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Date of the judgement

2012.02.02
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Case Number

2009(Ju)2056
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Reporter

Minshu Vol.66, No.2
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Title

Judgment concerning a case wherein the unauthorized use of the name, portraits, etc., of a person is considered to be infringement of the right of publicity and is found to be illegal under the tort law
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Case name

Case to seek damages
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Result

Judgment of the First Petty Bench of the Supreme Court, dismissed
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Court of the Second Instance

Intellectual Property High Court, Judgment of August 27, 2009
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Summary of the judgement

1. The unauthorized use of the name, portraits, etc., of a person is considered to be infringement of the right to exclusively use the customer appeal of the name, portraits, etc. (so-called the right of publicity) and is found to be illegal under the tort law if the sole purpose of the use is to take

advantage of the customer appeal, more specifically, in such cases where (i) the name, portraits, etc., are used as goods, etc., that may be appreciated as independent objects; (ii) the name, portraits, etc., are affixed to goods, etc., for the purpose of distinguishing the goods from other goods, etc.; or (iii) the name, portraits, etc., are used to advertise goods, etc.

2. In the case where photographs of the singers were used and published in an article of a weekly magazine without their consent, in light of the facts found by the court as listed in (1) and (2) below, the sole purpose of this use cannot be regarded as the use of the customer appeal of the portraits of the aforementioned singers, and therefore, this use can not be regarded as infringement of the right to exclusively use the customer appeal (so-called the right of publicity) and can not be found to be illegal under the tort law:

(1) The aforementioned article explains a weight-loss method that utilizes the dance moves of the singers' songs, which was popular around the autumn of the year preceding the year of the publication of said weekly magazine, and it also cites entertainers' childhood memories of mimicking the dance moves of the singers' songs; and,

(2) The aforementioned photographs are used only on three pages out of a total of about 200 pages of the aforementioned weekly magazine, and they are all black and white and 2.8 cm (length) x 3.6 cm (width) or 8 cm (length) x 10 cm (width) in size.

(There is a concurring opinion concerning 1.)

References

(Concerning 1 and 2) Article 709 of the Civil Code, Article 13 of the Constitution

Article 709 of the Civil Code

A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

Article 13 of the Constitution

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Main text of the judgement

The final appeal is dismissed.

The appellants shall bear the cost of the final appeal.

Reasons

Concerning the reasons for petition for acceptance of final appeal argued by the appeal counsels, NAKAMURA Minoru, et al.

1. In this case, the appellants of final appeal seek damages in tort against the appellee of final appeal, alleging that the appellee published 14 photographs of the appellants in a weekly magazine without the appellants' consent, thereby infringing their right to exclusively use the customer appeal of the appellants' portraits.

2. The outline of the facts legally determined by the court of prior instance is as follows:

(1) A. The appellants formed a female duo called "Pink Lady" (hereinafter referred to as the "Pink Lady") from 1976 to 1981 and performed as singers. The Pink Lady was popular among diverse age groups ranging from small children to adults. It became a national fad to mimic the dance moves of their songs.

B. The appellee is a company engaged in the business of publication, issuance, etc., of books, magazines, etc., including the weekly magazine "Josei jishin."

(2) Around the autumn of 2006, a weight-loss method that utilizes the dance moves of the Pink Lady's songs became popular, mostly among women who are interested in losing weight.

(3) A. On February 13, 2007, the appellee published the aforementioned weekly magazine (the issue of February 27; Size: Modified AB, 26cm (length) x 21cm (width), the total number of pages: about 200; hereinafter referred to as the "Magazine"). From page 16 to page 18, the appellee published an article titled "Pink Lady de Diet" (hereinafter referred to as the "Article").

B. In the Article, an entertainer (hereinafter referred to as the "Instructor") explains a weight-loss method that utilizes the dance moves of five songs of the Pink Lady. In the Article, 14 black-and-white photographs (hereinafter referred to as the "Photographs") of the appellants are used.

(4) A. Above the title "Pink Lady de Diet" on the right side of page 16 of the Magazine, a photograph (4.8cm (length) x 6.7cm (width)) of the singing appellants is presented.

B. Page 16 and page 17 are respectively divided into an upper section and a lower section, and these sections explain the weight-loss method utilizing four songs, one song per section. The upper section of page 18 explains such method utilizing the fifth song. Each of these explanatory sections has a title indicating the weight-loss effect and a description of the dance moves both in four-frame cartoons and words. Each section also contains one photograph 5 cm (length) x 7.5 cm (width) or 8 cm (length) x 10 cm (width) in size and one or two photographs of the Instructor.

