

Toward Further Distribution of Digital Contents

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1. For the Development of Businesses under Digital Environment

It is said that the development of businesses using digital media, such as the Internet and CS digital broadcast networks, requires provision of various materials. In this connection, environment needs to be formed where completed materials such as music, fine arts including pictures and lithographs, photographs, movies as well as broadcast programs may be used as much as possible.

To promote distribution of materials, coordination of active commitment of private sectors and appropriate assistance of governments are essential. Such materials, however, vary in their character though all of them fall within the definition of copyrighted works as some of them may be pieces of fine arts such as quite artistic paintings and lithographs while others may be photographs, movie films and broadcast programs often aimed to transmit the contents to the public. Thus treatment for distribution must be changed depending on the character of each copyrighted work.

Businesses now engage in the business of mediating various materials to promote distribution of materials in the digital environment. In the field of music, a certain body is requesting to the Director-General of Agency for Cultural Affairs for the registration as the copyright management agent under the Copyright Management Business Law to follow the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC). In the field of fine arts and photographs, intermediary businesses have already existed irrespective of the Copyright Management Business Law.

On the other hand, the Government has taken action by making Law on Management Business of Copyright and Neighboring Rights into effective on October 1, 2001 in place of the old Intermediary Business Law¹. This new Law is expected to promote even more active distribution of materials. Further, the Copyright Retrieve System called J-CIS is started experimentally. We believe that it will facilitate to deal with rights-related matters, which is essential in using materials.

2. Business Concerning Distribution of Digital Materials

Toppan Printing Co., Ltd. engages in several distribution businesses of digital materials. The major example of them is the "Bitway" business which distributes to the Internet users photographs and other materials owned by the content holders such as publishing houses. The services were started in July 1999.

(1) Digital Materials Distribution Services through Internet

This is the service of providing to several major Internet service providers (ISP), and finally to

¹ "Law on Intermediary Business Concerning Copyright" (Law No. 67 of April 5, 1939), under which any person who intended to engage in the intermediary business in relation to music pieces and lyrics accompanied by music pieces, fictions and play scripts was required to obtain a license from the Director-General of Agency for Cultural Affairs and an approval of the same for the royalty rate.

the end users, materials, mainly gravure pictures, owned by content-providers such as publishing houses through “Bitway” server for transmitting materials. Royalties are collected from the end users by the charging system of each ISPs and forwarded, after deducting commissions to the ISPs and prescribed fees to “Bitway”, to the content-holders through “Bitway” server. The system gives content-holders more chance to sell their materials to end users than solely offering them on their Web sites, and secures that they can safely collect royalties even if they do not have their own charging system.

On the other hand, ISPs can make their Web sites more attractive with the rich materials both in quantity and quality, possibly contributing to increase access to their sites and finally the sales. Moreover, end users can safely obtain various materials by simply accessing to major ISPs.

The material distribution business “Bitway” is thus beneficial to everyone, content-holders, ISPs and end users and will contribute to the distribution of digital materials.

“Bitway” business is operated in accordance with the following policy relating to the treatment of copyright. “Bitway” obtains a license to accumulate in the transmission server the materials collected from copyright holders and to transmit to multiple ISPs, also with the right to grant a sublicense to ISPs to accumulate materials on their servers and transmit to unspecified number of end users.

End users may download materials though they may reproduce them to the extent allowed under Article 30 of Copyright Law. In addition, electronic watermarks are used to know any unauthorized reproduction. Such watermarks may contain copyright management data. Any alteration of such watermarks may constitute copyright infringement².

(2) Digital Archive Business

The digital archive business which digitalizes cultural property such as paintings and lithographs and forms a database to be used to publications, broadcastings and electronic media³, is also significant as it contribute to the preservation and research of cultural property in the form of not-deteriorating images, as well as to the distribution of digital materials.

To start an intermediary service of digital materials as the digital archive business, it is important to form a license agreement between copyright owner or owner of an artistic piece and founder or operator of the digital archive as well as an agreement between founder or operator of the digital archive and users such as publishing houses⁴.

