

Date	September 6, 2002	Court	Tokyo High Court
Case number	2000 (Ne) 1516		13th Civil Division
– A case in which the court determined the meaning of musical arrangement of musical works.			

Reference: Article 2, paragraph (1), Article 27, Article 19, paragraph (1), Article 20, paragraph (1) and Article 114, paragraph (2) of the Copyright Act

Number of related rights, etc.:

#### Summary of the Judgment

1. This is a case where Appellant P, who created the musical composition Ko ("Musical Composition Ko"), and Appellant Q, which is the transferee of the copyright for Musical Composition Ko, alleged against the appellee, who created the musical composition Otsu ("Musical Composition Otsu"), that Musical Composition Otsu is a musical arrangement of Musical Composition Ko. Based on this allegation, Appellant Q demanded the payment of damages for infringement of the musical arrangement right while Appellant P demanded the payment of damages for infringement of the moral rights of author (the right to integrity and the right of attribution), respectively, against the appellee. On the other hand, the appellee filed a counterclaim against Appellant P to seek a declaratory judgment to the effect that the appellee has the moral rights of author for Musical Composition Otsu. In the prior instance, the appellants only alleged infringement of right of reproduction, but in the judgment in prior instance, the court dismissed all of the appellants' claims, and thus, the appellants added the allegation of infringement of the musical arrangement right in the appeal instance while withdrawing the allegation of infringement of the right of reproduction.

2. In this judgment, the court mainly held as follows and modified the judgment in prior instance to admit infringement of Appellant Q's musical arrangement right and infringement of Appellant P's moral rights of author by the appellee, while upholding the appellee's counterclaim.

(1) "Musical arrangement" means an act of correcting, increasing or decreasing, modifying, or otherwise changing specific expressions presented in an existing work, i.e., musical composition, in order to newly express thoughts or sentiments in a creative manner, and creating, depending on the existing work, another work to which any person who listens would be able to directly perceive the fundamental characteristics of the expressions presented in the original musical composition, while maintaining the identicalness in the fundamental characteristics of the expressions presented in the original musical composition, according to the meaning of adaptation.

With respect to the criteria to determine identicalness in the fundamental characteristics of the expressions presented in musical compositions, musical compositions consist of various elements such as melodies, harmonies, rhythms, tempos, styles and each musical composition naturally consists of different elements that make up the fundamental characteristics of the expressions presented therein. Thus, it is necessary to first examine the musical composition, which is considered to be the original musical composition, and determine which aspects of the musical composition reflect the fundamental characteristics of expressions, and then focus on the major elements that make up the fundamental characteristics of expressions, and eventually make a determination with a focus on the elements that are referred to in each party's allegation. As far as ordinary musical compositions with melodies are concerned, it is reasonable to interpret that melodies occupy a major position as an element that should be focused on when making a determination concerning "musical arrangement" under the Copyright Act.

(2) While Musical Composition Otsu has some new creative expressions that do not exist in Musical Composition Ko, the two musical compositions can be considered to be identical in substance in terms of melodies. Moreover, the two musical compositions are extremely similar in terms of the structures of the compositions of the melodies as a whole. Even if the differences in melodies and other elements are taken into consideration in a comprehensive manner, Musical Composition Otsu maintains identicalness in the fundamental characteristics of the expressions presented in Musical Composition Ko. Thus, any person who listens to Musical Composition Otsu can directly perceive the fundamental characteristics of the expressions presented in Musical Composition Ko.

Judgment rendered on September 6, 2002

2000 (Ne) 1516 Principal Action to Demand Payment of Damages, Counterclaim  
Appeal to Seek Declaratory Judgment Concerning Copyright (Court of prior instance:  
Tokyo District Court 1998 (Wa) 17119, 1998 (Wa) 21184, 1998 (Wa) 21285)

Date of conclusion of oral argument: May 10, 2002

### Judgment

Appellant: X

Appellant: Yugen Kaisha Kanai Ongaku Shuppan

Appellee: B

### Main text

1. Paragraph 1 of the main text of the judgment in prior instance shall be modified as follows.

(1) The appellee shall pay Appellant X 6,000,000 yen and the amount accrued thereon at the rate of 5% per annum for the period from December 1, 2001, to the date of completion of the payment.

(2) The appellee shall pay Appellant Yugen Kaisha Kanai Ongaku Shuppan 3,390,412 yen and the amount accrued thereon at the rate of 5% per annum for the period from December 1, 2001, to the date of completion of the payment.

(3) Any other claims of the appellants shall be dismissed.

2. This appeal filed by Appellant X concerning paragraph 2 of the main text of the judgment in prior instance shall be dismissed.

3. Between Appellant X and the appellee, the court costs for the first and second instances shall be equally divided into two portions, one of which shall be borne by said appellant, while the other shall be borne by the appellee. Meanwhile, between Appellant Yugen Kaisha Kanai Ongaku Shuppan and the appellee, the court costs for the first and second instances shall be equally divided into five portions, three of which shall be borne by said appellant, while the rest shall be borne by the appellee.

4. This judgment may be provisionally executed as far as (1) and (2) of paragraph 1 of the main text are concerned.

### Facts and reasons

No. 1 Judicial decision sought by the parties

## 1. Appellants

- (1) The judgment in prior instance shall be rescinded.
- (2) The appellee shall pay Appellant X ("Appellant X") 10,000,000 yen and the amount accrued thereon at the rate of 5% per annum for the period from December 1, 2001, to the date of completion of the payment.
- (3) The appellee shall pay Appellant Yugen Kaisha Kanai Ongaku Shuppan ("Appellant Kanai Ongaku Shuppan") 8,141,599 yen and the amount accrued thereon at the rate of 5% per annum for the period from December 1, 2001, to the date of completion of the payment. (Note: The appellants expanded their claim in this instance for the part thereof that goes beyond the payment of 3,210,000 yen and the amount accrued thereon at the rate of 5% per annum for the period from September 24, 1998, to the date of completion of the payment.)
- (4) The appellee's counterclaim against Appellant X shall be dismissed.
- (5) The court costs for both the first and second instances shall be borne by the appellee.
- (6) A declaration of provisional execution shall be made concerning (2) and (3) above.

## 2. Appellee

- (1) This appeal filed by the appellants and Appellant Kanai Ongaku Shuppan's claim expanded in this instance shall be dismissed.
- (2) The court costs for this instance shall be borne by the appellants.

## No. 2 Outline of the case

This is a case where Appellant X, who created the musical composition ("Musical Composition Ko") of the song titled "どこまでも行こう (Dokomademo yukou)" specified in Score 1 presented in Attachment 1 (a musical composition with lyrics shall be hereinafter referred to as a "song"), and Appellant Kanai Ongaku Shuppan, which is the copyright owner of Musical Composition Ko, alleged against the appellee, who created the musical composition titled "記念樹(Kinenju)"("Musical Composition Otsu") specified in Score 2 presented in Attachment 2, that Musical Composition Otsu is a musical arrangement of Musical Composition Ko. Based on this allegation, Appellant X demanded the payment of damages for infringement of Appellant X's moral rights of author (the right to integrity and the right of attribution), and Appellant Kanai Ongaku Shuppan demanded the payment of damages for infringement of its copyright (the musical arrangement right). On the other hand, the appellee filed a counterclaim against Appellant X to seek a declaratory judgment to the effect that the appellee has the moral rights of author for Musical Composition Otsu.

In the prior instance, while the appellants alleged that their right of reproduction was infringed, the judgment in prior instance dismissed all of the claims made in the

principal action and accepted the appellee's counterclaim. Dissatisfied with this judgment, the appellants filed an appeal and additionally alleged that the musical arrangement right was infringed (while the appellants used the term "adaptation right" in the brief, etc., in light of the facts that Musical Composition Ko and Musical Composition Otsu are musical works in the form of musical compositions, and that Article 2, paragraph (1), item (xi) of the Copyright Act specifies "musical arrangement," which is unique to musical compositions, as a manner of creating a derivative work equivalent to "translation," "reformulating," and "adaptation," and that Article 27 of said Act specifies the "musical arrangement right" as an exclusive right of the author in addition to the "adaptation right," etc., the "adaptation right" mentioned by the appellants can be interpreted to exactly mean the "musical arrangement right," and thus, this term shall be used hereinafter) and withdrew their allegation concerning infringement of the right of reproduction. Furthermore, Appellant Kanai Ongaku Shuppan expanded its claim in this instance.

1. Facts on which the decision is premised

(1) In 1966, Appellant X (born in 1932) created a musical composition and lyrics for the song titled "どこまでも行こう (Dokomademo yukou)" specified in Score 1 presented in Attachment 1 and obtained a copyright and moral rights of author for the musical composition (Musical Composition Ko) and the lyrics. This song was released through a TV commercial for Bridgestone Tire Company Ltd. (Current trade name: Bridgestone Corporation), in which C sang the song. In February 1967, Appellant X assigned his copyright including the musical arrangement right for Musical Composition Ko and his copyright for the lyrics to Appellant Kanai Ongaku Shuppan. On February 28, 1967, Appellant Kanai Ongaku Shuppan submitted a work report to Japanese Society for Rights of Authors, Composers and Publishers (referred to as "JASRAC" in some cases) and transferred the musical performance right to JASRAC by means of trust, but retained the musical arrangement right (Exhibits Ko 1, 2, 28, 29, 41, 54, 114, 118, Otsu 1 [including the branch numbers]).

(2) In 1992, the appellee (born in 1936) created a musical composition (Musical Composition Otsu) for the song titled "記念樹(Kinenju)" specified in Score 2 presented in Attachment 2. D (lyricist), E (music arranger), PONY CANYON INC. (record producer/master recording producer), and a group of actors appearing in the TV programs mentioned below, "あっぱれ学園生徒一同 (Appare gakuen seito ichido)" (singers) were also involved in the production of the song. This song was recorded in a CD album titled "『あっぱれさんま大先生』 キャンパスソング集 ('Appare sanma daisensei' Kyanpasu songu shū)" and was released in December 1992. The song was

used as the ending theme song, etc. for TV programs "あっぱれさんま大先生 (Appare sanma daisensei)" and "やっぱりさんま大先生 (Yappari sanma daisensei)," which were broadcast by Fuji Television Network, Inc. ("Fuji TV") and Fuji TV Network companies such as Kansai Telecasting Corporation ("Kansai TV"). In around December 1992, the appellee assigned his copyright for Musical Composition Otsu and D assigned his copyright for the lyrics to Fujipacific Music, Inc. ("Fujipacific"), respectively (The appellee of this instance, Exhibits Ko 27, 43-1, 43-2, 84, 99, Otsu 6 to 9, 12-3, Object of Observation Ko 17).

## 2. Major issues

- (1) Whether Musical Composition Otsu maintains identicalness with Musical Composition Ko in terms of the fundamental characteristics of expressions
- (2) Whether Musical Composition Otsu was created based on Musical Composition Ko
- (3) How much damage the appellants suffered

(omitted)

## No. 4 Court decision

### 1. Issue 1 (Identicalness in terms of the fundamental characteristics of expressions)

#### 1-1 General theory

##### (1) Significance of "musical arrangement"

The song titled "どこまでも行こう (Dokomademo yukou)" can be interpreted to be a so-called integrated work consisting of lyrics created by Appellant X and a musical composition (Musical Composition Ko) created by Appellant X. This is a dispute about infringement of a copyright (musical arrangement right) for the latter, in other words, a musical work in the form of a musical composition excluding lyrics. The Copyright Act does not have any particular provision to define "musical arrangement" of musical compositions (Article 2, paragraph (1), item (xi) and Article 27 of said Act) (the same can be said about Article 2 (3) and Article 12 of the Berne Convention for the Protection of Literary and Artistic Works). In the case of "adaptation" of a literary work, which is treated in the same manner under said Act, it is considered to be an act of correcting, increasing or decreasing, modifying, or otherwise changing specific expressions presented in an existing work in order to newly express thoughts or sentiments in a creative manner and creating, depending on the existing work, another work to which any person who listens would be able to directly perceive the fundamental characteristics of the expressions presented in the existing work, while maintaining the identicalness in the fundamental characteristics of the expressions presented in the

existing work (Judgment of First Petty Bench of the Supreme Court of June 28, 2001, Minshu Vol. 55, No. 4, at 837). Similarly, it is reasonable to interpret that "musical arrangement" means an act of correcting, increasing or decreasing, modifying, or otherwise changing specific expressions presented in an existing work, i.e., musical composition (the "original musical composition"), in order to newly express thoughts or sentiments in a creative manner and creating, depending on the existing work, another work to which any person who listens would be able to directly perceive the fundamental characteristics of the expressions presented in the original musical composition, while maintaining the identicalness in the fundamental characteristics of the expressions presented in the original musical composition.

Meanwhile, the guidelines of the musical arrangement examination committee of JASRAC (Exhibit Ko 72-2) specify that a work created by simply replacing musical notes with numbers or signs or by transposing the key of the original musical composition to another key would not be treated as a work of musical arrangement. This rule can be interpreted to be a standard that differentiates an act of musical arrangement from an act of modification that is not significant enough to be regarded as musical arrangement. This rule cannot be applied to the case where the original musical composition has been modified to such an extent that the act of modification can no longer be regarded as an act of musical arrangement and should be regarded as an act of creating a separate, independent musical composition.

