[Translation][*]

Holding

The judgment of the court of 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 the 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 the final appeal to this Court (excluding those not considered) by Masayuki Matsuda and other counsel for appellants X2 and X3, by Hiroshi Okazaki and other counsel for appellants X4 and X5, by Tetsuo Maeda and other counsel for appellants X6 and X7, by Makoto Ito and other counsel for appellants X8 and X9, and by Yukimasa Ozaki and other counsel for appellant X10.

1. In this case, the appellants, who are broadcasting organizations, assert against the appellee, who provides a service using a hard disc recorder, called Rokuraku II ("Rokuraku II"), with an Internet communication function, that said service infringes a right of reproduction for the copyrighted works, *i.e.*, broadcast programs, produced by each appellant, and for the sounds and images incorporated in the broadcasts made by each appellant (broadcast programs, and sounds and images incorporated in the broadcasts are collectively referred to as the "Broadcast Programs") (Articles 21 and 98 of the Copyright Act), and seek damages and injunctive relief against the appellee reproducing the Broadcast Programs.

   While the appellants assert that it is the appellee that reproduces the Broadcast Programs in providing the abovementioned service, the appellee asserts that the users of the abovementioned service legitimately reproduce the Broadcast Programs for private use and that it is not the appellee that reproduces the Broadcast Programs.

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 X1, X2, X4, X8, and X10 has a right of reproduction for each broadcast program provided in the list of copyrighted works attached hereto. Each of the appellants (other than appellant X6) is a broadcasting organization and has a right of reproduction for sounds and images incorporated in each broadcast provided in the list of broadcasts attached to the judgment in the first instance (each broadcast program provided in the list of copyrighted works attached hereto and the sounds and images incorporated in each broadcast provided in the list of broadcasts attached to the judgment in the first instance are collectively referred to as the "Programs").

   Party A used to be a broadcasting organization and used to have a right of reproduction for one of the broadcast programs provided in the list of copyrighted

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

works attached hereto and the same for sounds and images incorporated in one of the broadcasts provided in the list of broadcasts attached to the judgment in the first instance. The appellant X6 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 a company split.

(2) The appellee manufactures and sells or leases Rokuraku II.

Rokuraku II consists of two devices, one of which can be used as a main device and the other as a secondary device (the "Main Rokuraku" and the "Secondary Rokuraku" respectively). The Main Rokuraku includes a built-in tuner for terrestrial analog television (TV) broadcasts and performs a function of digitizing and recording received Broadcast Programs and a function of transmitting via the Internet the data relating to a recording. The Secondary Rokuraku has a function of instructing via the Internet the Main Rokuraku to record Broadcast Programs and thereafter, of receiving and playing the data from the Main Rokuraku relating to the recordings.

A user of Rokuraku II can, by setting up the Main Rokuraku and the Secondary Rokuraku to communicate exclusively with each other (one-to-one) via the Internet, view on the Secondary Rokuraku located in a different location from the Main Rokuraku the Broadcast Programs recorded by the Main Rokuraku. Specific procedures are: (i) the user operates the Secondary Rokuraku located with the user to request the recording of certain Broadcast Programs; (ii) that request is relayed to the corresponding Main Rokuraku via the Internet; (iii) the terrestrial analog broadcast received through a television (TV) antenna is inputted to the Main Rokuraku, the abovementioned Broadcast Programs relating to the request are automatically digitized and recorded by the Main Rokuraku when the abovementioned request for recording is received, and this data is then transmitted to the Secondary Rokuraku via the Internet; and (iv) the user plays the abovementioned data and views said Broadcast Programs by operating the Secondary Rokuraku.

(3) Around March 2005, the appellee commenced the service to lease sets of the Main Rokuraku and the Secondary Rokuraku or to sell the Secondary Rokuraku and lease only the Main Rokuraku (collectively, the "Service"), the appellee charging initial registration fees of 3,150 yen and monthly rental fees of 8,925 yen (for the former service) or of 6,825 yen (for the latter service).

A user of the Service can view the Broadcast Programs aired in the area where the Main Rokuraku is installed by operating the Secondary Rokuraku to request the recording of said Broadcast Programs.

3. The IP High Court denied the appellants' requests on the grounds that the appellee does no more than provide an environment that facilitates the reproduction by a user of the Service even though each Main Rokuraku is installed at a site managed and controlled by the appellee, and that the appellee shall not be deemed to be reproducing the Programs.

4. However, the abovementioned determinations by the IP High Court cannot be approved for the following reasons.

With respect to the service that enables a person to obtain reproduction of the Broadcast Programs, when a person who provides such service (the "Service Provider") under its management and control inputs broadcasts received by a television (TV) antenna to a device with the function of reproducing such broadcast (the "Reproduction Device") and the Broadcast Programs are automatically reproduced once a request for recording is sent to said Reproduction Device, it is reasonable to consider the Service Provider to be the actor of reproduction, even if the person who requests the recording is a user of said service. In other words, it is reasonable to take into account various factors such as the subject and method of reproduction, and the details and the extent of an entity's involvement in reproduction, and then to determine who can be deemed to be doing the reproducing of copyrightable works. In this case, the Service Provider not only provides an environment that facilitates the reproduction, but also plays an pivotal role in realizing the reproduction of the Broadcast Programs using a Reproduction Device by receiving broadcasts and inputting information relating to the Broadcast Programs to the Reproduction Device under its management and control. As such, it is virtually impossible for the user of said service to reproduce the Broadcast Programs unless the Service Provider conducts each of the acts in reproduction, even if the user sends a request for recording. Thus, the Service Provider can be deemed to be the actor of reproduction.

