

Decided on	July 17, 2008	Court	Intellectual Property High Court, Third Division
Case number	2008 (Ne) 10009		
- A case, with respect to an appeal made by the plaintiff, which was dismissed on the grounds that copyrightability prescribed in Article 2, paragraph (1), item (i) of the Copyright Act was not recognized in descriptions summarizing observed results of a witness examination (Observations by the Plaintiff) performed on the trial date for a criminal case involving the defendant			

References: Article 2, paragraph (1), item (i) and Article 10, paragraph (2) of the Copyright Act

1. The plaintiff disclosed, through the Internet, descriptions summarizing the observed results of a witness examination (hereinafter referred to as “Observations by the Plaintiff”), performed at the Tokyo District Court on the fourth (4th) trial date for a case involving a violation of the Securities and Exchange Act brought against defendant HORIE Takafumi. A third party published, without the knowledge of the plaintiff, an article relating to the witness examination mentioned above (hereinafter referred to as “the Blog Entry”) at a blog titled “Yahoo! Blog – Livedoor Victim’s Diary,” which was one of the “Yahoo! Blogs” managed and operated by the defendant.

The plaintiff requested the defendant to (1) disclose information on the author of the Blog Entry pursuant Article 4, paragraph (1) of the Act Concerning Limitation of Liabilities of Specified Telecommunications Service Providers and Disclosure of Information on Senders (hereinafter referred to as “the Provider Liability Limitation Act”) and to (2) delete the Blog Entry pursuant Article 112, paragraph (2) of the Copyright Act, claiming that the Blog Entry infringed on the plaintiff’s copyright over Observations by the Plaintiff.

The judgment in prior instance dismissed the plaintiff’s request, finding Article 4, paragraph (1) of the Provider Liability Limitation Act and Article 112, paragraph (2) of the Copyright Act inapplicable to Observations by the Plaintiff for the reason that the Observations did not fall under “works” prescribed in Article 2, paragraph (1), item (i) of the Copyright Act. The plaintiff appealed the judgment in this case.

2. The court decision dismissed the plaintiff’s appeal, explaining its reasons for the decision as follows:
 - (1) There is no need for the concerned descriptions to display originality in a strict sense for saying that they are “expressed in a creative way” as prescribed in

Article 2, paragraph (1), item (i) of the Copyright Act. However, the personality of authors thereof must be expressed therein in some way. As descriptions not expressing the personality of authors, descriptions and the like employing verbal expressions may not be understood to be “expressed in a creative way” in cases where other expressions are not assumable because they are extremely brief or forms of expressions are limited or where expressions are unremarkable and common.

“Thoughts or sentiments” of authors must be expressed as a subject matter to say that “thoughts or sentiments are expressed” as prescribed in Article 2, paragraph (1), item (i) of the Copyright Act. Expressions in descriptions and the like employing verbal expressions should not be considered to express “thoughts or sentiments” of authors when the contents thereof exclusively describe “facts,” without incorporating particular appraisals or opinions, and without modification. (“Facts” in this case refer to specific situations, manners, existence and the like, such as “who did what where and when,” “a certain matter exists,” and “this is how the manner of a certain matter is.”) (Refer to Article 10, paragraph (2) of the Copyright Act.)

(2) (a) Parts of Observations by the Plaintiff describing the contents of testimony (for example, “Livedoor’s first budget for the fiscal year ended September 2004” and “produced on the basis of draft budgets submitted by respective divisions and subsidiaries”) are the contents of actual testimony given by a witness that are described in a manner heard by the plaintiff or, granted that they are summarized, summaries of such contents produced in a method that is extremely commonplace. For the above reasons, none of the parts expresses the personality of the plaintiff, and may be recognized to constitute an intellectual creation.

(b) To facilitate understanding of the testimony, the opening part of Observations by the Plaintiff comes with brief descriptions, including headings (such as “‘Two (2) Billion Yen Posted through Share Exchange,’ Says Witness MARUYAMA Satoshi in the Direct Prosecutors’ Examination in the Livedoor Case”) and sub-headings (such as “Regarding Files Stored in the Witness’s Personal Computer” and “HORIE Takafumi (Former Livedoor President) Made Decisions”). However, no part of said additional descriptions expresses the personality of the plaintiff, and may be recognized to constitute an intellectual creation because headings added as summaries of the contents of testimony in a method that is extremely commonplace may not be considered to show particular

ingenuity and because all subheadings are extremely short and selectable modes of expression therefor may be called limited.

(c) The plaintiff asserts that Observations by the Plaintiff were produced on the basis of partial notes taken on the contents of the witness examination (hereinafter referred to as “the Notes”), and that Observations by the Plaintiff should be recognized to constitute an intellectual creation on the grounds that Observations by the Plaintiff display ingenuity in their “classifications” and “structure” in comparison with the Notes. Specifically, the plaintiff cites, as the illustrations of ingenuity displayed therein, points, including the following: (1) parts of Observations by the Plaintiff 2 relating to the career of the witness were extracted from the direct examination and the cross examination, (2) descriptions in Observations by the Plaintiff 1 that “posting of the share exchange with Kurasawa Communications was also explained orally” and “defendant HORIE said nothing, but he appeared to have understood the explanation because he asks questions when he doesn’t understand,” and descriptions in Observations by the Plaintiff 2 that “joined Mirai Securities as a new graduate from a university,” “traded in shares on trust from individual investors and engaged in financing for a venture company,” and “left the company in slightly less than a year and a half” were presented in a reshuffled chronological order, instead of the order of actual testimony, and (3) proper names were omitted in Observations by the Plaintiff 2.