The term "musical arrangement" means different things depending on whether it is used as a general or musical term. For example, well-known Japanese language dictionaries explain it as "an act of arranging a musical composition for a different musical instrument or editing a musical composition for a different performance style" ("広辞苑第5版(Kojien Dai 5han)" published by Iwanami Shoten, Publishers) and as "an act of rewriting the musical composition of the original composition to make it suitable for a different performance style" ("大辞林(Daijirin)" published by SANSEIDO BOOKSTORE LTD.). "新訂 標準音楽辞典(Shintei Hyōjun Ongaku Jiten)" published by ONGAKU NO TOMO SHA CORP. on February 28, 1999, states as follows. "(1) Musical arrangement usually means an act of arranging the original musical composition in order to make it suitable for a different performance style... while maintaining the nature of the substance of the original musical composition. If music for a large musical instrument composition is modified to make it suitable for a small musical instrument composition..., there is no room for a music arranger to express his/her creativity. Some arrangement is made for the purpose of performance. In such case, the musical arranger is often able to add creative elements. For example, such

cases include the case where the music arranger adds an accompaniment to the original composition consisting only of melodies, modifies the original to make it suitable for a completely different musical instrument composition, and re-writes music for a small musical instrument composition to make it suitable for a large musical instrument composition. Musical arrangement for a different musical instrument composition is referred to as "transcription" in some cases. (2) In the field of popular music and jazz, it means a certain interpretation of melodies and harmonies... Usually, in this case, the role of the composer is to designate melodies and simply provide harmonies as an accompaniment. Music arrangers are given the freedom to decide the performance style and orchestration and are permitted to decide the details about rhythm and harmonies." The case where "music for a large musical instrument composition is modified to make it suitable for a small musical instrument composition" mentioned in (1) above as an example can be interpreted to fall within the scope of "reproduction" under the Copyright Act. In conclusion, the term "musical arrangement" used in the sense of a general or musical term is not necessarily the same as the term "musical arrangement" specified in the Copyright Act. According to Witness I of this instance ("I's witness statement"), it can be found that, in the music industry, the term "musical arrangement" generally has the meaning specified in (2) above, in other words, an act of preparing a background orchestration score without changing its established structure of melodies and harmonies (according to E's written statement (Exhibit Otsu 9), it can be interpreted that "musical arrangement" of Musical Composition Otsu by E is limited to such type of arrangement). However, it is obvious that "musical arrangement" specified in the Copyright Act is not limited to such type of arrangement.

Thus, on the premise that the concept "musical arrangement" used as a general or musical term is not necessarily the same as "musical arrangement" specified in the Copyright Act, the following section examines, in accordance with the aforementioned interpretation of such concept under the Copyright Act, whether Musical Composition Otsu maintains characteristics that are identical with the fundamental characteristics of the expressions presented in Musical Composition Ko.

(2) Criteria to determine identicalness in the fundamental characteristics of the expressions presented in musical compositions

The appellants alleged a determination as to identicalness in the fundamental characteristics of the expressions presented in musical compositions must be made based solely on the melodies. On the other hand, the appellee alleged that melodies and harmonies are inseparable and that, since the melodies, harmonies, rhythms, tempos, styles, etc. are fundamental elements of a musical work, they should be evaluated in an



integrated manner.

Regarding this point, the opinion statement submitted by J (Exhibit Otsu 24, "J's opinion statement"; other opinion statements will be indicated in the same manner except for those that are mentioned for the first time) states that, despite the fact that some musical compositions consist solely of melodies or rhythms of percussion, most musical compositions consist of a "combination of melodies, harmonies, rhythms, tempos, and styles." While making the same reservation as the one mentioned above, K's opinion statement (Exhibit Otsu 25) states that most music consists of a "combination of rhythms, melodies, harmonies, styles, etc." Both opinion statements state that it is necessary to make a decision from a broad perspective by taking into consideration the fact that, when making a comparison between musical compositions, the aforementioned various factors affect the listeners' sentiments in an integrated manner. It is generally said that musical compositions consist of three elements, namely, melodies, rhythms, and harmonies. In some cases, another element such as styles should also be taken into consideration. It can be found that these elements are indispensable elements of a musical composition. The same interpretation was also presented by Witness L of this instance and in a book authored by Appellant X himself ("やさしい作曲のしかた／初心者のために (Yasashii Sakkyoku no shikata / Shoshinsha no tameni)" [Exhibit Ko 56] p. 36). (Witness L of this instance is a professor of the Faculty of Composition of Tokyo College of Music and its graduate school, who is known by the common name "M" [Exhibit Ko 73]. Since the common name "M" is used in the opinion statements, etc. [Exhibits Ko 30, 68, 72-1, 88, 102], L is stated as "M's witness statement," and the opinion statement, etc. of L is indicated as "M's opinion statement.")

Generally, musical compositions consist of various fundamental elements as mentioned above, each of which affect the sentiments of listeners in an integrated manner, and each musical composition naturally consists of different elements that make up the fundamental characteristics of the expressions presented therein. Thus, it should be said that it is not reasonable to discuss "the identicalness in the fundamental characteristics of expressions" without examining specifics in each case. It is necessary to first examine the musical composition, which is considered to be the original musical composition, and determine which aspects of the musical composition reflect the fundamental characteristics of expressions, and then focus on the major elements that make up the fundamental characteristics of expressions, and eventually make a determination with a focus on the elements that are referred to in each party's allegation.

As pointed out in the opinion statements of J and K as mentioned above, some musical compositions consist solely of melodies. Melodies alone can be considered to

be a musical work (musical composition) as is the case with Rōkyoku ("naniwa-bushi" recitation). If the melodies themselves are not modified, it is usually impossible to consider that an act of adding harmonies to the melodies would cause the loss of the identicalness in the fundamental characteristics of the expressions presented in the original work consisting solely of melodies. On the other hand, harmonies cannot generally be independently interpreted to be a "musical composition" apart from melodies. In comparison with melodies, the level of originality of harmonies is relatively low. Originality is one of the criteria for copyrightability. It can be interpreted that the same can be said about rhythms and styles except for special cases such as music performance using only percussion. As mentioned above, various elements make up the fundamental characteristics of the expressions presented in a musical composition, and it is impossible to discuss uniformly how to evaluate identicalness in those elements. As far as ordinary musical compositions with melodies are concerned, it is reasonable to interpret that melodies are relatively important as an element that should be focused on when making a determination concerning "musical arrangement" under the Copyright Act. For instance, in the case of the Act on Copyright and Related Rights of Germany (1965), in Section 23 "Adaptations and transformations" in Subchapter 3 "Exploitation rights" in Chapter 4 "Scope of copyright" in Part 1 "Copyright," it is provided for that "Adaptations or other transformations of the work may be published or exploited only with the consent of the author of the adapted or transformed work." Section 24 (Free use) stipulates that "An independent work created in the free use of the work of another person may be published or exploited without the consent of the author of the work used." (Subsection (1)) and that "Subsection (1) shall not apply to the use of a musical work in which a melody is recognisably taken from the work and used as the basis for a new work." (Subsection (2)) (according to the translation presented in "外国著作権法令集(16)－ドイツ編－(Gaikoku chosakukenhoushū (16) --- Germany ---)" (Collection of foreign copyright laws (16) --- Germany ---) published by Copyright Research and Information Center). In this way, Section 24 (2) of said Act, which emulates Section 13 (2) of the former Law on Copyright in Works of Literature and Music (1901), clearly stipulates that, in the case where a new musical work is created based on a melody of an existing work, in a manner that any person who listens to the work can perceive the characteristics of the original work, any person who uses such new musical work must obtain consent from the author of the original work. The fact that the German law explicitly specifies the legal principle of providing protection with a focus on melodies (Fromm/Nordemann: Commentary on the German Copyright Act [9th edition] (1998), Notes 12 to 15

concerning Section 24) should be noted although there are differences in relevant laws and regulations.

While the appellee alleged that melodies are inseparable from harmonies, if the objective of this allegation is to point out the unreasonableness of focusing solely on melodies in the course of making a determination, such argument can be interpreted to be denying the independent nature of melodies as described above and should therefore be considered to be unacceptable.

1-2 Elements that should be taken into consideration in this case

(1) Fundamental characteristics of the expressions presented in Musical Composition Ko

A. In this case, before determining identicalness of the fundamental characteristics of the expressions presented in Musical Composition Ko and Musical Composition Otsu, it is necessary to first examine what aspects exhibit the fundamental characteristics of the expressions presented in Musical Composition Ko. This is because, even if Musical Composition Otsu is identical with Musical Composition Ko in terms of uncreative expressions presented in Musical Composition Ko, such identicalness would not provide grounds for the identicalness in the fundamental characteristics of expressions (the aforementioned Judgment of First Petty Bench of the Supreme Court of June 28, 2001).

B. An examination of Musical Composition Ko from this perspective shows the following. As Musical Composition Ko was given lyrics created by Appellant X himself and was released as a TV commercial song sung by C, it is clear that Musical Composition Ko is a musical composition consisting of a song whose melodies are designed to be sung. Due to such characteristics, the melodies naturally attract attention. Moreover, Musical Composition Ko is a type of song that does not require a large musical instrument composition like an opera song, etc. Musical Composition Ko is a musical composition that is expected to be performed as a simple, easy-to-listen piece of music with a focus on its melodies. In other words, Musical Composition Ko is a musical composition that is a relatively short piece of light music and has a total of 16 bars in two-two time in one chorus. The structure of Musical Composition Ko consists of a total of 4 phrases, namely, Phrase [A] to Phrase [D]. Phrase [A] and Phrase [D] contain an almost identical repeated melody. In other words, Musical Composition Ko has adopted a simple style that can be formulated as A-B-C-A. The harmonies used in Musical Composition Ko have adopted a triad, so-called three chord, which is said to be common. Thus, it is reasonable to interpret that the fundamental characteristics of the expressions presented in Musical Composition Ko as a musical composition lie not in

such elements as harmonies and styles but mainly in its simple, easy-to-listen melodies. This is in line with I's opinion statements (Exhibits Otsu 5, 17), which state that such melodies represent Appellant X's style.

C. Regarding this point, the appellee cited the concept "trite" used in the case law of the U.S. and alleged that the melodies of Musical Composition Ko consist of a series of common sound patterns, which cannot be considered to be creative.

This is true to a certain extent. As mentioned in I's opinion statements (Exhibits Otsu 5, 17), N's opinion statement (Exhibit Otsu 16), etc., if some parts and fragments of the melodies of Musical Composition Ko are examined, the following can be said. [i] Phrase [A] and Phrase [D], "do re miii do tii do re doooooo" are similar to "do re miii do tii ree doooooo" of "ミルク色だよ(Miruku iro dayo)" (sung by Tadaharu Nakano and Columbia Rhythm Boys) and its original musical composition "Careless Love" (traditional song in the U.S.) and also to "do re miii do tii ree doooooo" of "涙くんさよなら(Nanidakun sayonara)" (composed by Kuranosuke Hamaguchi). Also, the musical compositions that start with "do re mi" include "Tennessee Waltz" (composed by P. E. King), "Do-Re-Mi" (composed by R. Rodgers), and "Country Road" (composed by B. Danoff, et al.). The subsequent "do tii do re do" part can be seen in "時計(Tokei)" (composed by R. Cantoral), etc. [ii] Phrase [B] "do do faaa fa fa fa so la sooooo" is similar to "do fa fa fa so la soooo" of "Mozart's Cradlesong." [iii] The former part of Phrase [C] "so so laaa so faa solasooo mi doo" is similar to "laaa so fa la soo" of "Stenka Razin" (Russian folk song) and "laa la so faa so la" of "アンジェリータ(Anjerīta)" (composed by Minerbi Marcello), etc. A melody "soo mi re doo," which is similar to the latter part of Phrase [C], can be found in "Blowin' in the Wind" (composed by Bob Dylan), "Bridge over Troubled Water" (composed by P. Simon), etc. (Objects of Observation Otsu 1, 2, 5, 11, etc.) Based on the aforementioned parts and fragments of the overall melodies, it might be possible to find that Musical Composition Ko consists of common sound patterns.

However, such identical or similar melodies as mentioned above could last one phrase at the longest (four bars in two-two time or two bars in four-four time). If Musical Composition Ko, which has four phrases in one chorus, is examined as a whole, the overall melodies cannot be considered to have been commonly used. If a part of the melodies that extends only one phrase or so is at issue in this dispute over the identicalness or similarity between the melodies of Musical Composition Ko and the melodies of Musical Composition Otsu, it could be concluded that identicalness and similarity can be observed only in common sound patterns that cannot be considered to exhibit creative expressions, and that such identicalness and similarity would not

provide grounds for identicalness in the fundamental characteristics of expressions. However, the appellants alleged that the issue in this case lies in the overall similarity between the melodies of Musical Composition Ko and the melodies of Musical Composition Otsu. If the overall melodies consisting of four phrases are examined, it is clear that they contain creative expressions unique to Musical Composition Ko.

According to K's opinion statement (Exhibit Otsu 25), K pointed out that the melodies of all of the phrases of Musical Composition Ko can be found in "Jesu, Joy Of Man's Desiring" Cantata No.147 of Bach. However, since the melodies used in said musical composition consist merely of an inconsistent combination of different parts of the phrases, which looks like a patchwork, even based on Objects of Observation Otsu 17 and 18, it has to be said that it is impossible to directly perceive all of the melodies of Musical Composition Ko from the aforementioned Bach's musical composition (M's opinion statement [Exhibit Ko 120] states the same). Even if all of the evidence submitted to this case including the aforementioned musical compositions is examined, there is no example of musical composition in which all of the melodies of Musical Composition Ko can be found. Thus, it cannot be said that the melodies of Musical Composition Ko consist of a series of common sound patterns and lack creativeness as expressions.

Furthermore, the appellee alleged that, if you want to make a common sound pattern sound comfortable to listeners by using a certain style of music, the options for the sound pattern that comes after that would inevitably be limited. However, as described above, despite the appellee's research, each of the examples of musical compositions that can be found to be similar to Musical Composition Ko in terms of melodies has the length of about one phrase at the longest. Thus, it is reasonable to interpret that relatively short musical compositions, like Musical Composition Ko, that are partially or fragmentally identical or similar to common sound patterns could show diversity to a certain extent in terms of melody structure. Therefore, the aforementioned allegation of the appellee is unacceptable.

D. The findings described above are in line with M's witness statement and M's opinion statement (Exhibits Ko 30, 68). More specifically, M's witness statement and M's opinion statement state that Phrase [A] to Phrase [D] of Musical Composition Ko correspond to "introduction, development, turn, and conclusion" respectively and accurately point out that, in comparison with Musical Composition Otsu, the important point about Musical Composition Ko lies not in the similarity in the melody that extends for two bars or so but in the identicalness in the melody structure as a whole that flows in the order of "introduction, development, turn, and conclusion."

Therefore, in the course of examining identicalness in the fundamental characteristics of the expressions presented in Musical Composition Ko and Musical Composition Otsu, we should first take into consideration the most important fundamental characteristics of the expressions presented in Musical Composition Ko, in other words, the simple, easy-to-listen melodies. Furthermore, examining the melodies, we should not partially or fragmentally examine each sound pattern that is as short as one phrase. Rather, we should focus on the structure, i.e., the structure of "introduction, development, turn, and conclusion" consisting of Phrase [A] to Phrase [D].

