

Unfair competition	Date	January 26, 2021	Court	Intellectual Property High Court, Second Division
	Case number	2020(Ne)10030		
<p>- A case in which the court found that regarding "望月流" (Mochizuki Ryu), which is a school of a Japanese traditional music, Nagauta-bayashi music, an indication of "望月" (Mochizuki) is well known as an indication of business of the Appellee, who is in the position of "Iemoto" (the head) to control "望月流" (Mochizuki Ryu), which is a group of professional players using "望月" as the last name of their stage names, and that the indication of "望月" constitutes a well-known indication of business of another person in relation to the Appellants who have not received permission from the Appellee to use a natori-name (name as a master accredited by a school).</p>				

Case type: Injunction against act of unfair competition

Result: Appeal dismissed

References: Article 2, paragraph (1), item (i) and Article 3, paragraph (1) of the Unfair Competition Prevention Act

Judgment of the prior instance: Tokyo District Court, 2018(Wa)27155, rendered on March 25, 2020

Summary of the Judgment

1. In this case, the Appellee, who engages in dissemination of Nagauta-bayashi music and other business activities, alleged that the name "望月" (Mochizuki) is well known as an indication of business of the Appellee, who is the Iemoto (the head) of the Mochizuki Ryu Soke (the originator of a group for performing a Japanese traditional music, Mochizuki Ryu) and has the stage name "十二代目望月太左衛門" (MOCHIZUKI Tazaemon the 12th), and that the act of the Appellants to use the name "望月," which is identical to the aforementioned indication of business of the Appellee, for their business activities of Nagauta-bayashi music, corresponds to the use of an indication of business that is identical to the well-known indication of business of another person, and therefore that it constitutes unfair competition as set forth in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act. Based on these allegations, the Appellee demanded an injunction against the use of the name "望月" by the Appellants as a stage name for Nagauta-bayashi music and the use of the name by indicating it on their name plates, signs, and printed materials based on Article 3, paragraph (1) of the same Act. The judgment in prior instance approved all the claims of the Appellee, and the Appellants filed an appeal.

2. In this judgment, the court held as outlined below concerning the main issue, whether

the indication of "望月" constitutes a well-known indication of business of another person in relation to the Appellants, and dismissed all appeals by the Appellants.

(1) Generally, in the field of traditional performing arts, the Iemoto is the head of each school and is in a position to control the operations of the school by permitting his/her disciples to use a natori-name with the last name of the Iemoto as the last name of their stage name, or by issuing a certification to his/her disciples. A person who received permission to use a natori-name from the Iemoto engages in activities using a stage name (natori-name) with the last name of the Iemoto, as in the case of Mochizuki Ryu. These rules are known widely to persons involved in Nagauta music and similar traditional performing arts, such as Kabuki, etc., as well as to consumers consisting of devotees of traditional performing arts, etc., including Nagauta music. MOCHIZUKI Tazaemon the 10th, 11th, and 12th have engaged in activities as persons in the position of the "Iemoto" who represent the Mochizuki Ryu by permitting their disciples to use the natori-name as the "Iemoto" or by holding concerts in which people under the Mochizuki Ryu participate, and they have been recognized as the "Iemoto" who control the Mochizuki Ryu, not only by people under the Mochizuki Ryu, but also by third parties.

According to these facts, it is found that the indication of "望月" became well known as the indication of business of the Appellee as the "Iemoto" who controls "望月流" (Mochizuki Ryu), which is a group of professional players who use "望月" as the last name of their stage names, at least by June 1994, when the Appellee succeeded to the name MOCHIZUKI Tazaemon the 12th.

(2) The Appellants have not received permission to use the natori-name of "望月" for the last name of their stage names from the Appellee and it was not found that there are grounds to justify the use of "望月" as their last name as members of "望月流" based on the article of evidence. Therefore, the indication of "望月" constitutes a well-known indication of business of another person in relation to the Appellants.

Judgment rendered on January 26, 2021

2020(Ne)10030, Appeal case of seeking injunction against the use of a name

(Court of prior instance: Tokyo District Court, 2018(Wa)27155)

Date of conclusion of oral argument: December 16, 2020

Judgment

Appellant (Defendant in the first instance) X1

Appellant (Defendant in the first instance) X2

Appellant (Defendant in the first instance) X3

Appellant (Defendant in the first instance) X4

Appellant (Defendant in the first instance) X5

(hereinafter the aforementioned five persons are collectively referred to as "Appellant X1, et al.")

Appellant (Defendant in the first instance) X6

(hereinafter referred to as "Appellant X6")

Appellee (Plaintiff in the first instance) Y known as MOCHIZUKI Tazaemon the 12th

Main text

1. All of the appeals shall be dismissed.
2. The Appellants shall bear the cost of the appeal.

Facts and reasons

Abbreviations of terms as used herein and the meaning thereof are the same as those used in the judgment in prior instance unless they are assigned or defined in this judgment, and the terms "Defendant X1," "Defendant X2," "Defendant X3," "Defendant X4," "Defendant X6," and "Defendant X5" as used in the judgment in prior instance are deemed to be replaced with "Appellant X1," "Appellant X2," "Appellant X3," "Appellant X4," "Appellant X6," and "Appellant X5," respectively.

