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NEWSLETTER
Research Center for the Legal System of Intellectual Property

JASRAC Copyright Seminar No.2
"Copyright and Content Distribution"
(2009/10/17)

【Lecturer】Hiroki Saito, Attorney at Law, "Network Distribution and Copyright System Foundation", Head of Sectional Committee on Promoting Content Distribution
【Moderator】Tetsuo Maeda, Attorney at Law, Lecturer of Waseda University

In order to discuss the way to balance between the promotion of content distribution and the protection of authors, the second lecture of JASRAC Copyright Seminar invited Attorney Hiroki Saito as a lecturer who plays an active role at "Network Distribution and Copyright System Foundation" which is addressing such an issue. Attorney Tetsuo Maeda moderated the seminar.

First, Attorney Maeda provided an overview of the issues related to the theme as well as the definitions in relation to the contents which are used in this seminar. Then, he raised concrete envisaged examples such as theatrical films, TV programs, records, and game software. Under the existing law, there is a difference in handling these contents. For example, there is a difference in handling the contents among the same film works: theatrical film and TV program, especially a program made by a TV station. He raised a question whether we should consider the difference depending on the type of contents in promoting content distribution and if so, how much we need to consider the difference.

According to Attorney Saito, there are two issues about reviewing the copyright law in order to promote content distribution. One is whether we should limit the exercise of the right of authors. The other is the issue of right handling for those who participate in creating works and have rights under the copyright law. Then, he gave an explanation about what differences exist in relation to such issues respectively depending on the type of contents such as ①records, ② theatrical films, and ③TV programs. ①About the records, there are three rights such as the copyright of music, the right of record creators, and the right of performers. It was pointed out that there are no circumstances in which we should examine to take measures under the law system, considering the current situation concerning granting these rights. ②About the theatrical films, he explained that there was no urgent need to take response under the copyright law, given the existence of Article 29 of the Copyright law, the so-called one chance doctrine related to performers, and the existing contract practices with classical authors. ③About TV programs, the one chance doctrine does not work. He also pointed out the reality that the right handling with classical authors is not accompanied other than broadcasting in the case of TV programs created on a daily basis. He suggested that we should consider the category of TV programs if any response is needed.

Next, Attorney Maeda asked a question concerning the differences in promoting distribution between past contents and future contents. Attorney Saito pointed out that the issue of content creation in the future would be much important for the industry from the viewpoint of the finite nature of time and money on the viewer's end. He also suggested that there was a different difficulty in promoting distribution of past contents in the eye of the law because of the aspect of the limitation of property rights.

In addition, he pointed out several issues regarding the proposal of the so-called Net law. Assuming that the proposal realizes the right unification to authors and imposes authors an obligation of acceptance on the Internet, we

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should not impose the obligation of acceptance because there is a problem in terms of the importance of media development, and also concerning the right unification, it was necessary set the allocation to all right holders, but deciding the ratio for that will be difficult. He also suggested that there was no reasonable ground for giving special treatment to Internet industries.

In addition, regarding the question about whether to set a rule concerning content use to the same effect in Article 65 (3) of the Copyright law on joint copyright, Attorney Maeda made a proposal on the rule, showing concrete stipulation. There was an interesting discussion between Attorney Maeda and Attorney Saito on that matter. Discussions were also made about the right and wrong of applying the one chance doctrine of performers to TV programs as well as about the judgment system on unknown right owners which was revised by the 2009 revision.

As stated above, the second lecture successfully ended as a fruitful mini symposium with an interesting exchange with the lecturer and the moderator.

（RC　Tetsuya Imamura）

JASRAC Copyright Seminar No.3
"The Essence of Copyright Protection – From the Perspective of Author and Lawyer"
(2009/10/31)

The theme of this seminar was "the essence of copyright protection – from the perspective of author and lawyer" and we invited Mr. Minoru Nakamura who is a lawyer as well as a poet and member of Japan Art Academy.

