediately judge that providing a link to such a copyrighted work is illegal. While taking into consideration that the defendant removed the link to the Video as soon as it received the plaintiff's complaint and became aware of the fact that the Video had been uploaded without the plaintiff's authorization, the court rejected the plaintiff's allegation of the defendant's commission of a tort by assisting a third party.

As for issue (iii), the court held that the plaintiff cannot be found to have allowed the Video, in which the plaintiff appears, to be used at the time of the live streaming or after time shifting. However, taking into consideration the circumstances, such as where the defendant did nothing but provide a link to the Video, and it being unclear, from its content or format, that the Video was uploaded without the portrait right holder's explicit or implicit authorization, and where the defendant removed the link to the Video as soon as it received the plaintiff's complaint, the court rejected the plaintiff's allegation of the defendant's illegal infringement of his/her portrait right.

Judgment rendered on June 20, 2013, the original received on the same date, Court Clerk

2011 (Wa) 15245 Case of Seeking Payment of Damages, etc.

Date of conclusion of oral argument: April 18, 2013

#### Judgment

Plaintiff: P1

Defendant: SOCIO CORPORATION

Counsel attorney: HIRANO Koji

Same as above: YAMAZAKI Satoru

Same as above: WATANABE Seiro

Same as above: KONDO Miki

Same as above: KUSUNOKI Junichi

Same as above: TAKAHASHI Masaki

Same as above: TABATA Satoshi

Same as above: FURUKAWA Ryo

#### Main text of the judgment

1. All of the plaintiff's claims shall be dismissed.
2. The plaintiff shall bear the court costs.

#### Facts and reasons

##### No. 1 Claims

1. The defendant shall remove the article posted on the RocketNews24 website operated by the defendant as shown in the attachment titled "Article" and the comments about the article as shown in the attachment titled "Comments."
2. The defendant shall post apologies in black and white for six days as shown in the attachments titled "Apology 1" and "Apology 2" in the banner advertisement sections (468x60, 300x250) on the top and bottom parts of the top webpage of the RocketNews24 website mentioned in the preceding paragraph.
3. The defendant shall pay the plaintiff 600,000 yen and delay damages accrued thereon at a rate of 5% per annum from June 9, 2011 until the date of full payment.

##### No. 2 Background

The plaintiff alleged that the defendant's act of posting, without due authorization, a video authored by the plaintiff on the website titled "RocketNews24" (the "Website") operated by the defendant and also of posting an article shown in the attachment titled "Article" (the "Article") that defames the plaintiff, and letting third parties post the comments shown in the attachment titled "Comments" (the "Comments") in the

comment section positioned below the Article and failing to remove the Comments, constitutes defamation of the plaintiff and infringement of the plaintiff's copyright (the right of public transmission) and moral rights of author (the right to make the work public and the right to determine the indication of the author's name). The plaintiff demanded that the defendant shall remove the Article and the Comments posted on the Website based on the right of honor. Also, the plaintiff demanded that the defendant shall post on the Website the written apology shown in attached Apology 1 as a measure to restore the plaintiff's honor damaged by the defendant's act of tort, i.e., infringement of the plaintiff's copyright and moral rights of author, as well as the written apology shown in attached Apology 2 as a measure to restore the plaintiff's honor damaged by the defendant's act of tort, i.e., defamation.

Also, the plaintiff demanded, as the primary claim, payment of 300,000 yen as a part of the damages for the defendant's act of tort, i.e., infringement of the plaintiff's copyright and moral rights of author, as well as delay damages accrued thereon at a rate of 5% per annum from June 9, 2011 until the date of full payment and also 300,000 yen as a part of the damages for the defendant's act of tort, i.e., defamation, as well as delay damages accrued thereon at said rate from said date until the date of full payment, and, as the secondary claim, alleged that said act of the defendant constitutes infringement of the plaintiff's portrait right and demanded against the defendant payment of 100,000 yen as a part of the damages for the defendant's act of tort, i.e., infringement of the plaintiff's portrait right, as well as delay damages accrued thereon at said rate from said date until the date of full payment, and 500,000 yen as a part of the damages for the defendant's act of tort, i.e., defamation, as well as delay damages accrued thereon at said rate from said date until the date of full payment.