Expressions in the parts relating to the career, however, are mere communications of facts, and, as stated above, they are not recognized to constitute an intellectual creation because the range of selectable expressions is narrow. The rearrangement of the order of actual testimony and omission of proper names may not be called a selection or arrangement ingenious enough to be assessed as the display of the personality of the plaintiff. Hence, the assertion of ingenuity made by the plaintiff cannot be accepted.

(3) On the grounds explained above, Observations by the Plaintiff may not be recognized as a work.

Consequently, publication of the Blog Entry at the website may not be considered to fall under Article 4, paragraph (1) of the Provider Liability Limitation Act. Furthermore, publication of said Article thereat may not be called an act that infringes on copyright.

Judgment rendered on July 17, 2008

2008 (Ne) 10009, Appeal Case Seeking Disclosure of Identification Information of a Sender
(Court of prior instance: Tokyo District Court; 2007 (Wa) 9982)

Date of conclusion of oral argument: June 10, 2008

Judgment

Appellant (hereinafter referred to as the "Plaintiff"): X

Appellee (hereinafter referred to as the "Defendant"): Yahoo Japan Corporation

Counsel attorney: HIDE Sakurako

Main Text

1. The appeal shall be dismissed.
2. The Plaintiff shall bear the appeal costs.

Facts and reasons

No. 1 Claims

1. The judgment in prior instance shall be revoked.
2. The Defendant shall disclose to the Plaintiff the information stated in the List of Identification Information of the Sender attached to this judgment in relation to the person who posted Blog Posts 1 and 2 attached to this judgment on the blog stated in the Blog List attached to this judgment.
3. The Defendant shall delete Blog Posts 1 and 2 attached to this judgment.

No. 2 Outline of the case

The Plaintiff disclosed, via the Internet, an observation record stated in the Plaintiff's Observation Record attached to this judgment (hereinafter referred to as the "Plaintiff's Observation Record"; for convenience, the parts corresponding to Blog Posts 1 and 2 as mentioned later are called "Plaintiff's Observation Record 1" and "Plaintiff's Observation Record 2," respectively, in some cases), which summarizes the observations from an examination of a witness in a criminal action.

Blog Posts 1 and 2 attached to this judgment (hereinafter referred to as "Blog Post 1" and "Blog Post 2" in order, and these blogs are collectively referred to as the "Blog Posts" in some cases) were posted without the Plaintiff's permission on the blog stated in the Blog List attached to this judgment (hereinafter referred to as the "Blog") among blogs using the service on the site "Yahoo! Blog" (hereinafter referred to as the "Service"), which the Defendant manages and runs.

The Plaintiff asserted that the Blog Posts constitute infringement of the Plaintiff's copyright for the Plaintiff's Observation Record. Based on this assertion, the Plaintiff demanded that the Defendant [i] disclose the identification information of the sender of the Blog Posts under

Article 4, paragraph (1) of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (hereinafter referred to as the "Providers Liability Limitation Act") and [ii] delete the Blog Posts under Article 112, paragraph (2) of the Copyright Act.

The court of prior instance ruled that Article 4, paragraph (1) of the Providers Liability Limitation Act and Article 112, paragraph (2) of the Copyright Act are not applicable to the Plaintiff's Observation Record because it does not fall under the "work" set forth in Article 2, paragraph (1), item (i) of the Copyright Act. Based on this ruling, the court dismissed the Plaintiff's claims. The Plaintiff consequently filed this appeal.

1. Assumed facts (undisputed facts or facts found based on evidence)

(1) On September 12, 2006, the Plaintiff observed an examination of a witness (hereinafter referred to as the "Examination of the Witness") held on the fourth trial date for a case of violation of the Securities and Exchange Act (hereinafter referred to as the "Trial Case") against Defendant Takarumi Horie (hereinafter referred to as the "Defendant in Question"), which was held at the First Criminal Division of the Tokyo District Court. The Plaintiff made notes of part of the content of the examination (Exhibits Ko No. 4 and No. 25; hereinafter referred to as the "Notes" in some cases; Exhibits Ko No. 18 and No. 20 to No. 22). Based on said notes, the Plaintiff prepared the Plaintiff's Observation Record, and disclosed it via the Internet on September 14, 2006 (Exhibit Ko No. 5; entire import of argument).

(2) The Defendant manages and runs the Service that enables an unspecified number of people to freely transmit information via the Internet with the aim of having unspecified people receive the information.

The Service is the provision of a free blog service (a blog is a simple diary on the website). In order to start a blog through the Service, a user needs to obtain a free ID, i.e. "Yahoo!Japan ID." The user enters his/her ID and arbitrarily-set password and thereby logs in to the Defendant's website. Then, the user accesses the "Yahoo! Blog Start Page." If the user clicks on the blog start button, the page moves to the necessary-information entry page. The user is required to certify that he or she has agreed to the guidelines (Exhibits Otsu No. 1-1 to No. 1-4).

(3) Blog Posts 1 and 2 were disclosed by being posted on the Blog on September 30, 2006 and October 25 of the same year, respectively (Exhibit Ko No. 2 and Exhibits Otsu No. 7 and No. 8).

The Plaintiff demanded that the Defendant delete the Blog Posts, but the Defendant has not complied with the demand.

