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# TOKYO HIGH COURT, JUDGMENT FOR JASRAC CASE (2013) (JAPAN)

Chengyu Shi<sup>1</sup>

*Abstract:* The Tokyo High Court, Judgment of November 1, 2013 made a unique judgment in regard to standing to sue for a party who is not a direct addressee.<sup>2</sup> Under the Japanese Administrative Case Litigation Act Article 9, Section 1, only “a person with legal interest” can bring an administrative lawsuit. The definition of “a person with legal interest” for revocation of a public order is an individual whose legal rights or interests are protected by law and are being infringed or threatened with unavoidable infringement. In addition to this definition, the Court considered not only the text of the law, but also (1) the meaning and purpose of the law and (2) the character and the context of the interests for deciding whether a person other than the addressee has an interest protected by law. The Court ruled that a party who is not a direct addressee had standing to sue if they are likely and unavoidably to be directly damaged because of the infringement of fair and free competition in the market, and if the damage would be substantial.

- I. PETITION (REDACTED)
- II. ABSTRACT (REDACTED)
- III. MATTERS AND JUDGMENTS (REDACTED)
- IV. ISSUES IN THE CASE
  - (1) Presence of Standing to Sue
  - (2) Errors in Findings of Fact
  - (3) Errors in the Judgment Regarding the Appropriateness of Exclusionary Private Monopolization
  - (4) Defects in Proceedings
- V. PARTIES’ CLAIMS ON THE ISSUES
  - (1) Presence of Standing to Sue  
[Plaintiff’s Claims]
- A.

When there is unlawful conduct in a market that violates the Antimonopoly Act, such as a private monopoly, other competitors within the market will be materially infringed in their rights to compete under a fair market. At times, this may represent substantial prejudice against new entities where even accessing the monopolized market is difficult. Following the interpretation of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the “Antimonopoly Act”), the right for fair competition is understood as a legal right that is directly protected.

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<sup>2</sup> Tōkyō Kōtō Saibansho [Tōkyō High. Ct.] (Nov. 01, 2013), Hei 25 (ke) no. 8, Kōtō saibansho hanreishū [Saibansho web] (Japan).

The plaintiff in this case is a competitor in a market for the management of copyrights for use in broadcasting, and has been blocked from entering the market because of the intervener. The profit from the songs managed by the plaintiff is virtually zero, due to the exclusionary effect (closed market effect) caused by the conduct of the intervener. If the decision on appeal were affirmed, the plaintiff would lose the profits it would have earned from competition—profits that are protected by the Antimonopoly Act.

After the 2005 Amendment of the Antimonopoly Act, the hearing procedure is legally situated as a post-hoc procedure to review the cease and desist order, which is an administrative disciplinary action. Moreover, in this case, in light of the fact that the plaintiff was acknowledged to be excluded from the market tangibly and specifically, the benefit to the plaintiff resulting from the cease and desist order is a concrete legal right and interest that is protected by law.

B.

Under the Antimonopoly Act, if the respondent's conduct is unlawful, the excluded party can bring a “no-fault damage compensation suit” (Article 25). In that suit, there are provisions that allow the excluded party to receive defense support through the opinion solicitation system (Article 84), describe rights to information disclosure for interested parties (Article 70-15), and recognize the discretionary right to participate in court proceedings (Article 70-3). Thus, it can be said that remedies and protection of interests for the excluded party are included in the interests protected by the courts. The plaintiff is an appropriate interested party who is protected by these rules. If this decision is affirmed on appeal, the plaintiff will not be able to submit a no-fault damage compensation suit or use the opinion solicitation system, and the plaintiff will be legally prejudiced.

The Act on Copyright, etc. Management Service introduces and promotes market competition from the viewpoint of protecting rights holders, and it has the same purpose and goal of the Antimonopoly Act.

From the purposes of each of the aforementioned provisions, it is clear that the plaintiff has legal interests protected by law regarding a request for the cancellation at issue in this decision on appeal, and therefore the plaintiff has standing to sue in this suit.

C.

The cancellation at issue in this decision on appeal is necessary to realize the public's interest in maintaining a fair market, which is the goal of the Antimonopoly Act. The plaintiff brought suit because the defendant was not fulfilling their obligations to the public interest, and therefore the plaintiff's standing to sue is also founded from the viewpoint of the public interest.

[Objections from the defendant]

A.

