Date	November 11, 2016	Court	Intellectual Property High Court Third Division
Case number	2016 (Ra) 10009		
– A case in which, with respect to a person who was indicated as one of the editors of a casebook, which is a compilation, the court held that such person may be presumed to be the author but, based on a comprehensive evaluation of the actual circumstances such as the involvement in the editorial process, such person was in an advisory position and was only expected to provide ideas and thus cannot be found to be the author.			

Reference: Article 2, paragraph (1), items (ii) and (xii), Article 12 and Article 14 of the Copyright Act

Number of related rights, etc.:

Summary of the Ruling

1. The appellee alleged that while the appellee is one of the co-authors of a casebook, which is a compilation, (fourth edition; the "Work"), since the casebook (5th edition; the "Journal"), which the appellant is planning to publish, is an adaptation of the Work, the Journal will infringe the appellee's copyright for the Work. The appellee filed a request for an order of provisional disposition so that the court issues an injunction against the appellant's act of reproducing, distributing, or otherwise handling the Journal. Since a ruling to accommodate this request (the "Ruling Concerning Provisional Disposition") and a ruling in prior instance approving the Ruling Concerning Provisional Disposition were made, the appellant demanded revocation of the ruling in prior instance and the Ruling Concerning Provisional Disposition and also dismissal of the request for provisional disposition in question. The major issue is whether or not the appellee can be found to be one of the authors of the Work.

2. In this ruling, the court determined mainly as follows with respect to this issue and held that the appellee cannot be found to be one of the authors of the Work.

(1) In the case of a compilation like the Work, the indication of the words "edited by" in front of a name could lead to the public recognition of that person as the author of the compilation. Thus, the appellee can be considered to be presumed as an author (Article 14 of the Copyright Act). On such premise, the following section considers the possibility of overturning the presumption.

A compilation that, by reason of the selection or arrangement of its contents, constitutes an intellectual creation, is protected as a work. As long as a compilation is protected as a work, the "creativeness" as referred to herein can be interpreted in the same manner as the creativeness of other works. For this reason, it is reasonable to

conclude that a person who had selected and arranged materials in a creative manner in the sense mentioned above is the author of the compilation. In the case where there is a dispute as to who should be recognized as an author of a joint compilation as in this case, any person who decided an editorial policy should also be regarded as an author of the compilation. On the other hand, other acts relating to editing, such as selecting an editorial policy or materials, giving advice about arrangement when requested, and approving another person's decision of an editorial policy or selection or arrangement of materials in a passive manner, cannot be considered to be directly related to an act of creation. Therefore, any person who merely conducted such acts should not be regarded as an author of the compilation.

Yet, a determination as to whether an act of a certain person demonstrates creativeness to such an extent that the person can be regarded as an author of the compilation should be made based not only on the concrete content of said act, but also on the significance and position of the act in the process of creating the work, which are ascertained in light of the status and authority of the person who conducted the act in that process and the timing and circumstances in which such act was conducted.

(2) Based on the background that led to the publication of the Work as well as other facts, at the stage of selecting editors for the Work, major editors excluding the appellee, the appellant and the appellee at least shared the understanding that, although the appellee would be included in the "editors," the appellee would have no control in substance or only an extremely limited control over the process of preparing a draft. This can be interpreted to actually mean that the appellee's involvement in the process of creating the Work as a highly creative compilation was extremely limited. In addition, in light of the actual course of editorial work, the appellee was hardly involved in the decision on the editorial policy including how to carry out the editorial work and the process of preparing the draft based thereon. In addition, it can be said that the draft itself was fairly close to the final form. Thus, the appellee's specific involvement in the correction of the Draft, final decision on the precedents to be included in the Work and candidates for authors and subsequent changes to these matters was not creative or even if it was found to be creative, the degree of creativeness was not high.

Based on a comprehensive evaluation of the facts mentioned above, in the editorial process of the Work, it would be reasonable to interpret that, although the appellee was actually considered to be one of the "editors," he was in an advisory position and was only expected to provide ideas and advice and that the appellee himself limited his involvement under these circumstances. This interpretation seems to properly reflect

the reality of the overall editorial process of the Work.
(3) Accordingly, despite the presumption under Article 14 of the Copyright Act, the appellee cannot be considered to be an author of the Work.

2016 (Ra) 10009 Appeal Case Pertaining to Provisional Remedy against Ruling Concerning Objection to Provisional Remedy (Court of prior instance: Tokyo District Court, 2015 (Yo) 22071, Case of Seeking Order of Provisional Disposition: Tokyo District Court, 2016 (Mo) 40004, Case of Filing Objection to Provisional Remedy)

Ruling

Appelllant: Yuhikaku Publishing Co., Ltd.

Appelllee: Y

Main text

1. The ruling in prior instance shall be revoked.

2. The ruling of provisional disposition made by the Tokyo District Court on October 26, 2015 with regard to the case of seeking an order of provisional disposition (Tokyo District Court, 2015 (Yo) 22071) shall be revoked.

3. The aforementioned appellee's request for an order of provisional disposition shall be dismissed.

4. The appellee shall bear the filing costs and the appeal costs.

Reasons

No. 1 Objects of the appeal

The same as the main text.

No. 2 Outline of the case, etc.

1. Outline of the case (the abbreviations are the same as those used in the ruling in prior instance)

The appellee alleged that "while the appellee is one of the co-authors of a compilation, namely, *Chosakuken Hanrei Hyakusen [Dai 4 han]* (One hundred precedents concerning copyrights [4th edition]) (the "Work"), since *Chosakuken Hanrei Hyakusen [Dai 5 han]* (One hundred precedents concerning copyrights [5th edition]) (the "Journal"), which the appellant is planning to publish, is an adaptation of the Work, the Journal will infringe the appellee's copyright for the Work." The appellee filed a request for an order of provisional disposition (the "Request for Provisional Disposition) so that the court issues an injunction against the appellant's act of reproducing, distributing, or otherwise handling the Journal by claiming that the following appellee's rights for the Work should be subject to provisional remedy: the adaptation right; the right of reproduction, the right of transfer, and the right to rent out based on the rights of the author of the original work in connection with the exploitation of a derivative work; or the right to seek an injunction based on the

moral rights of authors (the right of attribution and the right to integrity).

In response, on October 26, 2015, the Tokyo District Court made a ruling to accommodate this request (the "Ruling Concerning Provisional Disposition"). Dissatisfied with this ruling, the appellant filed an objection to provisional remedy. However, the ruling in prior instance approved the Ruling Concerning Provisional Disposition on April 7, 2016.

This is a case where the appellant, who is dissatisfied with the ruling in prior instance, demanded revocation of the ruling in prior instance and the Ruling Concerning Provisional Disposition and also dismissal of the Request for Provisional Disposition.

(omitted)

No. 3 Court decision

1. Regarding copyrightability (Issue 1)

(1) According to the facts undisputed by the parties concerned, the prima-facie evidence (those mentioned in each section), and the entire import of hearing, the following facts can be found.

A. The parties concerned

The appellee born in November 1959 is a professor of the Graduate Schools for Law and Politics and the Faculty of Law of the University of Tokyo, who specializes in intellectual property law. (Exhibit Ko 12)

The appellant is a stock company engaging in publishing books in the field of social science and humanity, etc.