No. 1 Judgment sought by parties

1. Appellant X1, et al.

(1) The part of the judgment in prior instance related to Appellant X1, et al. shall be rescinded.

(2) All of the Appellee's claims against Appellant X1, et al. shall be dismissed.

2. Appellant X6

(1) The part of the judgment in prior instance related to the Appellant X6 shall be rescinded.

(2) The Appellee's claim against Appellant X6 shall be dismissed.

3. Appellee

The same as Paragraph 1 in the Main Text.

No. 2 Outline of the case

In this case, the Appellee, who engages in dissemination of Nagauta-bayashi music and other business activities, alleged that the name "望月" (Mochizuki) is well known as an indication of business of the Appellee, who is the Iemoto (the head) of the Mochizuki Ryu Soke (the originator of a group for performing a Japanese traditional music, Mochizuki Ryu) and who has the stage name "十二代目望月太左衛門" (MOCHIZUKI Tazaemon the 12th), and that the act of the Appellants to use the name "望月," which is identical to the aforementioned indication of business of the Appellee, for their business activities of Nagauta-bayashi music, corresponds to the use of an indication of business that is identical to the well-known indication of business of another person, and therefore it constitutes unfair competition as set forth in Article 2, paragraph (1), item (i) of the Unfair Competition Prevention Act (hereinafter referred to as "Act"). Based on these allegations, the Appellee claimed an injunction against the use of the name "望月" by the Appellants as a stage name for Nagauta-bayashi music and the use of the name through the means of indicating it on their name plates, signs, and printed materials based on Article 3, paragraph (1) of the Act.

On the contrary, the Appellants contested the Appellee's allegations by alleging that the name "望月" is not an indication of business of the Appellee alone, but an indication of business of the overall Mochizuki Ryu family that consists of a sub-group to which the Appellee belongs, a sub-group to which the Appellants belong, and other multiple sub-groups, and does not constitute an indication of business of another person in relation to the Appellants, that the indication of business of Appellant X6 and the indication of business of the Appellee are not identical and there is no possibility of creating confusion between these indications, and that there is no infringement of business interests.

The court of prior instance found that the name "望月" falls under a well-known indication of business of the Appellee, who is another person in relation to the Appellants and approved all the claims of the Appellee, and the Appellants filed an appeal.

1. Basic facts (facts not disputed between the parties and facts that are found based on the evidence and the entire import of oral arguments)

The basic facts are as described in line 24 on page 2 through line 11 on page 5 of the judgment in prior instance and therefore cited herein, except for making the following corrections.

The section from line 11 to line 16 on page 3 of the judgment in prior instance is altered as follows:

"B. A general incorporated association Nagauta Association (hereinafter referred to as 'Nagauta Association') was established with the aim to preserve and to hand down to the next generation Nagauta music, as well as to improve and disseminate Nagauta music, and thereby to contribute to developing art and culture in Japan, and it has been engaging in business to hold concerts, etc. (Exhibit Ko 3, Exhibits Ko 8-1 and 8-2, and Exhibit Ko 52). An individual who agrees with the aims of the Nagauta Association can join the Nagauta Association as a regular member by obtaining the approval of the Board. At the time in 2016, according to the internal rules of the Nagauta Association, individuals were required to obtain the approval of the representative of each sub-group; however, the internal rules were revised in October 2019 and the approval of the representative of each sub-group is no longer required (Exhibits Ko 4-1 and 4-2, Exhibits Ko 24 and 51, and the entire import of oral arguments)."

2. Issues

- (1) Whether the indication "望月" falls under a well-known indication of business of another person in relation to the Appellants (Issue 1)
- (2) Whether it can be said that Appellant X6 uses an indication of business identical to the indication "望月" (Issue 2)
- (3) Whether there is the possibility of creating confusion (Issue 3)
- (4) Whether business interests are infringed (Issue 4)

(omitted)

No. 3 Judgment on issues

1. Factual situation

The aforementioned basic facts and facts that are found based on the evidence and the entire import of oral arguments are as described in line 3 on page 10 through line 17 on page 16 of the judgment in prior instance and therefore cited herein, except for the following corrections.

- (1) The section from "concerning 'Morishita-ha (Morishita sub-group)'" in line 17 through

'sub-group' in line 18 on page 11 of the judgment in prior instance is altered as follows:

"Concerning 'Morishita-ha (Morishita sub-group),' there is a statement that young Sakichi the 2nd, who had controlled a sub-group of Hayashi music under a society of Kensei-Kai with a talented disciple during the Taisho era, died after the World War II and his son succeeded to the name of Sakichi; however, the disciple of Sakichi the 2nd became an adopted child of *P* and the disciple established another sub-group."

(2) The phrase "Exhibit Otsu No. 5" in line 22 on page 11 of the judgment in prior instance is altered to "Exhibit Otsu 5."

(3) The section from line 15 through line 26 on page 12 of the judgment in prior instance is altered as follows:

"(3) Circumstances, etc. after the succession to the name of Tazaemon the 11th
A. Succession to the name of Tazaemon the 11th

O, who is the first son of Tazaemon the 9th, succeeded to the stage name of Tazaemon the 11th in June 1988 (Exhibit Ko 14 and Exhibit Otsu 4).

