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Newsletter

21COE-WIN-CLS RCLIP

RCLIP Special Seminar（2007/9/19）

"An Empirical Analysis on Copyright Duration"
Hosted by Research Center for the Legal System of Intellectual Property, Waseda Institute for Corporation Law and Society
Co-sponsored by Simul International, Inc.

【Invited Speaker】Dr. Paul J. Heald（Professor, School of Law, University of Georgia）
【Commentator】Mr. Junghoon Kim（Associate Professor, Research Institute for Digital Media and Content, Keio University）
【Chairman】Mr. Tetsuya Imamura (Lecturer, School of Information and Communication, Meiji University）
【Director】Mr. Ryu Takabayashi(Professor, School of Law, Waseda University; Director of Research Center for the Legal System of Intellectual Property, Waseda Institute for Corporation Law and Society）

The RCLIP Special Seminar held on September 19, 2007 invited Professor Paul J. Heald of School of Law, University of Georgia to deliver a lecture entitled "An Empirical Analysis on Copyright Duration". Associate Professor Junghoon Kim of Keio University made a comment.

In 1998, the U.S. enacted a law to extend copyright duration for existing works by twenty years. At that time, economists and policymakers advocated the theory of incentive to restore older works and further disseminate them to the public instead of the incentive-to-create theory. Professor Landes and Judge Posner of Chicago University also stated that "[A]n absence of copyright protection for intangible works may lead to inefficiencies because . . . of impaired incentives to invest in maintaining and exploiting these works" (Landes and Posner (2003a)) ※1. Their perspective was that long-term copyright protection can lead easier exploitation of existing creative works in the future.

According to the research by Kahn (2004) ※2, the past history showed that the absence of copyright protection can potentially lead to the under-exploitation of creative works. Based on that, Professor Heald pointed out that it would not necessarily unacceptable to affirm "the theory that the availability of creative works can decrease because of the absence of copyright". He thought the theory seemed to be as clear as crystal, however it should be empirically examined. With that motive, he started his study to find out whether the difference in availability occurred due to legal status (public domain or copyright protection) among the U.S. best-selling novels.

Professor Heald divided best-selling fiction published from 1913-1932 into two groups: 1) 166 public domain bestsellers published from 1913-1922 and 2) 168 copyrighted bestsellers from 1923-32. Then, he compared their availability from several perspectives.

This report does not cover the empirical analysis in detail because of space limitations. However, according to the comparative analysis between the two groups, a significantly higher percentage of the public domain books are still in

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print, with significantly more editions available per book.

Professor Heald said he called up Professor Landes when he found out this data. When he told him, "I had data which indicates that perhaps your theory is incorrect", Professor Landes did not seem impressed and told that most of the best-sellers published from 1913 to 1932 were not significant anymore and therefore, it was not necessary to think much of those fictions.

Then, based on the opinions of literary experts, Professor Heald selected the 20 most enduring popular protected works respectively (hereinafter called most durable books) from the 1) and 2) data sets, and conducted a further empirical analysis. Each of these 20 books is 100% available currently. So the study compared the number of editions and prices.

As a result, the study suggested that the public domain status of popular books does not result in under-exploitation. For the price comparison, a significant difference was measured in terms of average price per page. The result justified the public domain works were easier to access. The average prices per page were 4.7 cents for the copyrighted works and 3 cents for the public domain works. Also, the study showed that the copyrighted works had slightly higher shelf availability. However, in order to explain this result, he introduced a hypothesis that slightly greater shelf availability of copyrighted books is probably due to greater popularity or age, not legal status.

He suggested that, for the sub-set of durable works, the study concluded the extension of copyright protection will reduce availability as well as increase price of the works.

However, he did not conclude the extension of copyright protection should be unjustified for all cases. The extension of copyright protection is most likely justified when three conditions are met: 1) The cost of making the initial copy of a work available to the public is high; 2) the cost to free riders of making subsequent copies is low; and 3) the newly available work does not incorporate independently protectable material. As an example, he mentioned the case that old movies are restored to offer to the public.

He also argued against some economists' assertion that, without property right, the value of a creative work can be wasted by excessive competition or over-exploitation (so-called the issue of congestion externalities). He said, "Normally, of course I come from University Chicago, we don't see market failure in healthy competitive market." In general, the data shows a highly competitive and robust market for the production of public domain books. He concluded that the burden should be on the party arguing in favor of congestion externalities and a possibility of market failure in an apparently competitive market.

