

Kobayashi v. Hatorri

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).

JUDGMENT

Appellant: A
Appellant: Kanai Music Publishing Co., Ltd.
Litigation Attorneys: Junichiro Inoue
Satoshi Yamane
Takao Sato
Kenta Kondo
Miyuki Matoba
Kuniaki Harayama

Appellee: B
Litigation Attorneys: Nobuyuki Kamiya
Junichi Asahi
Mikiko Yamanouchi
Hirohito Nishihata

MAIN TEXT

1. Paragraph 1 of the main text of the original judgment is changed as follows:

(1) The appellee shall pay appellant A 6 million yen at a rate of 5% per year from December 1, 2001 to the completion of the payment.

(2) The appellee shall pay the appellant Kanai Music Publishing Co., Ltd. 3,390,421 yen at a rate of 5% per year from December 1, 2001 to the completion of the payment.

(3) Dismiss all other claims of the appellants.

2. Dismiss the Appellant A's appeal regarding Paragraph 2 of the main sentence of the original judgment.

3. The court costs are divided between Appellant A and the appellee through the first and second trials, one of which is borne by the appellant and the rest of which is borne by the appellee. Between Kanai Music Publishing Co., Ltd. and the appellee, the court costs shall be divided into five parts through the first and second trials, three of which shall be borne by the appellant and the rest shall be borne by the appellee.

4. This judgment can be tentatively enforced only in (1) and (2) of paragraph 1 of the main text.

FACTS & REASONS

I. Petitions by the Parties

1. Appellants

(1) Revoke the original judgment.

(2) The appellee will pay appellant A (hereinafter referred to as “appellant A”) 10 million yen at a rate of 5% per year from December 1, 2001 to the completion of the payment.

(3) The appellee shall pay 8,141,599 yen to the appellant Kanai Music Publishing Co., Ltd. (hereinafter referred to as “appellant Kanai Music Publishing”) at a rate of 5% per year from December 1, 2001 until the payment is completed. (Note, claims exceeding the deposit of 3.21 million yen at a rate of 5% per year from September 24, 1998 to the payment have been extended by this trial.)

(4) Dismiss the appellee’s counterclaim against Appellant A.

(5) Court costs shall be borne by the appellee in both the first and second trials.

(6) Provisional execution declaration for (2) and (3) above.

2. Appellee

(1) The appellants’ appeal and the appellant Kanai Music Publishing’s extended claims will be dismissed.

(2) The court costs shall be borne by the appellants.

II. Facts

This case is the composer of the song described in the score 1 of Attachment 1 (hereinafter, the term “song” is used as the song with lyrics) and the song related to “**Let’s Go Anywhere**” (hereinafter referred to as “**Koukyoku**”). Appellant A and its copyright holder, Kanai Music Publishing, responded to the appellee who was the composer of the song “**Memorial Tree**” (hereinafter referred to as “**Otsukyoku**”) described in the score 2 of Attachment 2. Claiming that Otsukyoku is an arrangement of Koukyoku, Appellant A claims damages due to infringement of the author’s copyright (the right to hold the same name and the right of representation) and Appellant Kanai Music Publishing’s copyright (arrangement right). In this case, the appellee counter-appealed and requested the appellant A to confirm that he / she owns the copyrights for the song.

The appellants alleged infringement of the copyright in the court, but they also appealed the original judgment that dismissed all of the appellants’ claims and accepted the appellee’s counter-appeal. The allegation of infringing the arrangement right (note that the appellants use the term “adaptation right” in their preparatory documents, but the Copyright Law states that Koukyoku and Otsukyoku are copyrighted works of the music. In Article 2,

Paragraph 1, Item 11 of the Copyright Law, “arrangement” of music is peculiarly defined as a mode of creation of a secondary work along with “translation”, “transformation” and “adaptation”, and in Article 27, in view of the fact that “arrangement right” is defined as one of the exclusive rights of the author together with “adaptation right”, the appellants’ “adaptation right” is nothing more than “arrangement right”. As it is understood, the following notation is used) was added and the allegation of infringement of the reproduction right was withdrawn, and the appellant Kanai Music Publishing extended the claim in this case.

1. Premise facts

(1) Appellant A (born in 1966) wrote and composed the song “Let’s Go Anywhere” (described in the score 1 of Attachment 1) in 1966, and wrote the lyrics and rhythm of the song (Koukyoku). Appellant A acquired copyright and moral rights of the author. This song was released at the time in the form of C singing on the TV commercial of Bridgestone Tire Co., Ltd. (current trade name: Bridgestone Co., Ltd., hereinafter referred to as “Bridgestone”). In February 1967, Appellant A transferred the copyright, including the arrangement right of the underlying song, to the appellant Kanai Music Publishing along with the copyright related to the lyrics, and the appellant Kanai Music Publishing became an incorporated association on the 28th of the same month. The work notification was submitted to the Japanese Society for Rights of Authors of Music (hereinafter referred to as the “Society”), and the performance rights were transferred in trust, but the arrangement rights were reserved by the appellant Kanai Music Publishing (Exhibit A1, 2, 28, 29, 41, 54, 114, 118, Exhibit B1 [including each branch number]).

(2) In 1992, the appellee (born in 1945) composed a song (Otsukyoku) related to the song “Kinenki” described in the score 2 of Attachment 2. In December of the same year, D was the lyricist, E was the arranger, Pony Canyon Co., Ltd. (hereinafter referred to as “Pony Canyon”) was the record producer (master producer), and “Appare Gakuen Students” was the singer. As the song was released, it was released at the time in the form of being recorded in a CD album titled “ ‘Apparesan ma Dai-sensei’ Campus Song Collection”, and then Fuji Television Network Co., Ltd. (hereinafter referred to as “Fuji Telebi”) and Used as the ending theme song for the TV programs “Appare Sanma Dai-sensei” and “After all Sanma Dai-sensei” broadcast on Fuji TV affiliated stations including Kansai Television Broadcasting Co., Ltd. (hereinafter referred to as “Kansai Television”). It is something that is. Around December 1992, the appellee transferred the copyright for the song Otsu and D the copyright for the lyrics to Fuji Pacific Music Publishing Co., Ltd. (hereinafter referred to as “Fuji Pacific”). (Appellee in this case, Exhibit A27, 43-1, 2, Exhibit A84,99, Exhibit Otsu 6-9,12-3, Exhibit A17)

2. Main issues

(1) Does Otsukyoku maintain the same essential characteristics of the expression of Koukyoku?

(2) Is Otsukyoku composed based on Koukyoku?

(3) What’s the damage to the appellants?

III. Parties’ claims on the main issues

1. Regarding issue 1 (identity of essential features in expression)

1-1 Appellants' allegations

(1) Judgment criteria

In this case, in the judgment of the identity of the essential characteristics in the expression of music, the elements other than the melody, i.e., harmony, rhythm, tempo, form, and atmosphere, must be placed outside of consideration. This is because, as long as there is creativity in the music, the copyright is generated as the original work only by the melody, and the music which changed the elements other than the melody is a derivative work.

Here, looking at the characteristics of the melody of Koukyoku, it is a song composed with the intention of creating a unique melody line while using a natural melody. It does not use an uncommon or strange melody, but it has highly unique and creative expression. It is unavoidable that there is the same or similar melody within the length of 1 to 2 bars in the composition of 8 bars and 4 phrases of Koukyoku, but within the entire melody line of 8 bars, the existence of the same or similar melody lines is practically impossible except for derivative works.

However, as will be described later, the whole of Otsukyoku is the same as or similar to Kokyoku, and the appellee borrows the melody of Koukyoku using a variation technique and changes a part of it to make it derivative. It is nothing but a kind of variation composed in, and is a derivative work related to the arrangement of the Koukyoku. In general, a variation is a song that uses the theme melody of the original song and adds new creativity, and all of them do not conflict with the reproduction right or arrangement right of the original song. However, in the case of Otsukyoku, the listener can misunderstand that it is the same song as Koukyoku, or at least directly feel the essential characteristics of the expression of Koukyoku.

(2) Beginning phrases of both songs

The melody of Koukyoku is 4 phrases corresponding to each lyric part of “Let’s go anywhere/ Even if the road is harsh / While whistling / Let’s go” (hereinafter, from “phrase A” to “phrase D” in order). And the phrase A, which corresponds to the “ki” [beginning] of Kishōtenketsu, begins with Doremi and ends with Do. Similarly, phrase B, which corresponds to “shō” [development], begins with Dodofa and ends with So. Phrase C, which corresponds to “ten” [turn], begins with Sosora and ends with Do. Phrase D, which corresponds to “ketsu” [ending], begins with Doremi and ends with Do.

On the other hand, the melody of Otsukyoku is “In the corner of the schoolyard / There’s a memorial tree planted by everyone / On one day far from now / You will think of it at a moment / It’ll probably be a moment / That life is hard / Green leaves swaying in the wind / The memorial tree.” It consists of 8 phrases (hereinafter referred to as from “phrase a” to “phrase h” in order) corresponding to each lyric part, and phrases e to h and phrases a to d are connected to form one song. In effect, phrases e to h is a repetition of phrases a to d.

Therefore, the comparison of phrase A of Koukyoku and phrases a, e of Otsukyoku (hereinafter collectively referred to as “first phrase”), phrase B of Koukyoku and phrases b, f of Otsukyoku (similarly referred to as “second phrase”), phrase C of Koukyoku and phrase c, g of Otsukyoku (“third phrase”), phrase D of Koukyoku and phrase d, h of Otsukyoku,

Comparing h (“fourth phrase”) shows that the beginning of each phrase and the sound of the paragraph are the same. In other words, in both songs, the connection of sounds between each phrase is the same, so the melody is so similar that the listener may mistakenly think that they are the same song.

(3) Strong beats of both songs

The strong beat is musically important and gives the impression of the melody, and it is in the first note of each bar. In Koukyoku, the strong beat of the first bar (in this section, the number of bars is described in Attachment 3, contrasted by the number of bars in the attached music score of Otsukyoku) is Mi, the second bar is Do, the third bar is Fa, the fourth bar is So, the fifth bar is La, the sixth bar is So, the seventh bar is Mi, and Do is used in the 8th bar. And in Otsukyoku, except for Re being used in the eighth bar, the same strong beats are used as the ones in Koukyoku. The strong beat in the eighth bar is different because the song is composed by connecting two of the same melody lines, phrases a to d and phrases e to h. It’s just a way to keep the song from ending. This similarity of strong beats further strengthens the similarity of impressions resulting from the fact that the beginning of each phrase and the paragraphs are the same.

(4) Differences in melody between the two songs

The difference between the melody of Koukyoku and Otsukyoku is the part colored in green on the contrasting musical score described in Attachment 3, and the other part colored in orange with the number of notes changed for some parts but the melody remaining the same. Looking at the difference, ① in the latter half of the first phrase, Koukyoku has “Midosidoredodo” while Otsukyoku has “Mimireredodo.” This is the same as the melody of “Miredo” when abstracted, except that the leading tone of Koukyoku is omitted. ② In the latter half of the second phrase, Koukyoku has “Fafafasolaso” while Otsukyoku has “Falalaso #Faso,” but all the tones used are the same. In Koukyoku, the pitch of the sound is gradually raised from Fa and ended with So, while in Otsukyoku, the pitch is raised from Fa to La and then gradually lowered to end with So. There is only a difference in the melody of the duet. In addition, “#Fa” of Otsukyoku is only a semitone raised to connect to So naturally. ③ In the latter half of the third phrase, Koukyoku has “Somido” while Otsukyoku has “Sosomiredo.” This is to increase the number of the same tone So and put a Re between Mi and Do to “Miredo.” It is the melody itself of Koukyoku’s “Somido.” ④ The difference between the two songs in the latter half of the fourth phrase is that Otsukyoku repeats the same melody twice to make one song, but it is only a change necessary to prevent the song from ending with phrase d. Comparing the latter half of the phrase D of Koukyoku with the latter half of the phrase h of Otsukyoku, the “Dosidredodo” of Koukyoku is “dpredodo” in Otsukyoku, but here too, the leading tone is omitted, and other tones are in common, making a “Doredodo” melody.

The above degree of melody change does not make a significant change to the melody of Koukyoku. In fact, even when compared with the one composed by Appellant A himself as a variation of Koukyoku, the similarity to the original Koukyoku is rather strong in Otsukyoku.

In this way, the difference between the melody of both songs is a part that is musically insignificant to the melody of Koukyoku. The difference is small in quantity. Moreover, since it is merely replaced with another sound within the same chord, the

characteristics of the melody of Koukyoku cannot be canceled, and the listener can directly feel the essential characteristics of the expression of Koukyoku. Even if the above-mentioned changes in the Otsukyoku are recognized as creative, it is limited to the creativity as a variation based on Koukyoku, and falls within the scope of arrangement under the Copyright Law.

(5) Elements other than melody

Regarding the harmony, Koukyoku has 4 types of harmony, while Otsukyoku has 18 types of harmony, but when compared from the viewpoint of the harmony group, the 1st to 5th bars, the 9th to 13th bars, the 15th and 16th bars of Otsukyoku are all the same harmony, and the 6th and 14th bars are the same harmony with a mixture of voice and surrogate harmony and transitional harmony. Only the 7th and 8th bars are different chords, but this is not a musical ingenuity because it is only a chord progression for repeating the music and connecting it to the first main chord. Next, regarding the rhythm, although there is a difference that Koukyoku has a duple meter and Otsukyoku has a quadruple meter, both can be easily replaced, and in light music it should be just a difference in performance format, and if both songs are written in the same way, the rhythm will be about 74% the same. The rhythm structure is also very similar. The difference in tempo is just a matter of performing style, not an essential factor. Also, regarding the form, Otsukyoku seems to have a two-part form, but strictly speaking, it is a repeating two-part form, and it is only repeating a part of the form of Koukyoku, so both songs should be said to be in the same form. The overall atmosphere of the song is not an essential element as long as it can be changed by changing the lyrics and arrangement, and the difference does not matter in this case.

