Date	April 25, 2018	Court	Intellectual Property High Court, Second Division
Case Number	2016(Ne)10101		

- A case in which the court found that, concerning the so-called "Retweet," there is no infringement of copyrights (reproduction right, right to transmit to the public, right of communication to the public), but that there is infringement of moral right of author (right to determine the indication of an author's name, right to maintain integrity).
- One cannot demand, 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 Senders", disclosure of the IP address and timestamp from the last time of login.

References: Article 2, paragraph(1), item(vii)-2, Article 2, paragraph(1), item(ix)-4, Article 2, paragraph(1), item(ix)-5, Article 19, paragraph(1), Article 20, paragraph (1), Article 20, paragraph(2), item(iv), Article 21, Article 23, paragraph(1), Article 23, paragraph(2), and Article 113, paragraph(6) of the Copyright Act

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"

Item(iv) and Item(vii) of the "Ministerial Ordinance Establishing Sender Information in Paragraph 1, Article 4 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"

Summary of the Judgment

1 In the present case, X (Appellant/Plaintiff) claimed that his copyrights (reproduction right, right to transmit to the public [including the right to make available for transmission], right of communication to the public) on his photograph and his moral right of author (right of attribution, right to maintain integrity, right to maintain honor and reputation of author) were infringed because, on Twitter, which is a website for sending short text messages, his photograph (the "Photograph"), which is his work, [i] was used by an unnamed person as a profile photo in an account without X's consent, and later the Photograph also appeared on a timeline and in a Tweet (post) of the account, [ii] was used by an unnamed person as a part of a "Tweet with image" without X's consent, and the Photograph also appeared on a timeline of said unnamed person's account, and [iii] appeared on timelines of accounts of the unnamed person, et al. who Retweeted (a "Retweet" means when a user introduces or quotes a third person's Tweet by making it appear on the user's own timeline or by telling about it to the user's own followers) the Tweet described in the above [ii], without X's consent. Based on the above claim, X demanded disclosure 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 Senders" (hereinafter referred to as the "Provider Liability Limitation Act") with regard to Y1 (Twitter, Inc., Appellee/Defendant) and Y2 (Twitter Japan, Appellee/Defendant) in connection with each of the above [i] through [iii], respectively.

2 The judgment in prior instance upheld the claim against Y1 to the extent that disclosure of e-mail addresses for the accounts according to the above [i] and [ii] may be demanded, and dismissed the remainder of the claim against Y1 as well as the claim against Y2. In response, X, who was dissatisfied with the judgment, filed the present appeal.

3 In the judgment rendered in the present case, the court held that the claim against Y2 is groundless because Y2 is neither the operator of Twitter nor the party with whom a user concludes a contract concerning the use of Twitter, and because evidences of the present case show that Y2 is not authorized to disclose identification information of senders.

In the present judgment, concerning whether or not the Retweet in the present case constitutes infringement of X's copyrights in terms of the right to transmit to the public, the court found that [i] while X has copyrights on the Photograph, the data of the Photograph exist only on the server that the link represents, so that the data of the work having been transmitted are only the data on the server, [ii] since transmission to the public means the "transmission with the aim of direct reception thereof by the public," it should be said that, in terms of how the transmission is related to the infringement of the right to transmit to the public, only the data that the link represents constitute "infringing information," and [iii] it is understood that the person of automatic transmission to the public is a person who creates the conditions in which the transmission device can automatically transmit information in response to requests from receivers, and in light of the fact that the data of the Photograph having been transmitted are only the data of the Photograph that the link represents, it should be said that the person of the automatic transmission to the public is the person who established the URL that the link represents and not those who Retweeted. Accordingly, the court denied the infringement, and found that those who Retweeted are not even aiders and abettors. The court also denied infringement of the reproduction right and the right of communication to the public.

