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judgedate

2020.07.21

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2018(Ju)1412

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reporter

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casetitle

Judgment concerning whether the process wherein "the work is made available or presented to the public" as referred to in Article 19, paragraph (1) of the Copyright Act is required to be carried out through the exploitation of the work regarding which any of the rights prescribed in Articles 21 to 27 of the same Act exists

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casename

Case seeking the disclosure of identification information of the senders

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caseresult

Judgment of the Third Petty Bench, dismissed

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Intellectual Property High Court, Judgment of April 25, 2018

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summary_judge

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1. The process wherein "the work is made available or presented to the public" as referred to in Article 19, paragraph (1) of the Copyright Act is not required to be carried out through the exploitation of the work regarding which any of the rights prescribed in Articles 21 to 27 of the same Act exists.

2. Where a person made a post, via an information network on the internet, with an image of a photograph, which is another person's work, and this image was displayed, with its part containing the indication of the author's name having been cut off, on the terminals of the viewers of the webpage of that post, the person who made the post cannot be deemed to have indicated the author's name, even if the viewers could have viewed the original image accompanied by the indication of the author's name, under the following circumstances (1) and (2) described in the judgment:

(1) the original image accompanied by the indication of the author's name can be viewed only on the webpage that is different from the abovementioned webpage; and

(2) there are no such circumstances where it can be said that the abovementioned viewers would normally click the displayed image.

3. Where a person who seeks the disclosure of 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 Senders suffered infringement of his/her right of attribution regarding a photograph which is the person's work, due to a post containing an image of the photograph made via an information network on the internet, it can be said under the following circumstances that the person who made that post falls within the category of "senders of infringing information" referred to in that paragraph, and has infringed the right of the person who seeks the disclosure of identification information of the senders, "by the distribution of infringing information" referred to in item (i) of that paragraph: when that post was made, data including HTML (a language for describing the structure, etc. of a webpage) data concerning the link to the file of that image and the designation of the manner of displaying the image was recorded on the recording medium in a specified telecommunications facility and transmitted to the terminals of the viewers of the webpage of the post, causing the data of that image to be transmitted from the server of the linked page to those terminals, thereby causing the image to be displayed on the terminals with its parts having been cut off as designated, due to which the indication of the author's name attached to the image was not displayed and the author's right of attribution was infringed.

(There is a concurring opinion concerning 2.)

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references

(Concerning 1 to 3) Article 19, paragraph (1) of the Copyright Act

(Concerning 1) Articles 21, 22, 23, 24, 25, 26, 26-2 (excluding paragraph (2)), 26-3, and

27 of the Copyright Act

(Concerning 2) Article 19, paragraph (2) of the Copyright Act

(Concerning 3) Article 2, item (iv) and Article 4, paragraph (1) of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders

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maintext

The final appeal is dismissed.

The cost of the final appeal shall be borne by the appellant of final appeal.

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reason

I. Outline of the case

1. In this case, the appellee, who is the author of the photograph indicated in the list of photograph attached to the judgment in first instance (hereinafter referred to as the "Photograph"), alleges that the appellee's right of attribution (hereinafter referred to as the "Right of Attribution") and other rights for the Photograph have been infringed by the posts on the websites of Twitter (an information network via which users can post messages, etc. called tweets using the internet), and demands the appellant, the company operating Twitter, to disclose the identification information of the senders of these posts under Article 4, paragraph (1) of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (hereinafter referred to as the "Provider Liability Limitation Act").

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

(1) The appellee is a photographer and the author of the Photograph. The appellant is a U.S. company operating Twitter.

(2) In 2009, the appellee posted an image of the Photograph with a copyright mark, alphabetic characters representing the appellee's name and other elements (hereinafter referred to as the "Indication of the Name") attached to its corner (hereinafter referred to as the "Image of the Photograph") on his/her own website.