Following the lecture stated above, Associate Professor Junghoon Kim made a comment. First, he appreciated Professor Heald's report as very timely in terms of current discussions in Japan. He said that it gave a significant suggestion to Japan's policy discussion. Then, he commented mainly on the congestion externalities which Professor Heald could not cover fully due to lack of time.

In traditional economics, granting property rights was justified on the ground of giving incentives to create because information is noncompetitive in consumption. However, granting property rights further was thought to be economically inefficient. In response, the parties arguing in favor of congestion externalities suggested that an absence of copyright protection may lead to potentially declining the value of especially popular works. However, it is pointed out that there seemed to be no simple cause-and-effect relationship between declining value of certain works due to overuse and declining benefit of the entire society.

Also, he pointed out that becoming public domain did not mean everything was free to use. It only means bringing the works which were in a

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different world into the general market. It is important that the existence of market failure in the public domain market should be verified by the parties in favor of protection extension.

After the report stated above, a QA session took place actively with the participants. (Although it was a quite interesting session, this report omits it due to space limitations. Please refer to our Institute's periodical publication, which will be published later.) Professor Heald's article （Paul J Heald, "Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Best Sellers" was placed in 『I.P. Annual Report 2007, Feature: The Goal of Intellectual Property Protection – Lights and Darks of Protection Reinforcement』, separate volume NBL120, November 2007, p. 249. Also, the tape script of this seminar will be published in our Institute's publication.

※1 Landes, William M. and Richard A. Posner. 2003. "*Indefinitely Renewable Copyright*." University of Chicago Law Review 70: 471-504.

※2 Khan, Zorina B. 2004. "*Does Copyright Piracy Pay? The Effects of U.S. International Copyright Laws on the Market for Books, 1790-1920.*" NBER Working Paper 10271: 1-40.

(RC Tetsuya Imamura）

RCLIP International IP Seminar Series (2007/11/23-14)

(1)Taiwan/Indonesia & Japan Special Seminar

Professor Shieh Ming-Yang, National Taiwan University
Mr. Hubert Hsu, Attorney at Law
Justice Abdul Kadir Mappong, Judge, the Supreme Court of Indonesia
Mr. Yoshio Kumakura, Attorney at Law
Moderator: Professor Toshiko Takenaka, Professor of Law School, University of Washington, Visiting Professor of Law, Waseda University

Moderated by Professor Toshiko Takenaka of University of Washington, Taiwan, Indonesia & Japan Special Seminar started the two-day RCLIP International IP Seminar Series from November 23 of 2007. With the theme of "Punitive Damages as Civil Actions vs. Penal Actions toward IP Infringement", the invited panelists from Taiwan, Indonesia, and Japan made a report respectively.

First, Professor Shieh Ming-Yang explained three aspects of Taiwan IP Laws such as Innovation, Culture, and Trade. The major laws in Taiwan are Patent Act, Copyright Act, Trademark Act and Trade Secrets Act. About liabilities of IP infringement, there are civil liability and criminal penalty for copyright and trademark infringement while only civil liability is for patent, trade secret, IC layout, and plant variety infringement. The history and the current situation of punitive damages were described.

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With condition that the infringement is proved to be intentional, the clause of punitive damages has been adopted through amendments for Patent Act in 2001, Trade Secret Act in 1996, and Copyright Act in 1992. Also, other laws such as Consumer Act have adopted it. Professor Shieh also mentioned the calculating way of the amount of damages and criminal litigations by each right.

Next, Mr. Hubert Hsu, Attorney at Law, explained about treble damage and criminal punishments in Taiwan. There is no criminal punishment for patent, utility model, and design infringement. Only civil remedy and punitive system are provided. Under Trade Secret Act and Fair Trade Act, the punitive damages system is provided for trade secret. Criminal punishment is applied only when the infringement violates the FTA orders. Then, Mr. Hsu elaborated the survey result about the punitive damages cases decided by six Taiwanese appeal courts. In Taiwan, the punitive damages system has been adopted as an alternative to criminal punishment. In reality, the system was not functioned as expected because plaintiffs tend to raise no claim for the punitive damages and the courts also tend to reject them.