1-2 Appellee's allegations

(1) The essence of a musical piece is that, over a certain period of time, the overall impression of the melody, harmony, rhythm, tempo, form, etc., create a flow of emotions in the listener's mind. In other words, a musical work related to a song requires a certain time frame for the listener to appreciate. Since the expression of a song changes over time, when distinguishing the essential features of that expression, the impression that you feel as a result of listening to the original song directly should be compared by dividing it at regular intervals. However, the above allegations of the appellants did not consider the comparison of the impressions created by the connection between the tones, and were all about the quantitative comparison of the tones that were cut before and after, thus overlooking the essence of the musical work.

(2) Comparing melody phrases

A. Koukyoku describes the "act" of moving forward, and Otsukyoku describes the "scene" that the memorial tree is blowing in the wind, or the "scene" that comes to mind when you see the memorial tree. This difference is because the underlined part in the beginning of Koukyoku, "Doremi—Dosi—Doredo," uses a leading tone Si that strongly guides the strong beat Do. This leading tone Si, located in the strong beat part, contains the force to push the entire melody forward. So even though it's a single note, it is extremely important.

On the other hand, at the beginning of Otsukyoku, "Doremi—Mire—Redodo," only these three tones, Do, Re, Mi, are used, and there is no leading tone. In this part, the three

tones are gently connected to create a soft feeling, which is completely different from the Koukyoku that expresses a feeling of moving forward.

B. Next, in the second phrase, which is the development part, the part in Koukyoku “Dodofa—Fafafasolaso” feels like climbing a steep mountain while holding your breath. This is caused by making four jumps from Do to Fa, then repeating Fa for four times, and then raising one tone each time to So and to La. On the other hand, the part in Otsukyoku “Dodofafafafalalaso#faso” uses a four-degree jump at the beginning, but then goes up to La, and then uses #Fa to delicately descend while finely connecting the eighth notes. It shows a smooth descent, and So is raised by a semitone from #Fa to tighten the intermediate melody. This delicate part of “Lalaso#faso” creates a feeling that a refreshing breeze is blowing.

Comparing the melody of this part, in addition to the difference in the location of the highest tone La, there is a decisive difference that the subtle sound of #fa is used in Otsukyoku.

C. Then, in the third and fourth phrases, which are the turn and ending parts, Koukyoku has “Sosola—Sofa—Solaso—Mido” and “Doremimi—Dosi—Doredo,” creating a feeling that I finally have climbed to the top of a mountain holding my breath, and climbed down the mountain, and am going further toward the next mountain. This is a very masculine impression, and the linear rise and fall of the melody resembles climbing up and down a mountain. On the other hand, the melody in Otsukyoku is “Sosola—Lasofa—Solastosomi redo” and then “Doremi—Dola—Mi—Re,” and these four bars are a continuous unit. The feature here is the fine division of notes that makes heavy use of eighth notes and the soft flow of the passage notes, and the arc of a feminine melody with a gentle roundness is repeated four times, creating a calm feeling for listeners.

This part of each song has different masculine and feminine qualities.

D. Furthermore, in Otsukyoku, the latter half of the song continues, and after once again regaining feelings with a quiet phrase without a leading tone of “Doremi—Re—Dodo”, climbing to the climax of “Dodofafafafalalaso#faso.” Unlike the second phase, this part has the effect of encouraging the outflow of emotions rather than a mere scene description. With such a strong emotional feeling expressed, the melody then converges with a soft flow of “Sosola—Lasofa—Solastosomiredo” and then “Doremi—Dore—Dodo”.

This emotional expression and the melody of calmness after a catharsis do not exist in Koukyoku.

E. As mentioned above, when you look at the melody of Otsukyoku as a whole, it starts with a scene that a person stands quietly, develops into a scene where the wind blows, prepares for emotional expression by urging the person to recollect, and once again the person quietly stands. After that, the flow is to exhale emotions and quietly contain the feelings purified by the exhalation, and the melody itself is completely different from Koukyoku.

(3) Essential difference in harmony

A. The most important factor that music affects the emotions of a listener is the harmony, and even if the melody is the same, the emotional impression created by the difference in the harmony can be completely different. A composer who writes an orchestra

score like an appellee creates a harmony and a melody at the same time, and the harmony is not subordinate to the main melody, but as a pillar of a piece of music that is inseparable from the melody. It is an element of music that is as important as or more important than a melody. The appellants' assertion that the essential characteristics of the musical composition should be judged only by the melody must be deemed biased.

B. The chords of Koukyoku are simple ones consisting of three basic chords (C, F, G in C major), while Otsukyoku has 18 kinds of various chords to express delicate emotions. Looking at this concretely, the melody that expresses the quiet scene of "Doremi—Mire—Redodo" at the beginning is wrapped in a floating harmony of $D \rightarrow G / A \rightarrow D \rightarrow G / D \rightarrow D$. G / A is used to create a gently descending atmosphere of the melody "Mi—Mi," "Re—Re," and "DoDo—."

In the following phrase b, "Dodofafafafalalaso#faso", the harmony is $D \rightarrow G \rightarrow D$, which is a very ordinary harmony, and it barely changes but stays simple and quiet.

The parts, "Sosola—Lasofa—Solasosomiredo" and "Doremi—Dola—Mi—Re—," in phrases c and d have a fine harmony that is integrated with the fine division of music. Starting from $D \rightarrow C / D \rightarrow D7$ in the 4th bar, the chords continue as $G \rightarrow A7 \rightarrow D \rightarrow F \# + / A \# \rightarrow Bm \rightarrow Bm / A \rightarrow G (Em) \rightarrow G \#m7 \flat 5 \rightarrow G / A$, where a mellow and sentimental feeling is conveyed even in the bright tones. This is because of the use of chords such as Bm and $G \#m7 \flat 5$, which express sadness in a major key. In addition, the flow of the melody is smoothly connected by using the transitional chords $F \# + / A \#$, Bm / A , and $G \#m7 \flat 5$, trying to create some emotional coloring without letting a single note loosen.

During the extension by three beats of the last Do in phrase e "Doremo—Re—Dodo—" by 3 beats, the harmony changes from $D \rightarrow Dmaj7 \rightarrow D7$, and then the harmony goes $G / B \rightarrow A7 / G \rightarrow F \#m$, expressing the emotions in "Dodofafafafalalaso#faso." In the third phrase, which has a common melody, a simple harmony of $G \rightarrow D$ is used, but in order to spit out the thoughts here, the static harmony of $G \rightarrow D$ is not enough, and it has a strong presence. Using a chord with a strong presence claims that this is the point of this song, and it can be seen that it is the climax that pushes the emotions to the utmost.

The parts, "Sosola—Lasofa—Solasosomiredo" and "Doremi—Dore—Dodo—," in phrases g and h are different from the common phrases c and d of the melody, and do not use the elapsed chords, $D7 \rightarrow G \rightarrow A7 / G \rightarrow F \#$. It is $m \rightarrow Bm \rightarrow Gm / B \flat \rightarrow D / A \rightarrow G / A \rightarrow D \rightarrow Gm6 / D \rightarrow D$. In this flow toward the end, instead of using finely tuned transitional chords to express the goodness of the flow, there is a tendency to naturally capture high emotions with orthodox chords. In addition, although the chords such as $Gm / B \flat$ and $Gm6 / D$ that express the feeling of crying are used, there is a device in that the commonly used Gm is not used as it is but is made into a fractional chord.

C. As mentioned above, the harmony of Otsukyoku has a completely different emotional feeling from Koukyoku. While Koukyoku leaves a bright and positive impression, Otsukyoku gives rise to sentimental feelings.

(4) About other factors

A. Looking at the rhythm, Koukyoku has a two-half time signature, and the strong beat appears in every part, strongly expressing the feeling that the rhythm is moving forward, with a lightly shuffling rhythm. On the other hand, such a progressive impression does not fit into the sentimental and nostalgic lyrics of Otsukyoku. Otsu has a four-quarter time signature suitable for a quiet ballad. This is also one of the essential differences between the two songs.

B. Next, the tempo Koukyoku with a forward-looking vibe is about 116 half notes per minute, while the tempo of Otsukyoku is 98 quarter notes per minute, which deepens the emotions. In this respect too, the two songs are essentially different.

C. Also, as for the format, Koukyoku is consisting of only one unit, while Otsukyoku is composed of two parts. Also, the latter half of Otsukyoku is not a simple repetition of the first half as described above with respect to the harmony. Koukyoku has no corresponding part to the climax part in Otsukyoku, which makes the two songs completely different in format.

(5) About idiomatic sound patterns

As described later (Part 2-2 (2) below), the melody of Koukyoku is made up of a series of sound patterns that follow the idiomatic phrase or marching form, and there is no much creativity in such idiomatic sound patterns. Therefore, even if a part of the melody of Otsukyoku is similar to such an idiomatic figure of Kyokouku, it cannot be said to be the basis for the identity of the essential features of the expression. In addition, even in the case law of the United States, infringement of copyright is denied in cases where there is only similarity in the “trite (common, obsolete)” melody.

2. Regarding issue 2 (reliance)

2-1 Appellants' allegations

(1) Koukyoku was first released in Bridgestone's television commercials in 1966 and gained great popularity as a hit song, so it has been used as a commercial song for a long time since then, and numerous records, CDs, publications, etc. have been sold. In addition to being included in junior high school textbooks in 1974, it has been published in elementary and junior high school music teaching materials published by major textbook publishers for many years. From these points, Koukyoku is a song that should be called a national favorite song, and there are few Japanese people nowadays who have never heard Koukyoku.

(2) The appellee was a person who had lived in Japan before 1966 and was involved in the work as a musician in the music industry. From the following points, it can be seen that he was in contact with Koukyoku. In other words, the appellee has a close working relationship with singer F from around 1959 to the present, and has accompanied overseas performances and composed and arranged a large number of songs for F. On the other hand, F has sung Koukyoku for many years and even released a single version of the record, so the appellee cannot be unaware of Koukyoku. In addition, the appellee was composing a Bridgestone company song around 1984, and in order to compose the company song, it is natural for the appellee to consider the commercial song that has a great influence on the image of the client company. In addition, Koukyoku is also published in Bridgestone's corporate history.

(3) In addition, the appellee responded to a reporter's interview in front of his home broadcasted on Nippon Television "Look Look Good Morning" on July 31, 1998, saying, "Oh yeah, it feels like this song," and "Isn't that you have an interest in knowing about it?" Also, on August 12, the same year, at a press conference at the ANA Hotel, he listened to the tape of Koukyoku and said, "The first thing I felt was, honestly, 'oh this is it.'" These remarks are nothing but admission that the appellee has heard Koukyoku.

(4) The appellee is a person who has no track record of hit songs as a composer, but he is evaluated as a music arranger. Given the composer's composing tendency, when required to compose a hit song, it is not hard to imagine that a hit song that has already been accepted by the public will be used as a reference when composing. In fact, in 2000, the appellee also released "Miyazaki City Tourism TV Commercial Song" and "Beyond the Waves and Light" as his own works, which closely resembled the hit song "Beyond the Knight Sky."

(5) The appellee argues Otsukyoku was composed without relying on Koukyoku, and that the melody of Otsukyoku was created after its lyrics. However, in the lyrics manuscript of Otsukyoku (Exhibit A 89-2), there is a hiragana enclosed in parentheses as "Unusable (ni)." This indicates that the lyricist was not convinced of the correspondence between the melody and the lyrics, that is, the lyricist struggled to match it to the previously composed melody. Thus, the appellee's allegations above are unreasonable.

(6) Considering the variety of composition, Otsukyoku is too similar to Koukyoku. Moreover, the similarity is not about 1 to 2 bars, and the whole music is similar as described above. Even if the melody part in the second bar is of an idiomatic figure, it is almost unthinkable from the theory of probability that a melody that closely resembles the entire song of Koukyoku composed of 4 phrases is accidentally created. Considering the fact of the appellee's access to the song as described above, it should be strongly inferred that the appellee is relying on Koukyoku.

2-2 Appellee's allegation

(1) It is clear from the following process of composition of Otsukyoku that Otsukyoku was not composed based on Koukyoku.

A. Otokyoku is a so-called song with lyrics created first.

Namely, from April to May 1992, the lyrics of eight songs used for the Fuji TV program "Apparesanma Daisensei" were made by D, and one of them was the lyrics of Otsukyoku. Regarding the composition, the appellee was requested to compose at the end of May of the same year with G, who was acquainted with both D and the appellee. At that time, it is assumed that D and Pony Canyon producer H, who was the record producer (master producer) of Otsukyoku, met the appellee directly and discussed that Otsukyoku would be sung at the graduation ceremony of the above program. It was explained that Otsukyoku was the last song in a ballet album which replaced "the honor" and "fluorescent light." In response, the appellee submitted two types of songs for the above lyrics, and one of them was accepted as Otsukyoku. In the process, corrections such as adjusting the number of characters were made to the first draft of the lyrics produced by D, as displayed in the writing part of Exhibit A No. 89-2.

In addition, the harmony of the lyrics, intonation, and melody of the song, the naturalness of the song's development, and the fact that there is nothing unreasonable in breathing of singing, all clearly show that Otsukyoku is created with lyrics finished first.

