Copyright	Date	October 19, 2022	Court	Intellectual Property High Court, Second Division
	Case number	2022 (Ne) 10019		

- A case in which disclosure of identification information of the senders was demanded, and the court determined that even if the posts on Twitter (tweets) amount to defamation through an allegation of a fact, it is not proved that there is no justifiable cause for noncompliance with the law, and did not find that violation of the right was obvious.
- A case in which the court ruled that the use of an illustration in a tweet constitutes legal "quotation" (Article 32, paragraph (1) of the Copyright Act).
- When an image of an illustration attached to a tweet is only partially displayed on the timeline of Twitter, such use of the illustration constitutes a "modification that is found to be unavoidable" (Article 20, paragraph (2), item (iv) of the Copyright Act) when using Twitter.

Case type: Disclosure of Identification Information of the Senders
Result: Partial modification of the prior instance judgment
References: Article 20, paragraph (1), paragraph (2), item (iv), Article 21, Article 23, paragraph (1), and Article 32, paragraph (1) of the Copyright Act, Article 4, paragraph (1) of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Sender
Judgment of prior instance: Tokyo District Court, 2020 (Wa) 24492, rendered on December 23, 2021

Summary of the Judgment

1. In this case, the Appellee (First-instance Plaintiff) alleges that it is obvious that the Appellee's copyright and moral rights of an author regarding the illustrations created thereby as well as the Appellee's right to honor and business right have been violated because the four posts of tweets containing the images of the illustrations created by the Appellee (Tweets 1-1, 1-2, 2-1, and 2-2; collectively the "Tweets") were made on Twitter (information service whereby users can post messages, etc. called tweets using the internet) by unidentified persons (Posters 1 and 2), and based on this allegation, the Appellee demands the Appellant (First-instance Defendant), the company operating Twitter, to disclose identification information of the senders pursuant to Article 4, paragraph (1) of the Act on the Limitation of Liability for Damages of Specified

Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Sender (the "Provider Liability Limitation Act") prior to the amendment by Act No. 27 of 2021.

The Appellee is an illustrator who sold his/her illustrations at around 3,000 to 5,000 yen for each. In the Tweets, it is indicated that the Appellee's illustrations were created by tracing other persons' illustrations or photographs, and that the Appellee is "常習犯" for tracing (a habitual tracer). These tweets show images created by overlaying the illustration or photograph that is alleged to be the original that is traced, on the Appellee's illustration that is suspected of having been created by tracing the former, and the Appellee's illustrations that are not suspected of having been created by tracing are attached to these tweets. Some of the images attached to the Tweets (e.g., illustrations created by the Appellee) are displayed in the trimmed form on the timeline.

2. The court of prior instance found that it is obvious that defamation, violation of the copyright, and violation of the right to integrity have been committed, determining as follows: [i] as it is not found that the Appellee created illustrations by employing the method of tracing, there is no justifiable cause for noncompliance with the law in terms of defamation; [ii] in order to examine the difference in the abilities to draw, it is sufficient to compare illustrations of a woman's profile that have the same or similar composition, and therefore, the use of the illustration with a different composition (a front view of a woman with open eyes) is not considered to be "within a scope that is justified for the purpose"; and [iii] displaying the illustrations in the trimmed form on the timeline constitutes a "modification" and it cannot be regarded as a "modification that is found to be unavoidable." The court of prior instance upheld the Appellee's claims to the extent to demand the disclosure of the IP address and the date and time for the latest login made before the Tweets were posted, and the telephone number and email address of the administrator of the accounts of the posters, while dismissing all the other claims. The Appellant filed an appeal against the judgment in prior instance.

3. In this judgment, the court determined that it is not found that the violation of the rights by the posting of the Tweets is obvious, and it modified the judgment in prior instance and dismissed all of the Appellee's claims. The reasons for this conclusion are as summarized below.

(i) Regarding whether the violation of the rights is obvious

In order to say that the situation falls under the case [as] provided in Article 4, paragraph (1), item (i) of the Provider Liability Limitation Act where "it is obvious that the rights of a person demanding the disclosure have been violated by the distribution of the violating information," it is considered that allegations and evidence are required

with regard to not only the fact that the rights of the person demanding the disclosure have been violated by the distribution of the violating information, but also the fact that there are no such circumstances suggesting the existence of justifiable cause for noncompliance with the law.

(ii) Regarding defamation

The social reputation of the Appellee, who is an illustrator, has been undermined due to the allegation of the fact that Appellee's Illustration 1 was created by tracing Exhibit Otsu 1-2 Illustration created by a third party. That alleged fact implies the possibility that the Appellee's act may be questionable under the Copyright Act, and it is important information to consumers who are to purchase illustrations created by the Appellee. Therefore, the act of posting Tweet 1-1 can be considered to be related to a fact concerning public interest and be intended exclusively to promote public interest. In addition, Appellee's Illustration 1 (an illustration of a woman's profile) and Exhibit Otsu 1-2 Illustration, which is alleged to be the original that is traced, are identical with each other in terms of the line, the angle of the neck and the position of the ear, and it is unlikely that these illustrations accidentally become identical in terms of all these features. Taking all these points into account, it is highly probable that the alleged fact that "Appellee's Illustration 1 was created by tracing Exhibit Otsu 1-2 Illustration" is true. Accordingly, it must be said that it is not sufficiently proved that there are no such circumstances suggesting the existence of justifiable cause for noncompliance with the law.

(iii) Regarding violation of the copyright

If, in order to verify and criticize that the illustration created by the Appellee was created by tracing another person's illustration or photograph, the illustration created by the Appellee and the illustration or photograph that is alleged to be the original that is traced are used by overlaying them on each other, such manner of use is convenient for examining the content of the article and can ensure objectivity, and it constitutes legal "quotation" provided in Article 32, paragraph (1) of the Copyright Act.

Poster 2 intends to show that the illustrations of a woman's profile created by the Appellee, which are contained in Appellee's Illustration 5, are unnatural in terms of the ability to draw when compared with other illustrations created by the Appellee, with a view to verifying that the abovementioned illustrations of a woman's profile were created by the act of tracing. In order to assess the Appellee's ability to draw, which is observed in the illustrations other than the illustrations of a woman's profile, it is appropriate to comparatively observe multiple illustrations created by the Appellee. Therefore, the use of two illustrations created by the Appellee in Tweet 2-1 constitutes

legal "quotation."

(iv) Violation of moral rights of an author

How a tweet is displayed on the timeline of Twitter depends on the specification of Twitter or the specification of the client app for displaying tweets, and it cannot be freely set by posters; therefore, at the time of posting a tweet, the poster is unable to know how his/her tweet would be displayed. After a tweet is posted, when there is a change to the specification of Twitter or the specification of the client app for displaying tweets, how the tweet is displayed on the timeline would also change. Image data attached to a tweet is downloaded onto the terminal of the user who views the tweet, and when the user clicks the image on the timeline, the entirety of the image would be displayed. In light of these facts, setting aside the issue as to whether the poster can be regarded as the person who carried out the modification, if the image is displayed only partially on the timeline, it should be deemed to be a "modification that is found to be unavoidable" under Article 20, paragraph (2), item (iv) of the Copyright Act when using Twitter.

Judgment rendered on October 19, 2022
2022 (Ne) 10019, Appeal case of seeking disclosure of identification information of the senders
(Court of prior instance: Tokyo District Court, 2020 (Wa) 24492)
Date of conclusion of oral argument: August 24, 2022

Judgment

Appellant (First-instance Defendant): Twitter, Inc.

Appellee (First-instance Plaintiff): Y

Main text

1. Of the judgment in prior instance, the part against the Appellant shall be revoked.
2. The appeal to the court of second instance filed by the Appellee shall be dismissed with respect to the part mentioned above.
3. The court costs in the first and second instances shall be borne by the Appellee.

Facts and reasons

The abbreviations of terms and the meanings of abbreviations are subject to the judgment in prior instance, except for those specified in this judgment, the "Plaintiff" and the "Defendant" referred to in the judgment in prior instance are deemed to be replaced with "Appellee" and "Appellant," respectively. The term "attachment (attached)" which appears in the cited parts of the judgment in prior instance is entirely altered to "attachment of (attached to) the judgment in prior instance."

No. 1 Object of the appeal

Same as the main text.

No. 2 Outline of the case, etc.