2. Issues in this case

(1) Whether the Plaintiff's Observation Record falls under the "work" set forth in Article 2, paragraph (1), item (i) of the Copyright Act; whether the act of publishing the Blog Posts can be

regarded as constituting infringement of the Plaintiff's right of reproduction for the Plaintiff's Observation Record

(2) Whether the act of publishing the Blog Posts can be regarded as falling under cases "where there is evidence that the rights of a person demanding said disclosure were infringed" as prescribed in Article 4, paragraph (1), item (i) of the Providers Liability Limitation Act; whether said act can be regarded as an act that constitutes an act of infringement on a copyright as prescribed in Article 112, paragraph (2) of the Copyright Act

3. Allegations of the parties concerning the issues (including supplementary allegations in this instance)

(1) Regarding Issue 1 (whether the Plaintiff's Observation Record has copyrightability set forth in Article 2, paragraph (1), item (i) of the Copyright Act)

(Plaintiff's allegations)

The Plaintiff's Observation Record is a summary that was prepared by classifying and reconfiguring the public prosecutor's questions and the witness's answers from the Plaintiff's unique perspective on the basis of the Notes, that is, by combining said questions and answers using originality. The Plaintiff made choices about information in preparing the Plaintiff's Observation Record. For example, for the part relating to the witness's personal history in Plaintiff's Observation Record 2, the Plaintiff made extractions from the direct examination and counter-examination. For the statements in Plaintiff's Observation Record 1, "○ The witness explained that the exchange of stocks with Kurasawa Communications had also been recorded" and "■ Defendant Horie said nothing, but the witness thinks that he understood the witness's explanation because he would have asked questions if he hadn't understood," and the statements in Plaintiff's Observation Record 2, "○ Entered Mirai Securities after graduating from university," "■ Engaged in acceptance of entrustment of stock trading from private investors and funding for venture companies," and "■ Left the company less than one and a half years later," the Plaintiff arranged them not in the order stated in testimonies but in chronological order. In Plaintiff's Observation Record 2, the Plaintiff omitted a proper noun (Shiro Yamada) in the actual testimony, "Had connections with Director Shiro Yamada" (Exhibit Ko No. 25).

Therefore, the Plaintiff's Observation Record is a work. The Blog Posts infringe the Plaintiff's right of reproduction for the Plaintiff's Observation Record because they are reproductions of the Plaintiff's Observation Record.

(Defendant's counterarguments)

A. Regarding the determination concerning whether the Plaintiff's Observation Record has copyrightability

The Plaintiff's Observation Record is a description of an exchange of questions and answers in the Examination of the Witness in the court of trial against the Defendant in Question.

In general, the content of an examination of a witness in the court of trial is a fact. Therefore, it ordinarily seems unlikely that a text describing such content is recognized as being creative, and such text is nothing more than mere "communications of facts" (Article 10, paragraph (2) of the Copyright Act). In addition, forms of expression are also limited in cases where a person intends to reproduce the content of an examination of a witness in writing, taking into account that an examination of a witness requires brief questions and answers and is conducted in principle in the "form of a series of questions and answers."

An examination of a witness consists of questions from a public prosecutor or counsel and a witness's answers thereto. Questions start with those relating to the witness's personal history, and are asked in chronological order or in the order of issues. Moreover, the content of the questions from the public prosecutor or counsel are limited to the time and date, the place, those who happened to be there, the witness's feeling, etc. in relation to the facts that the witness experienced. The witness states facts in answering these questions. Therefore, a description of these matters in a common manner lacks creativity.

The Trial Case is a case that had a major effect on the stock market. The content of the examination of a witness on said case is a social concern, but it is not that all of those who want to observe the trial can do so due to constraints, such as physical circumstances, including lack of the number of gallery seats. In order to secure the opening to the public of the court proceedings and realize the right of citizens to know and judiciary monitoring by citizens, it is not reasonable to broadly recognize the copyrightability of an observation record, such as the Plaintiff's Observation Record. In order to affirm the copyrightability of such an observation record, the following ingenuities in expressions are required: [i] in terms of the whole composition, classifying and reconfiguring the content of an examination from a unique perspective regardless of the order of the examination; [ii] in terms of the form of expression, not merely itemizing the content of the examination but exercising ingenuity to the extent that it can be evaluated as expressing personality; [iii] sorting out the important content from the author's unique perspective and, for example, highlighting the important part by writing it in a large font or in boldface; and [iv] describing how things went in court by adding the author's unique expressions and adding text that explains the background and outline of the case by using unique information and expressions (Exhibits Otsu No. 6-1 and No. 6-2).

As mentioned above, a note of the mere content of an examination of a witness and a note summarizing questions and answers fall under the "communications of facts" as set forth in Article 10, paragraph (2) of the Copyright Act, and should be regarded as not being creative.

B. Regarding the Plaintiff's Observation Record

(A) Plaintiff's Observation Record 1

The initial statement, "Public prosecutor's direct examination of Mr. Satoshi Maruyama,

who is a witness for the Livedoor case on 'recording 2,000,000,000 yen for exchange of stocks,'" is not creative.

The subsequent statements are composed in line with the flow of the Examination of the Witness under such headings as "Regarding a file on the witness's computer" and "Regarding another file on the witness's computer." However, this composition is not creative because it is common for an examination of a witness to be conducted separately with respect to each topic. The headings are also not creative.