In the present judgment, concerning whether or not the Retweet in the present case constitutes infringement of X's moral right of author in terms of the right to maintain

integrity, the court found that [i] the image shown by a Retweet in the present case is different from the image that is stored on the URL that the link represents, and the difference arose when the position and size and the like were specified upon showing the image, by way of an HTML program or the CSS program or the like, which were transmitted as a result of Retweeting, and that [ii] while it can be said that the image shown is a work according to Article 2, paragraph(1), item(i) of the Copyright Act, the image shown became the image as described above because the position and size and the like were specified upon showing the image, by way of an HTML program or the CSS program or the like, and [iii] the image was therefore altered as a result of Retweeting, which means that the right to maintain integrity has been infringed. In view of the above, the court found that there was infringement of the right to maintain integrity. As for the right of attribution, while it is true that the image shown by a Retweet does not indicate X's name, the image became as described above because the position and size and the like were specified upon showing the image, by way of an HTML program or the CSS program or the like, causing X's name to disappear, and thus the court found that there was infringement of the right of attribution. The court did not find that there was infringement of the right to maintain honor and reputation of author.

In the present judgment, the court held that the IP address and timestamp of the last time of login, which X demanded disclosure of, are unrelated to the acts of transmission of infringing information in the present case, and that said IP address and timestamp do not fall under the "IP address for infringing information" and the "date and time of transmission of infringing information" according to Item (iv) and Item(vii), respectively, of the "Ministerial Ordinance Establishing Sender Information in 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".

As for the e-mail address of the accounts of the above [i] through [iii], including Retweets, the court rendered the present judgment acknowledging the demand for disclosure of the e-mail addresses.

Judgment rendered on April 25, 2018
2016 (Ne) 10101
Appeal Case of Seeking the Disclosure of Sender Identification Information
Prior instance: 2015 (Wa) 17928 of the Tokyo District Court
Date of conclusion of oral argument: March 7, 2018

Judgment

Appellant (Plaintiff in the First Instance): X

Appellee (Defendant in the First Instance): Twitter Japan Kabushiki-Kaisha
(hereinafter referred to as "Appellee Twitter Japan.")

Appellee (Defendant in the First Instance): Twitter, Inc.
(hereinafter referred to as "Appellee Twitter U.S.")

Main Text

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

(1) Appellee Twitter U.S. shall disclose to the Appellant the email addresses of the following persons:

[i] the holder of the account No. 1 set forth in the account list attached hereto that is configured to display the images set forth in 1(1) through (4) "Displayed Image" of the distributed information list attached hereto on the monitors of client computers that access the URLs set forth in 1(1) through (4) of said list on "Twitter," an online short messaging site operated by Appellee Twitter U.S. (hereinafter referred to as "Twitter");

[ii] the holder of the account No. 1 set forth in the account list attached hereto that is configured to display the image set forth in 1(5) "Displayed Image" of the distributed information list attached hereto as the holder's profile image for each short message of the holder's posting (a short message posted on Twitter is hereinafter referred to as a "Tweet") that is displayed on the timeline when the web page of the URL set forth in 1(5) of said list is accessed by client computers on Twitter;

[iii] the holder of the account No. 2 set forth in the account list attached hereto that is configured to display the image set forth in 2(1) "Displayed Image" of the distributed information list attached hereto as an image on the Tweet No. 1 set forth in the Tweet list attached hereto that is displayed when the URL set forth in 2(1) of the distributed information list attached hereto is accessed by client computers on Twitter;

[iv] the holder of the account No. 2 set forth in the account list attached hereto that is

configured to display the image set forth in 2(2) of "Displayed Image" of the distributed information list attached hereto on the monitors of client computers that access the URL set forth in 2(2) of said list on Twitter;

[v] the holder of the account No. 2 set forth in the account list attached hereto that is configured to display the image set forth in 2(3) and (4) "Displayed Image" of the distributed information list attached hereto as an image on the Tweet No. 1 set forth in the Tweet list attached hereto that is displayed on the timeline when the web page of the URL set forth in 2(3) and (4) of the distributed information list attached hereto is accessed by client computers on Twitter; and

[vi] the holders of the accounts Nos. 3 to 5 set forth in the account list attached hereto that posted in the form of citation, as the short messages set forth in 3 to 5 "Retweets" of the distributed information list attached hereto, the Tweet No. 1 set forth in the Tweet list attached hereto that is configured to display the images set forth in 3 to 5 "Displayed Image" of the distributed information list attached hereto on the timeline when the web pages of the URLs set forth in 3 to 5 of the distributed information list attached hereto are accessed by client computers on Twitter.

(2) Both the remainder of the Appellant's claim against Appellee Twitter U.S. and its claim against Appellee Twitter Japan shall be dismissed.

