

Judgments of Intellectual Property High Court, Fourth Division

Date of the Judgment: 2005.10.6

Case Number: 2005 (Ne) No.10049

Title (Case):

A case wherein:

1. The court rejected a claim regarding the copyrightability of headlines of news articles published on an Internet website;
2. The court determined that imitation of such headlines of news articles did not correspond to imitation of the “configuration of other person’s goods” prescribed in Article 2(1)(iii) of the Unfair Competition Prevention Act;
3. The court determined that unauthorized use of such headlines of news articles constituted a tort.

Reference: Article 2(1)(i) and Article 10 of the Copyright Act, Article 2(1)(iii) of the Unfair Competition Prevention Act, Article 709 of the Civil Code

Summary of the Judgment:

The major issue in this case is whether or not the headlines of news articles published on an Internet website are copyrightable.

1. The summary of the judgment of this court on “copyright infringement for the headlines of news articles published on Yomiuri Online (YOL headlines)” is as follows.

(1) Generally, headlines of news articles are subject to restrictions because of their role in accurately conveying the contents of events to be reported to readers in concise expressions, and also face their own limits in respect of the number of characters able to be used. Due to such restrictions and limits, it is difficult to conclude that there are broad options for the expression of headlines and it is also difficult to deny that there is a relatively limited room for authors to display creativity in headlines; therefore, it may not be necessarily simple to affirm the copyrightability of headlines.

However, it is inappropriate to draw a quick conclusion that copyrightability of any headlines of new articles shall be immediately denied pursuant to Article 10(2) of the Copyright Act. Rather, there might be room to affirm creativity of such headlines depending on how they are expressed. It is ultimately necessary to examine individual and specific expressions of headlines and consider whether or not such expressions are creative.

The YOL headlines that are alleged to be copyrightable in this case, totaling 365 titles, are headlines attached to news articles on the Internet website that report accidents and other social events as well as political and economic events. The

reasoning mentioned above basically applies to the YOL headlines, although they have some special characteristics which will be mentioned later.

(2) Concerning copyrightability of the 365 YOL headlines published during the period from October 8 to December 7, 2002, which have been the subject matter of the dispute since the first instance

In the second instance, the appellant in particular alleges creativity of the following six YOL headlines: (i) “Professor Knowing No Manners Makes and Sells Pirated Copies of Manner Book” ; (ii) Mr./Ms. A. B. Enjoying Hot Foot Bath at Akakura Hot Spring” ; (iii) Small Fishing Boats Engaging in Saury Fishing in East of Hokkaido Secretly Become Bigger” ; (iv) “Car Parked in Driving Lane of Chuo Express way Invokes Crash of 14 Cars, Killing One Person” ; (v) “National Historical Places Ruined or Altered into Dump Sites and Small Golf Courses: General Accounting Office” ; (vi) “No to ‘Japanese Indian Curry’ : EU Proposes Rules for Indications of Sources.”

Even when individual and specific expressions of these headlines are examined, none of them can be deemed to be creative and protectable as copyrightable works.

Furthermore, aside from the six YOL headlines mentioned above, none of the other YOL headlines can be deemed to be creative and protectable as copyrightable works either.

(3) Concerning copyrightability of the YOL headlines published during the period from December 8, 2002 to September 30, 2004, which have been included in the subject matter of dispute in the second instance

The appellant has not even specified the expressions or contents of the YOL headlines published during this period, and the appellant’ s failure to fulfill the duty to allege and prove is inappropriate.

The appellant argues that YOL headlines in general should be deemed to be copyrightable. Although there might be room to affirm creativity of certain individual headlines of news articles depending on their expressions, it may not necessarily be easy to affirm creativity of headlines in general. It is ultimately necessary to examine individual and specific expressions of headlines and consider whether or not such expressions are creative. The appellant’ s argument that YOL headlines in general should be deemed to be copyrightable cannot be immediately accepted.

Even when individual and specific expressions of YOL headlines are examined, most of these headlines cannot be deemed to be actually creative. Taking as an example the headline “Mr./Ms. F Passes Away, Age 47,” this would inevitably be written with similar expressions irrespective of the author. Therefore, it cannot be concluded that YOL headlines in general that are created by the appellant are copyrightable.

2. The summary of the judgment of this court on “the appellant’ s claim on the

grounds of violation of the Unfair Competition Prevention Act” is as follows.

It is appropriate to construe that the “configuration of other person’s goods” prescribed in Article 2(1)(iii) of the Unfair Competition Prevention Act means the external and internal shape of goods and the pattern, color, gloss, and texture combined with such a shape, which may be perceived by consumers or other purchasers when making ordinary use of the goods.

Based on this definition, even if imitation of YOL headlines occurs, it does not correspond to imitation of the “configuration of other person’s goods” prescribed in Article 2(1)(iii) of the Unfair Competition Prevention Act. Without needing to examine other points, the appellant’s claim in the principal action on the grounds of violation of the Unfair Competition Prevention Act is groundless.

3. The summary of the judgment of this court on “the appellant’s claim on the grounds of a tort” is as follows.

(1) It should be construed that a tort (Article 709 of the Civil Code) occurs not only in the case of infringement of rights based on a strict definition, or legally established rights such as copyrights, but also in the case of illegal infringement of interests that deserve legal protection.

As is generally known, on the Internet, a vast amount of information is transmitted at high speed, providing great benefits for users. However, needless to say, such valuable information does not come to exist on the Internet without a great deal of effort. If it were not for those people who collect and process information and disclose it on the Internet, such a vast amount of information would not be available. News reports can become valuable information on the Internet by virtue of a series of everyday activities, from news-gathering to manuscript writing, editing, and headlining, which are carried out by news agencies including the appellant by incurring a lot of effort and expense.

(2) In this case, the following facts have been found. YOL headlines can be regarded as the result of such a series of activities carried out by the appellant, incurring a lot of effort and expense as a news agency. Although these headlines cannot be deemed to be protectable under the Copyright Act, they are created through certain effort and means and using concise expressions so that the people who read them will be able to understand to a certain extent the outline of the events and news that are reported. YOL headlines are treated as having independent commercial value because browsing of headlines alone without news articles is also provided as a paid service. In light of these facts, YOL headlines can be regarded as interests that deserve legal protection. On the other hand, the following facts have also been found. The appellee, without permission from the appellant, and for the purpose of making a profit, repeatedly and continuously, at the time immediately following the creation of individual YOL headlines, or in other

words, when the information was very fresh, made a slavish imitation or a substantially slavish imitation based on YOL headlines or YOL articles without making any special effort of their own, created LT headline links, and displayed these headline links on not only the LT page of the appellee's own website but also the LT pages of about 20,000 websites of registered users, thereby effectively transmitting LT headline links. It cannot be denied that the appellee's line topic services described above may compete with the appellant's business relating to YOL headlines.

Consequently, the series of acts conducted by the appellee in providing the line topic services go beyond the generally acceptable level, and constitute a tort of illegally infringing the appellant's interests that deserve legal protection.

(3) The appellant incurred a loss due to the appellee's unauthorized use of YOL headlines. According to the purport of Article 248 of the Code of Civil Procedure and in light of the fact-finding and the whole purport of the arguments in this case, it is appropriate to determine the amount of loss to be 10,000 yen per month. Therefore, for the period of infringement, 23 months and 24 days, the amount of loss incurred by the appellant is 237,741 yen.

The appellant's argument that intangible loss incurred amounts to 10 million yen cannot be accepted even based on the overall evidence produced in this case.

The appellant's claim for 10 million yen in legal costs also cannot be upheld because in light of the circumstances of the principal action, it is inappropriate to have the appellee shoulder the appellant's legal costs.

Consequently, the amount of damages shall be determined to be 237,741 yen.

(4) As a general remedy for a tort victim, a court will consider a claim for damages but not a request for an injunction. In this case, having examined whether or not there are any reasons to grant an injunction, the court cannot find any circumstances where a serious situation that is unrecoverable by damages would occur unless the appellee's future acts are prevented, nor can it find any reasons to approve such prevention even based on the overall evidence produced in this case. Therefore, the appellant's request for an injunction of a tort is groundless.

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2005 (Ne) 10049 Appeal Case of Seeking an Injunction against copyright infringement, etc.

Date of conclusion of oral argument: June 9, 2005

(Court of prior instance: Tokyo District Court, 2002 (Wa) 28035, Judgment dated March 24, 2004)

Judgment

Appellant (Plaintiff): Tokyo headquarters of Kabushiki Kaisha Yomiuri Shimbunsha

Counsel attorney: TANAKA Katsuro, NAKAMURA Katsuhiko, MASUMOTO Yoshiro, NEMOTO Hiroshi, SHINOMIYA Takashi

Appellee (Defendant): Digital Alliance, Inc.

Counsel attorney: SHIBATA Mari, TAKAMOTO Naoaki

Main text

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

(1) The appellee shall pay the appellant 237,741 yen and delay damages accrued thereon at a rate of 5% per annum from October 1, 2004 until the date of full payment.

(2) Any other claims of the appellant shall be dismissed.

2. The claims expanded by the appellant in this instance shall be dismissed.

3. Regarding the court costs, the appellee shall bear five ten-thousandths of the fees related to the filing of the action and appeal for the first and second instances. The remaining costs shall be borne by the appellant.

4. This judgment may be provisionally executed to the extent stated in 1, (1) above.

Facts and reasons

No. 1 Trial decisions sought by the appellant

1. The judgment in prior instance shall be revoked.

2 The appellee shall not use the article headings ("YOL heading(s)") stated in the "Works List 1" of Attachment 2 and the main text of the articles ("YOL article(s)") stated in "Work List 2" of Attachment 2 on the website (the "appellee's website") stated in the "Appellee's Website List" of Attachment 1, which is operated by the appellee.

3. The appellee shall not distribute the data of YOL headings.

4. The appellee shall not save the cache data of YOL headings and YOL articles on the hard disks of its personal computers.

5. The appellee shall pay the appellant 24.8 million yen and delay damages accrued thereon at a rate of 5% per annum from October 1, 2004 until the date of full payment.

6. The appellee shall bear the court costs for the first and second instances.
7. A declaration should be made for provisional execution to the extent stated in paragraphs 5 and 6.

No. 2 Background

The following terms used in this judgment have the same or similar meanings as those used in the judgment in prior instance: "Yomiuri Online," "Line Topics Service," "appellee's site," "Yahoo," "Yahoo site," "Yahoo! News," and "registered user."

1. The appellant sought the following court decisions in the prior instance.
 - [i] The defendant (appellee) shall neither reproduce nor use the article headings (YOL headings) presented on the website as stated in the Plaintiff's Website List of Attachment 2 to the judgment in prior instance as well as any headings similar thereto on the website stated in the Defendant's Website List of Attachment 1 to the judgment in prior instance, which is operated by the defendant (appellee).
 - [ii] The defendant (appellee) shall not distribute the tags stated in the Tag List of Attachment 3 to the judgment in prior instance, which present the article headings stated in the preceding paragraph.
 - [iii] The defendant (appellee) shall pay the plaintiff (appellant) 68.25 million yen and delay damages accrued thereon at a rate of 5% per annum from January 23, 2003 until the date of full payment.
2. In the prior instance, the appellant sought an injunction against and damages for the reproduction, etc. of YOL headings (68.25 million yen as a fee for the use of YOL headings) as mentioned in [i] through [iii] above on the grounds that, as a primary claim, the appellee's act of presenting YOL headings on the appellee's website constitutes infringement of the appellant's copyright for YOL headings (the right of reproduction and the rights of public transmission, etc.) and also on the grounds that, as a secondary claim, the aforementioned act of the appellee constitutes an act of tort.
3. In the judgment in prior instance, the court dismissed all of the plaintiff's (appellant's) claims by holding that, since YOL headings may not be regarded as copyrightable works, copyright infringement may not be recognized and that the aforementioned act of the defendant (appellee) does not constitute an act of tort.
4. The appellant filed an appeal and reduced, expanded, and added claims in this instance as stated in No. 1 above.

The appellant's claims in this instance are as follows: (α) a claim to seek an injunction (2. to 4. of No.1 above) and a claim to seek damages (4.8 million yen as a license fee) on the grounds of copyright infringement (the infringement of the right of reproduction and the rights of public transmission for YOL headings as well as the

infringement of the right of reproduction for YOL articles [the latter was added in this instance]), (β) a claim to seek an injunction (2. and 3. of No.1 above) and a claim to seek damages (4.8 million yen as mentioned above) on the grounds of an act of unfair competition specified in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act, and (γ) a claim to seek an injunction (2. to 4. of No.1 above) and a claim to seek damages (a total of 24.8 million yen consisting of 4.8 million yen as mentioned above, 10 million yen as intangible damage, and 10 million yen as attorneys' fees) on the grounds of an act of tort.

In this instance, the claim mentioned in 2. of No. 1 above is equivalent to a claim mentioned in [i] above made in the prior instance regarding YOL headings combined with a newly added claim for an injunction related to YOL articles. The claim mentioned in 3. of No. 1 above made in this instance and the claim mentioned in [ii] above made in the prior instance are the same in substance although they are expressed in different ways. The claim mentioned in 4. of No. 1 above made in this instance is a claim newly added in this instance.

Regarding these claims, the appellee sought dismissal of this appeal and dismissal of the claim added in this instance.

