

Example of case-based judgment in appeal case involving copyright

Copyright	Date	August 23, 2018	Court	Intellectual Property High Court, Third Division
	Case number	2018 (Ne) 10023		
- A case in which, concerning file footage for the press over which a news agency has copyright, the court held that the act of quoting and using the same in a documentary film without indicating the source is not lawful quotation, as prescribed in Article 32, paragraph (1) of the Copyright Act.				

Case type: Injunction against copyright infringement, etc. (principal action),

Compensation (counterclaim)

Result: Appeal dismissed

References: Article 32, paragraph (1) of the Copyright Act

Summary of the Judgment

1. The present case between X, a news agency (a TV channel), and Y, a film production company, involving file footage for the press, focused on whether the act by Y of quoting and using the file footage, over which X has copyright (the Footage), in Y's documentary film (the Movie) without indicating the source and without permission constitutes infringement of copyrights and author's moral rights, and whether the refusal by X of Y's request for licensing of the film footage is lawful.

2. In the prior instance judgment, it was determined that the use of the Footage in the Movie without any indication of the source, either in the places where the footage was used or in the credits at the end, is not compatible with "fair practices," thereby denying the defense of quotation (Article 32, paragraph (1) of the Copyright Act), partially approving the claims made by X in the principal action, and dismissing Y's counterclaims. Y, who expressed dissatisfaction with the judgment, filed an appeal to the court of second instance.

3. In the present judgement, the court held as follows and dismissed the appeal filed by Y.

The parties are not in dispute over the fact that in the Movie, the Footage, as edited and managed by X for the press, has been duplicated without permission and used without any indication of the name of X, who is the copyright holder. In the first place, indication of source is an obligation imposed on the quoter pursuant to the Copyright Act (Article 48, paragraph (1), item (i) of the Copyright Act). In the second place, it can be said that in the present case, there is room to speculate that a certain measure of distinction has been made in terms of screen ratio and image quality between the parts created by Y in the Movie and the parts used in the Movie (the Parts Used), as pointed out in the prior instance judgment. Still, it must be stated that said parts are not clearly distinguished from each other in the movie, and also that the

distinction level is low, and thus the need to indicate the source is high also for the purpose of clarifying that the Parts Used have been quoted. Furthermore, in the case of a documentary film as in the present case, it can be said that what is being used as the material (level of accuracy and objectivity thereof) is an important factor that determines the quality of the Movie. Accordingly, it is believed that, even from this perspective, it is highly necessary to indicate the source if the material has been quoted. On the other hand, in the present case, both the side that quotes (the Movie) and the side that is quoted (the Footage) concern visually acknowledgeable footage, and thus it is fully possible to indicate the source by way of captions and the like, and furthermore, it cannot be acknowledged that doing so is particularly damaging to the value of expression by the side that quotes (the Movie). When these factors are taken into consideration along with the content and the like of the "Documentary filmmaker's statement concerning the best practice of fair use," which has been pointed out in the prior instance judgment, it should be said that in the case of using the Footage in the Movie by way of quotation, the source should have been indicated, also because this is a requirement to be acknowledged as lawful quotation, and it can be said that indication of the source is compatible with fair practices, or is in accordance with reason. This remains unchanged by the circumstance that, while the total play time of the Movie exceeds two hours, the parts using the Footage (the Parts Used) remain at a total of 34 seconds, and that the Footage concerns the footage prior or being edited as a broadcast program.

Accordingly, it is reasonable to consider that Y's use of the Footage, over which X has copyright, by quoting the same in the Movie without any indication of the source is not compatible with "fair practices" in terms of the method and manner (rather than remaining at mere violation of Article 48, paragraph (1), item 1 of the Copyright Act), and the quotation does not fall under lawful quotation, as prescribed in Article 32 paragraph (1) of the Copyright Act. Therefore, it cannot be acknowledged that the judgment of the prior instance, which is of the same effect, is erroneous.

Judgment rendered on August 23, 2018

2018 (Ne) 10023 Appeal case concerning claim for injunction of copyright infringement, etc. (principal action) and claim for damage compensation (counterclaim) (prior instance: Tokyo District Court 2016 (Wa) 37339)

Date of conclusion of oral argument: June 21, 2018

Judgment

Appellant (in the first instance, Defendant (principal action) and Plaintiff in counterclaim)

SIGLO Ltd.

