8. International Law and Organizations

Xs v. Y
Supreme Court, December 8, 2011
Case No. (*jyu*) 603 of 2009
1545 Saibansho JIHO 7; 1366 HANREI TAIMUZU 93

Summary:

The Supreme Court denied the claim for a prohibition of broadcasting and payments of damages made by an administrative organ under the Ministry of Culture of the Democratic People's Republic of Korea (DPRK) and a company authorized by the said organ to manage the files of which copyrights the organ holds in Japan. The claims are related to the copyright of the nationals of an unrecognized State, such as DPRK under the Copyright Law of Japan and the Berne Convention.

Reference:

Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), Article 3; Copyright Law of Japan, Article 6 (iii); State Recognition.

Facts:

The appellants (the plaintiffs) are the Korean Film Export and Import Corporation, which is an administrative organ under the umbrella of the Ministry of Culture of the DPRK (X1) and a limited company, which is authorized to manage exclusively movies and pictures made by that Corporation (X2).

Japan acceded to the Berne Convention in 1899 and so did the DPRK in 2003. However, Japan has not recognized the DPRK as a sovereign state to this date.

The dispute stems from the fact that Nippon Television Network Corporation, the appellees (the defendant, Y) broadcast the North Korean films in a TV news program without the permission of Xs. Xs filed claims

for the prohibition of broadcasting and the payment of damages, with alleging that Y's act constituted a tort infringing X's copyright protected by Article 6(iii) of the Copyright Law of Japan. According to the Article, all the copyrighted works that the Berne Convention obliges Japan to protect shall be protected.

In the first instance, the Tokyo District Court dismissed all of the claims submitted by the plaintiff, and then, the Intellectual Property High Court, the court of second instance, dismissed the Xs' appeal concerning the application of the Berne Convention, while it partly affirmed X2's alternative claims.

Opinion:

The appeal is dismissed.

The present court decides that all the appellants' claims are unreasonable. The reason for this decision is somewhat different from the prior instances, as shown below.

1. The effect of a multilateral treaty under international law in the case of a unrecognized state's acceding to that treaty.

In general, where an unrecognized State has acceded to a multilateral treaty which is already effective in relation to Japan, such state's accession to the treaty cannot be deemed to immediately establish the relationship between Japan and the said unrecognized state in terms of rights and obligations under the treaty. However, this principle is not applicable when the obligation to be assumed under the treaty by its contracting parties is an obligation which has universal value under general international law. Therefore, it is appropriate to construe that Japan has discretion to decide whether or not to establish the relationship with the said unrecognized state in terms of rights and obligations under the Berne Convention.

2. In the case of the Berne Convention

In the case of the Berne Convention, while protecting works whose authors are nationals of the countries of the Union (Article 3(1)(a)), the Convention does not generally protect works whose authors are nationals of countries outside the Union. According to Article 3(1)(b), it protects the latter works only in the following two situations: (i) where they were

first published in one of the countries of the Union or (ii) where they were published simultaneously in a country outside the Union and in a country of the Union. Hence, the Convention aims to ensure protection of works on the premise of the framework of countries of the Union, and it does not intend to require the contracting parties to undertake any obligation which has universal value.

When North Korea acceded to the Berne Convention, which was already effective in relation to Japan, the government of Japan did not give public notice to announce that the Convention took effect in relation to North Korea. Moreover, according to the Ministry of Foreign Affairs (MOFA) and the Ministry of Education, Culture, Sports, Science and Technology (MECSST) Japan does not undertake the obligation to grant protection under the Berne Convention with respect to works of nationals of North Korea, an unrecognized State, as works of nationals of a country of the Union. Therefore, irrespective of whether North Korea has acceded to the Convention or not, Japan takes the position that it has no relationship with North Korea in terms of rights and obligations under the Berne Convention.

Taking all of these factors into consideration, it is appropriate to construe that Japan does not have the obligation to grant protection under Article 3(1) (a) of the Berne Convention with respect to works of nationals of North Korea, and therefore the Films do not fall within the category of works set forth in Article 6(iii) of the Copyright Law of Japan.

Editorial Note:

There has been a controversy on the nature of state recognition between two views: the Constitutive Theory and the Declarative Theory. According to the latter, a political entity that satisfies the requirements of statehood should be regarded as a sovereign State even for existing States that have not recognized that entity as a sovereign State.

In the present case, the Supreme Court seems to take the view of the Constitutive Theory as a general principle by denying the application of the Berne Convention between Japan and the DPRK, while it acknowledges the Declarative Theory exceptionally if a treaty provides for an obligation of universal value. Considering the fact that currently the Declarative Theory is dominant not only among scholars but also in state practices, the

adoption of the Constitutive Theory would be criticized.

In the first and second instances, the lower courts also adopted the Constitutive Theory as a rule and the Declarative Theory as an exception. However, they used different criteria for determining what kind of treaty can exceptionally be applied between an existing State and unrecognized State. While the Supreme Court depicts the treaty with "the obligation which has universal value", the lower courts described the treaty providing for the "obligation owed to the international community as a whole." Although it is not obvious whether the Supreme Court intentionally uses the different expression in order to indicate a different view from those of the lower courts, the "obligation of universal value" and "obligation owed to the international community as a whole" have different implications. The latter seems to be a so-called obligation *erga omnes*. The criterion to distinguish an obligation *erga omnes* and an ordinary obligation is the parties to which each obligation is addressed: the former obligation is to be borne vis-à-vis the international community as a whole, the latter is in force between particular States. In contrast, the criterion to distinguish the obligation of universal value and the other ordinary obligation is of difference in their contents, particularly in the values each treaty aims to realize.

In the present case, it seems appropriate for the Supreme Court to exclude the obligation under the Berne Convention from the obligation which has universal value. However, it does not indicate in detail what is the "universal value" in the international community at present. The Supreme Court should have elaborated the criteria it applies to treaties.

The present judgment is criticized from the perspective of its practical implication. If it is generally admitted that the Berne Convention cannot be applied between Japan and the DPRK, it does not protect the copyright of Japanese nationals either. Consequently, works produced in Japan could be copied and broadcasted in the DPRK and even exported to the third States, without violating any international law. This criticism sounds rational to some extent. As the Supreme Court alludes, however, it is the cabinet, not the courts, that has the discretion to decide whether Japan establishes legal relationship with an unrecognized State. Particularly as the MOFA and MECSST expressly have showed their position of denying the relationship with the DPRK in terms of rights and obligations under

the Berne Convention, it is not appropriate for the Supreme Court to reach the different conclusion by taking into account a purely judicial perspective.