

Chronology of the Case

2001	
Oct. 1	Law on Management Business of Copyright and Neighboring Rights comes into force.
Oct. 11	E-License Inc. registers with the commissioner of the Agency for Cultural Affairs as a copyright management business operator.
2006	
Oct. 1	E-License Inc. commences music copyright management operations in the field of broadcasting.
2008	
Apr. 23	On-site inspection of JASRAC by the Japan Fair Trade Commission (JFTC).
2009	
Feb. 27	Cease-and-desist order issued by the JFTC against JASRAC.
Apr. 28	JASRAC requests JFTC hearings.
May 25	JFTC decides to commence hearings.
Jul. 27	1 st hearing held.
2011	
Jun. 1	13 th hearing held. Hearings process concludes.
2012	
Jun. 12	JFTC notifies JASRAC of its decision (Note 1) to rescind its cease-and-desist order.
Jul. 10	E-License Inc. files a legal action with the Tokyo High Court demanding rescission of JFTC's decision to rescind the cease-and-desist order.
Sep. 6	JASRAC requests participation in the JFTC Decision Rescission case.
Sep. 24	First oral proceedings of the JFTC Decision Rescission case held. Tokyo High Court accepts JASRAC's participation.
2013	
Jun. 7	Third oral proceedings of the JFTC Decision Rescission case is held. Oral proceedings conclude.
Nov. 1	Tokyo High Court renders judgment (rescinding JFTC's

	decision (Note 2)).
Nov. 13	JFTC files a petition for acceptance of final appeal. JASRAC files a final appeal and a petition for acceptance of final appeal demanding reversal of the Tokyo High Court decision.
2014	
May 20	E-License, Inc. files a complaint with the Tokyo District Court demanding damages and an injunction against JASRAC.
2015	
Feb. 2	5-Party Talks commence.
Apr. 28	Supreme Court renders its judgment (dismissing JFTC's and JASRAC's final appeals (Note 3)).→Tokyo High Court judgment is upheld.→ Rescission of JFTC decision becomes final.
Jun. 12	JFTC notifies JASRAC of its decision to resume the hearings process.
Jul. 8	JFTC decides to allow the participation of e-License Inc. in the hearings process.
Aug. 3	14 th hearing held (1 st since hearings initially concluded in 2011).
Sep. 17	5-Party Talks conclude with signing of agreement.
2016	
Feb. 1	E-License Inc. and Japan Rights Clearance Inc. merge, and changes its firm name to NexTone Inc.
Feb. 16	NexTone Inc. withdraws its law suit against JASRAC.
Mar. 4	JFTC cancels its decision to allow NexTone Inc. to participate in the hearings process.
May 31	19 th hearing held (JFTC investigator's final statement of opinion).
Sep. 9	JASRAC submits application to withdraw hearings request to JFTC.

Note 1 Decision by the JFTC on June 12, 2012

The JFTC, after directly investigating evidence such as objective usage data on the use in broadcast programs of works administered by e-License Inc. in October 2006 when e-License first commenced operations in the field

of broadcasting, and upon questioning witnesses, decided to rescind its cease-and-desist order against JASRAC. It cited a failure to identify actual cases where the use of e-License repertoire was avoided, to reason that the actions in question (JASRAC's blanket collection of broadcast royalties) did not have the effect of excluding (#) other businesses. Because no effect of exclusion existed, such actions do not constitute private monopolization (violation of Antimonopoly Act, Article 3) regardless of how the other points may be judged, and thus the cease-and-desist order was rescinded.

(#) One of the four conditions that need to be confirmed in order to determine if a certain act constitutes a private monopolization (the remaining three being, the existence of artificiality, actual restriction of competition, and whether it is against public interests).

Note 2 Decision by the Tokyo High Court on November 1, 2013

The Tokyo High Court opined that “the various stipulations in the Antimonopoly Act have as their primary aim the realization of public interests, but the stipulations can be construed to include the objective of protecting the interests of competitors, even if they are the individual interests of individual competitors,” and recognized the competing operator's standing to sue (#1), which in principle had not been allowed until then.

Additionally, regarding the substantial evidence rule (#2), the Tokyo High Court opined that “although it cannot be said that e-License's repertoire had been excluded from usage, it can be concluded that there was urging to exclude such usage. On that point, the recognition of the decision in question which concluded that there were no facts to indicate the use of e-License's repertoire was avoided, cannot be said to be based on substantive evidence.” Without demonstrating how the JFTC's finding of facts had deviated from reasonableness, the Tokyo High Court produced a new recognition of facts, recognizing the exclusionary effects of the actions in question based on reasoning different from the cease-and-desist order (#3), and rendered a judgment that overturned the JFTC decision.

(#1) Qualification to take legal action as the plaintiff.

(#2) Stipulation in the Antimonopoly Act stating that the Tokyo High

Court can only make its own finding of facts when, the finding of facts of its decision based on the study of evidence by the JFTC is found to be deviating from the realm of reasonableness.

(#3) The reasoning for the cease-and-desist order was to say that, focusing on a popular work administered at the time by e-License, because even the use of a popular musical work with large demand for usage in broadcast programs was avoided, the actions in question had an exclusionary effect. In contrast, the Tokyo High Court decision, while accepting the fact that the popular musical work in question was used in equal frequency with musical works administered by JASRAC, reasoned that other musical works (musical works that are not popular) administered by e-License “cannot be presumed to have been used on similar terms (with JASRAC repertoire),” and rendered a judgment that acknowledged exclusionary effects for the actions in question.

This new reasoning by the Tokyo High Court was not expressed in the JFTC decision, nor during the trial examination in the Tokyo High Court, and was not arguable in the Supreme Court either (only legal matters such as constitutional violations are allowed as reason for appeal). As a result, JASRAC was not given the opportunity to argue its case.

Note 3 Decision by the Supreme Court on April 28, 2015

The Supreme Court accepted both the JFTC’s and JASRAC’s petitions for acceptance of final appeal, whose arguments were based on the lack of standing to sue (Note 2 (#1)) and violation of the substantial evidence rule (Note 2 (#2)). However, the Tokyo High Court decision was upheld without passing judgment on either point.

With the Tokyo High Court decision upheld, the JFTC decision (Note 1) to rescind the cease-and-desist order was overturned, and the JFTC reopened the hearings process to examine the remaining issues (see below).

Overview of Issues

Issues	JFTC Decision (Note 1)	Tokyo High Court Decision (Note 2)	Supreme Court Decision (Note 3)
1. Exclusionary Effect Whether the actions in question have the effect of making entry into the market difficult for other business operators.	Cannot say there is.	There is.	There is.
2. Artificiality Whether there is an artificiality to the actions in question that goes beyond the normal realm of competitive measures.	Because no exclusionary effect can be identified, there is no need to pass decisions on issues 2 to 5.	Decisions should be passed on issues 2 to 5 when the hearings reconvene.	Decisions should be passed on issues 2 to 5 (#) when the hearings reconvene. (#) On issue 2, obiter dicta was rendered as follows: whether there are “special circumstances” to determine that there is no artificiality is subject to examination.
3. Substantive Restriction of Competition Whether the actions in question substantively restrict competition in a particular field of trade.			
4. Public Interest Whether the actions in question work contrary to public interest.			
5. Legality of Order Whether the actions in question are necessary measures for the restoration of competition and are feasible.			

(Issues 1 to 4 correspond to the four conditions regarding the applicability of “Exclusionary Private Monopolization”)