

Harry v. Suzuki

Case No.: Heisei 12 (ne ネ) no. 1516 (2000).

Claims for damages, counterclaim for copyright confirmation request.

Appeal from Cases (Trial Court, Tokyo District Court No. 17119 (1998), No. 21184 (1998), No. 21285 (1998) (End of oral argument on May 10, 2002).

MAIN TEXT

(1) Dismiss each appeal in this case.

(2) The appeal costs for the Case Showa 43 (ne ネ) no. 1124 shall be borne by the appellant in that case, and the appeal costs for Case Showa 43 (ne ネ) no. 1190 shall be borne by the appellant in that case.

FACTS & REASONS

I. Petitions by the Parties

1. Regarding Case Showa 43 (ne ネ) no. 1124 (hereinafter referred to as “Case A”)

The appellant requested that: “(1) Revoke the original judgment. (2) The appellees shall jointly pay the appellant an amount of 9,664,595 yen at a rate of 5% per year from January 1, 1966. (3) The court costs shall be borne by the appellees for both the first and second trials.” The appellees requested that: “The appeal shall be dismissed. The appellant shall bear the cost of the appeal.”

2. Regarding Case Showa 43 (ne ネ) no. 1190 (hereinafter referred to as “Case B”)

The appellant requested that: “(1) Revoke the original judgment. (2) The appellees shall jointly pay the appellant an amount of 5,000,000 yen at a rate of 5% per year from July 9, 1965. (3) The court costs shall be borne by the appellees for both the first and second trials.” The appellees requested that: “The appeal shall be dismissed.”

II. [Appellant’s] Cause of the claim for Case A

1.

(1) The song composed by Appellant [A], “The Boulevard of Broken Dreams” (hereinafter referred to as “Song A”), as provided in the first score attached to the original judgment, was first published in the United States in 1933 by the US publisher Remick Music Corporation, and the copyright was registered in accordance with the provisions of the Copyright Law of the United States. The song registration was updated in 1960. This song is a musical work that is protected by the Copyright Act (in this case, Act No. 39 of 1902, the

former Copyright Act) in Japan under Article 2, Paragraph 1 of the Universal Copyright Convention.

(2) The appellant is a company that runs a music publishing business. On September 1, 1960, the appellant was given the agency right to conclude a copyright transfer agreement for the music owned by Remick Music Corporation with Music Publishers Holding Corporation. The copyright transfer agreement concerned the transfer area in Japan and the period from the same day to February 31, 1962, and the appellant became the copyright holder of Song A in Japan. After that, this transfer agreement was renewed under the same conditions by the agreement of both parties, and the period was extended to February 31, 1964.

(3) The above contract includes a special term that if the appellant publishes the score in Japan within the contract period, the copyright of the song will be extended for another year. Since the appellant published the score of Song A within the contract period until February 31, 1964, the contract period for the Song A was extended by one year, and the appellant's copyright to Song A was extended to February 31, 1965.

2.

Song A became a hit song in the United States in 1933, and has continued to be a popular song since then. However, Song A is played and recorded only in the refrain part of the first score within the first thirteen bars (hereinafter, this part is referred to as "Koukyoku"), and this part became famous in the United States.

After World War II, in many military comfort facilities in Japan such as the cabaret dance halls, Song A, especially the Koukyoku part, is played repeatedly as one of the standard numbers as reflecting the tastes of US soldiers. It became familiar to Japanese musicians who were involved in these comfort facilities. Furthermore, Song A, especially the Koukyoku part, became widely known not only to general musicians but also to the general public through the publication of sheet music, the release of records, and the broadcasting on radio and television. The appellant also contributed to its popularization by publishing and recording the score of Song A.

3.

The appellee [B] worked in the production department of the Tokyo Broadcasting System Co., Ltd. (TBS). He served as the second director of the production department in 1963 and was in charge of producing regular music programs. In addition, the appellee was involved in a music performance group at the military comfort facility "Colonial Club" in Yokohama around 1947, and was a member of the facility's registered swing band "Swing Tokyo." After joining TBS (the name at that time was Radio Tokyo) in 1952, he also worked as a record clerk. Therefore, the appellee must have come into contact with songs that were already familiar in Japan, such as Song A, at least the Koukyoku part, and must have known its existence. However, around 1938, the appellee created a melody attached to the lyrics from the 5th to the 44th bar of the song "One Rainy Night in Tokyo" (hereinafter referred to as "Song B." with the accompaniment and prelude created by [C], the appellee published Song B as his own creation. However, as explained in the next section, the appellee sets the theme of Otsukyoku based on the main melody of Koukyoku, and was created based on the melody processing method of Koukyoku. Thus, Song B including Otsukyoku is an adaption

of Song A including Koukyoku. Therefore, the appellee's right act infringed the copyright (adaptation right) of the appellant's A song.