(3) In December 2014, a tweet containing an image, which was a copy of the Image of the Photograph, was posted on the Twitter account specified as "Account 2" in the list of accounts attached to the judgment in prior instance, without the appellee's permission. As a result, the image specified in 2(2) of the list of distributed information attached to the judgment in first instance, which was a copy of the Image of the Photograph, was saved on the server as an image file with the URL specified in 2(2) of the same list (hereinafter the image and URL specified in 2(2) of the same list are referred to as the "Original Image" and the "URL for Saving the Image File").

(4) After that, retweets ("retweet" means a second or subsequent post made by a user by introducing or quoting a third party's tweet) of the tweet mentioned in (3) above were posted respectively on the Twitter accounts specified as "Accounts 3 to 5" in the list of accounts attached to the judgment in prior instance (hereinafter these accounts and these retweets are referred to as the "Accounts" and the "Retweets," respectively, and the messages, etc. posted by the Retweets are referred to as the "Retweeting Articles"; the persons who posted the Retweets are referred to as the "Retweeters"). As a result, the images specified in 3 to 5 of the list of distributed information attached to the judgment in first instance (hereinafter referred to as the "Displayed Images") were

displayed as part of the Retweeting Articles on the timelines ("timeline" is a page on which a user's tweets are displayed in chronological order) of the Accounts, which can be viewed by unspecified persons. The Displayed Images were displayed in the trimmed form of the Original Image with its upper and lower parts having been cut off, due to which the Indication of the Name is not displayed.

(5) The Displayed Images are displayed on the timelines of the Accounts because, when the Retweets were posted, a link (generally called an "inline link") to the file of the Original Image saved in the URL for Saving the Image File was automatically created on the webpages for these timelines (the webpages on the URLs specified in 3 to 5 in the list of distributed information attached to the judgment in first instance; hereinafter referred to as the "Webpages").

In other words, when the Retweets were posted, data in which the information indicating the link mentioned above and the information designating the manner of displaying the image on the linked page (the size, position, etc.) is described using HTML (a language for describing the structure, etc. of a webpage) (hereinafter such data is referred to as the "Linked Image Display Data") was automatically recorded in the recording medium on the server of the Webpages (the webpages providing the link). When persons who view websites using the internet (hereinafter referred to as "users") access the Webpages, the following steps are performed automatically: (i) the Linked Image Display Data is transmitted to the users' terminals from the server of the Webpages; (ii) as a result, the data of the Original Image (data of the file on the linked page) is transmitted to these terminals from the server related to the URL for Saving the Image File, without operation by users; and (iii) the image in question is displayed on the screens of the terminals in the designated manner. On the system of Twitter provided by the appellant, images that are different from the original image on a

linked page in terms of the horizontal and vertical size or images created by trimming the original image are displayed depending on the designation by HTML, etc. regarding the manner of displaying the image on the linked page. In the present case as well, the Displayed Images were displayed on the screens of the abovementioned terminals in the trimmed form as mentioned in (4), due to which the Indication of the Name was not displayed.

II. Reason 3-2 for a petition for acceptance of final appeal stated by the counsel for final appeal, NAKAJIMA Toru, et al.

1. The counsel argue that the court of prior instance that found infringement of the Right of Attribution by the Retweets erred in interpreting and applying the Copyright Act, on the following grounds: (i) since the Retweeters, when posting the Retweets, did not engage in exploitation of the work, which constitutes copyright infringement, they did not have the "work made available or presented to the public" as referred to in Article 19, paragraph (1) of the Copyright Act; and (ii) since the users who view the Webpages can view the Original Image containing the Indication of the Name by clicking the Displayed Images contained in the Retweeting Articles, the Retweeters can be deemed to have "indicated the name of the author in accordance with how the author has already done so" (paragraph (2) of the same Article) in connection with the Photograph.

2. (1) Regarding the counsel's argument (i)

Literally, Article 19, paragraph (1) of the Copyright Act does not limit its applicability to cases where a work, regarding which any of the rights prescribed in Articles 21 to 27 of the same Act exists, is made available or presented to the public through the exploitation of the work. In addition, Article 19, paragraph (1) of the same Act is considered to be intended to protect moral interests based on the relationship between

the work and its author, and this holds true regardless of whether exploitation of the work that infringes any of the abovementioned rights is involved in the process wherein the work is made available or presented to the public. Therefore, it is reasonable to consider that the process wherein "the work is made available or presented to the public" as referred to in that paragraph is not required to be carried out through the exploitation of the work regarding any of those rights.