Next, Justice Abdul Kadir Mappong, Judge, the Supreme Court of Indonesia illustrated the IPR system in Indonesia. IP Laws in Indonesia include Trade Secret, Design, IC layout, Patent, Trademark, and Copyright. For trademark infringement, revocation suits should be brought to Commercial Courts. In contrast, for design cases, revocation suits are brought to Commercial Courts, but criminal litigation comes under the jurisdiction of District Courts. It can be appealed to High Courts, and then, the Supreme Court.

Plaintiffs have the burden of proof for the amount of damages in civil litigations. Because the calculation is very difficult, most of litigations which come to courts are revocation suits of trademark registration. For revocation of trademark, it is necessary to have the condition that the trademarked article or service in question has been used for three consecutive years or that the trademark in question is registered and a service follows it.

Article 90 of Trademark Law states that an illegal criminal imitating breach can be punished with five years imprison and fined with the maximum of one billion rupiah, or either of the punishments. Article 91 states that the distributing an illegal similar products is subjected with four years imprisonment and fined with the maximum of eight hundred million rupiah, or either of the punishments. Considering the circumstances of criminal punishments, he concluded that there was no way to receive the compensation for damages through criminal litigation for the reason of infringement.

Last, Mr. Yoshio Kumakura, Attorney at Law, explained about the conditions in Japan. After sketching out IP protection in Japan, he explained that criminal punishments have been strengthen due to increasing criminal cases related with Trademark Law, Unfair Competition Prevention Act, and Copyright Law. This trend has an impact on strengthening compliance in companies, resulting in expected crime controls over individuals as well as organized crime syndicates.

As of damages, a major revision of Section 102 was made in order to protect patent holders. The newly adopted paragraph (1) provides a calculation method of multiplying defendant's sales volume by plaintiff's profit per unit. The paragraph (2), which is the previous (1), provides the method of presuming defendant's profit to be plaintiff's damage. The paragraph (3), the previous (2), changed "the amount to be received in general" to "the amount to be received". The paragraph (4), the previous (3), provides the

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possibility of increasing or decreasing the amount defined in (3). He explained the issues of each paragraph, raising infringement cases such as the case of an escaping tool out of punishing roads, the case of pachinko slot machines, and the case of Oji Paper and Daio Paper. Several issues are still discussed. For the paragraph (1), the issues are: whether a one-to-one complementary relation is applied between defendant's article and patented article and whether to determine the possible sales volume which could have been made allowing for competitiveness in the market. For (2), whether a plaintiff should "sell" the patented article. For (3), how the difference is determined between "the amount to be received in general" and "the amount to be received".

After the revision, the theory of compensatory damages in Japan became very refined. However Japan has not adopted the theories which expand the amount of damages such as Convoy Sales theory, Entire Market Value theory, or Expedite Market Entry theory as well as triple damages adopted in the US. Despite that, the trend of the spiraling amount of damages has been recognized in Japan. Mr. Kumakura concluded that we needed to deepen discussions on maintaining an appropriate amount level for the purpose of the balance with the current defendants as well as the Patent Act.

In the following panel discussion, an active opinion exchange occurred among the participating countries, moderated by Professor Toshiko Takenaka.

(RA　Akiko Ogawa)

(2)IP Enforcement in Asia Part II

Day 1, 14:00-17:00

Group Session I: Korea, Thailand, & Japan

"Roles of Specialized Court for Intellectual Property Right"

Judge Lee HanJu, Seoul Central District Court
Professor Jong SangJo, Seoul National University
Presiding Judge Visit Sripibool, the Central Bankruptcy Court of Thailand, Thailand
Judge Toshiaki Iimura, the IP High Court of Japan
Moderator: Professor Ryu Takabayashi, Waseda University

This group session begins with the statement by Professor Michiatsu Kaino, Director of Institute of Comparative Law, which is a co-organizer of the event. He talked about the importance of IP Law research from the view of comparative law.

