

# Can a Retweet Infringe Copyright?

*Nawata v Twitter*

Timothy MAGARRY\*

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## I. INTRODUCTION

Courts across the world are struggling with digital copyright. In Japan, the Intellectual Property High Court (IP High Court) confronted several new questions in *Nawata v Twitter*.<sup>1</sup> These were first, whether and how internet links should give rise to copyright liability; second, whether judges actually understand emerging technologies; and third, how to find the appropriate balance between the owner and user of copyrighted works on digital platforms such as Twitter.

In *Nawata v Twitter* the Court found three Twitter users liable for moral rights infringement because they retweeted a tweet which itself contained

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\* Research Officer and Sessional Academic, Australian National University College of Law.

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<sup>1</sup> Intellectual Property High Court, 25 April 2018, Case No. 10101(ne) of 2016 (*Nawata v Twitter*).

infringing material. At the time of writing, the decision is currently subject to a petition for special leave to the Supreme Court.<sup>2</sup>

*Nawata v Twitter* crystallizes a common problem in sharing online works, and the IP High Court's reasoning illustrates the difficulty that courts continue to have when moulding copyright law to a rapidly changing sphere of expression and creativity. This article summarizes this important Japanese case, translates key passages of the decision and argues that, given the ubiquity of social media platforms and the spread of content online, a consistent and coherent jurisprudence depends on resolving the three issues identified above.

## II. PROCEDURAL HISTORY

### 1. *The Parties*

The Appellant (Plaintiff at first instance) was Mr Yorinobu Nawata,<sup>3</sup> a 60-year old professional photographer based in Sapporo, Japan.<sup>4</sup> He displays copies of his photos on his business website for sale, but also takes significant measures to protect his copyright in them.<sup>5</sup> For example, Nawata's website has a dedicated copyright notice page in both English and Japanese. All photos on his website redirect to this page when clicked and hovering over them reveals a further copyright warning. Even banner ads for his website contain the words 'reproduction prohibited'.<sup>6</sup>

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2 Intellectual Property High Court, [http://www.ip.courts.go.jp/app/hanrei\\_jp/detail?id=4927](http://www.ip.courts.go.jp/app/hanrei_jp/detail?id=4927); See also, S. MORI, *Ritsuiito jiken* [The Retweet Case] in: *Tokkyo Nyūsu* [Patent News] (12 December 2018) 7, available at: [http://www.chosakai.or.jp/intell/pat/contents18/201812/201812\\_6.pdf](http://www.chosakai.or.jp/intell/pat/contents18/201812/201812_6.pdf).

3 Y. NAWATA, *Howaito to pinku iro no suzuran mudan kaihen shiyō hakken/hōteki sochi* [Discovery of Unauthorised Use and Modification of "White and Pink Lilies of the Valley"/Taking Legal Action], *Shashin-ka Nawata Yorinobu no burogu* [Photographer Yorinobu Nawata's Blog] (27 January 2015), <http://ynawata.asablo.jp/blog/2015/01/27/7554262>.

4 N. KOIZUMI, *Ritsuiito ni yoru chosaku-sha jinkaku-ken shingai no shutai* [The Person Responsible for Moral Rights Infringement via a Retweet], *Jurisuto* 1524 (2018) 8.

5 Y. NAWATA, *Ritsuiito de no kaihen shashin keisai ga ihō-tō no chizai kōsai hanketsu!* [IP High Court Rules Unlawful to Post Modified Photo in a Retweet!], *Shashin-ka Nawata Yorinobu no burogu* [Photographer Yorinobu Nawata's Blog] (22 May 2018), <http://ynawata.asablo.jp/blog/2018/05/22/8854401>.

6 Y. NAWATA, Copyright Notice Page, *Hōsendō* (2 May 2016), [http://housendo.jp/copyright/chosakuken\\_nitsuite.html](http://housendo.jp/copyright/chosakuken_nitsuite.html).

Nawata once famously sued the NHK over unauthorised use of his work in a news story,<sup>7</sup> and at the time of this decision had multiple parallel suits pending regarding unauthorised use of another photograph (also) on Twitter and other social media websites.<sup>8</sup> Nawata devotes a whole category of his posts on his personal blog to the many infringement suits he brings for unauthorised use of his photos, often also providing extracts of the judgments obtained, including this one.<sup>9</sup>

The Respondents (Defendants at first instance) are Twitter, Inc and its Japanese subsidiary, Twitter Japan KK, who together operate 'Twitter'. On Twitter, users can make short text posts called 'Tweets' which can also contain images, videos and other elements. Other users can comment on or otherwise interact with that Tweet by 'quoting' it or 'replying' with their own. Alternatively, users can share the Tweet on their account as is by 'Retweeting' it. Importantly, all Twitter content (except for private messages) is available publicly, and the platform permits use of anonymous accounts.

## 2. *The Facts*

At the time of filing suit, Nawata owned the copyright in a photograph titled 'White and Pink Lilies of the Valley' (hereinafter, 'the Photograph') which he uploaded on his website.<sup>10</sup> The owners of two Twitter accounts ('Account 1' and 'Account 2' respectively) downloaded the Photograph from Nawata's website and then uploaded it to Twitter without Nawata's permission. Account 1 used it as a profile picture and Account 2 posted it in a Tweet alongside two other pictures showing a Disney character and Sanrio character.<sup>11</sup> Account 1's conduct assumes no further significance during the case.

The photograph featured the words 'reproduction prohibited' in the top left-hand corner; a copyright mark with Nawata's name in the bottom left-hand corner; and Nawata's signature in the bottom right-hand corner.<sup>12</sup> However, in order to fit all three images into the same Tweet, Twitter's website coding trims the top and bottom thirds of the photograph, and in

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7 'NHK Faces Prosecution Over Photos', The Japan Times, 19 September 2008, <https://www.japantimes.co.jp/news/2008/09/19/national/nhk-faces-prosecution-over-photos/#.XE2Uqc2H6F4>.

8 Y. NAWATA, *Tsuittā gakusei purofairu (pengin shashin) jiken* [Twitter Student's Profile (Penguin Photo) Case], *Shashin-ka Nawata Yorinobu no burogu* [Photographer Yorinobu Nawata's Blog] (13 May 2018), <http://ynawata.asablo.jp/blog/2018/05/?offset=10>.

9 See, for example: Y. NAWATA, *Shashin-ka Nawata Yorinobu no burogu* [Photographer Yorinobu Nawata's Blog], <http://ynawata.asablo.jp/blog/cat/law/>.

10 NAWATA, *supra* note 3; KOIZUMI, *supra* note 4.

11 KOIZUMI, *supra* note 4.

12 NAWATA, *supra* note 3.

doing so, removed these marks.<sup>13</sup> Accounts 3, 4 and 5 (collectively, ‘the retweeters’) then retweeted Account 2’s Tweet, resulting in the trimmed photograph displaying on each of their accounts’ ‘timelines’.<sup>14</sup>

Although Twitter removed all instances of the infringing content immediately upon notification by Nawata,<sup>15</sup> he then filed suit on 26 January 2015;<sup>16</sup> oral arguments in the case began on 29 May 2015.<sup>17</sup>

### 3. *The Issues on Appeal*

Because Twitter allows users to create anonymous accounts, the persons operating Accounts 1 through 5 are unknown. However, for any given account, Twitter stores the email address, IP address and login timestamps, which can be used to identify the account’s owner.<sup>18</sup>

Nawata therefore demanded disclosure of this information under Art. 4(1) of Japan’s Provider Liability Limitation Law.<sup>19</sup> To approve this

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13 NAWATA, *supra* note 3.

14 KOIZUMI, *supra* note 4, 8; K. AKAGAWA, IP High Court Sets Precedent Regarding Liability for Inline Linking, International Law Office (18 December 2018), <https://www.internationallawoffice.com/newsletters/litigation/Japan/Anderson-mori-tomotsune/IP-High-Court-sets-precedent-regarding-liability-for-inline-linking>; H. MIZUNO, *Tsuittā no ritsui to chosaku-ken shingai (kōso-shin)* [Twitter’s Retweets and Copyright Infringement (Appeal)] (14 June 2018) on *Soei IP* [https://www.soei.com/blog/2018/06/14/ツイッターのリツイートと著作権侵害\(控訴審\)/](https://www.soei.com/blog/2018/06/14/ツイッターのリツイートと著作権侵害(控訴審)/).

15 Y. NAWATA, *Twitter Japan Kabushiki Kaisha (Tsuittā Tōkyō Jimu-sho) oyobi Twitter, Inc. (Tsuittā Beikoku Honsha) o teiso!* [Filing Suit Against Twitter Japan KK (Twitter’s Tōkyō Office) and Twitter, Inc. (Twitter’s American Headquarters)!] on *Shashin-ka Nawata Yorinobu no burogu* [Photographer Yorinobu Nawata’s Blog] (19 April 2015), <http://ynawata.asablo.jp/blog/2015/04/19/7610850>; Twitter Privacy Policy (April 2018), [https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/site-assets/privacy-page-gdpr/pdfs/PP\\_Q22018\\_April\\_EN.pdf](https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/site-assets/privacy-page-gdpr/pdfs/PP_Q22018_April_EN.pdf); Twitter Privacy Policy (8 September 2014), [https://twitter.com/en/privacy/previous/version\\_9](https://twitter.com/en/privacy/previous/version_9); MIZUNO, *supra* note 14.

16 NAWATA, *supra* note 3.

17 NAWATA, *supra* note 15.

18 KOIZUMI, *supra* note 4, 8; Twitter Privacy Policy (22 April 2018), [https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/site-assets/privacy-page-gdpr/pdfs/PP\\_Q22018\\_April\\_EN.pdf](https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/site-assets/privacy-page-gdpr/pdfs/PP_Q22018_April_EN.pdf).

19 *Tokutei denki tsūshin ekimu teikyō-sha no songai baishō sekinin no seigen oyobi hasshin-sha jōhō no kaiji ni kansuru hōritsu* [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], Law No. 137/2001. See M. YANAGA, Recent Developments in Computer Law in Japan, ZJapanR/J.Japan.L. 13 (2002) 185 for a translation of this law and some commentary on the context in which it was enacted; KOIZUMI, *supra* note 4, 8.

disclosure, the Law required Nawata to show a ‘clear’<sup>20</sup> case of copyright infringement in respect of each account owner.<sup>21</sup>

The parties agreed that Accounts 1 and 2 infringed the right of public transmission within Art. 23(1) of the Japanese Copyright Act.<sup>22</sup> However, Nawata further claimed that, by retweeting Account 2’s infringing Tweet, the retweeters should also be liable. Specifically, Nawata claimed damages for infringement of his rights of reproduction (Art. 21); public transmission (Art. 23(1)); making available for transmission (Art. 23(1)); public communication (Art. 23(2)); integrity (Art. 20); attribution (Art. 19); and the right against damage to honour or reputation (Art. 113(6)) of the Copyright Act.