Consequently, even if the Retweeters did not engage in exploitation of the work that could infringe any of those rights when posting the Retweets, they can be deemed to have presented the work to the public as referred to in Article 19, paragraph (1) of the Copyright Act when they caused the Displayed Images, which are works under the Copyright Act, to be displayed on the screens of the terminals of the users who viewed the Webpages.

(2) Regarding the counsel's argument (ii)

According to the facts mentioned above, the appellee attached the Indication of the Name to the corner of the Image of the Photograph in order to indicate the author's name. However, because the Retweeters transmitted the Linked Image Display Data by posting the Retweets, the Displayed Images were displayed in trimmed form and the Indication of the Name was not displayed (this manner of displaying an image is based on the system specification of Twitter, whereas the Retweeters, while knowing or not knowing it, posted the Retweets using such system, and hence, it is objectively obvious that the situation mentioned above was actually caused due to such act of the Retweeters). In addition, the Retweeters did not indicate the name of the author of the Photograph in any other way on the Webpages on which the Displayed Images were displayed by posting the Retweets.

Even though the users can view the Original Image containing the Indication of the

Name by clicking the Displayed Images contained in the Retweeting Articles, the Indication of the Name exists only on a webpage that is different from the webpages on which the Displayed Images are displayed, and the users who view the Webpages never see the indication of the author's name unless they click the Displayed Images. As well, there are no such circumstances where it can be said that the users would normally click the Displayed Images. Therefore, it should be said that the Retweeters cannot be deemed to have indicated the author's name only based on the fact that the users can view the Original Image containing the Indication of the Name by clicking the Displayed Images contained in the Retweeting Articles.

(3) For the reasons stated above, it should be said that the Retweeters infringed the Right of Attribution by the Retweets. The determination of the court of prior instance to the same effect is justifiable and can be accepted.

III. Reason 4 for a petition for acceptance of final appeal stated by the counsel for final appeal, NAKAJIMA Toru, et al.

1. The counsel argue as follows. The transmission of the Linked Image Display Data performed by the Retweeters does not meet the requirement of infringement of a person's rights "by the distribution of infringing information" as referred to in Article 4, paragraph (1), item (i) of the Provider Liability Limitation Act because the distribution of the relevant data does not in itself infringe the appellee's rights. Furthermore, in terms of the image data that is information directly infringing the appellee's rights, the Retweeters did not record any such data on recording media of specified telecommunications facilities, and hence, they do not meet the requirement of "senders of infringing information" referred to in the same paragraph. On these grounds, the counsel argue that the court of prior instance erred in interpreting and applying the Provider Liability Limitation Act as it determined that the two requirements

mentioned above were satisfied with regard to the infringement of the Right of Attribution by the Retweets, although these requirements could not have been satisfied concurrently.

2. Based on the facts mentioned above, by posting the Retweets, the Retweeters, irrespective of how they subjectively recognized their behavior, recorded the Linked Image Display Data, which pertains to the link to the file of the Original Image and the designated manner of displaying the image as described in I. 2. (5), on the recording medium of the server of the Webpages, a specified telecommunications facility, and transmitted that data to the users' terminals, thereby causing the data of the Original Image to be transmitted to these terminals from the server related to the URL for Saving the Image File, which is a linked URL, and causing those terminals to display the Displayed Images in trimmed form according to the designated manner, thus bringing about a situation in which the Indication of the Name was not displayed, and infringing the Right of Attribution. Accordingly, the transmission of the Linked Image Display Data performed as described above should be considered to have directly led to the infringement of the Right of Attribution, and in this case, it can be said that the appellee's rights have been infringed due to the distribution of the Linked Image Display Data, and the Retweeters can be regarded as persons who recorded the Linked Image Display Data, which is the "infringing information," on the recording medium in a specified telecommunications facility.

