

Portrait Right; Publicity Right	Date	September 13, 2023	Court	Intellectual Property High Court, First Division
	Case number	2023 (Ne) 10025		
<p>- A case in which the members of a group (band), who had entered into an exclusive management contract with a music promotion office, demanded the music promotion office for compensation by claiming that the music promotion office posted, after the exclusive management contract between the music promotion office and the band members had ended and against the will of the band members, information such as the group name, and portraits and artistic names of the members of the group on the websites managed and operated by the music promotion office, and the court partially approved the claims based on tort, on the grounds of infringement of rights of the members of the group, including portrait rights and publicity rights.</p>				

Case type: Compensation

Result: Partial modification of the prior instance judgment

References: Articles 709 and 710 of the Civil Code

Judgment of the prior instance: Tokyo District Court; 2019 (Wa) 30204

Summary of the Judgment

1. The present case is one in which X, et al., who were working as members of a performer group (Group) under an exclusive management contract between the members of the Group and Company Y, which is a music promotion office (Exclusive Contract), argued that Company Y continued to post (Act of Use), against the will of the members of the Group, information such as the name of the Group, and portraits and artistic names of X, et al. on the websites managed and operated by Company Y (Defendant's Site, Online Shopping Site for Goods, and Fan Club Site) even after the Exclusive Contract ended on July 13, 2019, until November 30, 2019 in the cases of Defendant's Site and Fan Club Site, and until December 31, 2021 in the case of Online Shopping Site for Goods, respectively, and demanded Company Y for compensation based on tort on the grounds of infringement of rights such as portrait rights and publicity rights, in the amount of 1.1 million yen per member of X, et al, in addition to making other claims such as a claim for payment of late payment charge.

In the prior instance judgment, the court of first instance held that, during the period from December 1, 2019 until December 31, 2021, in regards to the Act of Use, Company Y infringed on the publicity rights of X, et al. by the act of posting photographs showing goods on which portrait photos of X, et al. and portraits and the like of X, et al. are transferred, and selling the same on the Online Shopping Site for Goods, and partially approved the claims made by X, et al. to the extent of payment to X, et al. of 14,000 yen per person in damages as well as the payment to X, et al. of

late payment charge accrued thereon. X, et al., who were dissatisfied with the prior instance judgment, filed an appeal of the present case.

2. In the judgment rendered by the present court (Judgment), the court determined as follows concerning whether or not there was infringement of portrait rights and the like, which is a major point of contention (Issue 1), and partially changed the prior instance judgment.

(1) A person's name, portrait, and the like (hereinafter collectively referred to as "Portrait, etc.") is a symbol of an individual's personality. As such, it is the court's interpretation that the person has the right not to have the Portrait, etc. used without any good reason, as it derives from personal rights (Supreme Court Judgment; 2009 (Ju) 2056; Judgment rendered by the First Petty Bench on February 2, 2012; Refer to Minshu Vol. 66, No. 2, page 89, etc.). Upon determining whether or not the use of a person's Portrait, etc. is deemed illegal under the tort law, it is necessary to comprehensively take into consideration matters such as the social status of the person whose Portrait, etc. are used, the work of the person whose Portrait, etc. are used, the purpose of use, the manner of use, and the need for use, and then consider whether or not the infringement of the above rights of the person whose Portrait, etc. were used is such that it exceeds the socially accepted limitation.

(2) The Exclusive Contract ended on July 13, 2019, so that it can be said that after the end of the Exclusive Contract, Company Y no longer had the authority to use the artistic names, portraits, and other personal rights of X, et al.

According to findings, it is acknowledged that, in order to avoid creating confusion among relevant people in the fan club of the Group or to avoid causing trouble to them, X, et al. had given the implicit permission for the posting of Portrait, etc. of X, et al. on Defendant's Site and Fan Club Site until the time it became possible to shut down the Fan Club Site.

On the other hand, there are no reasonable grounds to sufficiently acknowledge that X, et al. had given their permission to Company Y for the continued showing of portrait photos of X, et al. on the Online Shopping Site for Goods as the Group's official shop even after the end of the Exclusive Contract, and for the continued posting of the photographs showing the goods on which portrait photos of X, et al. and Portrait, etc. of X, et al. are transferred, and for the continued sale of the same.

When the following factors are comprehensively taken into consideration, namely that X, et al. have been engaging in artist work as members of the Group, and that they had the purpose of making profits from the sale of goods through Company Y, and that Company Y showed portrait photos of X, et al. on the Online Shopping Site

for Goods as the Group's official shop, and then posted photographs showing the goods on which portrait photos of X, et al. and illustrated images of portraits of X, et al. are transferred, and selling the same, and that Company Y, while knowing that a request has been made by X, et al. to discontinue the use of Portrait, etc., continued to use the same without the permission of X, et al. for a considerable period of time from the end of the Exclusive Contract until December 31, 2021, the court considers that these factors constitute infringement of Portrait, etc. of X, et al., and the court cannot hold that they provide grounds for the argument that the infringement of Portrait, etc. of X, et al. by Company Y does not exceed the socially accepted limitation.