In July 1987, before the succession to the name of Tazaemon the 11th, *O* wrote a letter (Exhibit Otsu A28) to *C*, a Kabuki player, in which *O* alleged the existence of a 'commitment' concerning the stage name of Tazaemon, that is, if Tazaemon the 10th dies or a similar event occurs, *O* will succeed to the name of Tazaemon the 11th and the names of Tazaemon the 12th and thereafter will be succeeded to by the first sons of Tazaemon the 9th and Tazaemon the 10th alternately, and the letter also contained the following statements: 'I was born with the destiny to supervise Naniwamachi-ha (Naniwamachi sub-group) of the Mochizuki Ryu,' 'I would be too ashamed to face my ancestors if the Mochizuki Ryu were split apart,' and 'there are relatives who misconstrue the commitment to be out of interest.'

Later, an agreement (Exhibit Otsu A27) was prepared by *O*, which indicated that *O*, a child of Tazaemon the 9th, had become Tazaemon the 11th as of April 25, 1988, for the period until the seventh anniversary of the death of Tazaemon the 10th, but also that the Appellee would succeed to the name of Tazaemon the 12th in the event where any circumstances occur to make it impossible for *O* to fulfill the role of Tazaemon the 11th, and the president of Shochiku Co., Ltd. and Sakichi the 3rd (*A*) affixed their signature and seal on the agreement as observers.

B. Establishment of a society of 'Mochizuki-Kai' by Tazaemon the 11th and statements in its newsletter

Tazaemon the 11th established 'Mochizuki-Kai' in June 1989 and assumed the office of chairperson (Exhibit Ko 14 and Exhibit Otsu 4). 'Mochizuki-Kai' issued an inaugural issue of its newsletter in March 1991 and held the first Hogaku-bayashi music concert,

'Mochizuki-Kai,' on April 13, 1991 (Exhibit Ko 50-1, and Exhibits Otsu 4 and 20). Six issues of the aforementioned newsletter were published by September 1, 1997. In the newsletter, Tazaemon the 11th consistently posted his articles at the top of the newsletter in the capacity of the 'Iemoto' until the Appellee, who is the 12th, succeeded to the name of Tazaemon. At the top of inaugural issue of the newsletter, Tazaemon the 11th stated that 'the Iemoto refers to a person or 'family' that serves as leader in passing down the legitimacy of a group or a sub-group and the Iemoto is a presence that establishes 'a philosophy' that is referred to as '道 (do)' (way of an art) such as Kodo (incense burning), Sado (tea ceremony), Kado (flower arrangement), Budo (martial arts), etc. in addition to the performing arts as unique traditional ways in Japan, and is responsible for passing down the principles through artistic skills to the next generation,' and is also mentioned 'as MOCHIZUKI Tazaemon the 11th who supervises Mochizuki-Kai, ...' (Exhibits Ko 50-1 through 50-6, and Exhibits Otsu A45 and A46).

In addition, in the inaugural issue of the 'Mochizuki-Kai' newsletter, *D*, who was the president of Seio Printing Co., Ltd. and the director of the Japan Printing Industries Association, stated that 'The name of 'MOCHIZUKI Tazaemon' represents a very distinguished family in Japanese hand drums and Hayashi music and is broadly known to the general public in addition to people in Japanese traditional music circle...' (Exhibit Ko 50-1 and Exhibit Otsu A45).

C. Statements in the Program (Exhibit Ko 14)

On June 27, 1993, Tazaemon the 11th held, as the 11th Iemoto, a Hayashi music concert for the memorial of MOCHIZUKI Tazaemon the 9th at the Kabuki-za Theater, in which Kabuki players *C* and *Q* and Nagauta music players from other groups, including *R*, participated twice in a matinee performance and night performance. In the greetings of the chairman of Shochiku Co., Ltd. in the program for the concert (Exhibit Ko 14), Tazaemon the 11th was indicated as 'Tazaemon, who is the Iemoto of the Mochizuki Ryu that carries on the history and tradition of more than two hundred years and several decades since the founder' and Tazaemon the 9th was indicated as 'the 9th Iemoto.' A 'major chronological record of MOCHIZUKI Tazaemon the 11th' in the program contained a statement, 'June 1988: Succeeded to the 11th Iemoto, MOCHIZUKI Tazaemon,' and the colophon of the program also contained the statement, 'the 11th Iemoto, owner of Mochizuki-Kai, MOCHIZUKI Tazaemon' (Exhibit Ko 14)."

(4) The phrase "A child of Sakichi the 3rd" is inserted after "called himself" in line 3 on page 14 of the judgment in prior instance.

(5) The term "名籍" in line 7 on page 14 of the judgment in prior instance is altered to "名跡" (alteration of kanji).

(6) The following is added as a new line after the end of line 17 on page 14 of the judgment in prior instance.