1. Outline of the case

In this case, the Appellee alleges that it is obvious that the Appellee's copyright and moral rights of an author regarding the illustrations indicated in the List of the Appellee's Illustrations attached to the judgment in prior instance as well as the Appellee's right to honor and business right have been violated because the articles indicated in Attached Lists of Posted Articles 1 and 2 (including the images indicated in the List of Posted Images attached to the judgment in prior instance) were posted on Twitter (information service whereby users can post messages, etc. called tweets using

the internet) by unidentified persons (Posters 1 and 2), and based on this allegation, the Appellee demands the Appellant, the company operating Twitter, to disclose information indicated in the Attached List of Identification Information of Senders pursuant to Article 4, paragraph (1) of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Sender (the "Provider Liability Limitation Act") prior to the amendment by Act No. 27 of 2021.

The court of prior instance upheld the Appellee's claims to the extent to demand the disclosure of the following: [i] among the pieces of information indicated in 1 and 2 of the Attached List of Identification Information of Senders, the IP address for the latest login made on or after the midnight of April 3, 2020 (JST) and before each post indicated in the Attached Lists of Posted Articles was made, as well as the date and time when the information concerning that login was transmitted from the telecommunication facilities to which the abovementioned IP address was assigned, to the specified telecommunication facilities used by the Appellant; and [ii] the telephone number of the account administrator indicated in the User Name column of Attached List of Posted Articles 1 and the email address of the account administrator indicated in the User Name column of Attached List of Posted Articles 2. The court of prior instance dismissed all the other claims of the Appellee.

The Appellant filed an appeal with regard to the part of the judgment in prior instance which was against the Appellant.

2. The basic facts, issues, and allegations of the parties related to the issues are altered as follows, and the supplementary allegations and additional allegations of the parties made in this instance as stated in 3. below are added. The remaining parts are as stated in 2. and 3. in "No. 2 Outline of the case" and in "No. 3 Allegations of the parties on the issues" in the "Facts and reasons" section in the judgment in prior instance and they are therefore cited.

(1) The part from "ツイッターを" in line 22, page 3 of the judgment in prior instance to the end of line 23 on the same page is altered to "インターネットを通じて、自身が制作したイラストを販売している（甲９～１３、２７、２９、３０、４２）。[sells illustrations he/she created, using the internet (Exhibits Ko 9 to 13, 27, 29, 30, and 42)].".

(2) The following is added as a new line after the end of line 1, page 5 of the judgment in prior instance.

"D. The Posts remained undeleted after they were made until December 23, 2021, and they were available for viewing by anyone during this period."

(3) The part from the beginning to the end of line 4, page 5 of the judgment in prior instance is altered to "The Appellant retains the information indicated in the Attached List of Identification Information of Senders (hereinafter referred to as the "Identification Information of Senders").".
(4) The following is added as a new line after the end of line 12, page 5 of the judgment in prior instance: "E. Whether the requirement of 'violation by the distribution of the violating information' is satisfied with regard to Tweets 2-1 and 2-2 (Issue 1-5)".
(5) The term "Ministerial Order" on line 16, page 5 of the judgment in prior instance is altered to "Ministerial Order Specifying Identification Information of the Senders under Article 4, Paragraph (1), of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Sender prior to the repeal by Order of the Ministry of Internal Affairs and Communications No. 39 of 2022 (this ministerial order is hereinafter referred to as the 'Ministerial Order' and it may also be referred to as the 'Amended Ministerial Order' in order to make it clear that it is the Ministerial Order Specifying Identification Information of the Senders under Article 4, Paragraph (1), of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Sender which is prior to that repeal and after the amendment by Order of the Ministry of Internal Affairs and Communications No. 82 of 2020.)".
(6) The phrase "Ministerial Order prior to the amendment" on line 23, page 5 of the judgment in prior instance is altered to: "Ministerial Order Specifying Identification Information of the Senders under Article 4, Paragraph (1), of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Sender prior to the amendment by Order of the Ministry of Internal Affairs and Communications No. 82 of 2020 (hereinafter referred to as the 'Ministerial Order prior to the amendment.')".
(7) The phrase "Posted Image 1-1-4" on line 10, page 12 of the judgment in prior instance is altered to "Appellee's Illustration 1 contained in Posted Image 1-1-4".
(8) The phrase "paragraph (1)" is inserted after "Article 32" on line 6, page 19 of the judgment in prior instance, and the phrase "photograph of a kagami-mochi (round rice cake) on the internet" is altered to "image of the photograph of a kagami-mochi (round rice cake) uploaded on the internet".
(9) The term "原告の" on line 3, page 22 of the judgment in prior instance is deleted.
(10) The part from the beginning of line 5, page 25 of the judgment in prior instance to the end of line 9 of the same page is altered as follows:

"As mentioned in A. above, it is obvious that Poster 2 posted Tweet 2-1, which violates the Appellee's copyright and cannot be regarded as lawful speech, and that such posting strongly instilled in the viewers of this tweet a fact that the Appellee performs the act of tracing, which resulted in the decrease of the number of prospective purchasers of the Appellee's illustrations and the decrease in the Appellee's sales and earnings."

(11) The part from the beginning of line 16, page 27 of the judgment in prior instance to the end of line 20 of the same page is altered as follows:

"As mentioned in A. and B. above, it is obvious that Poster 2 posted Tweet 2-2, which cannot be regarded as lawful speech, and such posting gave the viewers of this tweet an impression that the Appellee sells illustrations created by performing the act of tracing, which resulted in the decrease of the number of prospective purchasers of the Appellee's illustrations and the decrease in the Appellee's sales and earnings."

(12) The phrase "Posted Image 2-2-2" on line 2, page 28 of the judgment in prior instance is altered to "Posted Image 2-2-2, which is the same image as Appellee's Illustration 5".

(13) The character "を" at the beginning of line 9, page 29 of the judgment in prior instance is deleted.

(14) The phrase "アカウントの [of the accounts]" on line 9, page 30 of the judgment in prior instance is altered to "本件各アカウントの [of the Accounts]". The following is added to the part that ends with "主張する[alleges]" on line 17 of the same page "and also alleges that only the IP address used at the time of transmitting the violating information is the 'IP address involved in the violating information'.". The phrase "Ministerial Order No. 8" on line 24 of the same page is altered to "Ministerial Orders No. 5 and No. 8". The part from "仮に、[If]" on line 1, page 31 of the judgment in prior instance to the end of line 8 of the same page is deleted.

(15) The phrase "identification information of the sender" is inserted before "pertaining to violation" on line 10, page 31 of the judgment in prior instance, and the phrase "identification information of the sender 'pertaining to the violation of the rights'" on line 25 of the same page is altered to "'identification information of the sender 'pertaining to the violation of the rights'".

(16) The phrase "the Tweets" on line 1, line 2, and line 16, page 35 of the judgment in prior instance is altered to "Tweets 1-1 and 1-2", and the phrase "the Posts" in line 4, line 8, and line 26 of the same page and in line 1, page 36 of the judgment in prior instance is altered to "the posts of Tweets 1-1 and 1-2".

(17) The phrase "(1) (Allegations of the Defendant), A. above" on line 4, page 38 of the judgment in prior instance is altered to "(1) (Allegations of the Appellant), A. and B.

above".

(omitted)

No. 3 Judgment of this court
1. Issue 1-1 (Whether the violation of the rights by the posting of Tweet 1-1 is obvious)
(1) Regarding whether the "violation of the rights is obvious"

Identification information of the sender is information that is concerned with the sender's privacy, freedom of expression, and secrecy of communication and should not be disclosed to any third party without justifiable grounds, and once such information is disclosed, it would be impossible to recover the original state prior to the disclosure. From this viewpoint, Article 4, paragraph (1), item (i) of the Provider Liability Limitation Act specifies strict requirements for the demand for the disclosure of the identification information of the sender (see 2009 (Ju) 609, judgment of the Third Petty Bench of the Supreme Court of April 13, 2010, Minshu Vol. 64, No. 3, at 758). In light of this, in order to say that the situation falls under the case as provided in that item where "it is obvious that the rights of a person demanding the disclosure have been violated by the distribution of the violating information," it is considered that allegations and evidence are required with regard to not only the fact that the rights of the person demanding the disclosure have been violated by the distribution of the violating information, but also the fact that there are no such circumstances suggesting the existence of justifiable cause for noncompliance with the law.
(2) Regarding Tweet 1-1

According to evidence (Exhibits Ko 1-1 to 1-5, Ko 17, 32, 37-1 and 37-2), Tweet 1-1 was posted by Poster 1 at 10:30 p.m. on April 3, 2020. It consists of the texts, "これどうだろう ww [What about this? (laugh)]" and "ゆるーくトレス？ 普通にオリジナルで描いてもここまで比率が同じになるかな [Roughly traced? Would the ratio be so close even when an illustration is drawn as an original in a normal manner?]," and the following images: [i] Exhibit Otsu 1-2 Illustration (Posted Image 1-1-1); [ii] two images each created by overlaying Exhibit Otsu 1-2 Illustration and Appellee's Illustration 1 one on the other (Posted Images 1-1-2 and 1-1-3); and [iii] an image in which multiple illustrations created by the Appellee, including Appellee's Illustration 1, are shown side by side (Posted Image 1-1-4). Tweet 1-1 is displayed on the timeline as indicated in 1 of the List of Timelines attached to the judgment in prior instance, and it is found that each of Posted Images 1-1-1 to 1-1-4 is displayed only partially on the timeline (as explained in (5) C. below, the display on the timeline is not fixed; the same

applies hereinafter).