2 With regard to the court costs in the first and second instances, Appellee Twitter U.S. shall bear one-fourth of those incurred by the Appellant and one-half of those incurred by Appellee Twitter U.S., and the Appellant shall bear the remainder.

3 Appellee Twitter U.S. shall be granted an additional 30 days to file a final appeal against this judgment and a petition for acceptance of final appeal.

Facts and Reasons

Unless otherwise noted, abbreviations used in this judgment are the same as those used in the judgment in prior instance.

I. Object of The Appeal

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

2. The Appellees shall disclose to the Appellant the sender information set forth in the sender identification information list attached hereto.

II. Outline of The Case

In the present case, the Appellant claimed that his/her copyrights (right of reproduction, right to transmit to the public [including the right to make available for transmission], right of transmission to the public; hereinafter collectively referred to as the "Copyrights") on the photograph set forth in the photograph list attached to the judgment in the prior instance (hereinafter referred to as the "Photograph"), which is a copyrighted work of the Appellant, and his/her moral right of author (right of attribution, right to integrity, right to maintain honor and reputation of author; hereinafter collectively referred to as the "Moral Right") was infringed because, on online short messaging site "Twitter," [i] the Photograph was used by an unnamed person as a profile image in an account without the Appellant's permission, and was also displayed later on the timeline and in a Tweet (posting) of the account, [ii] the Photograph was used by an unnamed person as part of a "Tweet with image" without the Appellant's permission, and was also displayed on the timeline of that person's account, and [iii] the Photograph was displayed on the timelines of the accounts of unnamed persons who Retweeted the Tweet set forth in [ii] above without the Appellant's permission. Based on this claim, the Appellant demanded the disclosure of the information set forth in the sender identification information list attached hereto in connection with each of the acts [i] through [iii] above 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 Senders (hereinafter referred to as the "Provider Liability Limitation Act").

In prior instance, the Appellant principally demanded the disclosure of the sender identification information set forth in the sender identification information list (No. 1) attached to the judgment in prior instance and alternatively demanded the disclosure of the sender identification information set forth in the sender identification information list (No. 2) attached to the judgment in prior instance. The judgment in prior instance upheld the claim against Appellee Twitter U.S. to the extent that the disclosure of the identification information of the sender set forth in 3 of the sender identification information list (No. 1) attached to the judgment in prior instance for the accounts set forth in 1 and 2 of the distributed information list attached to the judgment in prior instance may be demanded, and dismissed both the remainder of the claim against Appellee Twitter U.S. and the claim against Appellee Twitter Japan. In response, the Appellant, who was dissatisfied with the judgment, filed the present appeal and partially withdrew and changed its litigation; therefore, the Appellant's claim is as

described above.

1. Basic facts (facts undisputed by the parties and facts that can be found by the evidence set forth below and from the entire import of the oral argument; unless otherwise noted, references to an item of documentary evidence with a branch number include all branch numbers [hereinafter the same applies].)

The basic facts are the same as set forth from line 4 of page 3 to line 20 of page 5 of the judgment in prior instance, which are cited herein. However, "Exhibit Ko 4" on line 12 of page 4 of the judgment in prior instance shall be replaced with "Exhibits Ko 4-2 through 5," and "Exhibit Ko 4" on line 25 of the same page with "Exhibits Ko 4-1, 6, 7."

2. Issues

(1) Whether Appellee Twitter Japan possesses the information set forth in the sender identification information list attached hereto.

(2) With regard to the account Nos. 1 and 2, whether it is evident that the Appellant's Copyrights and Moral Right were infringed by the presentation of the Photograph in Tweets and timelines (distributed information 1(6) and (7), 2(3) and (4)) (Article 4, paragraph (1), item (i) of the Provider Liability Limitation Act).

For clarity purposes, it is undisputed between the parties that the configuration of the profile image under review and presentation on a timeline (distributed information 1(1) through (5)), and the Tweeting No. 2 and presentation on the Tweet No. 2 (distributed information 2(1) and (2)) do infringe the Appellant's right to transmit to the public (Article 23, paragraph (1) of the Copyright Act).

(3) With regard to the account Nos. 3 through 5, whether it is evident that the Retweeting under review (distributed information 3 through 5) infringed the Appellant's Copyrights and Moral Right (Article 4, paragraph (1), item (i) of the Provider Liability Limitation Act).