4.

(1) Copyright protection is given to the work and the essential part of the work. In the case of music works, the originality of the author's thoughts and feelings is manifested in the melody, so the essential part of the music work is in the main melody, and copyright protection is given to it. Therefore, music theoretically consists of four elements: melody, harmony, tune, and form, but in order to compare the emotional feelings of two songs, the main melody of both should be compared. However, if the two songs are analyzed and compared into these four elements, it is not possible to understand whether or not the emotional feelings of the two are the same.

First, Koukyoku is a three-part song with a total of 33 bars, including the first part of bars 1 to 16, the second part of bars 17 to 24, and the third part of bars 25 to 33. Looking at this structurally, it is composed of two melodies, the melody of the bars 1 to 4 (hereinafter referred to as "melody No. 1") and the melody of the bars 17 to 20 (hereinafter referred to as "melody No. 2"). The melody of bars 5 to 8 is a variation of melody No. 1, and the melody of bars 21 to 24 is a variation of melody No. 2. Melody No. 2 is used only in the 8th bar of the 2nd part including its variation, but Melody No. 1 and its variation melody are repeated in the 25th bar of the 1st and 3rd parts. Therefore, melody No. 1 is the main melody of Koukyoku, and the emotional feeling of Koukyoku is manifested in this melody.

In addition, Otsukyoku is a three-part song with 40 bars in total, including the first part of bars 1 to 16, the second part of bars 17 to 32, and the third part of bars 33 to 40. Since the rhythm of Otsukyoku is twice that of Koukyoku, it is 20 bars when counted at the rhythm of Koukyoku, which is a shorter song than Koukyoku. The theme of Otsukyoku is the melody of the bars 1 to 4, which is set based on the above-mentioned main melody of Koukyoku. This theme is used repeatedly in bars 33-36 and bars 37-40 of the third part. The melody of bars 9 to 12 is the melody that is transposed by lowering the theme by second, and the melody of bars 21 to 24 is the melody that is transposed by raising the theme by fourth. In addition, the melody of the 5th to 8th bars is the same melody as the latter half (3rd and 4th bars) of the first melody of Koukyoku. In this way, although Otsukyoku is a shorter piece of music than Koukyoku, one of the main melodies of Koukyoku and the same or very similar parts occupy 60% (24 bars) of the whole. Therefore, if you play Otsukyoku and listen to it, you will sense a reproduction of Koukyoku. Moreover, the melody of bars 17 to 20 at the beginning of the second part of Otsukyoku is very similar to the melody of bars 17 and 18 at the beginning of the second part of Koukyoku. Including this, the melody that is the same as or very similar to the instep song covers 70% (28 bars) of the whole. Therefore, Otsukyoku is very similar to Koukyoku in terms of musical effect.

From the above, it must be said that Otsukyoku shows the same emotional feelings as Koukyoku.

By the way, the melody of the bars 13 to 16, that of the bars 25 to 28, and that of the bars 29 to 32 of the Otsukyoku is not found in Koukyoku. The appellees claim that they have originality in the second part of Otsukyoku, which includes the melody of the latter two parts. But even if this part has originality, it remains within the scope of composition techniques. Since the proportion of the creative part of the whole song is extremely small, it does not alter the thought and emotion of the whole song. Therefore, this part is only an addition to the

original work Koukyoku, and for that reason, Otsukyoku cannot be a new work as referred to in the provision of Article 19 of the Old Copyright Act.

(2) Both Koukyoku and Otsukyoku are popular songs. The melody of a song is a musical expression attached to the lyrics in order to effectively convey the literary meaning or formal characteristics of the lyrics. Especially in popular songs, the meaning of the lyrics is required to be familiar to the general public and the song is required to be easy to sing, so that the literary meaning of the lyrics is emphasized. In addition, the national language used in the lyrics has a unique syntax, and the words have unique pronunciation and intonation, so the formal characteristics of such lyrics cannot be ignored in the composition of songs.

The lyrics of Koukyoku are old-style English poems with a clean format, and have musical elements such as anacrusis, double time signature, and ternary form. Koukyoku is composed with such musical elements, anacrusis, double time, and ternary form, which are inherent in the lyrics. On the other hand, Otsukyoku was composed with Japanese lyrics, but the lyrics do not have the musical elements of anacrusis, double time signature, and ternary form. Nonetheless, Otsukyoku is composed with such musical elements, just like Kokyoku.

As mentioned above, in songs, there is a close relationship between the melody and the lyrics, so songs composed independently of separate lyrics in different languages cannot be the same or very similar. Therefore, the appellee [B] was born in a country with completely different tradition from the composer of Koukyoku, and grew up in different times, places, and environments. If he created his own song with Japanese lyrics that are different from the lyrics of A song, it is impossible for his song to match up to 70% of Koukyoku in its melody as mentioned above, and it should not also match Koukyoku in terms of anacrusis, double time, and ternary form. It is unlikely that such a match between the two songs occurred by accident.

