

### **Holding**

The judgment in the second instance shall be reversed.

This case shall be remanded to the Intellectual Property High Court.

### **Grounds**

Regarding reasons for petition for acceptance of final appeal to this Court (excluding those not considered) by Yasuhiro Umeda and other counsel for appellant X1, and reasons for petition for acceptance of final appeal to this Court (excluding those not considered) by Masayuki Matsuda and other counsel for appellant X2, by Hiroshi Okazaki and other counsel for appellant X3, by Tetsuo Maeda and other counsel for appellant X4, by Makoto Ito and other counsel for appellant X5, and by Yukimasa Ozaki and other counsel for appellant X6.

1. In this case, the appellants, who are broadcasting organizations, assert against the appellee, who provides a service, called “Maneki TV,” using a device having a function to automatically transmit a broadcast program upon demand by a user (the “Service”), that the Service infringes the right to make transmittable (Article 99-2 of the Copyright Act) with regard to each appellant’s broadcasts and the right of public transmission (Article 23, Paragraph 1 of the Copyright Act) with regard to broadcast programs produced by each appellant, and thereby seek injunctive relief against making the broadcasts transmittable and against the public transmission of broadcast programs, as well as damages.
2. A summary of the facts determined by the court of the second instance, *i.e.*, the Intellectual Property High Court (“IP High Court”), is as follows:
  - (1) Each of the appellants (other than appellant X4) is a broadcasting organization that has the right to make transmittable the broadcasts provided in a list of broadcasts attached to the IP High Court’s judgment (collectively, the “Broadcasts”). Party A used to be a broadcasting organization and used to have the right to make transmittable a broadcast provided in said list.

Each of the appellants (other than appellant X4) and Party A produced each of the broadcast programs provided in the list of broadcast programs attached hereto (collectively, the “Programs”).

Appellant X4 is a broadcasting organization that succeeded the rights and obligations relating to all of Party A’s business other than its group management business on October 1, 2008 as a result of company split.

- (2) A product, sold by Party B, called LocationFree (“LocationFree”) is used for the Service. LocationFree’s main component is a device (“Base Station”) that includes a built-in tuner for terrestrial analog television (TV) broadcasts and that performs a function of digitizing received broadcasts and automatically

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\* the translation was supervised by Haruaki Murao, an attorney at law in Tokyo

transmitting that data upon demand by users.

A user of LocationFree can, by setting up a Base Station and a terminal device, which is located with the user (*e.g.*, dedicated monitor), so that they communicate exclusively with each other (one-to-one) via the Internet, view using the terminal device the broadcast digitized and transmitted to said terminal device by the Base Station. Specific procedures are: (i) the user operates the terminal device, which is located with the user, to request transmission of a certain broadcast; (ii) that request is relayed to the corresponding Base Station via the Internet; (iii) the terrestrial analog broadcast received through the television (TV) antenna is continuously inputted to the Base Station and such broadcast is automatically digitized by said Base Station upon receipt of the abovementioned request for transmission; (iv) after that, the digitized data is automatically transmitted to the user's terminal device via the Internet; and (v) the user views the received broadcast by operating the terminal device.

- (3) In order to provide the Service, the appellee installs at its office a Base Station owned and sent by a user in order to receive the Service from the appellee, connects the Base Station with a television (TV) antenna via a distribution device or the like, and connects the Base Station with the Internet upon payment of an admission fee of 31,500 yen and monthly usage fees of 5,040 yen from the user.

A user of the Service ("User") can view the broadcast aired in the area where a Base Station is installed by operating a terminal device located with the User that communicates with its corresponding Base Station.

3. The appellants assert that the appellee is infringing their right to make transmittable, claiming that the appellee is enabling Users to view a Broadcast by inputting the Broadcast to a Base Station or by connecting a Base Station to which the Broadcast is inputted with the Internet, which constitutes making the Broadcast transmittable.

The appellants also assert that the appellee is infringing their right of public transmission, claiming that the appellee's transmission of the Programs to a terminal device owned by a User, who is "public," is a public transmission of the Programs.

4. The IP High Court dismissed all of the claims brought by the appellants upon making the following determinations.

- (1) The act of making a broadcast transmittable is premised on the use of an automatic public transmission server (Article 2, Paragraph 1, (ix-5) of the Copyright Act), and the automatic public transmission server must be a device having a function of transmitting wireless communications or wire telecommunications, which can be directly received by the "public" (*i.e.*, unspecified or many people). Each Base Station merely has a function of one-to-one transmission, *i.e.*, transmitting data to a single corresponding device that is already set up, and thus cannot be considered an automatic public transmission server. Hence, making a Broadcast available for the User to view by inputting the Broadcast to the Base Station or otherwise does not constitute making the Broadcast transmittable, and, therefore, infringement of the right to make transmittable is not established.

