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For the SOFTIC Symposium  
November 20, 2001  
At Tokyo Prince Hotel

## **B. Legal Protection and Use of Digital Information -Technical Progress and Legal Development-**

### **Syllabus**

#### **Session B-1**

##### **Topic 1 Reproduction for personal use**

Article 30 (1) of the Japanese Copyright Act makes it permissible to reproduce copyrighted work for personal use. This provision requires payment of no “fair compensation”. It gives the user free license.

Rationale for this limit to reproduction right is various: At the time of enactment (1970), reproduction at home was not common. It is difficult to enforce the right against users at home. Privacy might be an excuse.

The law has been modified gradually to limit the free-use zone, though. Personal copy made by means of automatic reproducing machines (ex. PC at net-cafes) is excluded from the personal use limitation. Compensation for private recording has been introduced since 1993. Most recently, reproduction made by a person who knows that such reproduction becomes possible by the circumvention of technological protection (copy control) has been subject to permission by the author.

Still, there remains cases the user may freely copy. Decision of Tokyo District Court on May 16, 2000 (Star Digio) deemed reproduction made by digio listeners as permissible personal copy. It should be noted that the mass exact duplication made by the listeners may cause serious damages to the interest of record makers. It might unreasonably prejudice the legitimate interest of the author (Article 9 (2) of

the Berne Convention). Article 30 shall be totally restructured .

Article 20 of the Japanese Copyright Act give the author right to preserve the integrity of his work. Any distortion, mutilation or modification against his will shall be enjoined and compensated. This right is among the moral rights of the author. Article 30, on the other hand, only limits the economic right (reproduction right) of the author. It does not apply to moral rights (article 50).

The Japanese Supreme Court on “Tokimeki-Memorial” case, although not without ambiguity, assumes that alteration of the game-data made by the users at home of the memory card imported by the defendant shall not be permissible.

Many commentators criticize the proposition of the Supreme Court. May we freely play Video-Game at home ! They argue, at the least, alterations made at home and kept at home shall be permissible.

Article 20, though enjoins any alteration against the will of the author. Moral right to infringe, no prejudice to his honour or reputation. In other words, the Japanese law affords a Berne-plus protection . Infringement or moral rights often occur at home, or personally.

Article 20 (2) set forth exclusion to right to integrity. None of these very specific limitation seem to apply to our game-card, which undoubtedly free ride of the economic and moral value of the game software.

## **Topic 2 Definition of infringer**

The Supreme Court made the importer of the memory card, not consumers, liable for the damage as a joint tortfeasor. Another case of indirect or contributory copyright infringement is the Supreme Court’s decision on March 2, 2001. Under this decision, leaser of Karaoke machines has to first instruct, then confirm that the customer (Karaoke bar) license the music from JASRAC (the Japanese collecting society for music copyright). So far, the Japanese law has no general provision against indirect infringement of copyright. The Japanese Civil law applied to these two cases accordingly.

It is interesting to note that Japanese courts often deem the provider of means or devices to infringement as direct (not indirect) infringer, as far as the person controls the act of the actual (physical) infringement by the user, and makes profit

from it.

Traditional ways of use of copyrights works occur in public places. Publish, performance, broadcasting et al. To read a book, to watch the TV, to listen the radio have been opened free. Technologies have made this dichotomy at least ambiguous, not doubtful. The newest right of the author , the right to make works transmittable (Article 23 ) is free from personal use limitation. We are on the way in modifying the traditional limitations to personal use.

### **Topic 3 Temporary or ephemeral storage**

So far, the majority in Japan excludes temporary or ephemeral storage of copyrights works from definition of reproduction. One may cite the Star digio case as authority. Strictly, though, the case says nothing about PCs.

This exclusion dates back to the report of the Copyright Council at the Japanese government published in 1973.

The WIPO copyright treaty is not clear about this point. The drafting history reveals the member country may freely provide the definition of reproduction. The agreed statement is also silent.

In this connection, let me note several basic standpoint in reformulating the definition of reproduction.

First, it is not decisive whether storage is temporary or permanent. For example, internet caching is not a temporary copy, nonetheless it is indispensable in transmitting contents effectively. Therefore, it must be permissible.

On the other hand, there exists storages that is ephemeral but seriously prejudice the interest of the author. The Star digio decision realizes us this point.

Second, we have to be careful not to overly impede the free flow of information. For example, to afford both rights to transmitting and temporary copy to record producers could be too much protection.

### **B-2 ISP legislation**

There emerges “robots” or Scouts that patrols and search illegal contents on the Net. With this technology, at least in the future, the ISPs shall be more cautious to infringement. The problem is technology advances very fast. We do not hurry in limiting duty of ISPs by legislation.

Without Robots or Scouts, the Japanese courts does not obliges the ISPs to watch everything (no full duty of watching). This is different from situations in the U.S. and Europe.

Industry standard with regard to notice-and-takedown is advisable. To make it a law is another thing, though.

### **B-3 The new law on collecting societies in Japan**

For licensing via Internet, things will be more specific and personal, rather than collective and blanket.

The new law does not apply to the compensation for private recording. It is difficult to predict, in the long run, licensing through collecting societies or compensation system will be the “winner”.