(3) From the above, it is clear that the Song B including Otsukyoku is a modification of the Song A including Koukyoku.

5.

(1) The appellee [B] transferred the copyright to the appellee Nichion Co., Ltd. (hereinafter referred to as “appellee Nichion”) on August 27, 1964 in order to make Song B used by a third party and raise the profit of the usage fee. It was promised to split the royalties revenue equally between the two. In accordance with the contract, the appellee Nichion will display the appellee [B] as a composer and publish the score of Song B, reproduce Song B, permit the use, and outsource the Japanese Society for Rights of Music Copyright to collect the usage fee for Song B, etc. The assignment to the Society was established between September 1964 and December 1965.

① Permission was granted to Nippon Gramophone Co., Ltd., Nippon Crown Co., Ltd., King Record Co., Ltd., Teichiku Inc., Toshiba Music Industry Co., Ltd., Nippon Columbia Co., Ltd., JVC, etc. to reproduce records of Song B. A total of 167,657 copies of records were reproduced.

② License was granted to Keibunsha, JVC, Contemporary Arts, Teichiku Inc., Manufacturers Club, Asahi Sonopress, etc. to reproduce phonosheets of Song B. A total of 88,500 copies of phonosheets were reproduced.

③ Permission was given to broadcasters, movie makers, etc. to broadcast Song B.

(2) As mentioned above, the appellee [B] must have known the existence of Song A, and the appellee Nichion is not only engaged in the music publishing business, but also in partnership with the appellant A. Since appellee Nichion was involved in the publication of the score music of Song A, he knew the existence of Song A and that the appellant had the copyright of Song A. Then, via third parties who obtained the permission of the Japanese Society for Rights of Authors of Music, Song B, which is a modified version of Song A, was copied, broadcast, and started on a record and a phone sheet without the permission of the appellant. As a result, the appellant's copyright (copying right, broadcasting right, producing right) for Song A was infringed. Since this results from the copyright transfer agreement mentioned above and the consignment to the Japanese Society for Rights of Authors of Music, both appellees intentionally or negligently infringed copyright the appellant's Song A.

6.

As the copyright holder of Song A, the appellant lost the profit equivalent to the following license fee for the copying, broadcasting and production of Song B as a modification of Song A, and suffered the damages same as such license fee.

(1) In 1964 and 1965, the license fee for using music for the reproduction of records or phonosheets was 7.20 yen per song for each side of one record or phonosheet. Therefore, the damage of the appellant due to the infringement of the copying right is obtained by multiplying this by the number of records reproduced ($7.20 \times 1,067,657 = 7,687,130$ yen), plus multiplying this by the number of phonosheets reproduced ($7.20 \times 88,500 = 637,200$ yen), totaling 8,324,330 yen.

(2) The usage fee for broadcasting and production of Song B collected by the Japanese Society for Rights of Authors of Music from broadcasters, movie makers, etc. and delivered to the appellee Nichion between September 1964 and December 1965 was 1,340,265 yen. Therefore, this equates the amount of damage to the appellant due to infringement of broadcasting rights and production rights.

7.

Therefore, the appellant sought for against both appellees for damages totaling 9,664,595 yen as above (1) and (2), and requested the joint payment of late damages at a rate of 5% per year from January 1, 1966.

III. [Appellees'] Answer to Case A

1.

The facts in above Part 1 (1) and (2) of the cause of the claim are accepted. Regarding the above paragraph (3), the appellant admits that he published the score of Song A within the contract period until February 31, 1964, but denies the other facts. From January 1, 1965 to February 31, 1965, the appellant was merely obliged to collect copyright royalties to the Music Publishers Holding Corporation.

2.

The fact in above Part 2 of the cause of the claim is rejected. Song A was used as the theme song for the British movie “Moulin Rouge” released in Japan in 1934, but it has not been hit at all in Japan and no music record has been released. The score of Song A was first published in Japan by the appellant in March 1953, after the appellee [B] created Song B. This sheet music was created by the appellee Nichion at the request of the appellant, and was issued in the name of the appellant by Nippon Score Sales Co., Ltd., a subsidiary of the appellee Hichion. As shown by the number of 3641000 written at the end, it is indicated that were 1,000 copies published in March 1964.

3.

Regarding the above Part 3 of the cause of the claim, the appellee [B] worked for the TV organization station performance department of Tokyo Broadcasting System Co., Ltd. He admits that he created and published Song B with the accompaniment and prelude part created by [C] as his own creation, but he denies the other facts. The appellee [B] did not know the existence of Song A at the time when Song B was created.

4.

All the allegations set forth in paragraph 4 of the cause of claim are disputed.