5. Regarding the background and the allegations of the parties concerned, the contents of "No. 2 Background" and "No. 3 Allegations of the parties concerned regarding the issues" presented in the "Facts and reasons" of the judgment in prior instance (including the "Article Headings Comparison Table" of Attachment 4 to the judgment in prior instance) were cited. Furthermore, the following "No. 3 Key points of the allegations of the appellant in this instance" and "No. 4 Key points of the allegations of the appellee in this instance" have been added (the allegations were described relatively in detail for such reason as the fact that the appellant restructured its allegations in this instance).

Since the term "tag" was used in the plaintiff's allegations in the prior instance in an inaccurate manner, the plaintiff's allegations were modified in this instance. For this reason, the plaintiff's allegations in the judgment in prior instance have been modified as follows as far as the part cited above are concerned. "The section called 'tag' established on the defendant's website ("defendant's tag")" in lines 9 to 10 of page 10 of the judgment in prior instance is modified to "the long, horizontal bar-shaped section created on the defendant's website in order to indicate headings, etc. ("LT indication section")." In addition, in the judgment in prior instance, the term "defendant's tag" used on line 12, line 17, line 18, lines 22 to 24 (of the three, the second and third uses), and line 26 of page 10, line 12 and lines 16 to 17 (of the two, the first use) of page 11, lines 7 to 8 (of the two, the first use) of page 18, line 6 and line 13 of page 20 as well as in

the top paragraph of each page of the "Article Headings Comparison Table" of Attachment 4 is replaced with "LT indication section." Moreover, in the judgment in prior instance, the term "defendant's tag" used on line 21, lines 22 to 24 (of the three, the first use) of page 10, line 1 and lines 16 to 17 (of the two, the second use) of page 11, lines 7 to 8 of page 18 (of the two, the second use), and line 10, line 15, and line 20 of page 20 is replaced with "data."

No. 3 Key points of the allegations of the appellant in this instance (Key points of the reasons for filing an appeal and the key points of the allegations added in this instance)

1. Claims made on the ground of copyright infringement

(1) Product value of the headings and main text of articles in the news business

(a) The appellant has been engaged in the business where news organizations invest their personnel and material resources so that they can conduct information and news gathering activities when an accident or event occurs in society and whose mission is to provide the information that they gathered through these activities to the general public via newspapers and other media in an efficient and accurate manner.

The article headings and main text may be regarded as the result of the corporate efforts that each news organization has made by investing a considerable amount of their personnel and material resources, etc., i.e., the ultimate fruit of their information and news gathering activities.

(b) Each news organization such as a newspaper company has established its own business rules in order to ensure the immediacy, accuracy, public nature, and public benefit of information and has complied with those rules.

(c) The aforementioned nature of the news business and the need of news organizations to ensure the immediacy, accuracy, public nature, and public benefit of information would not undergo any change even if the information itself is provided to the general public via the Internet.

(d) The Line Topics Service uses the article headings that are identical or extremely similar to YOL headings available on the Internet without the appellant's authorization, while the headings still maintain a high product value before they lose information immediacy (news value). Such act of the appellee may be regarded as an act of sneaking the ultimate fruit, i.e., YOL headings that have a high product value as the ultimate result of the corporate efforts made by the appellant as a news organization, without paying any compensation, and also to be an act of complete disregard for the business practices of news organizations.

If the appellee's act is considered legal and acceptable, businesses similar to the Line Topics Service could spread. If this happens, it would threaten the basis of the existence

of news organizations and have an immeasurable impact on the news business.

(2) Copyright infringement of YOL headings (infringement of the right of reproduction or the rights of public transmission)

(2-1) During the period from October 8, 2002 to September 30, 2004 (the period from December 8, 2002 to September 30, 2004 was additionally claimed in this instance), the appellee continuously posted article headings on the appellee's website by reproducing YOL headings (The headings that the appellee created for the Line Topics Service shall be hereinafter referred to as "LT heading(s)." A type of LT headings with the function of allowing a user who clicks on an LT heading to be linked to the main text of the corresponding article posted on the Yahoo! News may be referred to as "LT link heading(s)," while a type of LT link headings that is used especially as an indication of a link button to a YOL article may be referred to as "YOL link heading(s)" in some cases.) (The section indicating LT headings on the appellee's website is the "LT indication section."). During the aforementioned period, since all of the LT headings presented in the LT indication section may be deemed to fall under the scope of headings identical to YOL headings, it is clear that these LT headings were created by reproducing YOL headings.

(2-2) During the period from October 8, 2002 to September 30, 2004 (the period from December 8, 2002 to September 30, 2004 was additionally claimed in this instance), the appellee continued the public transmission of HTML tags with the function of controlling the playing of SWF files including the data of YOL headings to users who had completed a certain registration procedure on the appellee's website ("registered users") and also the public transmission of the data of YOL headings to registered users who had installed said HTML tags on their own websites ("installation user(s)"). If the data of YOL headings is sent to installation users, LT headings will be presented in the LT indication section. During the aforementioned period, all of the LT headings presented in the LT indications section may be deemed to fall under the scope of headings identical to YOL headings.

(2-3) The judgment criteria adopted by the judgment in prior instance contain an error in the recognition of the significance of YOL headings, an error in placing too much importance on the restrictions on the number of characters, an error concerning the selection of terms, and the inconsistency between judgment criteria and the conclusion.

(2-4) Copyrightability of YOL headings

(a) In order to determine the creativeness of a work of expression, it is essential to examine whether the work consists solely of expressions that are commonly used to express the topic in question or includes other elements that are unique to the author.

(b) In the case of YOL headings in general, while newspaper readers can see the headings and main text of articles at the same time, users of the Yomiuri Online have to, first of all, read the list of YOL headings presented on the top page of the Yomiuri Online and then click on the heading that interests them in order to have their browser software open the webpage where the corresponding YOL article is posted so that they can read the main text of the article. YOL headings may be considered to be more independent than ordinary article headings in the sense that readers have to take these two steps in order to read the main text of articles. Therefore, in comparison with ordinary article headings, it is more important for YOL headings to have unique features in order to invite users to the main text of articles because readers decide whether to read articles or not based on YOL headings. Reporters create YOL headings (hereinafter sometimes referred to as "editing reporter(s)") very carefully with the awareness of the headings' function of attracting readers.

When creating YOL headings, it is not enough to simply select words that convey the fact and put those words together to create a heading. It is important for a heading to contain expressions that indicate the stance of the appellant as a newspaper company toward the news event itself that is covered by the news article, the editing reporter's subjective evaluation of the news event, or witty or humorous expressions in order to instantly make users who have come across YOL headings feel like reading the main text of the corresponding articles. In order to create such an attractive heading, a simple summary of the main text of the corresponding article would not be enough. It is necessary for an editing reporter who intends to create effective headings to temporarily keep a distance from the main text of the article, reevaluating the social significance of the news event itself covered by the article from his own perspective, carefully identifying what he/she, as a reporter, should convey to readers and what aspect of the news should be used to give a strong impression to readers from the viewpoints of a reporter as well as a reader, and thereby to determine the terms, signs, and methods of expression to be used.

Reporters who create YOL headings have to express a wide range of subject matters, namely, social events covered by news articles. In order to achieve this goal, they are required to create effective and accurate expressions by using only 25 characters or less. This means that they need to have a keen sense of wit and humor, rich experience, sophisticated writing skills and the ability to grasp the facts.

In the case of a YOL heading, even if a reporter simply picks up and uses some words from the corresponding article, he/she not only has to make a careful decision as to which words to cite from the article and how to use them but also has to pay

sufficient attention to which modifiers to use and where to insert those modifiers. Moreover, if the simple use of words cited from the article does not allow the heading to sufficiently perform its function, it would be necessary to make full use of words, signs, or expressions that are not used in the main text of the corresponding article.

As described above, in the case of YOL headings in general, each YOL heading displays a certain level of creativeness where the uniqueness of the creator is expressed. Therefore, YOL headings in general should be regarded as copyrightable.

(c) While every YOL heading should be regarded as copyrightable, we are going to discuss some headings that are also extremely creative as listed below.

[i] "Mannerless university professor sold a pirated edition of manners book" (posted on the Yahoo! News website on October 16, 2003)

The aforementioned YOL heading was created for an article reporting that a professor in the field of basic medicine at Kochi Medical School reproduced a doctor's manners book and sold it to students without permission from the publisher and editor. The purpose of this YOL heading is to convey the fact that a university professor, who is in a position as an educator, conducted a self-contradictory act and lost public trust.

The reporter who created this YOL heading chose not to take the method of simply stating the fact, but chose the word "manners" as a keyword and used it twice as "mannerless" and "manners book" in one sentence for the purpose of creating a contrast between the two in such a way that the sentence as a whole can exhibit good rhyme and rhythm. In this way, the reporter tried to give a strong, precise impression to readers about the "self-contradictory act" of the university professor. Such method of expression may not be considered to be a method commonly adopted to describe the topic expressed in this heading. Therefore, this heading may be regarded as a clear representation of the uniqueness of the editing reporter.

In contrast, the news website operated by the Jiji Press Co., "Jiji. com," reported the same news under the heading "Professor reprimanded for selling reproduced books; Kochi Medical School." In comparison, it may be said that the YOL heading is more distinctive.

In this way, in relation to the topic expressed in the heading, since the YOL heading may not be regarded as a "common expression" but may be considered as creative, the YOL heading should be recognized as copyrightable.

While the appellee created the LT heading "Mannerless university professor reproduced and sold a doctor's manners book without permission" based on the YOL heading and presented it in the LT indication section, the fundamental element of the creativeness of the YOL heading lies in the feature that the two words, "mannerless"

and "manners book" are used in one sentence for the purpose of creating a contrast between the two. Therefore, the appellee's act of copying this feature may be regarded as an act of making a reproduction in a tangible form without damaging the identicalness of expression, and should be considered to constitute infringement of the appellant's right of reproduction.

[ii] Mr. A and Mrs. B enjoyed atsu-atsu (a Japanese word for "hot" and "love-dovey") footbath in the Akakura Hot Spring (posted on the Yahoo! News website on October 23, 2003)

This heading was created for an article reporting that North Korea abduction victims, Mr. A and Mrs. B, who temporarily came back to Japan, visited Myoukou Kougen, Niigata Prefecture and enjoyed a hot spring footbath to heal their fatigue from a long trip. Through this heading, the reporter tried to express the abducted couple's relief of finally overcoming years of hardships and visiting their homeland, Japan, for sightseeing. In addition, in consideration of readers' sympathy for the victims under stress in a series of abduction cases, the reporter tried to reassure readers by reporting a happy moment for abduction victims.

The reporter who created this YOL heading used the word "atsu-atsu" in order to create an association between the scene of a happily-married couple enjoying time together and the scene of the couple taking a footbath. By using this word, the reporter tried to give a strong impression to readers by conveying a more accurate, graphic image of the couple's relaxed state of mind. The reporter further strengthened the impact by adding good rhyme and rhythm to the heading as a whole. In view of the fact that the word "atsu-atsu" was not used in the main text of the corresponding article, the very use of this word may be regarded as a representation of the uniqueness of the reporter who created the YOL heading.

The same news is reported under the heading "Mr. A and Mrs. B enjoying a footbath together with their families" on the news site, "Mainichi Interactive," operated by Mainichi Newspaper Co., Ltd., under the heading "A and B enjoying a trip to hot spring resort" on the news site, "Sankei Web," operated by The Sankei Shimbun; and under the heading "A and B visiting a hot spring resort with their families" on the news site, "NHK News," operated by NHK. None of these headings contains the word "atsu-atsu." This shows that the use of the word "atsu-atsu" is characteristic of the YOL heading.

Therefore, in relation to the topic expressed in the heading, the YOL heading is not a "common expression" at all, but should be regarded as creative and should be recognized as copyrightable.

In the meantime, the appellee created the LT heading "Mr. A and Mrs. B visited the

Akakura hot spring resort and enjoyed an atsu-atsu footbath to heal their fatigue from a long trip" based on the YOL heading and presented it in the LT indication section. Since the fundamental element of the creativeness of the YOL heading lies in the use of the word "atsu-atsu," the appellee's act of exactly copying said word may be regarded as an act of making a reproduction in a tangible form without damaging the identicalness of expression and should be considered to constitute infringement of the appellant's right of reproduction.

[iii] "Saury fishery vessels operating off the east coast of Hokkaido secretly enlarged" (posted on the Yahoo! News website on October 9, 2003)

This YOL heading was created for a YOL article reporting that most of the 60 small saury fishery vessels used for fishing in the Pacific off the east coast of Hokkaido are suspected to have been enlarged illegally beyond the officially registered tonnage and that the Hokkaido government has decided to conduct an on-site inspection on all of the 60 vessels under the Fishing Boat Act. The purpose of the YOL heading is to express the fact that, since any vessel from 20 tons (inclusive) to 30 tons (exclusive) cannot obtain a permission for salmon and trout fishing, slightly smaller 11-ton vessels and 19-ton fishing vessels secretly enlarged their capacity in an attempt to achieve two goals at once, i.e., obtaining permission for salmon and trout fishing and increasing the one-time catch of fish.