The subsequent statements, "It is Livedoor's first draft budget for the September 2004 term," "It was prepared based on draft budgets for its business divisions and subsidiaries," "Investment operations conducted by Livedoor Finance are not included," etc. are supposedly recognized as mere statements in the testimonies of the witness as they are, and do not include any expressions of the Plaintiff's thoughts or sentiments. Therefore, they are not creative. Consequently, Plaintiff's Observation Record 1 does not go beyond common expressions in terms of the whole composition, the order of questions and answers, and the content of questions and answers, and it is a mere communication of facts and lacks creativity. Therefore, it is not recognized as having copyrightability.

(B) Plaintiff's Observation Record 2

The initial statement, "The first witness in the public prosecutor's examination of witnesses on the fourth trial date for Defendant Horie in the Livedoor case is Mr. Satoshi Maruyama (kanji characters for "Satoshi" are unknown)," is a statement of an objective fact, and it cannot be regarded as including any ingenuity exercised by the Plaintiff.

The headings, "● From a direct examination by the prosecution" and "● From a counter-examination by the defense," are very short headings. Any person would adopt such headings if he/she intended to describe the flow of an examination of a witness in a criminal action. There are constraints on forms of expression, and such expressions are ordinary and common. Therefore, they are not recognized as being creative.

The statements under the heading "● From a direct examination by the prosecution" are "Former employee of Livedoor" and "At the time of the Livedoor case, took charge of budget formulation for the entire Livedoor Group." They describe the mere key points of questions and answers regarding the witness's personal history, and are mere communications of facts that are the results of the examination of the witness. There is no room for choosing other forms of expression, and therefore, the sentences cannot be regarded as including any ingenuity exercised by the Plaintiff.

The statements under the heading of "● From a counter-examination by the defense" are "Entered Mirai Securities after graduating from university," "Engaged in acceptance of entrustment of stock trading from private investors and funding for venture companies," etc.

These sentences are also not recognized as including any ingenuity exercised by the Plaintiff. In addition, the sentence, "The public prosecutor's examination of a witness for Mr. Satoshi Maruyama was conducted from 10:00 to 13:35 on Tuesday, September 12, 2006 (including a break from 12:00 to 13:15)," is a sentence that merely describes a fact, that is, court progress.

C. As mentioned above, the Plaintiff's Observation Record is not recognized as having copyrightability because very common expressions are chosen in terms of the whole composition, the order of questions and answers, the content of questions and answers, etc. and because the content thereof is nothing more than mere communications of facts and lacks creativity. Consequently, the act of publishing the Blog Posts on the Blog is not an act of infringement on the right of reproduction for the Plaintiff's Observation Record.

(2) Regarding Issue 2 (whether there is evidence for infringement of rights as set forth in Article 4, paragraph (1) of the Providers Liability Limitation Act)

(Plaintiff's allegations)

The Blog Posts were prepared by reprinting the entire text of the Plaintiff's Observation Record as it is, and infringe the Plaintiff's copyright for the Plaintiff's Observation Record. Therefore, the requirement of evidence for infringement of rights as set forth in Article 4, paragraph (1) of the Providers Liability Limitation Act is fulfilled.

The act of publishing the Blog Posts on the Blog is an act of infringement on the Plaintiff's right of reproduction for the Plaintiff's Observation Record. Consequently, the Plaintiff is eligible to demand that the Defendant delete the Blog Posts under Article 112, paragraph (2) of the Copyright Act.

(Defendant's counterarguments)

The obligation to disclose identification information of a sender arises only where there is evidence for infringement of a copyright. The act of publishing the Blog Posts on the Blog is neither an act of infringement on the right of reproduction for the Plaintiff's Observation Record, nor is it even an act for which there is evidence for infringement of a copyright. Therefore, it does not fulfill the requirement of evidence for infringement of rights as set forth in Article 4, paragraph (1) of the Providers Liability Limitation Act. There is no ground for demanding deletion of the Blog Posts under Article 112, paragraph (2) of the Copyright Act.

No. 3 Court decision

1. Regarding Issue 1 (whether the Plaintiff's Observation Record has copyrightability set forth in Article 2, paragraph (1), item (i) of the Copyright Act)

A work subject to protection under the Copyright Act needs to be a "production in which thoughts or sentiments are expressed in a creative way" (Article 2, paragraph (1), item (i) of the Copyright Act).

Whether a production expressed in language has copyrightability is mentioned below in line

with this case.

In order to say that a description is a "production ... expressed in a creative way" as prescribed in Article 2, paragraph (1), item (i) of the Copyright Act, it does not need to bring out originality in a strict sense, but needs to express some sort of personality of the person who wrote the description. In the case of a description, etc. by linguistic expression, if another expression is not assumable due to briefness of the description, etc. or constraints on the forms of expression or if the expression is ordinary and common, the description, etc. cannot be recognized as a "production ... expressed in a creative way," as it is deemed not to express the personality of the person who wrote the description, etc.

Moreover, in order to say that "thoughts or sentiments are expressed" as prescribed in said Article, the "thoughts or sentiments" of the person who wrote the description, etc. needs to be expressed as the subject-matter. If the content of expressions in a description, etc. by linguistic expression is a depiction of a sole "fact" ("fact" in this case refers to a specific situation, form or existence, etc.; for example, it refers to "who conducted what, and when and where the person did so," "existence of a product," and "form of a product") as it is, without adding any special evaluation and opinion, it should be regarded as not expressing the "thoughts or sentiments" of the person who wrote the description, etc. (see Article 10, paragraph (2) of the Copyright Act).