For the reasons stated above, with regard to the infringement of the Right of Attribution by the Retweets, it should be said that the Retweeters fall within the category of "senders of infringing information" referred to in Article 4, paragraph (1) of the Provider Liability Limitation Act, and that they infringed the appellee's rights "by the distribution of infringing information" as referred to in item (i) of the same

paragraph. The determination of the court of prior instance regarding the points argued by the counsel can be upheld.

IV. Conclusion

For the reasons stated above, none of the counsel's arguments can be accepted.

Accordingly, the Court unanimously decides as set forth in the main text of the judgment, except for the dissenting opinion by HAYASHI Keiichi. There is a concurring opinion by Justice TOKURA Saburo.

The concurring opinion by Justice TOKURA Saburo is as follows.

I agree with the majority opinion, but I would like to give some supplementary comments in consideration of the facts of the case.

1. When the tweet in which the Image of the Photograph was shown without the author's permission (hereinafter referred to as the "Original Tweet") was retweeted by the Retweeters, the Displayed Images, in which the Indication of the Name was not shown as a result of cutting off the upper and lower parts of the Image of the Photograph (the Original Image), were displayed as part of the Retweeting Articles on the timelines of the Accounts, due to the specifications of the system of Twitter. The image contained in the Original Tweet was also displayed in a trimmed form of the Image of the Photograph (the Original Image) with its upper and lower parts having been cut off due to the specifications of the system of Twitter in the same manner, due to which the Indication of the Name was not displayed. By posting the Retweets, the Retweeters caused the Displayed Images, in which the Indication of the Name was not contained, to be newly displayed on the timelines of the Accounts, thus failing to indicate the name of the author although the appellee had done that for the Photograph. Therefore, the Retweeters should be considered to have infringed the Right of Attribution.

It cannot be denied that if the claim of infringement of the right of attribution is upheld in such case, this would cause a certain amount of burdens on Twitter users in that when they retweet tweets in which images are contained (hereinafter referred to as the "original tweets"), they would need to check the sources of the images, indication of the author's name, and the author's consent, etc., and this would also cause psychological burdens on them due to the risk of infringement of the author's rights. However, such burdens necessarily arise in association with the care that is required to be taken in order to avoid infringing the author's rights under the existing Copyright Act when making posts on the internet, including those containing other persons' works. Even if people who have easily used Twitter and posted retweets feel that these are heavy burdens on them, this would not be a reason for considering infringement of the right of attribution by retweets differently from infringement by publications or by posts on the internet using other systems.

In the first place, if it is obvious that the image contained in the original tweet is a photograph taken by the person who posted the original tweet, it seemed that the author of the photograph, when posting the tweet, seems to have consented to the retweeting of his/her tweet by other persons. Then, a problem would arise only in the case of retweeting the original tweet containing an image which poses the risk of unauthorized posting because its source is uncertain. In addition, in some cases where the author's name is not indicated on the original image, it is found that the author of the work has chosen not to indicate his/her name for the work. In the case where the indication of the author's name contained in the original image is trimmed off in a retweet, if there are circumstances such as where users who view the timeline of the person who retweeted would normally click the displayed image in the retweeting article, the fact that the original image can be accessed by clicking it may possibly be

proof that the author's name has been indicated (whether there are such circumstances is supposed to be determined by comprehensively taking into consideration such factors as the content of the displayed image and how it is displayed, whether there is any notice that encourages viewers to click the image, on the basis of the normal level of care of ordinary users who view the timeline and their manner of viewing). In addition, there may be cases where the indication of the author's name may be omitted pursuant to Article 19, paragraph (3) of the Copyright Act. Assuming as such, it cannot be said that the burdens that would be caused on people who retweet would become excessive.