(1) Copyright protection extends to the entire work. There is no objection in musicology that a piece of music, which is a musical work, consists of four elements: melody, harmony, rhythm, and form. Therefore, the identity and similarity of the two songs should be judged comprehensively from these four elements, and there is no reason to exclude the three elements of harmony, rhythm, and form. In everyday terms, the melody is used to mean “Fushimawashi” [in Japanese; literally means “melody”] or “excluding the lyrics of the part of the song that is sung by the human voice.” The appellant’s alleged “melody” has a meaning equivalent to “music.” Theoretically, a “musical piece” includes melody, harmony, rhythm, and form.

(2) Koukyoku does not have a ternary form, but a two-part form. That is, [a] (bars 1 to 8), [a’] (bars 9 to 16), [b] (bars 17 to 24), and [a’] (bars 25 to 32). It consists of four phrases of eight bars each, and is composed of the format (a + a’) + (b + a’). And since [a’] is almost the same as [a], the main melody of Koukyoku are [a] and [b], and neither of them can be said to be the dominant one. Therefore, it cannot be said that the bars 1 to 4 of Koukyoku (the melody No. 1 of the appellant’s claim) are the main melody of Koukyoku.

(3) The melody of the bars 1 to 4 of Otsukyoku was not created based on the melody of the bars 1 to 2 of Koukyoku.

The five quarter notes at the beginning of the Otsukyoku are a musical expression as an ornamental sound called a “turn,” which is fixed as a song at a slower speed. Such a melody is commonly seen and can be created without having to imitate the seven eighth notes at the beginning of Koukyoku. This part is not original to both songs, and even if this part is similar to each other, it does not mean that Otsukyoku is a modification of Koukyoku.

Not only that, in Koukyoku, the melody “Mi-Re(#)-Mi-Fa-Mi-Re(#)-Mi” in centered on “Mi,” connected by “Fa”, which is a semitone higher, and “Re(#)”, which is a semitone

lower. It alternates and returns to “Mi” with seven notes, which is a perfect reverberation. In Otsukyoku, the reverberation ends with the five notes “Mi-Re(#)-Mi-Fa-Mi”, and is followed by “Si-Do-La.” While the tone of “Shi” is the fifth down from the tone of “Fa” before, this pitch is often used to express the emotional feelings that often appear in Japanese popular songs. However, in Koukyoku, “Mi-Re(#)-Mi-Fa-Mi-Re(#)-Mi” is followed by “La-La,” which is not a fifth down from the last two tones in Otsukyoku. Moreover, the final “La” tone of this one-part melody type is one octave lower in Otsukyoku than that in Koukyoku. In this way, in Otsukyoku, the melody gradually descends and naturally connects to the low “La”, so the tone of “La” resonates as a calm afterglow. On the other hand, in Koukyoku, the natural connection is intentionally eliminated, and the melody ascends to a high “La,” which brings about an optimistic change in the emotion, and the tone of “La” claims an independent existence that resonates strongly. As mentioned above, this part of both songs expresses different thoughts and feelings based on different musical expressions.

As mentioned above, Koukyoku has a two-part form, and Otsukyoku has a three-part form, so Otsukyoku was not developed based on the musical expression of Koukyoku. Also, the two-part form consists of $(a + a') + (b + a')$, and since $[a]$ and $[a']$ are almost the same, the melody of $[a]$ inevitably covers about 75% of the total song. And since the ternary form consists of $(a + b + a)$, the melody of $[a]$ inevitably occupies about 60% of the total.

Therefore, even if the melody of the bars 1 to 4 at the beginning of Otsukyoku is similar to the melody of the bars 1 to 2 at the beginning of Koukyoku, the ratio of this part to each song respectively is very small. Thus, this provides no basis for deciding whether the two songs are similar.

It should be noted that Koukyoku mainly progresses in the eighth note, while Otsukyoku progresses mainly in the quarter note, so the speed is completely different, giving a listener a different impression. In addition, while Koukyoku is in D minor, Otsukyoku is in C minor. And since speed and key are inevitably and uniquely linked to the selection of the theme, the two songs have different musical expressions in this respect as well.

(4) The second part (bars 17 to 32) of Otsukyoku has an original melody that is not found in Koukyoku. In particular, the bars 25 to 32 (the part with the lyrics of “Shifty eyes / Whispering I love you”) change from bass to treble from the transition part (bars 17 to 20) before it. It is a Japanese song-like melody that musically expresses emotions that make you feel like crying, with the emotion escalating and then bursting out. This part is unique, not found in Koukyoku, and forms the most prominent and original part. And since a song is a unit as a single work, it must be said that Otsukyoku is an independent work with originality as a whole.

