Date	August 28, 2014	Court	Intellectual Property High Court, Third Division
Case number	2013 (Ne) 10068		
– A case wherein the court maintained the judgment in prior instance which denied that the makeup, selection of clothes and movement, etc. of the models in a fashion show has copyrightability or falls under the performance prescribed in the Copyright Act.			

Reference:
Article 2, Article 19, paragraph (1), Article 23, paragraph (1), Article 90-2, paragraph (1) and Article 92, paragraph (1) of the Copyright Act

1. Background

In this case, the appellants claimed against the appellees compensation for damages based on the following allegations with respect to appellee 1's act of obtaining the images of a fashion show held by the appellants ("Fashion Show") via an employee of appellee 2 and broadcasting some of such images ("Images"): [i] infringement of the copyright (right of public transmission) and neighboring rights of appellant 1 (a planning and production consulting company for events, etc.); and [ii] infringement of moral right of the author and moral rights of the performer of appellant 2 (a planning and operation agent for events). The appellants alleged that their copyright was infringed with respect to the following contents in the Fashion Show: [i] the makeup and hairstyling applied to each model; [ii] selection of clothes to be put on and the mutual coordinates thereof; [iii] selection of the accessories to be worn and the mutual coordinates thereof; [iv] choreography of the poses to be taken at certain positions on the stage; [v] choreography of the movement of taking off the clothes at certain positions on the stage; [vi] coordinates of the related makeup, clothes, accessories, poses and actions; and [vii] the order of appearance of the models and the images aired in background, etc.

The judgment in prior instance denied infringement of all of the rights mentioned above and dismissed the appellants' claims.

2. Whether or not the right of public transmission and the right to determine the indication of the author's name are infringed

The court denied infringement of the right of public transmission and the right to determine the indication of the author's name by holding as follows.

Anything that appears in the Images must have copyrightability but those items mentioned in [i], [ii], [iii] and [vi] above (excluding the parts of posing and movement with respect to [vi]) fall under what is generally called applied art.

It remains unclear from the wordings used in the Copyright Act as to whether or not applied arts would be protected as a work, and it may be construed that this issue is entirely left to the construction to be made in each case. Based on the existence of the judgment of a lower instance court on applied arts and the judgment of the Supreme Court on typefaces (1998 (Ju) No. 332, judgment of the First Petty Bench of the Supreme Court of September 7, 2000, Minshu Vol. 54, No. 7, at 2481), the following findings can be made: [1] Article 2, paragraph (2) of the Copyright Act should be construed as mere illustrations; [2] since there is no difference between a work of crafts of artistic value which is an individual work of art and a mass-produced work of crafts of artistic value, definitions provided in Article 2, paragraph (1), item (i) of the Copyright Act permit a construction where even a mass-produced work of crafts of artistic value would be protected as a work of art if it is produced for aesthetic appreciation in whole; [3] based on the definitions provided in Article 2, paragraph (1), item (i) of the Copyright Act, an applied art for practical use which can be recognized to be equipped with a part with an aesthetic feature that makes it an object of aesthetic appreciation apart from the structures necessary for practical use can be deemed to be objectively identical to a "(pure) artistic work in which thoughts or sentiments are expressed in a creative way," which would be obviously included in the "work" prescribed in said item, and such part should be protected as an artistic work under said item; and [4] an applied art for practical use which cannot be recognized to be equipped with a part with an aesthetic feature that makes it an object of aesthetic appreciation apart from the structures necessary for practical use cannot be deemed to be objectively identical to the "artistic work in which thoughts or sentiments are expressed in a creative way," which would be included in said item, and thus such art would not be protected as a work under said item.

The contents mentioned in [i] through [iii] above do not fall under [2] and [3] above and thus cannot be found to have copyrightability.

The contents mentioned in [iv] and [v] above are not subject to the issue of applied arts but are not especially new and thus cannot be found to have copyrightability.

In addition, based on the abovementioned decisions, the contents mentioned in [vi] above also cannot be found to have copyrightability.