#### 1. Facts based on which determinations are made

The following facts are undisputed by the parties or easily recognizable based on the evidence mentioned below or the entire import of oral argument (among the following facts, the facts that are not supported by evidence are undisputed by the parties).

##### (1) Parties concerned

As of June 2011, the plaintiff was conducting, among other things, live streaming distribution of videos (immediate video distribution similar to TV live broadcasting) through the "niconico namahōsō" (niconico live broadcasting) described below as a niconico premium account of the online video sharing service, etc. (collectively referred to as "niconico dōga" (niconico video) at that time and, since May 2012, these have been collectively referred to as "niconico"; Exhibit Otsu No. 2) provided by niwango, Inc. (the "niwango").

The defendant is a company established for the purpose of providing information services and engaged in the operation and management of the Website, which provides the service of compiling various news, etc., adding titles and articles to the news, etc., and allowing readers to post comments.

Services provided by niwango at "niconico" include "niconico dōga," which allows users to share videos on the website and post comments, and "niconico namahōsō," which allows users to watch live-streaming videos. The videos distributed through "niconico namahōsō" are available only to the members of "niconico" ("niconico dōga" as of June 2011). The fee-based niconico premium members are allowed to distribute live-streaming videos by themselves through "niconico namahōsō." Also, "niconico" provides a service called "time shift function," which allows users to watch programs distributed through "niconico namahōsō" for a certain period of time even after the completion of said live streaming distribution.

(2) Defendant's acts such as the posting of the Article on the Website (Exhibits Ko No. 1, No. 3, No. 4, No. 6, and No. 7)

On June 5, 2011, the plaintiff went out with his camera and videotaped himself naked to the waist (except for a cat-ear headband and a necklace similar to a dog collar) entering a McDonald's in Osaka city and engaging with McDonald's staff and police officers. He then distributed the video through the live streaming distribution service called "niconico namahōsō" (the "Live Broadcast"). An unidentified third party other than the plaintiff posted on the video sharing site "niconico dōga" a part of the Live Broadcast, i.e., the part lasting about 15 minutes (the "Video") covering the incident from the time immediately before the plaintiff's entrance into the McDonald's until the time when the plaintiff went to the police station together with the police officers, who had been called to the McDonald's, and was given a verbal reprimand by them (the third party may be presumed to have recorded the Live Broadcast or the content distributed by the aforementioned time shift function and uploaded the recorded content to "niconico dōga"), and made the content available for any person accessing said site. The details of the remarks made by the plaintiff, etc. in the Video are as shown in the attachment titled "Remarks Made in the Video" (the remarks were made by the plaintiff unless the speaker is indicated otherwise).

The defendant noticed the existence of the Video and, on June 9, 2011, posted the article shown in the attachment titled "Article" (the "Article") on the Website and input, on the edit screen of the Website, the quotation tag or URL assigned to the Video posted on the "niconico dōga" so that any user who clicks on the video play button positioned at the top of the Article can watch the Video on the Website. The defendant stated

"Source: niconico dōga" at the end of the Article.

(3) Subsequent developments (Exhibit Ko No. 5 and Exhibit Otsu No. 1)

Below the Article, there is a comment section where any users can post their comments from their terminals, such as computers. From June 9, 2011 till August 1, 2011, the comments shown in the attachment titled "Comments" were posted about the Video or the Article.

On June 27, 2011, the plaintiff warned the defendant that the defendant's act of making the Video available on the Website constitutes infringement of the plaintiff's copyright and portrait right. On the same date, the defendant made the Video not available on the Website by removing the quotation tag or URL assigned to the Video from the edit screen of the Website.

The plaintiff sent the defendant a notice dated June 30, 2011, demanding against the defendant "payment of two million yen as a part of solatium within one month from the receipt of said notice" "for the defendant's act of distributing an article through RocketNews24, which constitutes infringement of the plaintiff's copyright and portrait right."