According to the Japanese Administrative Case Litigation Act, Article 9, Section 1, "a person with legal interest" has standing to sue to seek a revocation for the JFTC hearing and an administrative decision. "A person with legal interest" means an individual whose legal rights or interests protected by laws have been infringed, or who inevitably has a risk of the infringement by the JFTC hearing. (The JFTC repealed its cease and desist order to JASRAC). Assuming that the "person with legal interest" not only means public interest, which is generated from the aggregation of the interests of many unspecified persons, but also for individual interests, consequently, the individual interest should be protected by law and generate standing to sue for seeking revocation of the JFTC hearing. The person also has to have been infringed or under threat of infringement by the JFTC hearing.

To determine whether a party who did not receive the order has an interest protected legally, the court should consider not only the text of the law, but also the content and the context of the interests under the intent and purpose of the law. Under this scenario, the purpose of the law can be interpreted from other laws if those laws are sharing a similar purpose. Concerning the content and the character of the interests, it is also necessary to measure the state and degree of the interests infringed by violation of the JFTC hearing (From the Japanese Administrative Case Litigation Act, Article 9, Section 2).

According to these rules, the determination of standing to sue should be done by following two points: 1) the content and character of the interest infringed by the unlawful administrative judgment, and 2) whether this interest is protected by the law that is referenced.

## B.

The content and character of interests is infringed by the unlawful administrative judgment. Based on precedent, there is an inclination to allow standing to sue on an unlawful administrative judgment to a specific group of parties whose safety is threatened, or whose health or living environment is degraded, by appropriately interpreting the intent and goals of the law that is referenced.

On the other hand, there is a tendency to determine whether the law that is referenced includes the intent to protect an individual's safety or economic welfare on a case-by-case basis. For when law does not meet the degree of individual protection at this level, or is attached to the public interest, courts tend to deny standing to sue.

In this case, the lost interests that the plaintiff claims are interests that could have been gained under a competitive market, and the right to submit a "no-fault damage compensation suit," or the right to exploit the opinion solicitation system. These interests belong to the category of economic welfare, and compared with interests related to safety of life, body, or health, the degree of protection offered is low. Since the legislature is provided with the discretion to determine whether to provide a protection for individual interests on a case-by-case basis, the court will determine whether the judgment to protect the individual interest is provided by the law that is referenced.

## C.

Whether the law that is referenced protects the interests claimed by the plaintiff.

According to Article 1 of the Antimonopoly Act, the purpose of the Antimonopoly Act is to secure fair competition in a market and protect the public interest. Article 2, Section 5 and Article 3 of the Antimonopoly Act prohibit exclusionary private monopolization in a market. The purpose for prohibiting exclusionary private monopolization in the market is not to provide remedies to exclude parties, but to ensure fair competition within the market.

Similar to the purpose of the Antimonopoly Act, judgment proceedings under the Antimonopoly Act are not to provide remedies to exclude parties by the outcome of unlawful conduct, but to ensure wholesome and fair competition in a market.

Article 25 of the Antimonopoly Act regulates the strict liability for

parties who violate Article 3, and Article 26 states that parties cannot bring a claim for compensation unless the cease and desist order is finally determined. This is an incidental system that is aiming to enhance the deterrence effect for violations of the Antimonopoly Act by providing easier access to remedies for excluded parties. Hence, the interest protected by the Antimonopoly Act is the public interest for fair competition in a market under the purpose of the law, and not private interests for each individual party. The law does not protect that kind of interest.

Article 45 of the Antimonopoly Act provides that all people can report violations of antimonopoly conduct and make a request for an administrative order regarding the unlawful conduct by the Fair Trade Commission (hereinafter referred to as the “JFTC”). The JFTC also needs to report the outcome of the request to the requesting party if the requesting party makes the request properly in the prescribed way. In addition, Article 70, Section 3 states that the JFTC is authorized to invite third parties to intervene in the JFTC hearing by using its official authority, but these rules do not verify the legal interests and rights of proceedings for competitors and excluded parties. In addition, Article 70, Section 15 specifies rules on the right of inspection and making copies of the records for interested and related individuals. These rules are simply for the convenience of third parties who may get involved in the JFTC hearing and excluded parties in accordance with proper operation of the law, but they do not guarantee any legal interests of those individuals.

D.

For all of these reasons, even if the excluded parties may receive remedies or interests by proper operation of the Antimonopoly Act that secure fair competition in a market, this type of interest is only a consequence of efforts to maintain fair competition in a market for public interest, not for excluded parties' individual interests. Hence, we conclude that the Antimonopoly Act does not protect individual interests, and the plaintiff, who is a competitor with the intervener, did not have any legal interests, and did not have standing to sue for the revocation suit.

[Intervener's objections]

A.