Moreover, the order of appearance of the models among the contents mentioned in [vii] above cannot be found to be a production in which thoughts or sentiments are expressed in a creative way and thus cannot be found to have copyrightability. Since a different order is used in the Images, even if the order of appearance as mentioned above can be found to have creativity, the public transmission of such order of

appearance cannot be found to have made in the Images in a manner by which the viewer can perceive the abovementioned creativity. Furthermore, there is not sufficient evidence to find that the appellants are the copyright holders of the images aired in background, etc.

3. Whether or not the right to broadcast or the right to determine the indication of the author's name as the performer is infringed

The court denied infringement of the right to broadcast or the right to determine the indication of the author's name as the performer by holding as follows.

Except for the pictures used for the background image, the contents mentioned in [i] through [vii] above cannot be found to have copyrightability, and thus the choreography of the poses and movement of the models and the models' act of posing or moving with the selected hairstyles and makeup do not fall under the act of performing a work. In addition, even if the abovementioned pictures have copyrightability, the exhibition thereof does not fall under the act of performing a work.

The parts of the Fashion Show shown in the Images cannot be found to contain any "acting, dancing, musical performances, singing, reciting, declaiming or performing in other ways of a work" and parts that fall under any acts similar thereto can be found. The contents of the parts of the Fashion Show that are not shown in the Images per se are not clear and thus the parts of the Fashion Show other than the contents mentioned in [iv] and [v] above do not fall under the "similar acts" of "acting, dancing, musical performances, singing, reciting, declaiming or performing in other ways of a work." Moreover, the contents mentioned in [iv] and [v] above are nothing but an act of posing or moving in a common manner and thus do not fall under "similar acts which do not involve the performance of a work but which have the nature of public entertainment."

Judgment rendered on August 28, 2014
2013 (Ne) 10068 Appeal Case of Seeking Payment of Damages
(Court of prior instance: Tokyo District Court, 2012 (Wa) 16694)
Date of conclusion of oral argument: May 15, 2014

Judgment

Appellant: Yugen Kaisha maxavere
Appellant: X
Appellee: Japan Broadcasting Corporation
Appellee: WAG Inc.

Main text

1. All of the appeals of the appellants shall be dismissed.
2. The appeal costs shall be borne by the appellants.

Facts and reasons

No. 1 Objects of this appeal

1. Appellant Yugen Kaisha maxavere

(1) The judgment in prior instance shall be revoked with regard to Appellant Yugen Kaisha maxavere.

(2) The appellees shall jointly and severally pay Yugen Kaisha maxavere 9,434,790 yen and delay damages accrued thereon at a rate of 5% per annum from June 12, 2009 until the date of full payment.

2. Appellant X

(1) The judgment in prior instance shall be revoked with regard to Appellant X.

(2) The appellees shall jointly and severally pay Appellant X 1,100,000 yen and delay damages accrued thereon at a rate of 5% per annum from June 12, 2009 until the date of full payment.

No. 2 Outline of the case

1. In this case, the appellants alleged that an appellee, Japan Broadcasting Corporation, ("Appellee NHK"), received, via an employee of an appellee, WAG Inc., ("Appellee WAG"), a video of a fashion show held by the appellants and broadcast a segment of said video specified in the Video List attached to the judgment in prior instance (the "Video Segment") in its TV program, and thereby infringed the copyrights (the right to transmit to the public) and neighboring rights (broadcasting right) of an appellant, Yugen Kaisha maxavere, (the "Appellant Company") and the moral rights (the right of

attribution) of an appellant, X, ("Appellant X") as an author and a performer. The appellants demanded that the appellees shall jointly and severally pay 9,434,790 yen to the Appellant Company and 1,100,000 yen to Appellant X as damages based on the appellees' liability for a joint tort, i.e., infringement of the copyrights, neighboring rights, moral rights of author and performer (based on the employer liability in the case of Appellee WAG) (as an attendant claim, the appellants also demanded payment of delay damages accrued on said amounts at a rate of 5% per annum as specified in the Civil Code from June 12, 2009 until the date of full payment).

Since the judgment in prior instance dismissed all of the claims of the appellants, the appellants filed appeals respectively to seek the aforementioned judicial decisions.