(5) As the appellant insists, Otsukyoku includes anacrusis, double time signature, and ternary form. While Koukyoku has anacrusis and double time signature, as mentioned above, it is a two-part form, not a three-part form. Even if Koukyoku song is in the ternary form, there are so many songs with anacrusis, double time signature, and ternary forms in the world, so this alone is not enough to infer that Otsukyoku imitated Koukyoku. Not only that, Japanese folk songs are mostly written with anacrusis and double time signature, and about half of Japanese popular songs are in ternary form. Moreover, Otsukyoku fits the Japanese lyrics very naturally, and there is nothing unreasonable.

As the appellant insists, both Koukyoku and Otsukyoku are popular songs. Popular songs have to be simple songs that are familiar to the general public, so there is limitation for

the melody and harmony used for such songs, and the length of the song must be as short as 40 to 50 bars. Moreover, the life of popular songs is short, and there is a need for a large number of songs. Therefore, similar popular songs are often produced. Given the status of such popular songs, it is unreasonable to conclude that Otsukyoku is a modified version of Koukyoku just by the sensory subjectivity that the two songs are somewhat similar to each other.

5.

The fact in paragraph 5 (1) of the cause of the claim is admitted, but the fact in (2) is disputed.

6.

The allegations set forth in paragraph 6 of the cause of claim are disputed. Since the number of Song B records is incomparably higher than that of Song A records, even if Song B is a modified version of Song A, there is no reason why the amount of copyright royalties income from the sales of the Song B records immediately becomes the amount of the appellant's profit.

IV. [Appellees'] Answer to Case B

This is the same as the original judgment, so we will quote that from it. However, according to the statement in the 15th sheet of the original judgment, line 10 of the table, "I composed Song B and was the author of it," the statement "I'm the author of the song," the statement in the eighth line of the 20th table, "Counterfeit is called as a "modification;" and the statement in the ninth line of the same table, "Even if you created Song B" are corrected as "[It is] Song B even if you created Otsukyoku."

V. Evidence (Omitted)

OPINION

I. Judgment as to Case A

1.

According to the facts in the Causes of claim paragraphs 1 (1) and (2) and paragraph 3, the appellee [B] created the Otsukyoku around 1963, and added the accompaniment and prelude by [C]. There is no dispute between the parties regarding the fact that Song B was published as [B]'s own creation. According to the statement of the appellee himself in the court, it is recognized that the appellee created the song before June of the same year.

2.

The main issue in this case is that Otsukyoku is a modification of Koukyoku of Song A, and whether the appellee [B] infringes the appellant's copyright (adaptation right) of Song A.

By the way, contrast to a patent right that grants the “exclusive right to carry out the invention” (Article 68 of the Patent Law), the copyright allows a person to “exclusively own the right to reproduce” (Article 1 of the Old Copyright Act). And here, “reproduction” is based on the premise that the reproducing person knows the existence and contents of the copyrighted work, and the same applies to the adaptation which is one aspect of “reproduction”. Therefore, infringement of copyright (adaptation right), unlike infringement of patent right, requires that the infringer knows the existence and content of the copyrighted work. If so, even if you accidentally create something that matches or resembles an existing work, if you do not know the existence or content of the existing work and create it yourself, and there is no negligence not to know this, it is reasonable to understand that it does not infringe the copyright (revision right) (see the judgment of the Supreme Court on May 5, 1883).

Therefore, it is examined below whether the appellee [B] knew the existence and contents of Song A at the time when Song B was created.

3.

(1) (Regarding whether Song A was famous in Japan at that time in 1963)

According to Evidence A4, A8, A20, and A37 without dispute between the parties, in the United States, several types of records have been released since Song A was used as the theme song of the American movie “Moulin Rouge” produced in 1933. The score has also been published, and it’s acknowledgeable that the song was famous to some extent even at the time of 1963. In Japan as well, according to Evidence A17, A19, and A48 with no dispute between the parties regarding the records of Koukyoku, the record company that received the appellant’s permission from October 1960, after the appellant became the copyright holder of Song A, reproduced the Koukyoku part of Song A. The records were manufactured and released. The sales volume by December 1963 (to be exact, the number of records issued from the record manufacturing factory) was 184 in 1960, 2,844 in 1961, and 8,773 in 1962, and 2,040 in 1963, totaling 13,841. In addition, according to the first certificate of investigation report, there is no dispute between the parties that the records of Song A were released in Tokyo by Universal Records Company Limited. The above-mentioned records of Koukyoku were released in Japan by 1963, but there is no evidence showing that the time and the number of records released. In addition to these, there is no sufficient evidence to support that the records of Song A were manufactured and released in Japan by 1963.