(3) Accordingly, while it cannot be said that the act by Company Y of posting Portrait, etc. of X, et al. on Defendant's Site and Fan Club Site after the Exclusive Contract ended until November 30, 2019 should be evaluated as being illegal under the tort law, it can be said that the act by Company Y of posting the Portrait, etc. of X, et al. on the Online Shopping Site for Goods and selling the goods, on which the Portrait, etc. of X, et al. are transferred, from the end of the Exclusive Contract until December 31, 2021, should be evaluated as being illegal under the tort law.

Judgment rendered on September 13, 2023
2023 (Ne) 10025 Appeal case of seeking compensation
(Prior instance: Tokyo District Court 2019 (Wa) 30204)
Date of conclusion of oral argument: July 12, 2023

Judgement

Appellant: X1
(hereinafter referred to as "Appellant X1")

Appellant: X2
(hereinafter referred to as "Appellant X2")

Appellant: X3
(hereinafter referred to as "Appellant X3")

Appellant X4
(hereinafter referred to as "Appellant X4")

Appellee: Yugen Kaisha Sirene

Main text

1. The prior instance judgment shall be modified as follows.
2. The Appellee shall pay to Appellant X1 a sum of 211,577 yen and the money accrued on the amount of 15,577 yen out of said sum at an annual rate of 5% for the period from March 1, 2020 until payment completion, as well as the money accrued on the amount of 196,000 yen out of said sum at an annual rate of 3% for the period from December 31, 2021 until payment completion.
3. The Appellee shall pay to Appellant X2 a sum of 211,577 yen and the money accrued on the amount of 15,577 yen out of said sum at an annual rate of 5% for the period from March 1, 2020 until payment completion, as well as the money accrued on the amount of 196,000 yen out of said sum at an annual rate of 3% for the period from December 31, 2021 until payment completion.
4. The Appellee shall pay to Appellant X3 a sum of 211,577 yen and the money accrued on the amount of 15,577 yen out of said sum at an annual rate of 5% for the period from March 1, 2020 until payment completion, as well as the money accrued

on the amount of 196,000 yen out of said sum at an annual rate of 3% for the period from December 31, 2021 until payment completion.

5. The Appellee shall pay to Appellant X4 a sum of 211,577 yen and the money accrued on the amount of 15,577 yen out of said sum at an annual rate of 5% for the period from March 1, 2020 until payment completion, as well as the money accrued on the amount of 196,000 yen out of said sum at an annual rate of 3% for the period from December 31, 2021 until payment completion.

6. The remainder of the claims made by Appellants shall be dismissed.

7. Court costs throughout the first and second instances shall be divided into five parts, four of which shall be borne by Appellants, and the remainder shall be borne by the Appellee.

8. Only Paragraphs 2 to 5 of this judgment may be provisionally executed.

Facts and reasons

Unless otherwise indicated herein, abbreviations of the terms, and the meanings of the abbreviations shall be as indicated in the prior instance judgment. The "attached" as used in the prior instance judgment shall be read hereunder as "attached to the prior instance judgment".

No. 1 Object of appeal

1. The prior instance judgment shall be modified as follows.

2. Appellee shall pay to Appellant X1 a sum of 1,122,277 yen and the money accrued on the amount of 1,100,000 yen out of said sum, for the period from December 19, 2019 until payment completion, and the money accrued on the amount of 22,277 yen out of said sum, for the period from the first day of the same month until payment completion, at an annual rate of 5%.

3. Appellee shall pay to Appellant X2 a sum of 1,122,277 yen and the money accrued on the amount of 1,100,000 yen out of said sum, for the period from December 19, 2019 until payment completion, and the money accrued on the amount of 22,277 yen out of said sum, for the period from the first day of the same month until payment completion, at an annual rate of 5%.

4. Appellee shall pay to Appellant X3 a sum of 1,122,277 yen and the money accrued on the amount of 1,100,000 yen out of said sum, for the period from December 19, 2019 until payment completion, and the money accrued on the amount of 22,277 yen out of said sum, for the period from the first day of the same month until payment completion, at an annual rate of 5%.

5. Appellee shall pay to Appellant X4 a sum of 1,122,277 yen and the money accrued on the amount of 1,100,000 yen out of said sum, for the period from December 19, 2019 until payment completion, and the money accrued on the amount of 22,277 yen out of said sum, for the period from the first day of the same month until payment completion, at an annual rate of 5%.