First, the moderator, Attorney Eiji Tomioka who is Visiting Professor of Waseda University, introduced Mr. Nakamura, stating the reason why we invited him as a lecturer. Considering today's copyright law system, we often hear the voices from distribution channels, but not from authors at present. In view of the purpose of Article 1 of the Copyright law, we need the voices from authors in order for cultural development. Mr. Nakamura is the one who can talk as an author and is also familiar with copyright law. As a poet, he has won the Takamura Kotaro Award, the Yomiuri Prize for Literature, and the Mainichi Art Award. Since 1952, he has worked as a lawyer on many cases including the case of Chieko-sho and the case of Kabe no seiki.

Mr. Nakamura made a speech by examining the issues raised in the article by Associate Professor Tatsuhiro Ueno of Rikkyo University in "Copyright" Vol. 47 No. 560 (2007/12) issued by Copyright Research and Information Center because it covers fair use fully. The article is titled "review of rules limiting the right under the copyright law – the possibility of Japanese fair use" and based on the lecture by Associate Professor Ueno.

First, Mr. Ueno stated that, according to the traditional popular theories, protecting rights was fundamental and restricting rights was exceptional. Behind the background of restrict interpretation of restrictive regulations, there has been a way of thinking considering the protection of authors as a primary goal in the purpose of copyright law and placing author's benefit higher than user's benefit in advance. Based on that, he questioned the idea that the protection of authors precedes fair use of works. To this point, Mr. Nakamura stated that we should think in the context of the purpose of copyright law - "while giving due regard to cultural protection, contribute to the development of culture" instead of examining those issues by confronting the protection of right with user's right. Although

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there is a competitive or adversary relationship between “protection” and “utilization”, those two are interdependent. However, he raised a question whether we should think about both copyright protection and utilization in order to make them to contribute to cultural creativity and concluded that “protection” vs. “utilization” should not be a priori.

Concerning concrete exceptional regulations, he stated an opinion that we should examine private use in Article 30 and quotations in Article 32 from the perspective of what the actual usage exactly is and how the activity contribute to cultural development. He stated that the act of harming creative motivation should not be done concerning quotations and some regulations should be prepared for parodies although there is no such clause is included in restrictive regulations.

As a help of considering what a parody is, Mr. Nakamura introduced a poet that he made based on “Ame nimo makezu” by Kenji Miyazawa (see the reference).

In the cases of parody, whether the essential character in expression is the same or not becomes the basis for determining it is a parody, copy, or adaptation. Using this example, Mr. Nakamura read Kenji Miyazawa’s poet from the perspective as a poet in order to see what the essential character is. According to Mr. Miyazawa, the poet had been written from his sick bed, dreaming to be called “blockhead” if he were well. In other words, even though there are overlapping expressions with the poet made as a trial, the essential character is completely different.

It is also difficult to determine whether a parody should be added to the limitative listing or considered as fair use.

The appeal court decision on the case of parody-montage ruled that a focus of criticism must be famous as the primary condition. In other words, he concluded that it was very difficult to make a judgment because a parody must purport satire or social criticism.

Next, he examined the use of images at an Internet auction. Mr. Ueno stated that having no image was inconvenient in selling pictures at an Internet auction. In contrast, Mr. Nakamura questioned if anyone would want to buy a piece of work of unknown origin, which might be a fake, on the Internet. He pointed out that it was only a problem of online retailer setting up the site and there was neither benefit due recognition to painters.

In addition, he mentioned Article 41 (a reflection of pictures), Article 43 (arrangement for noncommercial performance and citation of summary), Article 45, Article 46, and Article 49. Then, he concluded that it was important to conduct studies from the perspective to see where the ruling contributes to cultural development and what point it starts to inhibit the development.