5. Accordingly, there are violations of laws that obviously affect the judgment in the IP High Court's decision denying the appellants' requests on the grounds that the appellee could not be deemed to be reproducing the Programs without determining how the Main Rokuraku is managed, etc., even if the Main Rokuraku for the Service is installed at a site managed and controlled by the appellee. The appellants' claims are with merit and the IP High Court's judgment must be reversed. This case shall be remanded to the IP High Court for further proceedings to determine how the Main Rokuraku is managed, etc.

Therefore, the judgment was unanimously rendered in the form of the Holding. Justice Seishi Kanetsuki provides a concurrence.

The concurrence by Justice Seishi Kanetsuki is as follows.

As there are issues related to this court's precedent with respect to standards of judgment for the actor of reproduction, etc. under the Copyright Act, I would like to express my opinion.

1. With respect to the standards, the so-called "Karaoke Hori ('Karaoke Doctrine')" from the decision by the Third Petty Bench of this Court on March 15, 1988 (Minshu Vol. 42, No. 3, p. 199) has often been referred to, and there are many judicial decisions, including the judgment of the first instance in this case, that determined the actor of reproduction in accordance with this doctrine. The "Karaoke Doctrine" recognizes a person who is not physically or naturally an actor as an actor from a legal perspective, and is based on a comprehensive consideration focused on the two factors of: (i) management of and control over the act; and (ii) attribution of profit. With this understanding of the doctrine, some critics point out that the doctrine does not have clear legal grounds, that its requirements are ambiguous, and that the scope of application is unclear. However, when determining the actor of "reproduction," "performance," "exhibition," "distribution," or any other act set forth in Article 21 and thereafter of the Copyright Act, an investigation merely from physical and natural perspectives is not sufficient, and a comprehensive investigation from social, economic,

and other perspectives must be conducted, although the interpretation different from the ordinary meaning of the language of the law should of course be avoided. I believe this is a logical legal judgment because the use of copyrighted works involves social and economic aspects.

Thus, the "Karaoke Doctrine" provides a legal interpretation of legal concepts, which is nothing more than a general method of legal interpretation. I believe that it is not appropriate to deem the "Karaoke Doctrine" a special legal theory. Accordingly, factors to be considered may change depending on the type of act in question, and the two factors, *i.e.*, management of and control over the act and attribution of profit, should not be deemed fixed factors. These two factors are merely important factors when determining the actor from social and economic perspectives. If the "Karaoke Doctrine" has wings as a special doctrine with two fixed requirements, I believe that it is a significant issue that should be reconsidered.

2. I understand that the IP High Court's judgment emphasized the fact that the user requests the recording, including program selection, at its discretion when identifying the user and not the appellee as the actor of the recording in this case. It can be said that this investigation was conducted with a focus on an aspect of the user's physical and natural act, *i.e.*, the operation of the recording device. Further, the judgment concluded that the use of the main device when self-managed by the user is private use and lawful, that even if the main device is managed by the appellee, the service provided by the appellee is merely to provide, in place of the user, the technical environments and conditions, required for smooth operation of the main device, and that this does not change lawful private use into infringing use. However, this view is questionable in several respects.

   As pointed out by this Court, since it is virtually impossible for the user to reproduce the Broadcast Programs even if the user makes a request for recording absent an action of receiving the broadcast and inputting the information relating to the Broadcast Programs to the Reproduction Device, the question of who manages and controls the process of receiving and inputting of the broadcast should have great significance in identifying the actor of the recording. Therefore, I believe it is not reasonable to put emphasis only on the fact that the requests for recording are made by the user as in the IP High Court's judgment, even if investigating the recording process of this case only from physical and natural perspectives.

   Furthermore, considering the function of Rokuraku II, the service to be provided using Rokuraku II obviously has great value to those residing overseas who are unable to directly receive Japanese television (TV) broadcasts at home, etc., and it is believed that installment and self-management of the main device in a coverage area is not always easy for such persons in terms of time, effort and cost. That is the very reason why this kind of business is viable, and it is not reasonable to downplay the social and economic significance of the management of the main device. It must be said that to consider that this system is a mere integration of private use does not reflect reality.

   It is also questionable to determine that the service provided by the appellee is only to provide environments and conditions, and that the fees paid by the user are only consideration for such service. In this case, what is provided by the appellee is a service specializing in receiving and recording of television (TV) broadcasts, and the appellee's business would not be viable without broadcasted television (TV) programs.

Hence, it is natural to consider that the user pays consideration for the service to record and view the television (TV) programs. In that context, I believe that the attribution of economic interests relating to exercise of copyrights and neighboring rights should be found. Although, the evaluation of profit attribution is not necessary in this case because the appellee can be identified as the actor of recording if the appellee's management of and control over the main device is found.

3. The IP High Court distinguished this case from the abovementioned precedent. Of course, this case is not identical to said precedent, but it can be understood that said precedent was based on the idea that it is reasonable to carry out a comprehensive investigation including social and economic aspects to identify who infringes the copyrights, rather than conducting such an investigation only from physical and natural perspectives. I believe that the IP High Court's judgment lacks such comprehensive perspective and is not a reasonable interpretation of the Copyright Act.

Justice Seishi Kanetsuki, Presiding

Justice Koji Miyakawa

Justice Tatsuko Sakurai

Justice Tomoyuki Yokota

Justice Yu Shiraki

Appendix

List of Copyrighted Works

1. X1

   Name of Program: *Variety Seikatsu Sho Hyakka*

   Name of Program: *Fukushi Network*

2. X2

   Name of Program: *Odoru! Sanma Goten!*

3. X4

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

4. A

   Name of Program: *MUSIC FAIR 21*

5. X8

   Name of Program: *Ikinari! Ogon Densetsu*

6. X10

   Name of Program: *Pet Daishugo! Pochi Tama*

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