Until now, the plaintiff had not requested the defendant to remove any specific one of the Comments from the comment section. Therefore, the defendant had removed neither the Article nor the Comments.

## 2. Issues

(1) Claims related to the plaintiff's copyright and moral rights of author

A. whether the Video may be considered to be a cinematographic work (Issue 1-1)

B. whether the defendant's act constitutes infringement of the right of public transmission (Issue 1-2)

C. whether the defendant's act may be regarded as "quotation" (Issue 1-3)

D. whether the defendant's use of the Video falls within the reasonable scope of use for the purpose of broadcasting (Issue 1-4)

E. whether the defendant's act constitutes infringement of the moral rights of author (the right to make the work public, and the right to determine the indication of the author's name) (Issue 1-5)

F. the damage suffered by the plaintiff (Issue 1-6)

G. the necessity of taking a measure to restore the plaintiff's honor (Issue 1-7)

(2) Claims related to defamation

A. whether the defendant's act of posting the Video and the Article constitutes defamation (Issue 2-1)

B. whether there are any grounds for removing illegality (Issue 2-2)

- C. whether the defendant has the obligation to delete the Comments (Issue 2-3)
- D. the damage suffered by the plaintiff (Issue 2-4)
- E. the necessity for taking a measure to restore the plaintiff's honor (Issue 2-5)
- (3) Claims related to the plaintiff's portrait right
  - A. whether the defendant's act constitutes infringement of the plaintiff's portrait right (Issue 3-1)
  - B. the damage suffered by the plaintiff (Issue 3-2)

(omitted)

#### No. 4 Court decision

##### 1. Issue 1-1 (whether the Video may be considered to be a cinematographic work)

The Video (including the Live Broadcast as a premise) is a video with sound recording from such a unique angle that the focus of the recorded video is fixed mainly on the face of the plaintiff in order to shoot an unusual situation where the plaintiff, who was naked down to the waist, entered a restaurant and had a conversation with the staff (Exhibits Ko No. 3 and No. 4). Therefore, the video may be considered to be creative to a certain extent.

As stated in the section titled "Facts based on which determinations are made" above, the "niconico namahōsō" provides a service called time shift function in order to allow users to watch live streamed content after the live streaming distribution. Therefore, the Live Broadcast may be considered to have been stored in the server of niwango as of the time of distribution and subsequently made available for viewing and, therefore, considered to have been "fixed" (Article 2, paragraph (3) of the Act).

Thus, the Video, which is a part of the Live Broadcast, may be considered to be a "cinematographic work" (Article 10, paragraph (1), item (vii) of the Act). The plaintiff may be regarded as the author thereof.

##### 2. Issue 1-2 (whether the defendant's act constitutes infringement of the right of public transmission)

###### (1) Issue of whether the defendant made the Video transmittable

The plaintiff alleged that the defendant's act of making the Video available for viewing on the Website for any user who clicked on the video play button positioned at the top of the Article may be regarded as an act of "making (the Video) transmittable" (Article 2, paragraph (1), item (ix-5) of the Act) and therefore constitutes an act of tort, i.e., infringement of the right of public transmission.

However, as stated in the section titled "Facts based on which determinations are

made" above, the defendant merely provided a link to the Video by inputting on the edit screen of the Website the quotation tag or URL of the Video uploaded to "niconico dōga."

In this case, the data of the Video was not recorded in the server of the Website. It can be said that the data was sent to any viewer of the Website who clicked on the video play button at the top of the Article directly from the server of "niconico dōga," not via the server of the Website.

In other words, on the viewer's terminal, the viewer was allowed to watch the Video on the Website, on which the link was provided. However, it was not the defendant but the manager of "niconico dōga" that transmitted the data of the Video to the viewer's terminal. Therefore, the defendant, which operates and manages the Website, may not be considered to have conducted "automatic public transmission" of the Video (Article 2, paragraph (1), item (ix-4) of the Act) or "making it transmittable" (Article 2, paragraph (1), item (ix-5) of the Act).

