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| Date | August 27, 2009 | Court | Intellectual Property High Court, Fourth Division |
| Case number | 2008 (Ne) 10063 | | |
| 1. Criterion for judging whether or not the use of the name or portrait of a famous person is illegal | | | |
| 2. A case, with respect to the use of the photographs of entertainers in a magazine article without their permission, in which the court dismissed their claims for damages on the grounds that such use cannot be found to have infringed the entertainers' exclusive right to control their own names and portraits | | | |

References:

Article 709 of the Civil Code

1. X1 and X2, the appellants, are entertainers who formed a female duo called "Pink Lady," and they were widely known for their performances in the late 1970s in Japan and were supported by a wide range of the public, from children to adults, to the extent that mimicking their dance became a kind of social phenomenon. In this case, X1 and X2 seek damages against Y, the appellee, alleging that their portrait photographs (the Photographs) were used without their permission in the article of the magazine published by Y, and such unauthorized use constitutes infringement of their right of publicity.

2. As the Tokyo District Court completely dismissed X1 and X2's claims in the prior instance, they appealed to this court.

3. In this judgment, the court found X1 and X2's claims to be groundless and dismissed their appeal, holding as follows.

(1) Whether or not the use of the name or portrait of a famous person is judged to be illegal should be considered based on a correlation and as a question of comparison between the person's exclusive right to control his/her own name and portrait, on one hand, and the constitutional guarantee of freedom of expression or the burden that the person was supposed to tolerate in the process of gaining prominence in society, on the other. Therefore, this question should be determined by comprehensively observing factors such as the purpose, method, and manner of the use of the person's name or portrait, how the portrait photographs have been acquired, the attributes of the person, the degree of his/her prominence, and his/her manner of using or managing his/her own name or portrait.

(2) In view of the composition of the article in question, its content as a report on a slimming method, and how the Photographs were used in the article, it is found that the purpose of using the Photographs in the article was to arouse interest among

readers in the article which introduces the method of slimming by dancing to Pink Lady's music, or to help readers remember the movements of the dance.

(3) Consequently, Y's use of the Photographs in the article cannot be deemed to have infringed X1 and X2's exclusive right to control their own names and portraits, beyond the bounds of the burden that they were supposed to tolerate in the process of gaining prominence in society.