(3) Regarding defamation

A. Whether the meaning or content of a certain article undermines another person's social reputation should be determined on the basis of the ordinary care and way of reading of general readers of the article (see 1954 (O) 634, judgment of the Second Petty Bench of the Supreme Court of July 20, 1956, Minshu Vol. 10, No. 8, at 1059). This also applies when determining whether an article posted on Twitter constitutes defamation.

Defamation could be caused not only by an allegation of a fact but also by presentation of one's opinions or comments. If an expression is understood as explicitly or implicitly arguing a specific matter concerning another person that can be proved to be true or false by evidence, etc., it is appropriate to consider that such expression is an allegation of a fact concerning that specific matter (see 1994 (O) 978, judgment of the Third Petty Bench of the Supreme Court of September 9, 1997, Minshu Vol. 51, No. 8, at 3804). Critiques and discussions concerning the value, judgment between right and wrong, and superiority of a thing that are not suitable for such proof by evidence, etc. should be deemed to fall within the scope of expressions of opinions or comments (see 2003 (Ju) 1793, 1794, judgment of the First Petty Bench of the Supreme Court of July 15, 2004, Minshu Vol. 58, No. 5, at 1615). The requirement that determination should be made on the basis of the ordinary care and way of reading of general readers also applies in terms of the distinction mentioned above (see the abovementioned judgment of the Third Petty Bench of the Supreme Court of September 9, 1997).

B. (a) Looking at Tweet 1-1, as mentioned in (2) above, it consists of two images each created by overlaying Exhibit Otsu 1-2 Illustration and Appellee's Illustration 1 one on the other, and the following texts: "これどうだろう ww [What about this? (laugh)]"; and "ゆる一くトレス？ 普通にオリジナルで描いてもここまで比率が同じになるかな [Roughly traced? Would the ratio be so close even when an illustration is drawn as an original in a normal manner?]." According to evidence (Exhibits Ko 1-1 and 49; Exhibit Otsu 1-1), it is found that: the tweets posted on Account 1 on the same day as or the day following the day on which Tweet 1-1 was posted, contained the statements: "目が開いていないのはトレス元に似ちゃうからなのか [The eye is closed probably because the illustration would resemble the original if the eye is open?]" and "検証に使用した絵はＡさんの絵[A-san's picture was used for verification]"; and these tweets are displayed on the thread for which Tweet 1-1 is the original tweet. In view of these facts, and on the basis of the ordinary care and way of reading of general readers, Tweet 1-1 can be found to be alleging that Appellee's Illustration 1, which is

an illustration of a woman's profile with her eye closed, was created by tracing, although not accurately, Exhibit Otsu 1-2 Illustration, which is an illustration of a woman's profile with the eye open that was created by Mr./Ms. A. This determination would not be affected by the fact that the abovementioned texts contain the sign that signifies a question ("?") or end with a phrase that signifies a question ("なるかな").

In light of the fact that Poster 1 tries to verify whether a tracing was made, by showing Exhibit Otsu 1-2 Illustration, which is alleged to be the original that is traced, and Appellee's Illustration 1, which is alleged to have been created by tracing the former, in a manner that they are overlaid on each other, it is appropriate to find that the term "トレース" (or "トレス" used by Poster 1) refers to displaying the original illustration or photograph and directly copying it by following its lines, using a tool such as an app for creating illustrations. The same applies to Tweet 1-2.

(b) The Appellant alleges that in the course of determining whether the posting of Tweet 1-1 amounts to defamation, the content of the tweets posted after Tweet 1-1 should not be taken into consideration. However, according to evidence (Exhibit Ko 50), the following facts are found: when posting a tweet, the user can create a "thread" by drafting multiple tweets and by clicking "Tweet all" button, and after creating a thread, the user can add a tweet to the created "thread" by clicking the button to add a tweet; and the tweets posted as a "thread" are connected with lines when they are displayed on the timeline so that they can be regarded as a group, and if a thread consists of four or more tweets, some of them are not shown, but by clicking the characters "Show this thread," the user can have the entire thread shown. Poster 1 voluntarily posted multiple tweets as a "thread" simultaneously upon posting Tweet 1-1 or by "adding tweets" to Tweet 1-1. Furthermore, it is presumed that Twitter users, who are general readers of Tweet 1-1, understand the abovementioned mechanism of a "thread" on Twitter and read the tweets in the thread including Tweet 1-1 while considering that tweets in the same thread are related to one another. In light of these points, when interpreting the content of Tweet 1-1 in the course of determining whether the posting thereof amounts to defamation, it is appropriate to also take into consideration the content of at least the tweets posted in the same thread as Tweet 1-1 simultaneously with or at a time close to the posing of Tweet 1-1. Therefore, the Appellant's allegation mentioned above cannot be accepted.

(c) On the basis of the ordinary care and way of reading of general readers, the matter to the effect that Appellee's Illustration 1 was created by tracing Exhibit Otsu 1-2 Illustration constitutes a specific matter concerning another person that can be proved to be true or false by evidence, etc., and hence, Tweet 1-1 constitutes an allegation of a

fact meaning a specific matter concerning the Appellee to the effect that Appellee's Illustration 1 was created by tracing Exhibit Otsu 1-2 Illustration.

C. Next, the act of tracing constitutes "reproducing" but it does not immediately mean violation of the Copyright Act. It cannot necessarily be said that the indication that a person performed the act of tracing another person's illustration when creating an illustration would undermine the social reputation of the person who traced the other person's illustration. However, in the present case, in light of the fact that the Appellee acts as a professional illustrator selling illustrations created thereby, the content of Tweet 1-1 means that the Appellee, an illustrator, engaged in publishing an illustration created by tracing another person's illustration as his/her original work, which is questionable under the Copyright Act, and it is a fact that can sufficiently make prospective purchasers of the Appellee's works pause in purchasing works from such illustrator. Therefore, it is found that the Appellee's social reputation as an illustrator has been undermined due to the allegation of that fact through the posting of Tweet 1-1 by Poster 1.

D (a) In the case of defamation by an allegation of a fact, where the act in question is related to a fact concerning public interest and it is intended exclusively to promote public interest, the act is not illegal if it is proved that the important part of the alleged fact is true; and even if this is not proved, if the person who engaged in that act has good reason to believe that the important part of that fact is true, the act in question does not constitute a tort because the person does not have the intention or negligence in terms of that act (see 1962 (O) 815, judgment of the First Petty Bench of the Supreme Court of June 23, 1966, Minshu Vol. 20, No. 5, at 1118, 1981 (O) 25, judgment of the First Petty Bench of the Supreme Court of October 20, 1983, Saibanshu Minji No. 140, at 177).

(b) Looking at this case from such viewpoint, Tweet 1-1 indicates that the Appellee publishes an illustration created by tracing another person's illustration as his/her original work, and it implies the possibility that the Appellee's act may be questionable under the Copyright Act. In light of the fact that the Appellee is a professional illustrator, such indication is important information to consumers who are to purchase illustrations created by the Appellee, and thus, the act of posting Tweet 1-1 can be considered to be related to a fact concerning public interest and be intended exclusively to promote public interest.

(c) The next point to examine is whether the alleged fact is true or not. The important part of the fact alleged by Tweet 1-1 is that "Appellee's Illustration 1 was created by tracing Exhibit Otsu 1-2 Illustration." Comparing the illustration shown on page 1 of

Exhibit Ko 29, which is alleged by the Appellee to be the base of Appellee's Illustration 1, with Exhibit Otsu 1-2 Illustration (Exhibit Otsu 54), it is found that: these illustrations are similar in composition; they are almost identical with each other in terms of the line of the profile from the forehead to the neck; and they are also almost identical with each other in terms of the angle of the neck and the position of the ear. Accordingly, it is found that there is the same relationship between Appellee's Illustration 1 and Exhibit Otsu 1-2. It is unlikely that these illustrations accidentally become identical in terms of all these features.