## (2) Significance of elements other than the melodies in this case

Generally, as described above, regarding ordinary musical compositions with melodies, it can be found that, among the criteria for finding a musical composition as a musical arrangement, melodies are the most important element, and if the specifics of Musical Composition Ko are examined from the perspective of the fundamental characteristics of Musical Composition Ko as a musical composition, it can be found that the fundamental characteristics of the expressions presented therein lie mostly in the overall melody structure. Since Musical Composition Ko is a musical composition consisting of various elements including harmonies, a final determination should be made based on all of those elements.

In this case, the appellants presented an allegation and proof with a focus on the melodies as specific evidence to prove the identicalness between Musical Composition Ko and Musical Composition Otsu in terms of the fundamental characteristics of expressions. On the other hand, the appellee denied such identicalness by disputing the alleged identicalness based on the melodies themselves and presented an allegation and proof with a focus on other elements such as harmonies, rhythms, tempos, and styles. In the following section 1-3, we are going to first examine the melodies as an independent element as alleged by the appellants, and then examine other elements such as harmonies as alleged by the appellee in the following sections 1-4 and 1-5 as the grounds for denying identicalness.

### 1-3 Melody comparison

#### (1) Correspondence relationship between the two musical compositions

As described above, the melodies of Musical Composition Ko have the "introduction, development, turn, and conclusion" structure consisting of Phrase [A] to Phrase [D]. The appellants alleged that, on the premise that Musical Composition Otsu consists of the repetition of the former part consisting of Phrase [a] to Phrase [d] and the latter part consisting of Phrase [e] to Phrase [h], a comparative study should be made between Phrase [A] of Musical Composition Ko and Phrases [a] and [e] of Musical

Composition Otsu as the first phrase, between Phrase [B] of Musical Composition Ko and Phrases [b] and [f] of Musical Composition Otsu as the second phrase, between Phrase [C] of Musical Composition Ko and Phrases [c] and [g] of Musical Composition Otsu as the third phrase, and between Phrase [D] of Musical Composition Ko and Phrases [d] and [h] of Musical Composition Otsu as the fourth phrase. It can be interpreted that the aforementioned statements of opinion, etc. examined identicalness on the premise that such correspondence relationship exists.

For the convenience of conducting an examination on the premise that such correspondence relationship exists as described above, Attachment 3 presents comparative musical scores showing the scores of both musical compositions by transposing them to C major and showing two bars of the two-two time Musical Composition Ko in such way that they correspond to one bar of the four-four time Musical Composition Otsu. (This was cited from page 11 of I's opinion statement [Exhibit Otsu 5], while adding the aforementioned names of phrases and coloring the parts that are identical in terms of pitch in orange and the parts that are not identical in terms of pitch in green.) Attachment 4 ("Comparison of Melody") states the note names of the melodies of each musical composition for each of the corresponding phrases mentioned above. (The number of notes described as "seventh note in Phrase [A]" or "five notes in do re miii" means not the number of musical notes but the number of beats as shown by the numbers specified in Attachment 4 in order to make it easier to understand the correspondence relationship. Therefore, one bar contains eight notes if the meter is converted to four-four time.)

## (2) Quantitative analysis

Based on Attachment 4, a quantitative examination of the rate of identicalness in terms of the pitch of corresponding sounds between Musical Composition Ko and Musical Composition Otsu shows that 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, 6 out of 16 notes in Phrase [d] of the fourth phrase and 12 out of 16 notes in Phrase [h] of the fourth phrase can be considered to be identical. Thus, it can be interpreted that 92 out of a total of 128 notes in Musical Composition Otsu (about 72%) use the same pitch as the corresponding notes in the melodies of Musical Composition Ko.

The appellee's written statement (Exhibit Otsu 6) lists some musical compositions that have identical or extremely similar melodies, but give a different impression due to the difference in tempos, etc., such as "Cumana" (composed by Alex Rodriguez), "いゝじゃないの幸せならば(Iijanaino shiawasenaraba)" (composed by Taku Izumi), "上を向いて歩こう(Ueo muite arukou)" (Hachidai Nakamura), "Emperor" (composed by

Beethoven), "夏の思い出(Natsu no omoide)" (composed by Yoshinao Nakata), and "Ode to Joy" (composed by Beethoven). According to O's opinion statements (Exhibits Ko 9, 19-1), P's opinion statement (Exhibit Ko 122), and Object of Observation Ko 30, based on a comparison with the melodies of the aforementioned musical compositions, it can be found that the rate of identicalness is much lower than the identicalness found between Musical Composition Ko and Musical Composition Otsu in terms of melody pitch (the rate of identicalness between Musical Composition Ko and Musical Composition Otsu is about 72%, whereas the highest rate of identicalness is about 40% found between "Cumana" and "いいじゃないの幸せならば (Iijanaino shiawasenaraba)") and that the rate of identicalness between "Careless Love" (traditional song in the U.S.) and its musical arrangement released to the public, namely, the aforementioned "ミルク色だよ(Miruku iro dayo)" is about 72%, which is the same as the rate between Musical Composition Ko and Musical Composition Otsu.

Needless to say, the identicalness in the fundamental characteristics of the expressions presented in musical compositions cannot be measured solely by such abstract figures. However, the level of identicalness between Musical Composition Ko and Musical Composition Otsu in terms of the melody pitch as shown by the figure calculated by using a formal, technical method of comparison as mentioned above is extremely high in comparison with the level of identicalness between any of many melodies presented as examples of high level of similarity in the allegations and proof submitted to this case. The level of identicalness between Musical Composition Ko and Musical Composition Otsu is as high as the one observed in the comparison cited above between the original song and its musical arrangement. This can be interpreted to be one of the factors that should not be overlooked.

### (3) Similarity in the structure of "introduction, development, turn, and conclusion"

Next, we will examine the similarity between Musical Composition Ko and Musical Composition Otsu in terms of the structure of "introduction, development, turn, and conclusion," which is construed as an important element that characterizes the fundamental characteristics of the expressions presented in Musical Composition Ko.

A. Regarding the similarity between Musical Composition Ko and Musical Composition Otsu in terms of melodies, M's witness statement states that "'do do faa fa faa so la soo' (Note: Phrase [B]) corresponds to 'do do fa fa fa fa la la so fa soo' (Note: Phrase [b]). This could be considered to be coincidental. But, why does the 'so so laa so faa so la soo mi do' part (Note: Phrase [C]) have to go like 'so so laa la so faa so la so so mi re doo' (Note: Phrase [c])? This phrase really shows a connection-a similarity of melody connection. This way of connection really emphasizes the similarity. This was



so obvious that I was very surprised... This is not the matter of which part shows difference. I think the most important point is the flow of melodies, the manner of connection, the structure of 'introduction, development, turn, and conclusion.'" "Similarity could be observed in two bars or so between any musical compositions. So, that's O.K. But, the next part (Note: after Phrase [a]) does not have to go like 'do do fa' (Note: the beginning of Phrase [b]). It could be anything else such as 'mi fa so' or 'fa so la.' It could go anywhere freely. Why does it have to go 'do do fa'?" (pp. 4 to 5 of the aforementioned shorthand record). This statement points out that the two musical compositions are identical in terms of the melody structure of "introduction, development, turn, and conclusion" and that such identicalness is clearly seen in the manner of phrase connection.

B. The point mentioned above is further examined below in consideration of M's opinion statements (Exhibits Ko 30, 68, 72-1, 88, 102).

First, Musical Composition Otsu as a whole has a repetitive binary form having the former part consisting of Phrase [a] to Phrase [d] connected with the latter part consisting of Phrase [e] to Phrase [h]. It is clear that almost the same melody is repeatedly played in the former part as well as in the latter part except for the difference observed in the latter parts of Phrase [d] and Phrase [h]. Since almost the same melody is used for the former part of Phrase [a] and Phrase [d], and the entire part of Phrase [h], it can be concluded that the structure of Musical Composition Otsu can be formulated into a repetitive binary form, [a-b-c-a'] - [a-b-c-a] (M's opinion statement and O's opinion statement [Exhibit Ko 9] mentioned above, etc.).

If the former part and the latter part are compared with the melody structure of Musical Composition Ko respectively, as clearly shown in Attachments 3 and 4, it has to be noted as a distinctive characteristic that Musical Composition Ko and Musical Composition Otsu are identical in terms of the first three or more notes (five or more notes if only the pitch of each note is examined without taking subdivision into consideration) and the last note in every phrase except for the only exception mentioned below. Moreover, the two musical compositions start with weak notes and have strong beats in the third note and the 11th note in each phrase (the first note in each bar). Musical Composition Ko and Musical Composition Otsu are identical in terms of the sounds of such strong beats except for the 11th note in Phrase [d]. Since Musical Composition Ko is in two-two time, strong beats should usually exist in the seventh note and the 15th note in addition to the strong beats mentioned above. The difference between two-two time and four-four time can be interpreted to be as small as a difference in the variation of performance (O's opinion statement [Exhibit Ko 9], M's

opinion statement [Exhibit Ko 11], Q's opinion statement [Exhibit Ko 12], and R's opinion statement [Exhibit Otsu 4]). In fact, Musical Composition Ko is presented as a four-four time musical composition in some textbooks (Exhibits Ko 22-1, 22-2). In consideration of these facts, it is reasonable to interpret that the strong beats on the third note and the 11th note that exist in both musical compositions should be considered to be important.

As mentioned above, there is "the only exception" to the identicalness between the two musical compositions in terms of the notes at the beginning and the end of each phrase and the notes of strong beats that exist in both musical compositions. The "exception" lies in the difference between the note (do) after the 11th note at the end of Phrase [D] of Musical Composition Ko and the note (re) after the 11th note at the end of Phrase [d] of Musical Composition Otsu. An examination of this difference clearly shows the following. As mentioned above, the overall structure of Musical Composition Otsu can be considered to have a repetitive binary form that can be formulated as [a-b-c-a'] - [a-b-c-a]. It is clear that the end of Phrase [d] (the aforementioned a' part) played the function of connecting this former part to the latter part. If the role of Phrase [d] within the structure of Musical Composition Otsu is examined, it is reasonable to interpret that the melody in the latter part of Phrase [d] is different from the corresponding part of Phrase [h] due to the facts that the melody cannot completely stop at the end of the former part since Musical Composition Otsu has a repetitive binary form and that the melody needs to be connected to the latter part. This point is mentioned in the aforementioned M's opinion statement, O's opinion statement (Exhibit Ko 9), P's opinion statement (Exhibit Ko 10), etc. In the case of a one-part form original musical composition that is repeated twice, if it is modified to such an extent necessary to make it into a repetitive binary form with one chorus, such modification should be considered to be a common act that falls within the scope of musical arrangement or reproduction. Therefore, the aforementioned only exception, namely, the difference between Phrase [D] and Phrase [d] in terms of the last note, cannot be considered as the grounds for denying the identicalness in the fundamental characteristics of the two musical compositions.

C. As described above, the fact that the two musical compositions are identical in terms of the first three or more notes and the last note in every phrase not only means that the two musical compositions are identical in terms of fragmental and partial sound patterns but also proves that the similarity should not be overlooked in terms of the structure adopted by those musical compositions to connect one phrase to the next phrase. In other words, the melodies of Musical Composition Ko and Musical Composition Otsu

are identical in terms of pitch. Quantitatively speaking, the rate of identicalness is about 72%. Additionally, the two musical compositions are basically identical in terms of the connecting parts of the structure of "introduction, development, turn, and conclusion" and the positions of strong beats in every phrase. Connecting parts and strong beats play important roles in determining the structure of the overall melodies of a musical composition. In light of these facts, since the two musical compositions are extremely similar, it is possible to go so far as to say that the structure of Musical Composition Otsu, [a-b-c-a] - [a-b-c-a], was made simply by repeating the structure of "introduction, development, turn, and conclusion" twice, namely, A-B-C-A consisting of Phrase [A] to Phrase [D] of Musical Composition Ko, and by changing it to a repetitive binary form. Various elements mentioned above should be considered to have provided strong evidence for the identicalness between the two musical compositions in terms of the fundamental characteristics of the expressions presented therein.

Regarding this point, J's opinion statement (Exhibit Otsu 24) contains a statement that the climax of Musical Composition Otsu exists in Phrase [f] and that Musical Composition Otsu is not a simple repetition of the former part and the latter part. Said statement was made in the context of the importance of harmonies. Thus, it is clear that said statement focuses mostly on harmonies and does not affect the aforementioned determination concerning the melodies.

#### (4) Differences between the two musical compositions in terms of melodies

Next, we are going to examine the differences between the two musical compositions in terms of melodies.

A. In the first phrase, Phrase [A] "miii do tii do re do" of Musical Composition Ko corresponds to Phrase [a] "miii mi ree re do do" and Phrase [e] "miii reee do do." The underlined parts are different. Regarding this point, the same can be said about Phrase [D], which has almost the same melody as Phrase [A] and also about Phrase [h], which has almost the same melody as Phrase [a] and Phrase [e].

Regarding these differences, I and I's witness statement and I's opinion statement (Exhibit Otsu 5) point out as follows: The seventh note "ti" of Phrase [A] is a "leading note," in other words, a note half step down from the tonic (the same as root note or fundamental note); Since a "leading note" is expected to be immediately followed by the tonic, if a leading note is used in a melody, it would convey the sense of stability, but lack resonance and freedom; For this reason, whether a leading note is used or not is an extremely important issue in terms of the expressions presented in a musical composition and Musical Composition Otsu does not use any leading note. The same thing is mentioned in J's opinion statement (Exhibit Otsu 24), K's opinion statement

(Exhibit Otsu 25), N's opinion statement (Exhibit Otsu 27), etc. For example, N's opinion statement states that the leading note "ti" in Musical Composition Ko is strongly connected with the following "do," creating a forward moving momentum in the melody. N's opinion statement also states that such characteristics of Musical Composition Ko are completely different from Musical Composition Otsu, which has a retrospective atmosphere. J's opinion statement states that the use of a leading note would allow listeners to easily predict the development of the melody and that it is an extremely important composition technique to remove leading notes in order to enable the melody to develop more flexibly and freely. The appellants also admitted that the aforementioned "ti" is a leading note.