（Research Associate Akiko Ogawa）

（Reference）

(Ame nimo makezu)　Kenji Miyazawa

He goes through the rain
through the wind
through the snow and through the heat of summer
His body with grit
without greed
without anger
with a smile in silence
He eats four bowls of brown rice a day
with just enough of miso and vegetable
Whatever he does
all for others, never for himself
He sees well, hears well, understands well
and never forgets
He lives under the shade of pines in the fields
in a little thatched hut
He walks to the east to a sick child
in order to nurse him
To the west to a tired mother
in order to shoulder her sheaf of rice
To the south to a man near the end
in order to tell him no need to be scared
To the north to the quarrel and the conflict

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in order to tell them not to waste their time
He drops his tears to a drought
but can only wonder around in a cold summer
Everyone calls him blockhead
No one appreciates him
No one cares about him
He is the person whom I want to be

(English translation: http://en.wikipedia.org/)

<Trial> Minoru Nakamura

He goes through the rain
through the wind
through the snow and through the heat of summer
His body with grit
with greed
with anger
without a smile
He eats fine meals a day
with dessert and good wine
Whatever he does
all for himself, never for others
He distinguishes between friend and foe
and never forgets
He lives in a large house in a quiet comfortable neighborhood of the city
He walks to the east to a sick child
And pays the bill in order to make him servant
He sends someone to the west to a tired mother
in order to make her a follower
To the south to a man near the end
He sends flowers to a funeral
To the north to the quarrel and the conflict
in order to profit from them
He waters to a drought
He uses an air conditioner in a cold summer
He thinks everyone should call him great politician
Everyone should appreciate him
Everyone should care about him
He is the person whom I want to be

JASRAC Copyright Seminar No.4
"Expansive Protection of French Copyright: Intersection with Other Branches of IP Protection and Limits for Public Interests"

(2009/11/28)

For this two-part international seminar, we invited Professor Yves Reboul, University of Strasbourg and Professor Frédéric Pollaud-Dulian, University of Panthéon -Sorbonne (Paris I) from France as lecturers and Professor Toshiko Takenaka, University of Washington and Associate Professor Yasuto Komada, Sophia University School of Law as commentators.

In the Part 1, Professor Reboul had a lecture titled "the extension of copyright to other IP laws in France" and especially emphasized France's position on the overlap of design and copyright.

After reviewing the history of design protection in France, Professor Reboul explained that they distinguished precisely between design and utility model in France. From its nature, design is aesthetic and falls into inutility. In contrast, technical utility model is designed to provide decorative look on industrial products and falls into utility. Thus, design is distinguished from utility model. Also, he introduced that design reflects designer's character because design is the result of intellectual activity by an author (designer) who gives unique aesthetic character to industrial products. Furthermore, he introduced the Paris Court of Appeals' decision stating that the shape of a toy "Rubik's Cube", for example, could be separated from the content of the invention and its coloring on six faces such as white, blue, or green possesses unique original

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appearance which is the same as abstract arts.

On the other hand, the Court decided that the shape of a windsurfing board was not design because it did not meet the needs in the aesthetic or decorative category but met the technical requirement to divide the flow of water. Thus he clarified the difference between two concepts.

Based on the aforementioned understandings on design, Professor Reboul expounded on "the principle of unity in arts" which was adopted for the protection on designers' creative activities in France. In that principle, there is no distinction between the protection through design and the protection through copyright. In addition, he explained that French design law had been revised in 2001 based on the EU directive and "the principle of unity" was valid under the revised design law. In design protection under the revised law, it is required that the design has to have individual character as well as novelty. The requirement of having individual character and novelty has the same content as the requirement of having expression of author's ideology or individuality. Therefore, in the relation between design law and copyright law, design with novelty has creativity and works with creativity have novelty. All designs are subject to copyright. Then, Professor Reboul answered the questions from Associate Professor Komada. Raising distinctive design in a "lemon squeezer" by a French famous designer Philippe Starck as an example, he said that it was not appropriate to decide the right or wrong of copyright protection by determining who made (such a distinctive) form, renowned designer or unknown artist.