On the other hand, as evidence showing that Appellee's Illustration 1 is not created by tracing, the Appellee submitted a video taken on July 19, 2021, which is said to record the scene where the Appellee created an illustration of a woman's profile (re-enactment video; Exhibits Ko 44-1 and 44-2). According to evidence (Exhibits Otsu 15 and 67), although the illustration of a woman's profile created in the re-enactment video was created on an occasion that was different from when Appellee's Illustration 1 was created, the angle of the neck and the position of the ear in this illustration are greatly different from those in Exhibit Otsu 1-2 Illustration and their lines do not overlap with regard to the chin part. In light of the fact that Exhibit Otsu 1-2 Illustration and Appellee's Illustration 1 are almost identical with each other in terms of the angle of the neck and the position of the ear as mentioned above, it is found that the angle of the neck and the position of the ear in the illustration of a woman's profile created in the re-enactment video would also be greatly different from those in Appellee's Illustration 1 and their lines would not overlap with regard to the chin part. This means that the difference as described above occurred although it is presumed that the Appellee tried to re-enact the process of creating Appellee's Illustration 1, and hence, even if the re-enactment video is taken into consideration, it is appropriate to find that it is difficult for the lines, the angle of the neck, and the position of the ear of the woman's profile in Appellee's Illustration 1 created by the Appellee to accidentally become identical with those in Exhibit Otsu 1-2 Illustration.

In addition, since Exhibit Otsu 1-2 Illustration was published on September 1, 2017 (Exhibits Otsu 14-1 and 14-2), it was in the public domain around February 2018, when the Appellee received an order which led to the creation of an illustration of a woman's profile (Exhibit Ko 26), and thus, it was possible for the Appellee to refer to Exhibit Otsu 1-2 Illustration when creating Appellee's Illustration 1.

Taking all these points into account, it is highly probable that the alleged fact that "Appellee's Illustration 1 was created by tracing Exhibit Otsu 1-2 Illustration" is true.

(d) As mentioned in (1) above, in order to find that the "violation of the rights is

obvious," which is the requirement for demanding the disclosure of identification information of the sender, allegations and evidence are required with regard to not only the fact that the rights of the person demanding the disclosure have been violated by the distribution of the violating information, but also the fact that there are no such circumstances suggesting the existence of justifiable cause for noncompliance with the law. It must be said that with regard to defamation by the posting of Tweet 1-1, it is not sufficiently proved that there are no such circumstances suggesting the existence of justifiable cause for noncompliance with the law.

Accordingly, with regard to defamation by the posting of Tweet 1-1, it is not found that the "violation of the right is obvious."

(4) Regarding violation of the copyright (right of reproduction, right to make an automatic public transmission)

A. Poster 1 posted Tweet 1-1 without obtaining permission from the Appellee (Exhibit Ko 9), and it can be said that by doing so, Poster 1 reproduced the image data of Appellee's Illustration 1 on Twitter's server and made it available for transmission.

B. The Appellant alleges that the use of Appellee's Illustration 1 mentioned in A. above constitutes "quotation" and it is therefore legal. This allegation is examined as follows. In order to be a legal "quotation," the work in question must be quoted [i] consistent with fair practices and [ii] within a scope that is justified for the purpose of news reporting, critique, study, or other place in which the work is quoted (Article 32, paragraph (1) of the Copyright Act).

C. (a) Looking at Tweet 1-1, as mentioned in (2) above, it consists of two images each created by overlaying Exhibit Otsu 1-2 Illustration and Appellee's Illustration 1 one on the other, and the following texts:"これどうだろう ww [What about this? (laugh)]; and "ゆるーくトレス？ 普通にオリジナルで描いてもここまで比率が同じになるかな [Roughly traced? Would the ratio be so close even when an illustration is drawn as an original in a normal manner?]." It is found that Tweet 1-1 alleges that Appellee's Illustration 1 created by the Appellee was created by tracing Exhibit Otsu 1-2 Illustration, and it is intended to verify and criticize Appellee's Illustration 1. Therefore, it can be said that Poster 1 used Appellee's Illustration 1 for the purpose of critique.

(b) a. Next, the Appellee's illustrations are used in Tweet 1-1 as follows: Appellee's Illustration 1 is displayed in a manner that Exhibit Otsu 1-2 Illustration is overlaid on it (Posted Images 1-1-2 and 1-1-3); and multiple illustrations created by the Appellee, including Appellee's Illustration 1, are shown side by side (Posted Image 1-1-4). These images together with the image of Exhibit Otsu 1-2 Illustration (Posted Image 1-1-1) are attached to the texts mentioned in (a) above. On the timeline, they are displayed as

indicated in 1 of the List of Timelines attached to the judgment in prior instance; the image data of the abovementioned four images is displayed only partially depending on the specification of Twitter or the specification of the client app for displaying tweets, and Posted Images 1-1-1 to 1-1-4 are displayed in full as they are when each image is clicked.

b. Posted Image 1-1-4 contains two illustrations of a woman's profile created by the Appellee. One of these is Appellee's Illustration 1, and the other is found to be a reproduction or adaptation of the Appellee's illustrations. Therefore, it is necessary to use Posted Image 1-1-4 as it is together with Posted Image 1-1-1 (Exhibit Otsu 1-2 Illustration) in order to verify similarity of the illustrations, and it can be said that Posted Image 1-1-4 is used in a manner that can ensure objectivity to a greater extent than expressions only by means of texts.

c. Posted Images 1-1-2 and 1-1-3 are images each consisting of Exhibit Otsu 1-2 Illustration and Appellee's Illustration 1 which are overlaid on each other. In the course of examining the similarity of two illustrations or images, if two illustrations are overlaid in a manner that each illustration can be distinguished, it can be said that these illustrations are used in a manner that is convenient for verification and can ensure objectivity. In addition, the image of the app that suggests that the color density of each illustration has been adjusted is indicated at the lower part of those posted images, showing these images in a manner that enables the viewers to see that they are two overlaid illustrations and that the color density has been adjusted. In the present case, the color of Exhibit Otsu 1-2 Illustration is darker in Posted Image 1-1-2, whereas the color of Appellee's Illustration 2 is darker in Posted Image 1-1-3. Such method of showing images can be considered to be helpful for comparing two overlaid illustrations in one image while distinguishing each illustration.

d. Accordingly, it can be said that for general readers of Tweet 1-1, the manner in which the Appellee's illustrations are used in Tweet 1-1 is convenient for examining the content of the article and can ensure objectivity.

In view of such manner of use, there are no such circumstances suggesting that the illustrations created by the Appellee are used in Tweet 1-1 for purposes such as the independent object of appreciation, and hence, it cannot be said that these illustrations are used beyond the purpose of verification of Appellee's Illustration 1 and Exhibit Otsu 1-2 Illustration through comparison.

e. Consequently, it is appropriate to find that the use of the Appellee's illustrations in Tweet 1-1 is conducted within a scope that is justified for critique, which is the purpose of quotation referred to in (a) above.

(c) According to evidence (Exhibits Otsu 5-1 to 5-5, 60, 63, 89, 110-1, 120-4 and 120-5), when alleging a fact that a person may have possibly created an illustration, etc. by tracing an illustration or photograph covered by a third party's copyright, it is a widely applied practice to [i] show, in an article, the illustration, etc. in question and the original illustration that may have been used for tracing, for the purpose of comparison, as they are or focusing only on the parts that are necessary for comparison, or [ii] show the two illustrations by overlaying one on the other. Furthermore, as mentioned in (b) above, such manner of showing the illustrations can be regarded as a method that is convenient for general readers of Tweet 1-1 when examining the content of the article and that can ensure objectivity.

In addition to the above, as explained in (5) below, the use of the Appellee's illustrations in Tweet 1-1 cannot be considered to be illegal from the perspective of violation of the right to integrity as well, and in light of this, it can be said that attaching the illustrations created by the Appellee to Tweet 1-1 is consistent with fair practices.

(d) Accordingly, the use of the Appellee's illustrations in Tweet 1-1 is legal as "quotation."

D. According to the above, with regard to violation of the copyright by the posting of Tweet 1-1, it is not found that the "violation of the right is obvious."

(5) Regarding violation of the moral rights of an author (right to integrity)

A. As mentioned in (2) above, [i] among the images attached to Tweet 1-1, Posted Images 1-1-2 and 1-1-3 consist of Appellee's Illustration 1 and Exhibit Otsu 1-2 Illustration which are overlaid on each other, and [ii] Posted Images 1-1-2 to 1-1-4 in Tweet 1-1 displayed on the timeline of Twitter only partially show the illustrations created by the Appellee. Therefore, there is room to consider that these posted images are created through modification or cutting of the Appellee's illustrations.

B. However, regarding [i], the works in question are illustrations, and the method of using them by overlaying one on the other is convenient for critique, which is the purpose of quotation, and can ensure objectivity. In light of the purpose and manner of use in addition to this point, it can be said that the use of these illustrations is a "modification that is found to be unavoidable" as referred to in Article 20, paragraph (2), item (iv) of the Copyright Act.