It is true that listeners who listen to the two musical compositions to make a comparison have an impression that Phrase [A] of Musical Composition Ko has a melody that is stable and easy to listen to and has a strong forward-moving momentum, while Phrase [a] of Musical Composition Otsu gives an impression described as "soft floating feeling" (the aforementioned I's opinion statement) and "feeling of soft landing" (the aforementioned J's opinion statement). Such difference in impression is mostly attributable to the existence or nonexistence of a leading note, which leads the melody line to the tonic. This part is interpreted to include the most important difference found in the comparison between the two musical compositions in terms of melodies.

Regarding this point, M's witness statement and M's opinion statement (Exhibit Ko 68) state that among the aforementioned difference between the two musical compositions, "do" of Musical Composition Ko and "mi" of Musical Composition Otsu differ but both are included in the same chord "do mi so." The following "ti do re" of Musical Composition Ko is considered to be similar to "re re do" of Musical Composition Otsu because these parts contain "ti" and "re" and can be considered to be decorative variations of the same chord and belong to the same chord or a chord similar thereto. For listeners who listen to Musical Composition Ko and Musical Composition Otsu sung simultaneously, the melodies of both musical compositions sound in harmony as chords (For example, Objects of Observation Ko 18, 19; As described below, the result will be different if the original harmonies are used). In this sense, M's witness statement and M's opinion statement should be considered to be reasonable to a certain extent. However, these statements cannot provide sufficient grounds to deny the difference in the impression that listeners would get if they actually listen to the aforementioned parts of the melodies.

Thus, Musical Composition Otsu can be considered to have excluded leading notes and come to exhibit creative expressions that do not exist in Musical Composition Ko.

On the other hand, for example, according to 2 of Exhibits Ko 124 and 125 respectively, some musical compositions that can be interpreted to fall within the scope of musical arrangements of Musical Composition Ko clearly do not include the leading note "ti." This can be interpreted to indicate that the leading note "ti" is not indispensable for Musical Composition Ko to maintain its fundamental characteristics of expressions. Thus, while the existence or nonexistence of the leading note "ti" is an important difference between the two musical compositions in terms of melodies, it does not necessarily immediately deny the identicalness in the fundamental characteristics of expressions. After all, whether an act of adding a new creative expression, i.e., the exclusion of leading notes, damages the identicalness in the fundamental characteristics of the expressions presented in the two musical compositions despite the aforementioned similarity in terms of melodies should be further examined within the framework of overall examination. An examination from this perspective will be described below.

B. Regarding the second phrase, Phrase [B] of Musical Composition Ko goes "do do faaa fa fa fa so la so " (mi chi waaa ki bi shi ku to mo), whereas Phrase [b] and Phrase [f] of Musical Composition Otsu go "do do fa fa fa fa la la so #fa so" (mi n na de u e ta ki ne n ju /tsu ra i to ki na ki ta i to ki). The two musical compositions differ from each other in terms of [i] subdivision of the third to fifth notes and [ii] pitch of the seventh to tenth note (See the underlined parts).

Regarding these parts that are considered to be different, especially, the difference in terms of the subdivision of the third to fifth notes mentioned in [i] above, it can be interpreted that an act of using the notes that are identical with a melody of the original musical composition in terms of pitch and modifying only the subdivision is a common method that falls within the scope of musical arrangement (M's opinion statement (Exhibit Ko 68)). Such act cannot be considered to be a modification that damages identicalness in the fundamental characteristics of the expressions presented in the original musical composition. Article 4 of the former Law No. 57-298 of March 11, 1957, on Literary and Artistic Property of France and Article 112-3 of the Law No. 92-597 of 1 July, 1992, on the Intellectual Property Code of France, which is established in line with said Article 4, stipulate that "The authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work" ("外国著作権法令集(18)ーフランス編ー(Gaikoku chosakuken houreishu (18) --- France ---)" published by Copyright Research & Information Center). In a lawsuit concerning the allegation that the musical composition "La Maritza" infringes the

copyright (the musical arrangement right) for "Autumn Leaves" composed by Joseph Kosma, the judgment of the Tribunal de grande instance de Paris of February 10, 1971 (Exhibits Ko 69-1, 69-2) recognized the occurrence of infringement (plagiarism) by adopting the expert opinion to the effect that the two musical compositions consist of four consecutive phrases, that the two musical compositions are completely identical in terms of the first four notes in each phrase, that the only difference can be found in whether the group of notes are sequentially fragmented or directly connected, and that the two musical compositions are similar in terms of the basic melodies and have similarities recognizable by ears with ordinary functions. If we listen to the two musical compositions by using Object of Observation Ko 23 and make a comparison between the two, study the scores of the two musical compositions (Exhibit Ko 70) and make a comparison between the two, and take into consideration M's witness statement and M's opinion statement (Exhibit Ko 68), the melodies of "La Maritza" are identical with the melodies of "Autumn Leaves" in terms of main notes and were created by fragmenting the subdivision of "Autumn Leaves" into small pieces and connecting them as a series of notes. In comparison with this dispute in France, the difference in subdivisions between the two musical compositions disputed in this case in Japan as described above can be considered to be very small.

Next, regarding the difference in pitch mentioned in [ii] above, I's witness statement and I's opinion statement (Exhibit Otsu 5) state that the aforementioned part of the melody of Musical Composition Ko starts with "do" and goes six intervals higher by using eight notes, emphasizing the direction of "going up," whereas the aforementioned part of the melody of Musical Composition Otsu starts with "do," goes up to "fa" and "la," and then creates a downward movement by using five notes, giving an impression of "gradually going down and shimmering" (almost the same thing is stated in J's opinion statement [Exhibit Otsu 24]). On the other hand, M's witness statement and M's opinion statement (Exhibit Ko 68) state that there is no fundamental difference between the aforementioned parts of the melodies because the difference falls within the decorative variation of the chord "fa la do" and can be included in the same harmony and that the only difference is whether the melody goes up or goes down. If we listen to the two musical compositions and make a comparison between the two, it is true that we cannot deny the existence of difference in impression as pointed out in I's witness statement and I's opinion statement due to the difference in the aforementioned parts of the melodies, more specifically, whether the melody goes up (Musical Composition Ko) or goes down (Musical Composition Otsu). However, the difference in the impressions we get from the two melodies is smaller than the difference in the impressions caused

by the existence or nonexistence of the leading note as mentioned in A above.

C. Regarding the third phrase, the melody after the ninth note of Phrase [C] of Musical Composition Ko goes "so la sooo mi doo" (fu ki naaa ga laa), whereas the corresponding part of Phrase [c] of Musical Composition Otsu goes "so la so so mi re doo" (to o i to ko ro dee). Also, the corresponding part of Phrase [g] of Musical Composition Otsu goes "so la soo mi re doo" (ha ppa ka ze nii). In this way, the two musical compositions are different in terms of the pitch of the underlined parts and the subdivision of the fifth note and 12th note (Phrase [c] only). Regarding the different parts mentioned above, I's witness statement and I's opinion statement (Exhibit Otsu 5) state that the aforementioned part of the melody of Musical Composition Otsu can be interpreted to be one of the four sections of the melody that gradually goes down four times in a row from Phrase [c] to Phrase [d] ([i] "so so laa la so faa," [ii] "so la so so mi re doo," [iii] "do re mii do laa," and [iv] "mii ree") to make listeners think about the past. J's opinion statement (Exhibit Otsu 24) states that the aforementioned part of the melody of Musical Composition Otsu and the melody before and after said part generate the atmosphere of reminiscence through a delicate flow of music created by making more subdivisions of the melody and inserting a passing note "re." M's opinion statement (Exhibit Ko 68) states that there is almost no difference in the aforementioned parts of the melodies. Except for two parts where the rhythm is faster and one part where a non-harmonic note "re" is inserted, there is no difference in the fundamental characteristics of sound.

Regarding the difference in the aforementioned parts of the melodies, as pointed out in the aforementioned opinion statements, the melody of Musical Composition Otsu can be interpreted to have been created by further subdividing some parts of the melody and inserting a passing note "re" between "mi" and "do" that are included in the downward flow "soo mii do." In other parts, the two musical compositions are completely identical throughout the phrase. From the perspective of connection with the preceding and following phrases, it can be said that the last note "soooooo" of the preceding phrase and the first three notes (do re mi) of the following phrase are completely identical. It is a common technique to create more subdivisions and connect them by a passing note as mentioned in connection with the example of "La Maritza" and "Autumn Leaves." In consideration of this point, the characteristics of the aforementioned melody parts in which Musical Composition Otsu is different from Musical Composition Ko are not so distinctive, both quantitatively and qualitatively. Thus, the use of such technique cannot be considered to be an act of adding noticeable creative expressions that do not exist in Musical Composition Ko. Even if it is considered to be an act of adding new creative

expressions, it is reasonable to interpret that such expressions have little influence on Musical Composition Otsu as a whole.

D. Regarding the fourth phrase, Phrase [D] of Musical Composition Ko goes "tii do re dooooo" (yuu ko uuuuuuu), while Phrase [d] of Musical Composition Otsu goes "laa mii reeeee" (suu daa rooooo). As far as this phrase is concerned, none of the notes are identical in terms of pitch. Regarding this point, as mentioned in (3) B above, this difference can be simply attributable to the fact that Musical Composition Otsu has adopted a repetitive binary form. Thus, this difference cannot be considered to be significant as a factor that damages the identicalness in the fundamental characteristics. The results of a comparison between Phrase [D] of Musical Composition Ko and Phrase [h] of Musical Composition Otsu are as described in A above.

E. The results of the examination described above can be summarized as follows. The most important difference between the melodies of the two musical compositions is the difference described in A above, i.e., whether the leading note "ti" exists or not. The second important difference is the difference described in B above, i.e., whether the melody goes up or down. Regarding any other differences, it can be interpreted that those differences do not add any noticeable creative expressions that do not exist in Musical Composition Ko. Even if a new creative expression can be considered to have been added, it can be interpreted to have little influence on Musical Composition Otsu as a whole.

#### (5) Examination of the melodies as a whole

In consideration of the similarities and differences between the two musical compositions in terms of melody as examined above, we are going to narrow the focus and examine melodies as a whole.

A. First, as mentioned in (2) above, many notes used in Musical Composition Otsu are identical with those used in Musical Composition Ko (about 72%). This level of similarity is very rare between two independent musical compositions in terms of melodies except for such musical compositions that were released as musical arrangements. The two musical compositions are basically identical in all of the phrases in terms of the first three notes in each phrase, which is considered to play an important role in determining the melody structure of the musical composition as a whole, and the last note in each phrase and also in terms of the notes of strong beats, which are relatively emphasized and expected to play an important role. For these reasons, the two musical compositions are extremely similar in terms of the structure, i.e., the structure of "introduction, development, turn, and conclusion," of the musical compositions as a whole. In particular, from the perspective of the structure of "introduction, development,



turn, and conclusion," the two musical compositions are almost identical when it comes to the part starting from the third phrase, which corresponds to "turn" in the aforementioned structure, and ending with the sixth note of the fourth phrase, which corresponds to the former part of "conclusion." As far as the aforementioned part is concerned, the two musical compositions are almost identical in terms of 22 notes in the melodies except for a difference with regard to common arrangement techniques, such as whether a passing note "re" exists or not and a slightly different manner of subdivision. This part alone accounts for more than one third of the entire Musical Composition Ko (5.5 bars in a total of 16 bars). On the other hand, the differences between the two musical compositions in terms of melodies include whether the leading note "ti" exists or not ((4) A above) and whether the melody goes up or down ((4) B above). The issue of whether the leading note "ti" exists or not should not be taken lightly in particular because it is a new creative expression that exists only in Musical Composition Otsu. However, said issue should not be considered to overshadow, both quantitatively and qualitatively, the dominant impression that listeners would get from the aforementioned melody structure that can be observed in both musical compositions.

B. I's witness statement and I's opinion statement (Exhibit Otsu 19), J/J's opinion statement (Exhibit Otsu 24), and K's opinion statement (Exhibit Otsu 25) point out that a comparison between the two musical compositions should be made based on the impression that the listeners get when they listen to the original musical composition (the version released for the first time) with an open mind. Musical Composition Ko was released for the first time as a TV commercial song sung by C as presented in Object of Observation Ko 1. It has to be said that the originality of C as a performer was strongly expressed at that time. Musical Composition Otsu was released for the first time as the ending theme song sung by children for the Fuji TV's program titled "あっぱれさんま大先生(Appare sanma daisensei)." This performance is presumed to have been almost the same as the second musical composition presented in Object of Observation Ko 3-1. This special way of the singing, i.e., singing by children manipulates the impression that the listeners would get. Furthermore, musical arrangement was done by E in addition to the arrangement of strings by S. Moreover, when people listen to the two musical compositions as songs with lyrics, the difference in impression caused by lyrics themselves should not be disregarded.

In this case, one way to directly perceive the fundamental characteristics of the expressions presented in the two musical compositions is to listen to the samples submitted to this case. One of those submitted samples is Object of Observation Ko 12,

which are the melodies of each musical composition performed by a musical instrument (while harmonies are attached, accompanied by a piano, they seem to be basically the same as those used in Musical Composition Ko and Musical Composition Otsu respectively except for some insignificant passing chords). The others are Objects of Observation Ko 13, 18, and 19, which are versions of the respective musical compositions sung with the identical lyrics by the same singing method. When we listen to them, the melodies of Musical Composition Otsu are not so similar to the melodies of Musical Composition Ko to the extent that Musical Composition Otsu can be considered to be an exact copy of Musical Composition Ko. However, it is difficult to deny that listeners would get the impression that the two melodies are similar in most parts. In particular, regarding Objects of Observation 13, 18, 19, it cannot be denied that the manner of performance itself, i.e., singing the same lyrics, contributes to increasing the chances that listeners would get an impression that two melodies are similar. Even if this is taken into consideration, it is easy to directly perceive the fundamental characteristics of the expressions presented in the melodies of Musical Composition Ko from the melodies of Musical Composition Otsu.