According to the first and second investigation reports with no disputes between the parties, the records of Koukyoku was released after 1964 as shown in Evidence A46. Such evidence does impact the fact that the records were released in the United States. In addition, the representative of the appellant contended at trial that Song A became famous as the theme song of the movie “Moulin Rouge” released in Japan around 1951 or 1952, and that each record company has released records of Song A. However, according to the testimony of witness [D] in Evidence A35, A36, and Exhibit B19 to B23, Song A was produced in 1933. It was used as the theme song of the American movie “Moulin Rouge” released in Japan in 1934, but this movie was not successful in the industry in Japan, and the record including SongA was not released in Japan at that time. It is acknowledged that the A song was not used in the British movie “Moulin Rouge”, which was released in Japan in 1953 and was successful in the industry. Therefore, neither the statement of the appellant representative nor the testimony of the witness [E] in line with this can be adopted.

Next, there is no dispute between the parties that the appellant published the score of Song A between September 1, 1960 and December 31, 1964. According to the testimony of [F], the statement of the appellant's representative and the whole oral argument at trial showed that the appellant published the score of Song A in March 1964. Thus, the testimony of the same representative that contradicts this point cannot be adopted (in this regard, there was no dispute between the parties that the appellant published the score of Song A during 1962, but this is an indirect confession and does not bind the appellees). In addition to this, there is no sufficient evidence to admit that the score of Song A was published in Japan before 1963.

Furthermore, according to Evidence 38 with no dispute between the parties, it can be seen that Song A was broadcast in Japan by 1963, but there is no evidence that possibly clarifies the timing, number of times, etc. of such broadcasting.

Based on the sales volume of previously certified records, even considering that Song A was famous in the United States, it cannot be admitted that Song A song or its Koukyoku part was so famous that anyone who was interested in music in Japan at the time of 1963 would know of it. Moreover, considering the statements of the appraiser [G] and the witness [H] altogether, it can be inferred that at that time Song A was not known to all music professionals or anyone engaged in music-related work, but only to some professionals or enthusiasts.

(2) (Regarding whether the appellee came into contact with Song A before composing Otsukyoku)

There is no dispute between the parties that the appellee [B] worked in the production department of the TV organization station of Tokyo Broadcasting System Co., Ltd. and was in the position of the second production department manager at that time in 1963. And, according to the testimony of the witness [I] and the statement of the appellee [B] in the trial court, and Exhibit B8-2, B5, B10, B12 to 15 with no dispute between the parties, the appellee was responsible for the planning and production of about 20 TV programs, including music programs, in 1963. Tokyo Broadcasting System Inc. has a huge amount of domestic and foreign records and sheet music. The appellee worked for the company for about three months around 1952 when he joined the company (then called Radio Tokyo Co., Ltd.). On the other hand, he wrote and composed popular songs in addition to Otsukyoku by 1963, including "Endless Love", "Ginza Bruce", "Lady's Tears", "When A Star Brings Hope", etc. It is acknowledged that he composed about 10 songs and published some of them. However, in light of the above fact that Song A was known in Japan at the time of 1963, Song A was used in the TV program broadcast by Tokyo Broadcasting System Inc., where the appellee worked. In this case, which has no special circumstantial proof, it cannot be inferred that the appellee knew the existence of Song A at the time of 1963, based only on the above-mentioned position and career of the appellee.

In addition, the appellant alleged that the appellee had been involved in the comfort facilities of the military force as a musician around 1947, and there was no dispute about Evidence A21 and the statement of appellee himself. However, from this alone, it cannot be inferred that the appellee had already come into contact with Song A at that time.

Not only that, considering altogether the appraisal of the expert witness [G], the testimony of the expert witness [J], the statement of appellee [B] and the whole oral argument at trial, in general, the melody used for popular songs such as Otsukyoku (there is no dispute

between the parties that Otsukyoku is a popular song) is limited to simple songs that are easy for the general public to sing. In particular, since the range and length of the song are limited, it is appropriate to recognize that there is a high possibility that accidental similarities will occur compared to other songs.

From the above, it cannot be said that there is a high probability that the appellee [B] came into contact with Song A before creating Otsukyoku. If so, unless it is recognized that Otsukyoku is similar to Song A to the extent that it cannot be created without knowing the song, it is not conclusive that the appellee [B] at the time of creating Otsukyoku knew about the existence of Song A.

4.

(1) Therefore, we will examine whether or not Otsukyoku is so similar to Koukyoku that it cannot be created without knowing it.

Looking at the first score attached to the original judgment, Koukyoku is in D minor (however, according to the result of the appraisal by the original judge [K], the bars 20 to 23 in the third part below are in G minor) with a two-half signature. It is composed of eighth notes in time signature, and has a total of 33 bars. It consists of the first part of bars 1 to 8, the second part of bars 9 to 16, the third part of bars 17 to 24, and the fourth part of bars 25 to 33. The first, second and fourth parts are the same except for the last note. The bars 1 and 2 at the beginning of this first part are hereinafter referred to as “first motif”, and the following bars 3 and 4 are hereinafter referred to as “second motif.” The first and second motifs (corresponding to the appellant’s alleged melody No.1) are repeated in the second and fourth parts. In addition, the bars 17 and 18 of the third part (corresponding to the first half of the appellant’s alleged melody No. 2) are hereinafter referred to as the “third motif.”

