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Guo Song et al. v. Heilongjiang Province, Raohe County, Sipai Township People's Government, et al.

Citation: The Beijing Higher People's Court's Civil Judgment No. Gaominzhongzi 246/2003

Date of judgment: December 17, 2003

Procedural history

The People's Government of the Sipai Hezhen Ethnic Community Township, Raohe County, Heilongjiang Province (Sipai) sued Guo Song, CCTV and the Beijing Beichen Shopping Center in the Beijing No. 2 Intermediate People's Court for infringement of the copyright in a work of folklore. It was decided in the first-instance judgment that the music work of the Boat Song on the Wusuli River (the song in suit) was an adapted work. Guo Song and CCTV appealed to the Beijing Higher People's Court.

Issue

1. Whether a local government had the right to sue in its own name for protection of the copyright in the works of folklore belonging to the local community?
2. The difference between, and determination of, an adapted work and an original work

Facts

The two songs of Missing My Spark and My Hunter Brother Has Come Back were folk songs substantially identical with the tunes of the Hezhen ethnic community living in the basin of the Wusuli River. They were works of folklore. In 1962, Guo Song, et al. went to the Hezhen ethnic community in the Wusuli River basin to collect folk songs, and found the Hezhen folk music

works, including the song *Missing My Spark*, and based on these songs, Guo Song et al. created the music work, *Boat Song on the Wusuli River*.

At a public performance in 1999, an anchor person presented the music work, *Boat Song On the Wusuli River* as a song Guo Song had created on the basis of the music elements of the Hezhen ethnic community, rather than a Hezhen folk song.

It was indicated, in the press carrying the song in suit between 1964 and 1991, that Guo Song composed the music or wrote both the music and words of the song in suit.

Guo Song did not give any explanation of the anchor's remark at the public performance, and accepted the improper authorship shown in the press.

Sipai sued on the grounds that the song in suit was a work of the Hezhen folklore and Guo song's act had infringed the copyright therein. During the first-instance trial, the plaintiff changed its litigant claim into one for establishing the music of the song in suit as adapted from the Hezhen folk music.

During the first-instance trial, both parties agreed that the China Music Copyright Association would be the organization to appraise the work in suit. In the appraisal conclusion made thereby was stated that: "1) the main part, namely the middle thematic tune, was substantially identical with the tune or melody of the songs *Missing My Spark* and *My Hunter Brother Has Come Back*; the beginning and concluding tones were wrote by Guo Song; and 2) the song in suit, adapted from the main thematic tune of the two folk songs, should be a piece of music created by adaptation or compilation, not an originally composed one."

Guo Song and CCTV appealed, arguing that Sipai was not entitled to bring the action, and the China Music Copyright Association's appraisal was procedurally and substantively flawed.

Rule of law

Article 4 of the General Principles of the Civil Law as of 1986 *In civil activities, the principles of*

voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed”.

Article 134, paragraph one (9) *The main methods of bearing civil liability shall be: ... (9) elimination of ill effects and rehabilitation of reputation; ...*

Article 6 of the Copyright Law as of 2001 *Measures for the protection of copyright in works of folklore shall be formulated separately by the State Council”.*

Article 12 *Where a work is created by adaptation, translation, annotation or compilation of a pre-existing work, the copyright in the work thus created shall be enjoyed by the adapter, translator, annotator, or compiler, provided that the exercise of such copyright does not prejudice the copyright in the preexisting work.*

Reasoning

1. The works of the folk music of the Hezhen ethnic community as represented by the songs of Missing My Spark and My Hunter Brother Has Come Back spreading among the people in the community were works of folklore, and should be protected under the law. As works of the nature, the folk music of the form of the Hezhen ethnic community was the cultural and intellectual wealth collectively created and owned by the people of the community. It did not belong to any particular member thereof, but was related to the interests of each of them. Any group or individual member of the community had the right to protect the works of folklore against infringement. As a local administrative authority at the township level in the ethnic community under the Constitution and other laws of China, Sipai could represent the common interests of the community. Accordingly, conforming to the basic principles of the Chinese Constitution and the other law provisions, Sipai was entitled to sue, in its own name, against the act infringing the legitimate rights and interests in the works of folklore of the Hezhen ethnic community to protect the public rights and interests of the community.

2. Adaptation in the sense of the Copyright Law meant creating a new work of originality on the basis of an original work by way of changing the form or use of the work. As a form of recreation,

adaptation was done mainly by making use of the original part of a pre-existing work. For adaptation of a music work, in the adapted work should be used the basic or important elements of the original music work and made creative change of the original tune, while keeping it from extinction. According to the appraisal conclusion that the thematic tune of the middle main part was substantially identical with the tunes or melodies of the songs *Missing My Spark* and *My Hunter Brother Has Come Back*, and the fact that the middle part of the music in the song in suit was somewhat different or creative compared with the original two folk songs, the middle part of the music in the song in suit should be one adapted from the main melody of the two folk songs. The middle part of the song in suit was one revealing the words, which was repeated three times. While the beginning or ending parts of the song in suit were originally created, and reached an extremely high level of artistic creation, the song in suit as a whole would have no fundamental tune of its own in the absence of the middle part. Accordingly, it was determined that this part was the main part of the entire music of the song in suit. Being an adapted work with its middle part being the main part thereof, the whole music work of the song in suit was a music work of adaptation.

Holding

1. Sipai was entitled to bring the suit, and had the right to sue in its own name to protect the music work of the Hezhen ethnic community.
2. The Boat Song of the Wusuli River was a music work of adaptation, with its tune adapted from the folk music of the Hezhen ethnic community.