Last, Professor Reboul mentioned the issue of the overlap of design and trademark. In France, aesthetic design which is discriminatory can be also protected as trademark. To the lecture, Associate Professor Komada introduced the judicial decisions and academic theories on the overlap of design and copyright in Japan and then, he said he was in sympathy with "the principle of unity in arts". However, especially in Japan, discussions have been made in a negative tone about applying copyright protection on design. It is said that applying copyright protection on design might marginalize design law's raison d'etre or that excessive protection might harm improvement or development of designs and disrupt the industry. He asked Professor Reboul about the responses to such concerns in France. To answer the question, Professor Reboul pointed out the relations between design and personality of designers again. While admitting the possibility of excessive protection on design specifically due to a long term of copyright protection, he emphasized that France's principle of unity in arts was the most legitimate answer to that issue in contrast with various adjusting theories adopted in other countries like Germany or Italy. After that, Professor Takenaka introduced the circumstances in the U.S. related to this issue. Then, the Part 1 ended.

（RA　Asuka Gomi）

In the Part 2, Professor Pollaud-Dulian made a lecture with the theme of "the Restrictions of Author's Right in France".

First, he clarified the distinction between the laws in France, a country of author's right, and the laws in the U.S., a country of copyright, and then, briefly introduced French copyright law. Author's right in France is a sort of natural law apart from social benefit and the relation between authors and works is as close as a parent-child relationship. Whether it is author's right or copyright, the more restrictions are made to the right, the authors' right to their works becomes

smaller. Also, he introduced the opinion that author's right was one of human rights, mentioning the Universal Declaration of Human Rights, International Covenants on Human Rights and Convention for Protection of Human Rights and Fundamental Freedoms.

Then, he introduced the history of French laws concerning the restrictions of author's right. Like many other countries, France has also increased legal restrictions recently. There has been an attempt to set restrictions on other areas such as legal procedure. The author's right is now being adjusted and the lobbying is ongoing

Next, Professor Pollaud-Dulian described the legal nature and structure of copyright restrictions and the law establishment and enforcement.

Copyright restrictions are not meant for those who benefit from the restrictions but only used as a defense in litigation. For example, while it is possible to evade a judgment of copyright infringement by the restriction on private copying, it cannot be possible to admit that an individual has "the right to make private copying". French courts have ruled that way.

Different from many other countries, French copyright law is based on the idea of "unifying" multiple rights to use. Granted privileges are only two rights: reproduction right and the right to make works public. These rights are widely and comprehensively understood and either of the rights will cover all usage of a work. From the perspective of the unifying idea as such, to the contrary, an analytical idea is taken for the copyright restrictions. As far as the definition of these two rights is broad and general, the restrictions must be presented by speedy, specific, and clear measures. Therefore, there is no "broad" restriction in France.

It must be legitimate and logical to admit one or multiple "broad" restrictions such as "fair use" when we take analytical thinking about rights granted to authors. It is, however, impossible in French law and might conflict the first requirement of "three-step test" in "Directive 2001/29/EC on the Harmonisation of certain aspects of copyright and related rights in the information society".

Legislators take into consideration freedom of expression, especially in various aspects of the right to criticize, argue, and analyze, or the right to mock, as a certain copyright restriction. That means, except these cases, it is not permissible to disobey copyright rules on the ground of freedom of expression. Also, even the freedom to use information or "the right to know" information often attempts to come before the execution of rights by authors, but fails in many cases. Only ideas constitute information and ideas cannot be protected in principle. That is because it cannot be said that the freedom to use or to get information is not fully confirmed by the principle. That is because works are not considered to be equivalent to information using a certain way of expression (copyright protects only expressions, not ideas). He said that it was also accepted in the legal interpretation in the U.S. to give more value to the freedom than author's right which was legally and constitutionally protected although there was no legitimate ground for that.