B. Then, what is important regarding reliance is whether or not the lyrics of Otsukyoku are associated with Koukyoku. The lyrics of Otsukyoku are made on the assumption that they will be sung at a graduation farewell scene. The essence is different from the bright song Koukyoku that expresses the feeling of going forward. Since it is clear that the lyrics of Otsukyoku are not associated with Koukyoku, it is clear that the song with the melody attached to the lyrics is not based on Koukyoku.

In the first place, the appellee is a composer with sufficient experience and achievements, so there is no difficulty for him to compose a simple 16-bar song like Otsukyoku. Thus, there is no need for him to make reference to a piece of music that is far away from his composing idea.

(2) In addition, Koukyoku is made up of a series of idiomatic sound patterns or repetitions of forward-going sound patterns, and it is easy to recall similar motifs without referring to the music piece of Koukyoku.

In other words, when Koukyoku is distinguished by its motif, the "Doremi—Dosi—Doredo" part in phrase A is used in songs published before Koukyoku like "Careless Love" and "Goodbye Tears," while the "Dodofa—Fafafasolaso" part in phrase B appears in "Mozart's Lullaby", and the parts after that appear in "Stenka Razin" and "Clock." Furthermore, all the phrases of Koukyoku are used in the inner voice part with the main melody in Bach's Cantata No. 147 "Lord, the Joy of Juman Desire."

The appellants argue that it is probabilistically unthinkable that the melodies of the four phrases are similar by chance, but make one idiomatic figure sound good to the listener as a constant tune. For this reason, the subsequent sound patterns are naturally limited, and simple probability theory is not valid.

(3) Appellants argue that there are few modern Japanese who have never heard Koukyoku. However, the work notification of Koukyoku was submitted on February 28, 1967, and Otsukyoku was composed from the end of May to the beginning of June, 1992, a quarter of a century since Koukyoku. However, no objective evidence has been submitted to show that Koukyoku was distributed during the time. Thus, the above allegations by the appellants are unsubstantiated.

(4) The appellants insist on the appellee's access to Koukyoku. There is no fact supporting that it is not necessary for the appellee to refer to the company's commercial song when composing Bridgestone's company song. Also, regarding the co-performance with F, there's nothing showing that the appellee proposed putting Koukyoku in the concert's program. Thus, this does not provide a basis that the appellee has access to Koukyoku either.

3. Regarding issue 3 (damage of appellants)

3-1 Appellants' allegations

(1) Damage of appellant Kanai Music Publishing

A. Fuji Pacific, the copyright holder of Otsukyoku, entrusts the management of the copyright to the association based on a trust. According to the association's copyright royalties regulations (hereinafter referred to as "royalties regulations") and the copyright royalties distribution rules (hereinafter referred to as "distribution rules"), the distribution amount and distribution suspension amount to Fuji Pacific for music recording, movie recording, videogram recording and publishing, which are subject to song-specific collection, the entire amount constitutes the amount equivalent to the amount of money normally received as stipulated in Article 114, Paragraph 2 of the Copyright Act ((a) to (d) below). The amount is based on the association's response to the survey commission (as shown in Attachments 5 and 6). On the other hand, on the premise of the existence of a comprehensive license agreement in terms of the usage fee regulations and distribution regulations or the operation of the association, the equivalent consideration for broadcasting and broadcasting recordings fees subject to comprehensive collection shall be the comprehensive license agreement. In the case of infringement that is not premised, it is appropriate to add up the usage fee for each song ((e), (f) below). Then, the damage of the appellant Kanai Music Publishing suffered by the infringement of the arrangement right of the song should not be less than 8,141,599 yen in total, which is the sum of these equivalent consideration and the attorney's fee (20%). The amount of damage below that is claimed for a part of the total damage can be proved at this time.

(a) Music recording 1,082,500 yen

① Distribution amount 850,539 yen (for each distribution period from March 1993 to March 1999)

② Distribution hold amount 231,961 yen (for each hold period from December 1998 to January 2000)

(b) Movie recording 240 yen

① Distribution amount 0 yen

② Distribution hold amount 240 yen (for the September 2000 hold period, but only for songs)

(c) Videogram recording 9800 yen

① Distribution amount 5370 yen (September, December 1996, September 1997, December distribution period)

② Distribution hold amount 4430 yen (September 1999, June 2000, September hold period)

(d) Publishing 1,026,686 yen

① Distribution amount 587,219 yen (September 1994-September 1995, March 1996-March 1999 for each distribution period)

② Distribution hold amount 439,467 yen (for each hold period from March 1999 to December 2000)

(e) Broadcasting 4,510,400 yen

① For Fuji TV (January 17, 1993-November 25, 2001) 2,976,000 yen

(According to Chapter 2, Section 3, 2 (2) of the Usage Fee Regulations, the minimum fee for the first class of copyrighted work usage fee per song is 5600 yen, and it was broadcast 372 times within the above period.)

② For Kansai TV (January 23, 1993-October 21, 2001) 1,534,400 yen

(The minimum fee for the copyrighted work per song specified above is 5600 yen, and it was broadcast 274 times within the above period.)

(f) Broadcast recording 155,040 yen

① For Fuji TV (January 17, 1993-November 25, 2001) 89,280 yen

(According to Rules for royalties, Chapter 2, Section 4, 1(2), the royalties for each song specified in the television movie are 240 yen, and it was broadcast 372 times.)

② For Kansai TV (January 23, 1993-October 21, 2001) 65,760 yen

(Similarly, the copyrighted material usage fee is 240 yen per song, and the song was broadcast 274 times.)

(g) Attorney's fee 1,356,933 yen

(20% of the subtotal of 6,784,666 yen in (a) to (f) above.)

B. The appellee insists that the distribution amount to the lyricist and the singer and the management fee of the association should be deducted from the above distribution amount and distribution suspension amount, but in this case, the right to arrange the music is reserved. The appellant Kanai Music Publishing, which owns the song, is exercising its rights directly as a copyright holder, and merely refers to the association's royalties regulations, etc. in calculating the equivalent consideration. Therefore, it is natural that the appellant may claim the full amount of the equivalent consideration, and thus the appellee's allegation is unreasonable. Moreover, the song "Memorial Tree" with lyrics attached to the song is an illegal one that infringes the arrangement right and the moral rights of the author of Koukyoku, so the royalties for the song as well as the lyrics are charged. It should be said that there is no right to claim distribution, and therefore the appellee's alleged distribution cannot be considered.

In addition, the appellee argues that it is unreasonable to calculate the equivalent consideration for broadcasting and recording for broadcasting by the usage fee per song. The purpose of the association's comprehensive usage fee is that the association sets a much lower amount than the song-specific usage fee in order to reliably collect the copyrighted work usage fee at low cost. This is a benefit for those who have made a comprehensive agreement. It is clear that it is unreasonable to grant such benefits without such an agreement.

(2) Damage of appellant A

Appellant A, who is the author of Koukyoku, has the right to integrity of the song and the right of attribution, but the appellee has modified the song against the will of the appellant A and infringed the right to integrity. In addition, by publishing Otsukyoku as his own creation but not a derivative work of Koukyoku, without displaying the real name of the appellant as the author name of the original work when presenting Otsukyoku to the public, the appellee infringes the right of attribution.

This state of infringement has continued since 1992, and even after the filing of this counterclaim. During this period, Otsukyoku has been offered or presented to the public through weekly television broadcasts, CD releases, karaoke singing, etc. As a result, the uniqueness of Koukyoku is diminished, with some people mistakenly thinking that Otsukyoku is Koukyoku.

A national hit song like Koukyoku is not something that even a talented composer can easily create. For that reason, it is considered to be very important for composers to remake the song, even if there is an order to do so, and it is not something easy to respond.

However, the appellee continues to provide or present Otsukyoku to the public, which has been modified from Koukyoku, against the wish of appellant A. It should be said that it will cost 100 million yen to remedy the mental distress suffered by the appellant. And in this counterclaim (appeal trial), a compensation fee of 9 million yen and an attorney's fee of 1 million yen is requested.

3-2 Appellee's allegation

(1) About damages of appellant Kanai Music Publishing

A. We acknowledge the appellants' claim of the distribution amount and distribution suspension amount related to the music recording, movie recording, videogram recording and publication of Otsukyoku to Fuji Pacific.

B. The amount of distribution related to the broadcasting of Otsukyoku to Fuji Pacific is 1,337,892 yen, and the amount of distribution pending is 614,319 yen. Appellant Kanai Music Publishing claims damages far exceeding the above distribution amount and distribution reservation amount as the equivalent consideration for broadcasting. However, even if the same broadcast is performed using Koukyoku instead of Otsukyoku, the amount paid as the distribution amount of Koukyoku should be the same comprehensive usage fee method as that of Otsukyoku. It should be said that there is no justification for the damage calculation method based on the usage fee per song, which is different from music recording, movie recording, videogram recording and publishing only for broadcasting and broadcasting recording. In addition, since it is not clear whether Otsukyoku was broadcast along with the broadcast of the programs "Appare Sanma Dai-sensei" and "Yappari Sanma Dai-sensei", the appellants' claims regarding the equivalent consideration for broadcasting and recordings for broadcasting are unreasonable.

C. The appellants claim the damage of the entire amount of the distribution and the distribution hold of Otsukyoku. But first, the distribution hold is paid to the legitimate right holder when the proceedings are finalized. Therefore, it should not constitute the damage of the appellant Kanai Music Publishing. Since the distribution amount also includes the distribution amount to the lyricist and the singer, if ignoring this point, the total amount in the above allegation will be unreasonable. Furthermore, even if Koukyoku is recorded for

broadcasting instead of Otsukyoku, the amount equivalent to 10% of the management fee of the association will naturally be incurred, as the fee “normally should be received” (Copyright Law, Article 114, Paragraph 2). It does not constitute the amount of damage and should be deducted.

(2) About the damage of appellant A

In Appellant A’s allegation, it is acknowledged that Appellant A’s real name is not provided or presented to the public as the author’s name of the original work. Other than this, the rest of his claims is disputed.

IV. Judgment of this court

1. Regarding issue 1 (identity of essential features in expression)

1-1 General remarks

(1) Significance of “arrangement”

The song “Let’s Go Anywhere” is understood to be a work combining the music and the lyrics created by the same person, Appellant A. But in this case, the lyrics are excluded, leaving the issue as the infringement of the arrangement right of the music. The Copyright Law does not provide a specific definition for the “arrangement” of music (Article 2, Paragraph 1, Item 11, Article 27 of the Copyright Law) (so do Article 2(3) and Article 12 of the Berne Convention on the Protection of Literary and Artistic Works). Under the law where the language shares a common position, the “adaptation” of a work means the action that relies on an existing work and maintains the identity of its essential expressive features, while modifying, increasing or decreasing, changing, etc., to creatively express a new idea or feeling. But person who comes into contact with it can still directly perceive the essential characteristics of the expression of the existing work (Supreme Court decision of the First Petty Court on June 28, 2001, Minshu Vol. 55, No. 4, p. 837). Accordingly, “arrangement” is based on a song that is an existing work (hereinafter referred to as “original song”), and is modified to a concrete expression while maintaining the same essential characteristics of its expression. It is another work that allows those who come into contact with it to directly perceive the essential characteristics of the original song by creatively expressing thoughts or feelings by adding, subtracting, changing, etc., some elements.

The examination criteria (Exhibit A72-2) of the Arrangement Examination Committee of the Japan Music Copyright Association are that the musical score is simply rewritten into numbers and codes, and the tone of the original song is simply transposed to another tone. Although it is stipulated that these things are not treated as arranged works, this is understood as a standard focusing on the distinction between arrangements and modifications that do not lead to arrangements, and between the original songs and their modifications. It cannot be used as a reference for the distinction between the creation of a separate and independent piece of music, which is no longer an arrangement.

In addition, consider “arrangement” as a general or musical term. For example, in a typical Japanese dictionary, it means “reorganizing a song for another instrument or reorganizing it to suit another playing format” (“Kojien 5th Edition” published by Iwanami Shoten Co., Ltd.), or “A song is the original song “Rewriting from the composition to suit other performance styles” (“Daijirin” published by Sanseido Co., Ltd.). The “New Revised

Standard Music Dictionary,” published by Ongakunotomo Co., Ltd. on February 28, 1999, says: “(1) Reorganizing a large-scale composition from the original form of the song so that it is suitable for other playing styles, without compromising the essence of the original song as much as possible. There is no room for the arranger’s creations. There are also arrangements made for performance purposes, in which case the arranger’s creative elements are often added. For example, accompaniment may be added to the original form of a melody only, or a completely different musical instrument composition may be added, or a small composition may be rewritten into a large composition. Arrangements into different compositions are sometimes called “transcriptions.” (2) In popular music and jazz, it refers to a specific interpretation of melody or harmony. ... Normally, in such cases, the composer’s role is to specify the melody and simply show the harmony of the accompaniment. It leaves the arranger with discretion regarding the form of performance and orchestration, and leaves it to the details of rhythm and harmony. However, the example in (1) above is “large-scale arrangement,” and “changing to a small organization” is rather understood as a “reproduction” under the Copyright Law. In the end, “arrangement” as a general or musical term does not always match the meaning of “arrangement” under the Copyright Law. In addition, according to the trial witness I (hereinafter referred to as “I testimony”), the term “arrangement” in the music industry generally refers to the purpose in (2) above. In other words, it is recognized that it refers to producing a back orchestra score for a song with a fixed melody and harmony structure without changing the structure (according to E’s statement [Exhibit B9]). The “arrangement” of the tune by the same person is also understood to refer to such a manner.) Yet, the “arrangement” under the Copyright Law is not limited to such a manner.