The reporter who created the YOL heading avoided common expressions such as citing some words from the main text of the article in order to simply convey the fact that small fishing vessels underwent illegal conversion. In order to express that the reporter considers the illegal conversion of small fishing vessels not as an extremely malicious act but as an "act of cheating to make money," the reporter used the word "secretly," which is not used in the main text of the article, for the purpose of communicating the nuance of cheating. As mentioned in the article, while 19-ton vessels were enlarged to surpass 20 tons or more, such level of enlargement cannot be clearly recognized by third parties. The word "secretly" was used to allow readers to understand that the enlargement was so slight that it is difficult to notice. As described above, the reporter used the word "secretly" not to convey the article itself but to communicate his/her own impression of the event covered by the article. By using such a humorous, accurate expression, the reporter intended to give a strong impression to readers and emphasize the cunning nature of the acts of the owners of the small fishing vessels. This aspect of the heading may be recognized as a representation of the uniqueness of the reporter.

Furthermore, the same news was reported under the heading "Saury small fishery

vessels operating off the east coast of Hokkaido illegally converted?" on the website, "Senkon Region News Digest." In this heading, the word "secretly" is not used. This indicates that the use of the word "secretly" is characteristic of the YOL heading. Therefore, the YOL heading may not be regarded as a "common expression" but should be recognized as creative and therefore copyrightable.

The appellee created the LT heading "Saury small fishery vessels operating off the east coast of Hokkaido illegally converted to larger vessels secretly" based on the YOL heading and presented it in the LT indication section. Since the fundamental element of the creativeness of the YOL heading lies in the use of the word "secretly," the appellee's act of exactly copying said word may be regarded as an act of making a reproduction in a tangible form without damaging the identicalness of expression and should be considered to constitute infringement of the appellant's right of reproduction.

[iv] "Car parked in a driving lane of the Chuo Expressway → 14 cars involved in a series of crashes such as rear-end collisions, leaving one person dead" (posted on the Yahoo! News website on October 16, 2003)

This YOL heading was created for an article reporting a car accident where two large trucks crashed into a car parked in a driving lane of the Chuo Expressway, while a large truck parked behind the crash site was crashed into by a following truck, leading to a pileup of other trucks. The purpose of this YOL heading is to convey the tragic consequences of the aforementioned crashes and the actual situation of the accident site.

The reporter who created this YOL heading decided to use the sign "→" in order to emphasize the tragic consequences of rear-end accidents by giving a very accurate, graphic image of the situation of the accident and helping readers visualize the actual accident site. By using the sign "→," the reporter wanted to give a strong impression to readers about a fatal accident where a "parked" car was crashed into by other cars. In consideration of the fact that the sign "→" is rarely used in ordinary newspaper articles, this expression may be regarded as a representation of the uniqueness of the reporter.

Moreover, on the news site operated by Japan News Network, the same news was reported under the heading "Accident involving 14 cars in the Chuo Expressway, one person killed." The sign "→" was not used. This indicates that the use of the sign "→" is characteristic of the YOL heading. Therefore, the YOL heading should not be regarded as a "common expression" but should be recognized as creative and therefore copyrightable.

Since the appellee exactly copied the YOL heading and presented it in the LT indication section as an LT heading, the appellee's act clearly constitutes infringement of the appellant's right of reproduction.

[v] "National historical sites covered with cracks and breaks, used as garbage collection sites, mini-golf courses, etc. --- Board of Audit of Japan" (posted on the Yahoo! News website on October 30, 2003)

This YOL heading was created for an article reporting that the Board of Audit of Japan had found out that, among the national historical sites such as shell mounds and castle ruins, at least more than 30 historical sites throughout Japan were not properly managed. The purpose of this YOL heading is to point out the fact that national historical sites have been managed in an improper and reprehensible manner.

The reporter who created the YOL heading tried to give a strong impression to readers about the reprehensibility by using the expression "covered with cracks and breaks." In fact, the incompatibility between the expression "covered with cracks and breaks" and the term "national historical sites" has the effect of making a strong impact on readers. In consideration of the fact that the expression "covered with cracks and breaks" is not used in the main text of the corresponding article, the very use of this expression may be regarded as a representation of the uniqueness of the reporter who created the YOL heading. Therefore, in relation to the topic expressed in the heading, the YOL heading is not a "common expression," but should be regarded as creative and should be recognized as copyrightable.

The appellee created the LT heading "Improper management left national historical sites covered with cracks and breaks, used as garbage collection sites, mini-golf courses, etc. --- Board of Audit of Japan" based on the YOL heading and presented it in the LT indication section. As mentioned above, since the fundamental element of the creativeness of the YOL heading lies in the use of the expression "covered with cracks and breaks," the appellee's act of exactly copying said expression may be regarded as an act of making a reproduction in a tangible form without damaging the identicalness of expression and should be considered to constitute infringement of the appellant's right of reproduction.

[vi] "'Indian Curry made in Japan' is × --- Place-of-origin rules proposed by the EU" (posted on the Yahoo! News website on November 6, 2003)

This YOL heading was created for an article reporting that, in the new round (multilateral trade talks) at the WTO, the EU proposed stricter rules for the use of the name of the place of origin in the names of various products sold in different places in the world. The purpose of the YOL heading is to convey the significance of these rules that could prohibit the use of a widely used product name such as "Indian Curry" unless the product in question was made in India.

The reporter who created the YOL heading used the sign "×" in order to give an

accurate, strong impression to readers about the news that the product name "Indian Curry" would be prohibited. In consideration of the facts that the sign "×" is not used in the heading of an ordinary newspaper article and that "×" is not used in the main text of the corresponding article, the very use of this sign may be regarded as a representation of the uniqueness of the reporter who created the YOL heading. Therefore, in relation to the topic expressed in the heading, the YOL heading is not a "common expression," but should be regarded as creative and should be recognized as copyrightable.

Since the appellee exactly copied the YOL heading and presented it in the LT indication section as an LT heading, the appellee's act clearly constitutes infringement of the appellant's right of reproduction.

(d) Summary

As described above, YOL headings should be regarded as copyrightable as creative linguistic expressions in general. Examination of each YOL heading has revealed that some YOL headings are very creative and at least such YOL headings should be found to be copyrightable. Therefore, the appellee's act of reproducing those headings clearly constitutes infringement of the appellant's right of reproduction.

(2-5) Counterargument against the allegation that all YOL headings may be regarded as "reports of various events and current affairs that merely convey facts"

As explained above, the reporters who create YOL headings are required to report social events covered by articles in an accurate, impressive manner by using 25 characters or less. The expressions used in a YOL heading would differ from one reporter to another. At least, in the case of the YOL headings examined above, none of the other newspaper companies created similar headings. Therefore, YOL headings should be treated differently from obituaries and notices of organizational and personnel changes. For this reason, the allegation that "all YOL headings may be regarded as "reports of various events and current affairs that merely convey facts" is incorrect.

(2-6) Unjust consequences caused by the recognition of the copyrightability of YOL headings

Even if similar headings exist, copyright infringement (the right of reproduction) may not be recognized in most cases because they often fail to fulfill the "dependency" requirement although they have to fulfill said requirement in addition to the requirement of "identicalness" of expression and the requirements of "similarity in substance." Therefore, even if the copyrightability of YOL headings is recognized, it would not allow the appellant to monopolize the headings for the relevant news and would not cause unjust consequences.

(3) Infringement of the right of reproduction of YOL articles

(a) YOL articles are unique in that they are news articles posted on an Internet website. However, since they do not differ from news articles in newspapers in terms of nature and substance, they should be recognized as copyrightable works as is the case with newspaper articles.

(b) During the period from October 8, 2002 to September 30, 2004, in order to gain financial benefits from YOL articles posted on the Yahoo! News website by using those articles as a direct subject-matter of its business, the appellee continuously read those articles on the browser software of the personal computers that the appellee was using and made tangible reproductions of those articles by saving the cache data of those YOL articles.

Furthermore, during the period from October 8, 2002 to September 30, 2004, the appellee built a system that allows users to read the YOL articles posted on the Yahoo! News website that correspond to the LT headings (in other words, YOL headings) with a click on the LT headings presented in the LT indication section on the appellee's website and continuously produced an effect that is identical in substance with the effect of making tangible reproductions of YOL articles.

(c) The appellee alleged that the appellant's allegation of the copyright infringement of YOL articles should be regarded as an allegation and evidence advanced out of time.

However, the appellant has consistently focused on the appellee's act related to the Line Topics Service and has not raised the issue of copyright infringement in relation to any other completely different act. Since it is quite possible to conduct proceedings as to whether copyright infringement of YOL articles may be recognized or not based on the evidence, etc. submitted in the prior instance, there would be no risk of causing a delay in concluding this lawsuit.

(4) Existence of a "risk of infringement"

While the YOL headings and YOL articles created by the appellant will continue to be copyrightable into the future, it is certain that the continuation of the aforementioned act of the appellee will frequently infringe the copyright for YOL headings and YOL articles. Therefore, there is a "risk of infringement" specified in Article 112, paragraph (1) of the Copyright Act.

(5) Damage caused by copyright infringement

At least during the period from October 8, 2002 to September 30, 2004, the appellee created LT headings by imitating YOL headings and presented them on the appellee's website and the LT indication section installed on the website of each installation user as link buttons to read the corresponding news articles posted on the Yahoo! News

website (as LT link headings).

With reference to the example of Hottolink, which is duly licensed by the appellant to use YOL headings, in light of the fact that more than 100,000 yen must be paid every month to obtain a legitimate license for the use of YOL headings (Exhibit Ko No. 18), the amount of damage caused by the aforementioned appellee's act of using YOL headings without due authorization would be considered to be at least 4.8 million yen in total (¥200,000/month multiplied by 24 months) (Article 114, paragraph (3) of the Copyright Act).

(6) Thus, the appellant demands against the appellee an injunction against each of the acts specified in 2. to 4. of No. 1 above as well as the payment of 4.8 million yen as damages for the copyright infringement and delay damages accrued thereon at a rate of 5% per annum from October 1, 2004 until the date of full payment.

2. Claims on the grounds of a violation of the Unfair Competition Prevention Act

(1) Issue of whether the appellee's act constitutes an act of unfair competition specified in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act

The appellee creates LT headings by imitating YOL headings and presents them in the LT indication section of the appellee's website and also distributes the LT indication section to registered users. Such act of the appellee constitutes an act of unfair competition specified in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act because it may be regarded as an act of creating LT headings by imitating "goods" of the appellant, namely YOL headings, exhibiting them on the appellee's website for the purpose of assigning or leasing them, and assigning them to any registered user who makes a request.

(a) Issue of whether YOL headings may be regarded as "goods"

In recent years, the diversification of economic value has led to the diversification of products that may be regarded as subject-matters of transactions. In consideration of this situation, etc., the term "goods" used in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act may be used not only for a tangible asset but also for an intangible asset as long as it is socially recognized as economically valuable and independently handled as a subject matter of transactions.

Although YOL headings are intangible assets, it is clear that they should be regarded as "goods" as mentioned above because they are socially recognized as economically valuable thanks to their function of conveying a single-line of news and are independently treated as a subject matter of transactions.

(b) Fulfillment of other requirements

Since YOL headings may be regarded as "goods" as described above, the

aforementioned act of the appellee constitutes an act of unfair competition specified in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act.

During the period from October 8, 2002 to September 30, 2004, the appellee continuously created LT headings on the appellee's website by almost exactly copying YOL headings. This act may be exactly regarded as "imitation of the configuration" of "goods," namely YOL headings in this case. Moreover, the appellee's act of continuously transmitting LT headings upon request from registered users during the aforementioned period constitutes an act of assigning imitation goods. Furthermore, the appellee's act of creating LT headings by imitating YOL headings and continuously presenting them in the LT indication section of the appellee's website during the aforementioned period constitutes an act of exhibiting imitation goods for the purpose of assigning them.

(c) As described above, the appellee's act constitutes an act of unfair competition specified in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act.

(2) Infringement of business interests (Article 3 and Article 4 of the Unfair Competition Prevention Act)

Due to the appellee's act, the appellant lost an opportunity to grant a license for the use of YOL headings and suffered damage to its business interests such as the loss of profits that could have been gained from such license.

(3) Damage

Due to the appellee's use of YOL headings without due authorization, the appellant lost the royalties that could have been gained from the YOL headings. As mentioned earlier, the appellant suffered damage of at least 4.8 million yen in total that is equivalent to the royalties for a total of 24 months from October 8, 2002 to September 30, 2004, during which the appellee clearly used YOL headings without due authorization (Article 5, paragraph (3) of the Unfair Competition Prevention Act).

(4) Conclusion

Therefore, the appellant demands against the appellee an injunction against each of the acts specified in 2. and 3. of No. 1 above as well as the payment of 4.8 million yen as damages for the violation of the Unfair Competition Prevention Act and delay damages accrued thereon at a rate of 5% per annum from October 1, 2004 until the date of full payment.

3. Claims on the grounds of an act of tort

(1) Issue of whether the appellee's act may be regarded as an act of tort

(a) As mentioned above, during the period from October 8, 2002 to September 30,

2004, the appellee continuously created article headings (LT headings) by reproducing YOL headings and presented them on the appellee's website. During the same period, the appellee publicly transmitted to registered users the HTML tags that had the function of controlling the playing of the SWF files containing the data of YOL headings and also publicly transmitted the data of YOL headings to registered users who had installed the HTML tags on their respective computers (installation users).