On the premise of the above, whether the Plaintiff's Observation Record has copyrightability is examined.

(1) Finding of facts (content stated in the Plaintiff's Observation Record)

A. Plaintiff's Observation Record 1

Plaintiff's Observation Record 1 was prepared by the plaintiff by describing the results of observation of the examination of a witness for Mr. Satoshi Maruyama in the Livedoor case in the following manner.

(A) Plaintiff's Observation Record 1 has the large heading (title) "Public prosecutor's direct examination of Mr. Satoshi Maruyama, who is a witness for the Livedoor case on 'recording 2,000,000,000 yen for exchange of stocks.'"

(B) There are the following medium headings.

- Regarding a file on the witness's computer
- Regarding another file on the witness's computer
- Regarding another file on the witness's computer
- Regarding another file on the witness's computer
- Regarding a meeting on November 10 (Monday)
- Regarding the final draft budget
- Regarding the budgets thereafter

(C) The content of testimonies is briefly described under each medium heading.

For example, the following are described under the heading, "● Regarding a file on the witness's computer."

- It is Livedoor's first draft budget for the September 2004 term.
- It was prepared based on draft budgets for its business divisions and subsidiaries.
- Investment operations conducted by Livedoor Finance are not included.
- The budget was aggressive as it was the first draft budget, specifically, "the amount of sales is 13,200,000,000 yen and operating profit is 2,270,000,000 yen."
- The witness felt it reasonable to set "the amount of sales at 10,000,000,000 to 11,000,000,000 yen and operating profit at 700,000,000 to 800,000,000 yen."
- These were feasible figures based on increases in revenue and profit from the previous year.
- Increases in revenue and profit in all businesses were required based on the management's idea.
- Decreases in revenue and profit might have caused business division managers and presidents of subsidiaries to become subject to pay cuts or demotions.
- Defendant Takafumi Horie (former president of Livedoor) had made certain determinations.
- It was the witness's task to revise the figures in the draft budget to realistic ones based on the previous year's result.
- Defendant Horie was relentless when the witness reported the draft budget to him.
- Defendant Horie knew that investment operations conducted by Livedoor Finance were not included.
- The sales of investment operations conducted by Livedoor Finance were expected to be 1,000,000,000 yen.
- Most of the sales consisted of compensations for establishment and management of 10,000,000,000 yen-scale funds in cooperation with eBANK Corporation.

B. Plaintiff's Observation Record 2

Plaintiff's Observation Record 2 was prepared by the plaintiff by describing the results of observation of the examination of a witness (continuation) for Mr. Satoshi Maruyama in the Livedoor case in the following manner.

(A) There is an explanatory note, "The first witness in the public prosecutor's examination of witnesses on the fourth trial date for Defendant Takafumi Horie (former president of Livedoor) in the Livedoor case is Mr. Satoshi Maruyama (kanji characters for 'Satoshi' is unknown)."

(B) There are the following medium headings.

- From a direct examination by the prosecution
- From a counter-examination by the defense

(C) The content of testimonies is briefly described under each medium heading.

For example, the following are described under the heading, "● From a counter-examination

by the defense."

- Entered Mirai Securities after graduating from university
- Engaged in acceptance of entrustment of stock trading from private investors and funding for venture companies
- Left the company less than one and a half years later
- Entered Tera Japan after leaving Mirai Securities
- A company engaging in the business of reducing the weight of garbage and oil by using organic substance
- Left the company as the earnings of the company deteriorated one to two months later
- Looked for a job for about a two-month period between leaving Tera Japan and entering Livedoor (the company name at that time was "Livin' on the Edge")
- Entered UFJ Capital after leaving Livedoor
- Engaged in M&A brokerage
- Left the company a little over nine months later
- Running his own company at present
- Consultant in relation to venture companies' preparation for listing and offering of stock to the public

(D) At the end, there is a statement that "The public prosecutor's examination of a witness for Mr. Satoshi Maruyama was conducted from 10:00 to 13:35 on Tuesday, September 12, 2006 (including a break from 12:00 to 13:15)."

(2) Determinations

A. The parts describing the content of testimonies in the Plaintiff's Observation Record (for example, "It is Livedoor's first draft budget for the September 2004 term" and "It was prepared based on draft budgets for its business divisions and subsidiaries") describe the content of the witness's actual testimonies as heard by the Plaintiff, or summarize such content in the most common manner. Therefore, the Plaintiff's personality is not expressed there, and these parts cannot be recognized as being creative.

B. In the Plaintiff's Observation Record, short notations, such as large headings (for example, "Public prosecutor's direct examination of Mr. Satoshi Maruyama, who is a witness for the Livedoor case on 'recording 2,000,000,000 yen for exchange of stocks'") and medium headings (for example, "Regarding a file on the witness's computer"), are added at the beginning in order to make it easy to understand the content of testimonies. However, regarding large headings, such additional notations were made in the most common manner as a summary of the content of testimonies, and it cannot be said that special ingenuities were exercised in relation to them. In addition, all the medium headings are very short and can be regarded as lacking the options of expression methods. Therefore, the Plaintiff's personality is not exerted there, and they cannot

be recognized as being creative.