"C. Concerts held by the Appellee

The Appellee co-hosted a 'concert in memory of MOCHIZUKI Tazaemon the 10th' on March 20, 2008. In the program of the concert (Exhibit Ko 48), Tazaemon the 10th is indicated as '10th Soke Iemoto of Kabuki-Bayashi Music Mochizuki Ryu, MOCHIZUKI Tazaemon' and 'the 10th Iemoto, MOCHIZUKI Tazaemon, Master.' In the concert held by the Appellee on March 2, 2014, the Appellee hosted the concert as 'Hayashi Music Mochizuki Ryu Soke Iemoto, MOCHIZUKI Tazaemon the 12th' (Exhibit Ko 49). Sakichi the 4th participated in both concerts (Exhibits Ko 48 and 49)."

(7) Item "C" in line 18 on page 14 of the judgment in prior instance is altered to item "D."

(8) The section from line 12 on page 15 through line 7 on page 16 of the judgment in prior instance is altered as follows:

"E. Submission of a petition by Sakichi the 4th and other persons

Persons, including the Appellants, who received permission to use the natori-name from Sakichi the 4th applied to join the Nagauta Association in December 2014; however, they could not join the Nagauta Association on the grounds that they had failed to obtain the approval of the representative of each sub-group, which had been required under the internal rules before the revision in October 2019 (Exhibits Ko 23, 24, and 51). Therefore, Sakichi the 4th, *F*, *G*, *H*, *N*, and *J* submitted a petition to the Nagauta Association on January 25, 2016, and 29 persons who use '望月' in the last name of their stage names, including those calling themselves members of 'Morishita-ha,' including Sakichi the 4th, and persons who received permission to use the natori-name from successive Tazaemon, submitted the Petition to board members of the Nagauta Association in August 2016, respectively (Exhibits Ko 23 and 24, and Exhibits Otsu 21-1 through 21-29). In the Petition, they alleged that in the Mochizuki Ryu, 'Naniwamachi-ha,' 'Morishita-ha,' 'Tanbo-ha,' and 'Hiko-ha' and other sub-groups granted their disciples stage names respectively and engaged in activities separately; that the Appellee ignored these historical facts and repeatedly made an allegation that only Tazaemon is the unique Iemoto of the Mochizuki Ryu and the stage name obtained from any person other than Tazaemon is invalid, against persons who newly obtained a stage name from each sub-group, thereby having prevented them from joining the Nagauta Association; that these acts will not only reduce younger participants who will lead the next generation, but will also cause a loss to the field of Hayashi music; that a meeting was held with the Appellee but they could not reach a resolution; and that it was not allowed for the Nagauta Association to approve the Appellee to be the unique representative of the Mochizuki

Ryu. Based on these allegations, they requested the Nagauta Association to give special consideration and to resolve the problem quickly in consideration of the aforementioned circumstances. Incidentally, some submitted statements that the details of the Petition differ from their recognition (Exhibit Ko 45, Exhibits Ko 46-1 through 46-3, and Exhibits Otsu 21-1 through 21-29).

Later in October 2019, the internal rules of the Nagauta Association were revised and the approval of the representative of each sub-group was made unnecessary for joining the Nagauta Association and the Appellants were permitted to join the Nagauta Association. The letter issued by the Nagauta Association to Sakichi the 4th on that occasion stated that matters related to any authorities, etc. in the sub-groups of the Mochizuki Ryu were not considered upon examination of the admission (Exhibit Ko 51)."

2. Judgment on Issue 1 (Whether the indication "望月" constitutes a well-known indication of business of another person in relation to the Appellants)

(1) As to whether the business activities of the Appellee constitute a business, it is as described in line 20 through line 25 on page 16 of the judgment in prior instance and therefore cited herein.

(2) Whether the indication "望月" constitutes a well-known indication of business of the Appellee and constitutes a well-known indication of business of another person in relation to the Appellants

These are as described in line 1 on page 17 through line 16 on page 19 of the judgment in prior instance and therefore cited herein, except for the following corrections.

A. The phrase "されたもの" in line 14 on page 17 of the judgment in prior instance is altered to "された者." (alteration from hiragana to kanji.)

B. The section from "In addition," in line 16 through "the 9th Iemoto" in line 21 on page 17 of the judgment in prior instance is altered as follows:

"In addition, as mentioned in 1. (3) B. above, Tazaemon the 11th also established 'Mochizuki-Kai and consistently called himself as 'Iemoto' on the assumption that 'Iemoto' refers to the person who leads the group in its group newsletters and, as mentioned in 1. (3) C. above, on June 27, 1993, Tazaemon the 11th held a Hayashi music concert for memorial of MOCHIZUKI Tazaemon the 9th as the 11th Iemoto at the Kabuki-za Theater, in which Kabuki players *C* and *Q* and Nagauta music players from other groups, including *R*, participated. In the greetings of the chairman of Shochiku Co., Ltd., Tazaemon the 11th was indicated as 'Tazaemon who is the Iemoto of the Mochizuki Ryu that carries on the history and tradition of more than two hundred years and several decades since the founder' and Tazaemon the 9th was indicated as 'the 9th Iemoto.' In addition, in the newsletter of Mochizuki-Kai, *D* also stated that 'MOCHIZUKI Tazaemon'

represents 'a very distinguished family in Japanese hand drums and Hayashi music and the name is broadly known to the general public in addition to people in Japanese traditional music circles.'

C. The section from "granted permission to use the natori-name" in line 15 through the end of line 16 on page 18 of the judgment in prior instance is altered to "granted permission to use the natori-name and, as mentioned in 1. (5) C. above, held concerts as the Mochizuki Ryu Soke Iemoto."