C. Next, regarding [ii], according to evidence (Exhibit Ko 49; Exhibits Otsu 113 to 119, 120-1, 120-2, 121-1 and 121-2), the following facts can be found. How a tweet is displayed on the timeline of Twitter depends on the specification of Twitter or the specification of the client app for displaying tweets, and it cannot be freely set by posters; therefore, at the time of posting a tweet, the poster is unable to know how

his/her tweet would be displayed. After a tweet is posted, when there is a change to the specification of Twitter or the specification of the client app for displaying tweets, how the tweet is displayed on the timeline would also change. Image data attached to a tweet is downloaded onto the terminal of the user who views the tweet, and when the user clicks the image on the timeline, the entirety of the image would be displayed. In light of these facts, setting aside the issue as to whether the poster can be regarded as the person who carried out the modification, if the image is displayed only partially on the timeline, it should be deemed to be a "modification that is found to be unavoidable" when using Twitter.

D. Accordingly, regarding violation of the moral rights of an author (violation of the right to integrity) by the posting of Tweet 1-1, it is not found that the "violation of the right is obvious."

(6) Regarding violation of the business right

As mentioned in (3) to (5) above, it cannot be said that the violation of the right to honor, copyright, and moral rights of an author by the posting of Tweet 1-1 is obvious, nor can it be said that the posting of Tweet 1-1 by Poster 1 is illegal, and therefore, regarding violation of the business right by the posting of Tweet 1-1 as well, it is not found that the "violation of the right is obvious."

(7) Consequently, it is not found that the "violation of the rights" by the posting of Tweet 1-1 "is obvious."

2. Issue 1-2 (Whether the violation of the rights by the posting of Tweet 1-2 is obvious)

(1) Regarding Tweet 1-2

According to evidence (Exhibits Ko 1-1, 2-1 to 2-5, 37-1 and 37-2; Exhibits Otsu 2-1 to 2-5), Tweet 1-2 was posted by Poster 1 at 1:31 a.m. on April 5, 2020. It consists of the texts, "この鏡餅も画像検索ですぐ出てきた。[This kagami-mochi was found right away by image search.]", "トレス常習犯ですわ。[A habitual tracer.]" and "Y′さん [Y'-san]", and the following images: [i] an image of the Appellee's tweet containing Appellee's Illustration 2 (Posted Image 1-2-1); [ii] an image containing Exhibit Otsu 2-3 Photograph (Posted Image 1-2-2); and [iii] two images each created by overlaying Appellee's Illustration 2 and Exhibit Otsu 2-3 Photograph one on the other (Posted Images 1-2-3 and 1-2-4). Tweet 1-2 is displayed on the timeline as indicated in 2 of the List of Timelines attached to the judgment in prior instance, and it is found that each of Posted Images 1-2-1 to 1-2-4 is displayed only partially on the timeline. Posted Image 1-2-2 is an image of a page for selling "porcelain kagami-mochi (unique kagami-mochi)" on Rakuten-Ichiba shopping site, and it contains the photograph of the product, "porcelain kagami-mochi" (Exhibit Otsu 2-3 Photograph)

(Exhibit Ko 2-3; Exhibit Otsu 2-3).

(2) Regarding defamation

A. As mentioned in (1) above, in Tweet 1-2, the texts, "トレス常習犯ですわ。[A habitual tracer.]" and "Y′ さん [Y'-san]", are posted together with two images each consisting of Appellee's Illustration 2 and Exhibit 2-3 Photograph which are overlaid on each other. The term "常習犯" has a meaning of a criminal offense, and it also has a meaning of "repeating the same wrongdoing, or a person who does so" (Kojien, seventh edition). On the basis of the ordinary care and way of reading of general readers, it is understood that the term "常習犯" is used with the latter meaning in Tweet 1-2, and the abovementioned texts are found to mean that the Appellee who acts under the pen name of "Y'" "repeatedly created illustrations by performing the act of tracing and published them as his/her original illustrations." Then, in light of the fact that the Appellee has acted as a professional illustrator, Tweet 1-2 means that the Appellee, an illustrator, repeatedly engaged in publishing an illustration created by tracing another person's illustration as his/her original work, which is questionable under the Copyright Act, and it is a fact that can sufficiently make prospective purchasers of the Appellee's works pause in purchasing works from such illustrator. Therefore, it is found that the Appellee's social reputation as an illustrator has been undermined due to the allegation of that fact through the posting of Tweet 1-2 by Poster 1. On the basis of the ordinary care and way of reading of general readers, the fact that the Appellee "repeatedly created illustrations by performing the act of tracing and published them as his/her original illustrations" can be regarded as a specific matter concerning another person that can be proved to be true or false by evidence, etc., and hence, Tweet 1-2 constitutes an allegation of a fact meaning a specific matter concerning the Appellee.

B. The next question is whether there is justifiable cause for noncompliance with the law with regard to the posting of Tweet 1-2.

(a) As mentioned in (1) above, Tweet 1-2 consists of an image created by overlaying Appellee's Illustration 2 and Exhibit Otsu 2-3 Photograph one on the other, with the texts, "トレス常習犯ですわ。[A habitual tracer.]" and "Y′ さん [Y'-san]." Taking all these into account, Tweet 1-2 is interpreted as alleging a fact that the Appellee, who is called "Y'," "repeatedly created illustrations by performing the act of tracing and published them as his/her original illustrations," and also alleging that Appellee's Illustration 2 attached to that tweet, was created by tracing Exhibit Otsu 2-3 Photograph, and this supports the alleged fact. Therefore, the important part of the alleged fact is that [i] Appellee's Illustration 2 was created by tracing Exhibit Otsu 2-3 Photograph, and [ii] the Appellee repeatedly created illustrations by performing the act of tracing

and published them as his/her original illustrations.
(b) Examination is made on the premise of the above. Appellee's Illustration 2 and Exhibit Otsu 2-3 Photograph are identical with each other in terms of the kagami-mochi, the mikan (citrus) put on top of the kagami-mochi, and the shapes, color tone and lines of the leaves of the mikan. Furthermore, when the sizes of the kagami-mochi in Appellee's Illustration 2 and Exhibit Otsu 2-3 Photograph are adjusted to be the same, the illustration and the photograph are also identical with each other in terms of the plate on which the kagami-mochi is placed, specifically, the position, length of depth, thickness, and brown color. It is very unlikely that all these features become identical accidentally, and it is appropriate to find that Appellee's Illustration 2 was created by tracing Exhibit Otsu 2-3 Photograph.

In this respect, the Appellee alleges that Appellee's Illustration 2 was created by making reference to an illustration, etc. of kagami-mochi that is different from Exhibit Otsu 2-3 Photograph, and that it was not created by tracing another person's photograph, etc. However, according to evidence (Exhibit Otsu 17), it is found that: when "kagami-mochi" was searched by image search on Google on July 3, 2020, Exhibit Otsu 2-3 Photograph was displayed first; and among kagami-mochi observed in more than 30 pieces of images displayed as the search results, the kagami-mochi in Exhibit Otsu 2-3 Photograph is the only one that is identical with the kagami-mochi in Appellee's Illustration 2 in terms of the number and shape of the leaves of the mikan put on top of the kagami-mochi, and the kagami-mochi in Exhibit Otsu 2-3 Photograph is the only one that is identical with the kagami-mochi in Appellee's Illustration 2 in terms of the ratio in size between the mikan and the kagami-mochi and the ratio between the kagami-mochi and the plate placed thereunder. Furthermore, the Appellee submitted a rough sketch of Appellee's Illustration 2 (Exhibit Ko 19) and also submitted a video taken to record the scene where the Appellee created an illustration in the same manner as that the Appellee had created Appellee's Illustration 2 (Exhibit Ko 45). Both of these articles of evidence were created after the posting of Tweet 1-2. Moreover, in the abovementioned rough sketch and the illustration created in the abovementioned video, it is found that the Appellee drew a picture by putting two axisymmetric oval figures with different sizes one above the other and putting an approximate circle on top of them. The kagami-mochi in Appellee's Illustration 2 does not consist of such axisymmetric oval figures, and the mikan in Appellee's Illustration 2 cannot be deemed to be an approximate circle. In addition, the position of the line drawn underneath the kagami-mochi and the shape of the leaves of the mikan in the abovementioned rough sketch are different from the line of the plate placed underneath the kagami-mochi and

the shape of the leaves of the mikan in Appellee's Illustration 2. The number and shape of the leaves of the mikan in the illustration created in the abovementioned video are different from those of the leaves of the mikan in Appellee's Illustration 2. Therefore, even if drawing is continued using the abovementioned rough sketch or the illustration created in the abovementioned video, it cannot be presumed that an illustration that is the same as Appellee's Illustration 2 would be completed. Accordingly, the Appellee's allegation mentioned above cannot be accepted.