(omitted)

No. 3 Court decision

This court found that Appellee NHK's act of broadcasting the Video Segment does not infringe the copyrights of the Appellant Company (the right to transmit to the public specified in Article 23, paragraph (1) of the Copyright Act), the moral rights of the author, Appellant X, (the right of attribution specified in Article 19, paragraph (1) of said Act), the broadcasting right of the Appellant Company (Article 92, paragraph (1) of said Act), or the right of attribution of the Appellant X as a performer (Article 90-2, paragraph (1) of said Act), and concluded that all of the appellants' claims are groundless for the following reasons.

1. Issue (1) (Issue of whether infringement of copyrights, neighboring rights, and moral rights of authors occurred or not)

(1) A. The Copyright Act defines a work protected by copyrights as "a production in which thoughts or sentiments are creatively expressed and which falls within the literary, academic, artistic or musical domain" (Article 2, paragraph (1), item (i) of the Copyright Act). Therefore, any work, etc. that expresses a thought or sentiment in a creative manner can be regarded as a copyrightable work and protected under said Act, whereas a thought, sentiment, idea, etc. that is not an expression per se or any expression that lacks creativity cannot be regarded as a copyrightable work and cannot be protected under said Act. In order for a work, etc. to be regarded as a "creative" expression, the work is not necessarily required to express the creator's originality in a strict sense. However, the work is required to express a certain distinctiveness of the creator. Any expression that is ordinary and commonplace can be regarded neither as an expression of the distinctiveness of the creator nor as a "creative" expression.

B. The assertion of copyright infringement would not be accepted, even if the allegedly infringed work, etc. can be regarded as creative as a whole in terms of expression in the aforementioned sense. It is necessary for the allegedly infringed part of the work to contain creative expressions of thoughts or sentiments and also to be considered to be copyrightable.

In this case, the appellants asserted that the act of broadcasting the Video Segment constitutes infringement of the copyrights for the following elements of the Fashion Show: [i] the makeup and hairstyle of each model, [ii] the selections and coordinates of outfits to be worn by each model, [iii] the selections and coordinates of accessories to be worn by each model, [iv] the choreography of a pose made by each model in a certain area of the stage, [v] the choreography of an undressing movement in a certain area of the stage, [vi] the coordinates of makeup, outfits, accessories, poses, and movements, and [vii] the order of stage appearance of the models and the background video. Therefore, it can be interpreted that the appellants intended to assert copyright infringement concerning any of the elements specified in [i] to [vii] above that are presented in the Video Segment. Therefore, it is necessary for the appellants to prove the copyrightability of the elements specified in [i] to [vii] above that are presented in the Video Segment.

C. Needless to say, most of the outfits and accessories used in the Fashion Show are so-called mass-produced fast fashion brand goods (Exhibits Ko 1 to 13, Hei 1, and the entire import of the oral argument). In consideration of the nature of those goods, it is obvious that those goods were produced for practical use. The appellants also alleged that the concept of the Fashion Show is to propose party styles for city life and resort life (dressed-up coordinates for women in cities and luxurious party styles for women in resort areas). Therefore, in light of the fact the Fashion Show is a show concerning fashion goods for practical use in each of these scenes, even if the combinations of makeup, hairstyle, outfits, and accessories specified in [i], [ii], [iii], and [vi] in B. above (in the case of [vi], the poses and movements are excluded) can be considered to be artistic creations, they are not produced for the purpose of display, etc. as is the case with artistic works, but are produced for practical use.

Regarding the issue of whether any artistic creation which is expected to be used for practical purposes or industrial purposes (generally called applied art), can be regarded as an artistic work, it is clear that a work of artistic craftsmanship can be regarded as an artistic work under the Copyright Act (Article 2, paragraph (2) of the Copyright Act). However, in the case of an object of applied art other than a work of artistic craftsmanship that is produced for the purpose of aesthetic appreciation, there are no

explicit provisions in the Copyright Act. Therefore, according to the wording of the Copyright Act, it is not clear whether such object can be protected as a work.