No. 2 Outline of the case

1. Summary of the case

The present case is one in which Appellants, who were working as members of a performer group called "A" (Group) under an exclusive management contract (Exclusive Contract) with Appellee, argued that Appellee continued to post (Act of Use) information such as the name of the Group, and portraits and artistic names of Appellants on the websites of the present case managed and operated by Appellee (Defendant's Site, Online Shopping Site for Goods, and Fan Club Site) even after the Exclusive Contract ended on July 13, 2019, until November 30, 2019 in the cases of Defendant's Site and Fan Club Site, and until December 31, 2021 in the case of Online Shopping Site for Goods, and demanded the following:

(1) Compensation based on an act of tort on the grounds of infringement of rights such as portrait rights and publicity rights (all claims being partial claims), in the amount of 1.1 million yen per member of Appellants (the breakdown being 500,000 yen for infringement of portrait right, etc., 500,000 yen for publicity right infringement, and 100,000 yen as the amount equivalent to attorney's fees), and for payment of late payment charge, accrued at an annual rate of 5% as prescribed by the Civil Code (prior to the amendment by Act No. 44 of 2017; hereinafter referred to as "Pre-Amendment Civil Code"), for the period from December 19, 2019 (the day immediately following the day of delivery of a complaint) until payment completion; and

(2) Payment of remuneration, pursuant to an implicit agreement for use of portraits, etc. between Appellants and Appellee, in the amount of 22,277 yen per member of Appellants and the late payment charge, which is accrued thereon at an annual rate of 5% as prescribed by the Pre-Amendment Civil Code for the period from December 1, 2019 (the day immediately following the day on which the act of use under the implicit agreement for use of portraits, etc. ended) until payment completion.

In the prior instance judgment, the prior court held that the Appellee's act of posting and selling, on the Online Shopping Site for Goods, for the period from December 1, 2019 until December 31, 2021, as indicated under 4 of the List of

Photographs attached to the prior instance judgment, photographs showing goods on which portrait photos of Appellants and portraits, etc. of Appellants are transferred, from among the Act of Use, infringed on the publicity rights of Appellants, and partially approved the claims made by Appellants within the extent of payment to Appellants of 14,000 yen per person in damages as well as the late payment charge accrued thereon, and as for the Appellee's act of using the portraits, etc. of Appellants after the Exclusive Contract ended until November 30, 2019, from among the Act of Use, the payment of remuneration in the amount of 22,277 yen, based on Appellants' right to demand Appellee for payment of remuneration, and the payment of late payment charge accrued thereon. The prior court dismissed the remaining claims.

In response, Appellants, who were dissatisfied with the part of the prior instance judgment in which they lost, filed an appeal of the present case.

2. Basic facts (facts over which the parties are not in dispute, and evidence (hereinafter the document numbers include branch numbers unless especially stated otherwise), and facts that can be acknowledged from the entire import of oral argument; hereinafter referred to as "Basic facts")

Other than the following collections to be made, what is indicated under No, 2, Paragraph 2 of "Facts and reasons" of the prior instance judgment applies and is cited hereinafter.

(1) After "exclusive contract" in line 13 on page 4 of the prior instance judgment, add "(hereinafter referred to as 'Exclusive Contract')".

(2) Correct each instance of "exclusive contract" in line 16 on page 4 and in lines 20 and 21 of the same page of the prior instance judgment to "Exclusive Contract".

(3) After the end of line 21 on page 4 of the prior instance judgment, add the following:

"(C) All Appellants' rights under the Copyright Act pertaining to matrixes and original editions, etc. created during the contract period of the present case (including all rights and ownership under the Copyright Act, including the right of reproduction, right of transfer, distribution right, performing right, right of screen presentation, right to make transmittable, neighboring right, right to demand secondary use fees, right to demand remuneration for renting out, right to demand compensation for private sound and visual recording), as well as all rights, including trademark rights, intellectual property rights, and merchandising right pertaining to Appellants, belong to Appellee (Article 6 of the Exclusive Contract).

(D) Measures after the end of the contract period and cancellation period shall be as follows.

For six months after the end of the contract period, Appellants may not execute with a third party, other than Appellee, any contract whose objective is performance, such as a management contract, without obtaining Appellee's approval beforehand (Article 9(5) of the Exclusive Contract).

(E) The Exclusive Contract does not provide for the handling of moral rights of Appellants after the Exclusive Contract ended, including artistic names, real names, photographs, portraits, handwritings, biographies, and voices."

(4) Correct each instance of "(C)" in line 22 on page 4 and in lines 1 and 3 on page 5 of the prior instance judgment to "(F)".

(5) Correct "(D)" in line 1 on page 5 of the prior instance judgment to "(G)".

(6) Correct "(E)" in line 3 on page 5 of the prior instance judgment to "(H)".

(7) After the end of the line 5 on page 5 of the prior instance judgment, start a new line and add the following:

"C. Since December 2010, for the duration of the Exclusive Contract, the Group sold nine singles, and the 7th single was ranked 17th on Oricon Weekly Ranking, and the 8th single was placed 8th in a top sales ranking. Also, the Group sold one single of a download-only type, three albums, three mini-albums, one album containing best hits, two albums focused on the Group's concept, etc. On December 5, 2010, the Group performed a solo live performance, and performed multiple solo live performances each year (including tours) in 2011 and between 2013 and 2018. Furthermore, since December 2010, for the duration of the Exclusive Contract, the cover or the back cover of "Cure", a specialized magazine for visual indie bands, featured the Group four times in total. A music piece performed by the Group was used as the closing theme for "Akkoni-Omakase!", a TV program broadcasted by TBS, in April 2016. The Group also performed on TV and radio. (Exhibits Ko 40 to 43)

(8) Correct "C" in line 6 on page 5 of the prior instance judgment to "D".