(c) According to evidence (Exhibits Otsu 2-1, 16-1 to 16-11, 86-1 and 86-2), it is found that the Appellee, at least on multiple occasions, created illustrations by tracing other persons' photographs or illustrations, and published them on Twitter or the blog site as his/her original illustrations with his/her signature affixed thereto. Furthermore, as mentioned in 1(3) above, it is highly probable that the alleged fact that "Appellee's Illustration 1 was created by tracing Exhibit Otsu 1-2" is true.

(d) Taking all these points into account, it is found that the Appellee repeatedly created illustrations by tracing other persons' photographs and illustrations and published them as his/her original illustrations. Therefore, it is highly possible that the alleged fact that the Appellee repeatedly created illustrations by performing the act of tracing and published them as his/her original illustrations is true.

(e) In light of the facts that the Appellee is a professional illustrator and that Tweet 1-2 was posted on the same thread as Tweet 1-1, the act of posting Tweet 1-2 can be considered to be related to a fact concerning public interest and be intended exclusively to promote public interest, as in the case of the act of posting Tweet 1-1.

(f) According to the above, it must be said that with regard to defamation by the posting of Tweet 1-2, it is not sufficiently proved that there are no such circumstances suggesting the existence of justifiable cause for noncompliance with the law.

Accordingly, with regard to defamation by the posting of Tweet 1-2, it is not found that the "violation of the right is obvious."

(3) Regarding violation of the copyright (right of reproduction, right of automatic public transmission)

A. Poster 1 posted Tweet 1-2 without obtaining permission from the Appellee, and it can be said that by doing so, Poster 1 reproduced the image data of Appellee's Illustration 2 on Twitter's server and made it available for transmission.

B. The Appellant alleges that the use of Appellee's Illustration 2 mentioned in A. above constitutes "quotation" and it is therefore legal. This allegation is examined as follows.

(a) Looking at Tweet 1-2, as mentioned in (1) above, it consists of two images created by overlaying Exhibit Otsu 2-3 Photograph and Appellee's Illustration 2 one on the

other, and the following texts: "この鏡餅も画像検索ですぐ出てきた。[This kagami-mochi was found right away by image search.]"; "トレス常習犯ですわ。[A habitual tracer.]"; and "Y′ さん [Y'-san]." Tweet 1-2 alleges that the Appellee, who is called Y', repeatedly created illustrations by performing the act of tracing and published them as his/her original illustrations. By presenting Appellee's Illustration 2 and Exhibit Otsu 2-3 Photograph as evidence supporting that allegation, Tweet 1-2 is intended to verify that Appellee's Illustration 2 was created by tracing Exhibit Otsu 2-3 Photograph, which is an image of kagami-mochi displayed at once by image search, and thereby criticize it. Therefore, it can be said that Poster 1 used Appellee's Illustration 2 for the purpose of critique.

(b) a. Next, the Appellee's illustrations are used in Tweet 1-2 as follows: Appellee's Illustration 2 is displayed in a manner that Exhibit Otsu 2-3 Photograph is overlaid on it (Posted Images 1-2-3 and 1-2-4); and Appellee's Illustration 2 is contained in the image of the tweet by the Appellee (Posted Image 1-2-1). These images together with the image including Exhibit Otsu 2-3 Photograph (Posted Image 1-2-2) are attached to the texts mentioned above. On the timeline, as indicated in 2 of the List of Timelines attached to the judgment in prior instance, the image data of the abovementioned four images is displayed only partially depending on the specification of Twitter or the specification of the client app for displaying tweets, and Posted Images 1-2-1 to 1-2-4 are displayed as they are when each image is clicked.

b. As mentioned in (a) above, the abovementioned images are used for the purpose of verifying that Appellee's Illustration 2 was created by tracing Exhibit Otsu 2-3 Photograph. It is necessary to use Posted Image 1-2-1, which is the image of the tweet containing Appellee's Illustration 2 posted by the Appellee, as it is, together with Posted Image 1-2-2, which contains Exhibit Otsu 2-3 Photograph to be compared with the former, in order to verify similarity of the illustration and the photograph by indicating the sources thereof, and it can be said that Posted Image 1-2-1 is used in a manner that can ensure objectivity to a greater extent than expressions only by means of texts.

c. Posted Images 1-2-3 and 1-2-4 show Exhibit Otsu 2-3 Photograph and Appellee's Illustration 2 which are overlaid on each other. In Posted Image 1-2-3, Appellee's Illustration 2 with high transparency is overlaid on Exhibit Otsu 2-3 Photograph, and in Posted Image 1-2-4, Appellee's Illustration 2 that is adjusted to show only the dark color part in purple is overlaid on Exhibit Otsu 2-3 Photograph. Thus, both posted images are displayed in a manner that it is easily recognized that the color tone of Appellee's Illustration 2 is adjusted. In the course of examining the similarity of an illustration and a photograph, overlaying the illustration and photograph one on the

other in a manner that each can be distinguished can be regarded as a method that is convenient for verification and can ensure objectivity. In the present case, in Posted Image 1-2-3, the color tone of Appellee's Illustration 2 is maintained and its color is turned light, and in Posted Image 1-2-4, the color tone of Appellee's Illustration 2 is changed. Such method of showing images consisting of an illustration and a photograph which are overlaid on each other can be considered to be helpful for distinguishing each.
d. Accordingly, it can be said that for general readers of Tweet 1-2, the manner in which Appellee's Illustration 2 is used in Tweet 1-2 is convenient for examining the content of the article and can ensure objectivity.

In view of such manner of use, there are no such circumstances suggesting that Appellee's Illustration 2 is used in Tweet 1-2 for purposes such as the independent object of appreciation, and hence, it cannot be said that Appellee's Illustration 2 is used beyond the purpose of verification of Appellee's Illustration 2 and Exhibit Otsu 2-3 Photograph through comparison.
e. Consequently, it is appropriate to find that the use of the Appellee's illustrations in Tweet 1-2 is conducted within a scope that is justified for critique, which is the purpose of quotation referred to in (a) above.
(c) As mentioned in 1. (4) C. (c) above, considering that violation of the moral rights of an author (right to integrity) cannot be found as explained in (4) below, the use of Appellee's Illustration 2 in Tweet 1-2 can be considered to be consistent with fair practices.
(d) Accordingly, the use of Appellee's Illustration 2 in Tweet 1-2 is legal as "quotation."
C. According to the above, with regard to violation of the copyright by the posting of Tweet 1-2, it is not found that the "violation of the right is obvious."
(4) Regarding violation of the moral rights of an author (right to integrity)

As mentioned in (1) above, [i] Posted Images 1-2-3 and 1-2-4 show Appellee's Illustration 2 and Exhibit Otsu 2-3 Photograph which are overlaid on each other, and [ii] on the timeline of Twitter, Appellee's Illustration 2 is only partially displayed in Posted Images 1-2-1, 1-2-3, and 1-2-4. Therefore, there is room to consider that these posted images are created through modification or cutting of Appellee's Illustration 2. However, as explained in 1. (5) above, it can be said that for all of these images, the use of the illustration is a "modification that is found to be unavoidable" as referred to in Article 20, paragraph (2), item (iv) of the Copyright Act.

Accordingly, regarding violation of the moral rights of an author (violation of the right to integrity) by the posting of Tweet 1-2, it is not found that the "violation of the right is obvious."

(5) Regarding violation of the business right

As mentioned in (2) to (4) above, it cannot be said that the violation of the right to honor, copyright, and moral rights of an author by the posting of Tweet 1-2 is obvious, nor can it be said that the posting of Tweet 1-2 by Poster 1 is illegal, and therefore, regarding violation of the business right by the posting of Tweet 1-2, it is not found that the "violation of the right is obvious."

(6) Consequently, it is not found that the "violation of the rights" by the posting of Tweet 1-2 "is obvious."

3. Issue 1-3 (Whether the violation of the rights by the posting of Tweet 2-1 is obvious)

(1) According to evidence (Exhibits Ko 3-1 to 3-3, 38-1 and 38-2; Exhibits Otsu 3-1 to 3-3), Tweet 2-1 was posted by Poster 2 at 7:21 p.m. on April 7, 2020. It consists of the texts, "Y′ 様がトレースを否定するツイートをされたようです[Y'-sama posted a tweet to deny his/her tracing]", "それを信じているファンの皆様 [To his/her fans who believe this tweet]", "一度こちらのイラストを見て下さい[Please take a look at this illustration]", "これもまた、Y′ 様が描いたイラストです[This is also an illustration drawn by Y'-sama]", and "横顔のイラストと比較し、画力の差に違和感を感じませんか？[Comparing his/her illustration of a profile, don't you feel odd about the difference in the abilities to draw?]", and the following images: [i] Appellee's Illustration 3 (Posted Image 2-1-1), and [ii] Appellee's Illustration 4 (Posted Image 2-1-2). It is found that Tweet 2-1 is displayed on the timeline as indicated in 3 of the List of Timelines attached to the judgment in prior instance.