This issue should be examined from the perspective of legal interpretation. According to many precedents at lower courts and the Supreme Court precedent (Supreme Court judgment, 1998 (Ju) 332, Judgment of the First Petty Bench of the Supreme Court dated September 7, 2000, Minshu Vol. 54, No. 7, p. 2481) concerning a typeface, the aforementioned Article 2, paragraph (2) of the Copyright Act should be interpreted as a provision simply presenting examples. Since there is no objective difference between works of artistic craftsmanship produced on a single-item basis and those produced in mass quantity, based on the definition clause, i.e., Article 2, paragraph (1), item (i) of the Copyright Act, it should be interpreted that even mass-produced works of artistic craftsmanship should be protected as artistic works as long as those works as a whole are produced for the purpose of aesthetic appreciation. According to said definition clause of Article 2, paragraph (1), item (i) of the Copyright Act, even in the case of an object of applied art produced for practical purposes, if it is possible to separate the configuration necessary for practical purposes from the configuration with aesthetic qualities designed for aesthetic appreciation, said object can be considered to be objectively identical with a "work of (pure) art in which thoughts or sentiments are creatively expressed." Therefore, said artistic configuration should be protected as an artistic work which falls under Article 2, paragraph (1), item (i) of the Copyright Act as mentioned above. On the other hand, in the case of an object of applied art produced for practical purposes, if it is impossible to separate the configuration necessary for practical purposes from the configuration with aesthetic qualities designed for aesthetic appreciation, said object cannot be considered to be objectively identical with a "work of (pure) art in which thoughts or sentiments are creatively expressed" which falls under Article 2, paragraph (1), item (i) of the Copyright Act as mentioned above. Therefore, said object cannot be protected as a work specified in Article 2, paragraph (1), item (i) of the Copyright Act.

D. Based on these premises, first, the following sections will examine whether the right to transmit to the public and the right of attribution as an author was infringed or not.

(2) Issue of whether the right to transmit to the public (Article 23, paragraph (1) of the Copyright Act) and the right of attribution (Article 19, paragraph (1) of said Act) occurred or not

A. [ii] The selections and coordinates of outfits to be worn by each model, and [iii] the selections and coordinates of accessories to be worn by each model

(A) The outfits, accessories, etc. of a model in each scene of the Video Segment is as

shown in the photographs presented in the Video List attached to the judgment in prior instance. It can be found that [i] "the first outfit of Iline" is a combination of a black lace top, leopard-print skirt, black belt, purple ring earnings, and black headdress, [ii] "the second outfit of Anna" is a combination of a white one-piece dress with black polka dots, black belt, pearl necklace, and a pink and black headdress, [iii] "the first outfit of Anna" is a combination of a green one-piece dress, silver bracelet, and black headdress, [iv] "the second outfit of Izabella" is a combination of a black one-piece dress and black headdress, and [v] "the second outfit of Tamra" is a combination of a black fur coat, purple top, black skirt, purple bag, and headdress.

(B) However, while the aesthetic elements (appearance and attractiveness) of the selections and coordinates of outfits and accessories to be worn by models are expected to be viewed by others, the outfits, accessories, etc. of the models who appear in the scenes included in the Video Segment are almost all made by a fast fashion maker, "Forever 21," and are not designed by the appellants. Moreover, as found in (1) C above, these selections and coordinates are expected to be used for practical purposes such as parties, etc. in cities and resorts. Those outfits and accessories as a whole were not produced for the purpose of aesthetic appreciation. No part of them can be separated from the configuration for practical purposes and cannot be recognized to have aesthetic qualities that could be subject to aesthetic appreciation.

(C) On these grounds, the selections and coordinates of outfits and accessories to be worn by models cannot be found to be copyrightable.

B [i] The makeup and hairstyle of each model

(A) The makeup and hairstyle of each model in each scene of the Video Segment are shown in the photographs presented in the Video List attached to the judgment in prior instance as follows: [i] "the first outfit of Iline" show a model with her hair let down and swept backward [ii] "the first outfit of Anna" and "the second outfit of Anna" show a model with gently curled hair with the bangs down, [iii] "the second outfit of Izabella" show a model with the hair above her ears tied together and the hair below her ears curled and let down, and [iv] "the second outfit of Tamra" show a model with her hair strongly curled and let down. All of the models wore beauty makeup such as eyeshadow, eye lines, and lipstick.