B. Nature, etc. of *Chosakuken Hanrei Hyakusen*

The appellant publishes a series of journals titled "*Hanrei Hyakusen*" (One hundred precedents) as a separate volume of a journal titled "*Jurisuto*" (Jurist) published by the appellant mainly for the undergraduate and graduate students of the faculties of law of universities. For each "*Hanrei Hyakusen*," about one hundred important precedents containing basic issues in each legal field (including precedents of lower courts; hereinafter the same) are covered. Each precedent is presented and explained by using two facing pages. "*Chosakuken Hanrei Hyakusen*" is one of those series of journals that presents and explains precedents concerning copyrights. The Work and the Journal are its fourth and fifth editions, respectively. (Exhibits Otsu 5, 101)

C. Content of the Work, etc.

The Work is the fourth edition of "*Chosakuken Hanrei Hyakusen*" published by the appellant on December 20, 2009, covering 113 precedents concerning copyrights. The

precedents included in the Work and the authors of the commentaries of those precedents are as specified in the sections titled "Precedents in the fourth edition" and "Authors of the fourth edition" of the "Table of changes in the selection of the precedents covered by *Chosakuken Hanrei Hyakusen*" attached to the ruling in prior instance.

On the front cover of the Work, the title was followed by the statement "Edited by A, Y, B, C," which lists the names of four persons including the appellee (these four persons shall be hereinafter sometimes collectively referred to as the "editors of the Work") in combination with the words "Edited by." Also, the preface of the Work reads as follows: "The fourth edition also covers important cases covered by the previous edition. However, in consideration of the legislation since the publication of the previous edition, technical changes, etc. related to copyrights, the fourth edition has adopted a new configuration and replaced a large number of precedents to be covered. The most important 113 precedents were selected in order to meet the demands in this modern age. In order to catch up with rapid changes, the authors include not only scholars but also many judges, lawyers, etc. who have a deep knowledge about legal practices. We are confident that this Work can also satisfy the needs of legal practitioners." Below this statement, the names of the editors of the Work are jointly indicated as nominal co-authors.

Also, on the appellant's website, the "author" section of the Work indicates the names of the aforementioned four persons with the words "edited by." (Regarding this section, Exhibits Ko 1-1 to 1-4, 15-1 to 15-3, and 17)

D. Events that led to the publication of the Work

(A) a. Since *Chosakuken Hanrei Hyakusen* has not been revised since the publication of "*Chosakuken Hanrei Hyakusen [Dai 3 han]*" (the "third edition") in May 2001, the appellant planned to publish a revised edition ("*Chosakuken Hanrei Hyakusen [Dai 4 han]*"; sometimes, simply, the "fourth edition"). On July 31, 2008, Person E, who was in charge of this publication, proposed a meeting to Professor A by saying, "I would like to hear your opinion about how we should revise '*Chosakuken Hanrei Hyakusen*.'" A meeting between E and Professor A was scheduled on August 7, 2008. (Exhibits Otsu 427 to 430)

b. On that day, Professor A had a meeting with E and talked to E as follows regarding the selection of editors, etc.: "I don't want Professor Y to get involved in this project. He takes up too many projects." "If people like B, C, and I are participating, you can count me in, at least nominally." "My textbook covers all of the important precedents except for very recent ones. You can choose one hundred precedents from them." "Someone should prepare a rough draft. We can start from there." "Maybe, it is not a good idea to exclude Professor Y from the beginning. I will talk to him before proceeding with this project."

While understanding E's concerns about including the appellee in the editors due in part to the appellee's health problems, Professor A thought that the appellee should be included in the editors, at least nominally, since the appellee was a professor of the Graduate Schools for Law and Politics and the Faculty of Law of the University of Tokyo and also was a successor to Professor A. Thus, before making a final decision, Professor A decided to meet the appellee in person in order to check how the appellee had been doing.

On the same day, E reported the results of the meeting with Professor A to the "*Hyakusen* Team" with such comments as: "Basically, we agreed that the editors should include Professor A, the Professor B, Professor C, etc." and "However, in a meeting between Professor A and Professor Y, it could be possible that Professor Y would insist on getting involved in the project." (Regarding this section, Exhibits Otsu 1, 105, 109)

c. On August 14, 2008, Professor A met the appellee and talked about the selection of the editors for the fourth edition. Although Professor A said to the appellee, "It might not be good for you to get involved in this project in consideration of your health," the appellee showed a strong desire to get involved in the project as an editor. As mentioned above, Professor A had been thinking that the appellee should be included in the editors, at least nominally, and that a request should also be made to Professor B and Professor C to become editors and also to Professor D to participate in the project in substance as a cooperating editor to have them prepare a draft. Therefore, Professor A decided to propose to E that the appellee should be included in the editors. However, Professor A clearly told the appellee, "Please do not express your opinions about how a draft should be prepared because, if you do, other editors would hesitate to express their opinions."

The appellee interpreted this as meaning that Professor A intended to deprive the appellee of the control over the process of preparing a draft and found such statement unacceptable, but did not present any objection at that time.

On the same day, Professor A told E that the request for participating in the project as an editor of the fourth edition, together with Professor A, was accommodated by the appellee, Professor C, and Professor B. (Regarding this section, Exhibits Ko 7, 12, Otsu 1, 5, 105, 109, 432, 433)

(B) a. Having decided the editors of the fourth editions, on September 2, 2008, E proposed a meeting to Professor B by saying, "In consideration of the facts that Professor Y has health problems and that Professor C is in a distant place, you (Professor B) might be requested to play an important role among the editors. I would like to hear your views." E had a meeting with Professor B on September 4, 2008. In the meeting, regarding the division of roles among the editors, Professor B said that he would support the appellee, who is the most senior to the other editors and should therefore play a central role.

However, since Professor A told Professor B about the details of the situation and Professor A's wish that Professor B would prepare a draft in collaboration with Professor C and Professor D, Professor B told E on September 5, 2008 as follows: "I understand the situation. I would like to be of help." (Regarding this section, Exhibits Otsu 434, 437)

b. On the same day, E asked for Professor A's instruction about how to proceed with the editors' meetings for the fourth edition by saying, "Usually, the editors' meetings for *Hanrei Hyakusen* proceed like this. At the first meeting, the editors decide the basic policy and the division of roles among the editors for preparation of a draft. At the second meeting, the editors select the precedents and titles. At the third meeting, the editors decide who should write which commentary. However, if these steps are taken, Professor Y could play a major role including the preparation of a draft and would have to shoulder heavy burdens. A couple of days ago, I talked with Professor Y. He was eager to know how the division of roles among the editors would be determined. He might not be happy about our plan to ask Professor B and Professor C to prepare a draft. As a solution, for example, how about having someone prepare a draft based on Professor A's instruction and starting discussing details based thereon from the first meeting."

On September 8, 2008, regarding this point, Professor A replied as follows: "In fact, the other day, I met Professor Y and clearly told him that, unlike the previous project about trademarks, he should not play the leading role." "I firmly told him that he had to refrain from getting involved in other affairs because he had to concentrate on writing academic papers. Ideally, I would like him not to get involved in this project as an editor and spend more time on writing papers instead. However, if he is excluded from the editors, it would prompt speculation. That's why I thought he should be included. But, I made it very clear that, unlike the previous project, he should not decide everything on his own." "So, this time, I agree with you, Mr. E. It is a good idea to prepare a draft before the first meeting." "Maybe I should ask Professor B to play the leading role and Professor D of Rikkyo University to help him as a cooperating editor. I'm thinking that it would be nice if these two people prepare a draft. I have already told Professor B about this plan, but I have not told it to Professor D yet. I wanted to make a final decision after obtaining your consent. Regarding the task of selecting precedents, it would not impose too much burden on Professor B and Professor D because most of the precedents published by the last summer are covered by my textbook concerning the Copyright Act. What do you think?"