Looking at the second score attached to the original judgment, Otsukyoku is in C minor with a half time signature, is composed mainly of quarter notes, and has a total of 40 bars. It consists of the first part of bars 1 to 16, the second part of bars 17 to 32, and the third part of bars 33 to 40. The bars 1 to 4 at the beginning of this first part are referred to as the “first motif” below, and the following bars 5 to 8 is hereinafter referred to as the “second motif.” This first motif is repeated twice in the third part. In addition, the bars 17 to 20 of the second part are hereinafter referred to as “third motif.”

(2) Around this time, the appellant claims that the melodies that make up the first to third motifs of both songs are the same or very similar, so we will compare each melody below.

The appellant argued that music theoretically consists of four elements: melody, harmony, tune, and form, as a premise for the right comparison, but the comparison of the two songs should be based on the melody. The appellee argues that these four factors should be compared together. However, as the appellee points out, it is clear that “melody” as a daily term means the part of the song excluding the accompaniment, prelude, and sequel. And according to the whole oral argument, the appellant’s allegation is understood to have this meaning. Then, the this meaning of “melody” naturally includes harmony and tunes among the above four elements, which is pointed out by the trial witness [H]. In addition, it is clear that the melody of the entire song naturally includes the form. Then, it must be said that both parties’ claims on this point are substantially the same (hereinafter, the term “melody” is used

in the same meaning as the everyday term said above, except when it is particularly distinguished from rhythm and form).

Now, comparing the melody that composes the first to third motifs of Otsukyoku with the melody that composes the first to third motifs of Koukyoku by transposing the tune in half and transposing it to D minor, the first five tones of the first motif are the same, and the last tone is the same, although it differs by an octave. Eight tones of the second motif are the same. The first seven tones of the third motif are the same. There is no dispute between the parties that when playing a record infusing Koukyoku and Song B together, as in Evidence A1, A3 to A15m and Evidence B1 to B6, a listener gets the impression that they are similar, but only to the extent of the similarity between the first to third motifs of both songs as stated above.

(3) However, just because two songs are similar does not mean that one song cannot be created without knowing the existence and contents of the other songs, so the question here is whether the first to third motifs of Otsukyoku cannot be created without knowing the first to third motifs of Koukyoku.

There is no dispute between the parties as the scholar Keisei Sakka stated in Exhibit B10 that, “The first and second motifs of Otsukyoku are similar to the first and second motifs of Koukyoku, but both are idiomatic expressions. It is just a continuation of the sound patterns where there is a high possibility of coincidental similarity.”

The expert witness [K] said and exemplified, “The first motif of both songs is not unusual for a minor key that starts with the dominant tone (“Mi”) and ends with the tonic tone (“La”). The third motif of both songs is often used as a transition when transposing to another key in a song in C minor.”

The expert witness [J] have stated that “the first to third motifs of Otsukyoku can all come from extremely simple musical progression.”

The expert witness [L] said, “Like the first motif of Otsukyoku, before settling on the tonic tone in D minor (“La”), a melody fragment that shifts up and down in semitones and turns around the dominant tone (“Mi”) is very familiar and not unusual, as often used as the “small fist” peculiar to Japanese popular songs. The upward phrase of the third motif of Otsukyoku is considered to be the result of creating a movement in contrast to the first and second part, which is a simple composition method. Therefore, even if these parts resemble Koukyoku, it is quite possible that they were created unconsciously.

The expert witness [H] said, “Like the first motif of Otsukyoku, The melody that moves up and down between the sixth tone (“Fa”) and the subdominant (“Re#”) below the semitone, centered on the minor scale (“Mi”), is also found in the works of other composers, so the way going falling below the sixth tone in the first motif of Otsukyoku is natural. Therefore, it is unlikely that the first motif of Otsukyoku was written by referring to the first motif of Koukyoku. The 4th to 8th notes of the second motif of Otsukyoku are just a downward type of minor scale, and there are innumerable melodies of the same form. The third motif of Otsukyoku is simply an upward form of the harmony scale, and there are countless songs of this form as well.

Taken together, it is reasonable to admit that none of the first and third motifs of Otsukyoku can be created without knowing the first to third motifs of Koukyoku.

The appellant admits that the melody of bars 13 to 16 and bars 25 to 28 and bars 29 to 32 of Otsukyoku is not found in Koukyoku. In addition, the melody of bars 9 to 12 and bars 21 to 24 of Otsukyoku is a variation of Otsukyoku's first motif, as claimed by the appellant. Therefore, it is clear that these melodies can be created without knowing Koukyoku, as the first motif can be created without knowing Koukyoku as previously stated. In that case, if the whole Otsukyoku can be created without knowing Koukyoku, it cannot be said that Otsukyoku is so similar to Koukyoku.