D. The section from "was reported and" in line 25 through the end of line 26 on page 18 is altered to be "was reported."

E. The section from line 1 through the end of line 16 on page 19 of the judgment in prior instance is altered as follows:

"B. According to No. 2, 1. (2) above and 1. (3), (4), and (6) above, the Mochizuki Ryu is found to be well-known among Consumers as a traditional group of Nagauta music.

According to No. 2, 1. (1) A. above, evidence (Exhibits Ko 47 and 50-1), and the entire import of oral arguments, generally, in the field of traditional performing arts, the Iemoto is the head of each group and is in a position to control the operations of the group by permitting his/her disciples to use a natori-name with the last name of the Iemoto as the last name of their stage names, or by issuing a certification to his/her disciples. A person who has received permission to use the natori-name from the Iemoto engages in activities using a stage name (natori-name) with the last name of the Iemoto, as in the case of the Mochizuki Ryu. These rules are widely known to Consumers. According to the circumstances reviewed in A. above, MOCHIZUKI Tazaemon the 10th, 11th, and 12th have engaged in activities as persons in the position of 'Iemoto' who represents the Mochizuki Ryu by permitting their disciples to use the natori-name or by holding concerts in which people involved in the Mochizuki Ryu participate, in the capacity of the 'Iemoto,' and it can be said that they have been recognized as the 'Iemoto' who is the person who controls the Mochizuki Ryu as mentioned above, not only by people involved in the Mochizuki Ryu, but also by third parties, such as the chairman of Shochiku Co., Ltd.

According to these facts, it is found that the indication '望月' became well known as the indication of business of the Appellee as the 'Iemoto' who controls '望月流' (Mochizuki Ryu), which is a group of professional players who use '望月' as the last name of their stage names, at least by June 1994, when the Appellee succeeded to the name MOCHIZUKI Tazaemon the 12th.

C. As mentioned in No. 2, 1. (4) G. above, the Appellants have not received permission to use the natori-name of '望月' for the last name of their stage names from the Appellee and it is not found that there are grounds to justify the use of '望月' as their

last names as members of '望月流' (Mochizuki Ryu) based on the evidence (authority to permit the use of the natori-name of Sakichi the 4th will be explained later). Therefore, the indication '望月' constitutes a well-known indication of business of another person in relation to the Appellants."

(3) Allegations of the Appellants in the prior instance

They are as described in line 18 on page 19 through line 5 on page 24 of the judgment in prior instance and therefore cited herein, except for the following corrections.

A. The phrase "petition dated August 2016" as described in line 9 on page 20 of the judgment in prior instance is altered to "Petition."

B. The term ". And" in line 12 on page 21 of the judgment in prior instance is altered to ", and."

C. The section from "In addition," in line 19 through "sub-group" in line 21 on page 21 of the judgment in prior instance is altered as follows:

"In addition, as mentioned in 1. (1) D. above, concerning 'Morishita-ha,' there is a statement in the Directory that a disciple of Sakichi the 2nd became an adopted child of P after the death of Sakichi the 2nd and the disciple established another sub-group."

E. The following is added as a new line after the end of line 15 on page 22 of the judgment in prior instance.

"There is no indication of 'Morishita-ha' in any of the evidence that Appellant X1, et al. submitted as a concert program of 'Morishita-ha' (Exhibits Otsu A31 through A40), nor in the register of disciples of Sakichi that was made in 1938 (Exhibit Otsu A48), and there is no statement to the effect that Sakichi is the 'Iemoto' in the register.

Sakichi the 4th held a 'concert in memory of MOCHIZUKI Sakichi the 3rd on the thirteenth anniversary of his death' on November 7, 2014. In the program (Exhibit Otsu A26), there is no indication of 'Morishita-ha' nor a statement referring Sakichi as the 'Iemoto.' In addition, when Sakichi the 4th participated in a concert of another sub-group held on October 8, 2018, there were many participants who were indicated as "Iemoto" regarding their title in the program of the concert (Exhibit Otsu A41); however, Sakichi the 4th was simply indicated as 'the 4th.'

In addition, as described in 1. (5) B. above, Sakichi the 4th told the Appellee that he would grant permission to use the natori-name to himself without obtaining the approval of the Appellee in September 2004; however, the Appellee rejected it. Then, in November 2004, a disciple of Sakichi the 4th received permission to use the natori-name from the Appellee and the Appellee participated, as the 'Iemoto,' in the ceremony to grant permission to use the natori-name (Exhibits Ko 18-2 and 18-3). In this manner, the Appellee acted to grant permission to use the natori-name to disciples of Sakichi the 4th

in the capacity of the 'Iemoto.' Additionally, as described in 1. (5) C. above, Sakichi the 4th participated in concerts in 2008 and 2014, where Tazaemon the 10th and the Appellee attended as the 'Iemoto.'

In addition, Appellant X1 stated in the self-introduction section on his website that '... received lessons in Nagauta-bayashi music from the Mochizuki Ryu Iemoto, MOCHIZUKI Tazaemon the 11th ... ,' while Appellant X1 did not describe himself as a person belonging to 'Morishita-ha,' whose 'Iemoto' is Sakichi the 4th (Exhibit Ko 16)."