The primary purpose of the Antimonopoly Act is for maintaining fair competition in a market, in other words, "promoting fair and free competition," and its ultimate purposes are "securing consumer's interests" and "promoting the democratic development of the nation's economy." (Article 1 of the Antimonopoly Act) Therefore, the Antimonopoly Act does not protect individual interests, but only protects public interests. As long as the Antimonopoly Act's initial purpose is maintaining fair competition in a market, the individual's interests will not be the purpose of the law and be protected by the law.

In addition, the JFTC hearing of the Antimonopoly Act is for rectifying infractions, but not for providing remedies for excluded individuals. A right to make a motion of objection for the violations of the law should be limited to the addressee's interests, but does not provide the same right to other general consumers and competitors.

For all of these reasons, the purpose of the Antimonopoly Act is not for protecting competitors, and there is no room for affirming the standing to sue for the competitors.

The harm that the plaintiff claimed in this case is simply a general disadvantage as a competitor with normal business activities in a market.

B.

Furthermore, the right to make a claim under the Antimonopoly Act Article 45, Section 1 is just an initial mechanism that allows a plaintiff to begin the screening procedure, and the Antimonopoly Act Article 70, Section 15 is also just a general right for requesting inspections and make copies of the certain records for interested individuals. Therefore, both of them are not giving any specific right for making a claim to request a remedy to the plaintiff. Instead of the right to make a claim under the Antimonopoly Act Article 45, Section 1, competitors can bring a civil compensation claims under the Japanese Civil Code Article 709 when there is a violation of the Antimonopoly Act, and request a suspension order for unfair dealings under the Antimonopoly Act Article 24, so they can protect their interests. These rules are independent from this proceeding and are not binding for the judgment of the proceeding.

Moreover, the Antimonopoly Act Article 25 regulates only a “no-fault Damage compensation suit,” and it is a special rule that serves only to diminish the excluded party's onus of proof, but does not prevent a general suit based on the civil codes.

C.

For all of these reasons, the purpose of the Antimonopoly Act is not for protecting individuals' specific rights, but only for the public interest that is generated from the aggregation of interests of many and unspecified persons. Therefore, the plaintiff does not qualify as "a person with legal interest" for revocation of the order, and the interests of plaintiff as a competitor are not protected.

## JUDGMENT OF THE COURT

### I . PRESENCE OF STANDING TO SUE

To decide whether the plaintiff, who is the sole competitor of the management of copyrights for musical works service market to the intervener, has a standing to sue in the revocation suit of the cease and desist in which the defendant assigned intervener as the addressee.

(1) According to the Japanese Administrative Case Litigation Act Article 9, Section 1, "actions for the revocation of administrative dispositions" (hereafter, disposition etc.), the definition of "a person with legal interest" for revocation of a public order is an individual whose legal rights or interests are protected by law and are being infringed, or threatened with unavoidable infringement. If the administrative law that regulates this disposition can be interpreted to protect each individual legal interest, not only for protecting the generalized public interest from unspecified individual interests, but also the individual interests protected under the law, those individuals also should have standing to sue.

For deciding whether a person other than the addressee of the JFTC hearing has an interest protected by law, we need to consider not only the text of the law, but also consider (1) the meaning and purpose of the law and (2) the character and the context of the interests. For the consideration of (1) meaning and purpose of the law mentioned above, we also look into the purpose of other related laws if they are sharing the same purpose. For the consideration of (2) the character and the context of the interests mentioned above, it is also necessary to consider the degree of the lost interests when the disposition was violated. (Refer to the Japanese Administrative Case Litigation Act, Article 9, Section 2;



Japan Supreme Court decision to revoke the Cease and Desist Order on June 12, 2012).

(2) From the determination standards mentioned above, deciding whether the plaintiff, as a sole competitor of the market, has a standing to sue in this suit.

A. The purpose of the Antimonopoly Act and rules related to cease and desist order

The Antimonopoly Act regulates: "The purpose of this Act is to promote fair and free competition, stimulate creative initiative of enterprises, encourage business activity, heighten the level of employment and actual national income, and thereby promote the democratic and wholesome development of the national economy, as well as secure the interests of general consumers by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, preventing excessive concentration of economic power and eliminating unreasonable restraints on production, sale, price, technology, etc. , and all other unjust restrictions on business activity through combinations, agreements, etc." (Article 1).

In other words, the Antimonopoly Act promotes a fair and free competition by prohibiting illegal conduct to secure the general consumer's interests and wholesome development of the national economy by allowing business operators to perform their full ability actively.

For enforcing the above purpose of the law, the Antimonopoly Act provides an authority to the JFTC to issue an administrative order to cease or desist the unlawful conduct (Article 7) to the business operator as addressee when there is unlawful conduct, such as monopoly and unjustifiable restraint of trade. Also, when there is a request for a proceeding by complaining parties, the JFTC can conduct the proceeding (Article 49, Section 6; Article 66).