C. In this regard, the Plaintiff alleges that the Plaintiff's Observation Record was prepared based on the Notes and that the Plaintiff's Observation Record should be recognized as being creative because, compared with the Notes, ingenuities are exercised in relation to the "classification" and "composition" of the Plaintiff's Observation Record. Then, the Plaintiff specifically shows the following as examples of ingenuities: [i] The part concerning the witness's personal history in Plaintiff's Observation Record 2 consists of extractions from the direct examination and counter-examination; [ii] The statements in Plaintiff's Observation Record 1, "○ The witness orally explained that the exchange of stocks with Kurasawa Communications had also been recorded" and "■ Defendant Horie said nothing, but the witness thinks that he understood the witness's explanation because he would have asked questions if he hadn't understood" and the statements in Plaintiff's Observation Record 2, "○ Entered Mirai Securities after graduating from university," "■ Engaged in acceptance of entrustment of stock trading from private investors and funding for venture companies," and "■ Left the company less than one and a half years later," were rearranged not in the order stated in testimonies but in chronological order; [iii] In Plaintiff's Observation Record 2, a proper noun was omitted.

However, regarding the ingenuities alleged by the Plaintiff, expressions in the personal history part are not recognized as being creative as they are mere communications of facts and there are fewer options of expressions, as mentioned above. Rearranging the order of actual testimonies and omitting a proper noun cannot be regarded as choices or ingenuities in arrangement that can be evaluated as exertions of the Plaintiff's personality. Therefore, the plaintiff's allegation is unacceptable.

(3) Summary

As mentioned above, the Plaintiff's Observation Record cannot be recognized as a work.

Therefore, the act of publishing the Blog Posts on the website can be regarded neither as falling under Article 4, paragraph (1) of the Providers Liability Limitation Act nor as being an act of infringement on the copyright.

2. Conclusion

There are no grounds for the appeal filed by the plaintiff without the need for making a ruling on other issues. Consequently, the judgment in prior instance that dismissed the plaintiff's claims in this action is reasonable in terms of its conclusion. Therefore, the appeal shall be dismissed. The judgment shall be rendered in the form of the main text.

Intellectual Property High Court, Third Division

Presiding judge: IIMURA Toshiaki

Judge: NAKADAIKEN Ken

Judge: UEDA Hiroyuki

Attachment

Blog List

"Diary of Livedoor's Victim on Yahoo! Blog"

<http://blogs.yahoo.co.jp/bachtoback/>

Attachment

Blog Post 1

Public prosecutor's direct examination of Mr. Satoshi Maruyama, who is a witness for the Livedoor case on "recording 2,000,000,000 yen for exchange of stocks"

Regarding a file on the witness's computer

It is Livedoor's first draft budget for the September 2004 term.

It was prepared based on draft budgets for its business divisions and subsidiaries.

Investment operations conducted by Livedoor Finance are not included.

The budget was aggressive as it was the first draft budget, specifically, "the amount of sales is 13,200,000,000 yen and operating profit is 2,270,000,000 yen."

The witness felt it reasonable to set "the amount of sales at 10,000,000,000 to 11,000,000,000 yen and operating profit at 700,000,000 to 800,000,000 yen."

These were feasible figures based on increases in revenue and profit from the previous year.

Increases in revenue and profit in all businesses were required based on the management's idea.

Decreases in revenue and profit might have caused business division managers and presidents of subsidiaries to become subject to pay cuts or demotions.

Defendant Takafumi Horie (former president of Livedoor) had made certain determinations.

It was the witness's task to revise the figures in the draft budget to realistic ones based on the previous year's result.

Defendant Horie was relentless when the witness reported the draft budget to him.

Defendant Horie knew that investment operations conducted by Livedoor Finance were not included.

The sales of investment operations conducted by Livedoor Finance were expected to be 1,000,000,000 yen.

Most of the sales consisted of compensations for establishment and management of 10,000,000,000 yen-scale funds in cooperation with eBANK Corporation.

Regarding another file on the witness's computer

It is a revised version of the budget in the aforementioned file.

In late October 2003, negotiations on an alliance with eBANK were being deadlocked, and it was difficult to establish funds.

Around that time, the witness heard from Defendant Osanari Nakamura (former president of Livedoor Finance) that "the sales of 1,800,000,000 yen is to be recorded for exchange of stocks."

The profit on sales of Livedoor's stocks is recorded as the consolidated sales of the group.

Although the witness had a bad feeling, he was preoccupied with preparation of the budget and

felt that "it was okay as long as figures added up."

Regarding another file on the witness's computer

It is a revised version of the budget in the aforementioned file.

As most of the eBank-related budget is not feasible, the witness deleted it.

The witness recorded 1,800,000,000 yen in the name of the sales of investment securities by Livedoor Finance.

The witness believes that said amount consists only of the profit on sale of Livedoor's stocks.

Said amount was recorded in two batches (900,000,000 yen each) in December and January for the purpose of leveling by quarter.

Leveling was based on the wishes of the board members, including Defendant Horie.

Regarding another file on the witness's computer

It is a revised version of the budget in the aforementioned file.

The operating profit was stated as 1,900,000,000 yen.

Defendant Ryoji Miyauchi (former director of Livedoor) said to the witness, "I cannot gain the approval of Defendant Horie if the operating profit does not reach 2,000,000,000 yen."

On November 7, the witness emailed a file to Defendant Horie in which the amount of the operating profit was revised to 2,000,000,000 yen.

Though the figures were complicated, Defendant Horie must have understood them.