- (2) Because each Base Station is not an automatic public transmission server as described above, transmission of the Programs to a User's terminal device is not automatic public transmission, and, therefore, infringement of the right of public transmission is not established.
5. However, the abovementioned determinations by the IP High Court cannot be approved for the following reasons.
- (1) Infringement of right to make transmittable

A. "To make transmittable" means an act that makes automatic public transmission possible by a method set forth in Article 2, Paragraph 1, (ix-5) (a) or (b) of the Copyright Act, such as inputting information to an "automatic public transmission server" already connected with a telecommunications line that is provided for use by the public, and "automatic public transmission server" means a device which, when connected with a telecommunications line provided for use by the public, has a function of performing automatic public transmission of information which is either recorded on an automatic public transmission portion of a recording medium of such device or is inputted into such device (Article 2, Paragraph 1, (ix-5) of the Copyright Act).

While "automatic public transmission" is a form of public transmission (Article 2, Paragraph 1, (ix-4) of the Copyright Act), and "public transmission" means a transmission intended for direct reception by the public from the transmitter's perspective (Article 2, Paragraph 1, (vii-2) of the Copyright Act), the objective and purpose of the Copyright Act in specifying "to make transmittable" as an act subject to regulation is to regulate a preparatory act that is carried out before "automatic public transmission" is actually made in the circumstances where, among forms of "public transmission," the transmission which occurs automatically in response to a request from the public (subsequently defined as "automatic public transmission") was already subject to regulation. Taking this into account, it must be considered that a device which, when connected with a telecommunications line provided for use by the public, has a function of automatically transmitting information inputted into said device in response to a request from a receiver is an "automatic public transmission server" if the transmission using said device can be said to be an "automatic public transmission" despite the device only having the function of transmitting to a single device that has already been set up.

B. In addition, considering that "automatic public transmission" is premised on the use of a device with a function of automatically transmitting information inputted into said device in response to a request from a receiver, it is reasonable to consider that the actor is the person who makes it possible for said device to automatically transmit the information in response to a request from the receiver. When said device is connected with a telecommunications line that is provided for use by the public and information is continuously inputted therein, it is reasonable to consider that the actor of the transmission is the person inputting information to said device.

C. In this case, each Base Station has a function of, by connection to the Internet, automatically digitizing and transmitting information inputted therein upon demand by the receivers, and is connected with the Internet, and information is continuously inputted therein. Because the appellee connects a Base Station with a television (TV) antenna managed by the appellee via a distribution device or the like so that the Broadcast received by said television (TV) antenna is continuously inputted to the Base Station, and installs and manages the Base Station at its office, it is reasonable to conclude that the actor of transmission by using the Base Station is the appellee, since the person inputting the Broadcast to the Base Station is the appellee even though the User is the owner of the Base Station. Further, because anyone can use the Service upon execution of a contract with the appellee to use said Service without the relationship with the appellee being an issue, the User of the Service is thus “public,” as in an unspecified person, from the perspective of the appellee, *i.e.*, the actor of the transmission. Thus, the transmission using the Base Station is “automatic public transmission,” and the Base Station is an “automatic public transmission server.” Consequently, it must be said that the appellee’s act of inputting the Broadcast to the Base Station, which is an “automatic public transmission server” connected with the Internet, constitutes making the Broadcast transmittable.

(2) Infringement of right of public transmission

Because it is obvious that the actor transmitting the data from a television (TV) antenna to the Base Station for the Service is the appellee, and the actor transmitting the data from the Base Station to a User’s terminal device should be understood to also be the appellee as described in (1)C. above, the transmission of the Programs from the television (TV) antenna to a User’s terminal device constitutes public transmission of the Programs.

6. Accordingly, there are violations of laws that obviously affect the judgment in the IP High Court’s decisions denying that the Base Station is an automatic public transmission server merely because the Base Station only has the function of transmitting the data to a single device that has already been set up and not finding the appellee’s infringement of the right to make transmittable and of the right of public transmission. The appellants’ claims are thus with merit. The IP High Court’s judgment must be reversed and this case shall be remanded to the IP High Court for further proceedings.

Therefore, the judgment was unanimously rendered in the form of the Holding.

Justice Mutsuo Tahara, Presiding

Justice Kouhei Nasu

Justice Kiyoko Okabe

Justice Takehiko Otani

## Appendix

### List of Broadcast Programs

1. X1

Name of Program: *Variety Seikatsu Sho Hyakka*

Name of Program: *Fukushi Network*

2. X2

Name of Program: *Odoru! Sanma Goten!*

3. X3

Name of Program: *Hiroshi Sekiguchi's Tokyo Friend Park II*

4. A

Name of Program: *MUSIC FAIR 21*

5. X5

Name of Program: *Ikinari! Ogon Densetsu*

6. X6

Name of Program: *Hello! Morning*

[This translation was supervised by Haruaki Murao, an attorney at law in Tokyo]