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Date of the judgement

2001.06.28

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Case Number

1999(Ju)922

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Reporter

Minshu Vol.55, No.4 at 837

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Title

Judgment upon the case concerning the definition of the adaptation of literary works; and an act of creating a work which is identical to the existing literary work in a part which is not in itself an expression, or a part which has no creativity in expression and adaptation

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Case name

Claim for Compensation

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Result

Judgment of the First Petty Bench, partly dismissed, partly quashed and decided by the Supreme Court

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Court of the Second Instance

Tokyo High Court

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Summary of the judgement

1. The adaptation of a literary work means the creation of another work in which those who have access to it may directly perceive the essential characteristics of the expression of an

existing work, based upon an existing work and by maintaining the essential characteristics of its expression, modifying, increasing or reducing, or altering its specific expressions, and newly expressing thoughts of feelings in a creative manner.

2. An act of creating a literary work which is identical to an existing work merely in a part which is not in itself an expression, or a part which has no creativity in expression such as the thought, feeling, or idea, facts or incidents is not an adaptation of an existing literary work.

References

Copyright Law: Article 2, para. 1; Article 27; and Chapter 7

Main text of the judgement

1. The part of the judgment of the original instance court in which the jokoku appellants had lost shall be quashed and the judgment of the court of first instance on this part shall be revoked.
 2. The claims of the jokoku appellee on the above part shall be both dismissed.
 3. The total cost of the action shall be borne by the jokoku appellee.
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Reasons

On the grounds of certiorari by the representatives of the jokoku appeal, ZY and HK:

1. The facts lawfully established by the original instance court are as follows:

(1) The jokoku appellee is the author of a non-fiction book entitled 'Singing in the Waves of the Northern Sea' (hereinafter, 'the Work'). The jokoku appellants, P1 produced a television programme entitled 'Hokkaido Special; Songs of remote Eurasia - in Pursuit of the Origin of Esashi-Oiwake' ([A regional folksong], hereinafter, 'the Programme') and broadcasted it on October 18, 1990. The jokoku appellant P is the deputy general manager of the broadcasting department of the Hakodate Office of P1, and participated in the production of the Programme as the person responsible for the production per se.

(2) The Programme has been produced by using the Work as one of the reference materials, and was based upon it, but there was no reference to the Work in the Programme.

(3) At the beginning of a short piece entitled 'The Hot Wind in September' which is contained in the Work, there is a part as reproduced in the upper part of the attached paper (hereinafter, 'the Prologue'). 'The Hot Wind in September' is a short piece which depicts the participants in and

the audience of the Esashi-Oiwake National Festival and describes the unique excitement and emotion of the Festival when the jokoku appellants went to see the Festival for the first time. In the Prologue, at the beginning, the past and present of the town of Esashi are introduced, and the Festival is depicted as a peak of the year in which the prosperity of the past is restored.

It is public knowledge that the town of Esashi prospered through the industry of catching herring, the town was rich and its prosperity was described with the phrase 'even Edo [ancient Tokyo] could not compete', but now, with the decline of herring catching, there is no trace of such prosperity. On the other hand, in Esashi, the summer festival of the Ubagami Shrine is generally regarded as the occasion in which the town is in the greatest bustle, and the Esashi-Oiwake Festival is held annually and is an important event, but the town as a whole does not bustle much.

(4) The Programme was intended to pursue the origin of Esashi-Oiwake and conveys the facts that the Town of Esashi suddenly becomes lively in September when the Esashi-Oiwake National Festival is held and that there are even overseas participants in the Festival. In the narration of the Programme, in the part corresponding to the Prologue, there is a part reproduced in the lower part of the attached paper (hereinafter, 'the Narration').

2. In the present case, the jokoku appellee claims compensation of one million yen which is the equivalent of the royalty for the use of the Work, half a million yen in moral damages for the infringement of the moral rights (the right to have the name credited), and half a million yen of lawyer's fees, in total, two million yen, vis a vis the jokoku appellants for the infringement of the copyright (the right of adaptation and the right to broadcast) on the ground that the Narration is an adaptation of the Prologue.

3. The original instance court in summary, ruled as follows and acknowledged payment of 200 thousand yen damages which is the equivalent of the royalty, 200 thousand yen of moral damages, and 200 thousand yen of lawyer's fees.