### III. SUMMARY OF JUDGMENT

At first instance, the Tōkyō District Court approved disclosure in respect of Accounts 1 and 2, but not in relation to the retweeters.<sup>23</sup> Nawata subsequently appealed, and the Intellectual Property High Court approved disclosure in respect of all the accounts.

The IP High Court rejected Nawata’s claim regarding infringement of his rights of reproduction, public communication and the right against damage to honour or reputation. The Court nominally recognised infringement of the right of automated public transmission, but ultimately found the user viewing the retweet liable, rather than the retweeters.<sup>24</sup> The Court reasoned that the person responsible was ‘the one who created the circumstances allowing the information to automatically transmit at the recipient’s request’, and that this was the user viewing the retweet.<sup>25</sup>

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20 Section 4(1)(i) Provider Liability Limitation Law relevantly provides: 侵害されたことが明らかである。

21 KOIZUMI, *supra* note 4, 8.

22 *Ibid.*; *Chosakuken-hō* [Copyright Act], Law No. 48/1970.

23 Tōkyō DC, 15 September 2016, No. 17928 (wa) of 2015; KOIZUMI, *supra* note 4, 8; A. IJIMA, *Ritsuiito ni tsuite chosaku-sha jinkaku-ken ni motozuki hasshin-sha jōhō kaiji seikyū o ninyō shita tsuittā hasshin-sha jōhō kaiji seikyū jiken chizai kōsai hanketsu ni tsuite* [On the IP High Court’s Decision in the Twitter Sender Identifying Information Disclosure Claim Case Which Recognised the Claim for Disclosure of the Senders’ Identifying Information Based on the Moral Rights Regarding a Retweet], *Innoventier* (18 June 2018), <https://innoventier.com/archives/2018/06/6177>; see also, H. AOKI, *Ritsuiito ni yoru chosaku-ken shingai no seihi* [Whether a Retweet Constitutes Copyright Infringement], *Jurisuto* 1520 (2018) 122; K. FUKUICHI, *Ritsuiito jiken* [The Retweet Case], *Chosaku-ken Kenkyū* 44 (2018) 140; KOIZUMI, *supra* note 4, 8.

24 KOIZUMI, *supra* note 4, 8.

25 *Nawata v Twitter*, *supra* note 1 [Author’s trans].

On the right of integrity, the Court held that, while the Photograph's image data was not itself modified, the photograph as displayed in the retweets was clearly modified due to the effect of the HTML and CSS scripts used in the retweet function.<sup>26</sup> This modification was not 'unavoidable' within the meaning of Art. 20(2)(iv) Copyright Act because 'the original Tweet on Account 2 contained infringing content', so the retweeters infringed this right.<sup>27</sup> As these same HTML and CSS scripts were responsible for removing Nawata's signature and copyright marks, the Court similarly found the retweeters had infringed his right of attribution.

#### IV. UNRESOLVED CONTROVERSIES IN DIGITAL COPYRIGHT

*Nawata v Twitter* has gained significant attention since its release. Apart from considerable commentary online,<sup>28</sup> the judgment has also been included in the sixth edition of *Jurisuto's Chosaku-ken Hanrei Hyakusen* [100 Selected Copyright Precedents] and this is for good reason.<sup>29</sup>

As detailed below, the case holds significant value as an illustration of three issues continuing to plague digital copyright jurisprudence. These are, principally: (i) whether and how an internet link may give rise to primary liability in copyright; (ii) whether judges exhibit sufficient understanding of the technology upon which they rule; and (iii) overprotection of copyrighted works online.

26 AKAGAWA, *supra* note 14; IJIMA, *supra* note 23.

27 *Nawata v Twitter*, *supra* note 1 [Author's trans].

28 Y. OKADA, *RT de gazō jidō torimingu, chosaku-sha jinkaku-ken shingai ni ataru, chizai kōsai hanketsu, Twitter yūzā ni shōgeki* [IP High Court Decision, Automatic Image Trimming in Retweets Infringes Moral Rights], IT Media (13 June 2018), <https://www.itmedia.co.jp/news/articles/1806/13/news109.html>; K. OKAMOTO, *RT ni yoru gazō torimingu de chosaku jinkaku-ken shingai, chizai kōsai hanketsu no imi to eikyō, bengoshi ga kaisetsu* [Lawyer Explains: The Meaning and Effects of the IP High Court's Decision Finding Copyright Moral Rights Infringement in the Automatic Image Trimming in Retweets], IT Media (22 June 2018), <http://www.itmedia.co.jp/news/articles/1806/22/news016.html>. D. ŌTSUKA, *Twitter aikon gazō jiken (kōso-shin) – chosaku-ken hasshin ha jōhō kaiji seikyū kōso jiken hanketsu (chitekizaisan saibanrei-shū)* [Twitter Icon Image Case (Appeal)] (31 May 2018), <http://ootsuka.livedoor.biz/tag/写真>; S. WATANABE, *Twitter Retweet Function Caused Moral Rights Infringement in Japan*, (25 July 2018) IAM Media, <https://www.iam-media.com/twitter-Retweet-function-causes-moral-rights-infringement>.

29 *Chosaku-ken Hanrei Hyakusen* [100 Selected Copyright Precedents] (Jurisuto Special Issue, 6<sup>th</sup> ed., Tōkyō 2018).

### 1. *The Problem of Link Liability*

The centrepiece of this judgment lies in the Court's treatment of links. Linking between websites is the 'single most basic characteristic of the World Wide Web', and 'critical to the functioning of the entire network'.<sup>30</sup> It is a technology the development of which established the internet's potential for communication and dissemination of great masses of data in a single body of knowledge.<sup>31</sup> As such, links are the 'threads in which the web is spun',<sup>32</sup> and the internet community as a whole sees them as inherently desirable.<sup>33</sup>

Yet, links also carry the potential for further copyright infringement. Digital material can be perfectly reproduced,<sup>34</sup> spread exponentially quickly and 'reposted on an infinite number of sites'.<sup>35</sup> Attempts to limit availability of information only further 'encourage the content in question to proliferate all over the Internet'.<sup>36</sup> What complicates this is that the user may not even be aware that they are infringing someone's copyright.<sup>37</sup> In this way, any person on the internet has the potential 'to engage in some form of infringement, whether intentionally or not'.<sup>38</sup>

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30 S. GIVONI, *Online Copyright: Introduction*, in: Lawrence (ed.), *Law of eCommerce* (Lexis Nexis 2012) 30,040.

31 S. GIVONI, *Online Interaction: Linking, Framing and Scraping*, in: Lawrence (ed.), *supra* note 30, 30420; *American Civil Liberties Union v Reno*, 929 F Supp 824 (1996) (Sloviter CJ, Buckwalter and Dalzell JJ); F. LOW/C. LOI, *Links, Frames and Meta-Tags: More Challenges from the Wild Wild Web*, Singapore Academy of Law Journal 12 (2000) 51, 75; M. O'ROURKE, *Fencing Cyberspace: Drawing Borders in a Virtual World*, Melbourne Law Review 82 (1998) 609; M. STAPLES, *Kelly v. Arriba Soft Corp.*, Berkeley Technology Law Journal 18 (2003) 69, 81.

32 B. SCHELLER, *Hey, Keep Your Link to Yourself – Legal Challenges to Thumbnails and Inline Linking on the Web and the Potential Implications of a First Impression Decision in Kelly v. Arriba Soft Corp.*, Villanova Sports & Entertainment Law Journal 10 (2003) 415, 433, n. 124; AOKI, *supra* note 23, section 2; J. GINSBURG/L. BUDIARDJO, *Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives*, Columbia Journal of Law & the Arts 41 (2018) 153, 190.

33 M. SABLEMAN, *Link Law Revisited: Internet Linking Law at Five Years*, Berkeley Technology Law Journal 16 (2001) 1273, 1276.

34 GIVONI, *supra* note 30, 30,010.

35 K. PODLAS, *Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows is Copyright Infringement*, Harvard Journal of Sports & Entertainment Law 6 (2015) 41, 42.

36 Y. AKDENIZ, *To Link or Not to Link: Problems with World Wide Web Links on the Internet*, International Review of Law, Computers & Technology 11 (1997) 281, 288.

37 GIVONI, *supra* note 30, 30,010.

38 *Ibid.*

a) *Links Generally*

All internet links present two major problems. First, they do not copy or store the information to which they direct. At its most basic level, a link is a line of code,<sup>39</sup> most commonly written in HyperText Markup Language (HTML).<sup>40</sup> That code instructs a browser to retrieve information from a certain server when activated.<sup>41</sup> Technically, then, a link to infringing material never actually copies or stores that material itself.<sup>42</sup> The only element which the HTML code copies is the directory reference for the website which hosts that content.<sup>43</sup> As no copy is produced, there can be no infringement of the right of reproduction (Art. 21 Copyright Act), and no distribution of copies which would infringe the right to distribute (Art. 26 Copyright Act). Such an understanding is broadly consistent with the Japanese IP High Court's findings.

The second problem is that links do not themselves transmit any material. A link merely informs the user's browser of where to find another file or webpage. Beyond that, it is the content's 'originating server, not the inline-linking page, which actually "transmits" the content' for the user's download.<sup>44</sup>

This also has ramifications for assessing copyright liability, as it suggests that a link cannot infringe the right of public transmission (Art. 23 Copyright Act). A previous case in the Ōsaka District Court addresses this point.<sup>45</sup> The Defendant, a website named 'Rocket News 24', attached a link to a video which had been uploaded on a third-party website named 'Nico Nico'. The Court considered the right of public transmission and found that the viewer was nonetheless viewing the video on the Nico Nico website. It determined that the 'person responsible for sending the Video's data to the device is, after all, the Nico Nico operator; it is not as if the Defendant is sending anything' themselves.<sup>46</sup> Consequently, the linker had neither infringed, nor conducted even 'the preliminary steps of making its transmission possible'.<sup>47</sup>

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39 SCHELLER, *supra* note 32, 423.