(B) However, according to the appellants' allegation, it can be found that Appellant X showed the "Plans and Instructions" (Exhibits Ko 4 to 12) and photographs (Exhibits Ko 14 to 16) to hair and makeup artists and that those hair and makeup artists created the hairstyles and applied makeup accordingly, which were subsequently modified by Appellant X. Therefore, it is not clear whether Appellant X can be regarded as a person

who created the aforementioned makeup and hairstyles.

Furthermore, even if Appellant X can be regarded as a person who created the aforementioned makeup and hairstyles, while the aesthetic elements (appearance and attractiveness) were expected to be viewed by others, as found in (1) C above, these makeup and hairstyles were expected to be used in practice in combination with the outfits and accessories to be worn in parties, etc. in cities and resorts. Those makeup configurations and hairstyles as a whole were not produced for the purpose of aesthetic appreciation. No part of them can be separated from the configuration for practical purposes and they cannot be recognized to have aesthetic qualities that could be subject to aesthetic appreciation. On these grounds, the makeup and hairstyles cannot be considered to be artistic works.

(C) On these grounds, regarding the makeup and hairstyles applied to each model, it can be said that Appellant X is not the author or that the makeup and hairstyles are not copyrightable.

C. [iv] The choreography of a pose made by each model in a certain area of the stage, and [v] the choreography of an undressing movement in a certain area of the stage

(A) In the Video Segment, "the first outfit of Iline" shows a model who walks with both arms sweeping back and forth broadly and then stops walking and puts her both hands on her hip and twists her waist to the audience's left and right (left and right from the audience's viewpoint; hereinafter the same) (except for Scene 1 (1), which does not show a back-and-forth arm movement and only partially shows the twisting of the waist). "The second outfit of Anna" shows a model slowly walking forward. In Scene 1 (3), "the first outfit of Anna" shows a model walking with both hands on the hip who stops walking and moves the shoulders with her hands on her hips. In Scene 2 (2), the model was walking with both arms down and moving in a sweeping manner, stopped walking, faced forward slightly diagonally, then faced left and right, moving her shoulders with her arms down and moving in a sweeping manner. "The second outfit of Izabella" shows a model using her right hand to take out an object from a paper bag held by her left hand, shifted the object from the right hand to the left hand, opened her right hand and put it to an ear, spread her arms with palms facing upward, as if she were agitating the audience, and used her right hand to grab the object held in her left hand and threw the object with her right hand. "The second outfit of Tamra" shows a model who walked with both hands on her waist, stopped walking and twisted her waist, turned backward, and took off the fur coat, while walking.

(B) The aforementioned poses and movements are not the matter of applied art, but the matter of whether these poses and movements in fashion shows can be protected as a

work. However, it can be said that these poses and movements are not particularly new as poses and movements presented in fashion shows. The aforementioned poses and movements cannot be considered to express the originality of the creator. Therefore, the choreography of these poses and movements are not copyrightable. For the same reason, these poses and movements cannot be interpreted as works of choreography.

The appellants pointed out that the aforementioned poses and movements of the models have such characteristics as holding a paper bag, spreading the palm of the right hand and put it in an ear, and spreading both arms with the palms facing upward, as if the model were agitating the audience. However, according to the appellants' allegation, these movements are conducted in order to distribute gifts in the Fashion Show so that the sponsor, Maybelline, can provide samples to the audience, and to provide the audience with an opportunity to express their excitement by screaming (pages 16 to 17 of the second brief of the plaintiffs dated December 21, 2012 submitted to the court of prior instance). It is not particularly new to exhibit the aforementioned poses and movements for the aforementioned purposes.

Furthermore, the appellants alleged that the idea of having models exhibit the aforementioned movements, etc. in fashion shows are unique to Appellant X. However, even if the idea of having models exhibit the aforementioned movements can be considered to be new in fashion shows, it cannot be considered to be creative expressions of thoughts or sentiments per se. Thus, the appellants' allegation does not provide grounds for the copyrightability of the aforementioned movements, etc.

Therefore, the aforementioned allegation of the appellants is unacceptable.

D. [vi] The coordinates of makeup, outfits, accessories, poses, and movements

Regarding [i] to [v] mentioned in (1) B above, as found in A to C above, the court cannot find Appellant X as an author or cannot recognize copyrightability, since no combination of the elements specified in [i] to [v] can be considered to give a new impression that the originality of the creator is expressed. Therefore, no combination of [i] to [v] mentioned above can be considered to be copyrightable.