At the end, Professor Pollaud-Dulian pointed out that freedom and author's right were different as legal measure.

Then, Professor Takenaka made a comment. Copyright is not included in human rights but freedom expression is included in human rights in the U.S. It is natural to restrict copyright, one of property rights, by the freedom of expression in the U.S. She also introduced the U.S. decisions on parodies. Defense of parodies can be applied for not only copyright but also trademark. The decisions on trademark were also introduced.

Last, there was a question from the floor asking concrete examples of admitting parodies in France. According to Professor Pollaud-Dulian, French courts have not taken a harsh attitude to parodies and there have been many precedents since 1970s. As a famous case, he introduced

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"Tarzan, Shame of Jungle" and an adult version of "Snoopy". Those parodies were permitted even when they damage the image of original works.

(RC Lea Chang)

JASRAC Copyright Seminar No.5
＜JASRAC-RCLIP IP Symposium＞
"Issues surrounding the Recent IP Laws"
（2009/12/12）

Moderator: Tatsuhiro Ueno, Associate Professor of Rikkyo University
Panelists:
Makoto Ito, Attorney at law, Iota law and patent office
Koji Okumura, Associate Prof. of Kanagawa University
Masahiro Motoyama, Associate Prof. of Kokushikan University

On December 12 of 2009, the IP symposium: Issues surrounding the Recent IP Laws (JASRAC Copyright Seminar) was held as the fifth year anniversary of I.P. Annual Report. More than 190 participants gathered at Waseda Campus. This symposium was organized by Waseda University Center for Professional Legal Education and Research and co-organized by the RCLIP, Waseda University Global COE.

The Panel 1 featured the current circumstances of publicity right protection and the criteria for judging infringement in Japan, the U.S., and Germany with the theme of "Legal Protection for Celebrities' Names and Portraits – the Latest Movement of Publicity Right –".

Associate Professor Ueno who is the moderator introduced the process of forming the publicity right in Japan – how the protection by tort law was led up to nonexclusive right. Then, he pointed out the following issues concerning the protection of publicity right.

The issues are: (1) The legal nature and ground are undefined because there is neither statutory law ruling the publicity right nor decision by the Supreme Court clearly defining the nature of the publicity right. (2) The scope of the subject of rights and the possibility of attribution and transfer/inheritance of rights, and the duration of rights. (3) The question of whether the object of rights include personal component such as voice and images and names of objects other than names and portraits of persons. (4) The judging criteria are undefined because judicial decisions adopted different criteria such as "overall balancing", "strict criteria", and "lenient criteria".

The first lecturer, Associate Professor Okumura, introduced publicity right protection in the U.S.

After explaining that the publicity right was protected by state laws in the U.S., he presented various points concerning the publicity rights by raising the Supreme Court of Kentucky's judgment on the case of Montgomery.

The theory of natural rights seems to be the most reasonable as the ground for legitimating the publicity right but there is a risk that the publicity right could harm the freedom of expression based on that theory. So he pointed out that the problem was how to balance the publicity right and the freedom of expression.

Although it varies by state, the subject usually includes not only celebrities but also general public in the U.S. It is possible to transfer/inherit the publicity right because the publicity right is considered as property right. It is also possible that an employer could make use of the publicity right of their employees. As to the object, identities can be the subject of protection but the publicity right is not granted to animals or business entities. Injunctive and damage remedies are granted like other intellectual property rights.

Last, raising some precedents, he pointed out the judging criteria was differentiated by the freedom of expression. When identities are used without consent in the speech in which the freedom of expression is strongly protected, the responsibility of infringing the publicity right is evaded in many cases. On the other hand, when identities are used without consent in the speech in which the freedom of expression is not strongly protected (commercial purpose such as advertisement), the infringing responsibility is not evaded in many cases.

Associate Professor Motoyama introduced the protection of the publicity right in Germany, having the theme as "Protection of Property Value of Portrait in Germany".