The appellants submitted the evidence (Exhibits Ko 124 and 125 (from 1 to 12 respectively) and Objects of Observation Ko 2, 16, 21, 22, 28, 29) in order to prove that there are a great number of possible musical arrangements of Musical Composition that could be made in order to express creativity. If further examination is conducted from this perspective, for example, Object of Observation Ko 16 contains recordings of four types of musical arrangements of Musical Composition Ko created by Appellant X, namely, "jazz," "waltz," "slow," and "lively." As clearly shown on the scores of those recordings (Scores (5) to (8) attached to Brief (3) of the appellant dated October 25, 2000), although the modifications made to the melodies of the aforementioned four types of musical arrangements are so significant that the difference between Musical Composition Ko (original musical composition) and Musical Composition Otsu is overshadowed, it is easy to directly perceive the fundamental characteristics of the expressions presented in Musical Composition Ko (original musical composition) from those four musical arrangements after the modifications. The same can be said about any musical compositions included in the aforementioned evidence other than Object of Observation Ko 16. It can be interpreted that there is still a lot of room to express creativeness in musical arrangements made based on Musical Composition Ko as the original musical composition despite the modifications to its melodies.

C. Based on a comprehensive evaluation of the facts found above, it is reasonable to interpret that the two musical compositions are identical in terms of the fundamental

characteristics of the expressions presented therein.

#### 1-4 Harmonies

(1) The harmonies used in Musical Composition Ko and Musical Composition Otsu are as stated in Attachments 1 and 2 (Scores 1 and 2). Musical compositions could be performed by using different harmonies in some cases. However, the following examination was conducted based on the aforementioned scores because these scores are undisputed by the parties concerned and are identified by them as the two musical compositions at issue.

(2) Based on a comprehensive evaluation based on the aforementioned scores and I's witness statement and I's opinion statement (Exhibit Otsu 5), J's opinion statement (Exhibit Otsu 24), and K's opinion statement (Exhibit Otsu 25), the harmonies of Musical Composition Ko go "E-B7-E-A-E-A-E- B7-E." This is a so-called three chord musical composition using a basic triad. This type of harmonic progression is commonly seen in simple, straightforward musical compositions. On the other hand, the harmonies of Musical Composition Otsu go "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." In this way, the progression is very complex. The frequent use of delicate passing chords and slash chord characterizes the harmonies. In order to make a part of "Tsuraitoki nakitaitoki" (Phrase [f]) sound emotional, the harmony goes "D-Dmaj7-D7." In this way, this makes a half step-lower counter melody. Although the harmonies of Musical Composition Otsu are in a major key, many harmonies such as Bm, G#m7b5, Gm/Bb, Gm6/D are used in some places in order to express sadness. In these respects, the harmonies of Musical Composition Otsu can be considered to be creative. As pointed out in the aforementioned opinion statements, such difference in the harmonies has certain influence on the tones of Musical Composition Ko and Musical Composition Otsu respectively (the details are roughly described in the appellee's allegation (No. 3, 1, 1-2, (3) above). This is one of the reasons for the difference in tone, more specifically, Musical Composition Ko gives a happy, positive impression, whereas Musical Composition Ko gives a sentimental impression.

(3) Since Musical Composition Otsu has a new harmonic expression as described above, the following section conducted a further examination from the perspective of whether such new expression overshadows the commonalities in the fundamental characteristics of the expressions presented in the two musical compositions in terms of melodies and damages the identicalness between the two. As described above, the fundamental characteristics of the expression of Musical Composition Ko as a musical composition

lie mainly in the simple, easy-to-listen melodies. On the other hand, Musical Composition Otsu is the same as Musical Composition Ko in terms of basic characteristics as a musical composition to be sung by ordinary people. It is undeniable that people who listen to Musical Composition Otsu tend to think that the melodies for singing are the most important, while the accompanying harmonies are secondary. In view of these facts, it can be said that, while the difference in harmonies causes the aforementioned difference between the two musical compositions in terms of tone, such difference cannot be considered to be crucial. Such difference cannot be considered to overshadow the commonalities in the fundamental characteristics of the expressions presented in the musical compositions in terms of melodies and to damage their identicalness.

The written statement of the appellee (this instance) contains a statement that, when he composes a musical composition, he three-dimensionally visualizes the entire combination of all of the elements including melodies, harmonies, and rhythms. Even if he composes a musical composition that way, it would not affect the aforementioned findings because the issue is whether the final result of such creation, Musical Composition Otsu, is identical with Musical Composition Ko in terms of the fundamental characteristics of the expressions presented in the two musical compositions.

Furthermore, I's witness statement and I's opinion statement (Exhibit Otsu 5), J's opinion statement (Exhibit Otsu 24), K's opinion statement (Exhibit Otsu 25), etc. point out that, if the melodies of Musical Composition Otsu are combined with the harmonies of Musical Composition Ko, the aforementioned leading note "ti" creates a discord. This is the fact that can be supported by Object of Observation Otsu 16 (Track Number 17). The issue of whether the modified melodies can be combined with the harmonies of the original musical composition and performed without creating any discord does not have any direct relationship with the issue of whether the two musical compositions maintain identicalness in terms of the fundamental characteristics of expressions and therefore does not affect the aforementioned determination.

#### 1-5 Other elements

(1) Regarding rhythm, according to the scores presented in Attachments 1 and 2, it is clear that Musical Composition Ko is in two-two time, while Musical Composition Otsu is in four-four time. As mentioned above, an act of modifying the two-two time original musical composition to a four-four time composition creates a difference merely falling within the scope of performance variation. Regarding tempo, no designation is made in each of the scores presented in Attachments 1 and 2, based on which Musical

Composition Ko and Musical Composition Otsu are expected to be performed. Thus, any determination cannot be made based on these scores. The tempo varies to some extent depending on actual performance. For example, Musical Composition Ko could be performed at the tempo of 116 half notes per minute, while Musical Composition Otsu could be performed at the tempo of 96 quarter notes per minute (I's opinion statement, Exhibit Otsu 5). Also, Musical Composition Ko could be performed at the tempo of 112 half notes per minute, while Musical Composition Otsu could be performed at the tempo of 100 quarter notes per minute (P's opinion statement, Exhibit Ko 24-5). On the other hand, some textbooks, etc. containing the score of Musical Composition Ko indicate tempos of 104 to 112 half notes per minute (Exhibits Ko 78, 79), 96 half notes per minute (Exhibits Ko 74, 75), or 88 to 96 half notes per minute (Exhibits Ko 76, 77). Thus, the difference in tempos should be basically considered to be a difference within the scope of performance variation and cannot be considered to be significant enough to damage identicalness in the fundamental characteristics of the expressions presented in the original musical composition.

(2) Regarding styles, as described above, Musical Composition Ko has the structure of "introduction, development, turn, and conclusion," more specifically, "A-B-C-A" consisting of four phrases as one chorus. On the other hand, Musical Composition Otsu has a repetitive binary form, specifically, [a-b-c-a'] - [a-b-c-a]. The two musical compositions are extremely similar due to the commonalities in the structure of "introduction, development, turn, and conclusion" consisting of four phrases. An act of repeating this structure and making a repetitive binary form should be considered to be a common modification that falls within the scope of musical arrangement or reproduction. We cannot find any elements that would damage identicalness in the fundamental characteristics of the expressions presented in two musical compositions.

#### 1-6 Summary of Issue 1

As described above, while Musical Composition Otsu has some new creative expressions that do not exist in Musical Composition Ko, the two musical compositions can be considered to be identical in substance in terms of melodies. Moreover, the two musical compositions are extremely similar in terms of the structures of the compositions of the melodies as a whole. Even if the differences in melodies and other elements such as harmonies are taken into consideration in a comprehensive manner, Musical Composition Otsu maintains identicalness in the fundamental characteristics of the expressions presented in Musical Composition Ko. It should be concluded that any person who listens to Musical Composition Otsu can directly perceive the fundamental characteristics of the expressions presented in Musical Composition Ko.

## 2. Issue 2 (Whether Musical Composition Otsu was created based on Musical Composition Ko)

(1) In the examination of the appellee and the appellee's statements (Exhibits Otsu 6, 23), regarding the process of creating Musical Composition Otsu, the access to Musical Composition Ko, and other matters, the appellee mentioned or stated as follows in summary. [i] From H of PONY CANYON and a lyricist, D, the appellee received a request for composition of an ending theme song for a Fuji TV program titled "あっぱれさんま大先生(Appare sanma daisensei)" in around May 1992. [ii] The appellee was requested to compose a musical composition similar to a modern version of the song "上げば尊し(Aogeba toutoshi)" that can be repeatedly sung at graduation ceremonies, etc. The lyrics for the song were already created by D. [iii] The appellee accepted the request and created two musical compositions (Exhibits Otsu 18-1, 18-2). One of them, namely, Musical Composition Otsu (Exhibit 18-1), was adopted. [iv] When the appellee created the musical composition, he decided not to widen the range so much and to use phrases and chords suitable for a slow-tempo, eight beat rhythm, because the musical composition was going to be used for a song to be sung by children. Basically, the appellee visualized the scenery expressed in the lyrics and naturally created Musical Composition Otsu without referring to Musical Composition Ko. [v] About five years later, in around April 1998, the appellee received a content-certified mail from Appellant X to the effect that Musical Composition Otsu infringes the copyright for Musical Composition Ko. The appellee checked the library containing records of the musical arrangements created by the appellee and found that the appellee had not created any musical arrangement of Musical Composition Ko. [vi] At that time, the appellee was unable to remember Musical Composition Ko from the title. The appellee obtained a tape and a score of Musical Composition Ko via an attorney, but was not sure if he had heard it before. He felt relieved because Musical Composition Ko sounds like a common American country song and is not similar to Musical Composition Otsu. [vii] Although Singer F was a close friend of the appellee from around 1959 to 1964, their relationships were nothing to do with Musical Composition Ko. When the appellee composed a company song for Bridgestone, he did not refer to Musical Composition Ko. [viii] Since the appellee has been composing and arranging more than 70,000 musical compositions over the past 40 years, he has no time to watch TV commercials and even if he hears a commercial song, he has a habit of eliminating it from his memory because he is busy creating many musical compositions, [ix] For the appellee, creating a simple musical composition like Musical Composition Otsu is very easy. There was no need to imitate another person's musical composition. The points mentioned in [i] to [iii] above

about how the appellee composed Musical Composition Otsu are in line with H's written statement (Exhibits Otsu 7, 20), D's written statement (Exhibits Otsu 8, 21), E's written statement (Exhibit Otsu 9), and G's written statement (Exhibit Otsu 22).

(2) As described above, the appellee thoroughly disputed the allegation that Musical Composition Otsu was created based on Musical Composition Ko. In the following section, we will examine whether there is any evidentiary fact that is sufficient to prove such allegation.

A. First, we will examine how widely Musical Composition Ko was known among the public. Musical Composition Ko was originally released as a song sung by C in a TV commercial for Bridgestone in 1966. Since then, this song has been attracting public attention. It was stated that "this folk music-type commercial song became widely known among young people. Its lyrics that cheer up listeners strike a chord with middle-age people as well. This song is still sung widely" ("ブリジストンタイヤ五十年史(Burijisuton taiya 50 nen shi)" (Fifty years history of Bridgestone) [Exhibit Ko 29-1] published by Bridgestone on March 1, 1982). In 1967, Musical Composition Ko was released as a song sung by Singer F in the form of a single record sold by King Records (Exhibit Ko 21). When a popular singer, T, sang a musical arrangement of Musical Composition Ko as a commercial song of Bridgestone in 2002, multiple sports newspapers published articles under the headline "T sings that great song," etc. to explain that Musical Composition Ko was a big hit and attracted public attention throughout Japan in 1966 (Exhibit Ko 121). After the release of Musical Composition Ko, the score thereof was published in "CM ソング傑作集(CM songu kessakushū)" (Great commercial songs) (Exhibit Ko 5) published by Doremi Music Publishing Co., Ltd. on May 10, 1972 and many other commercial songbooks and other songbooks with the indication of the real name of Appellant X as the name of the author (Exhibits Ko 6, 59, 82). Moreover, Musical Composition Ko has been continuously published in multiple textbooks published by large textbook publishers such as "改訂新版 中学生の音楽 2(Kaitei shinban Chūgakusei no ongaku 2)" (Music for junior high school students 2, new and revised edition) (Exhibit Ko 80) published by ONGAKU NO TOMO SHA CORP. on January 20, 1975, "中学生の音楽 2(Chūgakusei no ongaku 2)" (Music for junior high school students 2) (Exhibit Ko 74) published by KYOIKU-GEIJUTSU SHA CO., LTD. on December 10, 1975, "精選 中学生の音楽 2 (Seisen Chūgakusei no ongaku 2)" (Selected Music for junior high school students 2) (Exhibit Ko 81) published by ONGAKU NO TOMO SHA CORP. on January 20, 1978, "小学生の音楽 6(Shogakusei no ongaku 6)" (Music for primary school students 6) (Exhibit Ko 76) published by KYOIKU-GEIJUTSU SHA CO., LTD. on December 10,

1979, "新編 新しい音楽 4(Shinpen Atarashii ongaku 4)" (New music 4, new edition) (Exhibits Ko 21-1, 79) published by TOKYO SHOSEKI CO., LTD. on February 10, 1986, and "新訂 新しい音楽 4(Shintei Atarashii ongaku 4)" (New music 4, new and revised edition) (Exhibit Ko 78) published by TOKYO SHOSEKI CO., LTD. on February 10, 1989. The tutorial manuals of these textbooks for teachers (Exhibits Ko 75, 77) state that "since it is well-known..." and "a musical composition that became widely known as a commercial song." Furthermore, the "Teaching Objective" for Musical Composition Ko states: "Teaching students a new way of using music and its effect." The corresponding "Teaching Instructions" states: "to make students realize the development of a new field of music as a result of mass media and think about the connections between everyday life and music in recent years and its effect." According to these statements, teachers are expected to teach students that a new music genre, namely, commercial songs, has come to play an important role in everyday life in modern days and to use Musical Composition Ko as a good example. Furthermore, according to Exhibits Ko 3, 4, 125-1, Scores 4 to 12, and Object of Observation Ko 21, Bridgestone had been using various variations of Musical Composition Ko as its commercial song at least until 1980.

If a comprehensive examination is made in consideration of the facts found above, the written statement (Exhibit Ko 114) of U, who is the representative of Appellant Kanai Ongaku Shuppan, and the entire import of the oral argument, it can be found that Musical Composition Ko became a big hit among a wide range of people in Japan when it was released as a commercial song in 1966. Since then, Musical Composition Ko has long been known as a popular song or a school song and can be found to be a song well-known among most of the people who lived in Japan during the period from around 1965 up to the time when Musical Composition Otsu was composed (2002). According to the appellee's response given to a TV reporter in an interview that the appellee received immediately after the filing of this lawsuit (Exhibit Ko 85, Object of Observation Ko 24), the appellee himself did not seem to have a different view on Musical Composition Ko.