E. [vii] The order of stage appearance of the models and the background video

(A) According to the evidence (Exhibit Ko 2), in the Fashion Show, a total of eight models appeared on the stage, wearing two to three outfits each (20 patterns in total).

The aforementioned order of stage appearance is said to have been determined in consideration of practical factors such as the time for the models to change and the timing to distribute gifts. While recognizing that the aforementioned order of stage appearance was determined in consideration of the order of the presentation of outfits (first a monotone dress followed by a colorful dress, then an elegant dress followed by

another colorful dress, etc.), the aforementioned order of stage appearance cannot be recognized as a creative expression of thoughts and sentiments.

Moreover, Scene 1 (1) to (4) in the Video Segment correspond to the 1st, 11th, 2nd, and 13th stage appearance respectively, while Scene 2 (1) to (6) in the Video Segment correspond to the 1st, 2nd, 11th, 1st, 14th, and 13th stage appearance respectively. The Video Segment can be considered to consist of images of the Fashion Show sequenced in a random order. Therefore, even if the aforementioned order of stage appearance is recognized as creative, the Video Segment cannot be considered to have been publicly transmitted in a manner that allows the perception of the aforementioned creativity.

(B) Background video

In order to give a strong impression of "city fashion" and "resort fashion," a background video was selected for each scene of the Fashion Show to match the models and outfits in the scene. The plaintiff asserted that, in the Video Segment, Scene 1 (3) (Photograph (5) presented in the Video List attached to the judgment in prior instance) clearly shows Photograph 21 (Exhibit Ko 21), that Scene 1 (4) and 2 (6) (Photograph (7), (8), (23), (24) of said List) clearly show Photograph 54 (Exhibit Ko 21), and that Scene 2 (2) (Photograph (13) of said List) clearly shows Photograph 32 (Exhibit Ko 21).

However, the background video used in Scene 1 (3) (Photograph (5) presented in the Video List attached to the judgment in prior instance) is clearly different from Photograph (21) (Exhibit Ko 21). Said photograph cannot be considered to be shown in said Scene.

It is true that, according to the evidence (Exhibit Ko 1), Scene 1 (3) and Scene 2 (2) (Photograph (13) presented in the Video List attached to the judgment in prior instance) show Photograph 32 (Exhibit Ko 21), while Scene 1 (4) and Scene 2 (6) (Photograph (7), (8), (23), and (24) of said List) show Photograph 54 (Exhibit Ko 21).

However, according to the "Plaintiff's Description of the Evidence (Exhibits Ko 14 to 21)" dated May 17, 2013 prepared by the attorneys of the appellants in the prior instance, it is not clear who produced the photographs presented in Exhibit Ko 21. Since there is no other allegation about the person who took those photographs, it has to be said that even the photographer of those photographs is unidentifiable. Moreover, according to all of the evidence submitted to this case, there are no clear grounds to prove that the copyrights for the aforementioned photographs belong to the appellants. Regarding this point, in pages 9 to 10 of Appellee NHK's answer to the appellants' statement of appeal, the attorney of the appellants stated in the fifth session of preparatory proceedings in the prior instance held on May 17, 2013 that the photographs used as the background video in the Fashion Show were taken by a photographer upon

request of the Appellant X. However, in light of the information provided in the aforementioned Description of the Evidence, the accuracy of the aforementioned statement is questionable. Based on the premise that the aforementioned statement is accurate, the aforementioned photographer would be the author of the aforementioned photographs and there is no evidence to prove that the copyrights for the aforementioned photographs were assigned from the aforementioned photographer to the appellants.

Furthermore, the selection of the photographs alleged by the appellants cannot be considered to be creative.

Therefore, Appellee NHK's act of broadcasting the Video Segment including the background video containing the aforementioned photographs cannot be considered to constitute infringement of the appellants' copyrights.