(2) Issue of whether the defendant's act constitutes an act of tort by assisting a third party

The plaintiff's allegation may be interpreted that, even though the defendant's act may not be considered to be "making (the Video) transmittable," the defendant's act of providing a link to the Video uploaded to "niconico dōga" constitutes an act of tort by assisting a third party.

However, it was unclear, from its content or format, that the Video was uploaded to "niconico dōga" without the copyright holder's explicit or implicit authorization, and it is therefore difficult to immediately judge that providing a link to such a copyrighted work is illegal. As stated in the section titled "Facts based on which determinations are made" above, the defendant removed the link to the Video as soon as it received the plaintiff's complaint about the defendant's act of making the Video available on the Website, in other words, as soon as it became aware of the fact that the Video had been uploaded to "niconico dōga" without the plaintiff's authorization.

While taking such circumstances into consideration, the defendant's act of providing a link to the Video on the Website may be considered to constitute neither infringement of the plaintiff's copyright nor an illegal act of assisting a third party to commit copyright infringement. Since the defendant may not be considered to have committed an intentional act or an act of negligence, the defendant's act does not constitute an act of tort.

(3) Summary

As described above, the plaintiff's allegation that the defendant's act constitutes an

act of tort, i.e., infringement of the plaintiff's right of public transmission is unacceptable.

3. Issue 1-5 (whether the defendant's act constitutes infringement of the moral rights of author (the right to make the work public, and the right to determine the indication of the author's name))

(1) Infringement of the right to make the work public

The plaintiff alleged that the defendant's act of disclosing the Video to the public constitutes infringement of the plaintiff's right to make the work public (Article 18 of the Act).

However, the defendant provided a link to the Video only after the live streaming distribution of the Live Broadcast by the plaintiff. Moreover, it is stated in the written complaint that the number of viewers of a video distributed by the plaintiff "is constantly more than 400 and, for a popular program, more than several thousands, like the one distributed on that day." If this is the case, since the Live Broadcast may be considered to have been made available to the public by the author, namely, the plaintiff himself through public transmission (Article 2, paragraph (1), item (vii-2) of the Act) and have been "made public" (Article 4, paragraph (1) of the Act), the defendant's act does not constitute infringement of the plaintiff's right to make the work public, as far as the Video, which is a part of the Live Broadcast, is concerned.

(2) The right to determine the indication of the author's name

The plaintiff alleged that the defendant's act of using "P2," which is the plaintiff's pseudonym, without the plaintiff's authorization when the defendant "provided or presented (the Video) to the public" constitutes an act of tort, i.e., infringement of the plaintiff's right to determine the indication of the author's name.

However, the Article itself indicates neither the real name nor the pseudonym of the plaintiff. Only the plaintiff's pseudonym was included in the title of the Video indicated on the Website (Exhibit Ko No. 1). As described in 2 above, the defendant merely provided a link to the Video and may not be considered to have "offered (the Video) or made (it) available to the public (Article 19 of the Act) by automatic public transmission, etc." Therefore, there is no premise for infringement of the plaintiff's right to determine the indication of the author's name.

Furthermore, the plaintiff himself created a video by mostly recording the appearance of the plaintiff himself and distributed it as the Live Broadcast and stated his real name. When distributing the Live Broadcast and other videos through "niconico namahōsō," the plaintiff indicated his pseudonym "P2" (Exhibits Ko No. 1, No. 3, No. 4, Exhibit Otsu No. 1, the entire import of oral argument). Under these circumstances,

even if the fact that the Video may not be considered to have been "offered or made available to the public" is excluded from the consideration, the aforementioned indication made on the Website may not be considered to constitute infringement of the plaintiff's right to determine the indication of the author's name.

Therefore, the plaintiff's allegation regarding this point is unacceptable.

(omitted)

#### 5. Issue 2-3 (whether the defendant has the obligation to delete the Comments)

The plaintiff alleged that the Comments defamed the plaintiff and that, since the defendant's act of posting the Article and the Video triggered the Comments, the defendant is obliged to delete all of the Comments and that the failure to fulfill this obligation constitutes an act of tort.