(4) Whether the IP address of the last login as of the day when a judicial decision becomes final, and its corresponding time stamp constitute "identification information of the sender pertaining to said infringement of the rights" that should be disclosed pursuant to Article 4, paragraph (1) of the Provider Liability Limitation Act as they should be considered to be the "IP address for infringing information" and the "date and time of transmission of infringing information" according to item (iv) and item (vii), respectively, of the Ministerial Ordinance Establishing Sender Identification Information in 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 "Ministerial Ordinance").
(5) Whether the Appellant has good reasons to have the identification information of the sender disclosed to it (Article 4, paragraph (1), item (ii) of the Provider Liability Limitation Act).

(omitted)

III. Court decision
1. With regard to Issue (1) (whether Appellee Twitter Japan possesses the identification information of the sender), the Appellant demands that Appellee Twitter Japan as well as Appellee Twitter U.S. disclose the identification information of the sender.

According to the evidence (Exhibits Otsu 19 through 21, 24) and the entire import of the oral argument, it is found that Appellee Twitter Japan is neither the operator of Twitter nor a party to make agreements with Twitter users, and it is not found that Appellee Twitter Japan has the authority to disclose the identification information of the sender.

In this connection, the Appellant argues that Appellee Twitter Japan provides support for Twitter, including acting as a point of contact for information deletion requests; in a different case in which the Appellant demanded Appellee Twitter Japan to cease transmitting photographs taken by the Appellant to the public, the images were deleted after service of the complaint to Appellee Twitter Japan; with regard to the present case, when the Appellant asked Appellee Twitter Japan to delete the Photograph, it was deleted in fact; the Appellees share officers; and Appellee Twitter U.S. announced that it has a Tokyo office, where job applicant interviews take place. Even if these facts are accepted, however, it does not imply the authority of Appellee Twitter Japan to disclose the identification information of the sender. The Appellant also argues that it is unthinkable that Appellee Twitter U.S. as a global player would ignore the judgment of Appellee Twitter Japan, which is familiar with the circumstances in Japan; and if Appellee Twitter Japan assumes a legally binding obligation to disclose information as a result of a judgment or otherwise, it is unthinkable that Appellee Twitter U.S. would do nothing about it. However, neither of these is more than the Appellant's presumptions and provides grounds to conclude that Appellee Twitter Japan has the authority to disclose the identification information of the sender.

Therefore, it is not found that Appellee Twitter Japan possesses the identification

information of the sender, and all of the Appellant's claims against Appellee Twitter Japan are groundless.

2. With regard to Issue (2) (whether it is evident that the presentation of the Photograph on the account Nos. 1 and 2 infringed the Appellant's Copyrights) and Issue (3) (whether it is evident that the Retweeting under review infringed the Appellant's Copyrights)

Given the nature of the case, the Court will decide Issue (3) first, and then Issue (2).

(1) Facts

As described in the basic facts (3)C and (4) above (pages 4 through 5 of the judgment in prior instance), the Retweeting under review results in online links to the URL of distributed information 2(2) being included in the URLs of the timelines of the account Nos. 3 through 5 so that image file data will be transmitted directly from the server of the same URL to users' personal computers or other terminals and the image of the Photograph will be displayed on those computers. According to the evidence (Exhibits Ko 20, 27, 29, 32, 33, 48, 50 through 53) and the entire import of the oral argument, it is perceived, however, that in order for the image of the Photograph to be displayed on users' personal computers or other terminals, certain programs (HTML, CSS, and JavaScript programs) need to be transmitted to specify which photographs from which links should be displayed in what sizes and layouts; as a result of the Retweeting under review, such programs are transmitted from the server corresponding to the link source web page to users' personal computers; this may result in the presentation of images that have different aspect ratios from the linked images or that are only trimmed parts of the linked images; and the image displayed on the timelines of the account Nos. 3 through 5 is different from the one in distributed information 2(2) (the aspect ratio is different, it is only a trimmed part, and the Appellant's name is not indicated). The Appellant argues that not only the image data of the Photograph, but also the "rendering data for browsers" or the HTML data that are generated from the combination of data from these HTML, CSS, and JavaScript programs constitute "infringing information."