Professor Jong SangJo of Seoul National University made a report entitled "Roles and Perspectives of the Patent Court in Patent Litigations". He stated that it was necessary to focus on suits against a trial decision and infringement litigations in order to understand the roles of the Patent Court. There is an increasing ratio of the Patent Court's decisions to cancel the patents granted by the Korean Intellectual Property Office. But this trend cannot fully prove that the purpose of establishing the new court has been accomplished. He pointed out that the Patent Court and the Supreme Court needed to clarify the guideline in order to enhance predictability on whether inventiveness exists or not. In addition, in judging patent infringements, without exceptional conditions, the general courts

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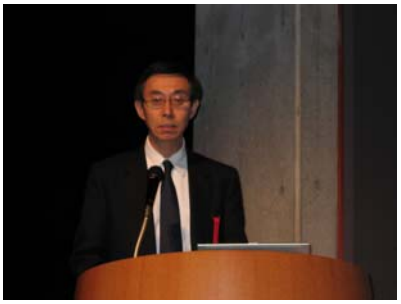
reject the exercise of the patent right which is to be canceled. Against the backdrop of these, unifying the procedure for claiming cancellation and that for asking remedies has become an issue.

With the title of "Roles and Perspectives of the Patent Court in Korea", Judge Lee HanJu, Seoul Central District Court introduced the report made by Judge Han Dong-Su of the Patent Court of Korea at the Supreme Court of Korea. He explained the process of establishing the Patent Court and introduced some statistical data of the cases related with the Patent Court. Having introduced the significance of precedents which decided that general courts could make a cancellation of patent, he referred to the discussion of centering IP infringement litigations in the jurisdiction of the Patent Court. Various parties or bodies are raising different opinions based on their interests, but the discussions still remains unsettled. In addition, he introduced Judge Han Dong-Su's view of centering jurisdiction as well as his opinion on the issues in the Technology Examiner System in Korea.

Judge Visit Sripibool from Thailand presented a report entitled "Roles of IP Specialized Court in Thailand". He introduced the current situation of IP infringement in Thailand and various measures against such infringement. Most of them are criminal cases because the cost is cheaper. He also introduced the execution of IPR in Thailand, the examining procedure and the career system at the IP&IT Court. In addition, he introduced an amendment to be enforced to the Copyright Law next year. No settlement will be made in criminal cases and the system to pay half of the penalty charges to the right owner will be eliminated.

Judge Toshiaki Iimura, the IP High Court of Japan presented a report entitled "The Roles of IP Specialized Courts for IP Infringements"



He explained the distinct point that the jurisdiction of IP litigations has. In addition, showing the statistic data of the number of cases, he introduced the structure of the IP High Court including the system of court investigation officials, the expert officials system, and the expert witness system. He pointed out that not every judge at IP Specialized Courts is a specialist and that it is important for judges to play the role as a generalist instead of the role of IP specialist. Therefore, a personnel measure is designed to avoid isolating from general courts or narrowing views of the judges. Some judges have a longer involvement with IP field and others have a very short career in IP. They work together. As the current issue, he raised the problem of a so-called double truck. According to his explanation, making use of the distinctiveness of the jurisdiction, the IP High Court is expected to actually remove variance in judgment due to double truck. Also, he mentioned the expectation of the grand panel system at the IP High Court. (He stated that it was necessary to have analysis in terms of theory, but the conclusion by the grand panel decision was maintained at the Supreme Court for the case of Ink Tank)

Following the presentations stated above, the panelists had a vigorous discussion.

（RC Tetsuya Imamura）

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Day 2
10:00 － 13:00
Group Session II: China, Vietnam, & Japan
"Roles of Intellectual Property in Opening Market Policy"

Professor Zhang Ping, Peking University
Professor Guo He, Renmin University
Mr. Nguyen Tran Tuyen, Attorney at Law, Vision & Associates
Moderator: Professor Toshiko Takenaka,
Law School, University of Washington,
Visiting Professor of Law, Waseda University

The group session II: "China, Vietnam and Japan" was held in the morning of the Day 2. The panelist from each country delivered a presentation with the theme of "Roles of Intellectual Property in Opening Market Policy".

First, Professor Zhang Ping, Peking University made a report of "China's Inevitable Choices to Realize the Goal to be an Innovational Nation". He stated that the importance of establishing and executing IP system had been growing in order for consecutive and sound development of Chinese economy as a whole. For creation, utilization, management, and protection of IPR, it is necessary to have the state-level policies which are strategic and visionary. A high-level total management capability is needed as well so that the IPR system can effectively function in the national development. He also raised the necessary policies as the following: "developing human resources highly specialized in IPR and enhancing companies' capability of creating, utilizing, managing, and protecting IPR", "improving the public policy environment related with IPR and enhance the quantity and quality of IPR", and "developing rules for administrative law enforcement and judicial protection of IPR to lead the IPR strategy in the right direction".