On the same day, the witness received an email reply from Defendant Horie to the effect that "It might be necessary to include the amount relating to Kurasawa Communications into the budget."

Actually, the exchange of stocks with Kurasawa Communications had also been recorded.

Regarding a meeting on Monday, November 10

The meeting was held at a restaurant in the basement of Yamato Life Insurance Building.

Defendant Horie, Defendant Miyauchi, the witness, and a student who was the assistant (an intern for some kind of project) of Defendant Horie attended the meeting.

The witness explained that the exchange of stocks with Kurasawa Communications had also been recorded.

Defendant Horie said nothing, but the witness thinks that he understood the witness's explanation because he would have asked questions if he hadn't understood.

Regarding the final draft budget

Defendant Horie said, "The operating profit, 2,000,000,000 yen, is small, so would it be possible to increase the current profit to 2,000,000,000 yen?"

It seemed that Defendant Horie was conscious of driving up the stock price of Livedoor beyond the expectation of the stock market.

The witness consulted with Defendant Nakamura and revised the sales of investment securities

to 2,000,000,000 yen.

As for the rest, the witness made almost no change.

The witness reported the revision to Defendant Horie by email, and gained his approval to the effect of "Roughly, OK" on November 18.

Regarding the budgets thereafter

In the earnings briefing in February 2004, the current profit was upwardly revised from 2,000,000,000 yen to 3,000,000,000 yen.

Defendant Fumito Kumagai (former representative director of Livedoor) said to the witness that "The stock price of Livedoor increased, and an exchange of stocks with Web Cashing.com is also scheduled."

The witness consulted with Defendant Nakamura, and revised the budgets for Livedoor and the entire Livedoor Group. The witness reported them to Defendant Horie, Defendant Miyauchi, and Defendant Kumagai.

After gaining the consent of Defendant Horie through Defendant Kumagai, the witness partially revised the budgets and published them in the earnings briefing.

In the earnings briefing in May, the witness also upwardly revised the current profit from 3,000,000,000 yen to 5,000,000,000 yen.

Defendant Horie said to the witness, "I want the current profit to be 5,000,000,000 yen."

The witness revised the current profit to 5,000,000,000 yen as a figure based on wishful thinking. After gaining the consent of Defendant Horie, the witness published it in the earnings briefing.

Attachment

Blog Post 2

The first witness in the public prosecutor's examination of witnesses on the fourth trial date for Defendant Horie in the Livedoor case is Mr. Satoshi Maruyama (kanji characters for "Satoshi" are unknown).

From a direct examination by the prosecution

Former employee of Livedoor

At the time of the Livedoor case, took charge of budget formulation for the entire Livedoor Group

From a counter-examination by the defense

Entered Mirai Securities after graduating from university

Engaged in acceptance of entrustment of stock trading from private investors and funding for venture companies

Left the company less than one and a half years later

Entered Tera Japan after leaving Mirai Securities

A company engaging in the business of reducing the weight of garbage and oil by using organic substances

Left the company as the earnings of the company deteriorated one to two months later

Looked for a job for about a two-month period between leaving Tera Japan and entering Livedoor (the company name at that time was "Livin' on the Edge")

Entered UFJ Capital after leaving Livedoor

Engaged in M&A brokerage

Left the company a little over nine months later

Running his own company at present

Consultant in relation to venture companies' preparation for listing and offering of stock to the public

The public prosecutor's examination of a witness for Mr. Satoshi Maruyama was conducted from 10:00 to 13:35 on Tuesday, September 12, 2006 (including a break from 12:00 to 13:15).

Attachment

List of Identification Information of the Sender

1. Name
2. Address
3. Email address
4. IP address pertaining to Blog Posts 1 and 2 attached to this judgment
5. The dates and times when Blog Posts 1 and 2 attached to this judgment were sent from a telecommunications facility to which the aforementioned IP address is allocated to the specified telecommunications facility that the Defendant uses.

Attachment "Plaintiff's Observation Record"

Plaintiff's Observation Record 1

Public prosecutor's direct examination of Mr. Satoshi Maruyama, who is a witness for the Livedoor case on "recording 2,000,000,000 yen for exchange of stocks"

- Regarding a file on the witness's computer
 - It is Livedoor's first draft budget for the September 2004 term.
 - It was prepared based on draft budgets for its business divisions and subsidiaries.
 - Investment operations conducted by Livedoor Finance are not included.
 - The budget was aggressive as it was the first draft budget, specifically, "the amount of sales is 13,200,000,000 yen and operating profit is 2,270,000,000 yen."
 - The witness felt it reasonable to set "the amount of sales at 10,000,000,000 to 11,000,000,000 yen and operating profit at 700,000,000 to 800,000,000 yen."
 - These were feasible figures based on increases in revenue and profit from the previous year.
 - Increases in revenue and profit in all businesses were required based on the management's idea.
 - Decreases in revenue and profit might have caused business division managers and presidents of subsidiaries to become subject to pay cuts or demotions.
 - Defendant Takafumi Horie (former president of Livedoor) had made certain determinations.
 - It was the witness's task to revise the figures in the draft budget to realistic ones based on the previous year's result.
 - Defendant Horie was relentless when the witness reported the draft budget to him.
 - Defendant Horie knew that investment operations conducted by Livedoor Finance were not included.
 - The sales of investment operations conducted by Livedoor Finance were expected to be 1,000,000,000 yen.
 - Most of the sales consisted of compensations for establishment and management of 10,000,000,000 yen-scale funds in cooperation with eBANK Corporation.
- Regarding another file on the witness's computer
 - It is a revised version of the budget in the aforementioned file.
 - In late October 2003, negotiations on alliance with eBANK were being deadlocked, and it was difficult to establish funds.
 - Around that time, the witness heard from Defendant Osanari Nakamura (former president of Livedoor Finance) that "the sales of 1,800,000,000 yen is to be recorded for exchange of stocks."