At the same time, there is no dispute between the parties that [M] stated, according to Evidence A10, "The first and second motifs of Otsukyoku are almost 100% similar to the first and second motifs of Koukyoku, and the third motif of Otsukyoku is a perfect imitation of that of Koukyoku. It must be judged that this striking similarity was done consciously." However, this testimony of the witness [M] cannot be adopted in light of the above evidence. In addition, the trial witness [E] testified that "the first motif of Otsukyoku is exactly the same as that of Koukyoku." However, since he did not state anything about the purpose and reason, this testimony does not reject the above judgment. And there is no other evidence sufficient to reject the above judgment.

In addition, the appellant said that both songs were composed with a weak beginning, double time signature, and a three-part form. Since these elements are inherent in the lyrics of Koukyoku, but no such elements are inherent in the lyrics of Otsukyoku, it is considered that the similarity of both songs did not occur by coincidence. The representative of the appellant has made a statement here, that according to the above-provided second score, Otsukyoku is composed with anacrusis and half time signature, and that Otsukyoku consists of three parts as the first to third parts described above. It is also clear that the appellant alleged such a ternary form of Otsukyoku. However, according to the statements of the witnesses [K], [G], and [L], there are many other songs that consist of three parts with anacrusis and double time signature, especially in Japan's popular songs. It is recognized that there are many songs in the form of anacrusis and three parts, and it is recognized there is nothing particularly unnatural to compose the lyrics of Otsukyoku in the form of anacrusis, double time and three parts. Therefore, neither the appellant's representative's above statement nor the appellant's allegations can be adopted.

5.

From the above, it must be said that there is no sufficient evidence to support the fact that the appellee [B] knew the existence and contents of Koukyoku at the time when Otsukyoku was created. Therefore, it cannot be said that the appellee infringed the copyright (adaptation right) of the appellant for Song A, and Otsukyoku is not a modification of Song A. Therefore, the appellant's counterclaim, which presupposes that Otsukyoku is a modified version of Song A, should be dismissed as unreasonable without judging the other issues.

II. Judgment as to Case B

1.

Except for a revision from the 8th line of 38th table of the original judgment "however" to the 9th line thereof "must be said to be", as described in paragraph 2 below, we adopt the original judgment that the appellant's request is unreasonable. However, in the 36th sheet of the original judgment, "B song" is added after "Otsukyoku" in the third line, and "B song" and "counterfeit" in the fourth line are changed to "Otsukyoku" and "adaptation",

respectively. We also add “accompaniment and prelude to Otsukyoku” before “B song” on the 5th line, and delete “composed this” on the 7th line.

2.

However, as mentioned in Case A, when the performances of both songs are compared by playing a record in which Koukyoku and Song B are infused, there is an impression that the two songs are similar. Not only that, as we reviewed the scores of both songs confirmed in Case A, comparing the melody of the first to third motifs of Otsukyoku with the melody of the first to third motifs of Koukyoku by transposing the tune in half and transposing it to D minor, five out of eight notes in the first motif are the same, and the last note is one octave different but the same note. Eight notes in the second motif are the same. The first seven notes in the third motif are the same.

Based on these facts, it is not unreasonable for the appellees who are not music experts to think that Otsukyoku is a modification of Koukyoku as a counterfeit. The expert witness [J] concludes, “Although it cannot be concluded that Song B is a counterfeit of Song A, it is common sense to a reasonable person that Song B copies Song A.” Moreover, according to the testimony of the witness [M] and the statements of the appellee [N] at trial, the appellee’s company has heard the opinions of music experts in advance regarding the filing of the complaint. Therefore, it cannot be admitted that both appellees were willing or negligent.

At the same time, according to the testimony of the witness [I] and the statement of the appellant [B] at trial, the appellee [N] introduced appellee [B] to an American [O] around December 1963. It is not unclear that he recommended that the copyright of Song B be transferred to such person. However, even in consideration of such circumstances, it is unlikely that both appellees had the above-mentioned intention or negligence.

Thus, the suit filed by the appellee’s company is not a sufficient ground for concluding that both appellees are liable for the infringement.

III. Conclusion

As explained above, the appellant’s request in Case A and the appellant’s request in Case B should both be dismissed as unreasonable, and the original judgment to the same effect is affirmed. Therefore, each appeal will be dismissed, and the burden of appeal costs will be decided by applying Articles 95 and 89 of the Code of Civil Procedure as in the main text.

(Judges:

Ryokichi Sugimoto

Eiichi Takigawa

Eiichiro Uno)