(9) Correct "D" in line 9 on page 5 of the prior instance judgment to "E".

(10) Correct the part, which starts with "portrait photos of Plaintiffs" in line 8 on page 6 of the prior instance judgment and ends with the last word in line 10 of the same page, as follows: "along with the indications of 'A' and 'OFFICIAL SHOP', by showing portrait photos of Appellants (the part framed in red in the upper right corner on the first page of the same List), posted photographs showing goods on which the portrait photos of Appellants and illustrated images of portraits of Appellants are transferred (each of the remaining parts framed in red on the same List), and sold such goods."

(11) Correct "Defendant, concerning the sale of goods on the Online Shopping Site

for Goods" in line 1 on page 7 of the prior instance judgment to "Appellee, concerning the sale of goods on the Online Shopping Site for Goods, received from SUKIYAKI".

(12) Correct "Defendant, concerning the fan club for the Group" in line 5 on page 7 of the prior instance judgment to "Appellee, concerning the fan club for the Group, received from Kabushiki Kaisha Zero One Style".

3. Issues

Issues of the present case are as indicated under No. 2, Paragraph 3 of "Facts and reasons" of the prior instance judgment, and are cited herein.

4. Arguments between parties concerning the Issues

The prior instance judgment shall be corrected as follows, with the supplementary arguments made by the parties in the present court added thereto. The remainder is as indicated under No. 2, Paragraph 4 of "Facts and reasons" of the prior instance judgment, and is cited herein.

(1) Corrections to the prior instance judgment

Correct "the degree of name recognition is very small" in line 13 on page 19 of the prior instance judgment to "the degree of name recognition is very low".

(omitted)

No. 3 Judgment of this court

1. Findings

In addition to making the following corrections, what is indicated under No. 3, Paragraph 1 of the prior instance judgment applies and is cited herein.

(1) Correct "person in charge at SUKIYAKI" in line 15 on page 21 of the prior instance judgment to "SUKIYAKI personnel in charge of operation, etc. of the Fan Club Site".

(2) Correct "to postpone" in line 6 on page 22 of the prior instance judgment to "to postpone, or above all, there are no legal grounds due to which Appellants must discuss with Appellee concerning the announcement on SNS, etc.".

(3) After the end of line 21 on page 22 of the prior instance judgment, start a new line and add the following:

"(7) Around August 1, 2019, Appellants filed for provisional disposition for preservation of status, etc., with the Tokyo District Court, against Appellee, seeking provisional confirmation that the contract pertaining to Article 6 and Article 9(5) of the Exclusive Contract is invalid. In the petition that was filed, Appellants indicated,

as a risk of their activities being interfered, the following: 'Even today, as of August 1, 2019, the former homepage of the group, consisting of obligees, managed by the obligor continues to exist, and continues to infringe the portrait rights of obligees even after contract termination. ... As such, it can be said that the fact that the former homepage managed by the obligor still exists today, in itself, constitutes interference with the obligees' activities.' (Exhibit Ko 53)"

2. Issue 1 (Whether or not there was infringement of portrait rights, etc.)

(1) A person's name and portrait and the like (hereinafter collectively referred to as "Portrait, etc.") represent an individual's personality. As such, it is the Court's interpretation that the individual has the right not to have the Portrait, etc. used without any good reason, as such use derives from personal rights (Refer to Supreme Court Judgment; 1983 (O) 1311; Judgment rendered by the Third Petty Bench on February 16, 1988; Minshu Vol. 42, No. 2, page 27 concerning names, refer to Supreme Court Judgment; 1965 (A) 1187; Judgment rendered by the Grand Bench on December 24, 1969; Keishu Vol. 23, No. 12, page 1625 and Supreme Court Judgment; 2003 (Ju) 281; Judgment rendered by the First Petty Bench on November 10, 2005; Minshu Vol. 59, No. 9, page 2428 concerning portraits, refer to Supreme Court Judgment; 2009 (Ju) 2056; Judgment rendered by the First Petty Bench on February 2, 2012; Minshu Vol. 66, No. 2, page 89 concerning names and portraits). Upon determining whether or not the use of a person's Portrait, etc. is deemed illegal under the tort law, it is necessary to comprehensively take into consideration matters such as the social status of the person whose Portrait, etc. are used, the work of the person whose Portrait, etc. are used, the purpose of use, the manner of use, and the need for use, and then consider whether or not the infringement of the above rights of the person whose Portrait, etc. were used is such that it exceeds the socially accepted limitation.