E. The section from line 19 on page 23 through the end of line 2 on page 24 of the judgment in prior instance is altered as follows:

"The number of persons who prepared the Petition is only 29, including Sakichi the 4th, and 4 persons among them prepared statements to the effect that the details of the Petition differ from their recognition (Exhibit Ko 45 and Exhibits 46-1 through 46-3) subsequently. As mentioned in 1. (6) above, there are more than 100 members of the Mochizuki Ryu who are also members of the Nagauta Association, even in the Tokyo Branch alone, and it is presumed that even more persons belong to the Mochizuki Ryu throughout Japan. Based on this fact, it can be said that the Petition was prepared only by people in minority groups in the Mochizuki Ryu and it cannot be said that the Petition has any impact on the aforementioned findings and determinations."

(4) Allegations of the Appellants in this instance

The Appellants alleged in this instance that [i] the Furukawa family, which Sakichi the 4th is from, obtained permission to use the natori-name before the Y' family that succeeded to the name of Tazaemon; [ii] the presence of "Morishita-ha," another subgroup, had been accepted until the period of Tazaemon the 11th; [iii] the Appellee intends to create a fait accompli in order to monopolize the Mochizuki Ryu; [iv] the Nagauta Association recognized Sakichi the 4th as the Iemoto of Morishita-ha; [v] the greetings of the chairman of Shochiku Co., Ltd., in which Tazaemon was recognized as the "Iemoto," was only made for the purposes of the entertainment; [vi] the Appellee currently has no jobs related to Kabuki and other theatrical shows and therefore the indication of "望月" is not well-known as being the one held by the Appellee; [vii] Tazaemon is not supervising the entire Mochizuki Ryu; [viii] even if Appellant X6 gives performances under the name of "望月," it does not constitute Appellant X6's use of the indication of business of the Appellee; and [ix] the indication of "望月" is not well-known.

A. Regarding [i] above

The fact that the A' family obtained permission to use the natori-name before the Y' family in the old period, such as the Edo era or Meiji era is not found by evidence, such as Exhibits Otsu A25, A55, and A61. Since there is no other evidence to find this fact and

even if this fact is found, it cannot be immediately said that Sakichi the 4th has the authority to grant permission to use the natori-name based on this fact. Therefore, defense of prior use is not established.

B. Regarding [ii] above

As mentioned above, in light of the facts found in No. 3, 1. (3) of the judgment in prior instance that is cited after alterations as above, it cannot be found that Tazaemon the 11th accepted the presence of "Morishita-ha." Since Tazaemon the 11th recognized that the "Iemoto" leads groups and called himself "Iemoto," it is found that he recognized himself as the "Iemoto" to supervise the entire Mochizuki Ryu.

In a letter, Exhibit Otsu A28, among evidence submitted by Appellant X1, et al., *O*, who later became Tazaemon the 11th, mentioned "(if) the Mochizuki Ryu were split apart," etc. According to the context and the details of the agreement, Exhibit Otsu A27, which was created after the letter, it was found that there was a dispute concerning succession to the name of Tazaemon between *O*, who has a blood relationship with Tazaemon the 9th, and persons who have blood relationships with Tazaemon the 10th, and that it has no relationship with "Morishita-ha." In addition, it is found that the reason why *O* mentioned his intention "to supervise Naniwamachi-ha (Naniwamachi sub-group)" in the aforementioned letter is to emphasize that *O* has a blood relationship with Tazaemon the 7th, but not to show his acceptance of the presence of "Naniwamachi-ha," "Morishita-ha," and other independent sub-groups in the Mochizuki Ryu.

Even if Sakichi the 3rd affixed his name and seal to the aforementioned agreement, it cannot be immediately said that Sakichi the 3rd had the position of the head of an independent sub-group. Concerning "various difficult things" as mentioned in the article of *D* in a program, Exhibit Ko 14, it is not defined what it meant. According to the developments regarding the aforementioned succession to the name of Tazaemon the 11th, it is instead considered to indicate the dispute between *O*, who is a child of Tazaemon the 9th, and persons who have blood relationships with Tazaemon the 10th. In the press conference, Tazaemon the 11th said, "I would like to facilitate exchanges between sub-groups" (Exhibit Ko 5); however, whether the term "sub-groups" refers to those in the Mochizuki Ryu or sub-groups in groups other than the Mochizuki Ryu is not clear and it cannot be said that Tazaemon the 11th accepted the presence of independent sub-groups in the Mochizuki Ryu. According to the statements in the "Greetings" of Tazaemon the 11th and the statements by performers in a program, Exhibit Ko 14, it is not found immediately that the presence of "Morishita-ha" is accepted in the Mochizuki Ryu. In consideration of other allegations of the Appellants, it is not found that Tazaemon the 11th accepted the presence of "Morishita-ha."

Therefore, the allegation indicated in [ii] above cannot be accepted.