Therefore, on the premise that the concepts of “arrangement” as a general or musical term and “arrangement” under the Copyright Law do not necessarily match, the following adopts the interpretation under the Copyright Law stated above. First, let us consider whether Otsukyoku maintains the same essential characteristics of the expression of Koukyoku.

(2) Criteria for determining the identity of essential musical features in terms of expression

While the appellants insist that the melody should be focused exclusively on determining the identity of the essential features of the expression of the music as a musical work, the appellee claims that melody and harmony are inseparable from each other. Melody, harmony, rhythm, tempo, form, etc. are essential characteristics of musical works, so a comprehensive judgment should be made considering the above all.

In this regard, J’s written opinion (Exhibit B24, hereinafter referred to as “J’s written opinion”, and other written opinions will be described in accordance with this except for the first one) provides that most of the songs are expressed as “melody, harmony, rhythm, tempo, and form,” although some songs were expressed only by the melody and some songs were expressed only by the rhythm of the percussion instrument. K’s written opinion (Exhibit B25) states that most of the music is “integrated rhythm, melody, harmony, form, etc.” with the same reservation as above. In each of the written opinions, it is stated that when comparing songs, the overall judgment should be made based on the fact that these factors act integrally on the emotions of the listener. Certainly, in general, the elements of a piece of music are sometimes referred to as three elements: melody, rhythm, and harmony. Also, in some cases, elements such as format are added, and it is said that all of these are important elements that are indispensable to the music. This is recognized by witness L and appellant A’s book (“Easy Composition / For Beginners” [Exhibit A56] p. 36, published by Narumi-do

Publishing on July 10, 1981) (As the chief professor of composition at Tokyo College of Music, the witness L is referred to as the common name M [Exhibit A73], and the written opinion [Exhibit A30, 68, 72-1, Exhibit A88, 102]. Since the common name is used, the testimony will be referred to as “M testimony” and the written opinion will be referred to as “M opinion” below).

And, in general, the essential elements of a piece of music include the various things mentioned above. In addition, since these elements act integrally on the emotions of the listener, the elements that underlie the essential characteristics of expression should be different for each song. Then, it should be said that it is not appropriate to discuss “identity of essential features of expression” apart from specific cases. After first considering what aspects the essential characteristics of expression can be found in the original song, both parties should focus on the main elements that underlie the essential characteristics of the expression. There is no choice but to pay attention to the factors that are stated.

However, the fact that some songs are expressed only by monophony is pointed out by the above J and K opinions. A melody can be established as a musical work (musical piece) by itself, such as a Rokyoku. It is usually unthinkable that the identity of the essential expressive features of the original work, which consists solely of the melody, is lost by simply adding harmony to the melody itself, without modifying it. Harmony, on the other hand, is not understood to be generally recognized as a “musical piece” by itself, apart from the melody. It cannot be denied that the originality as an element underlying the copyright is relatively poor compared to the melody. And this is understood to be valid for rhythms and forms, except for special cases such as music with percussion instruments only. Then, there are various elements that form the basis of the essential characteristics of the music, and it is not possible to uniformly discuss the method of judging the identity, but at least it is a normal one with a melody. As far as music is concerned, it is reasonable to understand that the melody occupies a major position as a relatively important factor in determining whether there is “arrangement” under the Copyright Law. By the way, the German Copyright Act (1965) states in “Copyright” in Chapter 1, “Copyright”, Section 4, “Contents of Copyright”, Subsection 3, “Use Right”, Article 23, “Adaptation and Deformation” that adaptations and other variants of the material may be published or used only with the consent of the author of the adapted or modified work.” In Article 24, “Free Use,” it says that “independent works created by free use of other people’s works can be published and used without the consent of the author of the used works (Paragraph 1). Paragraph 1 applies the use of a musical work and does not apply when a melody is clearly borrowed from the work and is the basis of a new work” (Paragraph 2) (translation of “Foreign Copyright Law Collection (16) -Germany Edition-” published by the Copyright Information Center). In this way, Article 24, Paragraph 2 of the German Copyright Act follows the provisions of Article 13, Paragraph 2 of the former German Literature and Music Copyright Act (1901). The doctrine strictly protects the melody by specifically stipulating that the consent of the author of the original work is required for the use of a new musical work in which the melody relies on the original work to make it feel (see Fromm-Nodemann, “Commental on Copyright Law” [9th Edition] (1998), Notes 12 to 15 of Article 24), including those that should be considered beyond the differences in legislative examples.

The appellee claims that the melody and harmony are inseparable. Even if it is for the purpose of judgment, it is an unfairness to consider only the melody. This is an argument that denies the uniqueness of the melody as described above, and thus cannot be adopted.

1-2 Factors to consider in this case

(1) About the essential characteristics of the expression of the instep

A. In this case, the first thing to consider as a premise for judging the identity of the essential expressive features of Koukyoku and the Otsukyoku is what are the essential expressive features of the Koukyoku. In other words, even if the expression form of Koukyoku is the same as that of Otsukyoku in the part where there is no creativity in the expression, it is necessary to base the identity of the essential characteristics in the expression (referring to the Supreme Court's decision of the First Petty Court on June 28, 2001).

B. Looking at Koukyoku from this point of view, it is clear from the fact that Koukyoku is a song published as a TV commercial song related to C's singing, with lyrics written by the appellant A himself. It is a song that is supposed to be sung along the melody. Due to such a character, it can be said that it is easy to pay attention to the melody. Moreover, Koukyoku is not supposed to be a large-scale musical instrument composition like an opera, but basically it is considered to be a song that assumes a simple and familiar melody-centered sound. In other words, Koukyoku is a relatively short piece of light music, with a total of 16 bars as one chorus in two-two time signature. As for the composition, of all four phrases A to D, phrase A and phrase D are repetitions of almost the same melody, forming a simple format as A-B-C-A is adopted. Harmony is also just a normal chord that progresses with three basic chords. Then, it is reasonable to understand that the essential characteristic of the expression of Koukyoku does not rely on the elements such as harmony and form, but mainly the simple and familiar melody. This is in line with what is pointed out as the style of appellant A in I's written opinion (Exhibits B5, 17).

C. In this regard, the appellee cites to the concept of "trite" in American case law. He argues that the melody of Koukyoku is a series of idiomatic figures, and that such idiomatic figures are not creative.

Certainly, as pointed out in I Opinion (Exhibit B5, 17) and N's Opinion (Exhibit B16), if partially and fragmentarily taking the melody of Koukyoku, ① the melody in phrases A, D, "Doremi—Dosi—Doredo———" is similar to the melody of "Milk Color" (sung by Tadaharu Nakano and Columbia Rhythm Boys) and its original song "Careless Love" (US standard song), "Doremi—Dosi—Re—Do———," or the melody of "Tears-kun Goodbye" (composed by Kuranosuke Hamaguchi), "Doremi—Dosi—Re—Do———." Songs that start with "Doremi" include "Tennessee Waltz" (composed by P.E. King), "Doremi Song" (composed by R. Rodgers), "Country Road" (composed by B. Tanhof), etc. The following "Dosi—Doredo—" part can be also similarly found in "Clock" (composed by R. Cantoral), etc. ② Phrase B's "Dodofa—Fafafasolaso———" is similar to "Dofafafasolaso———" in "Mozart's Lullaby." ③ The first half of phrase C is "Sosola—Sofa—Solaso—Miredo——." It is similar to "La—Sofalaso——" in "Stenka Razin" (Russian folk song), and "La—Lasofa—Sola" in "Angelica" (composed by Marcelo Minerobi), etc. The latter half of the phrase, "So—Miredo——," is similarly found in "Blown by the Wind" (composed by Bob Dylan), "Bridge over Troubled Water" (composed by Paul Simon), etc. (see Exhibit B1, 2, 5, 11 etc. above). As far as such a partial and fragmentary melody is concerned, it cannot be said that Koukyoku is composed of idiomatic figures.

However, a group of the same or similar melody as described above can be as long as one phrase (4 bars in 2/2 beats and 2 bars in 4/4 beats). Therefore, when looking at Koukyoku with four phrases as one chorus, it cannot be said that the whole melody was used idiomatically. If, in this case, the issue of identity or similarity with the melody of Otsukyoku

is related to the melody part of about one phrase like this, it is a creative expression. It is possible that there is no idiomatic sound pattern matching or similarity, and that it does not underpin the identity of the essential features of the expression. What the appellants are concerned about in this case is the similarity between the entire melody of Koukyoku and the entire melody of Otsukyoku. When considered as the composition of the entire four-phrase melody, it should be clear that it contains creative expressions peculiar to Koukyoku.

In addition, K's Opinion (B25) points out that the melody of all the phrases of the instep song appears in Bach's cantata No. 147 "Lord, the Joy of Human Desire." The melody that appears in the song is a combination of the sounds of each part intermittently, so to speak, in the form of a seam. According to Exhibit B17, 18, it is difficult to directly perceive all the melodies of Koukyoku from the same song (same according to M's opinion [Exhibit A120]). Then, there is no example of a song in which all the melody of Koukyoku appears, including each of the above songs, even if all the evidence of this case is combined. So it cannot be said that the melody of Koukyoku is lacking in expressive creativity as a series of conventional sound patterns.

The appellee also argues that in order for a listener to hear one idiomatic figure as a constant tune, the subsequent figure is naturally restricted. As mentioned above, despite the investigation by the appellee, the fact that only about one phrase has been found as an example of a song similar to the melody of Koukyoku Even if it is a short piece of music and, in part, matches or resembles an idiomatic figure. It is reasonable to understand that the assembly of the melody has a corresponding variety left, and the appellee's allegation above cannot be adopted.

D. The above purpose is as shown in M's Testimony and M's Opinion (Exhibits A30 and 68). In other words, in the M's testimony and the above M's Opinion, the phrases A to D of Koukyoku form the Kishōtenketsu in order. In comparison with Otsukyoku, there is a partial problem of the similarity of the melody of about two bars. Instead, it is accurately pointed out that the identity of the assembly of the Kishōtenketsu of the entire melody is the most important issue.

Therefore, when examining the identity of the essential expressive features of Koukyoku and Otsukyoku, the essential expressive features of Koukyoku that should be considered first are mainly its simple and familiar melody. Moreover, when considering the melody, the focus should be on the overall composition of the assembly of the Kishōtenketsu consisting of phrases A to D, rather than taking up the sound pattern of about one phrase partially or fragmentarily.

(2) Positioning of elements other than melody in this case

In general, in ordinary music with a melody, it is understood that the melody occupies a major position in determining whether there is an arrangement. Even if we look at this concretely from the viewpoint of the essential characteristics of the music of Koukyoku, the essential characteristics of its expression are mainly in the overall composition of the melody, as described above. Since Koukyoku is a song that consists of comprehensive elements including harmony, etc., it should be said that a comprehensive judgment including these elements is ultimately required.

In this case, the appellants proved the melody-focused assertion as a concrete fact that underlies the identity of the essential expressive features of the two songs. As a situation in

which the appellee denies such identity, he contends for the identity focusing on the melody itself, and at the same time, proves the assertion regarding elements such as harmony, rhythm, tempo, and form. Below, in section 1-3, the elements of the melody related to the appellants' allegations are first taken up and examined independently. Elements such as harmony claimed by the appellee are considered as the grounds for reduction in sections 1-4 and 1-5 below.

1-3 Melody contrast

(1) Correspondence between the melody of both songs

As mentioned above, phrases A to D of Koukyoku is composed with a structure of Kishōtenketsu. The appellants have assumed that phrases a ~ d and phrases e ~ h are repeating in Otsukyoku, and that the first phrase is phrase A of Koukyoku and phrases a and e of Otsukyoku; that the second phrase is phrase B of Koukyoku and phrase b and f of Otsukyoku; that the third phrase is phrase C of Koukyoku and phrases c and g of Otsukyoku; and that the fourth phrase is phrase D of Koukyoku and phrases d and h of Otsukyoku. The appellants insist that these phrases should be examined in comparison with each other, and that the above-mentioned written opinions are also examined on the premise of such a correspondence.

Then, considering the above correspondence, as shown in Attachment 3, both songs are transposed to C major, and two bars of Koukyoku with a two-half time signature correspond to one bar of Otsukyoku with a four-quarter time signature. The scores of both songs are compared side by side (extracted from page 11 of I Opinion [Exhibit B5] with the phrase names added, and the parts with the same pitch are colored orange and the parts with different pitches are colored green). In addition, Attachment 4 (“Comparison of melody”) shows the melody of both songs by scale name for each of the above corresponding phrases (hereinafter, for convenience of understanding the correspondence, the number of notes in the case is counted according to the number of beats, not the number of notes, such as “7th beat of phrase A”, ““Doremi—’s 5th beat,” as shown in the numbers described in Attachment 4. Therefore, one bar when converted to a four-quarter time signature is “8 notes”).

(2) Quantitative analysis

First, according to a very formal and mechanical comparison method, based on Attachment 4, if we quantitatively match the corresponding pitches of two songs, the number of notes with the same pitch are: 11 out of 16 notes in the first phrase, 12 out of 16 notes in the second phrase, 14 out of 16 notes in the third phrase, and 6 out of 16 notes when comparing to phrase d and 12 out of 16 sounds when comparing to phrase h. Then, it is understood that 92 out of 128 notes (about 72%) of Otsukyoku use the same pitch as the corresponding melody of Koukyoku.

