
Date of the judgement

1988.03.15

Case Number

1984(O)1204

Reporter

Minshu Vol.42, No.3, at 199

Title

Judgment upon the case concerning the existence of infringement of copyright by the singing at a karaoke outlet

Case name

claim for the injunction for infringement of copyright on a musical work

Result

Judgment of the Third Petty Bench, partly dismissed by procedural reasons, partly dismissed by substantive reasons

Court of the Second Instance

Fukuoka High Court

Summary of the judgement

If the owner of a snack bar installs karaoke equipment and karaoke tapes which contain recorded musical pieces which are copyrighted, and encourages the customers to sing, particularly to sing the piece of the customer's choice in the presence of other customers

accompanied by the music recorded in the karaoke tape being played, enhances the lively atmosphere of the outlet and thus, intends to increase the number of customers and increase profit, this owner is not exempted from tort liability as the subject entity of the singing in relation to the singing by the customers, unless there is consent of the holder of the copyright of the musical piece.

Main text of the judgement

The part of the present jokoku appeal in relation to the judgment of the original instance court concerning the claim for compensation by the jokoku appellee on the ground of an infringement of the right of performance by singing accompanied by the karaoke play shall be dismissed on substantive grounds. The remaining part of the appeal shall be dismissed on procedural grounds. The cost of appeal shall be borne by the jokoku appellant.

Reasons

On the ground of judgment by the representative for the jokoku appeal, Chiharu Abe:

According to the facts lawfully ascertained by the original instance court, the jokoku appellants installed in the snack bars jointly owned by the appellants karaoke equipment and karaoke tapes in which copyrighted musical pieces which the jokoku appellees manage by having the copyright and the performing rights derived from the copyright transferred by the holder of the copyright for trust management. There, hostesses and other employees of the snack bar operated the equipment, gave customers an indexed list of musical pieces, handed them a microphone and encouraged them to sing, and made the customers sing in the presence of other customers accompanied by the music recorded in the karaoke tape. They often made the hostesses sing alone or together with the customer, and thus enhanced the lively atmosphere of the snack bar with the intention of collecting customers and increasing profit. Under such circumstances, not only in cases where the hostesses sang, but also when the customers sang, the subject entity who used the copyrighted music by performance (singing) was the jokoku appellants, and the performance was in public and for profit making purposes. This is because it is evident that the singing by the customers and hostesses was intended for the public to listen to directly (Art.22, Copyright Law), and even when only the customers were singing, they were not singing without the involvement of the appellants; through the soliciting by the employees of the appellants of customers to sing, the choice of music within the scope of the karaoke tape provided by the appellant, the operating of the karaoke equipment by the employees, the customers are

understood to have been singing under the management of the appellants. On the other hand, the appellants accepted singing by customers as part of the snack bar's business strategy and by using this, enhanced the atmosphere as a karaoke snack bar, and also intended to attract customers who prefer such an atmosphere and thus increase profit. Thus, the singing by customers as indicated above can be seen as equivalent to the appellants themselves singing from the viewpoint of the regulation of the Copyright Law.

Therefore, the appellants have infringed the performing rights which are derived from the copyright on the musical work by allowing the hostesses and other employees and customers to sing, accompanied by the karaoke music[,] the pieces which are copyrighted works managed by the jokoku appellee without the consent of the appellee, and cannot be exempted from tort liability for the infringement of performing rights as a subject entity of the performance. Although when producing the karaoke tape, fees were paid to the holder of the copyright, the fees are for allowing the reproduction (recording) of the copyrighted music and as such, the karaoke tape can be freely replayed as the reproduction of the lawfully recorded copyrighted music (Copyright Law before the amendment by Law No.64 of 1986, attached rules Art.14, Implementation Order of the Copyright Law, attached rules, Art.3), it cannot be construed that singing by customers accompanied by karaoke, which is a completely different manner of use of copyrighted music from the replay of a karaoke tape, should be allowed to be done freely without the consent of the holder of the copyright, solely because the singing is accompanied by karaoke which merely has a supplementary role.

The ruling of the original instance court, which is in line with the above, is justifiable, and there is no breach of law in the judgment as was argued by the appellant. The argument of the appellant criticises the original judgment on grounds different from the above, and cannot be accepted.

The appellants have failed to produce a brief which contains the grounds for a jokoku appeal on the part of the judgment of the original instance court concerning the claim other than the claim on the ground of the infringement of the performing right by the singing accompanied by karaoke.

Therefore, by virtue of articles 401,399,399-3, 95,89, and 93 of the Code of Civil Procedure, except for the opinion of Justice Masami Itoh, the justices unanimously rule as the main text of the judgment.

The opinion of Justice Itoh is as follows:

I concur with the conclusion of the majority opinion which confirmed the judgment of the original instance court which ruled that the appellants are liable for the tort of infringing the

rights to perform and acknowledged the claim for compensation of the jokoku appellee based upon tort liability, but cannot concur with the reasoning which leads to the conclusion on the following grounds.