Appellee (in the first instance, Plaintiff (principal action) and Defendant in counterclaim)

Ryukyu Asahi Broadcasting Corporation

Main text

1. The appeal of the present case shall be dismissed.
2. The appellant shall bear the cost of the appeal.

Facts and reasons

No. 1 Object of the appeal

1. In the prior instance judgment, the part in which the Appellant lost in regards to the claims made in the principal action shall be revoked.
2. The part of the Appellee's claims pertaining to the above revocation shall be dismissed.
3. In the prior instance judgment, the part pertaining to the counterclaim shall be revoked.
4. The Appellee shall pay to the Appellant 19,500,000 yen and the money accruing at the rate of 5% per annum from April 5, 2016 until completion of payment.
5. The court costs for the first and second instances shall be borne by the Appellee.
6. Provisional execution declared for paragraph 4.

No. 2 Outline of the case (hereinafter, abbreviations shall conform to the usage in the prior instance judgment)

1. The present case concerns the following principal action and counterclaim.

(1) Principal action

In the principal action, the Appellee, who is the author and copyright holder

of the footage numbered 1 through 4, as indicated on the Description of Works (the footage numbered 1 through 4, collectively referred to as the "Footage") in Attachment 1 of the prior instance judgment, claimed, concerning the movie indicated in the Description of Movie in Attachment 3 of the prior instance judgment which was created by the Appellant by using the Footage without the Appellee's permission (the Movie), the following: [i] the Appellant's act of screening the Movie constitutes infringement of the Appellee's right of screen presentation (Article 22-2 of the Copyright Act); [ii] the Appellant's act of selling DVDs on which the Movie is recorded constitutes infringement of the Appellee's right to distribute (Article 26, paragraph (1) of the Copyright Act) the Footage; [iii] failure by the Appellant to indicate the name of the Appellee upon screening the Movie constitutes infringement of the Appellee's right to indicate the author's name (Article 19, paragraph (1) of the Copyright Act) for the Footage; and [iv] with regard to the footage numbered 2, the parts numbered [11] through [16] of "Work Numbered 2 on Description of Works" in Attachment 2-2 of the prior instance judgment (approximately 8 seconds; the parts indicated as "parts not yet made public" in the same Attachment), and with regard to the Footage 4, the parts numbered [1] through [4] of "Work Numbered 4 on Description of Works" in Attachment 2-4 of the prior instance judgment (approximately five seconds; the parts indicated as "parts not yet made public" in the same Attachment) are works which are not yet made public. As such, the Appellee claimed that the screening of the Movie by the Appellant using the footage of the aforementioned parts constitutes infringement of the Appellee's right to make the work public (Article 18, paragraph (1) of the Copyright Act), among other claims, and demanded the following, respectively: [i] pursuant to Article 112, paragraph (1) of the Copyright Act, injunction against the screening of, public transmission of, and making transmittable the Movie including the Footage, as well as against the distribution of copies of the Movie pursuant to Article 112, paragraph (1) of the Copyright Act; [ii] pursuant to paragraph (2) of the same Article, deletion of the Footage from the media on which the Movie is recorded as well as the media on which the Footage is recorded; [iii] pursuant to the right to claim compensation for an act of tort of copyright infringement, payment of damages in the amount of 1,110,160 yen and the delinquency charge accruing at the rate of 5% per annum, as prescribed by the Civil Code, for the period from June 21, 2015, which is the day on which the act of tort took place, until completion of payment; [iv]

pursuant to the right to claim compensation for an act of tort of infringement of an author's moral right, payment of damages in the amount of 3,000,000 yen and the delinquency charge accruing at the rate of 5% per annum for the period from June 21, 2015, which is day on which the act of tort took place, until completion of payment; and [v] pursuant to Article 115 of the Copyright Act, posting of an apology ad, which indicates the Content of Apology Ad in Attachment 5 of the prior instance judgment as per the guidelines indicated in the Guidelines for Apology Ad on Attachment 4 of the prior instance judgment.