40 *Ibid.* 422; A. STROWEL/N. IDE, Liability with Regard to Hyperlinks, Columbia VLA Journal of Law & Arts 24 (2001) 403; B. WASSOM, Copyright Implications of Unconventional Linking on the World Wide Web: Framing, Deep Linking and Inlining, Case Western Law Review 49 (1998) 181.

41 GIVONI, *supra* note 30, 30,430.

42 SCHELLER, *supra* note 32, 451; See, eg, *Goldman v Breitbart News Network LLC*, (SD NY, Civ No. 17-3144, 15 February 2018) slip. op. 4.

43 GIVONI, *supra* note 31, 30,430.

44 STAPLES, *supra* note 31, 81.

45 AOKI, *supra* note 23, section 2, quoting Ōsaka DC, 20 June 2013, Hanrei Jihō 2218 (2014) 112 ('Rocket News 24').

46 *Ibid.* [Author's trans].

47 *Ibid.* [Author's trans].



The above two features had material importance in *Nawata v Twitter*. By retweeting Account 2's Tweet, the retweeters merely provided a set of directions to the page containing the infringing copy. Their followers' devices then accessed that page and downloaded a copy from there. The significance of this difference is clear when we consider that all iterations of the infringing photo immediately disappeared once Twitter removed Account 2's infringing Tweet. The Court recognised this when clearly distinguishing between the Image File's Data and the Script Data:

'The Image File's Data is transmitted directly to the User's PC Terminal from the [destination] Server [...] [Yet] in order to make the Photograph's Image display on the User's PC terminal, it is necessary to transmit the [Script Data] (i.e. HTML, CSS, and Javascript programs) for specifying how to display a picture[...] As a result of the Retweets, those kinds of programs are transmitted to the User's PC from the Server corresponding to the [retweeters'] Webpage[s].'

In essence, then, there was only ever one reproduction (Account 2's), and what the retweeters transmitted was not the photographic work in dispute.

#### b) *Inline Links*

*Nawata v Twitter* concerns a particular form of linking called 'inline linking' which poses three further complications in assessing liability. Firstly, inline links activate without any deliberate user input. In the many forms of links that exist, most require the user to click or otherwise interact, in order to initiate the linking process.<sup>48</sup> However, inline links require no such interaction. If a webpage contains an inline link, then the user will download the contents of that link simply by opening the page.<sup>49</sup>

This raises questions about the knowledge required of a user whose browser automatically downloads content from a link, whether or not the user so intends.<sup>50</sup> On a site such as Twitter, for example, users subscribe to multiple feeds of content which is curated by persons other than themselves, and the content downloads and displays as the user scrolls through their feed. The user is in no position to decide not to download content which turns out to be infringing. In fact, the user cannot even judge whether the material is infringing until after downloading it.

This aspect of inline links is so problematic that many have suggested recognising an implied licence in favour of the user. Materials on the web

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48 GIVONI, *supra* note 31, 30,420; SCHELLER, *supra* note 32, 423.

49 *Goldman v Breitbart News Network LLC*, *supra* note 42, slip. op. 5; LOW/LOI, *supra* note 31, 84.

50 See eg, *Universal City Studios, Inc v Reimerdes* (2000) 51 IPR 441, 466.

can only be read on a browser by downloading and copying them,<sup>51</sup> so commentators argue that, by making the materials available online, ‘the copyright owner must be taken to have granted an implied licence’ to undertake all acts required to view that material, including downloading and linking to it.<sup>52</sup> Inline links therefore occupy a gap which Copyright law had never contemplated.

The second problem is that inline links present to the user as if part of the linking page. While most links require the browser to open a new webpage altogether, inline links pull content from another server and then place and arrange it on the web page the user is currently browsing.<sup>53</sup> These links bring content directly to the user without the need to leave the current webpage.<sup>54</sup> Without inspecting and scrutinising the webpage’s code, then, the user will remain wholly unaware that what they view is imported from another website, and not stored on the server for the webpage they have open.<sup>55</sup>

This raises questions about whether copyright liability should focus on the underlying technology or the overall user experience. Put differently, should a court measure by reference to the process or the end result? The IP High Court in *Nawata v Twitter* oscillates between the two options. For example, when rejecting any infringement of the right of reproduction, the Court relied on differences in the technological process, noting (as above) that the retweets do not themselves contain the Image File Data. Yet, when assessing moral rights infringement, it focused on how the photograph presented to the user, and rejected the Respondents’ arguments regarding the technology behind that result.

Thirdly, inline links directly deprive the copyright owner of economic benefits. Given how useful links are to disseminating information on the internet, many internet users are ‘puzzled by any legal scheme that would penalise or restrict use of such mutually beneficial indexes’.<sup>56</sup> Indeed, the majority of links are tacitly understood as unobjectionable ‘or even welcomed on the part

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51 LOW/LOI, *supra* note 31, 84.

52 GIVONI, *supra* note 31, 30,430; A MAJOR, Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the World Wide Web, *Rutgers Computer & Technology Law Journal* 24 (1998) 75; SCHELLER, *supra* note 32, 452; STROWEL, *supra* note 40.

53 AKAGAWA, *supra* note 14; SCHELLER, *supra* note 32, 424; A. ROARTY, Link Liability: The Argument for Inline Links and Frames as Infringements of the Copyright Display Right, *Fordham Law Review* 68 (1999) 1011; STROWEL, *supra* note 40; *Goldman v Breitbart News Network LLC*, *supra* note 42, slip. op. 4.

54 GINSBURG/BUDIARDJO, *supra* note 32, 155.

55 SCHELLER, *supra* note 32, 424; GIVONI, *supra* note 31, 30,450; WASSOM, *supra* note 40; STAPLES, *supra* note 31, 71.

56 SABLEMAN, *supra* note 33, 1276.

of the “linkee”<sup>57</sup>. For links requiring a click to activate, this is certainly true. Higher frequency traffic ‘serves as an indicator of the site’s prestige’ and typically leads to increased revenue for the linked-to site.<sup>58</sup>

However, this is where inline links differ. As inline links bring individual files from distant servers to the one webpage, the linking site can profit from that content at the expense of the linked-to server. The most notable example of this is advertisement revenue, now a considerably lucrative source of income.<sup>59</sup> Yet, if no one needs actually view the page containing that advertisement in order to view the content, then there is no revenue to gain. Instead, the inline-linker can fill their own page with advertising and rob the copyright owner of potential profit from their work.<sup>60</sup>

### c) *The Japanese Position*

The question, then, is not just whether linking itself should give rise to liability, but whether inline links should be treated differently because of the above features. In Japan, there are of course some previous cases which found liability for copyright infringement by posting links.<sup>61</sup> Generally, however, the prevailing view in Japan has been that links, including inline links,<sup>62</sup> do not give rise to copyright infringement.<sup>63</sup> This is partly born of necessity: linking cases arise infrequently, and different positions on different types of links may only obfuscate the limited jurisprudence.<sup>64</sup> To date, though, the focus has typically been on economic rights. By extending the discussion to moral rights, *Nawata v Twitter* introduces a new dynamic to this puzzle.

## 2. *Comprehension of Technology*

As the above discussion illustrates, linking technology is both a fundamental feature of the internet, and deceptively complex. As with any area of law, a thorough grasp of the underlying subject matter is crucial to develop-

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57 GIVONI, *supra* note 31, 30,420.

58 *Ibid.*; R. TUCKER, Information Superhighway Robbery: The Tortious Misuse of Links, Frames, Metatags and Domain Names, *Virginia Journal of Law & Technology* 4 (1999) 8; LOW/LOI, *supra* note 31.

59 LOW/LOI, *supra* note 31, 77.

60 *Ibid.*; GINSBURG/ BUDIARDJO, *supra* note 32, 190.

61 Sapporo DC, 27 April 2018, No. 2097 (wa) of 2016; KOIZUMI, *supra* note 4, 9; Tōkyō DC, 30 January 2018, No. 31837 of 2017; N. KOIZUMI, *Netto ōkushon o riyō shita kurakku-ban puroguramu no teikyō shutai* [The Person Responsible for Providing a Cracked Program Used on a Net Auction], *Jurisuto* 1521 (2018) 8; KOIZUMI, *supra* note 4, 9.

62 AOKI, *supra* note 23, section 2.

63 *Ibid.*; IJIMA, *supra* note 23.

64 AOKI, *supra* note 23 section 2.

ing coherent jurisprudence. Yet, while ‘links may be easy to use [...] they are not necessarily easy to define’.<sup>65</sup> The second major issue arising from this decision, therefore, is the quality of judicial understanding in regard to links and their surrounding technological circumstances.

Judges who struggle to develop link liability jurisprudence are of course not a problem limited to Japan. Courts throughout the world continue to have difficulty explaining the functions of this fundamental technology.<sup>66</sup> In the US, for instance, courts have variously compared links to: telephone exchanges,<sup>67</sup> photocopiers,<sup>68</sup> video-on-demand services,<sup>69</sup> video cameras filming in cinemas,<sup>70</sup> faster and more efficient library index cards,<sup>71</sup> footnoting or placing references in printed texts,<sup>72</sup> and ‘roadway signs on the information superhighway’.<sup>73</sup> All of these comparisons evince a desire for some familiar analogue counterpart, but none grasp the ‘unique communicative and technological’<sup>74</sup> role which links play on the internet.<sup>75</sup>

What makes the Japanese jurisprudence notable, then, is that these difficulties come in spite of a 17-year national plan to reposition the country as a leading ‘intellectual property-based nation’.<sup>76</sup> After the 2002 METI Task Force Report on Industrial Competitiveness and Intellectual Property,<sup>77</sup> the

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65 PODLAS, *supra* note 34, 70.

66 *Ibid.*

67 B. SOOKMAN, Understanding *Flava Works v Myvidster: Does Inline Linking Infringe Copyright*, Copyright Society of the USA Journal 59 (2012) 723, 729.

68 *American Broadcasting Companies Inc v Aereo Inc*, 134 US 2498 (2014) (Scalia, J., Dissenting); R. DENICOLA, Volition and Copyright Infringement, *Cardozo Law Review* 37 (2016) 1259, 1270; see also, LOW/LOI, *supra* note 31, 83; *Moorhouse and Angus & Robertson (Publishers) Ltd v University of New South Wales* [1976] RPC 151.