In addition, in the appellee's statement (Exhibit B6), a song can give a different impression when the melody is the same or very similar, but the tempo and other elements are different, such as “Cumana” (composed by Alex Rodriguez) comparing to “If You're Happy, It's Not Good” (composed by Taku Izumi), “Let's Walk Upwards” (composed by Hachidai Nakamura) comparing to “Emperor” (composed by Beethoven), “Summer Memories” (composed by Yoshinao Nakata) comparing to “Ode to Joy” (composed by Beethoven), etc. However, according to O's opinion (Exhibit A9, A19-1), P's opinion (Exhibit A122), and Exhibit A30, even if the melody of each of the above songs pointed out

two-half time signature, there should supposedly be a strong beat part at the 7th and 15th notes. It is understood that the difference between two-half and four-quarter time signatures is only within the range of performance variations (O Opinion [Exhibit A9], M Opinion. Book [Exhibit A11], Q's Opinion [Exhibit A12], R's Opinion [Exhibit B4]). However, considering that some textbooks actually publish Koukyoku as a song with a four-quarter time signature (Exhibit A22-1, -2), it should be recognized that both songs have the same strong beat parts, which are at the 3rd and 11th notes of each phrase.

And, as mentioned above, there is a "only exception" to the above similarities. The exception is the difference between the 11th note at the end of phrase D of Koukyoku (Do) and the 11th note at the end of the phrase d of Otsukyoku (Re). When examining this difference, it is as shown above that the overall composition of Otsukyoku is a repetitive binary form that can be formulated as [abca']-[abca]. It is clear that the end of (the part of "a" above) is the part that plays the role of connecting the first half part to the second half part. Considering the position of phrase d in the composition of Otsukyoku, the melody of the latter half of phrase d is changed from the corresponding part of phrase h because of the repetitive binary form of Otsukyoku. It is reasonable to understand that it is not possible to take a complete stop form at the end of the first half part, and there is a need to connect the second half part. This is stated in the above-mentioned M opinion, O opinion (Exhibit A9), P opinion (Exhibit A10), etc. Moreover, it is a conventional modification in terms of arrangement or reproduction to make some necessary changes within the limit when making an originally one-part-form song into a repeating two-part-form song. Thus, the only exception to the above, the difference in sound at the end of phrase D and phrase d, cannot be evaluated as a factor that denies the identity of the essential characteristics of both songs.

C. As mentioned above, the fact that the first three or more notes of each phrase and the last note are exactly the same means that not only the fragmentary sound patterns in both songs match each other, but also there is outstanding similarity in the style of transitioning from one phrase to other. In other words, the melody of Koukyoku and Otsukyoku is about 72% consistent in pitch in terms of quantity. Also, the connecting part and the strong beat part of Kishōtenketsu, which play an important role in the assembly of the melody of the song as a whole, are basically the same over all the phrases. As a result, it can be said that the form of [abca']-[abca] in Otsukyoku is changed to the iterative binary form by repeating twice the composition of ABCA, which consists of phrases A to D of Koukyoku. It is no exaggeration to say that the configurations of the two are very similar. Thus, it should be said that the identity of the essential characteristics of the expression of both songs is strongly based on the combination of the above factors.

Regarding this point, there is a statement in J Opinion (Exhibit B24) that the climax of Otsukyoku is in phrase f. It is also stated to the effect that it is not a simple repetition of the first half and the second half, but as is clear from the fact that the content is explained in the context of the importance of harmony. Even acknowledging such focus on harmony, it does not affect the above judgment regarding melody.

(4) About the difference between the melody of both songs

Next, the difference between the melody of both songs will be examined.

A. In the first phrase, the corresponding melody is "Mi—Dosi—Doredō" in phrase A of Koukyoku, and "Mi—Mire—Redodō" in phrase a and "Mi—Re—Dodo" in phrase e of Otsukyoku. There is a difference in the underlined part. The same can be said for the

relationship between phrase D, which has almost the same melody as phrase A, and phrase h, which has almost the same melody as phrases a and e.

Regarding this difference, I testimony and I opinion (Exhibit B5) indicate that the 7th note of phrase A is the “lead tone”, that is, one half tone below the tonic (also called the root tone or fundamental tone). Although it is a sound that guides the fundamental tone, when the lead tone is used for the melody, it creates a stable feel, but on the other hand, it lacks lingering sound and a sense freedom. It is extremely important to point out that Otsukyoku does not use lead tones on the other hand. The point to the same effect is also stated in the J Opinion (Exhibit B24), K Opinion (Exhibit B25), N Opinion (Exhibit B27), etc. For example, in the N opinion, the existence of the lead tone in Koukyoku is strongly associated with the next Do and creates a forward-marching feeling in the melody, which is completely incompatible with the reminiscence of Otsukyoku. The J opinion states that the use of lead tones is strongly predicted by the listener, so the lead tones are excluded in order to make the next development soft and free. It is said that this is an extremely important point in the composition technique. The appellants also affirm that the above-mentioned Si is a lead tone.

Certainly, as for the impression when listening to both songs, as stated in each of the above opinions, phrase A of Koukyoku gives a strong and forward-marching impression with a stable melody. On the other hand, the phrase a of Otsukyoku can be said to create “a fluffy floating feeling” (I opinion above) and “a feeling of landing softly” (J opinion above). It is recognized that the biggest reason for making such a difference in impression is the composition technique of the presence or absence of a leading tone that guides the melody line to the tonic, and this part is the most important difference in the comparison of the melody of both songs.

Regarding this point, M testimony and M opinion (Exhibit A68) show that among the above differences, the difference between the two songs is one note in the same chord, that is the “Do” in Koukyoku and the “Mi” in Otsukyoku. Next, regarding the “Sidore” in Koukyoku and the “Reredo” in Otsukyoku, since both are decorative changes in a chord that includes a squealing sound and are in the same chord or a similar chord, they are considered to be similar. Moreover, when overlaying the singing of the two songs, the melody of both can be heard as a harmony in the chord (See Exhibits A18, 19. However, it will be described later that different results will be obtained when the original harmony is used). In that sense, it is recognized that M testimony and M opinion have their legitimacy, but it is not a reason to deny the difference in impression when actually listening to the above melody part of the two songs.

Then, it can be said that Otsukyoku has a creative expression that Koukyoku does not have by eliminating the lead tones. But on the other hand, exemplified in Exhibits A124, 125, it is recognized that some of the songs that are clearly understood to be within the range of the arrangement of Koukyoku do not use the lead tone Si, which means that the existence of the lead tone Si in Koukyoku is not an indispensable element in maintaining the above essential characteristics of the song. Therefore, the presence or absence of the lead tone is an important difference in the melody of the two songs, but that does not immediately deny the identity of the essential features of the expression. In the end, the addition of a new creative expression of melody excluding the lead tone impairs the identity of the essential expressive features of both songs, despite the similarities of the melody as described above. Whether or not this is the case should be considered in the overall examination, which will be described later.

B. In the second phrase, phrase B of Koukyoku is “Dodofa—Fafafasolaso” (lyrics: Even when the road is hard), while phrases b and f of Otsukyoku are “Dodofafafafalalaso #faso” (lyrics: Everyone’s memorial tree / When you are having a hard time), and there is a difference in ① the pitch of the 3rd to 5th notes, and ② the pitch of the 7th to 10th notes (see the underlined part).

Among these differences, first of all, regarding the difference in the score division of the 3rd to 5th notes in ①, it is understood that changing the score by using only the same pitch as the melody of the original song is a usual method of arrangement (M opinion, Exhibit A68). It cannot be seen as a modification that impairs the identity of the essential expressive features of the original song. In addition, Article 4 of the French Old Literary and Artistic Property Law (1957) and Article 112 of the Intellectual Property Law (1992) provide that “Regarding translations, adaptations, modifications or modifications of spiritual works, the author of the arrangement enjoys the protection stipulated in this code without prejudice to the rights of the author of the original work.” (Published by the Copyright Information Center, “Foreign Copyright Law Collection (18) -French edition-”). In a trial in which it was disputed whether the song “La Marizza” infringed (counterfeited) the copyright (arrangement right) of the original song “Autumn Leaves” composed by Joseph Kosma, the Tribunal de Grande Paris decision of February 10, 1971 (Exhibit A69-1, -2) states that both songs consist of four consecutive phrases, and the first four notes of each phrase are exactly the same. The only difference is that the groups of notes are sequentially divided or directly linked, and there are similarities in the basic melody. Thus, infringement (counterfeiting) was found by adopting the appraisal result that similarities can be recognized by an ordinary listener. By listening and comparing both songs as shown in Exhibit A23, considering the musical score (Exhibit A70) and the M testimony and M opinion (Exhibit A68) together, the melody of “La Marizza” has the same important sound features as the melody of “Dead Leaf”. It can be said that the score is divided into small pieces and connected in a musical scale, but even when compared with such a scale, the above-mentioned change in the score in this case is only a slight difference.

Next, regarding the difference in pitch in ② above, I testimony and I opinion (Exhibit B5) stated that the above melody part of Koukyoku was 6 degrees above the first Do by 8 notes. Whereas the “climbing” feeling is emphasized in Koukyoku, the above melody part of Otsukyoku “gradually descends” by forming a flow that goes up from Do to Fa and La and then descends over five notes. It gives the impression that it “slowly descends and fluctuates” (see e.g., J Opinion [Exhibit B24]). On the other hand, in M testimony and M opinion (Exhibit A68), each of the above melody parts is a decorative change in the “FaLaDo” chord, and since it is a melody that can be placed on the same harmony. It is stated that there is no essential difference only in the difference between the ascending type and the descending type. And when comparing the melody of both songs, it is true that I testimony and I opinion point out based on the difference between the ascending form (Koukyoku) and the descending form (Otsukyoku) of the above melody part. It cannot be denied that there is a difference in impression, but it is not recognized that it produces a different and special impression as in the above-mentioned a regarding the presence or absence of sound conduction.

C. In the third phrase, the 9th and subsequent notes of phrase C of Koukyoku are “Solaso—Mido” (lyrics: While whistling), while the corresponding part of the phrase c of the Otsukyoku is “Solastosomiredo” (lyrics: Far from now), the corresponding part of the phrase g is “Solaso—Miredo” (lyrics: Leaves swaying in the wind). In addition to the difference in

pitch of each underlined part, the score division of the 5th and 12th notes (phrase c only) is also different.

And, regarding the above difference part, I testimony and I opinion (Exhibit B5) position the above melody part of Otsukyoku as one of the melody that the gently descends four times in a row from phrases c to d (① “Sosola—Lasofa”, ② “Solamosomiredo”, ③ “Doremi—Dola”, ④ “Mi—Re—”). The J Opinion (Exhibit B24) states that a listener is invited to perceive, from the above melody part of Otsukyoku and the melody before and after it, the delicate division in the score that creates a soft flow and produces a nostalgic feeling. While in M Opinion (Exhibit A68), there is almost no difference in the above melody part, and there are two places where the rhythm is finely carved. Even though there is one non-harmonic tone, there is no difference in the essence of the sound.

As for the difference in the above melody part, as pointed out by each of the above opinions, the melody of Otsukyoku has a transitional sound between Mi and Do in the descending form “Somido.” While the score is subdivided in some parts, in other respects, the score division is exactly the same throughout the phrases. In terms of the connecting points before and after the phrases, the last note of the previous phrase (So—) and the first three notes of the subsequent phrase (Doremi) are matching. Also, the technique of subdividing the score connecting it with the elapsed notes is a usual technique of arrangement, as can be seen in the above-mentioned examples of “La Marizza” and “Dead Leaf”. The characteristics of the above melody part, which is different between Koukyoku and Otsukyoku, are not so remarkable in terms of quantity and quality. Therefore, Otsukyoku doesn’t add a special creative expression that Koukyoku does not have, and even if there is some creativity added, the overall influence on the characteristics is so weak.

D. In the fourth phrase, phrase D of Koukyoku is “Si—Doredo—” (lyrics: Let’s go), and phrase d in Otsukyoku is “La—Mi—Re—” (lyrics: Will (think of)). There is no sound with the same pitch in this part, but as mentioned in (3) above, the difference is due to the adoption of the repetitive binary form in Otsukyoku. This is not a factor that should be evaluated as impairing the identity of the characteristics. The comparison of phrase D in Koukyoku and phrase h in Otsukyoku is provided in paragraph A above.

E. To summarize the above examinations, the most important difference between the melody of both songs is the difference in a above regarding the presence or absence of a lead tone. Next, as stated in above paragraph B, the difference melody flow, whether it is ascending type or a descending type, does not add a special creative expression that Koukyoku does not have. Even if there is additional creativity, it is understood that the influence on the whole will be weak.

(5) Consideration of the melody as a whole

Based on the similarities and differences between the melody of both songs examined above, here we will give an overall consideration with regard to melody.

A. First, as mentioned in (2) above, the two songs are similar in melody, except for the part where they were originally published as an arrangement. The first three or more notes and the last of each phrase, which are considered to play a particularly important role in the composition of the melody of the entire song, contain an unparalleled number of matching notes (about 72%). The strong beats, which is relatively emphasized and plays an important role, are basically consistent over all phrases in both songs. As a result, the composition of

Kishōtenketsu of the entire song is very similar. In particular, looking at the part from the 3rd phrase, which corresponds to the “turn” of Kishōtenketsu, to the 6th note of the 4th phrase, which corresponds to the first half of “ending”, there is always a difference between the presence or absence of the elapsed sound and the slight difference in the arrangement of the score. In addition to the differences in the arrangement method, the melody remains almost the same for 22 notes in a row. It occupies more than one-third of the entire Koukyoku (5.5 bars out of 16 bars). On the other hand, as the difference between the melody of both songs, there are differences such as the presence or absence of the lead tone (see above (4)A), and the difference between the ascending type and the descending type (see above (4)B). Of these, the presence or absence of the lead tone cannot be disregarded as it includes new creative expressions that only Otsukyoku has, but neither quantitatively nor qualitatively does it exceed the dominant impression given by the above-mentioned assembly of common melodies.