(2) Counterclaim

The counterclaim case is as follows: [i] concerning the use of the Footage in the Movie, the Appellant claimed that a set of activities by the Appellee of twice refusing the Appellant's request for permission and then filing the principal action constitutes violation of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as "Anti-Monopoly Act"), as the concerted refusal to deal or as the individual refusal to deal, thereby constituting an act of tort against the Appellant. Based on this claim, the Appellant claimed against the Appellee, pursuant to the right to claim compensation for an act of tort, payment of damages in the amount of 13,920,000 yen and the delinquency charge accruing at the rate of 5% per annum, as prescribed by the Civil Code, for the period from April 5, 2016, which is day on which the act of tort took place, until completion of payment; and [ii] by arguing that the act by the Appellee of keeping the content of negotiations with the Appellant concerning the Footage a secret and broadcasting, through its broadcast wave, that the Appellee filed the principal action, and posting the same content on its website, followed by release of the same content to the mass media constitutes an act of tort against the Appellant, the Appellant claimed against the Appellee, pursuant to the right to claim compensation for an act of tort, payment of damages in the amount of 5,580,000 yen and the delinquency charge accruing at the rate of 5% per annum, as prescribed by the Civil Code, for the period from April 5, 2016, which is day on which the act of tort took place, until completion of payment, respectively.

2. With regard to the prior instance judgment rendered for the principal action, the court entirely approved the claim for injunction and the claim for deletion, partially approved the claim for damage compensation, dismissed the other points (remainder of the claim for damage compensation, and the claim for posting of an apology ad), and as for the counterclaim, entirely dismissed the claims.

In response, the Appellant, who was dissatisfied with the part of the judgment with regard to which the Appellant lost, filed the present counterclaim.

(omitted)

No. 3 Judgment of this court

1. Concerning the claims made in the principal action, this court determines that it is reasonable to accept the claims to the extent as accepted in the prior instance judgment, dismiss the other points, and as for the claims made in the counterclaim, entirely dismiss those claims.

The reasons for the above are as described in No. 3, 1 through 10 in the prior instance judgment (from line 13 on page 19 until line 14 on page 31 in the prior instance judgment) in addition to amending the prior instance judgment, as per paragraph 2, and adding the judgment made against the Appellant's claims in the present examination, as per paragraph 3.

2. Amendment to prior instance judgment

- (1) The following shall be added in a new paragraph after the end of line 4 on page 20 of the prior instance judgment.

"The above footage was obtained from E (a UK national), who is a member of the "Futenma-Henoko Action Network". Upon borrowing the tape on which the above footage is recorded, A was given a warning from E as to the need to ask the Appellee for permission upon using the footage."

- (2) The following shall be added in a new paragraph after the end of line 14 on page 20 of the prior instance judgment.

"However, F and A did not make a new request to the Appellee for the licensing of the Footage or ask for reasons for not being granted the license, but instead, used the Footage without permission and completed the Movie."

- (3) Add "8," after "Exhibits Otsu 1, 2," in line 15 on page 20 of the prior instance judgment.

- (4) From lines 24 to 25 on page 26 of the prior instance judgment, change the words "Article 5, paragraph (1), items (i) and (ix) of the Code of Civil Procedure" to "Article 5, items (i) and (ix) of the Code of Civil Procedure."

- (5) On line 13 on page 30 of the prior instance judgment, change the words "the present case" to "the present principal action case."

- (6) On line 9 on page 31 of the prior instance judgment, change "a total of 31 seconds" to "a total of 34 seconds."

3. Concerning the Appellant's claims in the present examination

Addition shall be made to the judgment within a necessary extent in light of the reasons for appeal.

(1) Identification concerning the claim for injunction, etc. (pertinent to Issue 1)

In short, the Appellant's argument is such that, with regard to the claims made in the principal action, identification concerning the "claim seeking injunction and deletion" is inadequate.

