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China Wenlian Sound-Video Publishing House et al. v. Guangdong Changjin Video-Audio Co., Ltd.

Citation: The Supreme People's Court's Civil Judgment No. Minsanzhongzi 5/2008

Date of judgment: October 24, 2008

Procedural history

The Guangdong Changjin Video-Audio Co., Ltd. (Changjin) sued, in the Hebei Province Higher People's Court, the China Wenlian Audio-Video Publishing House (Wenlian), Tianjin Tianbao Cultural Development Co., Ltd. (Tianbao Culture), Tianjin Tianbao Guangdie Co., Ltd. (Tianbao Guangdie) and Hebei Yinxiangren Audio-Video Products Wholesale Co., Ltd. (Yinxiangren) for acts of publishing, reproducing, distributing and marketing works, such as "Butterfly Cup", which infringed its exclusive right of distribution. In the first-instance judgment, the acts were held to have infringed the right. The Wenlian et al. appealed to the Supreme People's Court.

Issue

1. Establishment of the performership in operatic works
2. Determination of the authorization under the circumstance where both parties had been licensed or authorized to publish and distribute the sound and video recordings
3. Whether the reproducer entrusted with reproduction of the audio and video recordings could be exempted from liabilities for infringement under the exemption clause of the entrustment contract?

Facts

The works in suit were the sound and video recordings of five works of the Hebei clapper operas, Butterfly Cup, Chen Sanliang, Remorse from Dual Errors, Clear-wind Pavilion and Blood-stained Chinese Plum Flowers. Changjin obtained the full authorization, including the performer's right in the relevant works: from the Hebei Province Hebei Clapper Opera Theater, the exclusive right to use the same for publishing and distributing the sound and video recordings of the operas Remorse from Dual Errors, Butterfly Cup and Chen Sanliang it staged; from Shijianzhuang City Heibei Clapper Opera Troupe, the right to record, publish and distribute the works of the operas, such as Clear-wind Pavilion it staged; from Baoding City Heibei Clapper Opera Troupe, the exclusive right to use for publishing and distributing the audio and video recordings of the operatic works it staged, such as Blood-stained Chinese Plum Flowers. Besides, it obtained the authorization from the producers to make audio and video recordings: from the Hebei TV Station, producer of opera performance, the right to publish and distribute the sound and video recordings of Butterfly Cup and Chen Sanliang; from the producer, Baoding City Heibei Clapper Opera Troupe; and the right to publish and distribute the sound and video recordings of the movie adopted from the traditional opera with realistic view Blood-stained Chinese Plum Flowers; and the copyright in the plays: the authorization of the right to publish and distribute the relevant opera plays respectively from the play and music writers or their heirs to the five operas. Changjin recorded and produced the works Remorse from Dual Errors and Clear-wind Pavilion itself.

Of the allegedly infringing sound and video recordings of the five operas Wenlian, Tianbao Guangdie and Tianbao Culture published, reproduced and distributed, Butterfly Cup was the same edition as that Changjin had produced; Chen Sanliang, Remorse from Dual Errors, Clear-wind Pavilion and Blood-stained Chinese Plum Flowers were different, and they were performed by the same performing troupe at different times, in respect of which, Wenlian and Tianbao Culture, respectively, obtained authorization from the copyright owners and/or main performers of the relevant operas.

It was agreed in the Letter of Entrustment with Reproduction of the Sound Recordings and Video Recordings concluded between Tianbao Culture and Wenlian that the latter was legally and fully responsible with regard to the matters of the contents of, and copyright in, the sound and video

recordings to be reproduced under the contract.

Rule of law

Article 39, paragraph one, of the Copyright Law *A producer of sound recordings or video recordings who exploits, for making a sound recording or video recording, a work created by another person shall obtain permission from, and pay remuneration to, the copyright owner.*

Article 40 *When making a sound recording or video recording of a performance, the producer shall conclude a contract with, and pay remuneration to, the performer.*

Rule 23 of the Regulations for the Administration of Sound and Video Recordings *Where a sound recordings or video recordings reproduction entity accepts entrustment with reproduction of sound recordings or video recordings, it shall conclude a contract for the entrusted reproduction with the entrusting publishing entity under the relevant State regulations; and verify the entrusting publishing entity's Sound Recordings or Video Recordings Publication License, copy of its Business License, and its sealed written Sound Recordings or Video Recordings Entrustment , and the copyright owner's written authorization.*

Article 41 of the Copyright Law *A producer of sound recordings or video recordings shall have the right to authorize others to reproduce, distribute, rent and communicate to the public on an information network such sound recordings or video recordings and the right to obtain remuneration therefor. The term of protection of such rights shall be fifty years, and expires on 31 December of the fiftieth year after the recording was first produced.*

Anyone who is authorized to reproduce, distribute and communicate to the public on an information network a sound recording or video recording shall also obtain permission from, and pay remuneration to, the copyright owner and the performer as prescribed by regulations.