69 *American Broadcasting Companies Inc v Aereo Inc*, 134 US 2498 (2014) (Scalia J Dissenting).

70 GINSBURG/ BUDIARDJO, *supra* note 32, 181; *The Leader’s Institute, LLC v Jackson*, (ND Tex, WL 5629514, 22 November 2017).

71 GINSBURG/ BUDIARDJO, *supra* note 32, 182.

72 PODLAS, *supra* note 34, 70.

73 *Ibid.*; see also, GINSBURG/ BUDIARDJO, *supra* note 32, 183–185.

74 PODLAS, *supra* note 34, 70.

75 GINSBURG/ BUDIARDJO, *supra* note 32, 183.

76 H. ODA, *Japanese Law* (3<sup>rd</sup> ed., Oxford 2009) 363; INTELLECTUAL PROPERTY POLICY HEADQUARTERS, *Intellectual Property Strategic Forum 2005*, 10 June 2005, 2, [https://japan.kantei.go.jp/policy/titeki/kettei/050610\\_e.pdf](https://japan.kantei.go.jp/policy/titeki/kettei/050610_e.pdf); M. KATOH, *Intellectual Property and the Internet: A Japanese Perspective*, *University of Illinois Journal of Law, Technology and Policy* 2 (2002) 333, 337.

77 MINISTRY OF ECONOMY TRADE AND INDUSTRY (JAPAN), *Report Summary of Task Force on Industrial Competitiveness and Intellectual Property*, 5 June 2002; KATOH, *supra* note 76, 333.

Japanese government explicitly acknowledged the need for ‘judges to improve their knowledge on intellectual property’.<sup>78</sup> Accordingly, the government established the Intellectual Property Strategic Forum,<sup>79</sup> a revitalised Basic Law on Intellectual Property,<sup>80</sup> and a host of other amendments to its Civil Code.<sup>81</sup> More recently, it floated the possibility of introducing English language patent litigation, ostensibly to encourage more confidence in the country’s expertise.<sup>82</sup> The establishment of the Intellectual Property High Court is a collective reflection of Japan’s commitment to this goal, so its level of technical knowledge warrants scrutiny.<sup>83</sup> However, as discussed below, multiple aspects of *Nawata v Twitter* suggest that judicial comprehension is not progressing quite as quickly as planned.

*a) Assigning Responsibility for Modification*

When assessing the right of integrity, the court found that the retweeters had modified the photograph. This was because, ‘properly considered, the Image found on the Timelines of Accounts 3–5 is a modified one when compared with the Photograph that is the Appellant’s Work’. In reaching this conclusion, the court acknowledged and dismissed the respondents’ point that ‘the Photograph displayed on the Timelines of Accounts 3–5 is also displayed with the exact same trimming as the Photograph in [Account 2’s] Tweet’.<sup>84</sup>

It is tempting to see this reasoning as sustainable when viewed within the confines of the Twitter platform. After all, it is not possible (nor meaningful) to retweet a retweet, so regardless of the context in which a given retweeter viewed the original tweet, all retweets are only one degree separated from the original tweet – in both appearance and function.

The problem, however, is that inline links can compound. One inline link can extract a full webpage in which other inline links exist, which in turn may direct to other webpages *ad infinitum* and only at the end of which may be found the infringing work. Modification of the work could occur at any stage along that process and be preserved by every subsequent link accordingly. By ignoring the stages in between and comparing only the

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78 INTELLECTUAL PROPERTY POLICY HEADQUARTERS, *supra* note 76, 142–143.

79 ODA, *supra* note 76, 363.

80 *Ibid.*

81 INTELLECTUAL PROPERTY POLICY HEADQUARTERS, *supra* note 76, 13–14.

82 T. ETO, Japan Considers Allowing Patent Litigation in English, *Nikkei Asian Review*, 15 March 2019, <https://asia.nikkei.com/Economy/Japan-considers-allowing-patent-litigation-in-English>.

83 ODA, *supra* note 76, 363.

84 *Nawata v Twitter*, *supra* note 1 [Author’s trans].

beginning and end, the court's reasoning here would potentially allow for unlimited extension of liability.

It is also possible that the Court is imposing liability for the right of integrity through the distribution of a modified work. There is at least one case which supports such a view, but it requires there be a reproduction of the modified work.<sup>85</sup> As explained above, however, reproduction within the meaning of the Copyright Act never occurs in instances of linking, and the court makes no explicit hint at this conclusion. Instead, the court simply says that the retweeters modified the photograph.

*b) Whether a Modification is 'Unavoidable'*

The court's treatment of HTML code also appears inconsistent. The court initially accepts that the trimming results from the HTML instructions specifying the size and arrangement by which the Image File displays on the computer. As the Respondents argued, this trimming is in fact an 'unavoidable' modification within Art. 20(2)(iv) Copyright Act because it occurs in order to 'naturally and unproblematically display' the content of tweets within the size of a tweet's frame.<sup>86</sup>

Indeed, in a previous case, the Sapporo District Court held that an unavoidable modification occurred on Google's Image Search Service when it compressed and shrank the images people searched for.<sup>87</sup> The situation is not much different on Twitter, where all the content of a single Tweet must fit within a predetermined frame.

Alternatively, the trimming ought to be 'unavoidable' for another reason. As an inline link, a retweet imports the original tweet in its entirety as a single element on the page. As Twitter provides the retweet function on an 'as is' basis, the retweeter has no option to retweet only a single image from the tweet or only its text. In this sense, then, importing the HTML instructions is an 'unavoidable' modification arising from the act of linking.

Confusingly, though, the IP High Court ruled that 'the relevant act was the act of Retweeting Account 2's Tweet'.<sup>88</sup> It focused on the fact that Account 2's Tweet contained infringing information and on this basis concluded that the retweeters' modification 'cannot constitute an unavoidable modification'.<sup>89</sup> This rejects all arguments which would acknowledge lack of control on the user's end and distills the analysis to nothing more than 'but

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85 DC Tōkyō, 12 April 2007, No. 15024 (wa) of 2006 ("Seikyō Graph Case"); AOKI, *supra* note 23, section 4.

86 *Nawata v Twitter*, *supra* note 1 [Author's trans].

87 KOIZUMI, *supra* note 4, 9.

88 *Nawata v Twitter*, *supra* note 1 [Author's trans].

89 *Ibid.*

for the retweeters, the modified image would not be displayed on their respective timelines’.

*c) Whether a Modification is ‘Necessary’*

Even if not ‘unavoidable’, it is puzzling that neither the Court nor the parties considered the application of Art. 20(2)(iii) Copyright Act. This excuses a modification from liability where that modification is ‘necessary [...] for a work of computer programming to be used more effectively’.<sup>90</sup> The Supreme Court has taken a narrow view of this in the past,<sup>91</sup> but the provision otherwise seems designed to impose a lower threshold than required in Art. 20(2)(iv) Copyright Act above. That is, while it may not be an ‘unavoidable’ modification to trim images to fit within a predetermined frame, it is certainly ‘necessary’ for Twitter to run effectively. Doing so simplifies the overall programming and maintenance needs for the platform, allows consistent display across different devices and operating systems, and facilitates faster and smoother processing of data as users scroll through their content feeds. As a content aggregator, Twitter’s service rests on the ability to curate the manner in which users interact with content.

*d) Right of Attribution*

Referring to the language of Art. 19 Copyright Act, the Court found Nawata’s right of attribution infringed ‘because [his] name was no longer displayed when the Work was “made available or presented to the public” through the Retweeters’ Retweets’. Because Nawata routinely includes both his name and signature on copies of his photographs, proper attribution of course required that his name be displayed. However, two points bring this logic into question.

Firstly, Nawata’s name and signature remain quickly accessible. The user need only touch or click on the thumbnail in the Retweet to view the full image on screen. At the very least, the abovementioned Google Search Engine case seems broadly applicable here,<sup>92</sup> but so too does Art. 19(3) Copyright Act. The article waives the requirement for attribution where doing so is ‘unlikely to harm the interests of the author in a claim to authorship, in light of the purpose of the work and the circumstances of its exploi-

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90 Art. 20(2)(iii) Copyright Act [Author’s trans].

91 See eg. Supreme Court, 13 February 2001, Hanrei Jihō 1740 (2001) 78 (“Konami K.K. v Spec Computer K.K.”), Translated in K. L. Port, Japanese Intellectual Property Law in Translation: Representative Cases and Commentary, Vanderbilt Journal of Transnational Law 34 (2001) 847.

92 See above under IV.2.b).

tation, provided that the omission is compatible with fair practices'.<sup>93</sup> As the IP High Court itself admitted, while the Script Data changes the way in which the photo is presented in the frame of the tweet, it does not actually change the Image File Data. That is to say, if a user simply clicks on the image in the tweet, they will be presented with a full view of the image in its original form – including Nawata's signature. On a smartphone, this is no more than a tap of the finger on screen.

True, this means that attribution is guarded by an extra step, but it is one which requires only the most minimal and routine user interaction. For example, suppose a user placed one of Nawata's images halfway down a webpage, such that a user opening that webpage only saw the top half of that image when the page first loaded. Nawata's signature would still be available, but would merely require a user to scroll further down that webpage to see the full image. The present situation is no different: Nawata's signature is still available to any interested twitter user so long as they click or tap the picture on screen. Requiring such additional interaction of the user is far from likely to harm Nawata's interests in a claim to authorship. Yet, worryingly, neither the Court nor the parties ever turned their attention to this aspect of the user's interaction.

Secondly, the facts of *Nawata v Twitter* warrant comparison with the IP High Court's earlier decision in the *North Korean Classified Documents Case*.<sup>94</sup> In that instance, a library had been lending a book translated from Korean which itself infringed the right of attribution of the original Korean work. The Court refused to hold the library responsible for infringing the right of attribution in the original work, and in doing so reasoned that:

'where the library has purchased and held the translated work for the purposes of allowing its users to view or borrow it [...] lending it in such a fashion is distinct from cases where the translated work's author has failed to attribute authorship in the original work when making it available or presenting it to the public. The library's conduct does not fall within Article 19(1).'<sup>95</sup>

This reasoning appears to limit liability for attribution by drawing a line between the person who created the infringing work and the people who later publicise that infringing work. In that sense, the retweeters' conduct is

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93 As translated in: *Chosakuken-hō* [Copyright Act], Japanese Law Translation: <http://www.japaneselawtranslation.go.jp/law/detail/?re=2&ft=1&ky=著作権&page=18>.