(2) Regarding violation of the copyright (right of reproduction, right of automatic public transmission)

A. Poster 2 posted Tweet 2-1 without obtaining permission from the Appellee (Exhibit Ko 9), and it can be said that by doing so, Poster 2 reproduced the image data of Appellee's Illustrations 3 and 4 on Twitter's server and made them available for transmission.

B. The Appellant alleges that the use of Appellee's Illustrations 3 and 4 mentioned in A. above constitutes "quotation" and it is therefore legal. This allegation is examined as follows.

(a) Looking at Tweet 2-1, as mentioned in (1) above, it consists of two images, which are Appellee's Illustrations 3 and 4, and the following texts: "Y′ 様がトレースを否定するツイートをされたようです[Y'-sama posted a tweet to deny his/her tracing]"; "それを信じているファンの皆様 [To his/her fans who believe this tweet]"; "一度こちらのイラストを見て下さい[Please take a look at this illustration]"; "これもまた、Y′ 様が描いたイラストです[This is also an illustration drawn by Y'-sama]";

and "横顔のイラストと比較し、画力の差に違和感を感じませんか？[Comparing his/her illustration of a profile, don't you feel odd about the difference in the abilities to draw?]." Following Tweet 2-1, Tweet 2-2 was posted in the same thread, and Appellee's Illustration 5, in which six illustrations of a woman's profile created by the Appellee are shown side-by-side (Exhibit Ko 4-3; Exhibit Otsu 4-3; these six illustrations are found to have been created by reproducing or adapting Appellee's Illustration 1 in light of their similarity) is attached to Tweet 2-2. Taking this into consideration along with the abovementioned texts, it is found that Tweet 2-1 is intended to criticize the Appellee for posting a tweet to deny his/her act of tracing, and to point out that in light of the Appellee's ability to draw, which is observed in illustrations other than the illustrations of a woman's profile contained in Appellee's Illustration 5, these illustrations of a woman's profile are unnatural because they appear to have been created by a person with a greater ability to draw, with a view to verifying that the abovementioned illustrations of a woman's profile were created by the act of tracing. It is appropriate to find that as in the case of Tweets 1-1 and 1-2, the term "tracing" used herein refers to displaying the original illustration or photograph and directly copying it by following its lines, using a tool such as an app for creating illustrations.

Accordingly, it is appropriate to find that Poster 2 used Appellee's Illustrations 3 and 4 in Tweet 2-1 for the purpose of critique. The Appellee alleges that Poster 2 quoted Appellee's Illustrations 3 and 4 for unjust purposes. However, as mentioned in 1. (3) and 2. (2) above, it is highly probable that Appellee's Illustration 1 was created by tracing Exhibit Otsu 1-2 Illustration, and the Appellee repeatedly created illustrations by tracing other persons' photographs and illustrations and published them as his/her original illustrations. It is not found that Poster 2 posted Tweet 2-1 for unjust purposes such as libeling the Appellee by groundlessly posting a tweet that implies that the Appellee engaged in illegal conduct. Therefore, it cannot be said that Poster 2 posted Tweet 2-1 by attaching Appellee's Illustrations 3 and 4 to it for unjust purposes.

(b) Next, the Appellee's illustrations are used in Tweet 2-1 as follows. Appellee's Illustrations 3 and 4 are attached to this tweet as they are. As mentioned in (a) above, Poster 2 intends to show that the illustrations of a woman's profile created by the Appellee, which are contained in Appellee's Illustration 5, are unnatural in terms of the ability to draw when compared with other illustrations created by the Appellee, with a view to verifying that the abovementioned illustrations of a woman's profile were created by the act of tracing. In order to assess the Appellee's ability to draw, which is observed in the illustrations other than the illustrations of a woman's profile, it is

appropriate to comparatively observe multiple illustrations created by the Appellee. In light of the manner of use as described above, it cannot be said that Appellee's Illustrations 3 and 4 are used in Tweet 2-1 beyond the purpose of verifying the Appellee's ability to draw.

In this respect, the Appellee alleges that since Posted Image 2-1-2 (Appellee's Illustration 4) significantly differs from Appellee's Illustration 1 in terms of the composition, there is little need to quote that image and the posting thereof cannot be deemed to be within a scope that is justified for the purpose of quotation. However, as mentioned in (a) above, the purpose of quotation is to point out that in light of the Appellee's ability to draw, the illustrations of a woman's profile contained in Appellee's Illustration 5 are unnatural because they appear to have been created by a person with a greater ability to draw, with a view to verifying that the abovementioned illustrations of a woman's profile were created by the act of tracing. As mentioned above, in order to assess the Appellee's ability to draw, it is appropriate to comparatively observe multiple illustrations created by the Appellee, and it is difficult to assess the Appellee's ability to draw only from one illustration created by the Appellee. Therefore, it cannot be said that there is no need to quote Appellee's Illustration 4, and hence the Appellee's allegation mentioned above cannot be accepted.

Consequently, it can be said that the use of Appellee's Illustrations 3 and 4 in Tweet 2-1 is conducted within a scope that is justified for the purpose of quotation.

(c) There are no such circumstances under which the use of Appellee's Illustrations 3 and 4 in Tweet 2-1 is found to be contrary to fair practices.

(d) Accordingly, the use of Appellee's Illustrations 3 and 4 in Tweet 2-1 is legal as "quotation."

C. Consequently, with regard to violation of the copyright by the posting of Tweet 2-1, it is not found that the "violation of the right is obvious."

(3) Regarding violation of the business right

As mentioned in (2) above, it cannot be said that the violation of the copyright by the posting of Tweet 2-1 is obvious, nor can it be said that the posting of Tweet 2-1 by Poster 2 is illegal, and therefore, regarding violation of the business right by the posting of Tweet 2-1, it is not found that the "violation of the right is obvious."

(4) Consequently, it is not found that the "violation of the rights" by the posting of Tweet 2-1 "is obvious."

4. Issue 1-4 (Whether the violation of the rights by the posting of Tweet 2-2 is obvious)

(1) According to evidence (Exhibits Ko 4-1 to 4-3, 38-1 and 38-2; Exhibits Otsu 4-1 to 4-3), Tweet 2-2 was posted by Poster 2 at 7:26 p.m. on April 7, 2020, following Tweet

2-1 in the same thread as this tweet. It consists of the texts, "特に横顔同士で比較してみてください[Compare the illustrations focusing on the profile]", "左の絵には鼻と唇の間に不自然な山があり「横顔がどうなっているか」という基本的なデッサンを理解していない方が描いたようにしか見えません[In the picture on the left, there is an unnatural mountain between the nose and the lip, and this picture definitely appears to have been drawn by a person who does not understand the basics of drawing as to how to draw a person's profile]", "Y′様は他のイラストでも手が描けない方です[Y'-sama cannot draw hands in other illustrations]", "それでもトレースしていない、という主張を信じられるでしょうか[Can you still believe Y'-sama's allegation that he/she does not trace others' illustrations?]", and the following images: [i] Appellee's Illustration 3, with a red box put to surround the part of the mouth (Posted Image 2-2-1); and [ii] Appellee's Illustration 5, in which six illustrations of a woman's profile created by the Appellee are shown side-by-side (Posted Image 2-2-2). Tweet 2-2 is displayed on the timeline as indicated in 4 of the List of Timelines attached to the judgment in prior instance, and it is found that Posted Image 2-2-2 is displayed only partially on the timeline.

(2) Regarding violation of the copyright (right of reproduction, right of automatic public transmission)

A. Poster 2 posted Tweet 2-2 without obtaining permission from the Appellee (Exhibit Ko 9), and it can be said that by doing so, Poster 2 reproduced the image data of Appellee's Illustrations 3 and 5 on Twitter's server and made it available for transmission.

B. The Appellant alleges that the use of Appellee's Illustrations 3 and 5 mentioned in A. above constitutes "quotation" and it is therefore legal. This allegation is examined as follows.