Next, Professor Guo He, Renmin University presented a report of "Roles of I Intellectual Property in Opening Market Policy". In his presentation, he explained that historically, the IPR system and a market economy were closely related. As a part of the market economy, the IPR system has played an active role to encourage innovations and to develop spread of knowledge and economic growth. However, knowledge has an attribute of public property. So the downside is that the IPR system restricts free competition and so forth. There is also a possibility of violating fundamental human rights such as freedom of speech or public health. Although he emphasized the IPR protection, he concluded that it was necessary to prevent the abuse of IRR for the operation of IPR.

Following Professor Guo, Mr. Nguyen Tran Tuyen of Vision & Associates from Vietnam presented a report entitled "Role of Intellectual Property in Opening Market Policy - Some Opinions in Contexts of Vietnam". He explained about the role of IP in a trade system, the main objectives of IP policies, the overview of IP enforcement system, the recent IP statistics, and the current IP issues in Vietnam. As to the current condition of IP enforcement, he mentioned specifically the fact that administrative procedure was mainly taken instead of judicial procedure in Vietnam. Although it is desirable that most of IP disputes should be solved through judicial procedure in the future, developing human

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resources (especially judges with IP knowledge) is urgent to realize the condition.

Last, Mr. Makoto Endo, Attorney at Law, who participated from Japan, introduced the issues on Chinese IP system mainly from practical viewpoints, with the title of "Roles of IP in Opening Market Policy – In Light with Japan's Experience". After comparing the development of the IP system in the recent China with that in the past Japan, he proposed the direction of policies to be adopted by the Chinese government in the future. He suggested it might be too early for China to take the policy to strengthen patents.

In the following panel discussion, various opinions were vigorously exchanged with the moderation of Professor Toshiko Takenaka.

(RA Asuka Gomi)

Day 2, 14:00 － 17:00

Conference of Asian Judges: Comparative Analysis of a Hypothetical Case

Judge Lee HanJu, the Seoul Central District Court

Judge Phattarasak Vannasaeng, the Supreme Court of Thailand

Judge Liu Jixiang, the High People's Court in Beijing

Judge Mieke Komar Kantaatmadja, the Supreme Court of Indonesia

Judge Toshiaki Iimura, the IP High Court of Japan

Presiding Judge Abudlul Kadir Mappong, the Supreme Court of Indonesia

Moderator: Ryu Takabayashi, Waseda University

Titled as Conference of Asian Judges, this session invited judges who specialized in IP litigations from Korea, Thailand, China, Indonesia and Japan in order to conduct a comparative analysis on administrative or judicial (civil or criminal) measures by each country, using a hypothetical case on infringement of trademark and trade dress. Although judges from Vietnam and Taiwan could not join unfortunately, the lawyers who participated in the other sessions from those countries provided a summary of possible measures against the hypothetical case in their country and those were handed out to the audience. Therefore the conference became an epoch-making project conducting a comparative analysis of measures for IP dispute by seven Asian countries, using the same hypothetical case. We will introduce the details in a Quarterly Review of Corporation Law and Society published by Waseda Institute for Corporation Law and Society. So it is introduced here briefly.

The hypothetical case can be simplified as the following.

"In a major city of Country Z, Company α runs a hamburger shop called "Dragon Burger (DB)" . It has many shops over the county, vying with other competitors because its taste specifically arranged for the people in Country Z is so popular. The DB has been registered as trademark for the goods and services in Country Z. On the other hand, at a beach resort away 3,000 km from the major city, there is only one DB shop at the airport. Company β has started a hamburger chain named "Dragon Hamburger Shop (DHS)" at the resort which is 90 minutes away by bus from the airport. The designs are quite similar to DB including interior decoration, shop-signs, product packages, and staff uniform. The flavor is rather similar to McDonald and completely different from DB. Then, the sales of the "DB" shop at the airport dropped sharply. In this case, what kind of administrative and judicial measures can be asked by Company α against Company β ?" So this case is designed for each

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country to easily fit the relation between the major city and the beach resort into each country's actual situation. For example, Japan can suppose the major city is Tokyo while the beach resort is Okinawa. Similarly, it is assumed that Seoul and Cheju in Korea, Jacarta and Bari in Indonesia, and Bangkok and Phuket in Thailand.