(2) Appellants' Act of Use of Portrait, etc.

A. As per No. 2, Paragraph 2 and No. 3, Paragraph 1 of the prior instance judgment to be cited after correction, it is acknowledged that [i] the Exclusive Contract ended as of July 13, 2019, and [ii] during the life of the Exclusive Contract, it was agreed between Appellants and Appellee that Appellee was able to use and develop, freely and at no charge, the artistic names, photographs, and other moral rights of Appellants (Article 5 of the Exclusive Contract), but that the Exclusive Contract did not contain any provision concerning the handling of the rights after the Exclusive Contract ended. Under these circumstances, it can be said that after the Exclusive Contract ended, Appellee was not authorized to use Appellants' moral

rights such as artistic names and Portrait, etc.

Appellee argues that since Appellee only used Appellants' Portrait, etc. pursuant to the Exclusive Contract even after the Exclusive Contract ended, such use does not pose any problem of infringement or the like to begin with. However, Appellants' Portrait, etc. constitute rights that belong exclusively to and are personal to Appellants based on Appellants' moral rights. As such, given that the Exclusive Contract, which provides for the use of these rights, ended, and that the Exclusive Contract does not provide for the handling of said use after contract termination, if Appellants give no separate permission to Appellee concerning said use, Appellee's use of Appellants' Portrait, etc. after the Exclusive Contract ended constitutes unauthorized use.

B. According to No. 2, Paragraph 2 and No. 3, Paragraph 1 of the prior instance judgment which is cited after correction, the following are acknowledged: [i] Appellants were engaging in artist activities as members of the Group, which is a performer group, under the management of Appellee, and the photographs and images pertaining to Appellants' Portrait, etc., which were posted on the websites of the present case, were taken and created by Appellee during the life of the Exclusive Contract with the approval of Appellants, and were posted with the purpose of introducing the members of the Group and their activities, and as for the goods on which Appellant's Portrait, etc. are transferred, they were likewise manufactured and sold with the approval of Appellants; [ii] in a letter dated April 24, 2019, Appellants requested Appellee to delete Appellants' Portrait, etc. from the websites managed by Appellee, including the Fan Club Site, and notified Appellee on June 14, 2019 that Appellants plan to announce on SNS, etc. that the fan club will be discontinued as of July 13 of the same year; [iii] in response, Appellee requested Appellants, in a letter dated June 12 of the same year, to postpone said announcement because if Appellants made an announcement on SNS, etc. to the effect that the fan club will be discontinued as of July 13 of the same year, it would create confusion and cause inconvenience to the relevant personnel and fans, and Appellee informed Appellants that, on the premise that nearly two months will be required for stopping the billing under the billing systems of mobile phone companies that were used for payment of membership fees for the Group, etc., the earliest time when the billing for the fan club can be stopped and then the Fan Club Site can be closed down would be the end of September of this year; [iv] in response, Appellants notified Appellee, in a letter dated June 14 of the same year, that Appellants, giving consideration to relevant personnel and fans, would postpone their announcement, which was scheduled on the same date,

on SNS, etc. about their discontinuation of the fan club; [v] on July 8 of the same year, Appellee was informed by SUKIYAKI personnel, who is in charge of operating the Fan Club Site, that since it was discovered that one of the fan club fee billing service operators requires time to end the service it provides to fan club members, the provision of service to fan club members on websites can be stopped only after December 1 of the same year; [vi] as a response, Appellee posted an announcement on Defendant's Site on July 14 of the same year, to the effect that after December 1 of the same year, Defendant's Site will cease to provide membership service to fan club members and to provide information on Defendant's Site; [vii] As of November 30 of the same year, Appellee stopped posting portrait photos of Appellants and illustrated images, etc. of portraits of Appellants on Defendant's Site and Fan Club Site; [viii] Even after the Exclusive Contract ended, Appellee indicated portrait photos of Appellants, and then posted photographs showing goods on which illustrated images of Appellants' portraits are transferred, as the official shop of the Group on the Online Shopping Site for Goods operated by SUKIYAKI, and continued selling such goods until December 31, 2021.

C. As described above, it is acknowledged that Appellants gave implicit permission to Appellee concerning the postponing of the timing to discontinue the fan club for the Group, for reasons related to the billing system, until the time when it became possible to stop the billing of the service provided to the members of the fan club before the provision of the service to the members can be stopped, so as not to cause confusion among relevant personnel or fans of the fan club or to cause inconvenience to them. In addition, in order to enable the members, who paid the membership fees, to continue to view the articles introducing the members of the Group and their activities for as long as the fan club existed, it can be said that it was necessary for Appellants to post the Portrait, etc. on the Fan Club Site as well as on the Defendant's Site, which is linked to the Fan Club Site. Given the foregoing, it is acknowledged that Appellants had granted implicit permission about the posting of Appellants' Portrait, etc. on Defendant's Site and Fan Club Site until the time it became possible to close down the Fan Club Site.