On the same day, E replied to Professor A by saying, "Then, I would like to hold the first meeting after deciding the division of roles among the editors through exchange of email. I will send email to all of the editors to obtain opinions about how to proceed with

this project. As a reply to my email, if you send all of the editors your instructions for preparation of a draft, it would be greatly appreciated. When you send the instructions for preparation of a draft, mentioning your decision to ask Professor D to become a cooperating editor would be a good opportunity to inform all of the editors of your plan at once." (Regarding this section, Exhibits Otsu 439 to 441)

c. On September 12, 2008, E consulted with the editors of the Work about the editors' meetings for the fourth edition by saying, "In the case of *Hanrei Hyakusen* in a new field or in the case of *Hanrei Hyakusen* adopting an editing policy that is greatly different from the conventional one, the following two steps are usually taken: At the first meeting, the editors determine the editing policy and the division of roles among the editors. At the second meeting, the editors discuss specific topics. However, do you think these steps are necessary for *Hanrei Hyakusen* concerning copyrights? If there are no major issues concerning the editing policy, it may be possible to decide the division of roles through exchange of email, and then ask you to prepare a draft topic list in advance, and start a discussion about details from the first meeting." and "Your opinions will be greatly appreciated."

In response, Professor C and Professor B sent their consent on the same day. The appellee and Professor A sent their consent on September 13, 2008 and September 16, 2008, respectively.

Then, on September 16, 2008, E replied, "Since I have obtained consent from all of you, I would like you to start discussing details from the first meeting. I will propose how to prepare a draft as soon as I receive an instruction from Professor A. Thank you for your patience." (Regarding this section, Exhibits Ko 82, 83, Otsu 442 to 448)

d. In order to discuss further details, Professor A decided to meet E on September 22, 2008. It was later decided that Professor B should join the meeting to decide the basic policy and, further, that Professor D should also join the meeting. As a result of the meeting on that day, they agreed that Professor D would participate in the project as a cooperating editor, and that a draft should be prepared by having Professor D select precedents and Professor B determine who should write which commentary.

Based on the result of this meeting, E sent Professor D the index data of the precedents covered by Professor A's book, "Copyright Act," on the same day. On September 23, Professor D sent a reply, which reads "Thank you for quickly sending me the index data. It will make my work much easier." (Regarding this section, Exhibits Otsu 1, 2, 4, 5, 8, 9, 447, 449 to 458)

e. Around September 22, Professor A notified the appellee and Professor C as follows and asked for cooperation: "As mentioned in the previous email regarding the project of

editing *Hanrei Hyakusen* concerning copyrights, we will first prepare a draft and then ask the editors to make corrections." "Professor B will lead the project as an editor. Professor D is also invited to participate in the project as a cooperating editor. Professor B and Professor D will propose the chaptering of the Work, tentative selection of precedents, and candidate authors. Then, their proposal will be sent to the other editors for corrections. After that, the editors will determine who should write which commentary." "I would like to select as many young, talented people as possible. But, it is hard to find such people. If you know anyone I should be interested in, please let me know." "Recently, there are many excellent legal practitioners. If there are any qualified legal practitioners who didn't write any commentaries in the third edition, I would like to know."

In response, on the same day, Professor C proposed four candidates for authors. On September 23, the appellee replied that the authors of *Hanrei Hyakusen* concerning trademarks, designs, and acts of unfair competition and *Hanrei Hyakusen* concerning patents could be considered to be possible candidates (Exhibits Ko 7, Otsu 17)

f. On October 5, 2008, Professor D notified Professor B as follows: "I have been gathering information to select precedents to be covered by *Hanrei Hyakusen*. As the first step, I prepared a list of (1) the precedents covered by the textbook authored by Professor A, (2) the precedents that are referred to in *Chiteki Zaisanhou Hanreishū* (Precedents concerning intellectual property law) (Yuhikaku), (3) the precedents that are referred to in *Cēsu Bukku Chiteki Zaisanhou* (Casebook intellectual property law) (Kobundo), (4) the precedents that are referred to in *Hanrei Hyakusen* (the first edition to the third edition), (5) the precedents that are referred to in the textbook of Professor C, and (6) recent precedents. I also prepared a draft concerning the overall configuration in accordance with the configuration of the textbook authored by Professor A." On October 6, Professor D had a meeting with Professor B.

Then, on October 10, Professor D sent Professor B [i] "List of Precedents Concerning Copyrights," [ii] "List of One Hundred Precedents Concerning Copyrights (draft)," and [iii] "List of One Hundred Precedents Concerning Copyrights (draft) (selected by Professor D)." Professor D explained to Professor B that the list mentioned in [i] above is a list of the precedents described in (1) to (6) above; that the list mentioned in [ii] above is a list of the precedents that are often referred to in textbooks, etc. as the major precedents related to each of the issues discussed in the textbook authored by Professor A and the precedents to be covered by *Hanrei Hyakusen* should be chosen based on this list; and that the list mentioned in [iii] above is a list of the precedents selected by Professor D based on the precedents stated in [i] and [ii] above and Professor D hopes that this list would be used as a basis for further discussions.

Based on these lists, Professor B prepared "List of One Hundred Precedents Concerning Copyrights (draft) (the precedents selected by Professor D and the division of roles proposed by Professor B)," which includes proposals concerning the structure, the theme, the precedents to be covered, the court decisions that could be covered, and the candidate author for each commentary. On October 12, Professor B sent the list to Professor D, Professor A, and E.

In response, on October 14, Professor A said, "This is mostly up to my expectations." Professor A also conveyed the proposals and opinions of Professor C and the appellee concerning candidates for authors (as stated in e. above), his recommendation for two lawyers, and gave his opinion that three specific persons should be excluded. Furthermore, on October 15, Professor A notified Professor B and Professor D of additional nine candidates for authors.

Professor B prepared an amended version of "List of One Hundred Precedents Concerning Copyrights (draft) (the precedents selected by Professor D and the division of roles proposed by Professor B) [1]" and sent it to Professor A and Professor D on October 17.

In response, on October 18, Professor D sent Professor A, Professor B, and E a comment about the draft concerning the theme (title) and the selection of the precedents to be covered. Also, regarding the candidates for authors, Professor D proposed to add one legal practitioner and pointed out some problems with one scholar, and gave his opinion about asking Professor B to write commentaries.

On the same day, Professor B prepared "List of One Hundred Precedents Concerning Copyrights (draft) (the precedents selected by Professor D and the division of roles proposed by Professor B) Revised," which reflects a part of the aforementioned opinion of Professor D. Professor B attached this list to email and sent it to Professor D, Professor A, and E with a comment that he (Professor B) should be considered to be a "substitute" for any resigning editor who cannot be substituted by anyone else and that "I have made a list of people who might be able to substitute a resigning candidate author." Furthermore, Professor B obtained consent from Professor D about the aforementioned revisions, etc. and sent the aforementioned file to Professor D, Professor A, and E on October 19 as a draft prepared by Professor B and Professor D.

On October 20, Professor A showed his appreciation to Professor B, Professor D, and E by saying, "It is very well made." Professor A suggested that Professor B should also write one commentary as an editor and said, "107 precedents seem enough at this moment. But, it is highly possible that we will newly find qualified candidate authors not nominated yet. So, a slight increase would be reasonable. Please consult with Professor

Y and Professor C and also ask for their recommendation for qualified candidates for authors."

Professor A and Professor B continued communicating with each other and consequently prepared "List of One Hundred Precedents Concerning Copyrights 20081020" (the "Draft"). In this process, Professor A asked E to send the Draft to the appellee and Professor C by saying, "Please send this draft with a message that your frank opinions would be appreciated with regard to any precedents that should be newly added or should be deleted, and any authors who should be newly added or who should be excluded."