B. In addition to the facts found above, the appellee admitted in the examination of the appellee in this instance that, prior to the release of Musical Composition Ko, the appellee accompanied Singer F upon his/her visits to the former Soviet Union twice in 1960 and 1962, and had close relationships with F and his music group. According to the evidence (Exhibits Ko 57, 62, 65 to 67, 83, "King Records' Entire List by Numerical Order [Japanese pops] '66" attached to Exhibit Ko 91), it can be found that, a while before and after the release of Musical Composition Ko, the appellee composed many



musical compositions and musical arrangements for songs to be sung by F. This is one of the reasons why the appellee can be presumed to have heard Musical Composition Ko, which was one of the songs sung by F and released as a single record. Furthermore, the appellee admitted (in this instance) that the appellee composed a company song for Bridgestone in around 1984. Musical Composition Ko is considered to be a famous commercial song of Bridgestone and is regarded as Bridgestone's company song (Exhibit Ko 60) and that "ブリジストンタイヤ五十年史(Burijisuton taiya 50 nen shi)" (50 year history of Bridgestone) (Exhibit Ko 29-1) published by Bridgestone in March 1982, which was immediately before the appellee's composition of the aforementioned company song, carries the entire score of Musical Composition Ko and a feature article explaining that Musical Composition Ko is a famous popular song in Japan, which was even published in a music textbook for junior high schools as described above, and that Appellant X composed lyrics and music for the song. Additionally, "ブリジストンタイヤ五十年史資料(Burijisuton taiya 50 nen shi shiryō)" (Data for the 50 year history of Bridgestone) (Exhibit Ko 29-2) states that "Broadcasting of the commercial song 'どこまでも行こう (Dokomademo yukou)' commenced in December" as internal news in 1966. Given these, the aforementioned facts could be considered to be one of the reasons for presuming that the appellee had heard Musical Composition Ko.

C. Above all, as described above, Musical Composition Ko and Musical Composition Otsu are extremely similar in terms of melodies. More specifically, the two musical compositions use the same pitch for 92 notes out of a total of 128 notes (about 72%). This rate of similarity is so high that it cannot be found between any other musical compositions. Moreover, to the extent of 22 notes, which account for more than one third of the entire musical compositions, some parts of the two musical compositions have almost identical melodies. While Musical Composition Otsu adopted a repetitive binary form, the basic melody composition observed in the former part and the latter part is extremely similar to the structure of "introduction, development, turn, and conclusion" of Musical Composition Ko. Furthermore, even the relatively short musical composition Musical Composition Ko can be interpreted to still have some room to exhibit creativeness in the melody structure in various manners to some extent as described above. It has to be said that it would be unnatural and unreasonable to consider that such high level of similarity as mentioned above occurred by chance. Thus, the similarity between the two musical compositions in terms of melodies must be presumed to strongly indicate that Musical Composition Otsu was created based on Musical Composition Ko.

(3) Next, we will examine the appellee's allegation concerning the grounds to deny the suspicion that Musical Composition Otsu was created based on Musical Composition Ko.

A. The appellee alleged that, since Musical Composition Otsu is a musical composition for which lyrics were created in advance, Musical Composition Ko would not be associated with the lyrics of Musical Composition Otsu and therefore that the suspicion that Musical Composition Otsu was created based on Musical Composition Ko should be denied. It is true that, in the case of Musical Composition Otsu, lyrics were already created as stated in the examination of the appellee (this instance) mentioned in (1) above and the written statements mentioned therein. However, it is not necessarily inevitable to limit the thinking process and only consider the association with the lyrics of Musical Composition Otsu when making a determination as to whether Musical Composition Otsu was created based on Musical Composition Ko. In light of the fact that a musical arrangement could be created from the original musical composition that has a completely different tone (for example, the original melodies of classical music with a sensitive, calm tone could be arranged into modern popular music that has a passionate tone), the fact that lyrics were already created for Musical Composition Otsu does not provide sufficient grounds to deny the suspicion that Musical Composition Otsu was created based on Musical Composition Ko.

B. Also, the appellee alleged that, since Musical Composition Ko is composed based on common sound patterns, the similarity between the melodies of the two musical compositions does not provide sufficient grounds to presume that Musical Composition Otsu was created based on Musical Composition Ko. However, as described above, the high level of similarity between the melodies between the two musical compositions cannot be explained as the accumulation of the identicalness between common sound patterns as seen in some parts of the melodies whose length is about one phrase at most.

C. The appellee alleged that he is a composer with a rich experience and long career and would be able to create a simple musical composition consisting of 16 bars easily and that he had no need to refer to Musical Composition Ko, which has a completely different tone. The written statements (Exhibits Otsu 6, 23) and the result of the examination of the appellee in this instance also contain statements to that effect. I's witness statement points out that there is no need or motive for the appellee to commit such an unrewarding act of composing Musical Composition Otsu based on Musical Composition Ko. According to the evidence (I's witness statement, Exhibits Ko 27, 39, Otsu 6, 23), it can be found that the appellee held prominent positions such as the president of the Japan Composers & Arrangers Association, the president of the

Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), the chairperson of the Japan Record Awards Committee, and an affiliate professor of the Tokyo College of Music and was respected as a composer and arranger with a rich experience and long career. However, especially in a case where a person created a musical composition that can be regarded as an exact copy of the original musical composition and released it as his/her own work, it could be possible that the appellee, who believed that he had added creative expressions and composed Musical Composition Otsu as an independent musical composition that is not identical with Musical Composition Ko in terms of the fundamental characteristics of expressions while referring to Musical Composition Ko, has ended up failing to add creative expressions that are sufficient to negate the identicalness in the fundamental characteristics of the expressions presented in Musical Composition Ko and causing infringement of the musical arrangement right for Musical Composition Ko from a legal perspective. This kind of incident could happen despite the aforementioned career of the appellee and cannot be denied based on a general empirical rule. Therefore, the aforementioned allegation of the appellee and the related evidence do not provide sufficient grounds to deny the suspicion that Musical Composition Otsu was created based on Musical Composition Ko.

D. The appellee alleged that there is no objective evidence submitted to this case in order to prove that Musical Composition Ko was widely distributed despite the fact that it had been a quarter-century since the submission of a work report for Musical Composition Ko up to the time when he composed Musical Composition Otsu. However, as described above, Musical Composition Ko established its status as a popular song or a school song after being sung over a long time since its release in 1966. Musical Composition Ko can be found to be a song well-known among most of the people who lived in Japan during the period from around 1965 up to the time when Musical Composition Otsu was composed (2002). The appellee is almost in the same generation as Appellant X and is a composer and arranger with a rich experience and long career in the music industry in Japan. Thus, the mere fact that a quarter-century has passed does not provide sufficient grounds to deny the suspicion that Musical Composition Otsu was created based on Musical Composition Ko. It should be noted that this case is completely different from the case (Judgment of the First Petty Bench of the Supreme Court of September 7, 1978, Minshu vol. 32, no. 6, p. 1145) where the court denied the allegation that a musical composition created in Japan was composed based on the original musical composition that was released in the U.S. about 30 years earlier, which did not become a hit in Japan.

(4) Based on a comprehensive evaluation of the facts found above, in light of the facts that Musical Composition Ko is a musical composition well-known among most of the people who lived in Japan during the period from around 1965 up to the time when Musical Composition Otsu was composed (2002), that the aforementioned high level of similarity between the Musical Composition Ko and Musical Composition Otsu cannot be reasonably explained unless we adopt the presumption that Musical Composition Otsu was created based on Musical Composition Ko, that there are objective facts that suggest that the possibility that the appellee had heard Musical Composition Ko before he composed Musical Composition Otsu is extremely high, that all of the appellee's allegations that deny such possibility are groundless, and that there is no other evidence to prove otherwise, it is reasonable to presume that Musical Composition Otsu was created based on Musical Composition Ko. Any part of the result of examination of the appellee in this instance and the written statements (Exhibits Otsu 6, 23) that goes against this determination is unacceptable.

3. Court proceedings as to whether an act of infringement was committed or not with regard to the claim in the principal action

Musical Composition Otsu was created based on an existing musical composition, i.e., Musical Composition Ko. In the process of creation, specific expressions were corrected, increased or decreased, or changed in various ways in order to express new thoughts or sentiments in a creative manner. Any person who listens to Musical Composition Otsu should be considered to be able to directly perceive the fundamental characteristics of the expressions presented in Musical Composition Ko. Thus, the appellee's act of composing Musical Composition Otsu should be considered nothing but an act of arranging music based on the original musical composition, i.e., Musical Composition Ko, under the Copyright Act. It is obvious that, since the appellee did not obtain consent from Appellant Kanai Ongaku Shuppan in this case, the aforementioned act of the appellee should be considered to constitute infringement of the musical arrangement right of Appellant Kanai Ongaku Shuppan.

Furthermore, the appellee's act of creating Musical Composition Otsu by modifying Musical Composition Ko against the will of Appellant X constitutes infringement of the right to integrity of Appellant X. As described above, Appellant X indicated his real name as the author's name when he provided or presented Musical Composition Ko to the public. In view of the fact that the appellee's act of releasing Musical Composition Otsu to the public not as a derivative work of Musical Composition Ko but as a work created by the appellee and providing and presenting Musical Composition Otsu to the public without indicating the real name of Appellant X as the author of the original

work (there is no dispute between the parties concerned with regard to the allegation that the appellee provided and presented Musical Composition Otsu to the public without indicating the real name of Appellant X as the name of the author of the original work). Such act of the appellee constitutes infringement of the right of attribution of Appellant X.

In light of the facts found above, it is obvious that the appellee either willfully or negligently committed the aforementioned infringement of the copyright and the moral rights of the author. Thus, the appellee is obliged to pay damages to the appellants.

#### 4. Issue 3 (Damage suffered by the appellants)

##### 4-1 Damage suffered by Appellant Kanai Ongaku Shuppan

(1) Appellant Kanai Ongaku Shuppan demanded the payment of damages for infringement of its copyright (the musical arrangement right) equivalent to "the amount of money that the owner should have usually received" as specified in Article 114, paragraph (2) of the Copyright Act. Act No. 56 of 2000 enforced on January 1, 2001 deleted the term "usually" from the aforementioned provision. It is clear that the provision after the amendment by said Act should apply to this case. In light of the entire import of the oral argument, since the purpose of the allegation of Appellant Kanai Ongaku Shuppan can be interpreted to be not so different from the purpose of said provision, we will determine, in the following section, "the amount of money that the owner should have received" ("the amount of reasonable compensation") for the exercise of the copyright (the musical arrangement right) for Musical Composition Ko under the amended provision.

(2) Amount of reasonable compensation in the case of a sound recording, cinematographic recording, videogram recording, or publication

A. According to the written replies from JASRAC in response to the requests for investigation dated October 29, 2001 and December 6, 2001 respectively and Exhibit Otsu 12-3, the copyright for the musical composition (Musical Composition Otsu) of the song "記念樹(Kinenju)" and the copyright for the lyrics are managed by JASRAC based on the copyright trust agreement concluded between JASRAC and the copyright owner, Fujipacific Music Inc. ("Fujipacific"). As mentioned in the aforementioned written replies, a consensus has been achieved between the parties concerned that the total amount of royalties that JASRAC distributed (from the distribution period of March 1993 to the distribution period of March 1999) and suspended to distribute (because the copyright owner of Musical Composition Otsu was unidentified since this lawsuits was still pending) (from the suspension period of December 1998 to the suspension period of December 2000) to Fujipacific for the song "記念樹(Kinenju)"

was 2,119,226 yen (Distributed amount: 1,443,128 yen, Suspended amount: 676,098 yen) (the total of this distributed amount and the suspended amount shall be hereinafter referred to as the "distributed amount, etc."). As shown in Attachments 5 and 6, the breakdown of the aforementioned total is as follows: 1,082,500 yen for sound recordings (Distributed amount: 850,539 yen, Suspended amount: 231,961 yen), 240 yen for cinematographic recordings (Distributed amount: 0 yen, Suspended amount: 240 yen (only for the musical composition)), 9,800 yen for videogram recordings (Distributed amount: 5,370 yen, Suspended amount: 4,430 yen), and 1,026,686 yen for publishing (Distributed amount: 587,219 yen, Suspended amount: 439,467 yen).

Appellant Kanai Ongaku Shuppan alleged that the aforementioned distributed amount should be regarded as the amount of reasonable compensation for the Musical Composition Ko. Since it is obvious to this court that copyrights for musical works are actually entrusted to JASRAC in most cases, that JASRAC manages those works in accordance with the Royalty Rules and the Distribution Rules, and that the Royalty Rules were established after receiving the approval from the Commissioner for Cultural Affairs under Article 3 of the Act on Copyright Intermediation (Act No. 67 of 1939), which was in effect until being abolished by Act No. 131 of 2000. Therefore, the practices of collection and distribution of royalties based on the Royalties Rules and the Distribution Rules of JASRAC function as de-facto standards for determining the amount of compensation for the use of musical works. Thus, it can be interpreted that it is reasonable to use them as tentative standards for determining the amount of reasonable compensation specified in Article 114, paragraph (2) of the Copyright Act. Based on this premise, specific issues alleged by the appellee are examined below.

B. First, the appellee alleged that the aforementioned suspended amount should be paid to the legitimate right holder when this lawsuit is finalized and that the suspended amount should not be included in the amount of damage suffered by Appellant Kanai Ongaku Shuppan. However, Appellant Kanai Ongaku Shuppan alleged that the amount of damage should include the distributed amount, etc. related to sound recordings, cinematographic recordings, videogram recordings, or publication. This is apparently due to an issue in the calculation of the amount of reasonable compensation for the exercise of the copyright (the musical arrangement right) for Musical Composition Ko under Article 114, paragraph (2) of the Copyright Act. Thus, even if the distribution to Fujipacific is suspended because this lawsuit is still pending (Article 5, paragraph (3) of the Distribution Rules [Exhibit Ko 107], Article 15, item (ii) of the Copyright Trust Contract [Exhibit Ko 40]), it would not negate the aforementioned amount of reasonable compensation. The fact that distribution is suspended would not provide sufficient

grounds to consider or deem that the actual damage has been compensated.