(b) Since the appellee copies YOL headings without due authorization when they are still new and high in product value, the appellee's act may be regarded as making single-line "news" available to many users. Therefore, LT link headings may not be considered as mere link buttons, but should be regarded as constituting an online news distribution business. From an objective perspective, the appellee's Line Topics Service is nothing but a news distribution business. The appellee has been gaining advertisement revenues from its news distribution business by taking advantage of the customer appeal of YOL headings. Therefore, it is obvious that the appellee's Line Topics Service is in competition with the business of the appellant, which is engaged in the online news distribution business called YOL.

Moreover, since erroneous or inappropriate reporting could greatly affect society and could make the appellant strictly accountable for such consequences, the appellant has spent a considerable amount of money on controlling the use of the main text and headings of its articles. Such right of the appellant should be sufficiently protected under law. The appellee's act of providing the Line Topics Service by using YOL headings without due authorization directly constitutes infringement of the aforementioned right of the appellant.

(c) In general, it is obvious that immediacy is essential in news reporting. In the field of news bulletins where coming second makes a difference, the newness is the key factor that determines the product value of news. In the case of the Line Topics Service of the appellee, the appellee creates headings by exactly copying YOL headings and immediately makes them available for users while those YOL headings are still new and valuable. This act of appellee is highly illegal in the sense that it is an act of "free-riding" on not only the content of articles but also the newness of articles.

The Line Topics Service of the appellee is the service of making exact copies of other companies' reports and distributing them without clearly stating the source of information, and thereby promotes reporting in which accuracy is not guaranteed by any person. Moreover, the illegality of the Line Topics Service should be emphasized even further given that said service interferes with the appellant's business in which the appellant has invested human and material resources to conduct news gathering and

reporting activities.

(d) The problem is that the appellee "free-rides" the product value of YOL headings and unjustly interferes with the appellant's business. Since an article heading like a YOL heading allows readers to immediately grasp the content thereof, a heading is sufficient for some readers and discourages them from accessing the corresponding article. Although an LT link heading is presented in the LT indication section, only a few users would click the LT link heading and access the linked website in order to read the main text of the corresponding article. For most of the users, it is enough to receive and read LT link headings only. Therefore, the Line Topics Service may be regarded to be independently serving a news distribution function only by distributing LT link headings and may therefore be considered to be complete as a service. The facts that access to Yahoo news is free of restrictions and costs and that the appellant licensed Yahoo to use YOL headings, etc. do not provide sufficient grounds for proving legality of the Line Topics Service. The appellant licensed Yahoo to use YOL headings, etc. only to the extent that YOL headings, etc. are used by general users for private use. Yahoo also prohibits any use by users beyond the scope of the aforementioned license granted by the appellant, who is a content provider. Therefore, it is clear that, as is the case with the Line Topics Service, the appellee's act of distributing LT link headings to a large number of users is beyond the scope of the license granted by the appellant and Yahoo.

(2) Damage

In its Line Topics business, the appellee imitates YOL headings without the appellant's authorization and "free-rides" the value of the headings, and thereby unjustly interferes with the appellant's business. Consequently, the appellant has suffered at a minimum the following damage.

(a) Due to the appellee's use of YOL headings without due authorization, the appellant lost the opportunity to gain royalties that the appellant could have gained. This means that the appellant suffered at least 4.8 million yen in total that is equivalent to the royalties for a total of 24 months from October 8, 2002 to September 30, 2004, during which the appellee clearly used YOL headings without due authorization.

(b) The appellee's act of creating LT headings by imitating YOL headings and transmitting them to the computers of a large number of unspecified installation users for free gave such companies as Hottolink, eHeadLine, and Yahoo, which have obtained a fee-based license from the appellant to use YOL headings with the function of offering links to the corresponding YOL articles, the wrong impression that YOL headings have no asset value and do not require a fee-based license. As a result, said

appellee's act damaged the social trust and reliability that the appellant received from the companies to which the appellant has granted a fee-based license to use YOL link headings.

Furthermore, the appellee provides the Line Topics Service for free to any person who requests said service without paying attention to the kind of person he/she is or the type of website and manner in which the LT indication section would be set up. Consequently, LT link headings, which are linked to YOL articles posted on the Yahoo! News website, are presented as "spiritual world news," etc. This appeared as if the appellant had transmitted YOL headings to the website of "spiritual world news." As a result, the appellant's social reputation and its fairness and neutrality as a news organization have been extremely damaged.

In this way, the appellant has suffered intangible damage from the Line Topics business of the appellee. The damage is equivalent to 10 million yen or more.

(c) The appellant requested the appellee to stop the use of YOL headings without due authorization. However, the appellant's request was rejected. It was inevitable for the appellant to appoint an attorney and file this lawsuit. Therefore, it is reasonable for the appellee to pay the appellant at least 10 million yen as an attorney's fee in order to compensate the damage caused by the appellee's Line Topics business.

(d) The amount of damage that the appellant has suffered as a result of the appellee's act of tort is 24.8 million yen in total.

(3) The appellant demanded against the appellee the payment of 24.8 million yen as the damages for an act of tort and delay damages accrued thereon at a rate of 5% per annum from October 1, 2004 until the date of full payment. In addition, based on an act of tort, the appellant seeks an injunction against each of the acts specified in 2. to 4. of No. 1 above.

No. 4 Key points of the allegations of the appellee in this instance

1. Claims on the grounds of copyright infringement

(1) Copyright infringement of YOL headings (infringement of the right of reproduction, infringement of the rights of public transmission)

(1-1) Copyrightability of YOL headings in general

(a) YOL headings are not copyrightable because they are common expressions.

In this lawsuit, the appellant presented a total of 365 YOL headings and argued that all of them are copyrightable. However, all of them may not be recognized as copyrightable.

YOL headings should be regarded as "common expressions" that cannot be protected under the Copyright Act due to the lack of creativeness and should be found

as uncopyrightable "reports of various events and current affairs that merely convey facts."

In contrast, the copyrightability of haiku (Japanese seventeen-syllable poem) is widely recognized because the author of a haiku selects material from all of the elements of the world and expresses his/her sentiment in accordance with certain rules.

(b) YOL headings are mere titles and therefore uncopyrightable.

Since YOL headings may be regarded as article titles in relation to the corresponding YOL articles, titles should be regarded as uncopyrightable in the first place.

Even though some YOL headings are unique, they are mere representations of ideas as to how to attract attention and have nothing to do with the creativeness of expressions.

(1-2) Copyrightability of each of the YOL headings

[i] "Mannerless university professor sold a pirated edition of manners book"

The part "university professor sold a pirated edition of manners book" is a statement about the fact itself. The part "Mannerless" is a play on words by using the word "manner" in the same sentence. However, such techniques as a pun or a play on words are widely known as common techniques used to create article headings. Any ordinary adult with average Japanese language skills could devise such play on words even if he/she is not an editing reporter. Thus, this heading should be regarded as a common, uncreative expression.

In consideration of the facts that the article headings disputed in this case consist of an extremely small number of characters and the ways of expression that can be adopted by those headings are limited due to the nature of news reporting, the identicalness of expression should be judged very carefully. Such level of similarity between the YOL heading and the appellee's link headings in this case should be found insufficient to recognize infringement of the right of reproduction.

[ii] Mr. A and Mrs. B enjoyed atsu-atsu (a Japanese word for "hot" and "love-dovey") footbath in the Akakura Hot Spring

The part "Mr. A and Mrs. B enjoyed footbath in the Akakura Hot Spring" merely states the fact. The part "atsu-atsu" is a modifier that has two meanings, namely, "hot" and "love-dovey." Such use of a double-meaning word is a common technique. Any ordinary adult with average Japanese language skills could devise such double-meaning word based on the content of the article and the coincidental identicalness in pronunciation between two Japanese words even if he/she is not an editing reporter. Thus, this heading should be regarded as a common, uncreative expression.

As is the case with [i] above, such level of similarity between the YOL heading and the appellee's link heading in this case should be found insufficient to recognize infringement of the right of reproduction.

[iii] "Saury fishery vessels operating off the east coast of Hokkaido secretly enlarged"

As far as this heading is concerned, the part "Saury fishery vessels operating off the east coast of Hokkaido enlarged" merely states the fact. While the part "secretly" is a word used to rephrase the corresponding part of the main text of the article "illegally converted without due authorization," such level of rephrasing could be easily made by any ordinary person.

From an objective perspective, the modifier "secretly" merely means "confidentially, without due authorization" as reported by the article. Even if the expression "secretly enlarged" is closely examined, the nuance of "cheating" cannot be perceived. Therefore, this heading merely conveys the fact that vessels were "secretly enlarged" and may not be considered to express the author's "intention." A decision as to whether an expression is creative or not should be made based not on the intention of the author but on an objective evaluation of the final expression itself. Thus, this article heading may not be recognized as creative.

Moreover, as is the case with [i] above, such level of similarity between the YOL heading and the appellee's link heading in this case should be found insufficient to recognize infringement of the right of reproduction.

[iv] "Car parked in a driving lane of the Chuo Expressway → 14 cars involved in a series of crashes such as rear-end collisions, leaving one person dead"

This article heading merely states the fact itself except for the part "→." The sign "→" is an expression commonly used to indicate the flow of an event in current Japanese writing, especially in the Japanese writing created by the use of computer software and cell phone email software, where signs are frequently used. Therefore, the sign "→" may not be considered creative. While the appellant also used "→" in another YOL heading (Exhibit Ko No. 1-21) in order to indicate a flow of an event, this is merely an example of a writing style or idea, using "→" as an indication of flow or as a replacement of an expression (- shi (Japanese word for "and then")). The same may be said about the use of square brackets. Moreover, since it is common to use "→" in the headings of news reports, at least in the world of online articles, this heading may not be considered to be creative.

[v] "National historical sites covered with cracks and breaks, used as garbage collection sites, mini-golf courses, etc. --- Board of Audit of Japan"

In this heading, "National historical sites," "garbage collection sites, mini-golf

courses, etc.," and "Board of Audit of Japan" are the terms cited from the main text of the corresponding article. The sign "---" is commonly used on the Yomiuri Online website in order to indicate a place or department. Therefore, this sign has no creativeness.

The expression "covered with cracks and breaks" itself is not used in the main text of the corresponding article, but is a modifier used to express the fact that historical sites have been changed from the original states. Any person could have easily devised the expression "covered with cracks and breaks" based on the phrase "the land and remains have suffered cracks and breaks" included in the main text of the corresponding article. Thus, this heading should be regarded as a common, uncreative expression.

As is the case with [i] above, such level of similarity between the YOL heading and the appellee's link heading in this case should be found insufficient to recognize infringement of the right of reproduction.

[vi] "'Indian Curry made in Japan' is × --- Place-of-origin rules proposed by the EU"

This heading merely states the fact that the EU proposed place-of-origin rules prohibit the product name "Indian Curry made in Japan."

The sign "×" is often used in news articles, especially in sports newspapers. Said sign is an expression commonly used to indicate "bad" and "unacceptable," at least in current Japanese writing, especially in the Japanese writing created by the use of computer software and cell phone email software, where signs are frequently used. The use of said sign is common in the world of online articles. Moreover, said sign should be regarded as a mere representation of the idea of using "×" in place of "bad" or "unacceptable" and may not be regarded as a creative expression.

(1-3) Unjust consequence of recognizing the copyrightability of YOL headings

The recognition of copyrightability of YOL headings would cause significant damage from the perspective that freedom of expression, which is a basic human right, would be made unacceptable.

The general public depends on mass media companies such as the appellant to collect information about events around the world. Therefore, the expressions used by the general public in relation to news reports inevitably depend mostly on the information provided by mass media companies. Under these circumstances, if the court recognizes the copyrightability of article headings and recognizes the ownership of a copyright by each mass media company, the general public would be deprived of means of expression. This would result in an unjust situation where only some mass media companies monopolize certain ways of expression and information.

As a result of the spread of the Internet, each member of the public has become

more likely to have an opportunity to describe an event in a format similar to an article heading. The recognition of the copyright of mass media companies would make the general public refrain from using those expressions for fear of receiving complaints from mass media companies.

(1-4) Comprehensive approval of the appellant

The appellant provides news articles to the Yahoo! News website with the awareness that said website allows free links to news articles. Therefore, it can be said that the appellant has granted a comprehensive approval for links provided through link headings.

(1-5) Provision of links and infringement of the right of reproduction

A link is an indication of the website to which a user is linked. In this sense, a link is a mere reference. Therefore, it should be interpreted that the provision of a link in an ordinary manner, i.e., indicating the name of the website to which the user is linked, would not raise any copyright infringement issue.

(2) Infringement of right of reproduction for YOL articles

(2-1) The appellant's allegation that the appellee infringed the copyright for YOL articles themselves should be dismissed as an allegation and evidence advanced out of time.

Since the filing of this lawsuit on December 25, 2002, the appellant has clearly mentioned that it is "YOL headings" that should be protected under the Copyright Act in this lawsuit. The proceedings have been conducted based on this presumption. An allegation of copyright infringement of YOL articles themselves could have been easily submitted in the prior instance.

In the case of a copyright-related lawsuit, it is first necessary to identify which work is subject to the lawsuit before presenting any allegation and evidence to determine whether various requirements such as the copyrightability requirement and the authorship requirement are fulfilled or not. While the main text of a total of 365 YOL articles was additionally claimed in this instance, since many of them are obituaries and stock price-related articles and may not be considered to be creative, it is necessary to carefully determine whether each article is creative or not given that they are all news articles on current affairs. Some of these YOL articles were created by the appellant, while many others were created by the non-party Osaka headquarters of Yomiuri Shimbun Corp. and the non-party west Japan headquarters of Yomiuri Shimbun Corp. For this reason, the authorship must be determined for the main text of each of these articles. Therefore, it is clear that the additional claim was made for the purpose of delaying the conclusion of this lawsuit.