94 IP High Court, 4 August 2010, No. 10033 (ne) of 2010; See also, M. HIRAO, *Chosakuken-hō chikujō kaisetsu* [Annotated Copyright Act], *Hirao Hōritsu Tokkyo Jimusho* [Hirao Law and Patents Firm] (13 June 2013), [http://hirao-pat.in.coocan.jp/copyright/right7.htm#right7\\_3](http://hirao-pat.in.coocan.jp/copyright/right7.htm#right7_3).

95 IP High Court, 4 August 2010, No. 10033 (ne) of 2010, slip. op. 17, quoting DC Tōkyō, 26 February 2010, No. 32593 (wa) of 2008.



quite comparable: it is Account 2's Tweet which failed to attribute authorship to Nawata, and the retweeters merely held that Tweet on their personal Timeline (their 'library collection') so that their followers (or 'library users') could view and access it. It stands to reason, then, that the retweeters should not have been liable for defects in Account 2's Tweet. For whatever reason, however, the IP High Court made no reference to this case and did not follow its approach.

*e) Automated Public Transmission*

In finding infringement of the right of automated public transmission, the Court held the person responsible to be the user whose computer downloads the work. This is problematic for three reasons.

First, this conclusion appears to misconstrue the Copyright Act and qualifying Supreme Court authority which the IP High Court explicitly adopted. Art. 2(1)(ix)-iv Copyright Act defines automated public transmission as 'a transmission to a member of the public [...] that is made automatically in response to a request from the member of the public', and the Supreme Court decision interprets this as the 'person who created the circumstances allowing the information to automatically transmit at the recipient's request'.<sup>96</sup> The wording of both sources clearly contemplates a single transmitter other than the ultimate recipient and in respect of whom multiple recipients may exist. With that in mind, ascribing responsibility to the Twitter user who viewed the retweet would create unlimited transmitters in respect of each only one recipient can exist. That is to say, the court appears to have assigned liability to the one party this right is not intended to cover.

Second, the ultimate viewer is the least appropriate person to describe as 'creat[ing] the circumstances allowing the information to automatically transmit'. In order, it is Account 2 who created such circumstances by placing the image on Twitter. Failing this, the responsible person is Twitter for providing the retweet function by which automated public transmission occurs. Failing that, it is actually the retweeters who should be liable, because it is the Script Data coded in the retweet which directs a user's computer to the site at which transmission can occur.

Thirdly, the distinguishing feature of inline links is that the ultimate viewer does not have a choice in whether to view the linked content. Twitter users browse content by scrolling through a continuous feed onscreen, and that content is downloaded in advance of viewing in order to facilitate the scrolling experience. This means the device has already requested and received the automated public transmission before the end user has their

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<sup>96</sup> *Nawata v Twitter*, *supra* note 1, citing Supreme Court, 18 January 2011, Minshū 65, 121.

first opportunity to view the material, let alone decide whether to view that material in the first place. Since the Court in fact acknowledged that the inline link is automatically generated,<sup>97</sup> this reasoning essentially imposes a Russian-roulette scheme of liability on all Twitter users based simply on whatever content is prepared for their feed.

### 3. *Over-protection of Copyright Owners Online*

A final issue is the need for balance in the relationship between creators and users of works. Copyright must offer authors enough protection to incentivise creation and dissemination of works, while simultaneously providing sufficient public access to them.<sup>98</sup> Although an author is entitled to the economic benefits of their work,<sup>99</sup> Copyright recognises that new knowledge and culture is built upon existing knowledge and culture, such that a rich intellectual commons also drives economic development.<sup>100</sup> This form of economic analysis rests at the heart of copyright policy.<sup>101</sup> As *Nawata v Twitter* illustrates, however, the current system skews heavily toward overprotecting copyright owners.

#### a) *A Skew Towards Copyright Owners*

Copyright owners have long complained about the threat of infringement online. Indeed, much like in the tangible world, there will always be some level of infringing activity on the internet.<sup>102</sup> It is for this reason that copyright holders endlessly advocate for further intellectual property protection.<sup>103</sup> Yet, both practically and legally, the balance is already significantly skewed in their favour.

Practically, the internet allows copyright owners a far more intimate relationship with consumers and many more options by which to license their works. Instead of a one-off transaction through a third party (as with, for example, a book shop selling various authors' books), an author can deal directly with the consumer. The author can charge for access on a 'per-

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97 AOKI, *supra* note 23, section 1.

98 GIVONI, *supra* note 30, 30,000; P. SAMUELSON/R. DAVIS, The Digital Dilemma: a Perspective on Intellectual Property in the Information Age, in: Computer Science and Telecommunications Board of the National Research Council, The Digital Dilemma: Intellectual Property in the Information Age (National Academy of Sciences Press 2000) 5–6; SCHELLER, *supra* note 32, 429.

99 *Harper & Row Publishers Inc v Nation Enters* 471 US 539 (1985) (O'Connor J).

100 A. DAWSON, The Intellectual Commons: A Rationale for Regulation, *Prometheus* 16 (1998) 275, 281–282; GIVONI, *supra* note 30, 30,020.

101 GIVONI, *supra* note 30, 30,000.

102 KATOH, *supra* note 76, 343.

103 *Ibid.*, 359.

device', 'per-access', or 'per-month' basis. In fact, the author can even control the way in which the user interacts with their work once accessed.<sup>104</sup> In that contractual relationship, copyright owners can 'severely limit fair use of creative materials online'.<sup>105</sup>

Additionally, the public access which supposedly threatens copyright owners may actually benefit them. For example, the massive increase in the availability of music online has ultimately increased purchases overall because consumers have the chance to 'sample' the music beforehand.<sup>106</sup> As such, 'there is little evidence that entertainment companies are in fact withholding their content' out of fear of infringement.<sup>107</sup>

Legally, too, safe harbours legislation such as the *Provider Liability Limitation Law* further empowers copyright owners, all while diverting even more responsibility from the provider to the individual user.<sup>108</sup> As Japanese law previously had no civil procedure 'to discover the identity of an unknown, would-be defendant', these laws significantly expand the class of people one can pursue, and by extension 'the ability of a person harmed by infringing content to enforce [their] rights'.<sup>109</sup>

#### b) *Disproportionate User Responsibility*

Nawata's claim for disclosure is a prime example of how these copyright owner protections can be abused, and in several respects shows increasingly disproportionate allocation of responsibility to the user.

First, the retweeters realised no economic gain from retweeting. Unlike sites such as YouTube, Twitter users do not receive any share in the site's advertising revenue. As there is no evidence that the Appellant suffered any economic loss due to the retweeters, nor that the retweeters exploited the original Tweet for commercial purposes, it seems excessive to facilitate Nawata's pursuit of them in the courts. This is especially so because, by virtue of being inline links, all the retweets disappeared automatically once Twitter deleted Account 2's original infringing Tweet.<sup>110</sup> The Court appears to have acknowledged this when it made a costs order against Nawata, ordering him to pay all costs, except half of Twitter Japan's and a quarter of his own. However, the Court still ultimately found in his favour, thereby facilitating his frivolous pursuit of rights.

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104 GIVONI, *supra* note 30, 30,020.

105 STAPLES, *supra* note 31, 90.

106 KATOH, *supra* note 76, 335.

107 *Ibid.*, 343.

108 *Ibid.*, 340.

109 *Ibid.*, 341.

110 AOKI, *supra* note 23, section 2.

Second, the retweeters have no control over how the Retweet function adjusts any given image. Twitter writes the Script Data responsible for modifying the Photograph and provides it on a ‘take it or leave it’ basis. If, despite some cases to the contrary,<sup>111</sup> the court refuses to recognise the modification as ‘unavoidable’, then the person responsible must surely be Twitter itself. Instead, the court apportioned blame to the retweeters, arguing that they could have avoided modification by not Retweeting at all.<sup>112</sup> The problem with this is that moral rights presuppose the use of a work. Unlike economic rights which regulate the ability to use (such as reproduction or public transmission), moral rights exist to regulate the *manner* in which a work is used. It is therefore rather contrived to suggest that moral rights compliance is possible by opting not to use the work at all.

Thirdly, this decision further contributes to the shrinking intellectual commons. Imposing such a heavy burden on the individual user will excessively stifle contributions to the public domain. All social networking sites rely either partly or wholly on users posting and sharing content.<sup>113</sup> Twitter in particular even provides code that web designers can ‘easily copy in order to enable embedding on their own webpages’.<sup>114</sup> So, if Twitter users are wholly responsible for all the due diligence required before sharing a tweet, there will quickly be no incentive to contribute to the site at all.<sup>115</sup> This is exactly the imbalance that Judge Kozinski warned of in *White v Samsung Electronics of America Inc* when his Honour stated that:

‘[...] overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, like nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture.’<sup>116</sup>

Ultimately, by sharing, modifying and critiquing content, Twitter users contribute to the intellectual commons and therefore engage in a public good. An appropriate assessment of copyright liability should account for this.

### *c) Acknowledging Existing Contractual Relationships*

More fundamentally, however, the court gave no consideration to a third and indispensable factor – the contractual relationship between Provider

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111 KOIZUMI, *supra* note 4, 9.

112 *Ibid.*; IJIMA, *supra* note 23.

113 *Goldman v Breitbart News Network LLC*, *supra* note 42, slip. op. 2.

114 *Ibid.*, slip. op. 5.

115 KATO, *supra* note 76, 359.

116 *White v Samsung Electronics of America Inc*, 989 F 2d 1512 (9<sup>th</sup> Cir 2003) (Judge Kozinski, Dissenting).