First, he explained that in Germany, Article 22 of German Copyright Act for Art in 1907 stipulated the protection of portraits. It stipulated that the nature of portraits was an individual phenomenon of general moral rights, the right should protect not only ideological benefit in personal component but also property benefit, and "portraits" include all portraits which could be recognized by the depicted person.

Next, the possibility of transfer and inheritance of the property value component in moral rights is generally accepted. As to the inheritor's authority, however, to draw a conclusion from the wishes of the deceased is required and the execution must not be conducted against the wishes of the owner of moral rights. As to the duration of the right, there are precedents judging that the protection term for the property value component in moral rights should be 10 years after the author's death based on the stipulations under the Copyright Act. In contrast, he introduced the academic perspective of proposing 70 years after the author's death considering the term of copyright protection.

Last, quoting Article 23 of the Copyright Act of 1997, he explained about the limitation of the protection. As far as it does not harm legitimate benefit of the person of portrait or the close relatives in case that the person is dead, it is allowed to distribute and exhibit the portrait which belongs to the modern history, without consent of the person or close relatives. According to the intention of legislator, "the portrait which belongs to the modern history" means the legitimate informative benefit of the public about a noteworthy character and his/her social activities. He pointed out that it was difficult to distinguish between the purpose of advertisement and the purpose of information in the commercial use of portraits.

With the theme of "Practical Issues surrounding the Publicity Right", Attorney Ito's lecture focused on the judging criteria for publicity infringement in books and magazines in Japan.

First, he mentioned the Tokyo High Court's decision on Bubuka Special 7 and the Tokyo District Court' decision on King Crimson as a precedent adopting the lenient criteria. Both decisions presented the criteria to determine "whether it is used for selling and promoting the publication in the case of commercial use".

Next, as precedents adopting the "exclusively" criteria, he introduced the Tokyo High Court's decision on King Crimson, the Tokyo District Court's decision on Nakata case as well as on Bubka Special 7, on @Bubuka, and on Pink Lady case. The "exclusively" criteria are based on "whether it is used exclusively for the purpose of making use of celebrity goodwill". Attorney Ito pointed out the meaning of "exclusively" should be interpreted as not "only" but "mainly".

Last, raising the IP High Court's decision on the Pink Lady case which adopted the overall consideration criteria, he introduced it evaluated the portrait photography and the purpose, method, and form to use names and portraits comprehensively by considering "the way of getting those information, celebrity attribution, the degree of fame, the celebrity's way of managing own names and portraits".

In the Panel Discussion, the lecturers discussed the U.S. and German response to the cases like

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Nakata case, Bubka Special 7 case, or Pink Lady case from the perspective of comparative law. The protection of publicity right in the case of impersonation was also discussed. In addition, a broad range of discussions were held among the lecturers concerning the issues like the relations between the "exclusively" criteria and the freedom of expression.

（RA　Fei Shi）

Panel 2. Summary - the Movement of Intellectual Property Precedents and Theories for Five Years

Five years have passed since I.P. Annual Report started in 2005. The movement of precedents and theories published in the Report is a broad collection of precedents and articles of that year with a commentary explanation. The Report is established as a valuable asset to understand a whole image of the movement of IP law in Japan.

In this seminar, Professor Tatsuki Shibuya who writes the movement of precedents and Mr. Tetsuya Imamura, full-time lecturer of Meiji University, Mr. Asuka Gomi, Patent Attorney, and Motoki Kato, lecturer of Shinsyu Univeristy who write the movement of theories summarized the past five years and Attorney Ryoichi Mimura, former judge of IP High court who involved with many IP cases gave an explanation.

(1) The Movement of Precedents

First, Professor Shibuya introduced the movement of precedents. Addressing the recent precedents which are particularly noteworthy, he explained about the overview and judgments of the cases. Then, he added comments sharply just as he did for the precedent review in the I.P. Annual Report.