B. According to I testimony and I opinion (Exhibit B19), J opinion (Exhibit B24), K opinion (Exhibit B25), when comparing the two songs, the impression of listening to the original song (the first published version) is important. Koukyoku was first released as a TV commercial song sung by singer C, as pointed out in Exhibit A1. Here, C’s individuality as a performer is emphasized. On the other hand, Otsukyoku was first released as a children chorus song as the ending theme for the Fuji Telebi program “Appare Sanma Dai-Sensei.” As presumed in Exhibit A3, the form of children chorus, along with E’s arrangement and S’s string music composing, creates a different impression that cannot be ignored.

In this case, to perceive the essential characteristics of the expression of the music, Exhibit A12 considers the melody of both songs played as by instruments (although the chords are added by the piano accompaniment, the chords of both songs are generally similar, regardless of the detailed progression), and Exhibit A13, 18, 19 discuss both songs sung with the same lyrics and singing method. When listening, the melodies of the two songs are not as strongly similar as the so-called dead copy, but at least it is undeniable that an impression of similarity occupies considerable parts of the melodies. Particularly, according to Exhibit A13, 18, 19, it is undeniable that the same lyrics and same singing method strengthen the commonality of impressions, but even if that is taken into consideration, it is easy to directly feel the essential features of the melody of Koukyoku from the melody of Otsukyoku.

In addition, the appellants provide evidence (Exhibits A124 and 125, 1 to 12, Exhibit A2, 16, 21, 22, 28, 29) to prove that the melody of Koukyoku allows much room for creativity in a wide variety of arrangements, so we will examine further from this point of view. For example, as in Exhibit A16, Appellant A himself arranged Koukyoku in different styles, “Jazz-style,” “Waltz,” “Slowly,” and “Bunde,” which were recorded together with Otsukyoku. As is clear from the musical score (see Appellant’s briefs dated October 25, 2000 (3) Attached music score (5)-(8)), the melody of the above four types of songs has been modified even though it has undergone bold modifications that exceed the difference between Koukyoku (original song) and Otsukyoku. It is easy to directly feel the essential characteristics of the expression of the original Koukyoku from the latter four songs. This observation is also supported by the above Exhibits other than Exhibit A16. This indicates that there is still a considerable amount of room for creativity in the arrangement based on Koukyoku, despite the modification of the melody.

C. Considering the above judgments altogether, it is reasonable to conclude that both songs have the same essential characteristics in terms of expression as an overall examination focusing on the melody.

1-4 About harmony

(1) The harmony of Koukyoku and Otsukyoku is as described in Attachments 1 and 2 (Scores 1 and 2). In actual performances, there could be some difference in harmony, but the following will examine the songs according to the above-mentioned musical scores, which are not disputed between the parties, to identify both songs.

(2) According to all music scores above, plus I testimony, I opinion (Exhibit B5), J opinion (Exhibit B24), and K opinion (Exhibit B25), the harmony of Koukyoku progresses as “E-B7-E-A-E-A-E-B7-E” with three basic chords, and such a harmony progress is commonly seen in simple songs. On the other hand, the harmony of Otsukyoku is “D-G / A-D-G / D-D-G-D-C / D-D7-G-A7-D-F#+ / A#-Bm-Bm / A-G (Em)-G#m7b5-G / A-D-G / A(A7)-D-Dmaj7 / (C#)-D7 / (C ·)-G / B-A7 / G-F#m-C / D-D7-G-A7 / G-F#m-Bm-Gm / Bb-D / A-G / A-D-Gm6 / D-D,” progressing in a complicated manner, and it is characterized by fine-tuned transitional chords and heavy use of fractional chords. Furthermore, in order to liven up the part of “It’ll probably be a moment / That life is hard “ (phrase f), the movement of the sub-melody is lowered by a semitone by advancing with “D-Dmaj7-D7.” Harmony such as Bm, G#m7b5, Gm/Bb, Gm6/D are also arranged to express sadness in a major key. And, as pointed out by each of the above opinions, the difference in harmony has a certain influence on the tunes of Koukyoku and Otsukyoku (The details are generally as stated in the appellee’s allegation (3-1, 1-2 (3) above). The difference is recognized that Koukyoku leaves a bright and positive impression, while in contrast Otsukyoku conveys sentimental feelings.

(3) Therefore, since Otsukyoku has the above-mentioned new harmony expression, the commonality of the essential characteristics of the expression of both songs when focusing on the melody is diminished. Further examining from the viewpoint of whether or not the identity of the song will be impaired, as shown above, the essential characteristic of the expression of Koukyoku is that it is mainly a simple and familiar melody. On the other hand, Otsukyoku has the same basic character as Koukyoku used for popular singing, and the melody sung is the main and accompaniment as a way of receiving ordinary people who come into contact with Otsukyoku. It is undeniable that the harmony that is performed is positioned as a subordinate. Based on these points, although the difference in harmony causes the above-mentioned difference in the tunes of both songs, it is hard to say that the difference is decisive, and when focusing on the melody, It cannot be said that it exceeds the commonality of the essential characteristics of the expressions of both songs and impairs their identity.

In addition, there is a part of the appellee himself who states that all of the elements such as melody, harmony, and rhythm should be considered as a whole of his composition method. Even if the method of composing the song is the same, it should be a matter of whether or not the final composition of Otsukyoku is the same as that of Koukyoku. This statement does not affect the above judgment.

In addition, in the I testimony and I opinion (Exhibit B5), J opinion (Exhibit B24), K opinion (Exhibit B25), etc., when laying the melody of Otsukyoku over the harmony of Koukyoku, there is a part where the sound becomes muddy (discorded). This can be affirmed

by Exhibit B16 (track number 17), but it is an expression whether the modified melody can be advanced without discarding the harmony of the original song. This matter is not directly related to whether or not the identity of the above essential features is maintained, and does not affect the above judgment.

1-5 About other factors

(1) First of all, regarding the rhythm, Koukyoku has a two-half time signature and Otsukyoku has a four-quarter time signature. As is clear from each score described in Attachments 1 and 2, changing the original song with a two-half time signature to a four-minute time signature is within the range of performance variations as stated above, and makes no big difference. In addition, regarding the tempo, it is not appropriate to use this as a basis for judgment because no designation is made in each of the scores described in Attachments 1 and 2, which set the criteria for reviewing both songs in this case. In the actual performance, the speed of Koukyoku is 116 half notes per minute, and the speed of the second song is 96 quarter notes per minute (I opinion, Exhibit B5). Alternatively, Koukyoku is sometimes performed with 112 half notes per minute and Otsukyoku with 100 quarter notes per minute (P opinion, Exhibit A24-5). On the other hand, in some textbooks where the score of Koukyoku is published, the speed is set to 104 to 112 times per minute (Exhibit A78, 79), 96 times (Exhibit A74, 75), or 88-96 times (Exhibit A76, 77). Even if there is a difference in tempo, it is basically a difference that should be within the range of performance variation, and it is not a difference that impairs the identity of the essential characteristics of the original song.

(2) As for the format, as mentioned above, Koukyoku consists of 4 phrases and 1 chorus composed of A-B-C-A, whereas Otsukyoku generally adopts the repeated binary form of [a-b-c-a']-[a-b-c-a]. There is remarkable similarity in the commonality of the composition of the four phrases, and it is just a modification that falls within the scope of arrangement or reproduction to repeat the phrases into a repetitive binary form. In addition, there is no other factor that impairs the identity of the essential characteristics of the expressions of both songs.

1-6 Summary of Issue 1

As mentioned above, although Otsukyoku contains some new creative expression that is not found in the Koukyoku, a considerable part of the melody is substantially the same. The composition of the entire melody is very similar, and even if the differences in the melody, the harmony, and other elements are comprehensively examined, the identity of the essential features of the expression of Koukyoku is maintained. It should be said that those who come into contact with Otsukyoku can directly feel the essential characteristics of the expression of Koukyoku.

2. Regarding issue 2 (reliance)

(1) The appellee, in the cross-examination and statement (Exhibits B6, 23) at this trial, regarding the composition process of Otsukyoku and access to Koukyoku, contends that: ① Around May 1992, H of Pony Canyon and D the lyricist requested to compose the ending song of the program “Appare Sanma Dai-sensei” on Fuji Telebi. ② As for the image of the song, it was requested that the song be a modern version of “Aogeiba Tohoku (Respect)” that is sung at graduation ceremonies, and the lyrics had already been produced by D. ③ The

appellee accepted this request and composed two types of songs (Exhibit B18-1, -2), and one of them (Exhibit B18-1) was adopted. ④ The song was composed with the premise that it would be sung by children, so the range is not widen too much, and should use phrases that match the rhythm of 8 beats and chords to match the slow tempo. Basically, the song was composed naturally while thinking of the scene of the lyrics, and Koukyoku was not used as a reference. ⑤ In April 1998, more than five years after the request, the appellee received a content proof mail from Appellant A to the effect that the arrangement was infringing the copyright of Koukyoku. The appellee examined the library records of his arrangement, but it was confirmed that he was not in charge of the arrangement of Koukyoku. ⑥ At that time, the appellee couldn't think of the content from the title of Koukyoku, so when he got the tape and score of the song through a lawyer and checked it, he wasn't sure if it was a song he had heard before. The appellee was relieved to learn that Koukyoku was a common American country song and was not similar to Otsukyoku. ⑦ The appellee had a close relationship with singer F from around 1959 to 1964, but he had no contact with Koukyoku. He has also composed Bridgestone's company song, but he has never referred to Koukyoku. ⑧ The appellee has composed and arranged 70,000 songs in the last 40 years, and he rarely had the opportunity to watch TV commercials. Even if he had heard a commercial song, it disappears from his mind as a habit for prolific production. ⑨ For the appellee, composing a simple song such as Otsukyoku is not difficult, and there is no reason to copy, as the purpose of composing is generally stated above. Among these, points ① to ③ above regarding the background of the appellee's composition of the song are in line with H's statement (Exhibit B7, 20), D's statement (Exhibit B8, 21), E's statement (Exhibit B9) and G's statement (Exhibit B22).

(2) As described above, the appellee disputes the reliance issue, and therefore, the following will be examined from the viewpoint of whether or not indirect facts are sufficient to support a finding of reliance.

A. First, we will examine how well Koukyoku is generally known. After the song was released in the form of C singing in a Bridgestone TV commercial in 1966, "This folk-style commercial song quickly spread among young people, and its life-supporting song lyrics are popular among the middle-aged, as they can sympathize with the lyrics (see "Bridgestone Tire Fifty Year History" [Exhibit A29-1], published by Bridgestone on March 1, 1982). In 1967, King Records Co., Ltd. released Koukyoku sung by singer F as a single(Exhibit A21). In 2002, when the popular singer T decided to sing an arrangement of Koukyoku as a Bridgestone commercial song, Koukyoku was published in multiple sports newspapers under the heading "T challenges the masterpiece". In 1966, an article was published describing the song a "a big hit" and "a predominance in the world" (Exhibit A121). After the publication of Kokyoku, the score still displays the real name of Appellant A as the author's name, such as in "Commercial Song Masterpiece Collection" published by Doremi Music Publishing Co., Ltd. on May 10, 1972 (Exhibit A5). The song has been published in many other commercial songbooks and songbooks (Exhibits A6, 59, 82). It is also continuously published in multiple textbooks, including those of major textbook publishers, such as "Revised New Edition Music for Junior High School Students 2" (Exhibit A80) published by Music Notomo Co., Ltd. on January 20, 1975; "Music for Junior High School Students 2" (Exhibit A74) published by Educational Arts Co., Ltd. on December 10, 1975.), January 20, 1978; "Selected Junior High School Music 2" (Exhibit A81) published by Music Notomo Co., Ltd. on December 10, 1979; "Elementary School Music 6" . (Exhibit A76) published by Educational Arts Co., Ltd.; "New Music 4" (Exhibit A22-1, A79), published by Tokyo Books

Co., Ltd. on February 10, 1986; and “New Revised New Music 4” (Exhibit A78) published by Tokyo Books Co., Ltd. on February 10, 1989. One teacher’s instruction book (Exhibits A75, 77) states, “Because it’s a song I’m familiar with ...”, “It’s a song that has become widely known as a commercial song ...” In addition, the “guidance goal” of Kyokouku is “to make people aware of the new usage and effects of music,” and as the corresponding “teaching content,” “the media has created a new field in music, making you aware of the modern connection between life and music and its effects.” Accordingly, in order to make students understand that the new field of music called commercial songs has played a major role in modern life, Koukyoku is positioned as a song that is suitable to be taken as a representative example. Furthermore, according to the scores in Exhibit A3, A4, Exhibit A125 1, A4-12, and Exhibit A21, Bridgestone commercialized various variations of Koukyoku during this period, at least until around 1980. It is recognized that the song has been used continuously.

Summarizing the above facts with the statement of the appellant Kanai Music Publishing Representative U (Exhibit A114) and the whole purpose of the argument, Koukyoku was a wide range of commercial songs at the time when it was published in 1966. Not only did it gain tremendous popularity with the people, but it also established itself as a popular song that has been sung for a long time, including the time period from 1965 to the time when Otsukyoku was composed (1992). From the response to the broadcast reporter’s interview (Exhibit A85, Exhibit A 24) that the appellee received immediately after filing the counterclaim, it seems that the appellee himself did not have a different perception of the above facts.