C. The upper left section of page 17 of the Magazine carries a description about the effect, etc., of the weight-loss method utilizing the dance moves of the Pink Lady's songs. Below the description, one photograph (7 cm (length) x 4.4 cm (width)) of the appellants in a swimsuit is presented. On the lower left section of the same page, a story about matters such as the Instructor's childhood memory of mimicking the dance moves of the Pink Lady's songs is cited.

D. Below the title "Our Treasured Photographs of the Memories of the Pink Lady" in the lower section of page 18 of the Magazine, a total of seven photographs of the appellants (size: 2.8 cm (length) x 3.6 cm (width) or 9.1 cm (length) x 5.5. cm (width)) are presented. Below the photographs, a story about matters such as the memory of the Pink Lady, similar to the section mentioned above, is cited from an entertainer who is different from the Instructor. On the left side of the story, one photograph of the entertainer is presented.

(5) The Photographs were taken by a photographer affiliated with the appellee with the appellants' consent. However, the appellants have not given their consent for the use of the Photographs in the Magazine. The Photographs were published in the Magazine without the appellants' consent.

3 (1) The name, portraits, etc. of an individual (hereinafter referred to as "portraits, etc.") are the symbol of the individual's personality. Therefore, it is construed that any person has the right to prevent others from taking advantage of his/her portraits, etc., which is derived from the right of personality (concerning the name of a person, see 1983 (O) No. 1311, judgment of the Third Petty Bench of the Supreme Court of February 16, 1988, Minshu Vol. 42, No. 2, at 27; concerning portraits, see 1965 (A) No. 1187, judgment of the Grand Bench of the Supreme Court of December 24, 1969, Keishu Vol. 23, No. 12, at 1625, 2003 (Ju) No. 281, judgment of the First Petty Bench of the Supreme Court of November 10, 2005, Minshu Vol. 59, No. 9, at 2428). In some cases, portraits, etc., have customer appeal, which can be used to promote the sale, etc., of goods. The right to exclusively use such customer appeal (hereinafter referred to as the "right of publicity") is established based on the commercial value of the portraits, etc., themselves. Therefore, the right of publicity may be regarded as one of the rights derived from the aforementioned right of personality. On the other hand, in the case of a person whose portraits, etc. have customer appeal, his/her portraits, etc. sometimes attract public attention and are consequently used in news, commentaries, work of art, etc, and in some cases, he/she has to permit such use as a legitimate act of expression, etc. Therefore, the unauthorized use of portraits, etc., of a person is considered to be infringement of the person's right of publicity and is found to be illegal under the tort law if the sole purpose of the use is to take advantage of the customer appeal of the portraits, etc., more specifically, in such cases where (i) the portraits, etc., are used as goods, etc., that may be appreciated as independent objects; (ii) the portraits, etc., are affixed to goods, etc., for the purpose of distinguishing the goods from other goods, etc.; or

(iii) the portraits, etc., are used to advertise goods, etc.

(2) In this case, according to the facts mentioned above, the appellants were popular among diverse age groups ranging from small children to adults in the late 1970s, and at that time, it became a national fad to mimic the dance moves of their songs. Therefore, the portraits of the appellants shown in the Photographs can be deemed to have customer appeal.

However, according to the facts mentioned above, the Article does not introduce the Pink Lady itself but it explains the weight-loss method, which utilizes the dance moves of the Pink Lady's songs and became popular around the autumn of the preceding year, while using both illustrations and words and indicating the effect of the weight-loss method in its title. The Article also cites entertainers' stories about their childhood memories of mimicking the dance moves of the Pink Lady's songs. The Photographs used in connection with the Article are presented only on three pages out of a total of about 200 pages of the Magazine. Those Photographs are all black and white and 2.8 cm (length) x 3.6 cm (width) or 8 cm (length) x 10 cm (width) in size. In light of these facts, it is reasonable to interpret that the Photographs are used for the purpose of bringing back the readers' memories and supplementing the content of the Article in the course of explaining the weight-loss method that utilizes the aforementioned dance moves and of citing entertainers' childhood memories of mimicking the aforementioned dance moves.