On the same day, E sent the appellee and Professor C (with a copy sent to Professor A, Professor B, and Professor D) the Draft with an attached message stating: "Thanks to the cooperation of Professor D, Professor B prepared a draft list of the precedents to be covered. Having obtained confirmation from Professor A, I would like to send this to you" and "These precedents are selected in consideration of the precedents covered by the former *Hanrei Hyakusen* and the precedents covered by the textbook authored by Professor A. Since I appreciate different views, I would like to know your frank opinions as to which precedents should be added or deleted. Regarding candidate authors, I also would like to know who should be added or excluded and who should write which commentary. After all the opinions are expressed, adjustments will be made. Then, a draft will be finalized at an editors' meeting." (Regarding this section, Exhibits Ko 7, 8-1, Otsu 1 to 5, 10 to 32, 459 to 499)

(C) a. On October 25, Professor C gave ten comments to the other editors of the Work and Professor D and E by saying as follows: "I would like to make some comments as an editor." "My opinion about deletion should be considered to be just a suggestion that should be taken into consideration only when it is necessary to decide what to delete in order to accommodate an addition of something. Also, my opinion about addition is just a suggestion." "Please read the following comments… I would appreciate if you take them into account only if you find them useful."

In response, Professor B made corrections to reflect two of those 10 comments. On October 27, Professor B sent the corrected draft to the other editors of the Work, Professor D, and E. On the same day, Professor C replied that he (Professor C) approved the corrections.

Subsequently, on the same day, Professor B sent email to the other editors of the Work, Professor D, and E and said to E, "If there are no more opinions, I would like to propose this as a draft for final decision." (Regarding this section, Exhibits Ko 7, 8-2, Otsu 1 to 5, 33 to 38, 502 to 506, 509)

b. Subsequently, the appellee called Professor B to say that one specific legal practitioner should be deleted from the candidate authors and that three legal practitioners should be newly added (judge (a), lawyer (b), and lawyer (c); hereinafter referred to as "Judge (a)," "Lawyer (b)," and "Lawyer (c)") (While the appellee alleged that, at that time, the appellee stated which precedents should be assigned to those three authors respectively, there is no accurate prima-facie evidence that is sufficient to prove the appellee's allegation. This remains the same even after taking into consideration the matters pointed out by the appellee.)

In response, on the same day, Professor B prepared a draft that reflects the aforementioned appellee's opinion to the extent of deleting one legal practitioner and adding two legal practitioners (Judge (a) and Lawyer (c)) and sent the draft to the other editors of the Work, Professor D, and E.

After that, the appellee sent email to Professor B to the effect that Judge (a), Lawyer (b), and Lawyer (c) should be added. In response, Professor B replied to the appellee by saying, "I added Judge (a) and Lawyer (c). However, regarding Lawyer (b), I hesitated to further increase the number. So, I didn't include Lawyer (b). How about asking Lawyer (b) to join if anyone resigns?" The appellee responded, "Lawyer (b) comes before Lawyer (c) in terms of priority. How about decreasing the number of legal practitioners already included?"

Then, on the same day, Professor B entirely accepted the aforementioned request of the appellee to delete one person and add three persons. Professor B corrected the draft again (the "Corrected Draft") by putting Lawyer (c) in charge of the precedent that used to be assigned to the legal practitioner who had been deleted and putting Judge (a) and Lawyer (b) in charge of one precedent each, which was referred to as "court decisions that could be covered" in the Draft. Professor B sent the Corrected Draft to the other editors of the Work, Professor D, and E. This correction had remained unchanged until the publication of the Work. (Regarding this section, Exhibits Ko 7, 84, Otsu 2, 39 to 41, 506 to 508, 510, 511)

(D) On November 5, 2008, E said to the editors of the Work and Professor D that the Corrected Draft "will be reflected in the configuration of *Hyakusen* (Table of contents) and will be presented at the meeting for final decision." E also requested instructions as to how to reflect the Corrected Draft in the configuration of *Hanrei Hyakusen*. On the same day, Professor B and Professor C said that they would leave it up to Professor A. On November 6, Professor A said that, with reference to the draft list of the precedents to be covered, a list should be prepared by emulating the conventional style of *Hanrei Hyakusen*. On the same day, Professor D said to E that, when E prepares a draft, Professor

D could "offer support as an assistant of E."

On the same day, E notified the editors of the Work that the aforementioned list will be prepared by E. Also, E and Professor D discussed how to proceed with the task and agreed that, after Professor D prepares a rough draft, E would make corrections to the draft. Subsequently, E continued communicating with Professor D based on this agreement. On November 11, E completed the task of preparing a draft of the aforementioned list (the "Original Draft List").

On November 12, after obtaining consent from Professor D, E sent the Original Draft List to Professor B and explained to Professor B that E had prepared the draft thanks to the cooperation of Professor D and requested Professor B's instruction as to what measures should be taken with regard to the matters that Professor D and E identified as possible problems in the course of preparing the draft and found that some corrections might be necessary.

Then, as the next step, Professor B, Professor D, and E continued communicating with regard to necessary corrections to the Original Draft List. As a result, E prepared, by November 18, "List of the Topics to Be Covered by *Chosakuken Hanrei Hyakusen [Dai 4 han]* (draft)" (the "Draft List"). On the same day, E sent the Draft List to the editors of the Work and Professor D and explained to them what issues were identified in the process of preparing the Draft List. E also stated, "Please examine the Draft List before the editors' meeting and let me know your opinions at the meeting (If you kindly let me know your opinions by email before the meeting, it would increase the efficiency of the meeting)." E checked the editors' schedules in order to schedule the editors' meeting and explained to them by saying, "While the section titled 'Source' remains empty in the topic list, this section will be filled up before the editors' meeting by gathering information from casebooks. Also, before deciding the assignment of precedents to lawyers and judges, I will make sure that they were not personally involved in those cases."

E continued communicating with the editors of the Work to schedule the editors' meeting and decided, on December 3, 2008, to schedule the meeting on January 6, 2009.

Also, E checked the legal practitioners who were selected as candidate authors from the perspective of preventing them from writing commentaries for the cases they had been involved in. On December 15, 2008, E obtained an instruction from Professor B about how to deal with the candidate authors who had been involved in their assigned cases and prepared a new "List of the Topics to Be Covered by *Chosakuken Hanrei Hyakusen [Dai 4 han]*" (Draft as of 20081216)" by correcting the Draft List again (the "Corrected Draft List"). On December 16, 2008, E sent the Corrected Draft List to the editors of the Work and Professor D and explained the corrections and requested them to have a discussion at

the editors' meeting based on the Corrected Draft List.

On the other hand, December 30, Professor D sent E the "List of Precedents concerning Copyright Act [Revised]" with a message that said the list should be distributed as referential material at the editors' meeting. Also, regarding the court decisions that could be covered, Professor D said that a change should be made to the information concerning the court decision for which an appeal court judgment was subsequently handed down (Judgment of the Intellectual Property High Court of December 15, 2008 [*Maneki* TV case]) and that, at the editors' meeting, a discussion should be held about the possibility of adding two more precedents (Judgment of the Intellectual Property High Court of December 24, 2008 [North Korea case] and Judgment of the Osaka High Court of October 8, 2008 [Prescription Management case]). In response, on January 5, 2009, E said that the precedent concerning the *Maneki* TV case would be replaced with the aforementioned judgment of the Intellectual Property High Court and that, regarding the two additional precedents, the editorial department would make a proposal. (Regarding this section, Exhibits Ko 7, Otsu 1, 5, 42 to 49, 512 to 521, 531 to 607, 613, 614, 615, 617)

(E) On January 6, in a meeting room of the appellant, the editors' meeting was held. The editors of the Work and Professor D participated in the meeting. In the meeting, they exchanged opinions about the Corrected Draft List and consequently decided to add the aforementioned North Korea case and, in this connection, decided to add one person as a candidate author. The editors of the Work unanimously made a final decision about the selection and editorial arrangement of the precedents (113 cases), and the way of assigning those precedents to the candidate authors (113 people), including the topics to be covered. The editors of the Work also decided to send each of the candidate authors a formal request for writing a commentary (however, some changes were made in response to the resignation, etc. of some candidate authors as described in (F) b. to i. below). While the editors' meeting was scheduled to last about two hours, it didn't take that long and ended earlier than scheduled.