On the other hand, as described above in B [ii], in a letter dated April 24, 2019, Appellants requested Appellee to delete Appellants' Portrait, etc. from the websites managed by the Defendant, and as per No. 3, Paragraph 1(7) of the prior instance judgment which is cited after correction, Appellants wrote as follows in a petition for provisional disposition, which was filed with the Tokyo District Court against the Appellee around August 1, 2019: "Even as currently as August 1, 2019, the former

homepage for the obligees' group, as managed by the obligor, still exists, and infringement of obligees' portrait rights continues even after the contract termination. ... As such, it can be said that the fact that the former homepage managed by the obligor still exists today, in itself, constitutes interference with the obligees' activities." Given the factors such as that Appellants had felt burdened about the Appellee's continued use of Appellants' Portrait, etc. on the homepage and the like even after the Exclusive Contract had ended, it is acknowledged that the notice sent by Appellants to Appellee concerning the postponing of the announcement to discontinue the fan club, as described above in B [iv], is one in which Appellants, giving consideration to relevant personnel and fans and how they will be affected by the timing to discontinue the billing under the billing system, were forced to postpone the timing of discontinuing the fan club until the time when it would be possible to close down the Fan Club Site, and as a result, gave implicit permission for and only with regard to the posting of Appellants' Portrait, etc. on Defendant's Site and Fan Club Site. However, beyond such unavoidable circumstances, there are no reasonable causes to sufficiently acknowledge that Appellants had given permission to Appellee for indicating portrait photos of Appellants as the Group's official shop on the Online Shopping Site for Goods even after the Exclusive Contract ended, and then posting photographs showing goods on which Appellants' portrait photos and portraits and the like of Appellants are transferred, and continuously selling the same. In addition, it cannot be acknowledged that there are circumstances to suggest that there was such permission, and there is no evidence to sufficiently acknowledge that there was such permission.

D. Appellants argue that the objective of Appellee in using Appellants' Portrait, etc. after the Exclusive Contract ended was to interfere with Appellants' activities, and that Appellee's manner of use and the objective of use of Appellants' Portrait, etc. were unjust, so that it cannot be said that there was the need or appropriateness with regard to Appellee's use of Appellants' Portrait, etc. However, as described above in C, considering that Appellants were also thinking about the need to avoid the confusion that may result from the sudden closing down of the Fan Club Site after the Exclusive Contract ended, and that at least as long as the fan club remains, the articles introducing the members of the Group and their activities had to be available for viewing by the members, who paid the membership fees, not just on the Fan Club Site but also on Defendant's Site which has a function of leading viewers to said site, it can be said that Appellee's use of Appellants' Portrait, etc. on Defendant's Site and Fan Club Site until November 30, 2019 took place with the implicit permission by

Appellants. Accordingly, the Appellants' above argument that Appellee had the need or appropriateness to use Appellants' Portrait, etc. cannot be accepted in the case of these sites.

Next, Appellants point out that a petition for a case seeking provisional disposition for preservation of status, which was filed against Appellee, contained sentences suggesting that there is a risk of Appellants' activities being interfered with, such as the following: "Even as currently as August 1, 2019, the former homepage for the obligees' group, as managed by the obligor, still exists, and infringement of obligees' portrait rights continues even after the contract termination." By using the foregoing as a basis, Appellants argue that Appellants had not given implicit permission for the posting of Portrait, etc. of Appellants. However, said indication is merely an indication that constitutes a part of the argument for filing a petition for provisional disposition for preservation of status, etc., seeking provisional confirmation that the agreement pertaining to Article 6 and Article 9(5) of the Exclusive Contract is invalid. As such, such fact cannot lead to the evaluation that, concerning the announcement to the effect that the service will be provided to the members and that the information will be provided on Defendant's Site until November 30 of the same year, Appellants made any objection, in particular, to Appellee about the timing to close down the Defendant's Site and Fan Club Site. As such, the above argument by Appellants cannot be accepted.

E. Appellee argues that the use of Appellants' Portrait, etc. on the Online Shopping Site for Goods after the Exclusive Contract ended is only to sell the goods in stock to the fan club members who had paid membership fees, so that it does not constitute infringement of Appellants' Portrait, etc. However, as described above in A, since the Exclusive Contract, in which agreement was reached concerning the use of Appellants' portrait rights, etc., had ended, and since the Exclusive Contract does not contain any agreement concerning the handling of such use after contract termination, if there is no permission in particular, by Appellants to Appellee concerning said use, the Appellee's use of Appellants' Portrait, etc. constitutes use by an unauthorized person, and even if the sale concerns the goods that were manufactured during the life of the Exclusive Contract, and even if the Appellee's intention was to sell the manufactured goods so as to get rid of the goods in stock in order to collect the invested money, given that there is no agreement between Appellants and Appellee after the Exclusive Contract ended, Appellee should not be able to use Appellants' Portrait, etc. on the Online Shopping Site for Goods and sell the goods on which Appellants' Portrait, etc. are transferred.