(2-2) The act of accessing a Yahoo! News article page and storing its cache data on the hard disk of a computer does not constitute infringement of the right of reproduction of the article.

(a) "Cache memory" is a technical and systematic mechanism of browser software in general used for the purpose of speeding up the access to a webpage or otherwise making webpage access more convenient. It is inevitably created by a relevant system without the awareness of the user. The cache data itself is used only for the purpose of webpage access. If access to the webpage becomes no longer necessary, it is automatically deleted without the awareness of the user within a relatively short period of time. Such storage and deletion process of cache data is automatically carried out entirely without the awareness of the user by browser software solely for the purpose of facilitating webpage access and therefore is completely different from the concept of "reproduction" specified in the Copyright Act. Consequently, it should not be regarded as "reproduction."

(b) Even if the storage of cache data on the hard disk of a terminal computer is interpreted as "reproduction," the reproduction should be permitted because it may be regarded as a reproduction for personal use.

(c) If a work is publicized on the Internet, the right holder is interpreted to have granted implicit, comprehensive approval for reproduction. The appellant should be considered to have granted a similar approval.

(d) As described above, the interpretation that the storage of cache data by browser software does not constitute "reproduction" and that "reproduction" was made solely for private use or has been implicitly and comprehensively approved is compatible with the current situation where every person accesses webpages by using browser software that has the function of storing cache data.

(2-3) Since the webpage links merely indicate the location of the linked pages without conducting an act of making tangible reproductions of the linked pages, the appellee's act of providing links to YOL articles on the Yahoo! News website should not be interpreted as infringement of the right of reproduction.

(3) Damage caused by copyright infringement

In this case, there is no evidence that the amount of the damage suffered by the appellant is twice as much as the royalties gained from Hottolink. In consideration of the fact that the appellant licensed Hottolink to use 65 YOL headings at 100,000 yen per month, the damage caused by the Line Topics Service, which presents seven YOL headings per day, should be considered not more than 10,769 yen per month.

(4) Claim for an injunction

The appellant's claim for an injunction does not satisfy the requirement for an action to seek future performance specified in Article 135 of the Code of Civil Procedure.

Even if only a small number of YOL headings are found to be copyrightable, since the possibility of the creation of copyrightable YOL headings in the future is small, a claim for an injunction should be dismissed.

2. Claim on the grounds of a violation of the Unfair Competition Prevention Act

(1) The issue of whether the appellee's act may be regarded as an act of unfair competition specified in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act

(a) Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act provides for the protection of the "configuration of goods." The "configuration" of goods means the shape, pattern, color, shiny texture, or any combination thereof in a comprehensive manner. Therefore, it should be interpreted that the term "goods" specified in said item exclusively refers to tangible objects and that intangible objects are not protected.

In this case, it is clear that the YOL headings for which the appellant claims protection are intangible objects and therefore not protected under said item.

(b) The protection claimed by the appellant in this case is not for the "configuration of goods."

(2) The theory of damage

The argument about the claim on the grounds of copyright infringement (1.(3) above) also applies here.

3. Claim on the grounds of an act of tort

(1) The issue of whether the appellee's act may be regarded as an act of tort

In view of conventional court decisions, an act that does not constitute a violation of the Copyright Act or the Unfair Competition Prevention Act may be regarded as an act of tort under the Civil Code only if the latecomer exactly imitates goods, etc. produced by the predecessor and, as a result, steals customers from the predecessor. This case is completely different from such conventional case.

(a) YOL headings represent information that can be freely used.

YOL headings represent uncreative information about current affairs and have already been publicized through the Internet for free. Regardless of the importance of information, once it is publicly transmitted, the news itself becomes public information. Even the mass media company that transmitted that information cannot monopolize it.

If this is the case, since the YOL headings, which comprise (a part of) the link buttons in the Line Topics Service, are information that the appellant itself publicized

on the Internet for free, all of the YOL headings should be regarded as information that can be used by any person. Each individual Internet user's act of having several article headings from the Yahoo website up on his/her computer and clicking on some of them to link to the corresponding articles would not raise any issue because those headings are not copyrightable. The appellee's act is nothing but renewing such individual user's links on a daily basis on behalf of the user and is therefore not illegal in any way.

(b) The appellee does not have the purpose of gaining unjust profits.

The appellee commenced the Line Topics Service based on the understanding that it is desirable to share information at a grass-root level by taking advantage of the mechanism of Internet links. The appellee does not intend to receive any benefit itself. The appellee gains only a small amount of advertisement revenues in order to cover the minimum maintenance costs. In consideration of the appellee's burdens, such as maintenance work, it may be said that the appellee is losing money rather than making money on the Line Topics Service.

(c) The appellee does not have the purpose of causing damage to the appellant.

The appellee does not intend to cause damage to the appellant in any way because the appellee simply selects information that is found to be interesting in accordance with the standards of an employee of the appellee and renews the link heading without the awareness of which information those headings are linked to.

Moreover, the appellee commenced the service by using articles posted on the Yahoo! News website, which permits free links, as the source of information and asked Yahoo how to provide these links. It then provided links by presenting article headings, which are the titles of the corresponding articles. This clearly shows that the appellee did not have the purpose of causing damage to any person.

(d) The appellant did not suffer any damage.

Even if the Line Topics Service did not exist, each user would be freely allowed to provide links to the YOL headings on the Yahoo! News website without obtaining permission from the appellant or paying compensation to the appellant. Furthermore, since the appellant itself let YOL articles coexist with Yahoo! News articles, the absence of the Line Topics Service would not increase the page views of YOL articles. Therefore, the appellee's act may not be considered to have caused any damage to the appellant.

(e) The appellant is not in a competitive relationship with the appellee

The appellant does not have a competitive relationship with the appellee because they are in different industrial fields. Also, the appellant does not sell or provide a tool designed to be pasted and used on a webpage, like the Line Topics Service provided by

the appellee to users, and does not have a competitive relationship with the appellee. Furthermore, since the YOL headings that the appellee was alleged to have provided links and used account for only about 4% of the entirety of the YOL headings, which are considered to be uncopyrightable information, the appellant may not be considered to have a competitive relationship with the appellee in its advertisement business either.

(f) It is not a proven fact that the appellant's business precedes the appellee's business.

The Line Topics Service, which allows Internet users to be linked to news articles on a webpage, was invented by the appellee. Therefore, the appellee did not free-ride another person's preceding business and therefore did not commit an act of tort.

(g) The appellee's act may be considered not as free-riding but as the provision of its own service.

The Line Topics Service is a service that the appellee created based on its own unique idea. The Line Topics Service has a simple, excellent design, offers good functionality that allows each user to customize how the service is installed onto his/her computer in accordance with the user's preference and the atmosphere and colors of the webpage to be established, provides convenience such as allowing each customer to use any part of a webpage in order to install the service, and produces an access promotion effect by offering an exchange function useful for advertisement of his/her own websites. Due to these excellent features, the Line Topics Service has developed a large following and seen a considerable increase in the number of persons who have installed it. Therefore, the appellee's act may not be regarded as an act of free-riding to take advantage of the brand power of news articles. This case may be found completely different from the past court cases where an act of tort was recognized.

(h) The appellee's act may not be considered to have damaged the appellant's reputation.

Since the Line Topics Service merely provides links to Yahoo! News articles, it is impossible to consider that any user of the Line Topics Service has damaged the appellant's reputation.

(i) The appellant's comprehensive approval has been obtained.

As described above, the appellant provided news articles with the awareness that the Yahoo! News website permits free links to news articles. Therefore, it may be said that the appellant is given comprehensive approval for the provision of links through the indications of "link headings." Thus, the act of tort may not be recognized.

(j) A mere act of providing links may not be regarded as illegal.

First of all, it should be noted that a link is an indication of the linked destination and a mere reference. Therefore, in the case where a link is provided, if the link is provided by an ordinary method, i.e., by indicating the name of the linked webpage, the

act should be interpreted as raising no legal issues. In the case of a news article, since the article heading corresponds to the name of the linked news article, the indication of the article heading as a link bottom would not constitute any illegal act under the tort law.

(k) Summary

Since before the commencement of the Line Topics Service, the appellee has considered that, in the ideal world of the Internet, information should be shared by the general public at a grass-roots level. Thanks to the recent rapid spread of new technologies and software such as blogs (web blogs), which allow mutual communications through the provision of links and comments, and RSS (RDF Site Summary), which distributes headings, an increasing number of existing news organizations has entered the business of distributing headings for free by use of the RSS technology.

The appellant argued that YOL headings themselves should be regarded as independent "goods" and the use thereof through the Internet should be regarded as a "new business project on which the future of the appellant as a news company depends." However, as mentioned by the appellee, "headings" are becoming something to be shared by all Internet users. The appellant's argument presented in this court case will soon become meaningless.

Moreover, the appellant argued that, if the Line Topics Service is not illegal, it would become inevitable for the appellant to charge a fee for the service of distributing news articles, although it would be against the right-to-know of the people. However, the right-to-know of the people is completely compatible with the fee-based service of distributing news articles.

The Internet is a world consisting of a web of information where all of the webpages are connected with each other. If YOL link headings are distributed to Line Topics Service users, users, who click on such headings, would be linked to the main text of Yahoo! News articles originally provided by the appellant and would ultimately be linked to the Yomiuri Online of the appellant. In consideration of the fact that many of the users of the Line Topics Service are general citizens and end-users, it may be said that the appellee also contributes to the effort of protecting the right-to-know of the general public. The appellant's argument that takes advantage of the right-to-know of the people and distorts the value and characteristics of the Internet for the sake of the appellant's benefit must be found unacceptable.

On these grounds, it is clear that the appellee's act is not illegal and may not be regarded as an act of tort.

(2) Claim to seek an injunction on the grounds of an act of tort

A claim to seek an injunction against the manufacturing, sale, and distribution of goods on the grounds of the other party's act of tort is permitted only if the right infringed by said act of tort is an exclusive right of monopolization unless there are any legal provisions permitting this. It may be interpreted that it is not permitted to seek an injunction against the manufacturing, sale, and distribution of goods on the grounds of the other party's act of tort if the benefit infringed by the act of tort is limited to the business activities protected by law in the world of transactions.

In particular, since YOL headings are uncopyrightable, are not likely to become copyrightable in the future, and fail to fulfill the requirements for seeking an injunction, it is natural that a claim to seek an injunction on the grounds of an act of tort is found to be unacceptable when it comes to the business profits from a linguistic work of expression that may not be regarded as exclusive.

(3) Theory of damage

(a) This is the same as the argument (1.(3) above) about the claim made on the grounds of copyright infringement.

(b) While the appellant argued that it suffered "significant intangible damage," it is not clear what this means. The basis of calculation of the damage is also unclear. Therefore, such argument is completely unacceptable.

(c) In comparison with the amount of damage demanded by the appellant, the attorneys' fee of 10 million yen is too high. The appellant argued that, before this lawsuit was filed, the appellant requested the appellee to stop the use of YOL headings without due authorization. However, this is not a true fact. Therefore, there is an error in the appellant's argument that, after the appellant's request was dismissed by the appellee, the appellant appointed attorneys and filed this lawsuit.

No. 5 Court Decision

1. One of the allegations made on the grounds of copyright infringement, i.e., the allegation of copyright infringement of YOL headings (infringement of the right of reproduction and infringement of the rights of public transmission)

(1) The appellant alleged that the appellee infringed the copyright for YOL headings during the period from October 8, 2002 to September 30, 2004. The period from December 8, 2002 to September 30, 2004 was added in this instance.

As stated in the "Article Headings Comparison Table" of Attachment 4 of the judgment in prior instance, while specific allegations and evidence were provided for the 365 YOL headings that were posted during the period from October 8, 2002 to December 7, 2002, no allegations and evidence were provided for the YOL headings

that were posted during the aforementioned added period. It may be interpreted that this period is included in the allegation that YOL headings in general should be regarded as copyrightable.

(2) In general, in the case of article headings in the field of news reporting, there are a limited number of expressions to choose from, due to the restrictions imposed by the role of article headings, i.e., giving readers an accurate report about the details of an event, etc. covered by the news reports by using simple expressions, and also imposed by a limitation on the maximum number of characters that can be used to create a heading. These restrictions tend to make it difficult for reporters to use their creativity. Therefore, the recognition of creativity is not always easy.

However, any article heading should not be automatically found to be uncopyrightable under Article 10, paragraph (2) of the Copyright Act just because it is created in the field of news reporting. Some headings could be found to be copyrightable depending on how they are expressed. Ultimately, it is necessary to determine whether each article heading may be found to be creative or not by examining how the heading is expressed.

According to Exhibit Ko No. 1 (including all Exhibits of the branch numbers), the aforementioned 365 YOL headings were created as article headings posted on an Internet website for news articles reporting on social affairs such as crimes and accidents, as well as political and economic affairs, etc. Although they are distinctive to a certain extent as explained below, the aforementioned explanation basically applies to those YOL headings as well.

First, we are going to examine the copyrightability of each of the 365 YOL headings that were posted during the period from October 8, 2002 to December 7, 2002.