On the same day, E prepared "List of the Topics to Be Covered by *Chosakuken Hanrei Hyakusen [Dai 4 han]* (sent to the editors after a discussion on 20080106)," which reflects the results of the aforementioned meeting, and sent it to the editors of the Work and Professor D. (Regarding this section, Exhibits Ko 12, Otsu 1 to 5, 50, 51, 613, 614, 619, 620)

(F) a. Based on the aforementioned topic list, E prepared a list of topics to be attached to a request sent to the authors. E sent the newly prepared list to the editors of the Work and Professor D and obtained their consent. On January 22, 2009, E sent each of the candidate

authors a request for writing a commentary by stating, "We are planning to publish *Chosakuken Hanrei Hyakusen [Dai 4 han]*. Professor A, Professor Y, Professor B, and Professor C will join the project as editors and will review the configuration and the precedents to be covered." (Exhibits Ko 8-7, Otsu 5, 52, 53, 109, 623 to 625)

b. On January 29, 2009, E consulted with the editors of the Work and Professor D about what to do with the requests from two candidate authors (a request for permission of joint authorship and a request for assignment of a different topic). In response, on the same day, Professor B said that, while the final decision should be left up to Professor A, the request for permission of joint authorship seems acceptable, but the request for assignment of a different topic seems unacceptable, although the author could be replaced with a different person, which seems unnecessary at this moment. On the same day, Professor C said that, while it is possible to accept the request for permission of joint authorship, the final decision should be left up to the other editors of the Work and Professor D. Regarding the request for assignment of a different topic, Professor C said it might be inevitable unless there is any other solution. On the same day, Professor A said that, if all of the editors of the Work agree, the request for permission of joint authorship may be accepted. Regarding the request for assignment of a different topic, Professor A said that, while it would be all right to have the author take charge of the assigned topic, if the author complains that the topic is difficult to handle, it might be necessary to let the author resign and find a new author.

On the same day, E notified the editors of the Work and Professor D that, regarding the request for permission of joint authorship, E would question the candidate author and obtain confirmation that he/she would take all the responsibility, and then permit joint authorship, while, regarding the request for assignment of a different topic, E would wait and see how things would turn out. (Regarding this section, Exhibits Otsu 54 to 58, 627 to 632)

c. On January 30, 2009, E reported to the editors of the Work and Professor D that, regarding the aforementioned request for permission of joint authorship, E permitted joint authorship. Then, E asked whether permission could also be given to a request for joint authorship from Lawyer (b) as well. In response, Professor B said "yes," while Professor C said he would respect the decision of Professor B, who was in charge of the entire process of selecting candidate authors, unless Professor A disagreed.

On January 31, regarding this point, the appellee replied as follows: "Lawyer (b) (former judge) is famous in the field of not only the Patent Act but also the Copyright Act… I heard that Lawyer (b) has been extremely busy lately. Because of that, it can be presumed that Lawyer (b) had his/her subordinates in his/her law firm gather information,

prepare a draft, or do other work on behalf of him/her. In such case, it seems often the case that the completed document is published under the name of the author (the superior) only. Maybe, Lawyer (b) thought this is not the right thing to do. In consideration of his/her personality and habit as a (former) judge, Lawyer (b) would thoroughly revise the draft until he/she is satisfied. The revised draft would be completely different from the original draft. For this reason, I think joint authorship should be permitted."

Subsequently, on the same day, Professor A replied that, since the request for permission of joint authorship was already accommodated, this request should also be accommodated, but it could contradict with the policy that no assistant or graduate student should be selected as an author.

In response, on February 2, 2009, E reported to the editors of the Work and Professor D that E would reply to Lawyer (b) that his/her request for permission of joint authorship would be accommodated. (Regarding this section, Exhibits Ko 7, Otsu 59 to 64, 633 to 638)

d. On February 17, 2009, E reported to the editors of the Work and Professor D that one of the candidate authors had submitted a notice of resignation and requested an instruction as to whether the topic of the resigning candidate author should be assigned to the candidate author who had filed a request for assignment of a different topic, and, if the answer is yes, who should be selected as a candidate author in charge of the topic that had been initially assigned to the candidate author who had filed the request for assignment of a different topic, and, if the answer is no, who should be selected as a candidate author in charge of the topic that had been assigned to the resigning candidate author. In response, on the same day, Professor B and Professor A proposed that the candidate author who filed a request for assignment of a different topic should be assigned to the topic that had been assigned to the resigning candidate author. Furthermore, Professor B and Professor A proposed the same person as a candidate author in charge of the topic that had been initially assigned to the candidate author who had filed a request for assignment of a different topic. Professor C and the appellee supported this proposal. Thus, on the same day, E reported that E would take care of this matter in accordance with this proposal. (Exhibits Otsu 65 to 71, 640 to 646)

e. On February 20, 2009, E reported to the editors of the Work and Professor D that another candidate author had submitted a notice of resignation and that there had been no reply from five candidate authors regarding the request for writing commentaries. In response, on the same day, Professor B proposed a new candidate author as a replacement of the resigning candidate author and made comments, etc. about how to deal with the five candidate authors not responding to the request. Professor C also made comments,

etc. about one of those five candidate authors not responding to the request. On February 22, Professor A said that he was able to contact one of those five candidate authors and obtained his/her consent and that another one of them had to be replaced. Professor A proposed a person who could serve as a replacement.

On February 23, E reported to the editors of the Work and Professor D that E was able to contact two of those five candidate authors who had not sent any reply and obtained their consent, and that three topics still remain unassigned to anyone, and cited the names of persons nominated as candidate authors for two of those three topics.

In response, on the same day, Professor B said that he would basically support Professor A's proposal concerning candidate authors. Professor C replied that he agreed with the proposals of Professor A and Professor B.

On February 24, E reported to the editors of the Work and Professor D that, while E was able to contact one of the remaining three candidate authors not responding to the request, the candidate author hesitated to accept the request, and also explained the current situation about the three topics for which no authors had been assigned. In response, on the same day, Professor A proposed to replace the candidate authors for the three topics and raised the names of some candidate authors as replacements. On the same day, Professor B gave a comment about Professor A's proposal. On February 25, Professor C replied that he supported Professor A's proposal. The appellee also contacted E and expressed no objection to Professor A's proposal.

On the same day, E said that, since E received no objections from the editors of the Work, E would take measures in accordance with Professor A's proposal.

On March 5, 2009, E reported to the editors of the Work and Professor D that authors had been assigned to all of the topics and sent the final topic list ("Topic List for *Chosakuken Hanrei Hyakusen [Dai 4 han]* [20090305 Final version]"). (Regarding this section, Exhibits Otsu 72 to 84, 647 to 651, 653 to 660, 666, 667)

f. On March 10, E consulted with Professor D with regard to the judgment of the Intellectual Property High Court handed down on January 27, 2009 (the appeal court judgment concerning the *Rokuraku* II case) and asked whether it was necessary to replace the appeal court judgment concerning the *Maneki* TV case with the *Rokuraku* II case. Having received a reply from Professor D regarding this matter on March 12, E requested instructions, on the same day, from the editors of the Work and Professor D about how to handle the appeal court judgment concerning the *Rokuraku* II case in connection with the two cases concerning similar services included in the aforementioned topic list (the appeal court judgments for the *Maneki* TV case and the *Rokuga* Net case).