Therefore, it may not be considered that the sole purpose of the appellee's use of the Photographs in the Magazine without the appellants' consent is the use of the customer appeal of the portraits of the appellants and therefore the use of the Photographs may not be found to be illegal under the tort law.

4. For the reasons stated above, we can affirm the holding by the court of prior instance to the effect that the act of using the Photographs in the Magazine may not be regarded as illegal under the tort law, as it goes along with our reasoning explained above. We cannot accept the appeal counsels' arguments.

Therefore, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices. There is a concurring opinion by Justice KANETSUKI Seishi.

The concurring opinion by Justice KANETSUKI Seishi is as follows:

Various interpretations have been presented by lower courts, etc., as to what criteria should be used to determine infringement of the right of publicity. Since the right of publicity is the right to exclusively use the customer appeal of the portraits, etc., of a person, the unauthorized use of customer appeal should be considered as the main element of infringement.

Celebrities, who have customer appeal, could naturally attract the legitimate interest of the

public in many ways. For instance, entertainers and athletes often attract attention from people who are interested in the field of entertainment. Although such public attention could raise the issue of the right of publicity in some cases, unreasonable restrictions should not be placed on the reports, news, commentaries, etc., about the personality, activities, etc., of celebrities. Since most of reporting, publishing, and broadcasting activities, etc., are conducted on a commercial basis, it would be quite possible that the use of the portraits, etc., of a celebrity as a part of such activities has the effect of appealing to customers. Therefore, it would be unreasonable to consider the general commercial use of portraits, etc., as infringement of the right of publicity. The scope of acts that constitute infringement should be defined as clearly as possible. On the grounds that Japan does not have a law or an ordinance about the right of publicity and merely recognizes the right of publicity as a right derived from the right of personality and that a person whose right of publicity has been infringed would only suffer financial damage and could seek a separate remedy if the use of his/her name, portraits, etc., constitutes defamation or an invasion of privacy, a narrow interpretation of the scope of infringement should be adopted. This approach should be understood in association with the judgment handed down by the Second Petty Bench of the Supreme Court that denied the right of publicity of an object, 2001 (Ju) No.866, No.867 of February 13, 2004, *Minshu*, Vol. 58, No. 2, at 311. In the judgment, the court denied the right of publicity of an object by holding that, in the case of the use of an intangible element of an object such as the use of the name of an object, in light of the fact that the Trademark Act and other intellectual property laws protect rights and, at the same time, clearly specify the scope and limit of the right of exclusive use so that the grant of the right of use will not lead to excessive restriction of the freedom of economic and cultural activities of the public, it would be unreasonable to provide the owner of a racehorse with the right of exclusive use of the name of the racehorse and other rights without any underlying laws, ordinances, etc., even if the name, etc., of the racehorse has customer appeal.

This judgment presents the following three patterns where the unauthorized use of a portrait, etc., is considered to be illegal under the tort law: (i) the cases where portraits, etc., are used as goods, etc., such as posters and photographs, that may be appreciated as independent objects; (ii) the cases where portraits, etc., are affixed to goods, etc., i.e., as so-called character goods, for the purpose of distinguishing the goods from other goods, etc.; and (iii) the cases where portraits, etc., are used to advertise goods, etc. These three patterns are typical cases where the sole purpose of using portraits, etc., is to use their customer appeal. A study of the relevant lower court precedents has shown that these three patterns cover most of the cases where infringement of the right of publicity may be recognized. Aside from these three patterns, the scope of cases where the right of publicity may be considered to be infringed may become sufficiently clear if infringement is recognized only if the intention of using the customer appeal

of portraits, etc., is as strong as such intention shown in the cases that fall under any of the aforementioned three patterns.

The court of prior instance pointed out that, if there is any purpose other than the purpose of using customer appeal, the use of customer appeal may not be regarded as the "sole" purpose. However, it is our understanding that, for example, in the case of a publication that contains both an article and a portrait photograph, if a study of the article and the photograph, by comparing the content of the article and the size, role, etc., of the photograph, reveals that the article plays only a supplementary role and does not serve any independent purpose or that the photograph is used in a large size independently from the article, the sole purpose of the use of the photograph may be interpreted as the use of its customer appeal. In this case, the word "sole" should not be interpreted so strictly.

Presiding judge

Justice SAKURAI Ryuko

Justice MIYAKAWA Koji

Justice KANETSUKI Seishi

Justice YOKOTA Tomoyuki

Justice SHIRAKI Yu

(This translation is provisional and subject to revision.)