Therefore, review of this point shows that, the claim for injunction in the present case (equivalent to paragraph (1) of the main text of the prior instance judgment) is such that the Appellee demands, with regard to the movie indicated in the Description of Movie on Attachment 3 of the prior instance judgment (the Movie) containing the footage numbered 1 through 4 as indicated in the Description of Works on Attachment 1 of the prior instance judgment (the Footage), which are works of the Appellee, for prohibition of screening of, public transmission of, and making transmittable, as well as distribution of copies. The Attachments specifically identify the Footage, which constitutes the works being subject to infringement, and the Footage, which is to be the subject of injunction, respectively.

The claim for deletion in the present case (equivalent to paragraph (2) of the main text of the prior instance judgment) is such that the Appellee demands deletion, from the media on which the movie indicated in the Description of Movie on Attachment 3 of the prior instance judgment (the Movie) is recorded, of the footage numbered 1 through 4 (the Footage) in Attachment 1 of the prior instance judgment, which are works of the Appellee, and as described above, it can be acknowledged that the Footage and the Movie are specifically identified in the Attachments.

If the identification is made to the extent as described above, it should be said that such identification is normally considered sufficient as identification of the subject of execution, and it is not understood that further identification is necessary with regard to the automatic public transmission server or copies of works, or the recording medium of the Movie.

While the Appellant makes an issue of whether or not the Footage which constitutes the works having been infringed constitutes works of movies, as stipulated in the Copyright Act, or works which are not yet edited for use as materials, such matter does not pose any problem with regard to the identification, in itself, of the Footage either way, and thus this argument is improper from the

perspective of identification concerning the claim.

Based on the above, the Appellant's claims concerning the identification of claims cannot be accepted.

(2) Concerning the indication of the author's name (pertinent to Issue 3)

A. The Appellant argues that the absence of indication of the author's name is active manifestation of the author's intention to keep the author's name of the work concerned unknown, and that Article 19, paragraph (2) of the Copyright Act can be interpreted as follows (and thus the absence of indication of the Appellee's name in the Movie does not establish infringement of the right to determine the indication of the author's name): "Concerning a work which does not have the author's name indicated thereon, it can be considered that the author exercised his or her right not to indicate the author's name, and thus, upon using such work, it is sufficient to use the same as an anonymous work."

However, in the present case, there is no evidence to acknowledge that the Appellee chose to make the Footage public as anonymous works in the first place, or in other words, that the Appellee actively exercised its right not to indicate the author's name for the Footage.

Accordingly, since the precondition, in itself, that the Footage comprises anonymous works is improper, the Appellant's claims shall not be accepted, and there is no need to examine any other points.

B. Concerning the hypothetical claims in the present examination

The Appellant makes a hypothetical claim in the present examination, among other claims, to the effect that, while Article 19, paragraph (3) of the Copyright Act stipulates that "the name of the author may be omitted if it is found that doing so is unlikely to harm the interests of the author in a claim to authorship, in light of the purpose of the work and the circumstances of its exploitation, provided that the omission is compatible with fair practices," the Appellant was in the place of having to omit the indication of the Appellee's name as an author (copyright holder) pursuant to "fair practices," and that this act consequently satisfies all requirements of the same paragraph.

However, in the first place, it cannot be acknowledged (nor is there any specific proof in this regard) that omission of indication of the author's name pertaining to the Footage satisfies the requirement of "doing so is unlikely to harm the interests of the author in a claim to authorship, in light of the purpose of the work and the circumstances of its exploitation," as prescribed in Article 19, paragraph (3) of the Copyright Act, and as described below in (3), the

precondition that the Appellant had no choice but to omit the indication of the Appellant's name as the author (copyright holder) pursuant to "fair practices" is, in itself, improper.

Accordingly, the Appellant's above claim cannot be accepted, either.

(3) Concerning the defense of quotation (pertinent to Issue 4)

A. The Appellant argues that the prior instance judgment is erroneous because it did not approve the defense of quotation (Article 32, paragraph (1) of the Copyright Act) by determining that the use of the Footage in the Movie without making any indication as to the source either in the Parts Used or in the credits at the end is not compatible with "fair practices."