(Twitter) and User (retweeters). Social networking sites require users to agree to an array of copyright terms and licences.<sup>117</sup> Under Twitter's terms of service, users agree to grant Twitter a 'worldwide, non-exclusive, royalty-free license (with the right to sub-license) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute' any content that user uploads.<sup>118</sup> By uploading that content, the user warrants that they possess 'all the rights, power and authority' to grant such a licence.<sup>119</sup>

This is an important agreement, because retweeters are ill-placed to know (i) whether any content has been validly licensed, (ii) who the copyright owner is or (iii) how to contact them. In this case, for example, the extensive measures Nawata took to assert his copyright ownership meant very little if the retweeters' first and only exposure to his work was through Account 2's Tweet, with Nawata's marks already removed. The terms of service therefore reflect the parties' understanding of how risk ought to be allocated for exactly these instances of liability. The parties intend that responsibility for that due diligence should fall to the person who uploaded the infringing material. As the terms of service are identical for all Twitter users, the effect of this agreement is to lead users to trust that all content on the Twitter platform is validly licensed for use. Whether this be characterised as an implied warranty from Twitter or a multi-partite contract with all other users, any given user should be entitled to rely on Account 2's promise that it had good title in Nawata's photograph. By ignoring this contract and finding against the retweeters, the court's decision undermines the purpose of the terms of service.<sup>120</sup>

Further, by staying silent on the question of the underlying contractual relationship, *Nawata v Twitter* invites further questions on procedural issues. As Twitter is a Provider for the purposes of the Provider Liability Limitation Law, Art. 4(4) of this law divests Twitter of any liability in copyright for the retweeters' actions – indeed that is the very purpose of the Act. Yet, if the retweeters are entitled to rely on this effective warranty from Twitter that the platform's content is good to use, Twitter would nevertheless have indemnified the retweeters for liability arising from their actions. If not Twitter, then Account 2 must take responsibility for having breached the warranty.

This has immediate ramifications for application to the Provider Liability Limitation Law. If either or both of Twitter and Account 2 are proportionate-

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117 GIVONI, *supra* note 29, 30,010.

118 Twitter Terms of Service (8 September 2014), [https://twitter.com/en/tos/previous/version\\_8](https://twitter.com/en/tos/previous/version_8), Art. 5.

119 *Ibid.*

120 *Ibid.*

ly liable in the above fashion, then there is no need to pursue the retweeters, and accordingly, no justification in disclosing their personal information to Nawata. The fact that the court both ignored the contractual relationship and also granted disclosure therefore sends a very puzzling message.

## V. CONCLUSION

*Nawata v Twitter* illustrates the myriad problems courts continue to face in settling copyright disputes involving digital works. Most significantly, it highlights the need for a clear solution.

Despite decades of debate on the matter, there is still no settled position on why or how links may give rise to infringement, if at all. The Japanese court still seems unwilling to distinguish between different types of links, and hesitant to acknowledge the differing levels of control available to those participating in the online environment. Accordingly, and because links underpin the digital century's most important infrastructure, it is crucial that we find a solution which neither threatens 'the fundamental operation of the Internet nor its technological development'.<sup>121</sup>

Doing this requires judges to have a solid understanding of the technology which is the subject of dispute. A bad precedent produced by judges who misunderstand how the internet works can have profoundly negative effects down the line.<sup>122</sup> Yet, much like courts in other jurisdictions, it seems the Intellectual Property High Court is still some ways from such comprehension.

Finally, and most importantly, any settled position must remain faithful to the policy aims underlying copyright. While the internet certainly creates far greater potential for copyright infringement, this accompanies copyright owners' enhanced ability to control how users access and interact with their works. As it stands, the court appears too willing to find relief for copyright holders, and a continued trend of this kind could see creativity stifled online.

These issues continue to grow in commercial importance. How copyright principles should apply in the online world will continue to be subject to debate, but 'as the technologies grow in commercial importance, answers to these questions will be of increasing significance'.<sup>123</sup> At the moment, however, it seems any resolution is far off.

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121 KATO, *supra* note 76, 335.

122 SCHELLER, *supra* note 32, 456; P. ATHANASEKOU, Internet and Copyright: An Introduction to Caching, Linking and Framing, *Journal of Information Law & Technology* 1998, 7.

123 GIVONI, *supra* note 30, 30,040; WASSOM, *supra* note 40.

## VI. TRANSLATION OF JUDGMENT

*Intellectual Property High Court*

Judgment made 25 April 2018

No 10101 (ne) of 2016, Appeal Case on the Claim for Disclosure of the Sender's Identifying Information,

First Instance: Tōkyō District Court No 17928 (wa) of 2015

Last Day of Oral Arguments: 7 March 2018

YORINOBU NAWATA	v	TWITTER JAPAN KK
(Appellant, Plaintiff at First Instance)		(First Respondent, Defendant at First Instance) ('First Respondent')
		and
		TWITTER, INC.
		(Second Respondent, Defendant at First Instance) ('Second Respondent')

*Judgment of the Court*

Amend the Original Decision as follows:

Second Respondent must disclose to Appellant the Email Addresses of the following persons:

1. The Owner of Account 1 found in the attached Account list. This account is configured to display each of the 'Displayed Images' in Distributed Information List items 1(1)-(4) on the monitors of client computers which access each of the URLs in the same items of that list. Those URLs belong to the short-form messaging website 'Twitter' which the Second Respondent operates ('Twitter').
2. The Owner of Account 1 found in the attached Account list which is configured to display 'Displayed Image' 1(5) of the Distributed Information List as its Profile Image for every short-form message ('Tweet' it posts and which is displayed on its Timeline when a client computer accesses the Twitter webpages corresponding to the URLs listed in Distributed Information List 1(5).
3. The Owner of Account 2 found in the attached Account List which is configured to display the image in 'Displayed Image' item 2(1) of the attached Distributed Information List as the image displayed in Tweet 1 listed in the attached Tweet list, which displays whenever a client computer accesses the Twitter URLs listed in Distributed Information List 2(1).

4. The Owner of Account 2 found in the attached Account list, which is configured to display the Image in ‘Displayed Image’ 2(2) of the Distributed Information List on the monitor of a client computer which accesses the Twitter URLs in the same item.
5. The Owner of Account 2 found in the attached Account list, which is configured to display the Images in ‘Displayed Image’ items 2(3) and 2(4) of the Distributed Information List as Images which are displayed in Tweet 1 of the attached Tweet List, and which are displayed on the Timeline whenever a client computer accesses the Twitter Webpages for the URLs listed in those same items.
6. Each of the Owners of Accounts 3–5 in the Account List, which themselves posted the quotation-form Tweets (‘Retweets’) in Distributed Information List items 3-5 of Tweet 1 of the Tweet List, and which is configured to display the images in ‘Displayed Image’ items 3-5 of that same list on its Timeline whenever a client computer accesses the Twitter Webpages for the URLs found in that same list.

We dismiss each of the Appellant’s claims against the Second Respondent beyond the above, and each of the claims against the First Respondent. For the costs of litigation in the first and second instances, the Second Respondent will bear half of its own costs and one quarter of the Appellant’s costs. The Appellant will bear all additional costs. The Second Respondent has an additional 30 days to apply for leave to appeal this decision.

## FACTS AND REASONS

### I. Summary of the Facts

In the present case, the Appellant makes the following claims regarding the short-form blogging internet site ‘Twitter’ and the photographic Work found in the Photograph List attached in the original decision (‘Photograph’):

1. That an unknown person used it as their account’s profile image without permission, and thereafter displayed it on that account’s Timeline and ‘Tweets’ (posts);
2. That an unknown person used it without permission as part of a Tweet containing images, and displayed it on their account’s Timeline; and
3. That, by various unknown persons without permission, the second Tweet was Retweeted, and displayed on those persons’ Timelines, thereby infringing the Appellant’s Copyright in the Photograph (specifically, the Right of Reproduction, the Right of Public Transmission, the Right to make available for Transmission, and the Right of Public Communica-



tion, collectively referred to as ‘the Copyright’) and also the Author’s Moral Rights (specifically, the right of Attribution, Right of Integrity and Right against damage to honour or reputation – collectively, ‘the Author’s Moral Rights’).

Under Art. 4(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 (‘the Provider Liability Limitation Law’), the Appellant claims Disclosure of the information in the Attached Sender’s Identifying Information List in relation to all three claims.

The Appellant, at first instance, primarily claimed disclosure of each of the Sender’s Identifying Information listed in the Sender’s Identifying Information List (No 1) attached to the Original Decision, and alternatively each of the Sender’s Identifying Information listed in the Sender’s Identifying Information List (No 2) attached to the Original Decision.

The Original Decision upheld the claims against the Second Respondent to the extent that they required disclosure of each of the Sender’s Identifying Information found in the original decision’s attached Sender’s Identifying Information List 1(3) for each account listed in 1 and 2 of the Original Decision’s attached Distributed Information List.

Because the Original Decision dismissed each of the additional claims in respect of the Second Respondent and all claims in respect of the First Respondent, the Appellant brought this appeal in objection. In the present instance, having partially withdrawn the action and amended the suit, the Appellant’s claims are as above.

The Agreed Facts are as stated from paragraph 3 line 4 to paragraph 5 line 20 of the Original Decision and we quote accordingly. However, we make two revisions: we refer to ‘Ko 4’ in paragraph 4 line 12 of the Original Decision as ‘Ko 4(2)-(5)’; and refer to ‘Ko 4’ in line 25 of the same as ‘Ko 4(1), (6) and (7)’.

## II. Issues in Dispute

*Issue 1:* Does the First Respondent own the Information in the Sender’s Identifying Information List?

*Issue 2:* For Accounts 1 and 2, is it clear whether the Appellant’s Copyright and associated Author’s Moral Rights were infringed (Provider Liability Limitation Law Art. 4(1)(1)) via the Tweet or Display of the Photograph on the Timeline (Distributed Information 1(6) and (7), 2(3) and (4))? Further, there is no dispute between the parties as to whether the act of setting a Profile Image and displaying it on a Timeline (Distributed Information

1(1) to (5)) as well as the act of Tweet 2 and Display on Tweet 2 (Distributed Information 2(1) and (2)) infringes the Appellant's Right of Public Transmission (Copyright Act Art. 23(1)).

*Issue 3:* For Accounts 3 to 5, is it clear whether the Appellant's Copyright and associated Author's Moral Rights were infringed via the Retweets? (Distributed Information 3 to 5) (Provider Liability Limitation Law Art. 4(1)(1))

*Issue 4:* At the date of final judgment, did the IP Address of the Most Recent Login and accompanying Timestamp fall within the meaning of 'IP Addresses related to Infringing Information' (item 4) or 'the time and date on which the Infringing Information was transmitted' (item 7) as stipulated in the 'Ordinance for Establishing the Sender's Identifying Information in Art. 4(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' ('The Ordinance')? If so, is it the 'Sender's Identifying Information relating to the infringement of rights' which must be disclosed under the Provider Liability Limitation Law Art. 4(1)?

*Issue 5:* Does the Appellant have just grounds for disclosure of the Sender's Identifying Information (Provider Liability Limitation Law Art. 4(1)(2))?

[...]

### III. Decision of this Court

[...]