The majority opinion, based upon the facts ascertained by the original instance court that the appellants, in the snack bars which they own, installed karaoke equipment and tapes, the hostesses and other employees operated the equipment, gave customers an indexed list of musical pieces, handed them a microphone and encouraged them to sing, let the customers sing in the presence of other customers accompanied by the replay of the music recorded in the karaoke tape, and often made the hostesses sing alone or together with the customer, and thus enhanced the lively atmosphere of the snack bar with the intention of collecting customers and increasing profit, ruled that not only in cases where the hostesses and the others sing, but also in cases where only the customers sing, the subject entity of the use of the copyrighted music by performance (singing) is the appellants, who are the entrepreneurs, and because the performance was for profit making purposes and made in public, the appellants who failed to obtain the consent of the appellee cannot be exempted from tort liability for the infringement of the right to perform.

I have no objection in cases where the hostesses and other employees sing with karaoke accompaniment, the appellants as entrepreneurs should be regarded as the subject entity of using the copyrighted music by performance (singing), and in cases where the hostesses and other employees sing together with customers, the appellants may also be regarded as the subject entity of using the copyrighted music by considering the singing of the hostesses and customers as a whole. However, it is rather unnatural to regard the appellants who are entrepreneurs as the subject entity of using the copyrighted music when only the customers sing; as an interpretation, this has gone too far. The majority opinion, as mentioned above, even in cases where it was only the customers who sang, took into consideration the solicitation to sing by employees, the choice of the music within the scope provided by the karaoke tape supplied by the appellants, along with the operation of the karaoke equipment by the employees, and concluded that the customers were singing under the control of the appellants, and on the other hand, found that the appellants accepted the singing by customers as part of the business strategy and pursued profit, and thus found the singing by customers to be the equivalent to the singing by the appellants from the viewpoint of the regulation of the Copyright Law. Even by taking into account the circumstances such as the solicitation of singing as referred to in the majority opinion, the customers are not singing on the basis of employment or work contract with the appellants, or have an obligation against the appellant to sing; whether to sing or not is entirely left to the choice of the customers, and the copyrighted music is used by their free will. Therefore, it cannot be said that the appellants were actively involved in the use of the copyrighted music,

and the singing by customers should be distinguished from the singing by hostesses and other employees in relation to the use of the copyrighted music. Treating the singing of customers as an equivalent of the singing by the appellant is too fictional and unacceptable.

I believe that regarding karaoke performance, the matter should be approached not from the aspect of singing with karaoke accompaniment as above, but by focussing on the karaoke equipment and considering the replay of the karaoke tape by the karaoke equipment itself as an infringement of the rights to performance. Article 14 of the Attached Rules to the Copyright Law (Law No.48, 1970, but before the amendment by Law No.64, 1986; the same in the following) provides that concerning the replay of the performance of the copyrighted music which has been lawfully recorded, for the time being, Article 30, para.1. subpara.8 of the previous Copyright Law (Law 1889 Law No.39; the same in the following) which provided that 'providing for entertainment and broadcasting the works lawfully copied on the equipment which mechanically reproduces the sound shall not be deemed as forgery' is applicable except for the broadcasting, or cable transmission, and profit making business using copyrighted music which are designated by the cabinet order, and on this basis, Art. 3, para.1 of the Implementation Order of the Copyright Law lists 'cafes and other businesses providing food and drinks to customers which advertise as part of the business that the customers are able to enjoy music, or have a special equipment installed for the customers to enjoy music' as one of the designated businesses as mentioned above. The majority opinion seems to understand that the installed karaoke equipment was not 'special equipment installed for the customers to enjoy music'. However, karaoke equipment is special equipment with which, by replaying the karaoke tape, customers sing directly to the public accompanied by the recorded music, and although the installation of karaoke equipment with such a purpose may not be a place 'which has special equipment enabling the customers to enjoy music' per se, nevertheless should be regarded as something similar, and therefore, for the replaying of the karaoke tape by karaoke equipment for business purposes, it is reasonable to understand that Article 30, para.1. subpara.8 of the previous Copyright Law by Article 14 of the Attached Rules to the Copyright Law is not applicable. Since, at the time of the enactment of the Copyright Law, the popularity of karaoke equipment of today was not foreseen, Art. 3, para.1 of the Implementation Order of the Copyright Law does not have the wording with karaoke equipment in mind, but in the light of the intention of the law concerning Article 14 of the Attached Rules and Art. 3, para.1 of the Implementation Order of the Copyright Law which allowed the application of the former Copyright Law only to those businesses in which the provision of music was not directly linked to the profit, the above interpretation is thought to be in line with such an intention of the law.

The Third Petty Bench of the Supreme Court

Presiding judge

Justice SAKAUE Toshio

Justice ITOH Masami

Justice YASUOKA Mitsuhiko

Justice NAGASHIMA Atsushi

(*Translated by Sir Ernest Satow Chair of Japanese Law, University of London)