B. In addition to the above facts, the appellee accompanied singer F to travel to the former Soviet Union twice in 1960 and 1957 before the publication of Koukyoku. The appellee also admits in cross-examination at the trial that he had a close relationship with the touring group. Evidence confirms that the appellee has composed and arranged many songs sung by F before and after the publication of Koukyoku (see Exhibit A57, 62, 65-67, 83, and A91 attachment “King Record Number Order General Catalog << Japanese Music >> ‘66”). This is one of the circumstances that makes us infer access with Koukyoku, because the song is one of F’s repertoire and F has released a single version of the song. In addition, the appellee himself acknowledges the fact that the appellee composed Bridgestone’s company song around 1984, at which time Koukyoku is Bridgestone’s representative commercial song, published in the company’s “Love Singing” (Exhibit A60). In “Bridgestone Tire Fifty Years History” (Exhibit A29-1) published by Bridgestone in March 1982, just before the appellee’s composition of the above company song, the entire musical score of Koukyoku was published. It was especially introduced that Koukyoku was a national song related to the lyrics and composition of Appellant A, which was recorded in the music textbook of junior high school as mentioned above. In light of the fact that the “Bridgestone Tire Fifty Year History Material” (Exhibit A29-2) states that “December commercial song ‘Let’s go anywhere’ will start broadcasting” as an internal matter in 1966, the above can also be one of the circumstances for inferring that the appellee had accessed the song.

C. And above all, there is remarkable similarity between the melody of the two songs, as mentioned above. In particular, 92 out of 128 sounds (about 72%) have the same pitch in both songs, which is an unprecedented high match rate. There is a part where almost the same melody continues over 22 notes, which is more than one-third of the whole song. Although Otsukyoku adopts a repetitive binary form, the basic melody composition seen in the first half and the second half is very similar to the Kishōtenketsu of Koukyoku. On the other hand,

as mentioned above, it is understood that even a relatively short piece of music, such as Koukyoku, leaves room for a variety of creativity in the assembly of the melody. It is extremely unnatural and unreasonable to think that the above-mentioned remarkable similarities are caused by coincidence. Then, such similarities between the two melodies strongly infer Otsukyoku's reliance on Koukyoku.

(3) Next, we will consider the points alleged by the appellee as circumstances for which reliance should be negated.

A. The appellee argues that the reliance is negated because Otsukyoku is song composed based on lyrics, and the lyrics are not associated with Koukyoku. It is acknowledged that Otsukyoku is song composed with lyrics finished first, as recognized by the appellee in (1) above along with the testimonies. However, the judgment on reliance does not necessary depend on whether Otsukyoku's lyrics are associated with that of Koukyoku. Rather, considering that arrangements can occur between songs that are way different from each other (for example, relying on the delicate and calm melody of classical music, but transforming it into a modern popular song with a passionate expression), the fact that Otsukyoku is a song composed after the lyrics cannot be evaluated so much as a situation for which reliance should be negated.

B. The appellee also contends that Koukyoku has a conventional sound pattern. He argues that the similarity of the melody does not infer reliance. However, the remarkable similarity of the melody of both songs overlapping with the conventional sound pattern is only seen at most one phrase. As mentioned above, such part does not amount to the full melody.

C. Furthermore, the appellee argues that he is a composer who has sufficient experience and achievements, and thus he has no need to refer to Koukyoku to produce a simple 16-bar song with little creativity such as Otsukyoku. In addition to the statement (Exhibit B6, 23) and the result of the cross-examination of the appellee at trial, along with I testimony, the appellee points out that there is no necessity or motivation to do something that is not profitable. In addition, the appellee has served as chairman of the Japan Composers and Arrangers Association, director of the Japanese Society for Rights of Authors of Music, executive committee chairman of the Japan Record Awards, and visiting professor of Tokyo College of Music, and is highly regarded as a composer and arranger with experience and achievements. This is confirmed by evidence (see I testimony, Exhibit A27, 39, Exhibit B6, 23). However, instead of publishing a song as a "dead copy" of the original song as his own work, the appellee, while relying on Koukyoku, puts in his own creative expression. The appellee composed Otsukyoku as a separate and independent song that, as he contends, does not maintain the identity of the essential characteristics of the expression of Koukyoku. As a result, the arrangement right related to Koukyoku was legally infringed because the creative expression that impaired the identity of the essential characteristics of Koukyoku was not included in the inscription of Otsukyoku. Such a situation can still occur even if the above-mentioned background of the appellee is taken into consideration, and cannot be generally denied as a rule of thumb. Therefore, the appellee's allegations above and the evidence in line with them do not, by themselves, have sufficient grounds to negate reliance.

D. The appellee argued that no evidence was submitted to show that Koukyoku was widely disseminated, even though a quarter of a century had passed between the time of proposing Koukyoku and the time of composing Otsukyoku. However, since Koukyoku was published in 1966, it has been sung for a long time and established itself as a popular song or song, and lived in Japan from the 1965's to 1992, when Otsukyoku was composed. As

mentioned above, the appellee is a composer / arranger who belongs to almost the same generation as appellant A and has many years of experience and achievements in music activities in Japan. It is impossible to deny reliance by only considering that there was a quarter-century gap between the publication of Koukyoku and the composing of Otsukyoku. While there is a published opinion by the Supreme Court, September 7, 1978, Judgment of the First Small Court, Minshu Vol. 32, No. 6, p. 1145, which denied reliance of one song published in Japan on an original song published in the United States 30 years ago, which was never a hit song in Japan, the fact of that case is clearly different from the instant case.

(4) To sum up the above judgments, Koukyoku is a well-known prominent song among the majority of people who lived in Japan during the period from the 1965s to the time when Otsukyoku was composed (1992). In addition to the above-mentioned remarkable similarities between the melody of the two songs, it is considered that Otsukyoku relied on Koukyoku. There are objective circumstances to indicate that it is highly likely that the appellant would have come into contact with Koukyoku before the composition of Otsukyoku. Considering that the appellee's allegation does not necessary dispute such circumstantial evidence, and that there is no other accurate counter-evidence, it is reasonable to presume that Otsukyoku was composed based on Koukyoku. Thus, the allegation from the appellee's cross-examination and the statements (Exhibits B6, 23) of the appellee who disputes this finding cannot be adopted.

3. Summary of infringement theory related to the counterclaim

Otsukyoku relies on the existing song Koukyoku, and maintains the same essential characteristics of Koukyoku's expression. While Otsukyoku contains some new ideas and emotions by adding corrections, increases, decreases, changes, etc. to the original expression, those who come into contact with it can directly feel the essential characteristics of the expression of Koukyoku. Then, the act of the appellee composing Otsukyoku is nothing but an arrangement based on Koukyoku under the Copyright Law. In this case, where it is clear that there is no permission from Kanai Music Publishing, the appellant who has the right of arrangement, the above actions of the appellee infringe the arrangement right of the appellant.

In addition, the act of the appellee composing Otsukyoku, which is a modification of Koukyoku against the will of the appellant A, infringes the appellant's right to integrity. Furthermore, as mentioned above, the appellant displays its name as the real author's name when providing or presenting the song to the public. The appellee publishes Otsukyoku as a work related to his own creation that is not a derivative work of Koukyoku, without showing the appellant's name as the real author's name of the original work (there is no dispute that the appellee did not show the appellant's name when presenting the song to the public), so this act of the appellee infringes the appellant's right to display the name.

And since it should be clear that the appellee had intentionally or negligently infringed the above copyright and moral rights of the author in light of the facts above. Thus, the appellee cannot excuse paying damages to the appellants.

4. Regarding issue 3 (damages of appellants)

4-1 Appellant Kanai Music Publishing's Damages

(1) Appellant Kanai Music Publishing is demanding payment of "amount equivalent to the amount of money normally received" stipulated in Article 114, Paragraph 2 of the

Copyright Act as compensation for damages due to copyright (arrangement right) infringement. However, the wording “ordinary” in the above provisions was deleted by Law No. 56 of 2000, which came into effect on January 1, 2001, and the revised provisions of the same law shall apply to this case. In light of the whole argument, it is understood that the appellant’s allegation does not stand on a different premise. Hereinafter, based on the revised provisions, the “amount equivalent to the amount of money to be received” (hereinafter referred to as “equivalent consideration”) will be determined for the exercise of the copyright (arrangement right) related to Koukyoku.

(2) Equivalent consideration for recording, movie recording, videogram recording and publishing.

A. According to the responses to the commissioned investigation dated October 29, 2001 and December 6, 2001, as shown in Exhibit B12-3, the copyright and lyrics of the song “Memorial Tree” (Otsukyoku) are managed by the association based on the copyright trust agreement between the copyright holder Fuji Pacific and the association. As stated in the above response, the amount already distributed by the association to Fuji Pacific as the usage fee for the song “Memorial Tree” (from March 1993 distribution period to March 1999 distribution period) and distribution are withheld (The reason to withhold is that the proceedings are pending and the copyright holder of Otsukyoku is unclear). The total amount of money (from December 1998 hold period to December 2000 hold period) is based on the breakdown described in Attachments 5 and 6: 1,082,500 yen per music recording (distribution amount 850,539 yen, distribution hold amount 231,961 yen); movie recording 240 yen (distribution amount 0 yen, distribution hold amount 240 yen (only for songs)); videogram recording 9800 yen (distribution amount 5370 yen, distribution hold amount 4430 yen); publication 1,026,686 yen (distribution amount 587,219 yen, distribution hold amount 439,467 yen); total 2,119,226 yen (distribution amount 1,443,128 yen, distribution hold amount 676,098 yen). There is no dispute of the numbers between the parties, and hereinafter the distribution amount and the distribution hold amount are collectively referred to as the “distribution amount, etc.”.

And, the appellant Kanai Music Publishing insists that the above distribution amount etc. constitutes the equivalent consideration value of the music, but in the majority of cases, the music copyright is managed through a trust to the association. The management is carried out in accordance with the association’s usage fee regulations and distribution regulations based on the Act on Mediation Business Regarding Copyright before abolition by Law No. 131 of 2000 (Showa). Since it is remarkable in our court that such management was approved by the Commissioner for Cultural Affairs pursuant to the provisions of Article 3 of the 2014 Law No. 67), the practice of collecting and distributing copyrighted material usage fees based on the association’s usage fee regulations and distribution regulations functions as a de facto standard for the consideration for the use of musical works. This is an appropriate standard in determining the equivalent consideration stipulated in Article 114, Paragraph 2 of the Copyright Act. Based on above, the individual issues alleged by the appellee will be examined in sequence below.

B. First, the appellee argues that the above distribution hold amount does not constitute damage to the appellant Kanai Music Publishing because it will be paid to the legitimate right holder when the proceedings are concluded. However, the appellant’s claim to that amount of distribution related to music recordings, movie recordings, videogram recordings, and publications is based on Article 114, Paragraph 2 of the Copyright Act. Since it is clear that there is a problem in calculating the equivalent consideration to be received for

exercising the right of arrangement), distribution to Fuji Pacific happens to be suspended due to the pending of this case (see Distribution Regulations Article 5.3 [Exhibit A107], the Copyright Trust Agreement Article 15 No. 2 [Exhibit A40]). As a result, the above-mentioned equivalent consideration does not fluctuate. In addition, the fact that the distribution is withheld does not equate the actual damage to be compensated to the distributed amount.

C. Next, the appellee insists that the above distribution amount, etc. includes the distribution to the lyricist D and the singer, so this should be deducted. The argument cannot be adopted. As is clear from the Copyright Trust Agreement Article of the association (Exhibit A40), the association is entrusted with the management of the copyright of the work of music, and the association represents lyricist, composer, music publisher and other related work producers. The association receives a copyright trust for the copyright holder, and as the consignor, distributes the copyrighted work fee, etc. obtained through the management of the trust. Therefore, it is not recognized that the above distribution amount includes the distribution amount to the singer as the performer, and the appellee's allegation of the deduction on the premise that the distribution amount exists is unreasonable.

Then, let us consider the appellee's allegation of deducting the distribution to the lyricist. It is acknowledged that the song "Memorial Tree" is a joint work of the lyricist and the composer (Copyright Law, Article 2, Paragraph 1, Item 12). In this case, there is not enough evidence to admit that the copyright of the lyrics has been waived for the combined work, so the right of the work of the lyrics exists independently of the copyright of the song (Otsukyoku). On the other hand, the fact that the distribution amount, etc. is actually distributed or planned to be distributed not as the usage fee for the song alone but as the usage fee for the song "Memorial Tree" as a whole package of work to the association (Exhibit B12-3). Then, it should be clear that the above distribution amount, etc. includes the consideration for the use of the copyrighted work of the lyrics of the song "Memorial Tree", and it is reasonable to deduct the distribution amount to the lyricist from the equivalent consideration for Otsukyoku. In this regard, the appellant Kanai Music Publishing stated that the song "Memorial Tree" is an illegal one that infringes the arrangement right and the moral rights of the author of Koukyoku, not only the song but also the lyrics. It insisted that it does not have the right to claim the distribution of the copyrighted work fee, but the copyright for each of the lyrics and the song coexists, and thus cannot consider the usage fee for each separately. There is no ground for the appellant's above allegation because it is different from the issue of legality of arrangement (in addition, the appellant Kanai Music Publishing itself is insisting on the claim of the equivalent consideration for movie recording, excluding the lyrics).