On the same day, Professor C said, "Please note that what I'm going to say is just a

suggestion or casual advice because I'm going to support whatever decision is finalized by the other professors." and then commented as follows: "I think … the *Rokuraku* case should be included," "It would be reasonable to replace the *Maneki* case with the *Rokuraku* case. Or, the *Rokuraku* case could be newly added. But, as the total number of cases is already large, it would be hard to find an appropriate candidate author." On the same day, Professor B supported Professor C's opinion that the appeal court judgment for the *Rokuraku* II case should be included and said that he would be willing to write a commentary for the case.

On the same day, the appellee also commented, saying, "Since we have finalized our decision and sent out letters of request, I thought it would be enough if the *Rokuraku* II case is mentioned in the commentaries for the existing topics. But, having seen your enthusiasm, I think it would be better if the *Rokuraku* II case is included. Regarding what approach should be taken, I agree with Professor C's opinion. Although the issue of 'indirect infringement' is one of the important topics these days, it would be a little too much if we put even more focus on this issue."

On the same day, Professor A supported the idea of replacing the *Maneki* case with the *Rokuraku* II case and commented that, since a request had already been sent to an author to write a commentary for this case, it would be necessary to listen to the author's opinion.

On the same day, E reported that E would consult with the author about the possible replacement of the appeal court judgment for the *Maneki* case with the appeal court judgment for the *Rokuraku* case. On March 17, E reported to the editors of the Work and Professor D that E obtained consent from the author about the replacement of precedents. (Regarding this section, Exhibits Ko 7, Otsu 85 to 90, 669 to 680)

g. On March 25, having received a comment from one of the authors, E requested instructions from the editors of the Work and Professor D about which level of instance the author should refer to in order to obtain a standard precedent for the topic assigned to the author (SMAP *Daikenkyū* case). In response, on the same day, Professor A said that the author should use the judgment handed down in the first instance as a standard precedent and also refer to the appeal court judgment, if necessary. E reported to the editors of the Work and Professor D that E would explain to the author in accordance with Professor A's opinion. On the same day, the appellee and Professor C also notified that they supported the way E was going to handle this matter (Exhibits Ko 7, Otsu 91 to 94, 682 to 686)

h. On March 26, having received a comment from another author, as is the case mentioned above, E requested instructions from the editors of the Work and Professor D about which

level of instance the author should refer to as a standard precedent for the topic assigned to the author (Asahi Logo case). In response, on the same day, Professor C said, "I would support the other editors' final decision," while making a comment that an appeal court judgment should be used as a standard precedent. On March 27, Professor A made the same comment.

Thus, on the same day, E reported that E would correct the topic list in such a way that the appeal court judgment would be used as a standard precedent for the aforementioned topic. In response, Professor B said he would agree. On March 28, the appellee also replied, "As you said, the high court's judgment should be used as a standard precedent in this case. Generally speaking, however, the author should use a lower court's judgment as the major topic of a commentary even if there is a higher court's judgment, as long as the lower court's judgment presented a substantive holding and seems more suitable as the major topic of a commentary. (Regarding this section, Exhibits Ko 7, Otsu 5, 95 to 100, 687 to 692)

i. In June 2009, an author sent a comment to Professor B and raised an issue of the suitability of the title "Subject Matter of a Lawsuit to Seek an Injunction against an Act of Copyright Infringement." On June 10, E requested instructions from the editors of the Work and Professor D by saying, "What do you think about deleting the word 'injunction,' etc. from the title and adopting a new title 'Subject Matter of a Copyright Infringement Lawsuit' and leaving this topic in the same chapter ('IX Infringement and the Remedies --- (1) Injunction')?" In response, on the same day, Professor B, Professor C, and Professor A said that they would support the aforementioned idea of E, while the appellee suggested to E to the effect that the title of the chapter should be corrected as "Injunction, etc." to allow broad interpretation.

On June 11, E directly contacted Professor D to obtain an opinion about this issue and reported that "Injunction, etc." should be used for the title of the chapter. Professor B gave consent to E on the same day. The appellee and Professor A gave consent to E on June 12. (Regarding this section, Exhibits Otsu 693 to 708)

j. After all these communications, they finally determined which precedents to be included in the Work and who would write commentaries as shown in the sections titled "Precedents for the fourth edition" and "Authors for the fourth edition" of the "Table of Changes in the One Hundred Precedents Concerning Copyrights" attached to the ruling in prior instance. (Exhibit Ko 1)

(2) As found above ((1) C), the indication "Edited by A, Y, B, and C" was placed on the front cover of the Work. The preface thereof contains the names of the editors of the Work and a statement that: "In consideration of the recent legislation, technical advancement

related to copyrights, etc., the fourth edition adopted a new configuration and contains 113 precedents that have been greatly changed from the previous edition in order to satisfy the needs of the times."

In the case of a compilation like the Work, the indication of the words "edited by" in front of a name could lead to the public recognition of that person as the author of the compilation. It also can be said that the indication and statements included in the aforementioned preface could lead to the public recognition of the indication of editors of the Work as the indication of authors of the Work, which is a compilation. Furthermore, regarding the indication on the appellant's website ((1) C), the public would generally interpret the indication "edited by" as corresponding to an indication of an "author."

Therefore, it can be said that the Work indicates the names of the editors of the Work including the name of the appellee as the names of the authors of the compilation in an ordinary manner.

Thus, the appellee can be considered to be presumed as an author (Article 14 of the Copyright Act).

Regarding this, the appellant alleged that a person whose name is indicated with the words "edited by" is, in not a few cases, different from the author of a compilation as specified in the Copyright Act and that the appellee cannot be presumed to be an author. However, even though a person whose name is indicated with the words "edited by" is different from the author of a compilation, it does not necessarily provide sufficient evidence to deny the fact that a person whose name is indicated with the words "edited by" could be recognized by the public as having his/her name "indicated as the author of a compilation in an ordinary manner." There is no other prima-facie evidence to deny the fact.

Therefore, the appellant's allegation regarding this point is unacceptable.

(3) On the premise that the appellee can be presumed to be an author, the following section considers the possibility of overturning the presumption.

A. The term "author" means a person who creates a work (Article 2, paragraph (1), item (ii) of the Copyright Act). The term "work" means a production in which thoughts or sentiments are creatively expressed and which falls within the literary, academic, artistic or musical domain (Article 2, paragraph (1), item (i) of the Copyright Act). A compilation (except a compilation that constitutes a database) that, by reason of the selection or arrangement of its contents, constitutes an intellectual creation, is protected as a work (Article 12, paragraph (1) of the Copyright Act). As long as a compilation is protected as a work, its creativeness can be interpreted in the same manner as the creativeness of other works.

For this reason, it is reasonable to conclude that a person who had selected and arranged materials in a creative manner in the sense mentioned above is the author of the compilation.

In the case where there is a dispute as to who should be recognized as an author of a joint compilation as in this case, since materials are selected and arranged in accordance with a certain editorial policy, an act of deciding an editorial policy is inseparable from an act of selecting and arranging materials. In other words, such decision can be considered to contribute to the creativeness of the selection and arrangement of materials. Thus, any person who decided an editorial policy should also be regarded as an author of the compilation.

On the other hand, other acts relating to editing, such as selecting an editorial policy or materials, giving advice about arrangement when requested, and approving another person's decision of an editorial policy or selection or arrangement of materials in a passive manner, cannot be considered to be directly related to an act of creation. Therefore, any person who merely conducted such acts should not be regarded as an author of the compilation.