C. The appellee alleged that the aforementioned distributed amount, etc. includes the amount distributed to the lyricist D and the singer and that such part of the distributed amount should be deducted. First, the appellee's allegation concerning the distribution to the singer is unacceptable. In other words, based on the Copyright Trust Contract of JASRAC (Exhibit Ko 40), JASRAC, which was established for the purpose of accepting requests for managing copyrights for musical works, is entrusted with copyrights from lyricists, composers, music publishers, and any other copyright owners for works, and distributes royalties, etc. to those entrusters, i.e., copyright owners etc. Therefore, the aforementioned distributed amount cannot be considered to include the distributed amount to singers, i.e., performers. The appellee's demand for such deduction on the presumption that such amount was distributed to the singers is unreasonable.

We also need to examine the appellee's allegation that the amount distributed to the lyricist should be deducted. In this case, there is no sufficient evidence to prove that the song titled "記念樹(Kinenju)" is a joint work of the lyricist and the composer (Article 2, paragraph (1), item (xii) of the Copyright Act) and that the copyright for the lyrics had been extinguished. Thus, it is clear that the copyright for the lyrics exists independently from the copyright for the musical composition (Musical Composition Otsu) as a so-called combined work. On the other hand, according to the notice of works submitted to JASRAC (Exhibit Otsu 12-3), it is also clear that the aforementioned distributed amount, etc. was not distributed or scheduled to be distributed as the royalties for the musical composition alone but distributed as royalties for the song titled "記念樹(Kinenju)." Thus, it is obvious that the aforementioned distributed amount, etc. includes the compensation for the copyright for the use of the work consisting of the lyrics of the song titled "記念樹(Kinenju)." It is reasonable to deduct such compensation from the calculation of the amount of reasonable compensation for Musical Composition Otsu as a musical composition. Regarding this point, Appellant Kanai Ongaku Shuppan alleged that the song titled "記念樹(Kinenju)" is an illegal musical composition infringing the musical arrangement right and the moral rights of author for Musical Composition Ko and that no one has the right to demand distribution of royalties for the musical composition and the lyrics. However, the fact is that, in the case of a song, since the copyright for the lyrics exists independently from the copyright for the musical composition, it is possible to calculate the amount of compensation for the lyrics and the musical composition separately. This has nothing to do with the issue of legitimacy of a musical arrangement. Therefore, the aforementioned allegation of Appellant Kanai

Ongaku Shuppan is groundless (Appellant Kanai Ongaku Shuppan itself alleged that the compensation for the lyrics should be deducted from the amount of reasonable compensation for cinematographic recordings).

D. As described above, the song titled "記念樹(Kinenju)" was released, provided and presented to the public as a musical arrangement by E. It may be necessary to consider distribution of the royalties to E as a music arranger. As mentioned above, Musical Composition Otsu is a derivative work created by the appellee based on Musical Composition Ko by adding creative expressions of the appellee. Thus, it is impossible to deny the appellee's copyright for the derivative work. It should be considered that the amount of compensation for the use of Musical Composition Otsu as a derivative work created based on Musical Composition Ko as the original musical composition should be partially distributed to the copyright owner of the original musical composition and also to the copyright owner and the music arranger of the derivative work. Therefore, when the amount of reasonable compensation for Musical Composition Ko is determined, the latter amount should be distributed for derivative work from the aforementioned distributed amount, etc. The proportion of deduction should be determined based on the distribution ratio for the music arranger of the original musical composition (while the appellee did not explicitly provide this argument in his allegation, since the information that provides sufficient grounds for this argument was provided to this case both in terms of allegation and proof, this argument should not be precluded).

As mentioned above, Appellant Kanai Ongaku Shuppan alleged that any distribution of the royalties for the song titled "記念樹(Kinenju)" should be denied on the grounds that the process of creating the song was illegal. However, in light of the wording of Article 2, paragraph (1), item (xi) of the Copyright Act and the process of amending the former Copyright Act (Act No. 39 of 1899) (the abolishment of the applicability requirements of Article 22 of the former Copyright Act), it is obvious that the current Copyright Act does not require the legality of the creation of a derivative work in order for said work to be copyrighted and protected under said Act. Thus, the aforementioned allegation should be considered to be unreasonable. The aforementioned argument should be considered to be sufficiently reasonable in light of the fact that a large amount of royalties should be paid for a derivative work in some cases where the market value of the derivative work increases due to the creativeness added to the original work through a musical arrangement. Needless to say, if the amount of reasonable compensation is calculated based on a license fee specified in a license agreement that allows the use of a work in the process of musical arrangement, there would be no such



issue as deducting the amount distributed to the music arranger. In this case, Appellant Kanai Ongaku Shuppan alleged that the amount of reasonable compensation for Musical Composition Ko should be calculated based on the actual royalties paid for Musical Composition Otsu as a derivative work of Musical Composition Ko. It is impossible to discuss the two methods from the same perspective.

E. As a next step, we should determine the amount that should be deducted and distributed to the lyricist (D) and the music arrangers (the appellee and E) from the aforementioned distributed amount, etc.

First, Appellant Kanai Ongaku Shuppan alleged that the amount of reasonable compensation should be determined based on the distributed amount, etc. (2,118,986 yen in total) without any deduction for the lyrics. Articles 3 and 29 of the Distribution Rules of the JASRAC (Exhibits Ko 106, 107) specify that the distribution ratios of the royalties of sound recordings, videogram recordings, or publication shall be  $\frac{3}{8}$  for the composer,  $\frac{4}{8}$  for the lyricist, and  $\frac{1}{8}$  for the music arranger. Since there are no special reasons for considering these ratios inapplicable, these distribution ratios should be applied. Thus, it is reasonable to calculate the amount of reasonable compensation for the use of Musical Composition Ko for sound recordings, videogram recordings, and publication by multiplying the aforementioned distributed amount, etc. by the distribution ratio,  $\frac{3}{8}$ , for Appellant Kanai Ongaku Shuppan, which is the copyright owner of the original musical composition, and to conclude that the amount of reasonable compensation is 794,619 yen (A) (2,118,986 yen (the total amount of the aforementioned distributed amount, etc.) $\times\frac{3}{8}$ =794,619 yen; Any fraction under one yen shall be disregarded; Hereinafter the same).

Regarding the amount of reasonable compensation for the use of Musical Composition Ko for cinematographic recordings, the distributed amount only for the musical composition for the cinematographic recordings can be calculated as 240 yen. It is reasonable to deduct the amount to be distributed to the music arranger. Based on the distribution ratio (if the relevant right owners are the composer and the music arranger,  $\frac{6}{8}$  for the composer and  $\frac{2}{8}$  for the music arranger) of the royalties for sound recordings specified in Article 29 of the Distribution Rules (Exhibits Ko 106, 107). Thus, the amount of reasonable compensation should be determined to be 180 yen (B) (240 yen $\times\frac{6}{8}$ =180 yen).

(3) Amount of reasonable compensation for broadcasting and recordings for broadcasting

A. Appellant Kanai Ongaku Shuppan alleged that the amount of reasonable compensation for broadcasting and recordings for broadcasting should be calculated by

adding up royalties for every use of each musical composition. On the other hand, the appellee alleged that, since the appellee obtains only the distribution of royalties calculated based on the blanket fee system, it is unreasonable to calculate the amount based on the royalties paid on a per-work per-performance basis.

B. Based on the examination of the aforementioned points, it can be found that, according to the Royalty Rules (Exhibit Ko 105) and the Distribution Rules (Exhibit Ko 106) of JASRAC and also to the replies from JASRAC in response to the aforementioned request for investigation (including the attached materials), while the Royalty Rules specify that the royalties for broadcasting by general broadcasters could be paid in the form of a blanket fee, which is determined based on the all-inclusive royalties for one year (Chapter II, Section 3, Subsection 2 (1)), or in the form of a per-work fee, which is determined based on the royalties calculated on a per-work per-performance basis (Chapter II, Section 3, Subsection 2 (2)), JASRAC has adopted the blanket fee system in practice. Also, it can be found that, regarding the royalties for recordings to be broadcast by general broadcasters, the Royalty Rules specify that the royalties shall be paid on a per-work per-performance basis for any recording made when a work is used as a theme song or an insert song in a film broadcast on television (Chapter II, Section 4, Subsection 1 (1) (B) and (2)), while royalties are paid in the form of a blanket fee in practice as described above. It can also be found that, in these cases where the blanket fee system is used, it takes an extremely large amount of work to investigate and check the amount distributed to each musical composition and that this is why the replies from JASRAC in response to the aforementioned request for investigation only provide information about the distribution period of December 2000 (demanding further investigation to JASRAC would go beyond the scope of a request for investigation).

According to the facts found above, the adoption of the method of calculating the royalties for broadcasting and the recordings for broadcasting by adding up royalties on a per-work per-performance basis is in line with the Royalty Rules of JASRAC (for broadcasting, Chapter II, Section 3, Subsection 2 (2), for the recordings for broadcasting, Chapter II, Section 4, Subsection 1 (1) (B) and (2)). Adopting this calculation method as a standard cannot be considered to be unreasonable. Even though JASRAC always adopts the blanket fee system in practice, the aforementioned determination would not be affected. The purpose of the blanket fee system is considered to set royalties at a lower level as a whole than the method of adding up royalties on a per-work per-performance basis, so that those who want to use works would be willing to get a license in advance. From this perspective, it is also impossible to justify the adoption of

the blanket fee system for the calculation of the amount of damage in an infringement lawsuit.

C. The appellee alleged that, even if it is not Musical Composition Otsu but Musical Composition Ko that was broadcast or recorded for broadcasting, the management fee would have to be paid to JASRAC and should not therefore be regarded as a part of the damages that "the owner should have usually received." The appellee also alleged that the management fee should be deducted in the calculation of the amount of reasonable compensation. However, to begin with, the term "usually" was deleted from the wording of Article 114, paragraph (2) of the current Copyright Act as described above. Since each person can freely decide whether to entrust JASRAC with the management of the copyright for a musical work, the payment of the management fee for Musical Composition Ko is not necessarily required. Therefore, the aforementioned allegation is unacceptable.

D. Next, based on the system of adding up royalties on a per-work per-performance basis, we will calculate the amount of reasonable compensation for broadcasting and recordings for broadcasting below.

According to the evidence (Exhibits Ko 103, 110-1 to 110-372, 111-1 to 111-274, Object of Observation Ko 17), during the period from January 1993 to November 2001, the TV programs "あっぱれさんま大先生(Appare sanma daisensei)" and "やっぱりさんま大先生(Yappari sanma daisensei)" were broadcast at least 372 times on Fuji TV and 274 times on Kansai TV. For these programs, Musical Composition Otsu was used as the ending theme song. Regarding this point, there is no evidence to prove otherwise. Furthermore, since there is no sufficient evidence to prove that the aforementioned number of broadcasts includes the number of re-broadcasts, it is fully possible to presume that, every time the aforementioned TV programs were broadcast, an act of recording Musical Composition Otsu for broadcasting was committed (a recording of a work to be used as a theme song or an insert song of a film broadcast on TV).

According to Chapter II, Section 3, Subsection 2 (2) (Exhibit Ko 105) of the Royalty Rules, the royalties for broadcasting on a per-work per-performance basis are 8,000 yen for Fuji TV (Class 1 up to five minutes), 5,600 yen for Kansai TV (Class 2 up to five minutes) (please refer to Exhibit Ko 113 regarding the definition of Classes 1 and 2). On the other hand, according to Article 8 of the Distribution Rules (Exhibits Ko 106, 107), the distribution ratio of royalties for broadcasting to the relevant parties, namely, the composer, the lyricist, and the music arranger, is specified as 5/12 for the composer, 5/12 for the lyricist, and 2/12 for the music arranger. As described in (1), C and D above, it is reasonable to deduct the amount distributed to the lyricist and the music arranger.

Thus, it is reasonable to estimate that the amount of reasonable compensation for the use of Musical Composition Ko for broadcasting is 1,879,333 yen (C) in total, consisting of 1,240,000 yen for Fuji TV ( $8,000 \text{ yen} \times 372 \text{ times} \times 5/12 = 1,240,000 \text{ yen}$ ) and 639,333 yen for Kansai TV ( $5,600 \text{ yen} \times 274 \text{ times} \times 5/12 = 639,333 \text{ yen}$ ).

Regarding the recordings for broadcasting, based on Royalty Rules (Exhibit Ko 105), if a work is used as a theme song or an insert song for "regular film" (Chapter II, Section 4, Subsection 1 (1)), the royalties would be 1,200 yen for "cultural film, less than five minutes." On the other hand, in the case of a film broadcast on TV (Chapter II, Section 4, Subsection 1 (2)), since the royalties are specified to be 20/100, the unit price of standard royalties would be 240 yen ( $1,200 \text{ yen} \times 20/100 = 240 \text{ yen}$ ). Since it is explicitly stated that the unit price is applicable to "the lyrics and the musical composition respectively," it is not necessary to deduct the amount distributed to the lyricist. However, regarding the royalties for the musical composition, the amount distributed to the musical arranger should be deducted. Since Article 29 of the Distribution Rules (Exhibits Ko 106, 107) specifies that the distribution ratio of the royalties for recordings to the parties concerned, for example, the composer and the music arranger, is 6/8 for the composer and 2/8 for the music arranger. Under said Article, the amount of reasonable compensation for the use of Musical Composition Ko for recordings for broadcasting should be found to be 116,280 yen (D) ( $240 \text{ yen} \times (372 + 274) \text{ times} \times 6/8 = 116,280 \text{ yen}$ ).

#### (4) Attorneys' fees

As explained above, the damage suffered by Appellant Kanai Ongaku Shuppan calculated based on the amount of reasonable compensation is equivalent to 2,790,412 yen, which is the total of the amounts found in (2) and (3) above. Thus, it would be reasonable to estimate the attorneys' fees, which can be recognized as the damage proximately caused by the appellee's act of infringement, as 600,000 yen (E) in consideration of various factors such as the nature and judicial proceedings of this case.

(5) Therefore, the amount of damage suffered by Appellant Kanai Ongaku Shuppan due to infringement of its musical arrangement right can be estimated to be 3,390,412 yen, which is the total of the amounts specified in (A) to (E) above, as a claim for partial damages in the principal action filed by Appellant Kanai Ongaku Shuppan.