#### *1. Issues 2 and 3: Copyright Infringement Due to Accounts 1, 2, and the Retweets*

In light of the facts of this case, we will first deal with the issue of the Retweets.

##### *(1) The Facts*

As listed above in the Agreed Facts (Original Decision pages 4 to 5), through the Retweets an Inline Link is established in the URLs for the timelines of Accounts 3–5 to the URL representing the Destination anchor as found in Distributed Information 2(2). The Image File's Data is transmitted directly to the User's PC Terminal from the Server related to that same URL, and the Photograph's Image is displayed on the User's PC.

Yet, based on the Evidence (Ko 20, 27, 29, 32, 33, 48, 50-53) and entire substance of argument, in order to make the Photograph's Image display on

the User's PC terminal, it is necessary to transmit the programs (i.e. HTML, CSS, and Javascript programs) for specifying how to display a picture from any kind of Destination anchor, and in what size or arrangement. As a result of the Retweets, those kinds of programs are transmitted to the User's PC from the Server corresponding to the Source anchor's Webpage. Because of this, Destination anchor's Image is occasionally displayed as either an Image of different length and width or a partially trimmed Image.

We find that the Image on the Timelines of Accounts 3–5 differs from the Image in Distributed Information 2(2) in this way (it is trimmed, the aspect ratio is different, and the Appellant's name is not displayed). Moreover, the Appellant argues that the 'Infringing Information' is the Script Data or 'Browser Rendering Data' generated by the combination of not just the Photograph's Image Data, but also these HTML Program, CSS Program, and JavaScript Program Data.

## *(2) Right of Public Transmission*

### *a) The Legislation*

The Copyright Act Art. 2(1)(7)(2) defines Public Transmission as 'making a transmission of wireless communications or wired telecommunications with the objective of allowing the public to receive them directly'. Item 9(4) of the same paragraph defines Automated 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', and item 9(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 (an automatic public transmission server is a device with a function that allows it to send automatic public transmissions of data which is recorded onto the area of its recording media that is used for automatic public transmissions (hereinafter in this item and Article 47-5, paragraph (1), item (i) referred to as a "recording medium for public transmissions") or of data that is input into it, through its connection with a public telecommunications network; the same applies hereinafter); adding a recording medium onto which data has been recorded to such an automatic public transmission server as its recording medium for public transmissions; converting a recording medium onto which data has 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;

(b) connecting an automatic public transmission server onto whose recording medium for public transmissions data has been recorded or into which data has been input, to a public telecommunications network (if this is done through a series of actions such as connecting cables, starting up the automatic public transmission server, and booting the programs for transmission and reception, connecting means the last action in the series).’

Additionally, the Copyright Act Art. 23(1) provides that ‘[t]he 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) Particularising the Infringing Information*

The Appellant’s copyright is in the Photograph. As the Photograph Data is only present on the server related to the Distributed Information 2(2) as a Destination anchor, the Transmitted Work Data is only the Data in Distributed Information 2(2). As above, Public Transmission means ‘making a transmission... with the objective of allowing the public to receive them directly’. Therefore, as concerns infringement of the Right of Public Transmission, only the Data in Distributed Information 2(2) constitutes ‘Infringing Information’ contrary to the Appellant’s arguments, neither the Browser Rendering Data nor Script Data can be considered ‘Infringing Information’.

Consequently, we cannot accept any of the Appellant’s arguments concerning the Right of Public Transmission (specifically, the right to make available for transmission and the right of Automated Public transmission) which assume the Browser Rendering Data or Script Data to be ‘Infringing Information’.

We will now turn to the alleged infringement of the right of Public Transmission where only the Image Data in Distributed Information 2(2) constitutes Infringing Information.

*c) Whether or Not There is Infringement*

The Photograph Image displayed on terminals such as the User’s PC by the Retweets is displayed at the Users’ request upon transmission of the Data in Distributed Information 2(2). As such, it constitutes an Automated 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’).

The person responsible for Automated Public Transmission is understood to be the person who created the circumstances allowing the information to automatically transmit at the recipient’s request (cf. Supreme Court Decision 2011.1.18 Minshū 65-1-121).

Given that only the Data in Distributed Information 2(2) is transmitted, the person responsible for automated public transmission of the Photograph Data is the person who opens the URL of Distributed Information 2(2), not the Retweeters. When asking who is responsible for the Copyright infringing act, one must normatively consider all the surrounding circumstances, including the nature and degree of involvement in the act, as well as its object and method. The Karaoke Principle is one example of this application (Supreme Court Decision 2011.1.20 Minshū 65-1, 399).

In the present case, though, it is difficult to identify any circumstances which suggest that the Retweeters are responsible for the automated public transmission. The Appellant argues that the operator of Accounts 3–5 controls the Home Screen, and gains social and economic benefits from their Home Screens being viewed. Yet, these circumstances only relate to the Home Screens of Accounts 3–5, and are still not circumstances suggesting that the Retweeters are primarily responsible for the Photograph's Automated Public Transmission, the transmission of which only contained the Data in Distributed Information 2(2).

Of course, the Retweets lead to the Photograph's Image being displayed on a greater range of Users' PCs and terminals. Yet, under the interpretation of this nation's Copyright Act, such an increase in the range of recipients does not make the Retweeters primarily liable for the Automated Public Transmission. Furthermore, it is difficult to say whether the Retweets in fact facilitated the above Automated Public Transmission. The Retweeters therefore cannot be considered accessories, and no other circumstances suggest otherwise.

The Appellant further claims infringement of a right of Public Transmission which does not fall within Automated Public Transmission, Broadcast or Cablecast. However, as above, this constitutes an Automated Public Transmission, so no infringement other than by Automated Public Transmission can arise.

### *(3) Right of Reproduction (Art. 21)*

As discussed above, because the Photograph Work is transmitted only by the Data in Distributed Information 2(2), one cannot say that the Work has been 'reproduced' by the Retweets. Consequently, as regards any infringed Right of Reproduction, the Appellant cannot treat the 'Browser Rendering Data' or Script Data as the 'Infringing Information'. We therefore cannot adopt any arguments by the Appellant for Infringement of the Right of Reproduction which assume that the Infringing Information is either the Browser Rendering Data or Script Data.

(4) *Right of Public Communication (Art. 23(2))*

Copyright Act Art. 23(2) provides that '[t]he 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 the Retweeters should be considered the persons who displayed the Work on Client Computers, and that they therefore publicly communicated the work using the Client Computers as Receivers. However, Copyright Act Art. 23(2) provides the right to publicly communicate a work through a receiver once it has been publicly transmitted.

Yet, assuming that the Client Computer is the Receiver, the person responsible for communicating through that receiver must be the Computer's User, and therefore cannot be the Retweeters. The circumstances that the Appellant argues are those relating to the Photograph's Public Transmission and the Home Screens of Accounts 3–5. These do not influence this decision. As such, we find it difficult to accept that the Client Computer's User is the person responsible and has communicated to the public, and therefore cannot accept that it is itself an act constituting infringement of the right of Public Communication.

Accordingly, as there is no infringement upon the Right of Public Communication itself, there can be no complicity in such an infringement.

(5) *Infringement of the Author's Moral Rights*

a) *Right of Integrity*

As in the previous paragraph, the Image displayed on the Timelines of Accounts 3–5 is distinct from the Image in Distributed Information 2(2). As above, the displayed image is distinct because the location and size are specified upon display according to the HTML and CSS Programming transmitted as a result of the Retweets.

The Image Data in Distributed Information 2(2) has not itself been subjected to Modification. However, If it is accepted that the displayed Image is a 'a creative expression of thought or sentiment of literary, academic, artistic or musical character' within the meaning of Copyright Act Art. 2(1)(1), then as above, the Image found on the Timelines of Accounts 3–5 is an Image like that in Distributed Information List 3 to 5 because the size and location are specified by the HTML and CSS Programming upon display. It follows that the displayed Image is one modified by the Retweeters, and the Right of Integrity is infringed.

On this point, the Respondents contend that, even if [it] were modified, the Modifier is the Internet User. Yet, as noted above, because the location and size are specified by the HTML and CSS Programming transmitted as a

result of the Retweets, the Modifier is the Retweeter and not the Internet User (Copyright Act Art. 47(8) is a provision concerning reproduction accompanying the use of Works on Computers, and this decision is not influenced that provision).

The Respondents also argue that, because the Image found on the Timelines of Accounts 3–5 is the same Image as the one in Distributed Information 2(1), it is the owner of Account 2 who ‘modified’ it. However, properly considered, the Image found on the Timelines of Accounts 3–5 is a modified one when compared with the Photograph that is the Appellant’s Work and, as above, it was modified by the Retweeters. It therefore follows that the Retweeters infringed the Right of Integrity.

Furthermore, the Respondents claim that any modification is nevertheless an ‘unavoidable’ modification within Copyright Act Art. 20(4). But, the Retweet was the act of Retweeting Account 2’s Tweet, which includes the Photograph’s Image File without the Appellant’s permission. A Modification accompanying that kind of action cannot constitute an ‘unavoidable’ Modification.

*b) Right of Attribution*

The Appellant’s name is not displayed in the Image found on the Timelines of Accounts 3–5. Further, as above, the Image found on the Timelines of Accounts 3–5 becomes an Image like that in Distributed Information List 3 to 5 because the location and size are specified upon display by the HTML and CSS Programming. The Appellant’s right to have the Author’s name displayed was therefore infringed, because the Appellant’s name was no longer displayed when the Work was ‘made available or presented to the public’ through the Retweeters’ Retweets.

*c) Right Against Damage to Honour or Reputation (Art. 113(6))*

It does not automatically follow that, simply because the Photograph was displayed alongside Sanrio and Disney Characters on Accounts 3–5, it gives the false impression of being a ‘cheap Work’ or ‘of such little value that anyone can use it without permission’. It is therefore not the case that Accounts 3–5 used the Work in a manner which damaged the Author’s Honour or Reputation. Accordingly, as we also find no other circumstances of use which Damage the Appellant’s Honour or Reputation, we hold that the Retweeters did not infringe the Appellant’s right against Damage to Honour or Reputation (Copyright Act Art. 113(6)).

(6) *Identity of the Account Owners*

The Appellant claims that the owners of Accounts 2, 4 and 5 are the same person or that they at least colluded to infringe the Right of Public Transmission. There is, however, no evidence to sufficiently support this.