B. Needless to say, it is clearly difficult in some cases to determine whether a certain person's act conducted in the course of creating a joint compilation falls under any of the acts mentioned above if such person's act is examined merely from an objective and practical perspective without taking into consideration the status, authority, etc. of that person when that person was involved in the process of creating the joint compilation. In other words, it is often the case that the meaning and significance of the same act would differ depending on the status and authority of the person who conducted the act or depending on the timing and circumstances in which such act is conducted.

For this reason, in the case where a joint compilation is created with multiple people involved in various manners, regardless of the existence or nonexistence of creativeness therein, a determination as to whether an act of a certain person has creativeness to such an extent that the person can be regarded as an author of the compilation should be made based not only on the practical nature of said act, but also on the status and authority of the person who conducted the act and the timing and circumstances in which such act was conducted.

On the other hand, the appellant alleged that, when determining whether someone's act was creative enough to consider the person as an author, it is necessary to disregard the circumstances and the person's status under which said act was conducted and to focus only on whether said person expressed creativity or not. However, this allegation of the appellant is unreasonable in light of the actual situation where multiple persons are

involved in the creation of a work, and is unacceptable in this respect.

C. On these grounds, regarding the aforementioned facts found by the court, further examination is conducted as follows.

(A) When selecting editors for the fourth edition, E, who was in charge of the fourth edition at the appellant, seemed to have basically thought that the appellee should not be included in the editors due to his health problems ((1) D (A) b., (B) b. above). On the other hand, Professor A, who was consulted with by E regarding this issue, showed an understanding of E's concern, while inevitably deciding to include the appellee in the editors of the fourth edition, at least nominally, because it was impossible to casually exclude the appellee from the editors in consideration of various factors such as the appellee's status as a professor of the University of Tokyo and the nature of *Hanrei Hyakusen* and also because the appellee showed a strong desire to get involved in the project as an editor when Professor A asked whether the appellee would like to get involved. At the same time, Professor A clearly told the appellee not to express any opinions about how a draft should be prepared ((1) D (A) b., c., (B) b.).

When the appellee heard this, the appellee thought that he was deprived of the control over the process of preparing a draft ((1) D (A) c. above). This means that the aforementioned intention of Professor A was conveyed to the appellee largely correctly.

This intention of Professor A was also conveyed to E ((1) D (B) b. above).

When requested to join the project as an editor of the fourth edition, Professor B did not know such background and expected that the appellee would play a central role in the editorial process. Professor B seemed to understand that he was expected to play a central role after learning the aforementioned communications in detail ((1) D (B) a. above).

In sum, at the stage of selecting editors for the fourth edition, the appellant, Professor A, Professor B, and the appellee at least shared the understanding that, although the appellee would be included in the "editors," the appellee would have no control in substance or only an extremely limited control over the process of preparing a draft. This interpretation would not change even in consideration of the fact that the appellee found Professor A's statement unacceptable.

At this early stage of selecting editors, the appellee was given no control or only an extremely limited control over the process of preparing a draft, which can be considered to constitute, due to its nature, the core part of the creativeness of the Work as a compilation, both qualitatively and quantitatively. This can be interpreted to actually mean that the appellee's involvement in the process of creating the Work as a highly creative compilation was extremely limited.

(B) In fact, in the editorial process of the fourth edition, as the first step, Professor A and

E discussed and decided that Professor B and Professor D, who would be a cooperating editor, should prepare a draft and that the editors' meeting should directly start with discussions on details based on the draft prepared by Professor B and Professor D instead of holding a meeting to determine the basic editorial policy. Professor A and E also decided how to communicate among the editors in order to implement such policy ((1) D (B) b. above). After obtaining consent from Professor B and Professor D, these decisions were put into action ((1) D (B) c. to e. above).

Professor B and Professor D obtained confirmation from Professor A concerning the details sequentially and asked opinions about the selection of candidate authors from Professor A and also from the appellee and Professor C through Professor A. However, it can be said that Professor B and Professor D mostly took the initiative in preparing a draft through mutual communications ((1) D (B) f. above).

On the other hand, the appellee's involvement in the project in this stage was limited to giving a general opinion to the effect that the candidate authors may be selected with reference to the authors of *Hanrei Hyakusen* concerning trademarks, designs, and acts of unfair competition and *Hanrei Hyakusen* concerning patents ((1) D (B) e., f. above).

(C) In this way, Professor B and Professor D played a central role in preparing a draft. In light of the degree and nature of the corrections subsequently made to the draft, it can be said that a large part of the selection and arrangement of the precedents to be covered by the Work and the commentaries (candidate authors) thereof has remained the same as the draft. It can be said that the draft itself was fairly close to the final form of the Work.

(D) After Professor B and Professor D prepared a draft and obtained confirmation from Professor A, the draft was sent to the appellee and Professor C. In response, Professor C made ten comments about the draft. Professor B adopted two of them and corrected the draft accordingly ((1) D (C) a. above). Professor C roughly explained the reasons for some of those ten comments, while he did not give any reasons for the rest of the comments. Before Professor B made corrections based on Professor C's comments, there is no evidence to prove that opinion exchange or discussions were held between Professor C and Professor B or between the appellee and Professor A. Thus, it can be presumed that the aforementioned corrections were made based solely on the decision of Professor B. Furthermore, even after the aforementioned corrections, approval for the corrections was sent only from Professor C. There is no prima-facie evidence to prove that the appellee and Professor A made any comments about the corrections.

On the other hand, the appellee contacted Professor B by telephone and email and proposed to delete one specific legal practitioner from and add specific three legal practitioners to the candidate authors. In response, Professor B corrected the draft by

deleting said one legal practitioner and adding two legal practitioners (Judge (a) and Lawyer (c)) (and determined which precedents they should write commentaries about). Professor B showed the corrected draft to the editors of the Work. The appellee told Professor B that Lawyer (b) comes before Lawyer (c) in terms of priority. Eventually, Professor B made a correction to reflect all of the opinions from the appellee ((1) D (C) b. above). While the details of these communications are not clear in detail, in light of the statements, the content of email, etc. submitted by the appellee and Professor B, it is impossible to presume that the appellee and Professor B sufficiently conducted concrete discussion or opinion exchange about the reasons for the proposal, etc. Regarding this proposal from the appellee, it seems that Professor A and Professor C did not say anything in particular. Therefore, when the draft was corrected based on the appellee's opinion, it would be reasonable to consider that Professor B took the initiative in determining whether a correction should be made and what kind of correction should be made.

It cannot be said that the appellee's proposal to delete a specific legal practitioner from and add three specific legal practitioners to the candidate authors was so commonplace that it cannot at all be considered to be creative in light of the subsequent change, etc. in the candidate authors. However, in consideration of the status, experience, etc. of those three legal practitioners proposed to be added and how the appellee's proposal was reflected in the draft, the proposal cannot be considered to be creative enough to be regarded as innovative. The proposal of these candidates can be considered to be a selection that any person with some academic background in the field of the Copyright Act could devise relatively easily. Thus, even if the appellee's proposal can be considered to be creative, the degree of creativeness cannot be considered to be necessarily high.

(E) After the Corrected Draft was prepared, the first editors' meeting was scheduled, while a series of drafts, namely, the Original Draft List, the Draft List, and the Corrected Draft List, were prepared. The appellee was not involved in this process at all except for the process of scheduling the meeting.