However, as described in 4 above, the defendant's act of posting the Article and the Video does not constitute defamation of the plaintiff. There is no premise for the plaintiff's allegation. Even if this point has been excluded from consideration, the Article does not indicate the real name of the plaintiff in the first place. Moreover, the Comments only referred to the plaintiff's pseudonym, and do not refer to his real name. Initially, a link to the Video (including the appearance and real name of the plaintiff) was provided in such manner that integrates the link with the Article and the Comments. At that time, general readers may be considered to have understood that the Comments were made about the plaintiff. However, as described in 2 above, the defendant removed the link to the Video from the Website immediately after receiving a complaint from the plaintiff on June 27, 2011. Consequently, the readers of the Comments have not been able to recognize that the Comments were made about the plaintiff. In other words, the defendant has promptly taken a measure to prevent the Comments from damaging the plaintiff's social reputation. Thus, the defendant is not obliged to delete all of the Comments and, therefore, has not failed to fulfill the obligation.

Even though the indication of the plaintiff's pseudonym in the Comments could make it possible to identify the plaintiff even after the removal of the link to the Video, it may be recognized that the Comments, which contain only about 20 individual comments, vary in terms of the content and include some that clearly do not defame the plaintiff, and that none of the Comments may be considered to clearly constitute illegal infringement of the plaintiff's reputation in light of the nature of the Video and the plaintiff's behavior recorded therein that triggered the Comments. Furthermore, each of the Comments is independent and could be removed separately. The defendant

expressed its intention that, if the plaintiff requests deletion of a specific comment, the defendant would be willing to consider deleting it (the 6th date of preparatory proceeding (January 18, 2013)). However, the plaintiff has not made such specific request. In consideration of these facts, the defendant, which operates and manages the Website, may not be considered to be obliged to delete the Comments.

Thus, the defendant is not obliged to delete the Comments and is not liable for an act of tort, i.e., the failure to fulfill such obligation.

6. Issue 3-1 (whether the defendant's act constitutes infringement of the plaintiff's portrait right)

The plaintiff alleged that the defendant's act of posting the Video and the Article may be regarded as infringement of the plaintiff's portrait right and constitutes an act of tort. Since such form of linguistic expressions as the Article may not be presumed to have infringed the plaintiff's portrait right, the following examination was made to determine whether the defendant's act of providing a link to the Video constitutes infringement of the plaintiff's portrait right.

The defendant alleged that, since the plaintiff himself recorded and publicized the Video, the plaintiff no longer has the right to prohibit the publication of his portrait. However, the Live Broadcast distributed by the plaintiff was expected to be watched by viewers only during the time of live streaming distribution and the period of time shift. Therefore, the plaintiff may not be considered to have approved the use of the Video, which contains his portraits, after the expiration of the period of time shift.

It should be noted, however, that the defendant did not publicize the Video, but merely provided a link to the Video that a third party uploaded and publicized through "niconico dōga" and that it was unclear, from its content or format, that the Video was uploaded without the copyright holder's explicit or implicit authorization, and that it is therefore difficult to immediately judge that the defendant's act of providing a link to such video constitutes infringement of the plaintiff's portrait right. Moreover, as stated in the section titled "Facts based on which determinations are made" above, the defendant removed the link to the Video immediately after receiving a complaint from the plaintiff about the defendant's act of making the Video available on the Website.

In light of these facts, the defendant's act of providing a link to the Video on the Website may not be considered to constitute illegal infringement of the plaintiff's portrait right. Since the defendant may not be considered to have committed an intentional act or an act of negligence in connection with the infringement of the plaintiff's portrait right by a third party, the defendant's act does not constitute an act of tort.

## 7. Conclusion

On these grounds described above, the court found all of the plaintiff's claims to be groundless and dismissed them. Therefore, the judgment has been rendered in the form of the main text.

Osaka District Court, 21st Civil Division

Presiding judge: TANI Yuko

Judge: MATSUAMI Takashi

Judge: MATSUKAWA Michiyasu