F. Next, upon comprehensively taking into consideration factors such as that Appellants engage in artist activities as members of the Group, as per No. 2, Paragraph 2(2)C of the prior instance judgment which is cited after correction, and that Appellants had the objective of making profits from Appellee's sale of goods, and that Appellee showed portrait photos of Appellants as the official shop of the Group on the Online Shopping Site for Goods, and then posted photographs showing goods on which portrait photos of Appellants and illustrated images of portraits of Appellants are transferred, and sold such goods on the Online Shopping Site for Goods, and that Appellee, with the awareness that Appellants requested Appellee to discontinue the use of Portrait, etc., continued to use Portrait, etc. without Appellants' permission for a considerable period from the end of the Exclusive Contract until December 31, 2021, these factors constitute infringement by Appellee of Appellants' portrait rights, etc., and it cannot be said that Appellee's infringement of Appellants' portrait rights, etc. exceeds the socially accepted limitation.

(3) Summary

Accordingly, it cannot be said that Appellee's act of posting Appellants' Portrait, etc. on Defendant's Site and Fan Club Site from the end of the Exclusive Contract until November 30, 2019 should be evaluated as illegal under the tort law. On the other hand, it can be said that Appellee's act of posting Appellants' Portrait, etc. on the Online Shopping Site for Goods from the end of the Exclusive Contract until December 31, 2021 and selling goods on which Appellants' Portrait, etc. are transferred should be evaluated as illegal under the tort law.

3. Issue 2-1 (Whether or not there was infringement of publicity rights)

What is indicated under No. 3, Paragraph 3 of "Facts and reasons" of the prior instance judgment applies, and is cited herein.

4. Issue 2-2 (Whether or not license was granted for Appellants' Portrait, etc.)

In addition to the following corrections to be made, what is indicated under No. 3, Paragraph 4 of "Facts and reasons" of the prior instance judgment applies and is cited herein.

(1) Make the following corrections to the prior instance judgment, from line 16 on page 26 to the end of line 10 on page 27.

"Upon consideration, as indicated above in 2 (2) C, it can be said that Appellants had given implicit permission to Appellee concerning the posting of Appellants' Portrait, etc. on Defendant's Site and Fan Club Site after the end of the Exclusive Agreement until November 30, 2019, which is when the service for members of the fan club ends, but it cannot be acknowledged that, after the Exclusive

Contract ended, Appellee was given the permission to post Appellants' Portrait, etc. on the Online Shopping Site for Goods and selling goods on which Appellants' Portrait, etc. are transferred."

(2) Correct "since December 1, 2019" in line 11 on page 27 of the prior instance judgment to "since July 14, 2019, which is the next day of the day on which the Exclusive Contract ended".

5. Issue 3 (Whether or not there was intention or negligence)

In addition to making corrections to the prior instance judgment as follows, what is indicated under No. 3, Paragraph 5 of "Facts and reasons" of the prior instance judgment applies, and is cited herein.

(1) After each instance of "an artist's" in line 23 on page 27 and in line 10 on page 28 of the prior instance judgment, add "portrait right, etc. and".

(2) Correct "since December 1, 2019, which is when the service for members of the fan club ended" in line 25 on page 27 of the prior instance judgment to "since July 14, 2019, which is the next day of the day on which the Exclusive Contract ended".

(3) Correct "since December 1, 2019" in line 15 on page 28 of the prior instance judgment to "since July 14, 2019".

(4) After "Plaintiffs" in lines 17 and 18 on page 28 of the prior instance judgment, add "portrait rights, and".

6. Issue 4 (Whether or not there was damage, and the amount thereof)

(1) Damage due to infringement of Appellants' portrait rights, etc.

As indicated above in 2 (2), for a considerably long period of two years, five months, and 18 days between July 14, 2019 and December 31, 2021, Appellee continuously posted Appellants' Portrait, etc. on the Online Shopping Site for Goods as the official shop of the Group, and this act constituted use of Appellants' Portrait, etc. against Appellants' will. It is presumed that Appellants suffered pain morally, and it is reasonable to acknowledge that the compensation for moral damage shall not be less than 150,000 yen for each member of Appellants, when the content of the activities by Appellants until the end of the Exclusive Contract (as indicated under No. 2, Paragraph 1(2)C of the prior instance judgment to be cited after correction), the fact that the objective of the use of Appellants' Portrait, etc. was to make profits by the use on the Online Shopping Site for Goods and in the goods to be sold, the manner of infringement and the period of infringement as described above, and other factors are taken into consideration.

The Appellee's act of infringement of portrait rights, etc. constitutes a continuous act of tort in which Appellee posted Appellants' portrait photos and the

photographs showing the goods on which Appellants' Portrait, etc. are transferred, and selling the same on the Online Shopping Site for Goods from July 14, 2019 until December 31, 2021, and the above amount of damage is calculated on the premise that said act of posting and sale took place over the entire period concerned. In light of the foregoing, it is reasonable to consider that the day to start calculating the late payment charge shall be the same day as the day when the continuous act of tort ended, and that the rate shall be 3% per annum.