(2) With regard to the infringement of the right to transmit to the public (Article 23, paragraph (1) of the Copyright Act)

A. Article 2, paragraph (1), item (vii)-2 of the Copyright Act defines transmission to the public as "making a transmission of wireless communications or wired telecommunications with the objective of allowing the public to receive them directly ..." Item (ix)-4 of the same paragraph defines automatic public transmission as "a transmission to a member of the public (excluding one that constitutes a

broadcast or cablecast) that is made automatically in response to a request from the member of the public." Item (ix)-5 of the same paragraph defines making available for transmission as "making it ready to be transmitted via automatic public transmission, through either of the following actions: A. recording data onto a recording medium which an automatic public transmission server that is connected with a public telecommunications network uses for transmissions to the public ...; adding a recording medium onto which data have been recorded to such an automatic public transmission server as its recording medium for public transmissions; converting a recording medium onto which data have been recorded into such an automatic public transmission server's recording medium for public transmissions;, or inputting data into such an automatic public transmission server; and B. connecting an automatic public transmission server onto whose recording medium for public transmissions data have been recorded or into which data have been input, to a public telecommunications network ..." In addition, Article 23, paragraph (1) of the Copyright Act prescribes that "The author of a work has the exclusive right to transmit to the public that work (this includes the right to make the work available for transmission, if the work is to be transmitted to the public via automatic public transmission)."

B. The work the Appellant has copyright to is the Photograph. The Photograph data are present only in the server related to the distributed information 2(2) as a link target, so the data of the distributed information 2(2) are the only work data transmitted. As mentioned above, transmission to the public is defined as "making a transmission with the objective of allowing the public to receive them directly"; therefore, in relation to the infringement of the right to transmit to the public, only the data of the distributed information 2(2) should be considered as "infringing information," and the "rendering data for browsers" or HTML data cannot be regarded as "infringing information" as asserted by the Appellant. Consequently, none of the Appellant's arguments concerning the infringement of its right to transmit to the public (the infringement of its right to make available for transmission and right to automatic public transmission) based on the assumption that the "rendering data for browsers" or HTML data are "infringing information," is acceptable.

C. Next, the Court examines the alleged infringement of the right to transmit to the public when only the image data of the distributed information 2(2) are considered to be "infringing information."

(A) The image of the Photograph displayed on users' personal computers or other terminals by the Retweeting under review can be considered to be the data of the

distributed information 2(2) that was transmitted and displayed at the request of these users; therefore, it constitutes an automatic public transmission (a transmission to a member of the public [excluding one that constitutes a broadcast or cablecast] that is made automatically in response to a request from the member of the public).

(B) An automatic public transmission is interpreted to have been made by the one who made the equipment ready to automatically send the information to recipients at their request (see the Supreme Court judgment of January 18, 2011, page 121 of the Supreme Court Civil Case Book Vol. 65, Issue 1). Given the fact that only the data of the distributed information 2(2) were transmitted, an automatic public transmission of the Photograph data should be considered to have been made by the one who opened the URL of the distributed information 2(2), not by those who Retweeted. Who is the primary actor in an copyright infringing act should be interpreted normatively with all factors taken into consideration, such as the object and method of the act and the nature and degree of involvement in the act, and the so-called karaoke doctrine is interpreted as one example of its application (see the Supreme Court judgment of January 20, 2011, page 399 of the Supreme Court Civil Case Book, Vol. 65, Issue 1); for the present case, however, no circumstances can be found that would suggest those who Retweeted should be regarded as primary actors in the automatic public transmission. The Appellant argues that the administrator of the account Nos. 3 through 5 has control over the home screens and also gains social and economic benefits from the home screens being viewed; however, such circumstances are only related to the home screens of the account Nos. 3 through 5, and cannot be considered as circumstances based on which those who Retweeted can be regarded as primary actors in the automatic public transmission of the Photograph in connection with which only the data of the distributed information 2(2) were transmitted. Also, the Retweeting under review results in the Photograph image being displayed on the personal computers or other terminals of more users; however, pursuant to the interpretations of Japan's Copyright Act, such an increase in the scope of recipients does not provide grounds for perceiving those who Retweeted as primary actors in the automatic public transmission. Furthermore, it is hard to say that the Retweeting under review made the above-mentioned act of automatic public transmission easier, so those who Retweeted cannot be considered to be aiders. No other circumstances would support otherwise.