C. Regarding [iii] above

As mentioned in A. above, it is found that Tazaemon the 11th called himself as "Iemoto" in terms of a person who supervises the entire Mochizuki Ryu and that the Appellee who succeeded to the name of Tazaemon the 11th engaged in the activities as the "Iemoto" of "望月流" (Mochizuki Ryu) in the same way as Tazaemon the 11th, as held in No. 3, 2. (2) of the judgment in prior instance that is cited after alterations as above. On the contrary, according to circumstances indicated in No. 3, 2. (3) of the judgment in prior instance that is cited after alterations as above, it is not found that Sakichi the 4th had argued with the Appellee's engagement in activities as the "Iemoto" before 2013, when Sakichi the 4th started to allege his authority to grant permission to use the natori-name. Based on the above, it is not found that the Appellee is intending to create a fait accompli recently as alleged by Appellant X1, et al.

Concerning the admission of the Appellants in the Nagauta Association, as mentioned in No. 3, 1. (5) E. above that is cited by altering the judgment in prior instance as mentioned above, the Appellants were not permitted to join the Nagauta Association due to the internal rules at the time. It cannot be said that it is unjustifiable that the Appellee did not approve the admission in the Nagauta Association of the Appellants, who had used the last name of "望月" without receiving permission to use the natori-name from the Appellee.

Based on the above, the allegation indicated in [iii] above cannot be accepted.

D. Regarding [iv] above

According to the facts found in No. 3, 1. (5) E. of the judgment in prior instance that is cited after alterations as above, the Appellants were approved to join the Nagauta Association only because the internal rules were revised in October 2019 to make it unnecessary to obtain the approval of the representative of each sub-group and it is not found that this is because the Nagauta Association recognized the authority of Sakichi the 4th to permit the use of the natori-name and accept the presence of "Morishita-ha." Therefore, the allegation indicated in [iv] above cannot be accepted.

E. Regarding [v] above

It is difficult to consider that the chairman of Shochiku Co., Ltd. would refer to a person who is not the Iemoto as being the Iemoto of a sub-group of Nagauta music, which has a close relationship with Kabuki. Therefore, the allegation indicated in [v] above cannot be accepted.

F. Regarding [vi] above

Even if the Appellee cannot appear in Kabuki plays and theatrical shows temporarily

due to the impact of the novel coronavirus infectious disease, it is not found based on this fact alone that public recognition of "望月" of the Appellee has been lost. Therefore, the allegation indicated in [vi] above cannot be accepted.

G. Regarding [vii] above

As it was held in No. 3, 2. (2) of the judgment in prior instance that is cited after alterations as above, the Appellee has been engaging in activities as the "Iemoto" of "望月流" (Mochizuki Ryu). On the contrary, as it was held in No. 3, 2. (3) of the judgment in prior instance that is cited after alterations as above, from 1973 until today, it is difficult to say that "Morishita-ha" and "Tanbo-ha" have been engaging in activities independently and separately from activities of "望月流" (Mochizuki Ryu), whose Iemoto is Tazaemon. Even if there is the fact that Tazaemon the 11th granted permission to use the natori-name before succeeding to the name of Tazaemon the 11th or after he became Bokusei the 4th (Exhibits Otsu A52, A55, and A59) or even if there were two persons who obtained the same natori-name, *L*, in 1993 (Exhibits Otsu A56, A57, and A60), it cannot be said based on these facts that Sakichi the 4th has the authority to permit the use of the natori-name. Based on the ruling above, it cannot be said that these facts have any impact on the aforementioned findings and determinations.

In addition, the statement of *M'* the 3rd (Exhibit Otsu B1) only describes the status of the Mochizuki Ryu 70 to 100 years ago and does not have any impact on the aforementioned findings or determinations. The fact that there are no internal rules does not have any impact on the aforementioned findings or determinations.

Therefore, the allegation indicated in [vii] above cannot be accepted.

H. Regarding [viii] above

As it is held in No. 3, 2. (2) of the judgment in prior instance that is cited after alterations as above, the indication of "望月" is a well-known indication of business of the Appellee and using the last name of "望月" in Nagauta-bayashi performance activities falls under the use of an indication of business of the Appellee.

I. Regarding [ix] above

As it is held in No. 3, 2. (2) of the judgment in prior instance that is cited after alterations as above, the indication of "望月" is a well-known indication of business of the Appellee among the Consumers.

The Consumers include persons exclusively involved in Nagauta music and similar traditional performing arts, such as Kabuki, etc., as well as members of the general public who are devotees of traditional performing arts, etc., including Nagauta music. Therefore, the allegation of Appellant X6 that is against these facts cannot be accepted.

(5) Summary

As mentioned above, none of the aforementioned allegations of the Appellants can be accepted and no other matters that the Appellants alleged in this instance can be accepted.

3. Judgment on Issue 2 (Whether it can be said that Appellant X6 uses an indication of business identical to the indication of "望月")

As it was held in No. 3, 2. (2) of the judgment in prior instance that is cited after alterations as above, it is found that in the field of traditional performing arts, the fact that persons belonging to each sub-group engage in activities by using the stage name with the last name of the Iemoto is known widely to Consumers. Therefore, it should be said that the last name of "望月" out of the stage names used by the Appellants constitutes the main element as an indication of the source of business of the Appellants. "望月" that is the last name of the stage name of the Appellants and "望月" that is a well-known indication of business of the Appellee are identical.