3. Implementation of Law on Management Business Copyright and Neighboring Rights

(1) Outline of Law on Management Business Copyright and Neighboring Rights

On and after October 1, 2001 when Law on Management Business Copyright and Neighboring Law became effective, “use of copyrighted works, performance, sound recordings,

² Paragraph 3, Article 113 of Copyright Law

³ “Japan Digital Archives Association” is sponsored by the Ministry of Economy and Industry, the Agency for Cultural Affairs and the Ministry of General Affairs, and supports digital archive business which records tangible and intangible cultural property in the digital form, stores the digitalized data as a database, offers for inspection and/or appreciation, and transmits using information networks. See <http://www.jdaa.gr.jp>

⁴ “Japan Digital Archives Association” provides “digital archive (rights-related issues and agreement samples).” See <http://www.jdaa.gr.jp/public/kenri/kenri.html>

broadcastings and cable broadcastings [is expected to be] facilitated” as set forth in Article 1. (Purposes) of the Law. Under this Law, the scope of subject copyrighted works for regulation under the old Intermediary Business Law was broadened from music pieces, lyrics accompanied by music pieces, fictions and play scripts to all works and action in neighboring rights. Accordingly, photographs, paintings, lithographs and others that have previously not been subject to regulation are now covered, for which the intermediary businesses dealing in such materials need to be constantly reviewed to see whether or not they may be deemed as the management businesses of copyright and neighboring rights.

A management business of copyright and neighboring rights is the commercial acts of managing use of copyrighted works based on the management referral agreement (Article 2.2 of the Law). And a management referral agreement is any of the followings entered between the referrer and referee:

1. a trust agreement under which copyright is transferred and managed; or
2. a referral agreement under which one is made to act as an agent⁵ or a proxy⁶ in granting a license for copyrighted works and manage the copyright.

(Article 2.1 of the Law). Moreover, the royalty rate must be determined by the referrer under such an agreement.

A person who intends to enter into the copyright management business must be registered by the Director-General of Agency for Cultural Affairs and submit the management referral agreement and royalty rules.

As of now (October 29, 2001), there are 6 companies or bodies that have been registered by the Director-General of Agency for Cultural Affairs as management business of copyright and neighboring rights: Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) and 3 other companies that have been granted a license under the old Intermediary Business Law⁷, and e License, Inc. specialized in the management service relating to music copyrighted works and sound recordings and Tokyo Arts Club dealing in fine arts such as paintings⁸.

It should be said that even such businesses or bodies meeting the prescribed requirements are not a management businesses of copyright and neighboring rights under the Law if they are required to provide copyrighted works as they merely “notify the intention of copyright owner⁹. Based on

⁵ Acts of agent mean that one engages in judicial conduct under its name and at the expense of others (Article 502.111 of Commercial Law).

⁶ Proxy is a system under which person B who has a special relationship with A makes or recognizes an expression of intention by which the legal effect of such expression becomes effective directly to A. (Article 99 of Civil Law)

⁷ Article 3. of additional provisions to Copyright Management Business Law. (Transitional measures in connection with copyright management business which had been deemed as intermediary business)

⁸ See <http://www.bunka.go.jp/8/6/VIII-6-H.html>

⁹ Mr. Makoto Kawase, assistant chief of the copyright section, secretariat of Director-General of Agency for Cultural Affairs, stated in a lecture titled “What is provided in the Copyright Management Business Law and Its Implementation,” which appeared on the July issue of Copyright journal, that “...while it refers to notice of right holder’s intention to grant a license which will be made incidentally with provision of copyrighted works (content), such form is often taken by photo agencies, computer retailers and news wires.....A photo agency notifies to the users when offering films, et al. the fact that it has a license for the film, et al. In such a case, the Management Business Law does not apply as there is no referral relationship between the photographer and

the law construction, most material-distribution services on the Internet fall within this category.

(2) Distribution of Music Copyrighted works and Designated Management Business Operator

Music copyrighted works are quite attractive materials to companies engaged in the Internet distribution services of digital materials. "Bitway" which we mentioned above, also provides music copyrighted works under the name of "dejifu (digital score)." We obtained a license from Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) and pay royalties to them for the interactive distribution based on the royalty rules of JASRAC.