(C) The Appellant also asserts the infringement of its right to transmit to the public, which is neither automatic public transmission nor broadcast nor cablecast; however, given the fact that it constitutes an automatic public transmission as discussed in (A) above, no infringement of the right to transmit to the public other than automatic

public transmission can be found.

(3) With regard to the infringement of the right of reproduction (Article 21 of the Copyright Act)

As discussed in (2)B above, transmitted in connection with the copyrighted Photograph was only the data of the distributed information 2(2), so it cannot be said that the copyrighted work was reproduced by the Retweeting under review. Therefore, even in relation to the infringement of the right of reproduction, the "rendering data for browsers" or HTML data cannot be regarded as "infringing information" as asserted by the Appellant, so the Appellant's argument for the infringement of its right of reproduction is not acceptable, as it is based on the assumption that the "rendering data for browsers" or HTML data are "infringing information."

(4) With regard to the infringement of the right of transmission to the public (Article 23, paragraph (2) of the Copyright Act)

Article 23, paragraph (2) of the Copyright Act prescribes that "The author of a work has the exclusive right to publicly communicate the work being transmitted to the public through a receiver."

The Appellant argues that those who Retweeted, who should be regarded as the ones who displayed the copyrighted work on client computers, did publicly communicate it, using client computers as receivers. However, Article 23, paragraph (2) of the Copyright Act prescribes the right to publicly communicate, using a receiver, a work after it has been transmitted to the public. If it is supposed that a client computer is a receiver mentioned here, then the primary actor in the communication through the receiver is interpreted to be the user of that computer, and those who Retweeted cannot be regarded as the primary actors. The circumstances brought up by the Appellant are related to the public transmission of the Photograph and to the home screens of the account Nos. 3 through 5, and do not influence this judgment. Moreover, no circumstances can be found that would suggest public communication by the user of the client computer, which is the primary actor in the communication, and no act of infringing the right of transmission to the public can be found. Thus, the fact that no act of infringing the right of transmission to the public can be found means no room for aid in the act.

(5) With regard to the infringement of the moral right of author

A. Infringement of the right to integrity (Article 20, paragraph (1) of the Copyright Act)

As discussed in (1) above, the image displayed on the timeline of the account Nos.

3 through 5 is different from the image given in distributed information 2(2). This difference arose because the position and size of this image as displayed were designated by the HTML and CSS programs transmitted as a result of the Retweeting under review, and no modifications were added to the image data of the distributed information 2(2) itself.

However, the displayed image is a creative expression of a thought or emotion included in the area of literature, science, art, or music, and can be described as a work as defined in Article 2, paragraph (1), item (i) of the Copyright Act. However, as discussed above, on the timelines of the account Nos. 3 through 5, the image actually looked as shown in 3 through 5 of the distributed information list because its position and size were designated by the HTML and CSS programs. Consequently, it can be said that the image was modified by those who Retweeted and the right to integrity was infringed.

In this respect, the Appellees argue that the modification, if ever made, was made by Internet users. However, as discussed above, it can be said that the modification arose because of the display location and size designated by the HTML and CSS programs transmitted as a result of the Retweeting under review, and it is those who Retweeted, not Internet users, who can be regarded as the primary actor in the modification (Article 47-8 of the Copyright Act provides for reproduction in conjunction with the exploitation of works on a computer, and does not influence this judgment). The Appellees also argue that the image displayed on the timelines of the account Nos. 3 through 5 is the same as the image given in the distributed information 2(1), and it is the holder of the account No. 2 who made the modification. It can be held, however, that the image displayed on the timelines of the account Nos. 3 through 5 was a modification as compared with the Photograph, which is a work of the Appellant, and as discussed above, the modification was made by those who Retweeted. Therefore, it can be said that the right to integrity was infringed by those who Retweeted. Furthermore, the Appellees argue that the modification was "unavoidable" within the meaning of Article 20, paragraph (2), item (iv) of the Copyright Act. However, the Retweeting under review was a Retweeting of a Tweet from the account No. 2 that contained the Photograph image file without the Appellant's permission, and a modification involved in such an act cannot be regarded as "unavoidable."