B. The purpose and intent to set rules relating the cease and desist order

(1)

The Antimonopoly Act specifies that (1) Any individual may request the JFTC to take an appropriate measure when there is a violation of the Antimonopoly Act (Article 45), (2) The JFTC may ask third parties, who are related to the outcome of the proceeding, to join the proceeding by using its authority when needed (Article 70, Section 3), (3)

Related parties have rights to claim information disclosure after the proceeding began towards the JFTC (Article 70, Section 15). In addition, (4) The business operator, who violates a law, and is convicted as a target of the cease and desist order, is liable without fault for compensation (Article 25 and Article 26), and (5) A court may seek an opinion from the JFTC for the amount of the compensation when the claim was brought under the Article 25, (Article 84)

(2)

The above statutes relating to the cease and desist order do not limit the scope of claims for proper government action, but the JFTC can use its authority to decide whether a third party can join the proceeding. Furthermore, the rights to information disclosure after the proceeding began towards the JFTC (Article 70, Section 15) and the right to bring a claim for compensation under the Antimonopoly Act Article 25 are also not limited to a direct excluded party, but also for an indirect excluded party. From these facts, it is not able to instantly interrupt a source law of the cease and desist order as a law applied to all interested parties, and protecting each interest of each party.

However, concerning the circumstance that the cease and desist order is revoked, even when the business operator is a monopoly and is unlawfully limiting other operator's activity in a market, the judgment of this case is not simply contrary the public interest from "promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, preventing excessive concentration of economic power and eliminating unreasonable restraints on production, sale, price, technology, etc. , and all other unjust restrictions on business activity through combinations, agreements, etc.," but also causing the possibility of infringing fair and free competition and ruining or unavoidably threatening the individual interests of competitors in a market by the exclusionary effect in the market.

(3)

From these viewpoints, and considering the Antimonopoly Act, the rules such as: (1) The unlawful business operator is liable without fault for the compensation in the cease and desist order (Article 25 and Article 26), (2) The proceeding of information disclosure for interested parties (Article 70, Section 15), and (3) The expressing opinions system that court may seek an opinion from the JFTC for the amount of the

compensation in a compensation claim (Article 84), are interruptible that they are aiming to provide proper, prompt, and easier access for remedies to excluded parties from unlawful conduct by reducing the burden of the presentation of evidence and providing easy access to documents that will be needed for filing a compensation claim when competitor's interests were infringed.

C. The meaning of rules related to the cease and desist order

Considering the content and character of the competitor's interests by the revocation of the cease and desist order under the Antimonopoly Act, the context and character of statutes in above (the Antimonopoly Act Article 25, Article 26, Article 70, Section 15, and Article 84), and the statutes relating the cease and desist order under the Antimonopoly Law (the Antimonopoly Act Article 7, Article 49, Section 6, Article 66), they are initially aiming to maintain the public interest. However, the statutes also can be interrupted for protecting each competitor's interests in the case when that competitor's interests may be directly and substantially infringed or subject to an unavoidable threat of infringement and the JFTC can issue the cease and desist order for ensuring the fair and free competition in the market and secure each competitor's interests individually.

D. The judgment for whether the plaintiff has standing to sue in this decision to revoke the cease and desist order

Including all of considerable factors in above, in here, consider whether the plaintiff has standing to sue in this decision to revoke the cease and desist order. In this case, the issue was whether there was a monopoly and violation of the Antimonopoly Act in the market of the management of copyrights for musical works. Until the Act on Copyright, etc. Management Service was enacted in October 1, 2001, the intervener was conducting a monopoly in the market under the Act on Mediation Service. Even after the Act on Copyright, etc. Management Service was enacted, the condition of monopoly did not change until the plaintiff began its service for the management of copyrights for musical work in October 1, 2006. After the plaintiff entered into the market, there was no more new entrants in the market.

If the intervener violated the Antimonopoly Act, the plaintiff, as the only competitor in the market of the management of copyrights for musical works, is likely and unavoidably to be directly damaged because of the infringement of the fair and free competition in the market, and the damage will be substantially.

After considering multiple factors, the interruption of the statutes relating the JFTC hearing under the Antimonopoly Law (the Antimonopoly Act Article 49, Section 6, Article 66), in the context of other related statutes (the Antimonopoly Act Article 25, Article 26, Article 70, Section 15, and Article 84) and the content and character of competitor's infringed interests infringed, we hold that the plaintiff, who was the sole competitor for the intervener since 2005, has standing to sue for the JFTC hearing even the plaintiff was not an addressee the proceeding.