(2-1) This court has also found that none of the YOL headings specifically pointed out by the appellant are creative. Since the reasons are the same as those described in line 3, page 22 to line 21, page 27 of the judgment in prior instance, we are not going to cite them, except for the reasons stated in (2-2) and (2-3) newly added below.

(2-2) We are going to determine the creativity of the six YOL headings that the appellant explained on an individual basis and claimed as copyrightable in this instance (regarding [i] and [ii], about which the court of prior instance had specifically determined copyrightability, this court further determined as below).

[i] YOL heading "Mannerless university professor sold a pirated edition of manners book" (posted on the Yahoo! News website on October 16, 2003) (Exhibits Ko No. 1-35-1 and No. 1-35-2)

The court of prior instance examined the creativity of the aforementioned YOL

heading and denied the creativity thereof. This determination (line 23, page 23 to line 14, page 24 of the part cited above) may be considered appropriate.

The appellant argued that said heading does not merely state the fact, but tries to give a strong, accurate impression to readers about the act of the university professor by using the word "manner" as a keyword and creating a contrast between the words "mannerless" and "manners book" contained in the same sentence, which add a rhythm to the expression of the heading, and therefore that the feature of the heading may be regarded as a clear representation of the uniqueness of the editing reporter.

However, the aforementioned technique of creating a contrast between words is a commonly used expression. Therefore, the aforementioned YOL heading may be deemed a common expression and may not be regarded to have a sufficient level of creativeness that could be protected as a work. The fact that Jiji Press Co. did not use the word "manner" in its report about the same topic does not necessarily provide grounds for concluding that the aforementioned YOL heading is expressed in a creative manner.

Thus, the appellant's argument is unacceptable.

[ii] Mr. A and Mrs. B enjoyed atsu-atsu (a Japanese word for "hot" and "love-dovey") footbath in the Akakura Hot Spring (posted on the Yahoo! News website on October 23, 2003) (Exhibits Ko No. 1-71-1 and No. 1-71-2)

The court of prior instance also examined the creativity of the aforementioned YOL heading and denied the creativity thereof. This determination (line 24, page 26 to line 17, page 27 of the part cited above) may be considered appropriate.

The appellant argued as follows: the reporter used the word "atsu-atsu" in order to create an association between the scene of a happily-married couple enjoying time together and the scene of the couple taking a footbath. By using this word, the reporter tried to give a strong impression to readers by conveying an accurate, graphic image of the couple's state of mind. The reporter further strengthened the impact of the heading by adding a pleasant rhythm to the heading. Therefore, this heading may be regarded as a representation of the uniqueness of the reporter who created the YOL heading.

However, the "Mr. A and Mrs. B enjoyed footbath in the Akakura Hot Spring" part of the aforementioned YOL heading merely states the objective fact and does not use any special technique of expression. The expression "atsu-atsu" is a commonly-used, ordinary expression. Even if the one word "atsu-atsu" creates an association between the image of a happily-married couple and the image of a footbath, this technique of expression should be considered commonplace. Even if the reporter who created this YOL heading had such intention as that stated by the appellant, the way the heading is

expressed would not be regarded as creative enough to be protected as a work as long as the manner of expression represented in the heading is evaluated as above. Even though the same topic was reported by the Mainichi Newspapers, the Sankei Shimbun, and NHK without using the word "atsu-atsu," it simply means that they did not choose to use said word. The non-use of said word does not provide sufficient grounds for evaluating that the expression of the aforementioned YOL heading is creative.

[iii] "Saury fishery vessels operating off the east coast of Hokkaido secretly enlarged" (posted on the Yahoo! News website on October 9, 2003) (Exhibits Ko No. 1-9-1 and No. 1-9-2)

As stated in Exhibit Ko No. 1-9-2, the YOL article that corresponds to the aforementioned YOL heading reports the fact that most of the 60 small saury fishery vessels used for fishing in the Pacific off the east coast of Hokkaido are suspected to have illegally been converted and enlarged beyond the total tonnage officially registered for the vessels and that the Hokkaido government has decided to conduct an on-site inspection on all of the 60 vessels under the Fishing Boat Act.

The "Saury fishery vessels operating off the east coast of Hokkaido secretly enlarged" part of the aforementioned YOL heading merely states the objective fact and does not use any special technique of expression. Moreover, the word "secretly" is merely a commonly-used expression. Even if the expression "secretly" is not used in the main text of the YOL article, this expression is merely one that any ordinary person could have easily devised, although the reporter seems to have exercised a certain level of ingenuity [to come up with this expression in order] to convey the nuance that the vessel conversion was made without submitting necessary documents to a public agency (without updating the registration).

As described above, the appellant used the word "secretly," which is not used in the main text of the corresponding article, in order to convey the nuance of "cunning" and also report the fact that the enlargement was so slight that it is difficult to notice. By using this word, the reporter expressed his/her own impression of the social event covered by the article and tried to give a strong impression to readers about the act of "cunning" conducted by small fishing vessels by using such accurate, humorous expression. The appellant argued that the use of this word may be regarded as a representation of the uniqueness of the reporter.

However, even if the reporter has formed the aforementioned impression and tried to convey it to readers through an article heading, this could be deemed to be merely the formation of an idea. Even though the word "secretly" is used as an expression represented in the heading, the expression of the aforementioned YOL heading would

not be considered as creative enough to be protected as a work as long as the manner of expression is evaluated as above. Although the same topic was reported by the website Senkon Region News Digest without using the word "secretly," it does not necessarily provide grounds for concluding that the aforementioned YOL heading is expressed in a creative manner.

[iv] "Car parked in a driving lane of the Chuo Expressway → 14 cars involved in a series of crashes such as rear-end collisions, leaving one person dead" (posted on the Yahoo! News website on October 16, 2003) (Exhibits Ko No. 1-27-1 and No. 1-27-2)

As stated in Exhibit Ko No. 1-27-2, the YOL article that corresponds to the aforementioned YOL heading reports a multiple pileup where two large trucks crashed into a car parked in a driving lane of the Chuo Expressway, while a large truck parked behind the crash site was crashed into by a following truck, leading to a pileup of other trucks, which left one person dead and eight persons injured.

The "Car parked in a driving lane of the Chuo Expressway" part and the "14 cars involved in a series of crashes such as rear-end collisions, leaving one person dead" part of the aforementioned YOL heading merely convey the objective fact by stating a series of events and do not use any special technique of expression. While the sign "→" is used between the first half and the second half of the heading, it is common in the field of online article headings to use various signs such as "=", "–," and "..." since before the creation of the aforementioned YOL heading (there are many examples such as Exhibits Ko No. 1-1-2, No. 1-2-2, No. 1-3-2, and No. 1-5-2, and the sign "→" is also used in an article heading created by the appellant shown in Exhibit Ko No. 1-21-2). The use of the sign "→" may be deemed to be the same as the use of any of the various aforementioned signs (the appellant's employee who belongs to the Media Strategy Bureau of the appellant also recognizes that "→," "–," and "..." belong to the same category (Exhibit Ko No. 15)). Therefore, the sign "→" may not be recognized to be particularly creative.

The appellant argued that the reporter tried to help readers instantly visualize the actual situation of the accident and give a strong impression to readers about the tragic consequences of rear-end accidents. Even if this argument is reasonable, this may be deemed to be merely the formation of an idea. The appellant's argument that the reporter tried to give us a strong impression by using the sign "→" is not necessarily acceptable.

Therefore, the aforementioned YOL heading may not be considered as creative enough to be protected as a work from an analytical or general perspective. Even though the same topic was reported by the Japan News Network without using the sign "→," it does not necessarily provide grounds for concluding that the aforementioned YOL

heading is expressed in a creative manner.

[v] "National historical sites covered with cracks and breaks, used as garbage collection sites, mini-golf courses, etc. --- Board of Audit of Japan" (posted on the Yahoo! News website on October 30, 2003) (Exhibits Ko No. 1-117-1 and No. 1-117-2)

As stated in Exhibit Ko No. 1-117-2, the YOL article that corresponds to the aforementioned YOL heading reports the facts that the Board of Audit of Japan discovered that, among the national historical sites such as shell mounds and castle ruins, at least 30 historical sites throughout Japan were not properly managed and that some of them were used as garbage collection sites, mini-golf courses, or as spaces to build fences or playground equipment.

The "National historical sites" part and the "as garbage collection sites, mini-golf courses, etc. --- Board of Audit of Japan" part of the aforementioned YOL heading merely cite nouns from the article and do not use any special technique of expression. The expression "covered with cracks and breaks" itself may also be regarded as a commonly used expression. Any person could have easily devised that expression based on the content of the aforementioned article without much difficulty. Thus, the heading may not be considered to be particularly creative.

The appellant argued that, in consideration of the facts that the reporter used the phrase "covered with cracks and breaks" in order to convey reprehensibility in a precise, impressive manner and that the incompatibility between the expression "covered with cracks and breaks" and the term "national historical sites" has the effect of giving a strong impact on readers, the heading is a representation of the uniqueness of the reporter.

However, the aforementioned intention of the reporter may be deemed to be merely the formation of an idea. The use of the expression "covered with cracks and breaks" together with the term "national historical sites" may not be considered to be especially creative. As described above, any ordinary person could have easily devised such expression without much difficulty based on the event covered by the article. Therefore, the method of expression in the aforementioned YOL heading expressed may not be considered as creative enough to be protected as a work.

[vi] "'Indian Curry made in Japan' is × --- Place-of-origin rules proposed by the EU" (posted on the Yahoo! News website on November 6, 2003) (Exhibits Ko No. 1-146-1 and No. 1-146-2)

As stated in Exhibit Ko No. 1-146-2, the YOL article that corresponds to the aforementioned YOL heading reports that, in the new round (multilateral trade talks) at the WTO, the EU proposed stricter rules for the use of the name of the place of origin in

the names of various products sold in different places in the world. The purpose of the YOL heading is to convey the significance of these rules that could prohibit the use of a widely used product name such as "Indian Curry" unless the product in question was actually made in India.

The "Indian Curry made in Japan" part and the "Place-of-origin rules proposed by the EU" part of the aforementioned YOL heading merely convey the objective fact and do not use any special technique of expression. While the sign "×" is used in the expression "'Indian Curry made in Japan' is ×," it is in fact extremely common to use the sign "×" to mean "unacceptable." As mentioned above, expressions that contain various signs are commonly used in article headings posted on websites. Therefore, the use of the sign "×" in the heading may be deemed to fall within the scope of the use of one of the various aforementioned signs. Thus, in this respect, the aforementioned YOL heading may not be considered to be especially creative.

The appellant argued that, by using the sign "×," the reporter tried to give an accurate, strong impression to readers about the fact that the product name "Indian Curry" would be prohibited and that, in consideration of the fact that the sign "×" is not usually used in newspaper article headings and is not used in the main text of the corresponding article at all, the aforementioned heading may be evaluated as a representation of the uniqueness of the reporter.

However, the aforementioned intention of the reporter may be deemed to be merely the formation of an idea. Even if the appellant's argument about the use of the sign "×" is taken into consideration, in light of the holding stated above with regard to the use of the sign "×" in the aforementioned YOL heading, the method of expression of said heading may not be regarded as creative enough to be protected as a work.

(2-3) Also, none of the rest of the 365 YOL headings posted during the period from October 8, 2002 to December 7, 2002, excluding the aforementioned YOL headings that the appellant specifically highlighted and examined, may be regarded as creative enough to be protected as a work.

As stated in the holding above, as far as the aforementioned 365 YOL headings are concerned, it cannot be denied that, due to the very nature of those headings, there are a limited number of options of expressions to choose from and that, relatively speaking, it is difficult for reporters to use their creativity. For example, the YOL headings for which the appellant alleged that the copyright was infringed include the following: "Four persons including a mother (Mrs. C) and her daughter newly recognized as abduction victims" (Exhibit Ko No. 1-2-2), "Three persons including Mr. D, professor emeritus at the University of Tokyo, won a Nobel Prize in Physics" (Exhibit Ko No.

1-5-2), "Five abduction victims, return to Japan on 15th" (Exhibit Ko No. 1-10-2), "Mr. E won a Nobel Prize in Chemistry --- 43-year-old company employee" (Exhibit Ko No. 1-11-2), "North Korea revealed its nuclear development activities to the U.S." (Exhibit Ko No. 1-38-2), "USD/JPY(NY) reached the \$1/¥125 level for the first time in four months (Exhibit Ko No. 1-43-2), "Tokai-mura nuclear plant automatically stopped due to an earthquake" (Exhibit Ko No. 1-54-2), "Government's approval rating leveling out --- Yomiuri survey" (Exhibit Ko No. 1-99-2), "Formation of a special team for abduction investigation" (Exhibit Ko No. 1-106-2), "Employment insurance rate raised to 1.6%" (Exhibit Ko No. 1-136-2), "TSE plummeted consecutively with the closing price of 8690.77 yen" (Exhibit Ko No. 1-167-2), "Iraq accepted the Security Council resolution" (Exhibit Ko No. 1-204-2), "Advance team of inspectors arrived at Baghdad" (Exhibit Ko No. 1-233-2), "His Highness, F, passed away at the age of 47" (Exhibit Ko No. 1-260-2), "Mr. G will announce registration today" (Exhibit Ko No. 1-325-2), "Next year's budget adjusted at around 83 trillion yen" (Exhibit Ko No. 1-345-2), and "Former Secretary-General, H, announced his candidacy in the party's leadership election" (Exhibit Ko No. 1-365-2). All of these consist of ordinary expressions and merely convey objective facts. Even if the relationships between these headings and the main text of the corresponding YOL articles are taken into consideration, the way YOL headings are expressed may not be considered to be particularly creative.