#### 4-2 Damage suffered by Appellant X

As described above, the appellee's act of composing Musical Composition Otsu, which is a derivative work based on Musical Composition Ko as the original musical composition, against the will of Appellant X and releasing it and providing or presenting it to the public as a work created by the appellee without indicating the real

name of Appellant X as the author of the original work constitutes infringement of Appellant X's moral rights of author for Musical Composition Ko (the right to integrity and the right of attribution). According to the evidence (Exhibits Ko 25, 54, 87, 100, 115, Object of Observation Ko 24), the following can be found, as described above. Appellant X is respected as the pioneer who created many famous musical compositions for commercial songs that are said to go down in history and widely known as a composer who creates a wide range of musical compositions including "ピンポンパン体操(Pinponpan taisou)" in 1972, which received a Japan Record Award for a children's song, and "北の宿から(Kita no yadokara)," which received a Japan Record Award. Among 6,000 commercial songs composed by Appellant X, Musical Composition Ko is one of his outstanding works, and Appellant X, who also recognizes Musical Composition Ko as such, can be considered to have a strong sense of pride and attachment to Musical Composition Ko. Moreover, Musical Composition Ko is a famous musical composition that was initially released as a commercial song and has established its status as a popular song and a school song that will be sung over generations, having been published in many textbooks. Under these circumstances, as described above, Musical Composition Ko was modified into Musical Composition Otsu against the will of Appellant X. The appellee provided or presented Musical Composition Otsu to the public as the ending theme song for a program of Fuji TV not as a derivative work of Musical Composition Ko but as a work created by the appellee without indicating the real name of Appellant X as the author of the original work. According to the entire import of the oral argument, it can be found that this situation has continued for about 10 years from around December 1992 until the conclusion of oral argument.

Based on a comprehensive evaluation of these facts and all of the other factors found above such as the manner of modification, it is reasonable to conclude that the amount of solatium for the emotional distress suffered by Appellant X with regard to the aforementioned infringement of his moral rights of author is 5,000,000 yen, while the amount of attorneys' fees that can be regarded as the damage proximately caused by the appellee's act of infringement is 1,000,000 yen.

## 5. Counterclaim

The appellee filed a counterclaim against Appellant X to seek a declaratory judgment to the effect that the appellee has the moral rights of author for Musical Composition Otsu. As mentioned above, it can be found that Musical Composition Otsu is a derivative work created by arranging Musical Composition Ko and that said musical arrangement must be considered to be illegal. However, as explained above in

connection with the copyrights, under the current Copyright Act, if a derivative work is created through musical arrangement, the musical arrangement is not required to be legal in order for the musical arranger to obtain moral rights of author. Thus, the appellee can be found to have moral rights of author for Musical Composition Otsu.

The appellants withdrew their allegation that Musical Composition Otsu is a reproduction of Musical Composition Ko in this instance and, instead, solely alleged that, since Musical Composition Otsu is a derivative work created through musical arrangement, there may be doubts about the merit of seeking a declaratory judgment in the counterclaim filed by the appellee. However, Appellant X does not make any allegation that explicitly confirms the existence of the appellee's moral rights of author for Musical Composition Otsu, but, solely seeks a court judgment that dismisses the counterclaim. Furthermore, Appellant X made an allegation that can be interpreted to be made on the premise that a derivative work created through musical arrangement is required to be legal in order for the music arranger to obtain protection under the Copyright Act. In consideration of these facts, it is necessary and appropriate for the appellee and Appellant X to reach a consensus as to whether the appellee has moral rights of author for Musical Composition Otsu. Thus, the merit of seeking a declaratory judgment should be considered to exist.

Therefore, there are grounds for the appellee's counterclaim against Appellant X.

## 6. Conclusion

As described above, the appellants' claims in the principal action shall be accepted to the extent that Appellant X demands payment of 6,000,000 yen and the amount accrued thereon at the rate of 5% per annum as specified in the Civil Code for the period from December 1, 2001, which is the day after the act of tort, to the date of completion of the payment and that Appellant Kanai Ongaku Shuppan demands payment of 3,390,412 yen and the amount accrued thereon as above. Any other claims shall be dismissed. The judgment in prior instance is reasonable with regard to the part that accepted the appellee's counterclaim against Appellant X.

Paragraph 1 of the main text of the judgment in prior instance, which is different from the aforementioned determination in terms of conclusion, shall be modified as stated in paragraph 1 of the main text of this judgment. This appeal filed by Appellant X with regard to paragraph 2 of the main text of the judgment in prior instance concerning the counterclaim shall be considered to be groundless and dismissed. The judgment shall be rendered in the form of the main text with regard to the court costs based on Article 67, paragraph (2), Article 61, and Article 64 of the Code of Civil Procedure and with regard to a declaration of provisional execution based on Article 259 of said Code.

Tokyo High Court, 13th Civil Division

Presiding judge: SHINOHARA Katsumi

Judge: NAGASAWA Yukio

Judge: MIYASAKA Masatoshi

# どこまでも行こう

詞 曲 歌

ど こ ま で も ゆ こ う

う み ち は き び し く と も

も く ち ぶ え を ふ き

な が ら は し っ - て

ゆ こ う ど こ

## どこまでもゆこう

1. どこまでもゆこう 道はきびしくとも  
口笛を吹きながら 走ってゆこう
2. どこまでもゆこう 道はげわしくとも  
幸せが待っている あの花の向うに
3. どこまでもゆこう 道は苦しくとも  
君の面影胸に 風をうけてゆこう
4. どこまでもゆこう 道がなくなっても  
新しい道がある この丘の向うに
5. どこまでもゆこう 道は淋しくとも  
あの花をみつめながら 迷わずにゆこう
6. どこまでもゆこう 道はげわしくとも  
幸せが待っている あの花の向うに  
..... 幸せが待っている  
あの花の向うに  
あの花の向うに



## 楽譜二

記念樹

D /  $\frac{G}{A}$  D  $\frac{G}{B}$  D / G D /  $\frac{C}{B}$  D<sub>2</sub>

こ う と い の す み に み ん な で うえ た き ね ん じ つ い つ

G / A<sub>2</sub> D  $\frac{F\#}{A\#}$  B<sub>m</sub>  $\frac{B_m}{A}$  G (E<sub>m</sub>) / G<sub>m</sub>  $\frac{G}{A}$  D /  $\frac{G}{A}$  (A<sub>2</sub>)

の ひ に か と お い と こ ろ で お も い だ す だ づ う そ れ は た ぶ

D /  $\frac{D_m}{(C\#)(C\#)}$  D<sub>2</sub>  $\frac{G}{B}$  /  $\frac{A_2}{G}$  F<sub>m</sub> /  $\frac{C}{D}$  D<sub>2</sub> G /  $\frac{A_2}{G}$  F<sub>m</sub> /  $\frac{B_m}{B\flat}$  G<sub>m</sub>

ん つ ら い と き な ぎ た い と き み じ り い の ほ っ ぽ か せ に ゆ れ

$\frac{D}{A}$  /  $\frac{G}{A}$  D  $\frac{G_m}{B}$  D /

る さ ね ん じ つ

1 校庭の隅に  
みんなで植えた記念樹  
いつの日にか遠いところで  
思い出さう  
それは多分  
つらい時泣きたい時  
緑色の葉っぱ風に  
揺れる記念樹

2 忘れないずっと  
みんな子供だったこと  
スコップうまく使えずに  
顔見合わせた  
大人になっても  
心から笑いたいね  
あの日空の雲は夢の  
かたち描いた

3 夕暮れの校舎  
みんなで植えた記念樹  
ニワトリが朝と間違え  
鳴いていたつけ  
振り返るのは  
つらい時泣きたい時  
枝は空をめざし風に  
揺れる記念樹  
揺れる記念樹

## 対比譜面

どこまでも行こう  
1番

記念樹  
1番

どこま でも ゆこう - みちは まじしくと  
a 1 2 b 3

こうて いの すみ に みんなでうたをねん

も - くちぶ" えを ふきは がら はし> - ゼゆこう  
c 4 5 6 d 7

いつの かにか とお いとこぞ" おも 11 T"す T"1

う  
3う

そのま 1 番の後半  
e 9 10 f 11

そへは た ぶ" ん っら 11 とまなまT"1と

ま  
12

みと"り 113の は、ぼ かぜ"に ゆへ3 まね んじゆ

23 24 C 25 26 27 28 D 29 30 31 32

9 13 14 h 15 16

## Attachment 4

### Comparison between the Melodies

#### [First Phrase]

Phrase [A] do re miii do tii do re doooooo

Phrase [a] do re miii mi ree re do doooooo

Phrase [e] do re miiii reee do doooooo

Lyrics [A] (do ko maaa de moo yu ko uuuuuu)

Lyrics [a] (ko u teee i noo su mi niiiii)

Lyrics [e] (so re waaaa taaa bu nnnnnn)

#### [Second Phrase]

Phrase [B] do do faaa fa fa fa so la soooooo

Phrase [b] do do fa fa fa fa la la so #fa soooooo

Phrase [f] do do fa fa fa fa la la so #fa soooooo

Lyrics [B] (mi chi waaa ki bi shi ku to moooooo)

Lyrics [b] (mi n na de u e ta ki ne n juuuuuu)

Lyrics [f] (tsu ra i to ki na ki ta i to kiiiii)

#### [Third Phrase]

Phrase [C] so so laa so faa so la sooo mi doo

Phrase [c] so so laa la so faa so la so so mi re doo

Phrase [g] so so laa la so faa so la soo mi re doo

Lyrics [C] (ku chi buuu e oo fu ki naaa ga raa)

Lyrics [c] (i tsu noo hi ni kaa to o i to ko ro dee)

Lyrics [g] (mi do rii i ro noo ha paa ka ze nii)

#### [Fourth Phrase]

Phrase [D] do re mi mii do tii do re doooooo

Phrase [d] do re miii do laa mii reeeeee

Phrase [h] do re miii do reee do doooooo

Lyrics [D] (ha sh iiii tte yuu ko uuuuuuu)

Lyrics [d] (o mo tiii da suu daa roooooo)

Lyrics [h] (yu re ruuu ki neee n juuuuuu)

(Note) A quarter note of Musical Composition Ko and an eighth note of Musical Composition Otsu counted as one note.

Musical Composition Otsu is different from Musical Composition Ko in terms of the underlined parts (excluding differences solely in terms of subdivision).

The boxed parts above show strong beats that appear in both musical compositions.

"ti" indicates a leading note.

## Attachment 5

## List of the Amounts Distributed to Fujipacific for "記念樹(Kinenju)"

(Unit: yen)

Item Distribution period	Sound recordings	Cinematographic recordings	Recordings for videogram	Recordings for broadcasting	Performance	Broadcasting	Cable broadcasting	Publication	Rental	Stored for online karaoke	Transmitted for online karaoke	Compensation for private recordings	Total for each distribution period
Mar. 1993	87,477												87,477
Jun.	201,582			9,856		37,762							249,200
Sep.	12,195					1,681							13,876
Dec.	3,677			19,532		47,929							71,138
Mar. 1994	3,347			8,563		30,343	2,476						44,729
Jun.	11,353			5,450		19,429							36,232
Sep.	11,763			16,061		36,986		8,128					72,938
Dec.	4,370			8,591		27,208		53,868					94,037
Mar. 1995	12,052			28,482		77,801	4,577	29,874					152,786
Jun.	26,077			17,699		40,138		3,640					87,554
Sep.	9,012			5,544	527	17,440		28,120					60,643
Dec.	5,099			7,338	351	26,563							39,351
Mar. 1996	10,115			5,037	171	16,786		10,555					42,664
Jun.	93,126			6,805	220	22,413		32,911					155,475
Sep.	67,611		1,810	6,504	512	22,063		71,513					170,013
Dec.	8,366		910	15,477	169	45,666		40,734					111,322
Mar. 1997	26,840			4,926	1,620	15,127		26,982					75,495
Jun.	22,548			13,969	414	40,976		7,509					85,416
Sep.	117,342		1,810	12,024	1,248	35,889		40,674					208,987
Dec.	5,261		840	16,418	2,231	56,056		53,486					134,292
Mar. 1998	26,521			5,487	1,876	18,899		17,556		14,906	2,255		87,500
Jun.	10,980			5,262	4,423	19,095		70,320		1,084	423		111,587
Sep.	48,673			4,039	5,421	12,696		39,529		2,837	893		114,088
Dec.	7,072							21,058					28,130
Mar. 1999	18,080							30,762					48,842
<b>Total for each item</b>	<b>850,539</b>	<b>0</b>	<b>5,370</b>	<b>223,064</b>	<b>19,183</b>	<b>668,946</b>	<b>7,053</b>	<b>587,219</b>	<b>0</b>	<b>18,827</b>	<b>3,571</b>	<b>0</b>	<b>2,383,772</b>

Attachment 6

List of the Distributed Amount and the Suspended Amount for "記念樹(Kinenju)"

(Unit: yen)

Item Suspension period	Sound recordings	Cinematographic recordings	Recordings for videogram	Recordings for broadcasti ng	Performance	Broadcasting	Cable broadcasting	Publication	Rental	Stored for online karaoke	Transmitted for online karaoke	Compensation for private recordings	Total for each suspension period
Dec. 1998	11,775			4,803	7,107	34,355				1,023	807		59,870
Mar. 1999	20,347			40,042	16,817	306,474		64,458		1,101	868		450,107
Jun.	20,378			6,132	10,366	42,292		46,563		1,325	40,084		167,140
Sep.	41,288		35	6,233	9,545	51,007		68,041		955	752		177,856
Dec.	2,117			5,657	10,795	45,276		36,158		896	39,752		140,651
Mar. 2000	15,773			4,785	11,342	39,754		4,400		33,702	65,684		175,440
Jun.	71,163		3,336	3,512	13,511	24,095		81,919		3,748	21,600		222,884
Sep.	20,000	480	1,059	3,455	24,246	27,615		61,206		4,483	29,977		172,521
Dec.	29,120			5,187	22,210	43,451		76,722		4,049	23,990		204,729
<b>Total for each item</b>	<b>231,961</b>	<b>480</b>	<b>4,430</b>	<b>79,806</b>	<b>125,939</b>	<b>614,319</b>	<b>0</b>	<b>439,467</b>	<b>0</b>	<b>51,282</b>	<b>223,514</b>	<b>0</b>	<b>1,771,198</b>

(Note concerning the judgment) 480 yen for cinematographic recordings is the total of 240 yen for the lyrics and 240 yen for the musical composition.