Upon implementation of Law on Management Business of copyright and neighboring rights, JASRAC was recognized as a designated management business operator¹⁰, and now bears obligation to discuss with the representative of users on royalties for each field of use at the request of the representative of users. (Article 23.2 of the Law) In the event that the agreement is not reached, they may request the ruling of Director-General of Agency for Cultural Affairs to which they must follow. (Article 24.1 to 24.6 of the Law)

Under the above circumstances, the users of music copyrighted works can expect that the royalty rate will be determined more convincingly than ever.

4. Recent Cases on Music Copyrighted works

Distribution of music copyrighted works is attractive not only to the distributors of digital materials but also, of course, to individual users. Accordingly, they try to obtain music copyrighted works at a low price or free of charge. Napster Case¹¹, which was brought in the U.S. based on such background, is all too famous. In addition, music labels under Recording Industry Association of America (RIAA) and motion picture studios and distribution companies under Motion Picture Association of America (MPAA) filed a copyright infringement action on October 2, 2001 at U.S. District Court for Central District of California against Dutch Consumer Empowerment BV which develops genuine peer-to-peer software programs and distributes through Kazaa.com, Glokstar Ltd. which has its principal office in the West Indies and distributes its own software programs, and MusicCity Networks, Inc. which develops, distributes to users and makes users use, a peer-to-peer software program named "Morpheus" which works on the operating system software developed by Consumer Empowerment known as FastTrack. According to the argument of the plaintiffs, defendants' activities constitute contributory infringement or they are liable to indemnify their users as they encourages their users to

the photo agency." (See p.6 of this issue)

¹⁰ Article 23.1 of Copyright Management Business Law provides as follows: "Director-General of Agency for Cultural Affairs may appoint a copyright management company as the designated copyright management company for a certain field of use if the amount of royalties collected by the company in the field of use as provided for in its royalty rules constitutes a considerable part of the total amount of royalties collected by all copyright management companies and if the following requirements are met:

1. that the total amount of royalties collected by all copyright management companies makes a considerable part of the total amount of royalties collected in said field of use;
2. that, in addition to the case as set forth in the preceding paragraph, the royalty rules of said copyright management company are widely used as the standards of royalties in said field of use, and where such an appointment is deemed as especially required to secure the smooth use of copyrighted works in the field of use."

directly infringe copyrighted works (sound recordings and motion pictures) in such way as unauthorized reproduction and distribution.

The same argument was made by the plaintiffs in Napster case, which was generally accepted by the court though MusicCity case, however, this case is different from Napster case in that the three defendants merely provide file-swapping software and are not involved in the actual swapping of content files on the networks. The case attracts a wide attention since the requirements for finding contributory infringement or liability for indemnification, as indicated by the Napsar Appeal court decision, that the knowledge of user's copyright infringement, involvement to such infringement, and the situation where the plaintiff could have supervised users, may not apply in this case.

In Japan, on the other hand, a venture company is reportedly starting the same file-swapping service for music copyrighted works as those provided by Napster. The server is reportedly located outside Japan, which may arise the issues of international jurisdiction and governing laws. There is no doubt that more controversy over these issues will take place especially in connection with sound copyrights.

5. Expectation to J-CIS

As we stated above, business environment and corresponding legal system will be needed to the development of distribution services of digital materials while such a system is also important under which copyright-related issues may be cleared in advance to prevent copyright and quasi-copyright infringement. As copyright and quasi-copyright may establish without examination, sometimes it is very difficult to identify the right holder of the materials which one intends to use. It is presumed that difficulties in finding right holders partially contribute to unauthorized use of materials.

J-CIS is a pioneer tool for clearing rights-related issues and now operated as trial. "J-CIS (Japan Copyright Information Service)" provides an integral system by which users may obtain necessary rights-related data (title of copyrighted work, name of copyright holder, owner, contact information for license, et al.) by retrieving crossing various databases of copyright-related data accumulated by the right bodies of each field. Databases of all fields (for the time being, music (Music Forest (MINC), fine arts, photographs and graphics (Japan Arts Copyright Organization (APG-JAPAN)), books (Japan Book Publisher's Association (Books), and motion pictures (Film Copyright Council (IMC), National Institute for Multimedia Education (NIME))) will be provided to J-CIS. The system will be further improved through feasibility study to be a more user-friendly system which is expected to contribute, by facilitating to clarify copyright-related matters, to the development of businesses relating to digital contents.

¹¹ A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), (9th Cir. 2001)