B. Infringement of the right of attribution (Article 19, paragraph (1) of the Copyright Act)

The Appellant's name was not given for the image displayed on the timelines of the

account Nos. 3 through 5. Moreover, it can be found, as discussed in (1) above, that because of the image's display position and size designated by the HTML and CSS programs, on the timelines of the account Nos. 3 through 5, the image actually looked as shown in 3 through 5 of the distributed information list, and the Appellant's name was lost. It can thus be said that the Appellant's right to indicate the name of the author of a work when it is made available or presented to the public was infringed by the Retweeting under review by those who Retweeted.

C. Infringement of the right to maintain honor and reputation of author (Article 113, paragraph (6) of the Copyright Act)

The fact that the Photograph is displayed on the account Nos. 3 through 5 together with Sanrio or Disney characters does not necessarily and directly mean that it would give a misleading impression that the Photograph is a "work of low value that can safely be used without permission" or "cheap work," and it cannot be said that the work was used in a way prejudicial to the honor or reputation of the Appellant as the author. Additionally, there are no other circumstances found that would suggest the work was used in a way prejudicial to the honor or reputation of the Appellant, so it cannot be found that those who Retweeted infringed the Appellant's right to maintain honor and reputation of author (Article 113, paragraph (6) of the Copyright Act).

(6) The Appellant argues that the holders of the account Nos. 2, 4, and 5 are the same natural person or jointly infringed the Appellant's right to transmit to the public; however, there is no evidence that can support this.

(7) "by the distribution of the infringing information" (Article 4, paragraph (1), item (i) of the Provider Liability Limitation Act) and "sender" (Article 2, item (iv) of the same Act)

As discussed in (5)A and B above, the Retweeting under review is an act of infringing the Appellant's moral right of author. In light of the forms of infringement found in (5)A and B above, in this case, not only the Photograph image data, but also the HTML and CSS programs and other data, can be said to constitute "infringing information" under the Provider Liability Limitation Act, and the Retweeting under review evidently infringed the Appellant's right by the distribution of the infringing information. Moreover, the "sender" in this case can be said to be those who Retweeted.

(8) With regard to Issue (2)

The distributed information 2(3) and (4) from the account No. 2 can be said to have infringed the moral right of author because the image of the distributed information 2(2) was modified and the Appellant's name was not indicated, as was true with the

distributed information 3 through 5. However, with regard to the distributed information 1(6) and (7) from the account No. 1, the image displayed on it was the same as the image of the distributed information 1(3), and it cannot be said that the moral right of author was infringed. Copyright infringement cannot be found here, just as it cannot with regard to the distributed information 3 through 5.

3. With regard to Issue (4) (whether the IP address of the last login constitutes identification information of the sender)

(1) The Appellant argues that the IP address of the last login and its corresponding time stamp constitute the "IP address for infringing information" and the "date and time of transmission of infringing information" according to item (iv) and item (vii), respectively, of the Ministerial Ordinance, and that these constitute "identification information of the sender pertaining to said infringement of the rights" under Article 4, paragraph (1) of the Provider Liability Limitation Act.

Article 4, paragraph (1) of the Provider Liability Limitation Act prescribes that "Any person alleging that his or her rights were infringed by distribution of information via specified telecommunications may ... demand ... to disclose identification information of the sender pertaining to said infringement of the rights (referring to information, including a name and address, contributing to identifying the sender of the infringing information and which is as stipulated in the applicable MIC ordinance ...) ..." This paragraph permits the disclosure of "identification information of the sender pertaining to said infringement of the rights," prescribing that the specific scope of disclosure shall be stipulated in the applicable MIC ordinance. The ordinance names, in its item (iv), the "IP address for infringing information ... and the port number combined with that IP address," and in its item (vii), the "date and time of transmission of infringing information." Therefore, it is reasonable to interpret that the "IP address for infringing information" according to item (iv) of the Ministerial Ordinance does not include information that is not related to the transmission of the infringing information and that the time stamp, which is not related to the transmission of the infringing information, does not constitute the "date and time of transmission of infringing information" according to item (vii) of the ordinance.

The Appellant argues that if the Ministerial Ordinance cannot be interpreted to permit the disclosure of the IP address of the last login, then it is illegal because it goes against the purport of delegation by the Provider Liability Limitation Act. However, the above-mentioned provision of Article 4, paragraph (1) of the Provider Liability Limitation Act anticipates that some information may not be subject to disclosure even when it helps identify the sender of infringing information, and it cannot be said that

the provisions of the Ministerial Ordinance are against the purport of delegation by said paragraph.