- The profit on sale of Livedoor's stocks is recorded as the consolidated sales of the group.
- Although the witness had a bad feeling, he was preoccupied with preparation of the budget and felt that "it was okay as long as figures added up."
- Regarding another file on the witness's computer
 - It is a revised version of the budget in the aforementioned file.
 - As most of the eBank-related budget is not feasible, the witness deleted it.
 - The witness recorded 1,800,000,000 yen in the name of the sales of investment securities by Livedoor Finance.
- The witness believes that said amount consists only of the profit on sale of Livedoor's stocks.
- Said amount was recorded in two batches (900,000,000 yen each) in December and January for the purpose of leveling by quarter.
- Leveling was based on the wishes of the board members, including Defendant Horie.
- Regarding another file on the witness's computer
 - It is a revised version of the budget in the aforementioned file.
 - The operating profit was stated as 1,900,000,000 yen.
- Defendant Ryoji Miyauchi (former director of Livedoor) said to the witness, "I cannot gain the approval of the president if the operating profit does not reach 2,000,000,000 yen."
- On November 7, the witness emailed a file to Defendant Horie in which the amount of the operating profit was revised to 2,000,000,000 yen.
- Though the figures were complicated, Defendant Horie must have understood them.
- On the same day, the witness received an email reply from Defendant Horie to the effect that "It might be necessary to include the amount relating to Kurasawa Communications into the budget."
- Actually, the exchange of stocks with Kurasawa Communications had also been recorded.
- Regarding a meeting on Monday, November 10
 - The meeting was held at a restaurant in the basement of Yamato Life Insurance Building.
 - Defendant Horie, Defendant Miyauchi, the witness, and a student who was the assistant (an intern for some kind of project) of Defendant Horie attended the meeting.
 - The witness explained that the exchange of stocks with Kurasawa Communications had also been recorded.
- Defendant Horie said nothing, but the witness thinks that he understood the witness's explanation because he would have asked questions if he hadn't understood.
- Regarding the final draft budget
 - Defendant Horie said, "The operating profit, 2,000,000,000 yen, is small, so would it be possible to increase the current profit to 2,000,000,000 yen?"
- It seemed that Defendant Horie was conscious of driving up the stock price of Livedoor

beyond the expectation of the stock market.

- The witness consulted with Defendant Nakamura, and revised the sales of investment securities to 2,000,000,000 yen.

- As for the rest, the witness made almost no change.

- The witness reported the revision to Defendant Horie by email, and gained his approval to the effect of "Roughly, OK" on November 18.

- Regarding the budget[s] thereafter

- In the earnings briefing in February 2004, the current profit was upwardly revised from 2,000,000,000 yen to 3,000,000,000 yen.

- Defendant Fumito Kumagai (former representative director of Livedoor) said to the witness, "The stock price of Livedoor increased, and an exchange of stocks with Web Cashing.com is also scheduled."

- The witness consulted with Defendant Nakamura, and revised the budgets for Livedoor and the entire Livedoor Group. The witness reported them to Defendant Horie, Defendant Miyauchi, and Defendant Kumagai.

- After gaining the consent of Defendant Horie through Defendant Kumagai, the witness partially revised the budgets and published them in the earnings briefing.

- In the earnings briefing in May, the witness also upwardly revised the current profit from 3,000,000,000 yen to 5,000,000,000 yen.

- Defendant Horie said to the witness, "I want the current profit to be 5,000,000,000 yen."

- The witness revised the current profit to 5,000,000,000 yen as a figure based on wishful thinking. After gaining the consent of Defendant Horie, the witness published it in the earnings briefing.

Attachment "Plaintiff's Observation Record"

Plaintiff's Observation Record 2

The first witness in the public prosecutor's examination of witnesses on the fourth trial date for Defendant Horie in the Livedoor case is Mr. Satoshi Maruyama (kanji characters for "Satoshi" are unknown).

- From a direct examination by the prosecution
 - Former employee of Livedoor
 - At the time of the Livedoor case, took charge of budget formulation for the entire Livedoor Group
- From a counter-examination by the defense
 - Entered Mirai Securities after graduating from university
 - Engaged in acceptance of entrustment of stock trading from private investors and funding for venture companies
 - Left the company less than one and a half years later
 - Entered Tera Japan after leaving Mirai Securities
 - A company engaging in the business of reducing the weight of garbage and oil by using organic substance
 - Left the company as the earnings of the company deteriorated one to two months later
 - Looked for a job for about a two-month period between leaving Tera Japan and entering Livedoor (the company name at that time was "Livin' on the Edge")
 - Entered UFJ Capital after leaving Livedoor
 - Engaged in M&A brokerage
 - Left the company a little over nine months later
 - Running his own company at present
 - Consultant in relation to venture companies' preparation for listing and offering of stock to the public

The public prosecutor's examination of a witness for Mr. Satoshi Maruyama was conducted from 10:00 to 13:35 on Tuesday, September 12, 2006 (including a break from 12:00 to 13:15).