Therefore, review of this point shows the following. The parties are not in dispute over the fact that the Footage edited and managed by the Appellee for press purposes was duplicated and used without the Appellee's permission and without making any indication of the name of the Appellee, who is the copyright holder. Meanwhile, the indication of source is, in the first place, an obligation imposed on a quoter pursuant to the Copyright Act (Article 48, paragraph (1), item (i) of the Copyright Act), and in the second place, while it can be said that there is room to speculate that a certain measure of distinction has been made in terms of screen ratio and image quality between the parts created by Y in the Movie and the Parts Used, as pointed out in the prior instance judgment, it must be stated that said parts are not clearly distinguished from each other in the movie, and also that the distinction level is low, and thus the need to indicate the source is high also for the purpose of clarifying that the Parts Used have been quoted. Furthermore, in the case of a documentary film as in the present case, it can be said that what is being used as the movie material (the degree of accuracy and objectivity of the material) is an important factor that determines the quality of the Movie. Accordingly, even from this perspective, it is highly necessary to indicate the source if the materials have been quoted. On the other hand, in the present case, both the side that quotes (the Movie) and the side being quoted (the Footage) concern visually acknowledgeable images, and thus it is fully possible to indicate the source by way of captions, and furthermore, it cannot be acknowledged that doing so is particularly damaging to the value of expression by the side that quotes (the Movie). When these factors are taken into consideration upon considering the content and the like of the "Documentary filmmaker's statement concerning the best practice of fair use" (Exhibit Otsu 17), which has been pointed out in the

prior instance judgment, it should be said that in the case of using the Footage in the Movie by way of quotation, the source should have been indicated, also because this is a requirement to be acknowledged as lawful quotation, and it can be said that indication of the source is compatible with fair practices, or that it is in accordance with reason. This remains unchanged by the circumstance that, while the total play time of the Movie exceeds two hours, the parts using the Footage (the Parts Used) remain at a total of 34 seconds, and the circumstance that the Footage is the footage before being edited for a broadcast program.

Accordingly, it is reasonable to consider that the fact that the Appellant used the Footage, for which the Appellee has copyrights, and quoting the same in the Movie without indicating the source is not compatible with "fair practices" in terms of the method and manner (rather than remaining at merely violation of Article 48, paragraph (1), item 1 of the Copyright Act), and the quotation does not fall under the lawful quotation as prescribed in Article 32 paragraph (1) of the Copyright Act. Therefore, it cannot be acknowledged that the judgment of the prior instance, which is of the same effect, is erroneous.

B. On the other hand, the Appellant makes claims such as the following: [i] it is not appropriate to impose the burden of proof for "fair practices" on the user's side; [ii] with regard to whether or not the defense of quotation can be established in the present case, it is natural to take into consideration the Appellee's reason, it itself, for not granting permission for the use of the Footage (the reason for not granting permission); [iii] since posting the author's name in the credits at the end means tribute of praise according to "fair practices," the Appellant, whose request for permission had been rejected, should have avoided making the indication which suggests that the Appellee gave its permission; and [iv] in the first place, the act of turning down the defense of quotation based on the reason of not indicating the source is, in itself, erroneous.

However, as described below, none of the above claims can be accepted.

Concerning the above [i], given that Article 32, paragraph (1) of the Copyright Act is only a restrictive provision for the exercise of copyright, it is reasonable to understand that, with regard to the application of the same, basically the side insisting on application should bear the burden of proof for the claim of fulfilling the requirement.

Concerning the above [ii], Article 32, paragraph (1) of the Copyright Act is

a restrictive provision concerning copyright, and quotation as approved by this provision is, in the first place, considered lawful even without the copyright holder's permission, and it must be said that, upon determining the applicability of lawful quotation, there is no room for considering whether or not the right holder granted a license for the copyright, or for the reason thereof in the case where no permission was given.

Concerning the above [iii], the prior instance judgment points out that it cannot be acknowledged that the failure to indicate the copyright holder of the footage even in the credits at the end should be approved as a fair practice. In other words, the prior instance judgment is not such that if the Appellee's name is indicated in the credits at the end, the footage should immediately be approved as lawful quotation. What is being asked there is only whether or not the source was indicated, and the reason, in itself, for not indicating the Appellee's name in the credits at the end is not at issue (even if there are "fair practices" as claimed by the Appellant, it does not mean that the Appellee's name cannot be indicated for the Parts Used). As such, the Appellant's argument is improper.