An examination of other YOL headings has also revealed that the methods of expression in those headings are not creative enough to be protected as a work.

The results of the survey conducted by the appellant (Exhibits Ko No. 44 to No. 46 (including Exhibits of branch numbers)) do not provide grounds for reversing the aforementioned determination concerning the copyrightability of YOL headings.

(3) In this instance, the appellant added an allegation to the effect that the copyright for YOL headings was infringed during the period from December 8, 2002 to September 30, 2004.

(3-1) Any person who makes a claim for an injunction or damages based on copyright infringement must identify the infringed work and submit allegations and evidence to prove that said work satisfies the creativeness requirement for copyright protection. In particular, in this court case, since the appellee denied the copyrightability of the YOL headings posted during the aforementioned period, the appellant must examine each of the YOL headings posted during the aforementioned period, identify creative concrete expressions used in those headings, and submit allegations and evidence to prove the creativeness thereof.

However, the appellant has even failed to clarify the expression and content of the

YOL headings posted during the aforementioned period and did not submit such allegations and evidence as mentioned above. Therefore, the appellant's allegation about the copyright infringement of the YOL headings posted during the aforementioned period should be regarded as unreasonable in itself (there is also no sufficient evidence to recognize any fact that can prove the copyright infringement).

(3-2) Meanwhile, as described above, the appellant argued that, since all of the YOL headings are ingenious and creative and express the uniqueness of the reporters who created them, YOL headings in general should be considered creative. Therefore, it may be interpreted that, based on this presumption, the appellant alleged that the copyright for the YOL headings was infringed during the aforementioned period.

However, as mentioned in the holding presented above, while article headings in the field of news reporting are sometimes found to be creative depending on how they are expressed, it is generally not necessarily easy to recognize the copyrightability of article headings. Ultimately, it is necessary to examine how each article heading is expressed and to determine whether the heading may be regarded as a creative expression. Therefore, it is difficult to accept the appellant's argument that YOL headings in general should be regarded as copyrightable.

Examination of each of the YOL headings has revealed that, as already mentioned in the holding presented in (2) above, none of the 365 YOL headings, including the YOL headings [i] to [vi], which were especially emphasized by the appellant, posted during the period from October 8, 2002 to December 7, 2002 contain any expression that may be regarded as creative enough to be protected as a work. In particular, the YOL heading "His Highness, F, passed away at the age of 47" (Exhibit Ko No. 1-260-2) may be regarded as an obituary, whose heading would be expressed in the same way regardless of who creates it. In this way, the YOL headings highlighted by the appellant contain many headings like the one mentioned above that may not be regarded as creative.

On these grounds, even if the appellant's allegations about the nature, creation process, etc. of YOL headings are taken into consideration, it may not be concluded that YOL headings created by the appellant may generally be considered to be creative (as held below, even though the appellant invests a great deal of human resources and monetary resources in order to gather news, write articles, and create YOL headings, this does not necessarily mean that all of the YOL headings should automatically be found to be creative).

Therefore, from this perspective, the appellant's allegation that the copyright was infringed for the YOL headings posted during the period from December 8, 2002 to

September 30, 2004 should be found to be groundless.

2. Among the allegations related to the claims made on the grounds of copyright infringement, the allegation that the right of reproduction for YOL articles was infringed

(1) The appellant alleged that the right of reproduction for YOL articles posted during the period from October 8, 2002 to September 30, 2004 was infringed.

Meanwhile, as mentioned in the holding presented above, any person who makes a claim for an injunction or damages on the grounds of copyright infringement is required to identify the infringed work and submit allegations and evidence to prove that the work satisfies the creativeness requirement for copyright protection. In response to the appellant's allegation that the right of reproduction for YOL articles was infringed, the appellee sought dismissal thereof as an allegation and evidence advanced out of time and disputed the appellant's allegation. Therefore, the appellant should examine the expressions used in YOL articles and submit allegations and evidence to prove the facts that can provide a basis for recognizing the creativeness thereof.

(2) When it comes to the allegations and evidence submitted in relation to YOL articles, evidence was submitted in the prior instance with regard to the YOL articles posted during the period from October 8, 2002 to December 7, 2002 (Exhibits of branch No. 2 of each of the Exhibits Ko No. 1-1 to No. 1-365). However, no evidence was submitted to reveal the content of the YOL articles posted during the period from December 8, 2002 to September 30, 2004. Moreover, the appellant has not presented any fact that can provide a basis for recognizing the creativeness of YOL articles including that for the YOL articles about which evidence was submitted (in particular, regarding the YOL articles posted during the period for which no evidence has been submitted, the appellant did not even clarify the content thereof in this instance).

Since the appellant failed to submit a sufficient allegation regarding the requirements that must be fulfilled in order to provide a basis for the appellant's claim made on the grounds of the infringement of the right of reproduction for YOL articles, such allegation itself should be considered unreasonable.

(3) According to the entire import of oral argument, the following circumstances may be recognized.

In the written answer (dated August 23, 2004) prepared in this instance, the appellee sought dismissal of the aforementioned appellant's allegation as an allegation and evidence advanced out of time. In response, the appellant prepared the first brief in this instance (dated October 1, 2004) and presented therein a counterargument that it would be quite possible to examine the aforementioned allegation based on the evidence, etc.

submitted in the prior instance. However, the appellant failed to present any allegations concerning facts that could provide a basis for recognizing the creativity of expressions used in YOL articles and to provide the aforementioned missing YOL articles as evidence. In response, the appellee prepared the first brief in this instance (dated December 3, 2004). In the brief, the appellee requested once again the dismissal of the aforementioned appellant's allegation as an allegation and evidence advanced out of time by arguing that, in the case of a copyright-related lawsuit, it is necessary, first of all, to identify the work subject to the lawsuit and, then, to present allegations and evidence in order to determine whether the work in question satisfies the copyrightability requirement or not. However, the appellant still failed to present the aforementioned allegations in the second brief (dated January 17, 2005) either.

In the third brief prepared by the appellant under the control of court proceedings by this court as the final brief (dated April 6, 2005), the appellant neither stated the aforementioned allegations nor presented the allegation of the infringement of the right of reproduction for YOL articles itself.

In light of the aforementioned circumstances, it may be recognized that, due, in part, to the issue of submission of an allegation and evidence advanced out of time, the appellant chose not to submit any allegations or evidence with the awareness that the appellant is obliged to submit allegations and evidence in this lawsuit.

3. Claim made on the grounds of a violation of the Unfair Competition Prevention Act

It is reasonable to interpret that the term "configuration of goods" specified in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act means the internal and external shapes of the goods and the patterns, colors, gloss, and texture that are integrated with the shapes. (The Act for Partial Revision of the Unfair Competition Prevention Act, etc. (Act No. 75 of 2005) enacted on June 22, 2005 contains a provision that adopts the same interpretation as mentioned above. While said Act of Partial Revision does not apply to this case, it may be interpreted that the aforementioned revision clarifies the rule based on the interpretation commonly accepted by precedents ("Direction of the Review of the Unfair Competition Prevention Act" issued by the Unfair Competition Prevention Sub-committee of the Intellectual Property Policy Committee of Industrial Structure Council in January 2005). The aforementioned interpretation is reasonable as an interpretation of the Act prior to the revision.)

In consideration of these facts mentioned above, an act of imitating a YOL heading would not constitute an act of imitating the "configuration of goods" specified in Article 2, paragraph (1), item (iii) of the Unfair Competition Prevention Act. Therefore, it is

reasonable to conclude, without examining any other factors, that the appellant's principal claim made on the grounds of a violation of the Unfair Competition Prevention Act is groundless.

4. Claim made on the grounds of an act of tort

(1) The outline of the website operated by the appellee, the procedures of the appellee's Line Topics Service, the indication on the appellee's website, the content of the article headings of Yahoo! News, etc. are as described in line 12, page 2 to line 10, page 5 of the judgment in prior instance as already cited above ("Undisputed facts, etc." in the judgment in prior instance).

In addition, according to the evidence (Exhibits Ko No. 1 [including Exhibits of branch numbers], No. 12, No. 15 to No. 18, No. 21, No. 35, No. 37-1-1, No. 55-1, No. 55-2, No. 56, No. 57, No. 58-1 to No. 58-3, No. 59, No. 67, No. 68, and No. 71, Exhibits Otsu No. 22, No. 24, and No. 39) and the entire import of oral argument, the following facts may be recognized.

(a) During the period from October 8, 2002 to December 7, 2002, the appellant created the YOL headings listed in the section "Article Headings of the Plaintiff" of the "Article Headings Comparison Table" and posted them on the Yomiuri Online. Also, the appellant licensed Yahoo to post said YOL headings and the corresponding YOL articles on the Yahoo! News website.

Moreover, during the aforementioned period, the appellee read the article pages of the Yahoo! News website and selected such news from among the Yahoo! News articles that seemed important and appealing to its users, manually input the LT headings and the URLs of the linked webpages in the designated section of the management screen in the management site of the appellee's website server, and thereby presented, in the LT indication section of the appellee's website, the LT link headings (LT headings that have the function of providing links to the corresponding Yahoo! News articles) that had been manually input as mentioned above, and posted the same LT link headings in the LT indication section of the website of each installation user through the Line Topics Service. The LT link headings that were created and posted based on the YOL headings and the corresponding YOL articles are as stated in the "Defendant's tag (as mentioned above, this was modified to "LT indication section" in this judgment)" section of the "Article Headings Comparison Table" of Attachment 4 of the judgment in prior instance. The comparison table compares LT link headings with the corresponding YOL headings. The appellee input an LT link heading that is expressed in the exact same manner as the corresponding YOL heading in some cases, while creating an LT link heading that is slightly different from the corresponding YOL heading in other cases.

None of the LT link headings indicates the name of newspaper company, etc. that created the Yahoo! News article based on which the appellee created said heading.

As shown in Attachment 4 of the judgment in the prior instance, the number of the LT link headings posted in the LT indication section is 365 in total over the period of 61 days. This means 6.0 headings per day on average. (According to the aforementioned evidence, it may be recognized that the 365 LT link headings were actually posted over the period of 46 days. However, since the appellant alleged that an act of infringement was committed during the period of 61 days from October 8, 2002 to December 7, 2002, it should be considered to have been proven that the 365 headings were the maximum amount posted during the period of 61 days.)

(b) The appellee tried to make it a rule to update LT link headings three times on weekdays (around 10:00, 13:00, and 18:00) and once a day on Saturdays, Sundays, and holidays

(c) In the Line Topics Service, for news articles about current affairs, the appellee posted six LT link headings (which did not necessarily depend on YOL headings) and two advertisements in the LT indication section in such a way that LT link headings and advertisements appear on the screen in rotation in the order of "News Article 1 - News Article 2 - News Article 3 - Advertisement Spot A - News Article 4 - News Article 5 - News Article 6 - Advertisement Spot B" (the term "News Article" herein means "LT link heading"). In this way, one rotation of LT link headings contains two advertisement spots, i.e., "Advertisement Spot A" and "Advertisement Spot B," each of which show one advertisement. This advertisement spot is a fee-based service. The appellee obtained advertisement revenues by letting third parties use these advertisement spots. The advertisement rate is calculated based on the number of points. For example, the right to have an advertisement shown twice in total, i.e., once in the Advertisement Spot A and once in the Advertisement Spot B, is counted as one point. For example, 500,000 points cost 20,000 yen and 1 million points (in the case of the Light Plan) cost 39,000 yen.

(d) In around February 2001, the appellee officially commenced the Line Topics Service. Subsequently, from around January 2002, the aforementioned fee-based advertisement service was launched. During the period of 31 months until July 2004, the appellee gained a total of 1,601,382 yen in advertisement revenue. During this period, the average monthly advertisement revenue was 51,657 yen.

(e) As of February 2002, the Line Topics Service operated by the appellee had about 7,500 registered installation users in terms of the number of websites and 12 million accesses per month. On June 20, 2002, the number of registered installation users

surpassed 13,000 in terms of the number of websites. On December 3, 2002, the number of registered installation users surpassed 20,000 in terms of the number of websites, while the number of accesses per month topped 30 million.

It cannot be denied that the appellee's Line Topics Service competes with the following appellant's business of posting YOL headings because the Line Topics Service distributes LT link headings to a large number of installation users in substance.

(f) A comparison between LT link headings and the corresponding YOL headings is made in Attachment 4 of the judgment in prior instance. A close examination of this table has revealed that 227 out of the 365 YOL headings are completely identical in terms of expression (those listed as "the same as the left" in the "Plaintiff's article headings" section of Attachment 4 of the judgment in prior instance). These LT headings should be regarded as exact copies made by the appellee based on the corresponding YOL headings. The rest of the LT headings are not exactly the same as the corresponding YOL headings. However, they may be deemed to be exact copies in substance although there is a varying degree of difference between the two. For example, the appellee created some LT headings by adding several words for further explanation or changing the end of the sentence from a noun to an ordinary sentence ending, while retaining the fundamental, essential components of the corresponding YOL headings.