2. On the other hand, the posting of the retweets caused the Displayed Images, in which the Indication of the Name was not shown as a result of cutting off the upper and lower parts of the Image of the Photograph, to be displayed on the timelines of the Accounts, because the specifications of Twitter's system were designed to perform such processing, and the Retweeters were unable to change the manner of displaying the images. In that case, there is a possibility that people who will retweet, while not knowing such specifications of Twitter's system, might unintentionally infringe other persons' right of attribution, depending on the shape of the original image, the position of the indication of the author's name, and the layout of the image in the original tweet (if they are aware of such specifications of the system, they would be able to take measures such as checking the indication of the author's name by clicking the displayed image in the article of the original tweet and viewing the original image, and then posting a retweet with a comment in which this information is added). Twitter is used widely by people at all levels of society and has now become one of the important information distribution tools. It is reportedly being used by as many as around 45 million people in Japan alone, and it seems that not a few of them use it while not

knowing the situation explained above. In addition, the rights that might be infringed by retweets are related to technical knowledge of law regarding moral rights of author. In consideration of these points, it may not be appropriate to leave this issue to be dealt with by individual Twitter users while expecting improvement of their awareness or their independent responses. Not only from the perspective of protecting moral rights of author and avoiding the imposition of burden on Twitter users, but also from the perspective of requesting the provider of the information distribution services, which have become an important social infrastructure, to fulfill its social responsibility, the appellant is expected to take appropriate measures such as raising awareness among Twitter users.

The dissenting opinion by Justice HAYASHI Keiichi is as follows.

Contrary to the majority opinion, I consider that the Retweeters cannot be found to have infringed the Right of Attribution by posting the Retweets, and that the part of the judgment in prior instance that upheld the claim for disclosure of the identification information of the Retweeters as senders should be quashed, for the following reasons.

1. The court of prior instance found infringement of the moral rights of the author (right to integrity and right of attribution) by the Retweeters, on the grounds that the Displayed Images were displayed in the form in which the Image of the Photograph (the Original Image) had been trimmed (hereinafter this trimming is referred to as the "Modification") and as a result the Indication of the Name was not displayed. However, the Modification and the failure to display the Indication of the Name resulted from the specifications (mechanisms) of the system of Twitter, and it is the appellant that decided the method of displaying images that caused this situation. On the other hand, the Retweeters, when retweeting the Original Tweet, were unable to delete the image contained in the Original Tweet or change the manner of displaying it.

While the infringement of moral rights of the author as described above becomes an issue when an image is posted without the author's permission, the person who uploaded the image in question without the author's permission was not the Retweeters but the person who posted the Original Tweet.

Taking all these circumstances into account, I consider that the Retweeters cannot be deemed to be the persons who committed infringement of moral rights of the author.

2. Social networking services including Twitter have become an important infrastructure in society because of their capabilities to disseminate and spread information. At the same time, as a matter of course, disseminating and spreading information via social networking services must be accompanied by social responsibility. In this sense, if an image itself is legally and socially inappropriate and therefore it is clear that the image should not have been disseminated by the initial post (the original tweet) but should have been deleted (e.g., obscene images and abusive images), needless to say, it is impermissible not only to post a tweet containing such image but also to retweet that tweet, and the original tweet and its retweets do not deserve protection. However, in the present case, the Original Image itself does not seem to ordinary people as being inappropriate for dissemination, and hence, from the perspective of Twitter users in general, it poses an issue that is different in nature from an obscene image or the like. According to the view supported by the majority opinion and the court of prior instance, persons who intend to retweet a tweet that contains any such image, including an accidental image that has no relevance with the subject of the tweet, would have to investigate and check the source of the image, the consent of the author, and other matters. In my view, this would inevitably impose a heavy burden on Twitter users and could even lead to a situation where people would refrain from posting retweets when it is difficult to immediately judge whether their

retweets would infringe other people's rights. To avoid such situation, I adopt the conclusion mentioned in 1. above.

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presiding

Justice TOKURA Saburo

Justice HAYASHI Keiichi

Justice MIYAZAKI Yuko

Justice UGA Katsuya

Justice HAYASHI Michiharu

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note_other

(This translation is provisional and subject to revision.)