With regard to the present case, according to the evidence (Exhibits Ko 4-1, 3, 6, 7) and the entire import of the oral argument as well as the basic facts set forth above, it is found that the account No. 1 was opened on April 1, 2013, the profile image under review was set up on January 21, 2015 at the latest, the Tweeting No. 2 took place on December 14, 2014, and the Tweeting Nos. 3 through 5 took place around December 14, 2014. It was March 25, 2015 when the Appellant raised the present litigation before the Sapporo District Court.

Then, the IP address of the last login and the time stamp which the Appellant wants to be disclosed are irrelevant to any of the acts above that involved the transmission of the infringing information in the present case, and it should be concluded that neither comes under either item (iv) or (vii) of the Ministerial Ordinance. Therefore, the Appellant's claim against Appellee Twitter U.S. with regard to 2 and 3 of the sender identification information list attached hereto is groundless.

(2) In response, the Appellant argues that [i] with regard to Twitter, if the IP address of the last login and the corresponding time stamp, which are only in the possession of the Appellees, are not disclosed, the Appellant would have no means to identify the infringer or person who sent the information thereby infringing its rights, and [ii] if a work is used as a profile photo without permission, it is part of publicly known knowledge that the image will be displayed on all Tweets, and the inclusion of the image in the profile means the perpetually continued infringement of the rights from the time of posting, and the continued existence of the account itself means the continued transmission of the infringing information by way of nonfeasance. It further argues that the disclosure of the IP address of the last login and the corresponding time stamp should be permitted when the right of access to courts (Article 32 of the Constitution), the proprietary right as embodied in copyright (Article 29 of the Constitution), the right to pursue happiness as embodied in the moral right of author (Article 13 of the Constitution), the right to equality (Article 14, paragraph (1) of the Constitution) and other human rights are weighed against the information sender's privacy, freedom of expression, and privacy of communications.

However, Article 4 of the Provider Liability Limitation Act and the Ministerial Ordinance established by way of delegation under the same Act are provisions intended to achieve a balancing point between the rights and interests the sender may have, such as privacy, freedom of expression, and privacy of communications, and the interests the aggrieved party may gain from injunction, damages, and other means of

damage recoupment, and to this extent, the Provider Liability Limitation Act provides for the right to demand the disclosure of sender identification information. In addition, as held in (1) above, the scope of disclosure permitted under Article 4 of the Provider Liability Limitation Act and the Ministerial Ordinance does not include the IP address of the last login and the corresponding time stamp. Also, even when the provisions of the Constitution and the purport thereof as asserted by the Appellant are taken into consideration, it is impossible to interpret that the Appellant has the right to demand the disclosure of the sender identification information that is not prescribed in the laws. Therefore, the Appellant's argument is nothing more than an argument for new legislation and is irrelevant.

Even if an image used as a profile photo without permission is displayed on all Tweets, the infringing act itself is completed by uploading the photograph image file as the profile image, and it cannot be said that the continued displaying of the image thereafter is an infringement *per se*. There can be facts that may constitute an infringement by nonfeasance, but in the present case, no such facts have been brought forward or substantiated.

4. Issue (5) (whether the Appellant has good reasons to have the identification information of the sender disclosed to it)

As instructed above, the Appellant has certain rights to exercise against those who displayed the Photograph on the account Nos. 1 through 5 on the ground of the infringement of its copyright or moral right of author, but does not have any other means to obtain information that would help it to identify those persons. Therefore, it is found that the Appellant has good reasons to have the sender identification information disclosed to it.

IV. Conclusion

As discussed above, the Appellant's claim is well grounded to the extent that it demands the disclosure of the email addresses set forth in 1(1) of the Main Text of Judgment from Appellee Twitter U.S., and the remainder of its claim is groundless. Therefore, the judgment in prior instance, which is different in this respect, shall be changed as stated in the Main Text of Judgment.

Intellectual Property High Court, Second Division

Presiding Judge: MORI Yoshiyuki

Judge: MORIOKA Ayako

Judge NAGATA Sanae is not available to sign this document because of reassignment.

Presiding Judge: MORI Yoshiyuki