4. Judgments on Issue 3 (Whether there is the possibility of creating confusion) and Issue 4 (Whether business interests are infringed)

(1) Regarding the possibility of creating confusion and infringement of business interests

Acts to create confusion as set forth in Article 2, paragraph (1), item (i) of the Act include an act that causes a person to mistakenly believe that there is any relationship between the person and another person who is an actor of a well-known indication of business (see the judgment of the Third Petty Bench of the Supreme Court, 1981(O)1166, rendered on May 29, 1984, Minshu Vol. 38, No. 7, at 920). In this case, if Appellants, who have not received permission to use the natori-name from the Appellee, engage in activities related to Nagauta-bayashi music by using the stage names including the last name of "望月" as an indication of their business, it can be said that it may create confusion to make Consumers consider that the Appellants belong to "望月流" (Mochizuki Ryu), for which the Appellee engages in activities as its Iemoto.

If there is the possibility of causing the aforementioned confusion, the possibility of infringement of business interests is affirmed, unless there are special circumstances (see the judgment of the Third Petty Bench of the Supreme Court 1979(O)145 rendered on October 13, 1981, Minshu Vol. 35, No. 7, at 1129). In this case, for example, it is found that there is the possibility that the Appellee who is the Iemoto of "望月流" (Mochizuki Ryu) may suffer a decrease in the value of the brand "望月流" (Mochizuki Ryu), a loss of the opportunity to receive consideration, and other business disadvantages.

(2) Allegations of the Appellants

A. According to the judgment of the Supreme Court for the case of Tenrikyo, Appellant X6 alleged that whether "competition is performed abusively by deviating from the range of free competition or disturbing the fair free competitive order for society as a whole"

substantively or not should be examined in this case. When judging whether it falls under Article 2, paragraph (1), item (i) of the Act or not, the requirements alleged by Appellant X6 are not necessary additions to the requirements set forth in said item. The judgment of the Supreme Court for the case of Tenrikyo did not hold to that effect.

B. Appellant X1, et al. alleged that even if they engage in activities of the performing arts by using the last name of "望月," it does not create confusion with the business of the Appellee. Appellant X6 also alleged that the business of an individual musician is unique and there is no possibility of creating confusion between the performances of Appellant X6 and the performances of the Appellee. However, as judged in (1) above, the possibility of creating confusion can be affirmed in this case.

C. Appellant X6 alleged that Appellant X6 is well known as an excellent musician; however, even if it is true, it does not have any impact on the determination concerning the possibility of creating confusion. In addition, Appellant X6 alleged that there is no possibility of creating confusion on the assumption that consumers are limited to persons who have knowledge of the status of Japanese traditional music. However, the aforementioned allegation that consumers are limited is not accepted, as held in 1. (4) I. above. Therefore, the aforementioned allegation of Appellant X6 lacks the premise and cannot be accepted. In addition, Appellant X6 alleged that the fact that fees for the natori-name cannot be obtained is related to the relationship between the master and the Appellee and therefore there is no infringement of business interests. However, the possibility of infringement of business interests can be found in this case, as mentioned in (1) above. It cannot be said that the circumstances alleged by Appellant X6 support his allegation that there is no possibility of infringement of business interests.

D. As mentioned above, the allegations of the Appellants do not have an impact on the determinations set forth in (1) above. Other allegations of the Appellants cannot be accepted in light of the aforementioned findings and determinations.

5. Claim for injunction

As examined in 1. through 3. above, activities of the Appellants while using the last name of "望月" when engaging in activities of Nagauta-bayashi music constitutes an act of unfair competition and there is the possibility that the business interests of the Appellee is infringed by such activities. Therefore, the Appellee can claim an injunction against the Appellants based on Article 3, paragraph (1) of the Act.

Considering the facts that the Appellants are engaging in activities related to Nagauta-bayashi music using stage names with the last name of "望月"; that a name plate indicating the natori-name is given when receiving permission to use the natori-name (Exhibit Ko 13-3, Exhibits Otsu 5 and 6, and Exhibit Otsu 10-2); that the stage names are

indicated in programs, etc. of concerts (Exhibit Ko 7, Exhibits Ko 8-1 and 8-2, and Exhibit Ko 9); and that there is the possibility to install signs indicating the stage names on occasions of those concerts, it can be said that the Appellee may claim an injunction against the Appellants' use of the name, "望月," as their stage names in relation to Nagauta-bayashi music and against their act of using the name, "望月," by indicating it on their name plates, signs, printed materials, etc. pursuant to Article 3, paragraph (1) of the Act.

Appellant X6 alleged that acceptance of the claim for injunction against Appellant X6 in this case may constitute discrimination by family origin, which is prohibited by Article 14, paragraph (1) of the Constitution; however, the Appellee's claim for injunction against the Appellants is based on the fact that the indication of "望月" is a well-known indication of business of the Appellee, but not based on the blood relationship or family origin of the Appellee. Therefore, the allegation of Appellant X6 is groundless.

No. 4 Conclusion

Consequently, the judgment in prior instance is reasonable. Therefore, all of the appeals in this case are dismissed and the judgment shall be rendered in the form of the main text.

Intellectual Property High Court, Second Division

Presiding judge: MORI Yoshiyuki

Judge: MANABE Mihoko

Judge: KUMAGAI Daisuke