(a) Looking at Tweet 2-2-, as mentioned in (1) above, it consists of Appellee's Illustration 3, with a red box put to surround the part of the mouth, and Appellee's Illustration 5, and the following texts: "特に横顔同士で比較してみてください[Compare the illustrations focusing on the profile]"; "左の絵には鼻と唇の間に不自然な山があり「横顔がどうなっているか」という基本的なデッサンを理解していない方が描いたようにしか見えません[In the picture on the left, there is an unnatural mountain between the nose and the lip, and this picture definitely appears to have been drawn by a person who does not understand the basics of drawing as to how to draw a person's profile]"; "Y′様は他のイラストでも手が描けない方です[Y'-sama cannot draw hands in other illustrations]"; "それでもトレースしていない、という主張を信じられるでしょうか[Can you still believe Y'-sama's allegation that

he/she does not trace others' illustrations?]." In light of the content of these texts and the fact that Tweet 2-2 was posted following Tweet 2-1 in the same thread, it is found that Tweet 2-2 is intended to criticize the Appellee for posting a tweet to deny his/her act of tracing, and to point out that the illustrations of a woman's profile contained in Appellee's Illustration 5 are unnatural because they appear to have been created by a person with a greater ability to draw, with a view to verifying that the abovementioned illustrations of a woman's profile were created by the act of tracing.

Accordingly, it is appropriate to find that Poster 2 used Appellee's Illustrations 3 and 5 in Tweet 2-2 for the purpose of critique.

(b) Next, the Appellee's illustrations are used in Tweet 2-2 as follows. Appellee's Illustration 3 is attached to this tweet, with a red box put to surround the part of the mouth, and Appellee's Illustration 5 is attached to the same as it is. As mentioned in (a) above, Poster 2 intends to show that the illustrations of a woman's profile created by the Appellee, which are contained in Appellee's Illustration 5, are unnatural in terms of the ability to draw when compared with other illustrations created by the Appellee, with a view to verifying that the abovementioned illustrations of a woman's profile were created by the act of tracing. When an illustration in which multiple illustrations of a woman's profile that are suspected of having been created by the act of tracing are shown side-by-side (Appellee's Illustration 5) and an illustration to compare with the former (Appellee's Illustration 3) are attached to a tweet, it can be said that these illustrations are used in a manner that is convenient for comparing the ability to draw and can ensure objectivity. In addition, putting a red box to surround the part that particularly needs to be compared can help in understanding Poster 2's arguments. That red box is put in a manner that it can be easily distinguished from Appellee's Illustration 3 and it is not likely to cause confusion among general readers.

Accordingly, it can be said that for general readers of Tweet 2-2, the manner in which Appellee's Illustrations 3 and 5 are used in Tweet 2-2 is convenient for examining the content of the article and can ensure objectivity. In view of such manner of use, it cannot be said that these illustrations are used beyond the purpose of verification of the Appellee's ability to draw.

Consequently, it can be said that the use of Appellee's Illustrations 3 and 5 in Tweet 2-2 is conducted within a scope that is justified for the purpose of quotation.

(c) In addition to the circumstances pointed out in (b) above, as explained in (3) below, the use of Appellee's Illustrations 3 and 5 in Tweet 2-2 cannot be considered to be illegal from the perspective of violation of the right to integrity as well, and in light of this, it can be said that attaching Appellee's Illustrations 3 and 5 to Tweet 2-2 is consistent with

fair practices.
(d) Accordingly, the use of Appellee's Illustrations 3 and 5 in Tweet 2-2 is legal as "quotation."
C. Consequently, with regard to violation of the copyright by the posting of Tweet 2-2, it is not found that the "violation of the right is obvious."
(3) Regarding violation of the moral rights of an author (right to integrity)

As mentioned in (1) above, [i] Posted Image 2-2-1 is Appellee's Illustration 3 with a red box put to surround the part of the mouth, and [ii] Posted Image 2-2-2 displayed on the timeline of Twitter is displayed only partially. Therefore, there is room to consider that these posted images are created through modification or cutting of Appellee's Illustration 3 or 5. However, regarding [i], the use of the illustration can be regarded as a modification within an extent necessary for indicating the part that particularly needs to be compared, and regarding [ii], for the same reason as that mentioned in 1. (5) above, the use of the illustration can be regarded as a "modification that is found to be unavoidable" as referred to in Article 20, paragraph (2), item (iv) of the Copyright Act.

Accordingly, regarding violation of the moral rights of an author (violation of the right to integrity) by the posting of Tweet 2-2, it is not found that the "violation of the right is obvious."
(4) Regarding violation of the business right

As mentioned in (2) and (3) above, it cannot be said that the violation of the copyright and moral rights of an author by the posting of Tweet 2-2 is obvious, nor can it be said that the posting of Tweet 2-2 by Poster 2 is illegal, and therefore, regarding violation of the business right by the posting of Tweet 2-2, it is not found that the "violation of the right is obvious."
(5) Consequently, it is not found that the "violation of the rights" by the posting of Tweet 2-2 "is obvious."
No. 4. Conclusion

For the reasons stated above, all of the Appellee's claims are groundless and should be dismissed. The judgment that partially upheld these claims is inappropriate and the appeal is well-grounded. Therefore, the part of the judgment in prior instance which is against the Appellant is revoked, the Appellee's claims concerning the revoked part are dismissed, and the judgment is rendered as indicated in the main text.

Intellectual Property High Court, Second Division
Presiding judge: HONDA Tomonari

Judge: ASAI Ken
Judge: KATSUMATA Kumiko

Attachment

List of Identification Information of Senders

Information regarding the persons who posted the articles indicated in Attached List of Posted Articles 1 and Attached List of Posted Articles 2, which falls under the following.

1. Among IP addresses used upon making logins to the accounts indicated in the user name columns of Attached List of Posted Articles 1 and Attached List of Posted Articles 2, all of the IP addresses held by the Appellant which correspond to the logins made during the period from April 3 2020, until the end of conclusion of oral argument

2. The dates and times when the login information referred to in the preceding paragraph was transmitted from the telecommunication facilities, to which the IP addresses referred to in the preceding paragraph are assigned, to the specified telecommunication facilities used by the Appellant

3 (1)The telephone number of the administrator of the account indicated in the user name column in Attached List of Posted Articles 1

(2) The email address of the administrator of the account indicated in the user name column in Attached List of Posted Articles 1 (an email address used by a communication method for sending correspondences and other information to mobile communication terminal equipment, using a telephone number for sending and receiving)

4. The email address of the account administrator indicated in the user name column in Attached List of Posted Articles 2 (an email address used by a communication method that uses simple mail transfer protocol entirely or partially)

End

Attachment

List of Posted Articles 1

1. Tweet 1-1

URL for viewing	https:// (omitted hereinafter)
Name	B
User name	B'
Posting date and time	10:30 p.m. on April 3, 2020
Content of post	これどうだろう ww [What about this? (laugh)] ゆるーくトレス？ 普通にオリジナルで描いてもここまで比率が同じになるかな [Roughly traced? Would the ratio be so close even when an illustration is drawn as an original in a normal manner?]

2. Tweet 1-2

URL for viewing	https:// (omitted hereinafter)
Name	B
User name	B'
Posting date and time	1:31 a.m. on April 5, 2020
Content of post	この鏡餅も画像検索ですぐ出てきた。[This kagami-mochi was found right away by image search.] トレス常習犯ですわ。[A habitual tracer.] Y′ さん [Y'-san]

End

Attachment

List of Posted Articles 2

1. Tweet 2-1

URL for viewing	https:// (omitted hereinafter)
Name	C
User name	C'
Posting date and time	7:21 p.m. on April 7, 2020
Content of post	"Y′ 様がトレースを否定するツイートをされたようです[Y'-sama posted a tweet to deny his/her tracing] それを信じているファンの皆様 [To his/her fans who believe this tweet] 一度こちらのイラストを見て下さい[Please take a look at this illustration] これもまた、Y′ 様が描いたイラストです[This is also an illustration drawn by Y'-sama] 横顔のイラストと比較し、画力の差に違和感を感じませんか？[Comparing his/her illustration of a profile, don't you feel odd about the difference in the abilities to draw?]

2. Tweet 2-2

URL for viewing	https:// (omitted hereinafter)
Name	C
User name	C'
Posting date and time	7:26 p.m. on April 7, 2020
Content of post	特に横顔同士で比較してみてください[Compare the illustrations focusing on the profile] 左の絵には鼻と唇の間に不自然な山があり「横顔がどうなっているか」という基本的なデッサンを理解していない方が描いたようにしか見えません[In the picture on the left, there is an unnatural mountain between the nose and the lip, and this picture definitely appears to have been drawn by a person who does not understand the basics of drawing as to how to draw a person's profile] Y′ 様は他のイラストでも手が描けない方です[Y'-

	sama cannot draw hands in other illustrations] それでもトレースしていない、という主張を信じられるでしょうか [Can you still believe Y'-sama's allegation that he/she does not trace others' illustrations?]

End