(F) In the first editors' meeting in which the appellee also participated, a discussion was held based on the Corrected Draft List, which had been sent to the editors of the Work in advance. In the meeting, in response to the editorial department's proposal to add the judgment of the Intellectual Property High Court for the North Korea case based on the comment made by Professor D to E ((1) D (D) above), a decision was made to add said judgment as well as one additional candidate author. Also, the editors of the Work unanimously agreed to the selection and arrangement of 113 cases as the precedents to be covered by the fourth edition and the assignment of the candidate authors (113 people) to each of those precedents, including the topics to be covered ((1) D (E) above). While the

details of the communications between the attendants in the editors' meeting are not clear, in light of the content of the written statements submitted by the attendants, it can be presumed that the meeting ended within a relatively short period of time without any entanglements, etc. Therefore, the appellee's specific contribution to the editors' meeting can be said to be limited to giving consent to the addition of the aforementioned judgment and also to the selection and arrangement of the precedents to be covered by the fourth edition and the selection and assignment of the candidate authors.

As mentioned above, an act of passively agreeing to the selection and arrangement of materials proposed by another person cannot be considered to be an act of directly participating in the process of creation. Since the appellee's contribution to the editors' meeting was limited to agreeing to the submitted proposal (the Corrected Draft List) and also to a third party's proposal, such involvement of the appellee cannot be considered to be creative. In view of the facts that the decision made in the editors' meeting can be basically regarded as the final decision concerning the selection and arrangement of materials to be covered by the Work and that the appellee carefully examined the draft and agreed to the decision based on his academic experience, such involvement of the appellee could be regarded to be creative in some respects. Even if this is the case, in consideration of the facts that the appellee's involvement can still be considered to be passive and that the draft was fairly close to the final form of the Work, it can be considered that the degree of creativeness in the appellee's involvement was not necessarily high.

(G) After the editors' meeting, a request for writing a commentary was sent to each of the candidate authors. Having received replies from the candidate authors to the request, necessary actions were taken such as giving permission for a request for joint authorship and replacing some candidate authors ((1) D (F) a. to e. above). When E consulted with the appellee about the requests, etc. from candidate authors, the appellee did not give any advice or simply gave his final decision of supporting the proposal of E or the other editors of the Work except for the case when E consulted about Lawyer (b)'s request for permission of joint authorship. Regarding Lawyer (b)'s request for permission of joint authorship, the appellee recommended E to accommodate Lawyer (b)'s request by listing some reasons. As of that time, joint authorship had already been permitted to another author. Before the appellee's recommendation, Professor B already gave consent to accommodating Lawyer (b)'s request. Professor C had also given support for the decision of Professor B.

In light of the circumstances and the reasons why the appellee thought that Lawyer (b)'s request should be accommodated, the appellee's involvement mentioned above

should be evaluated in the same manner as the appellee's involvement in the editors' meeting ((F) above).

(H) In response to the appeal court judgment handed down after the editors' meeting and to the comments, questions, etc. from authors about some precedents, some of the precedents to be covered by the Work were replaced after the editors' meeting ((1) D (F) f. to h. above). When E reported to the appellee that E decided to change the selection of the precedents to be covered after consulting with the other editors of the Work, the appellee only said that he would support the decision. When E consulted with the editors of the Work with regard to what measures should be taken in response to the appeal court judgment handed down for the *Rokuraku* II case after the editors' meeting, the appellee gave comments and briefly explained the underlying reasons. However, in the end, the appellee simply supported Professor C's opinion already presented.

In consideration of the circumstances and the reasons given by the appellee for supporting Professor C's opinion, the appellee's involvement mentioned above should be evaluated in the same manner as the appellee's involvement in the editors' meeting ((F) above).

(I) After the editors' meeting, when an issue was raised about the topic title concerning a certain precedent and the arrangement thereof, E finally took measures in accordance with the appellee's instruction to the effect that in the title of the chapter to which said topic belongs, the term "Injunction" should be changed to "Injunction, etc." to allow broad interpretation ((1) D (F) i. above). To begin with, the appellee's involvement mentioned above should not be considered to have reached such level that the appellee can be considered to exhibit creativity as an author of a compilation, i.e., the Work.

D. In this way, at least among Professor B, who played a central role in editing the Work, Professor A, who not only gave comments about the content in the course of editorial work, but also often gave advice, etc. to E and Professor B from the beginning of the editorial work with regard to the editorial process, etc., and E, an employee of the appellant, who was in charge of this work, there was a mutual understanding that the appellee was given no control in substance or only an extremely limited control over the editorial policy and content of the Work. In reality, such intention of the appellant, etc. was correctly understood by the appellee, when the appellee accepted the offer from the appellant for getting involved in the project as an editor. The appellee did not present any objection at least publicly. Therefore, regarding this point, there was a shared understanding between the appellee and those who played major roles in the editorial process of the Work. In light of the facts that the appellee did not make any concrete contribution to the process of preparing the Draft, that the appellee's involvement was

limited to a passive role even after the Draft was presented, and that, even when the appellee gave concrete comments, etc. and the content thereof can be considered to be creative, the degree of creativeness was not necessarily high, it can be presumed that the appellee was trying to refrain from getting involved excessively in consideration of the aforementioned mutual understanding.

Based on a comprehensive evaluation of the facts mentioned above, in overall editorial process of the Work, it would be reasonable to interpret that, although the appellee was actually considered to be one of the editors, he was in an advisory position and was only expected to provide ideas and advice and that the appellee himself limited his involvement under these circumstances. This interpretation seems to properly reflect the reality of the overall editorial process of the Work.

(4) On these grounds, despite the presumption under Article 14 of the Copyright Act, the appellee cannot be considered to be an author of the work.

(5) In response, the appellee alleged that he is one of the authors of the Work. However, as described above, the appellee's allegation is unacceptable based on the detailed examination of the overall process of editing the Work.

In addition to the aforementioned facts found by the court, the appellee also alleged that, in around September 2008, the appellee gave Professor D a concrete comment about the selection of the precedents to be covered and that the appellee gave Professor B a concrete comment about which precedents should be assigned to the three legal practitioners proposed to be added as candidate authors. However, as mentioned above, there is no prima-facie evidence that is accurate enough to prove that the appellee gave such comment to Professor B at the time of the proposal of the addition of legal practitioners. Regarding this point, the same can be said about the appellee's comment to Professor D.

Even if these facts alleged by the appellee can be proved, in light of the facts that Professor D prepared a list of the precedents to be covered by the fourth edition after conducting a comparative study by using Professor A's textbook and other literature, etc. ((1) D (B) d., f. above) and that, when the appellee assigned precedents to those three legal practitioners proposed to be added, the precedents were the same as the precedent that had been assigned to the legal practitioner whom the appellee proposed to delete or the same as the precedents that had already been included in a list of the "court decisions that could be covered" presented in the Draft, the appellee's involvement cannot be necessarily considered to be highly creative, as in the case of the appellee's involvement at different times. Thus, these facts alleged by the appellee failed to provide sufficient grounds to change the aforementioned court findings and evaluations.

2. On these grounds, it can be said that the appellee, who cannot be found to be an author of the Work, has neither copyrights nor moral rights of author and that the appellee does not have the right to seek an injunction against the appellant, i.e., the right that should be subject to provisional remedy.

Therefore, without needing to examine any other factors, it can be found that the appellee's Request for Provisional Disposition should be dismissed because it is groundless. Thus, the court dismisses both the Ruling Concerning Provisional Disposition, which accommodated said Request, and the ruling in prior instance, which approved said Ruling, and thereby dismisses the Request for Provisional Disposition. The judgment shall be rendered in the form of the main text.

November 11, 2016

Intellectual Property High Court, Third Division

Presiding judge: TSURUOKA Toshihiko

Judge: SUGIURA Masaki

Judge: TERADA Toshihiko