(7) *'By the Distribution of the Infringing Information' and 'Sender'*

As discussed above, if the Retweets infringe the Appellant's Moral rights, then, in light of acknowledging that infringement, in this case 'Infringing Information' for the purposes of the Provider Liability Limitation Law includes not only the Photograph's Image Data, but also the HTML and CSS Programming Data. It is therefore clear that 'by the distribution of [that] infringing information', the Retweet infringed the Appellant's Rights, and the Retweeters in this instance are 'Senders'.

(8) *Issue 2 Specifically*

The Distributed Information 2(3) and (4) from Account 2 infringes the Author's Moral Rights. This is because, like with Distributed Information 3 to 5, the Image in Distributed Information 2(3) is modified and the Appellant's name not displayed. However, there is no infringement owing to the Distributed Information 1(6) and (7) from Account 1. This is because the image displayed is the same as that of Distributed Information 1(3). Like with Distributed Information 3 to 5, there is no Copyright Infringement here.

[...]

2. *Issue 4: Whether the Most Recent Login's IP Address is the 'Sender's Identifying Information'*

The Appellant contends that the IP Address of the Most Recent Login falls within 'IP Addresses related to Infringing Information' in item 4 of the Ordinance and its associated Timestamp falls within 'the time and date on which the Infringing Information was transmitted' under item 7, thereby constituting 'Sender's Identifying Information relating to the infringement of rights' under Provider Liability Limitation Law Art. 4(1).

In determining this point, the Provider Liability Limitation Law Art. 4(1) provides that 'Any person alleging that his or her rights were infringed by distribution of information via specified telecommunications may... [claim disclosure] of Sender's Identifying Information relating to the infringement of 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)'.



The same provision, while recognising Disclosure for the ‘Sender’s Identifying Information relating to the infringement of rights’, simultaneously leaves the Ordinance to concretely define what information is the object of Disclosure. The Ordinance relevantly defines this as ‘IP Addresses related to Infringing Information... and the Port Numbers joined to the Relevant IP Addresses’ (item 4), and ‘The time and date on which the Infringing Information was transmitted’ (item 7). Consequently, that which does not relate to the Sending of the Relevant Infringing Information is not included within ‘IP Addresses related to Infringing Information’ in item 4 of the Ordinance. Additionally, it is reasonable to infer that Timestamps which are irrelevant to the sending of the Infringing Information do not fall within ‘the time and date on which the Infringing Information was transmitted’ in item 7.

Further, the Appellant argues that, if there can be no Disclosure of IP Address of the Most Recent Login as interpreted under the Ordinance, the Ordinance must be invalid for contravening its intended authorisation under the Provider Liability Limitation Law. However, even if it is information which would contribute to the identification of the Sender of the Infringing Information, Art. 4(1) envisages that some information may not be the object of Disclosure, and the Ordinance provision under this article cannot defy that intention.

Viewing this in the present case, according to the above agreed facts, evidence (Ko 4(1), (3), (6) and (7)) and overall arguments, we find that: Account 1 was established on 1 April 2013 and the Profile Image set by 21 January 2015 at the latest; Tweet 2 was posted on 14 December 2014; and Tweets 3–5 were posted on or around 14 December 2014. Further, the Appellant filed the Present Suit in the Sapporo District Court on 25 March 2015.

We must say that the IP Address of the Most Recent Login and Timestamp, disclosure of which the Appellant requires, is, in the present case, irrelevant to each of the above acts in which the Infringing Information was sent, and does not fall within either of items 4 or 7 of the Ordinance. Consequently, there are no grounds for the Appellant’s claims against the Second Respondent as concerns the Attached Sender’s Identifying Information List items 2 and 3.

In response to this, the Appellant makes two arguments. Firstly that, as concerns Twitter, if the IP Address of the most recent login and accompanying Timestamp (which are only owned by the Respondents) are not disclosed, there will be no means of identifying the Sender which infringed the Appellant’s Rights. Secondly the Appellant argues that, if a Work is used as a Profile Picture without permission, it is a matter of public knowledge that the Image will be displayed on all Tweets and, as setting the image on one’s profile would result in perpetual rights infringement from the time of post-

ing, the Account's continued existence will itself mean the continued transmission of infringing information if only by omission/forbearance.

Furthermore, the appellant argues that there should be disclosure of the IP Address of the most recent login and accompanying Timestamp when Constitutionally protected human rights such as the Right to Access the Courts (Constitution Art. 32), the Property Rights embedded in Copyright (Constitution Art. 29), Right to the Pursuit of Happiness embedded in the Author's Moral Rights (Constitution Art. 13), and the Right of Equality (Constitution Art. 14(1)) are balanced against the Information Sender's Privacy, Freedom of Expression and Secrecy of Correspondence.

However, Provider Liability Limitation Law Art. 4 and authorised Ordinance are provisions which were established in order to strike a balance between the Sender's interest in rights to privacy, freedom of expression and secrecy of correspondence, and the infringed party's interest in preventing infringement and recovering damages for loss. The Provider Liability Limitation Law recognises the right to require disclosure of Sender's Identifying Information within that framework.

Further to this, as held above, the IP Address of the most recent login and associated Timestamp are not included in the items subject to the Disclosure Right within the Provider Liability Limitation Law Art. 4 and the Ordinance. Also, even having considered the provisions and substance of the Appellant's Constitutional arguments, we cannot find in the Appellant any Right to require disclosure of Sender's Identifying Information which is not established in law.

Consequently, the Appellant's Arguments are incongruent and cannot but fail at the point of legislative theory. Moreover, where used as a Profile Picture without permission, even if displayed as an image in all [the] Tweets, the infringing act concludes once the Photograph's Image File has been uploaded as a Profile Image. Its continued display does not, as a matter of course, constitute [new] acts of infringement. Depending on the facts of the case, there may conceivably be some infringement through forbearance, but no such evidence is established on the facts of the present case.

[...]

#### *Conclusion*

Based on the above, the Appellant has grounds to demand the Second Respondent disclose the email addresses above and no more. To this extent, and for the above reasons, we amend the Original Decision accordingly.

Intellectual Property High Court, Second Division

Presiding Judge: MORI Yoshiyuki

Judge: MORIOKA Reiko

Judge NAGATA Sanae is unavailable to sign due to reassignment.

## SUMMARY

*Courts across the world are struggling with digital copyright. In Japan, the Intellectual Property High Court confronted several new questions in *Nawata v Twitter*. The Court ultimately found three Twitter users were liable for moral rights infringement because they retweeted a tweet which itself contained infringing material.*

*As the IP High Court's reasoning illustrates, courts continue to face difficulty when moulding copyright law to a rapidly changing sphere of expression and creativity. With a summary and translation of the case, this article examines three such ongoing difficulties.*

*The first is whether inline links should be treated differently from other internet links for copyright liability. As they differ both in programmed function and in how they present to the viewing user, courts must ask whether function or appearance is more important and why. The second difficulty is whether judges actually understand the emerging technologies upon which they adjudicate. Despite the establishment of a specialised IP court and nearly 20 years of government investment in judicial understanding of IP, many inconsistencies still trace back to an incomplete understanding of the underlying technology. The final difficulty is in finding an appropriate balance between the owner and user of copyrighted works on digital platforms. Fundamentally, copyright must balance the incentive to create against public access, but the balance online currently skews towards copyright owners.*

**Nawata v Twitter* crystallizes a common problem in sharing online works. Given the ubiquity of social media platforms and how quickly online content spreads, this article ultimately calls for a consistent and coherent jurisprudence based on the resolution of the above three issues.*

## ZUSAMMENFASSUNG

*Das digitale Urheberrecht bereitet Gerichten auf der ganzen Welt Probleme. In Japan hat sich das Obergericht für Geistiges Eigentum im Fall *Nawata v Twitter* verschiedenen Problemen gestellt. Das Gericht entschied, dass drei Twitter-Nutzer für das Weiterverbreiten eines Tweets (sog. „retweet“) wegen Verletzung des Urheberpersönlichkeitsrechts haftbar gemacht werden können, wenn der ursprüngliche Tweet selbst einen urheberrechtsverletzenden Inhalt hatte.*

*Wie die Argumentation des Obergerichts für Geistiges Eigentum verdeutlicht, haben Gerichte Probleme, das bestehende Urheberrecht anzuwenden, wenn es um rasante Entwicklungen der Ausdrucksformen und kreativen Entfaltung im digitalen Bereich geht. Mit einer Zusammenfassung und einer Übersetzung der Entscheidung untersucht dieser Artikel drei der fortwährenden Probleme.*

*Erstens geht es um die Behandlung von sogenannten Inline-Links und ob diese Verlinkung im Internet im Hinblick auf eine mögliche Haftbarkeit für Urheberrechtsverletzungen anders zu behandeln ist als andere Arten der Verlinkung. Da sich Inline-Links sowohl in ihrer programmierten Funktion als auch in der Weise, wie sie sich dem betrachtenden Nutzer präsentieren, unterscheiden, müssen Gerichte sich die Frage stellen, ob Funktion oder äußeres Erscheinungsbild für die Beurteilung wichtiger ist, und warum. Das zweite Problem ist, ob Richter wirklich die aufkommenden Techniken verstehen, über die sie zu Gericht sitzen. Trotz der Errichtung eines spezialisierten Gerichts für geistiges Eigentum und einer zwanzigjährigen Investition in das juristische Verständnis des geistigen Eigentums, lassen sich viele Widersprüche noch immer auf ein unvollständiges Verständnis der zugrundeliegenden Technologie zurückführen. Die dritte Schwierigkeit ist das Finden eines angemessenen Interessenausgleichs zwischen dem Urheberrechtsinhaber und dem Nutzer von digitalen Plattformen. Grundsätzlich muss das Urheberrecht Anreize zu schöpferischer Tätigkeit mit dem Interesse der Öffentlichkeit an einem Zugang zu Werken angemessen austarieren. Gegenwärtig scheint der Schutz des Urhebers im digitalen Bereich jedoch schwerer zu wiegen.*

*Im Fall *Nawata v Twitter* kristallisiert sich ein gemeinsames Problem bei der digitalen Verbreitung von Werken heraus. Angesichts der Allgegenwärtigkeit von Social-Media-Plattformen und der hohen Geschwindigkeit der Verbreitung von Werken online, fordert dieser Aufsatz eine konsistente und schlüssige Rechtsprechung auf Grundlage einer Lösung der drei oben angesprochenen Probleme.*