(g) The appellant (Tokyo headquarters of Kabushiki Kaisha Yomiuri Shimbunsha) and the Osaka headquarters and the west region headquarters thereof have built a network consisting of headquarters, branch offices, branch bureaus, communications departments, etc. at 340 locations throughout Japan, where more than 2,300 reporters are working. Also, they have established 41 news gathering sites overseas, to which more than 60 reporters are dispatched. Those headquarters collect a wide range of information through daily newsgathering activities and create articles based on the collected information. To collect such information, the reporters assigned to various places in the world visit actual sites and conduct interviews and other newsgathering activities.

The number of YOL articles posted on the Yomiuri Online is 160 to 200 per day. 90% of the articles are created by the appellant (Tokyo headquarters), while the remaining 10% are created by the Osaka headquarters and the west region headquarters combined. All of these articles are sent to the Media Strategy Bureau. The editing reporters of the Media Strategy Bureau create YOL headings based on those articles. On weekdays, the task of creating YOL headings was carried out by two to three reporters during the evening edition hours, three to four reporters during the morning edition

hours, and one reporter during the night time. On average, about 30 to 40 YOL headings are created per reporter per day.

Usually, a heading of a newspaper article must be created within eight characters or less (there are four types of newspaper article headings, i.e., "Letterpress heading," "Primary heading," "Supplementary heading" and "Secondary heading"). However, a YOL heading is required to be written within 25 characters or less in double-byte character (equivalent to the number of characters of "Letterpress heading," "Primary heading," "Supplementary heading" all combined). In comparison with a newspaper article heading, a YOL heading may contain a larger amount of information. As mentioned in the holding presented above, although the level of creativeness of the YOL headings disputed in this lawsuit is not so high as to be protected as a work, it may be presumed that the reporters who created the YOL headings had to overcome great difficulty and use ingenuity in order to convey information within a limited number of characters in a precise, accurate manner so that any person who reads a simply-expressed YOL heading would be able to understand the outline of the news report about an accident, etc. to a certain extent.

(h) YOL headings and YOL articles posted on the Yomiuri Online are made available to any general reader for free if he/she accesses said website. In the news section of a portal site, such as Yahoo and Inforseek, to which the appellant provides YOL articles, etc., general readers can access such website and read news articles, etc. for free. However, news articles, etc. are made available to readers for free only because advertisements are also posted on the website where those news articles, etc. are posted in order to make profits by gaining advertisement revenues. Therefore, news articles, etc. are not made available to the public completely for free. The aforementioned appellant's provision of YOL articles, etc. to Yahoo, etc. is a fee-based service. YOL headings are handled separately from YOL articles as an independent service.

For instance, according to the results of a survey on the "Inforseek Ticker," which is a news distribution service operated by Rakuten, out of the 1,000 times a user opens Ticker on his/her computer, the user clicks on a heading on average less than eight times. This suggests that most of the users read article headings only. The situation of the appellee's Line Topics Service would not be so different from that of "Inforseek Ticker."

(2) It should be interpreted that an act of tort (Article 709 of the Civil Code) could be recognized not only in the case where any person infringes a copyright or any other right that is specified in the law in a strict sense but also in the case where any person infringes interests that deserve legal protection.

It is common knowledge that the Internet transmits a large amount of information at a fast speed and greatly benefits Internet users. However, needless to say, valuable information is not made available on the Internet without any effort. A vast amount of information exists on the Internet thanks to those who gather and process information and post it on the Internet. News reports can be made available as useful information on the Internet thanks to news organizations such as the appellant that are engaged in a series of activities such as gathering information, preparing and editing articles, and creating headings on a daily basis by investing a large amount of human and monetary resources on such activities.

In consideration of the facts accepted above, especially the facts that the disputed YOL headings may be considered to be the results of a series of activities that the appellant carried out by investing a large amount of human and monetary resources, that, although the YOL headings should not be given copyright protection, the appellant created them by overcoming great difficulty and using ingenuity, that the posted YOL headings were expressed so simply that readers can understand the outline of the news of the reported accidents, etc. to a certain extent based solely on the headings, and that the YOL headings were independently subject to transactions at a fee and may be independently handled as a valuable service, it should be concluded that the YOL headings should be considered to deserve legal protection. Moreover, according to the facts accepted above, the appellee repeatedly and continuously created LT link headings by making identical or substantively identical copies of the corresponding YOL headings and YOL articles without the appellant's authorization solely for the purpose of making profits. The appellee, without having to make any special effort itself, used the YOL headings shortly after their creation, in other words, while the YOL headings are still new as information, and posted the LT link headings not only in the LT indication section of the appellee's own website but also in the LT indication section of the websites of registered installation users, which had reached 20,000 or so in terms of the number of websites. Therefore, it may be said that the appellee actually distributed LT link headings. It cannot be denied that the aforementioned Line Topics Service competes with the appellant's business of posting YOL headings in some respects.

Thus, it may be said that a series of acts conducted by the appellee in the course of providing the Line Topics Service went beyond the limit that is socially permissible and therefore constitute acts of tort because those acts have illegally infringed the appellant's interests that deserve legal protection.

(3) The appellant may make a claim against the appellee based on the damage that the appellant suffered as a result of the appellee's act of using YOL headings without due

authorization.

(a) The appellant alleged that it lost the opportunity to obtain royalties as a result of the appellee's act of using YOL headings without due authorization and demanded the payment of twice the amount based on the royalties (100,000 yen per month) (Exhibit Ko No. 18) agreed in a YOL heading license agreement actually concluded with non-party Hottolink. However, there are no grounds for justifying the allegation that the amount of damage suffered by the appellant is twice the amount of the royalties specified in the aforementioned license agreement. The appellant did not submit any other allegations to justify the amount of damage suffered by the appellant.

By using the aforementioned agreement mentioned by the appellant as a premise, the amount of damage is calculated as below in consideration of the appellee's allegation on this point.

Under the agreement concluded with Hottolink, the system was programmed to post 65 YOL headings (according to Exhibits Otsu No. 1 to No. 6, the number could be larger, but in consideration of the fact that the appellee recognizes the number of headings as 65 although it is disadvantageous to itself, the number may be recognized as 65 as a maximum) (Exhibits Otsu No. 24 and No. 30-1 to No. 30-6). This indicates that an agreement for 100,000 yen per month has been concluded for the provision of 65 YOL headings per day in substance. This means that, as highlighted by the appellee, the appellee used seven YOL headings per day without due authorization as mentioned above (the number should be six headings per day on average as mentioned above, but since the appellee itself recognizes that the number of headings is seven per day and makes an argument based on this premise, the number of headings should be deemed to be seven). The amount of compensation calculated based on this rate would be 10,769 yen per month ($100,000 \text{ yen} \div 65 \times 7$) (although it will be unusual to conclude an agreement under which royalties are determined based on the number of headings actually used, it cannot be said that such an agreement does not exist). As mentioned in the holding presented above, while allegations and evidence were submitted for the specific acts that the appellee committed during the period from October 8, 2002 to December 7, 2002, only an abstract allegation was submitted for the acts committed by the appellee during the subsequent period up to September 30, 2004. However, according to the evidence and the entire import of oral argument as mentioned above, it may be easily presumed that illegal acts that are the same as those mentioned in the holding presented above were continuously committed even after said period (the appellee has no intention of disputing the allegation that said acts appear to have been committed continuously). Therefore, if the amount of damage is calculated by using the

aforementioned agreement mentioned by the appellant as a premise based on the number of headings actually used, the amount of damage equivalent to royalties for the period of 23 months and 24 days from October 8, 2002 to September 30, 2004 would be calculated as 256,024 yen ($10,769 \text{ yen} \times (23 + 24/31)$).

However, the aforementioned amount of damage is the amount mentioned in the appellant's claim for damages made on the grounds of copyright infringement. Since this calculation was made based on the premise that, against the appellee's act of infringement, the appellant has a specific right with effect *erga omnes* such as a copyright, or, even if this is not the case, on the premise that any person in such a position as the appellee should conclude an agreement under certain terms and conditions requested by the appellant, it may not be reasonable to immediately presume that the aforementioned amount of damage was actually suffered by the appellant. Furthermore, in light of the appellee's allegation (No. 4, 3.(1) (d) and (e) above) in particular, there is no evidence to prove that the appellee's provision of the Line Topics Service over a certain period of time actually caused the number of accesses to the appellant's YOL headings to decrease. Thus, it may be said that the appellant did not suffer any actual damage in this respect. However, although there are cases where a person pays the agreed amount of royalties specified in an agreement to use information collected and edited by another person, if it is permitted to make commercial use of such information without concluding an agreement, in other words, without paying royalties on the grounds that no one has suffered actual damage, such permission would promote an act of infringement and should be regarded as socially unacceptable unless such person is required to shoulder certain costs. Therefore, it would be reasonable to consider the damage and the amount of damage suffered by the appellant as a result of the appellee's act of infringement as the appellant's lost earnings that are equivalent to the amount of reasonable royalties that would have been specified in an agreement concluded between the appellant and the appellee.

As described above, while the appellant may be recognized to have suffered damage as a result of the appellee's act of infringement, it is extremely difficult to prove the accurate amount of damage under the current situation where reasonable market prices of royalties have not been fully established. Then, in light of the purport of Article 248 of the Code of Civil Procedure with reference to the amount of damage calculated above, and also in consideration of the facts accepted above and the entire import of oral argument, it is reasonable to calculate the amount of damage suffered by the appellant as a result of the appellee's act of infringement as 10,000 yen per month.

Thus, the total amount of damage suffered by the appellant is 237,741 yen ($10,000$

yen $\times (23+24/31)$) because 10,000 yen per month is charged for the period of 23 months and 24 days during which said act of infringement was committed.

(b) Although the appellant claimed 10 million yen as the amount of intangible damage, even if all of the evidence submitted in this case is taken into consideration, there is no sufficient proof that the aforementioned act of the appellee caused damage to the social reputation and reliability of the appellant and also to the evaluation of the appellant as a news organization from the perspective of fairness and neutrality. Therefore, the appellant's claim made based on the intangible damage is groundless.

(c) Regarding the attorneys' fees, the court ruled as follows. The amount of damage accepted in (a) above is extremely small in light of the amount originally claimed by the appellant and the amount claimed after the reduction (both amounts include the amount related to the claim for an injunction). Moreover, it is easily presumed that the appellee was also forced to bear certain attorneys' fees although the appellee is not required to pay the amount claimed by the appellant. Furthermore, in this lawsuit, it may not be found that the appellant conducted appropriate negotiations in advance to demand the payment of such reasonable amount as determined by this court. Therefore, it is not reasonable to order the appellee to shoulder the attorneys' fees borne by the appellant.

(d) As described above, the amount of damage acceptable in this case shall be 237,741 yen.

(4) The claim for an injunction based on an act of tort is examined below.

In general, any person who seeks a remedy for an act of tort is expected to make a claim for damages and is not expected to make a claim for an injunction. In this court case, although it has examined whether there are any grounds to justify a claim for an injunction, the court cannot find any serious consequences irrecoverable by the payment of damages unless the court orders an injunction against the appellee's act into the future. Even if all of the evidence submitted in this case is taken into consideration, the court cannot find any grounds to justify the claim for an injunction.

Therefore, it must be said that the appellant's claim for an injunction based on an act of tort is groundless.

5. Conclusion

Based on these facts described above, the appellant's claim for damages based on an act of tort may be found to be well grounded up to 237,741 yen at a maximum. Any other claims shall be found groundless. Therefore, the judgment in prior instance shall be modified to the extent of accepting the aforementioned claim. The claims added in this instance shall be dismissed.

In consideration of the facts that, while the total amount of claims made in this lawsuit, i.e., a total of the claim for an injunction and the claim for damages, surpassed 400 million yen, only a small portion of the damages was found to be acceptable, that, in this lawsuit, most of the allegations and evidence were submitted with regard to a claim made based on a copyright, while the appellant's claims regarding this point were dismissed by the court, that the appellee responded to the action from a remote place, that the appellant did not take appropriate measures to have prior discussions, and that, when the settlement was proposed, the appellee implied its intention of considering the payment of a considerable amount of money, when it comes to the payment of the court costs, it would be reasonable if the appellee bear five ten-thousandths of the fees related to the filing of the action and the appeal, while the remaining costs shall be borne by the appellant.

Intellectual Property High Court, Fourth Division

Presiding Judge: TSUKAHARA Tomokatsu

Judge: TANAKA Masato

Judge: SATO Tatsubumi

Attachment 1

"Appellee's Website List"

Domain name: D-A.CO.JP

Organization name: Digital Alliance, Inc.

Name Server: ns.marute.co.jp

The same as above: ns2.dcmp.co.jp

Registration Date: June 5, 2000

Connection Date: June 14, 2000

The websites shown on said domain name or its subdomain name

Attachment 2

"Works List 1"

The news article headings posted on the website "YOMIURI ON-LINE" (<http://www.yomiuri.co.jp/>) that were created by the appellant during the period from October 8, 2002 to the date of conclusion of oral argument or during the period thereafter.

"Works List 2"

The news articles posted on the website "YOMIURI ON-LINE" (<http://www.yomiuri.co.jp/>) that were created by the appellant during the period from October 8, 2002 to the date of conclusion of oral argument or during the period thereafter.

* Regarding the judgment presented above, a ruling of correction was made on October 7, 2005.