(2) Damage suffered by infringement of Appellants' publicity rights

In addition to making the following corrections, what is indicated under No. 3, Paragraph 6 of "Facts and reasons" of the prior instance judgment applies, and is cited herein.

A. Correct "Basic facts (2)B(C)" in line 5 on page 29 of the prior instance judgment to "No. 2, Paragraph 2(2)B(F) of the prior instance judgment to be cited after correction".

B. Correct "December 1, 2019" in line 6 on page 29 of the prior instance judgment to "July 14, 2019 of the prior instance judgment to be cited after correction".

C. Correct "66,993 yen" in line 7 on page 29 of the prior instance judgment to "143,574 yen".

D. Correct "5,862 yen (" in line 9 on page 29 of the prior instance judgment to "12,563 yen (143,574 yen × 35% / 4 persons)".

E. Correct "83,742 yen" in lines 14 and 15 on page 29 of the prior instance judgment to "179,469 yen".

F. Delete the part starting with "In addition," in lines 23 and 24 on page 29 of the prior instance judgment and ending with "it is difficult to acknowledge" in lines 24 and 25 on the same page.

G. Correct "a total of 48,000 yen (12,000 yen per person)" in lines 3 and 4 on page 30 of the prior instance judgment to "26,000 yen to each member of Appellants".

H. Delete the part starting with "In addition," in line 5 on page 30 of the prior instance judgment and ending with the last word in line 7.

I. Correct "December 1, 2019" in line 8 on page 30 of the prior instance judgment to "July 14, 2019".

J. Correct "upon calculating the amount of damage suffered from the infringement of publicity rights" in line 18 on page 31 of the prior instance judgment to "upon calculating the amount of damage suffered from the infringement of publicity rights, by analogical application of Article 114, paragraph (3) of the Copyright Act, as a previous step for ultimately calculating the amount that adds the

factor of being a case in which the amount of damage for a claim for compensation against the infringer of publicity rights will be calculated".

K. After the end of line 7 on page 32 of the prior instance judgment, start a new line and add the following:

"E. Appellants argue that publicity rights derive from personal rights, so that if Portrait, etc. are used on a commercial website, etc. in a manner that is against the Appellants' feelings, Appellants' suffered moral pain in the sense that there was infringement of moral interests, which should be legally protected, although there may be no fall of public esteem, so that the court should acknowledge moral damage for the infringement.

However, while publicity rights are part of the rights that derive from personal rights, they are based on the commercial value of Portrait, etc. per se, so that unless there are special circumstances, it is difficult to acknowledge moral damage. In the present case, no special circumstances can be acknowledged, and as indicated above in 6 (1), compensation for moral damage is approved due to infringement of Portrait, etc., so that no moral damage on the ground of publicity right infringement shall be approved."

L. Correct "E" in line 8 on page 32 of the prior instance judgment to "F".

(3) Attorney's fees

When giving consideration to various circumstances, including the difficulty of the case, the amount claimed, and the amount approved, the reasonable amount of attorney's fees that have legally sufficient cause with the act of tort of the present case is 20,000 yen per member of Appellants.

7. Issue 5 (Appropriateness of demand for payment of remuneration for Act of Use)

In addition to making the following corrections, what is indicated under No. 3, Paragraph 7 of "Facts and reasons" of the prior instance judgment applies, and is cited herein.

(1) Correct "Sites" in line 11 on page 32 of the prior instance judgment to "Defendant's Site and Fan Club Site".

(2) Delete "6,700 yen per member of Plaintiffs concerning the sale of goods, and for the same period" in line 16 on page 32 of the prior instance judgment.

No. 4 Conclusion

In conclusion, the court holds that Appellants' demand to Appellee is reasonable within the extent of seeking payment, to each member of Appellants, of a

sum of 196,000 yen in damages based on an act of tort on the ground of infringement of portrait rights and publicity rights, and the late payment charge accrued thereon at a rate of 3% per annum as prescribed by the Civil Code for the period from December 31, 2021 (the last day of the act of tort) until payment completion, as well as of a sum of 15,577 yen as remuneration requested pursuant to the implicit agreement for the Act of Use, and the late payment charge accrued thereon at a rate of 5% per annum as prescribed by the Pre-Amendment Civil Code for the period from March 1, 2020 (the day immediately following the payment due date as admitted by Appellee) until payment completion, and thus such payments shall be approved within said extent. The prior instance judgment that held otherwise is partially unreasonable, whereas the appeal of the present case is partially reasonable, and thus the court makes the above changes to the prior instance judgment and renders the judgment as per the main text.

Intellectual Property High Court, First Division

Presiding Judge: HONDA Tomonari
Judge: TOOYAMA Atsushi
Judge: AMANO Kenji