Concerning the above [iv], setting aside whether or not indication of source at all times is a necessary requirement for lawful quotation as prescribed in Article 32, paragraph (1) of the Copyright Act, it is acknowledged that the source should have been indicated at least in the present case (as a requirement for lawful quotation), as described in the above A.

C. Based on the above, the Appellant's claim concerning the defense of quotation cannot be accepted.

(4) Concerning the abuse of right (pertinent to Issue 5)

A. The Appellant argues that the prior instance judgment is erroneous because it did not acknowledge the Appellee's exercise of copyright and author's moral right as constituting abuse of right by pointing out various circumstances, such as the following, before and after the filing of the principal action: [i] the Appellant consistently and sincerely kept asking the Appellee for licensing of the Footage, apologized as requested by the Appellee, and expressed its intention to pay an appropriate price for the Footage, and then, by presenting rational reasons, sought for reconsideration of the various conditions presented by the Appellee. Objectively, it can be viewed that the negotiations over the licensing conditions had been going on up to the point immediately before the principal action was filed; [ii] on the other hand, the Appellee's side

unilaterally quit the negotiations without contacting the Appellant at all in this regard, and filed the principal action; and [iii] even after filing the principal action, the Appellee did not explain the reason for not giving permission, and did not give any proof as to the validity of its conduct.

However, the facts of the present case are as recognized in "1. Findings" under "No. 3 Judgment of this court" in the prior instance judgment (from line 13 on page 19 until line 20 on page 22 in the prior instance judgment) (provided that amendment shall be made as per the above 2), according to which the following can be acknowledged among other circumstances: [i] the Appellant made a request to the Appellee for licensing of the Footage approximately three years after the start of planning and producing the Movie (around 2012), which is approximately four months earlier (February 19, 2015) than the day of release of the Movie (June 20 of the same year), and the reason given for the request is only recapitulative, indicating that "the documentary film, 'Okinawa (tentative title),' directed by A and produced by SIGLO Ltd., is a work created in commemoration of the 70th anniversary since the end of the Battle of Okinawa, and lasts for two hours and a half (scheduled), depicting the history of Okinawa from the ground battles in Okinawa until the present, particularly how the presence of US military bases in Okinawa has oppressed the region and about the actual situation of sexual violence, based on the results of interviews conducted with both the Okinawa side and the US side. The movie is scheduled to be released on June 20 this year at the Iwanami Hall in Tokyo and the Sakurazaka Gekijo in Okinawa"; [ii] the Appellant made a request to the Appellee for licensing of the Footage only for the above one time before the Movie was released, and despite not being granted a license by the Appellee, used the Footage anyway without the permission and completed the Movie, followed by release of the same; and [iii] even after the release of the Movie, the Appellant did not give any reason for using the Footage without any permission until the Appellee's side demanded explanation, and did not exactly acknowledge the fact of infringement of right (illegality) head-on; for example, Appellant claims fair use during the negotiations afterwards.

When these circumstances are taken together, it is clear that the Appellant cannot be viewed as having kept up, throughout before and after the release of the Movie, sincere negotiations with the Appellee concerning the licensing of the Footage. It cannot be said that the points made in the above [i] and [ii] as claimed by the Appellant accurately reflect the truth of matters, and they cannot

be accepted as the grounds or circumstances providing basis for abuse of right.

As for the point made in the above [iii] as claimed by the Appellant, it cannot be acknowledged that the Appellee's pursuit of action or attitude during the action after the filing of the principal action involves special circumstances in which the exercising of its right should be considered abuse of right.

Accordingly, the claim of abuse of right which is based on the negotiation process and other matters between the parties shall be considered groundless.

B. In addition, the Appellant argues, among other things, that the circumstances to be comprehensively taken into consideration concerning whether or not the defense of quotation can be established should be compatible with the circumstances which should be taken into consideration concerning the determination of the establishment of abuse of right, but that the prior instance judgment did not engage at all in the comprehensive consideration regarding this point pursuant to relevant standards, and thus the judgment should not have reached the conclusion that not falling under quotation does not constitute abuse of right.