(1) The Prologue and the Narration are similar in depicting that the Town of Esashi had prospered through herring catching and the bustle was described as such that 'even Edo could not compete', but now, without herring catching, there is no trace of such prosperity, and that in September, the Esashi-Oiwake Festival is held annually and the town regains its bustle and suddenly becomes lively. It is public knowledge that the Town of Esashi had once prospered through herring catching and the bustle was described as such that 'even Edo (Tokyo) could not compete', and that without herring catching, there is no trace of such prosperity now. However, it is a general view in the Town of Esashi that the summer festival of the Ubagami Shrine is the occasion in which the town is in the greatest bustle, and the view that the Esashi-Oiwake Festival is such an occasion is different from the view of the inhabitants of the Town, which

holds that the summer festival of the Ubagami Shrine is the occasion in which the town is in the greatest bustle, and is a unique view of the jokoku appellee, who has a particular compassion with Esashi-Oiwake.

(2) The Narration narrates the substance of the Prologue in the same sequential order and not only is the content of the expression similar, but the expression on the event which attracts the greatest bustle of the year is similar to that in the Prologue, although it is different from the general view, and the external form of expression is similar in most parts, and therefore, it is possible to directly perceive the essential characteristics of the form of expression of the Prologue.

(3) Therefore, it can be said that the Narration is an adaptation of the Prologue, and the production and broadcasting of the Programme is an infringement of the right of adaptation, broadcasting and the right to have the name credited by the jokoku appellee on the Work.

4. However, the above ruling of the original instance court is not justifiable. The reasons are as follows:

(1) The adaptation of a literary work (Article 27 of the Copyright Law) means the creation of another work in which those who have access to it may directly perceive the essential characteristics of the expression of an existing work, based upon an existing work and by maintaining the essential characteristics of its expression, modifying, increasing or reducing, or altering its specific expressions, and newly expressing thoughts or feelings in a creative manner. Since the Copyright Law is designed to protect the creative expression of thoughts or feelings (Article 2, para.1, subpara.1 of the Copyright Law), if a work which has been created on the basis of an existing work is identical to an existing work merely in a part which is not in itself an expression, or a part which has no creativity in expression such as the thought, feeling, or idea, facts or incidents, it should not be regarded as an adaptation of an existing literary work.

(2) In the present case, the Prologue and the Narration are similar in describing that the Town of Esashi had once prospered through herring catching and the bustle was described as such that 'even Edo (Tokyo) could not compete', that now, without herring catching, there is no trace of such prosperity, but in September, the Esashi-Oiwake Festival is held annually and the town regains its bustle and suddenly becomes lively, and also in the sequence of expression. However, of the parts which are similar between the Prologue and the Narration, it is public knowledge that the Town of Esashi had once prospered through herring catching and the bustle was described as such that 'even Edo (Tokyo) could not compete', that now, without herring catching, there is no trace of such prosperity and these parts are a mundane introduction to the Town of Esashi, and the identity can be merely found only in the part which is not an expression per se.

It may be the case that it is a unique view or perception of the jokoku appellee that the town regains its bustle and suddenly becomes most lively at the time of the National Festival of Esashi-Oiwake which is different from the general view of the inhabitants of the Town, but this perception is not in itself an expression which should be protected by the Copyright Law, and therefore, it is not prohibited under the Copyright Law to express the same perception. By expressing the view that in September, the Esashi-Oiwake Festival is held annually and the town regains its bustle of the old days and suddenly becomes lively, the Narration can be regarded as identical to the Prologue merely in a part which is not an expression per se, and in specific expressions, they are different. Furthermore, the way the Narration proceeds is the same in the sequence of describing the facts which forms the structure of the Prologue, but the sequence of description cannot in itself be found to be original, and has similarity only in the part which does not have originality in its expression. Besides, if one looks at the Narration which comprises the above parts as a whole, the length is shorter than the Prologue by far, and has been broadcasted with the background filmed by the jokoku appellants, those who have access to it cannot directly perceive the essential characteristics of the expression of the Prologue.

Although the Narration has been created on the basis of the Work, the parts which are common with the Prologue are parts which are not an expression per se, or have no creativity in expression, and one cannot perceive the essential characteristics of the expression of the Prologue from the Narration, and therefore, the Narration is not an adaptation of the Prologue.

5. Conclusion

Thus, as explained above, the production and broadcasting of the Programme is not an infringement of the right of adaptation, broadcasting, or the right to have the name credited regarding the Work, and therefore, the claims for compensation by the jokoku appellee should all be dismissed. The ruling of the original instance court and the court of first instance which acknowledged part of the claims of the jokoku appellee, based upon a different view, has erred in law which evidently affects the judgment. The arguments are in line with the above and with grounds. Therefore, the part of the judgment of the original instance court in which the jokoku appellants had lost shall be quashed, the judgment of the court of first instance on this part shall be revoked and the claims of the jokoku appellee shall all be dismissed. .

Thus, the justices unanimously rule as the main text of the judgment.

Presiding judge

Justice IJIMA Kazutomo

Justice FUJII Masao
Justice OHDE Takao
Justice MACHIDA Akira
Justice FUKAZAWA Takehisa

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