First, Judge Lee HanJu, the Seoul Central District Court presented a report. The measures to be taken by Company α in Korea are mostly similar to those in Japan, which Judge Toshiaki Iimura, the IP High Court presented later. At first, the trademark which Company β was using was similar to the Company α's registered trademark as well as the specified goods/services were the same or similar. On the ground of trademark infringement, a measure asking injunction and compensation for damages as well as filing a lawsuit for criminal punishment could be taken although it is not a crime requiring a complaint from the victim for prosecution. Next, there would be civil litigation against violation of the Unfair Competition Prevention Law or based on the trade name right. Against violation of the Unfair Competition Prevention Law, a measure asking criminal punishment could be taken. In case of civil litigation, it is also possible to ask a temporary injunction through an interim order before principal suit. He also introduced an administrative measure to ask the Patent Office to issue a corrective recommendation to Company β's unfair act, which does not exist in Japan.

Judge Phattarasak of the Supreme Court of Thailand introduced that, like in Korea, against trademark infringement, it is possible to ask an injunction, a civil litigation for compensation for damages, and an interim injunction prior to those aforementioned. It is possible for Company α to file a lawsuit for criminal punishment as well as to bring a case to the Police for accusation.

Judge Liu Jixiang, the High People's Court in Beijing introduced the twofold system as a measure correcting trademark infringements or unfair competition acts in China. The system has administrative remedies and judicial remedies. As administrative remedies, a complaint can be filed to the State Administration for Industry & Commerce in the place where the infringement occurred, to make the State Administration stop infringing act, order confiscation or disposal of the infringing articles, or impose a fine. Those who object to such measures can take the case to the People's Court. As judicial remedies, the measures can be taken on the ground of trademark infringement, such as to file a suit to the People's Court for demanding stopping the infringement, asking compensation, eliminating influence, or redeeming reputation. Civil sanctions like confiscation or disposal will be conducted in a minority of case. One of the reasons is that administrative bodies have taken proper actions. Other measures like criminal prosecution were also introduced.

Judge Komar, the Supreme Court of Indonesia introduced that the possible measures against trademark infringement are to ask an injunction or compensation to commercial courts to bring a case to general courts as a criminal case. Judge Mappong added that an interim injunction was legally prepared but not actually used yet and that although damages could be claimed, calculating the amount of damages was quite difficult in fact. Last, Judge Toshiaki Iimura, the IP High Court presented Japan's measures, which were almost similar to Korea.

After that, opinions were exchanged among the panelists and the audience. Active discussions took place, confirming the reported measures to conduct a comparative analysis.

(Ryu Takabayashi, Director of RCLIP)

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C L I P

The RCLIP's
Asian IP Precedents Database Project

※ The database is available in English, free of use at: http://www.21coe-win-cls.org/rclip/db/

IP Database Project: China

For Addition to the Chinese DB of FY2007, RCLIP will be steadily keep working with collaborators of Peking Univ., Tsinghua Univ., Renmin Univ., Zhongshan Univ., and Higher People's Court of Shanghai. Guangzhou, Shanghai, and part of Beijing have agreed collaboration. By the end of March, the work of five parts will be completed.

(RA Yu Fenglei)

IP Database Project: Thailand

Currently 316 Thai precedents have already been placed at the database. More 50 cases will be added this year. (RC Tetsuya Imamura)

IP Database Project: Indonesia

Within FY 2007, at least 20 precedents will be added. . (RA Akiko Ogawa)

IP Database Project: Taiwan

Within FY 2007, at least 50 precedents will be added. (RA Akiko Ogawa)

IP Database Project: Vietnam

We are planning to have a meeting with the Supreme Court of Vietnam about the precedents for the database in the near future.

(RA Asuka Gomi)

IP Database Project: Korea

In addition to the sixty precedents which were added last year at the DB, another sixty precedents was placed this year. On November 6, 15 trademark cases and on December 26, 14 patent cases were added respectively. The Korean precedents are 89 in total.

(COE Research Associate Lea Chang)

Events and Seminars

RCLIP Workshop Series No.22

【Date】January 28, 2008, 18:30-20:30
【Place】Waseda Univ. International Conference Hall, 3F, Room #2
【Invited Speaker】Asuka Gomi, Patent Attorney, Doctoral Course of Graduate School of Law, Waseda University
【Theme】
"Personal Standards for Similarity Judgment of Designs"

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