However, in the first place, the defense of quotation as claimed by the Appellant cannot be established, and there is no error in the prior instance judgment concerning this point, as respectively described in the above (3).

Accordingly, the claim of abuse of right which is based on the claim of defense of quotation shall also be considered groundless.

C. Based on the above, in the present case, the Appellee's exercise of copyright and author's moral right for the Footage against the Appellant cannot be valued as falling under abuse of right, and the Appellant's claim to the contrary cannot be accepted.

(5) Concerning illegality of the acts [i] through [iv] (pertinent to Issue 8)

The Appellant argues that the Appellee's acts [i] through [iv] fall under unfair trade practices pursuant to Article 2, paragraph (9), item (i), B of the Anti-Monopoly Act (concerted act of refusal of transaction) or Article 2, paragraph (9), item (vi), B, second paragraph of the acts designated by the Fair Trade Commission (singular act of refusal of transaction), and also falls under an act of tort against the Appellant as the Appellee's abuse of right, thereby claiming that the prior instance judgment regarding this point is erroneous.

However, while the Appellee's acts [i] through [iv] are, respectively, none other than the exercise by the Appellee of its copyright and author's moral right, it should be understood that the exercise of copyright and author's moral right

should not be subject to the application of the provisions of the Anti-Monopoly Act unless the exercise of said rights deviates from the purport of the copyright system or is unlawful in a way that is against the objective of the system.

Put simply, as described in the above (4), it cannot be acknowledged that there are any grounds or circumstances which provide basis for the claim that the exercise of copyright and author's moral right by the Appellee constitutes abuse of right, and thus the Appellant's claim lacks the premise.

Generally speaking, given that the Appellee is in a position to monopolize the footage and materials obtained as a news agency through interviews (in the first place, it is obvious as a rule of thumb that there are sites and situations where no interview, in itself, would be permitted except to news agencies; in that case, it can be said that the news agencies are in a position to monopolize the footage and materials obtained through interviews; it can be said that this becomes even more obvious if certain requirements are to be imposed on news agencies in order to be allowed to conduct interviews), it can be said that the obligation to grant a license for the Movie to a third party may arise under some circumstances, and thus it should be said that refusal to give the permission, by hiding behind the protection of copyright and author's moral right, under such circumstances also gives room for the view that such refusal is illegal under the Anti-Monopoly Act, but in the present case, it cannot be acknowledged that such circumstances actually exist.

Accordingly, the Appellant's claim concerning Issue 8 shall be considered groundless, without having to examine any other points.

(6) Concerning illegality of the news report on the filing of the principal action (pertinent to Issue 9)

The content which was broadcast by the Appellee and was posted on its website concerns the following, as per the prior instance judgment; namely, that [i] the Appellee filed a copyright infringement case against a movie production company; [ii] the footage which lasts for 42 seconds and which was taken by the Appellee of the accident of the U.S. helicopter crash onto Okinawa International University was used in the Movie without permission; [iii] although the Appellee demanded that the production company apologize, the production company responded by arguing that "the footage taken by a broadcasting station has a high level of public nature and can therefore be used freely"; [iv] the Movie is also sold in a DVD, and a subtitled version of the Movie is currently being created; and [v] the representative of the production

company made a statement as to not seeing the complaint, and thus it can be said that the report, in itself, is generally consistent with the objective facts of the present case.

It is obvious that the above report, as shown by its content, focuses mainly on communicating the objective fact that an action was filed by the Appellee (the above [i]), and as shown by the fact that the report introduces, to some extent, arguments made by the Appellant's side, as indicated in the above [iii], it can be said that the report is generally neutral, and there does not seem to be any specific circumstances based on which further decisions can be made, such as that the report is aimed at manipulating information by intentionally distorting facts and that the purpose of the report is to harm the Appellant's honor and reputation.

Therefore, the Appellant's claim concerning the above report shall be considered groundless, without having to examine any other points.

No. 4 Conclusion

As described above, the present appeal shall be considered groundless and shall therefore be dismissed. The judgment shall be rendered in the form of the main text.

Intellectual Property High Court, Third Division

Presiding judge: TSURUOKA Toshihiko

Judge: TERADA Toshihiko

Judge: MAGIRA Hiromitsu