D. Besides, as mentioned above, the song "Memorial Tree" was published as an arrangement by E when provided or presented to the public, so there is an issue of the share for E as an arranger. In the first place, as mentioned above, Otsukyoku is a derivative work of the original song of Koukyoku with the creative expression added by the appellee. It cannot be denied that the appellee owns the copyright as the derivative work. Then, in the consideration for the use of Otsukyoku, which is a derivative work based on original song of Koukyoku, there are different parts to be distributed to the copyright holder of the original song and to the copyright holder of the derivative work and its arranger. Therefore, in determining the equivalent consideration value of Koukyoku, the latter distribution should be deducted from the above distribution amount, etc., and the ratio to be deducted is based on the distribution rate of the original song to the arranger (although the appellee does not

explicitly assert this, the underlying facts are clearly submitted, both assertively and in evidence, so there is no hindrance to taking this into consideration).

As mentioned above, the appellant Kanai Music Publishing has asserted that the distribution to the parties concerned is denied because of the illegality of the creation process of the song “Memorial Tree”. However, the current copyright law requires that derivative works are copyrighted and protected by the law. The legality of the creation of the derivative work is not required as provided by Article 2, Paragraph 1, Item 11 of the Copyright Law and the revision process from the old copyright law (Law No. 39 of 1902) (for example, abolition of legal requirements of Article 22 of the old copyright law). As it is clear, the above allegation is unreasonable. In addition, the above points are legitimized considering that the market value of the derivative work increases due to the creativity added by the arrangement, and the equivalent royalties of the derivative work may be high. However, on the premise of licensing practice that includes the license of copyrighted works with arrangements, it goes without saying that there is no room for the problem of deduction of distribution to the arranger when the equivalent consideration is calculated based on the license fee. But in this case, the appellant Kanai Music Publishing claims that the equivalent consideration value of Koukyoku is calculated based on the actual usage fee of Otsukyoku, which is a derivative work. Those two lines of argument cannot reconcile with each other.

E. Therefore, we will proceed to consider the amount to be deducted from the above distribution amount, etc. as the distribution amount to the lyricist (D) and to the arranger (appellee and E).

First, regarding music recording, videogram recording and publication, the appellant Kanai Music Edition insisted on the equivalent consideration based on the distribution amount, etc. (the total is 2,118,986 yen) without deducting the amount for the lyricist. According to Articles 3 and 29 (Exhibits A106 and 107) of the Association’s Distribution Regulations, the distribution rate of royalties related to music recording, videogram recording and publication to composers, lyricists and arrangers is determined by the relevant right holders, where it is recognized that the composer is $\frac{3}{8}$, the lyricist is $\frac{4}{8}$, and the arranger is $\frac{1}{8}$. Since there are no circumstances that make it unreasonable to apply this rate to this case, we will adopt this distribution rate. Then, the equivalent consideration for the use of Koukyoku related to music recording, videogram recording and publishing is the above distribution amount, etc. multiplied by the distribution rate $\frac{3}{8}$ to the appellant Kanai Music Publishing, the copyright holder of the original song, which is 794,619 yen (A) (total of the above distribution amount, etc. $2,118,986 \text{ yen} \times \frac{3}{8} = 794,619 \text{ yen}$, rounded down to the nearest whole number. The same shall apply hereinafter).

And, the equivalent consideration for the use of Koukyoku related to movie recording based on the distribution amount, etc. is 240 yen. Since it is appropriate to deduct the distribution to the arranger, under the distribution rate of the usage fee for movie recording specified in Article 29 of the Distribution Regulations (Exhibit A106, 107) (If the relevant right holder is the composer and the arranger, composer is $\frac{6}{8}$, arranger is $\frac{2}{8}$), the equivalent consideration for the use of Koukyoku related to movie recording is 180 yen (B) ($240 \text{ yen} \times \frac{6}{8} = 180 \text{ yen}$).

(3) Equivalent consideration for broadcasting and recording for broadcasting

A. Appellant Kanai Music Publishing insists that the equivalent consideration for broadcasting and recording for broadcasting should be based on the total usage fee per song,

while the appellee releases the song. Even in this case, we argue that it is unreasonable to use the usage fee per song as the standard, because only the usage fee can be distributed by the comprehensive usage fee method. The appellee asserts that since the distribution of usage fees where Koukyoku is broadcast can only be obtained by the comprehensive usage fee method, it is unreasonable to use the usage fee per song as a standard.

B. In consideration of the above points, according to the association's usage fee regulations (Exhibit A105) and distribution regulations (Exhibit A106), and each association's response to the survey commission (see attached), the usage fee related to broadcasting performed by general broadcasters is based on the comprehensive usage fee amount for one year (Chapter 2, Section 3, 2(1)). In the case of the usage fee for each song (same as (2)), the usage fee per song is accumulated by each song. In practice, the comprehensive usage fee method is adopted. Regarding the usage fee for broadcasting recordings performed by general broadcasters, according to the usage fee regulations, the usage fee per song is calculated when the work is used as the theme song or insert song in a television show (Chapter 2, Section 4, 1(1)(a), (2)). Actually, it is based on the same comprehensive usage fee as before, and in these comprehensive usage fee methods, it takes a huge amount of work to investigate and confirm the distribution amount for each song. Therefore, it is recognized that even in the response form of the association to the above survey commission, only the response limited to the distribution period of January and February 2000 was obtained (requiring the association to do further investigation exceeds the limits of the commissioned investigation).

According to the above-mentioned facts, it is reasonable to apply the calculation method for accumulating the usage fee for each song in broadcasting and recording for broadcasting as stipulated by the association's usage fee regulations (Chapter 2, Section 3, 2(2) for the former, Chapter 2, Section 4, 1(1)(a), (2) for the latter). Even if the comprehensive usage fee method is adopted exclusively in the actual practice of the association, it does not influence this judgment. The comprehensive usage fee method sets a lower usage fee as a whole than the method of accumulating the usage fee for each song. It seems to provide incentives to those who intend to use the copyrighted work in advance to obtain a license. From this point of view, the adoption of the comprehensive usage fee method cannot be justified in calculating the amount of damage in an infringement case.

C. The appellee contends that the amount of damage equivalent to the management fee of the association is "naturally incurred" when Koukyoku were to be recorded for broadcasting instead of Otsukyoku. He argues that it should be deducted in the calculation of the equivalent consideration. However, in Article 114, Paragraph 2 of the current Copyright Law, the wording "ordinary" has been deleted as described above, and it is in the association's discretion entrust the management of music copyright. It cannot be said that the management fee of the association is naturally incurred, so the above allegation is not adopted.

D. Therefore, we will proceed to calculate the equivalent consideration for broadcasting and recording for broadcasting according to the method of accumulating the usage fee for each song.

According to the evidence (Exhibit A103, Exhibit A110-1~372, Exhibit A111-1~274, Exhibit 17), the TV program "Appare Sanma Dai-sensei" and "Yappari Sanma Dai-sensei" was broadcast between January 1993 and November 2001 at least 372 times on Fuji TV and 274 times on Kansai TV, and it was acknowledged that Otsukyoku was used as the ending

theme song in these programs. There is no particular disproof of this issue. In addition, since there is no evidence sufficient to show that the number of broadcasts mentioned above includes re-broadcasts, it can be fully inferred that the recording of Otsukyoku was used in each of the above broadcasts (used as the theme song and inserted song for a television program).

According to the usage fee regulations, Chapter 2, Section 3, 2 (2) (Exhibit A105), the usage fee unit price per song in the case of broadcasting is 8000 yen for Fuji TV (Class 1, up to 5 minutes), and 5600 yen for Kansai TV (class 2, up to 5 minutes) (see Exhibit A113 for classes 1 and 2). On the other hand, according to Article 8 of the Distribution Regulations (Exhibit A106, 107), if the relevant right holders are composers, lyricists and arrangers, the distribution rate of royalties related to broadcasting is the composer 5/12, the lyricist 2/12, and the arranger 5/12. As mentioned in (1) C and D above, it is appropriate to deduct the distribution to the lyricist and the arranger. Then, the equivalent consideration for the use of Koukyoku related to broadcasting is 1.24 million yen ($8,000 \text{ yen} \times 372 \text{ times} \times 5/12 = 1,240,000 \text{ yen}$) for Fuji TV and 369,333 yen for Kansai TV ($5,600 \text{ yen} \times 274 \text{ times} \times 5/12 = 639,333 \text{ yen}$) The total is 1,879,333 yen (C).

In addition, regarding recording for broadcasting, if the copyrighted work is used as the theme song or inserted song in a “general movie” (see Chapter 2, Section 4, 1 (1)) in the usage fee regulations (Exhibit A105),” whereas the use in “cultural movie, less than 5 minutes” costs 1200 yen, and the rate for “television movie” is 20/100, the standard unit price is 240 yen ($1200 \text{ yen} \times 20/100 = 240 \text{ yen}$). And since it is clearly stated that this unit price is applied to “lyrics and songs respectively”, it is not necessary to deduct the distribution to the lyricist, but appropriate to deduct the distribution to the arranger for the music. According to Article 29 of the Distribution Regulations (Exhibit Ko No. 106, 107), if the relevant right holders are composers and arrangers, the distribution rate of the usage fee for recording is 6/8 for the composer and 2/8 for the arranger. Therefore, following this, the equivalent consideration for the use of Koukyoku related to broadcast recording is 116,280 yen (D) ($240 \text{ yen} \times (372 + 274) \text{ times} \times 6/8$). The total is 116,280 yen.

(4) About attorney’s fees

As described above, the damage amount of the appellant Kanai Music Publishing due to the equivalent consideration is 2,790,412 yen, which is the total amount of the certified amounts in (2) and (3) above. The attorney’s fees, which are recognized as damages that have a considerable causal relationship with the appellee’s infringement, should be recognized as 600,000 yen (E) in consideration of various circumstances such as the content of the case and the proceedings.

(5) Therefore, the amount of damage incurred by the appellant Kanai Music Publishing due to the infringement of the arrangement right will be 3,390,412 yen in total of the above (A) to (E) as claimed by the appellant.

4-2 Damage of Appellant A

The appellee composes a derivative work, Otsukyoku, based on Koukyoku, contrary to the will of appellant A. By disclosing this as a work related to his own creation without displaying the real name of the appellant as the author name of the original work when providing or presenting it to the public, the appellee infringed the moral rights of the author (right to integrity and right to display name) as stated above. And, according to the evidence

(Exhibits A25, 54, 87, 100, 115, Exhibit A24), Appellant A is evaluated as the leading composer of many masterpieces that are said to remain in the musical history of commercial songs. In addition, he is known for his wide range of composition activities, such as receiving the Record Award for Children's Song Award for "Ping Pong Pan Gymnastics" in 1972 and the Record Award for "Kita no Yadokara" in 1976. In the work of the appellant's commercial song, Koukyoku is regarded as one of the masterpieces, and it is recognized that he himself has a strong pride and attachment to Koukyoku with the same recognition. Moreover, although Koukyoku was published as a commercial song, it is a well-known song that has established itself as a popular song that has been sung for a long time and published in many textbooks. Otsukyoku is modified against the will of Appellant A and thus the song is not a derivative work of Koukyoku. As mentioned above, the name of Appellant A was not displayed as the real author's name of the original work when Otsukyoku was provided or presented to the public as the ending theme song of the Fuji TV program. This situation has continued for about 10 years from around December 1992 until the conclusion of the oral argument.

Considering the above facts including the mode of modification and all other circumstances, the amount of damages for the mental distress of Appellant A regarding the infringement of the above moral rights is 5 million yen. The attorney's fees recognized as damage that has a considerable causal relationship with the appellee's infringement is 1 million yen.

5. Counterclaim

The appellee's request for counter-appeal requires Appellant A to confirm that the appellee is the copyright owner of Otsukyoku. Since Otsukyoku is derivative to the arrangement of Koukyoku, as mentioned above, such arrangement is illegal, but the current copyright law gives the arranger the moral right of the author for a derivative work related to the arrangement without requiring the legality of the arrangement. Then, the appellee is recognized to have the moral rights of the author of Otsukyoku.

In addition, the appellants withdrew the main claim that Otsukyoku was a copy of the Koukyoku, and changed it to the claim that it was a derivative work exclusively related to the arrangement. Therefore, there is no doubt that the appellee has a ground for his counterclaim. However, Appellant A does not make an assertion that the appellee explicitly acknowledges that the appellee has the moral rights as the author of Otsukyoku, but seeks a judgment that dismisses the counterclaim. Moreover, Appellant A argued that the legality of the arrangement is a requirement for the arranger to receive protection under copyright law for derivative works related to the arrangement. Since it is necessary and appropriate between the appellee and the appellee to establish that the appellee has the moral rights as the author as Otsukyoku, the benefit of confirmation should also be affirmed.

Therefore, the appellee's counterclaim against Appellant A is supported.

6. Conclusion

According to above, as claimed by the appellants, Appellant A requested payment of 6 million yen and late damages to be paid at a rate of 5% per year from December 1, 2001 as provided by the Civil Code. Appellant Kanai Music Publishing requested payment of 3,390,412 yen and the late damages in the same manner of payment, and all other claims

should be dismissed. In addition, the part of the original judgment that allowed the appellee's counterclaim against Appellant A is granted.

Therefore, the first paragraph of the main text of the original judgment regarding the request for counterclaim, which differs from the above judgment and the conclusion, has been changed as described in the first sentence of the main text of this judgment. Appellant A's appeal regarding the counterclaim, paragraph 2 of the main text of the original judgment, was dismissed because there was no legal ground for such appeal. Article 67, Paragraph 2, Article 61, Article 64 of the Code of Civil Procedure shall be applied to bear the legal costs, and Article 259 of the Code of Civil Procedure shall be applied to the declaration of provisional execution, and the judgment shall be made as the main text provides.

Tokyo High Court 13th Civil Affairs Department

Chief Judge Katsumi Shinohara

Judge Yukio Nagasawa

Judge Miyasaka Masatoshi