Reasoning

The preparation, organization and rehearsal for performing dramatic works were all done by a performing entity, such as theater or troupe, and the performing entity also puts in the money needed

for the performance. A performance reflected the will of a performing entity. That was, for the whole performance, the performing entity was the performer in the sense of the Copyright Law, having the right to authorize another party to broadcast live or make sound or video recordings and/or reproduce and distribute the sound or video recordings. Without any special agreement, the actors/actresses did not enjoy said rights.

Changjin obtained the authorization for publishing and distributing the sound recordings and video recordings of Butterfly Cup, Chen Sanliang, Remorse from Dual Errors, Clear-wind Pavilion and Blood-stained Chinese Plum Flowers from the performing entity Hebei Province Hebei Clapper Opera Theater and the authorization from the producers of the sound recordings and video recordings, or itself was the producer; it obtained the authorization from the copyright owner under the circumstance where there were the copyright in the plays and/or music. The sound recordings and video recordings it distributed conformed to the provisions of Articles 39 and 40 of the Chinese Copyright Law. In respect of the sound recordings and video recordings legitimately made, Changjin enjoyed all the rights, including the right of distribution, under Article 41 of the Chinese Copyright law.

Changjin had concluded agreements respectively with the Hebei Province Hebei Clapper Opera Theater, Shijiazhuang City Hebei Clapper Opera Troupe and Baoding City Hebei Clapper Opera Troupe, and obtained the exclusive right to publish and distribute the video recordings of the operas in suit. Accordingly, Changjin enjoyed the exclusive right to publish and distribute the video recordings of the relevant operas. All these rights were reserved.

As for the operas Chen Sanliang, Remorse from Dual Errors, Clear-wind Pavilion and Blood-stained Chinese Plum Flowers, the versions thereof Chanjin distributed were different from those Wenlian and Tianbao Culture had published and distributed, and they were not made in the video recording producing process. Under Article 41 of the Copyright Law, the right of the producer of a video recordings was limited to prohibiting others from reproducing and distributing, without authorization, the video recordings it made; it had no right to prohibit others from reproducing and distributing recordings which were not produced thereby. However, Changjin enjoyed, in addition to the exclusive right to distribute the video recordings it distributed, the exclusive right to publish

and distribute the video recordings of the relevant operas. Without authorization from both Changjin the relevant performers, Wenlian and Tianbao Culture published and distributed the video recordings of the relevant operas without full authorization of the right, and they had infringed Changjin's right as mentioned above. Accordingly, they should be held civilly liable for ceasing the infringement and for paying for the damages.

Under Rule 23 of the Regulations for the Administration of Sound and Video Recordings, where a sound recordings or video recordings reproduction entity accepts entrustment with reproduction of sound recordings or video recordings, it shall conclude a contract for the entrusted reproduction with the entrusting publishing entity under the relevant State regulations; and verify the entrusting publishing entity's Sound Recordings or Video Recordings Publication License, copy of its Business License, and its sealed written Sound Recordings or Video Recordings Entrustment , and the copyright owner's written authorization. In the present case, Tianbao Guangdie verified the authorization from the main actors/actresses of the operas in suit, and it obviously failed to have met the obligation to pay the attention under the Regulations. Besides, its agreement with Wenlian on the responsibility was effective with regard to the two parties only, and should not be posed against a third party whose right was infringed.

Holding

1. The performer of a dramatic work in the sense of the Copyright Law was the performing entity, and individual actors/actresses did not enjoy the right of performance.
2. Publication and distribution of sound recordings and video recordings required authorization from the performers, video recording producers and the copyright owners or the relevant rights the publisher owned. That is, it required full authorization.
3. The sound recordings and video recordings reproducers should sufficiently perform the statutory obligation to make verification, and it should not be exempted from any liability for infringement because of the exemption clauses set forth in an entrustment contract.