(3) Summary

On these grounds, it can be said that the appellants are not the copyright owners concerning the elements (specified in [i] to [vii] of (1) B above) of the Video Segment or that those elements are uncopyrightable. Thus, an act of broadcasting the Video Segment cannot be considered to constitute infringement of the copyrights (the right to transmit to the public specified in Article 23, paragraph (1) of the Copyright Act) of the Appellant Company or the moral rights of the author, Appellant X (the right of attribution specified in Article 19, paragraph (1) of said Act).

In addition, even if the elements (specified in [i] to [vii] of (1) B above) of the Video Segment in the Fashion Show are uncopyrightable as found above, it can be interpreted that the Video Segment should be protected as a cinematographic work as long as the Fashion Show is filmed and fixed onto an object.

(4) Issue of whether the broadcasting right (Article 92, paragraph (1) of the Copyright Act) and the right of attribution as a performer (Article 90-2, paragraph (1) of said Act) were infringed

A. Infringement of the broadcasting right and the right of attribution as a performer will be recognized only if "performance" is broadcast or offered or presented to the public (Article 92, paragraph (1) and Article 90-2, paragraph (1) of the Copyright Act). The term "performance" means "acting dramatically, dancing, giving a musical performance, singing, giving a speech, giving a recitation, or by any other means for acting of work (including similar actions not involving the interpretation of a work but having the nature of a performing art)" (Article 2, paragraph (1), item (iii) of said Act).

B. Although the appellants alleged that the presentation of the choreography of the poses and movements can be regarded as performance, the aforementioned movements,

etc. cannot be regarded as works as described in (2) (C) above. Therefore, the models' act of making the aforementioned movements or poses would constitute neither "performing … of a work" nor "performance."

The appellants also alleged that, since the elements specified in [i] to [vii] of (1) B above can be regarded as works, the models' act of making the aforementioned poses and movements with the aforementioned hairstyles, makeup, and outfits constitutes performance of works and that Appellant X, who staged said performance, has the rights as a performer.

However, as found in (2), the aforementioned elements specified in [i] to [vii] cannot be considered to be copyrightable except for the photographs used in the background video. Even if the photographs used in the background video are considered to be copyrightable, the presentation thereof would not constitute the "performing ... a work." Therefore, the models' act of making poses and movements with the aforementioned hairstyles, makeup, and outfits as alleged by the appellants cannot be considered to be the "performing .... a work."

Thus, the aforementioned allegation of the appellants is unacceptable.

Furthermore, the appellants alleged that the Fashion Show as a whole can be considered to be "similar actions not involving the interpretation of a work but having the nature of a performing art" (Article 2, paragraph (1), item (iii) of the Copyright Act) and should be regarded as performance.

However, according to all of the evidence submitted to this case, except for the elements specified in [iv] and [v] of (1) B mentioned above, no part of the Video Segment of the Fashion Show can be considered to be "acting dramatically, dancing, giving a musical performance, singing, giving a speech, giving a recitation, or by any other means for acting of work" (Article 2, paragraph (1), item (iii) of the Copyright Act) or any other similar actions. Moreover, in the case of any part of the Fashion Show that is not shown in the Video Segment, the content of such part itself is not clear. Therefore, no part of the Fashion Show other than the elements specified in [iv] and [v] mentioned above can be considered to be an action similar to "acting dramatically, dancing, giving a musical performance, singing, giving a speech, giving a recitation, or by any other means for acting of work." Regarding the elements specified in [iv] and [v] above, the models merely made poses and movements found in (2) C above. The manner of making those poses and movements was ordinary. Therefore, those elements cannot be considered to be "similar actions not involving the interpretation of a work but having the nature of a performing art."

Thus, the aforementioned allegation of the appellants is unacceptable.

C. On these grounds, since the act of broadcasting the Video Segment, which is a part of the Fashion Show, cannot be regarded as an act of offering or broadcasting "performance" to the public, said act of broadcasting the Video Segment cannot be considered to constitute infringement of the broadcasting right of the Appellant Company and the right of attribution of Appellant X as a performer.

No. 4 Conclusion

On these grounds, the conclusion of the judgment in prior instance is reasonable. All of the appeals should be considered to be groundless and shall be dismissed. The judgment shall be rendered in the form of the main text.

Intellectual Property High Court, Third Division

Presiding judge: SHITARA Ryuichi

Judge: NISHI Rika

Judge: KAMIYA Koki