(2) The Movement of Theories – Copyright Law-

Next, Mr. Imamura introduced the movement of theories under the copyright law.

He described overall trends in theories, referring to the relations with legislation, judiciary, and academic society.

As to the object of rights, he outlined the concept of copyrighted work, the requirement of creativity, legal protection of applied arts, and copyrightability of titles, works in architecture, and aroma. As to the subject of rights, he outlined copyright belong to universities, the nature of joint works, the significance of "relating to entity's business", and the film author and the attribution of copyright of films.

Also, as to the content of rights, he outlined the argument of extending the term of copyright, the accreditation of authors of film works and the protection term under the previous copyright law, temporary accumulation and copy, and the concept of adaptation, and as to the restriction of rights, the evidence to justify neighboring rights, sampling of music and records, and the secondary use and rights handling of broadcast programs.

Furthermore, as to the use of copyrighted works and contract, he outlined the protection of licensees, unknown use and contract wording, and avoidance of the restrictive regulations by contract, and as to violation and legal measures, the structure of judging infringements of the right reproduction or adaptation, the responsibility of copyright debt, and non-infringing acts and illegal acts.

(3) The Movement of Theories – Patent Law-

Next, Mr. Kato introduced the movement of theories in patent law. He stated that precedents often became the start of a new academic discussion. Based on the major decisions by the IP High Court and the Supreme Court, he introduced the issues actively discussed.

First, he introduced arguments on the essential part of invention, harmonization of patent law and completion law as general theories, and then, as to employee's invention, introduced accreditation of inventors, legal nature of claim for compensation, the way of estimating equivalent consideration, and the handling of the rights to obtain foreign patents.

As to requirements for patent, he introduced arguments on support requirements of patent

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description, the judgment of novelty, and patent term extension, and as to correction and so forth, arguments concerning handling of correction in multiple claims.

Furthermore, as to execution of patent, he introduced arguments on exhaustion and exclusive licensee's right to seek injunction, and as to patent infringement lawsuits, arguments on interpretation of technical scope, the amount of compensation, requirements for invalid claim /determination of judgment and retrial, and confidentiality order.

(4) The Movement of Theories - Design, Trademark, Unfair Competition Prevention Law-

Next, Mr. Gomi introduced the movement of theories concerning Design, Trademark, and Unfair Competition Prevention Law. He pointed out that discussions had been active on law amendment or related movement on the whole and that the discussions on fundamental theories such as trademark function were comparatively active in the field of trademark.

As to design law, the discussions have been quite slow. In such a circumstance, comparatively serious discussions have been made about overlaps with copyright concerning applied arts and 3D trademark and the boundary area of neighboring laws.

Next, as to trademark law, the interest in regional collective trademark system is quite high, the discussions become active about the protection of new trademark or famous trademark, considering the future law revision, a series of the recent IP High Court' decisions stimulated the discussions about the discrimination of 3D trademark, and the discussions are actively made about trademark functions concerning the position of quality assurance functions.

In addition, as to unfair competition prevention law, the discussions are made about trade descriptions in conjunction with the discussions under trademark law. As to trade secrets, the issue of trade secret leak is especially focused. As to the acts to damage to credit, the major issue is patentee's warnings to alleged infringement customers.

(5) Comment

Following the lectures, Mr. Mumura made a comment on interesting points in each law field.

As to copyright law, he referred to the differences of cases, the structure of judging decisions concerning the subject responsible for copyright infringement using Maneki TV case, Rokuraku II case, and Yoridori midori case.

Also, as to patent law, he explained about the discussions so far and the positioning by the Supreme Court, and the future prospect concerning the handling of correction in multiple claims.

As to design, trademark, unfair competition prevention law, he examined the requirements for 3D trademark, referring to Hiyoko case, Mag light case, Coca Cola case, nad Guy Lian case.

During Mr. Mimura's comment, opinion exchanges with lecturers were also conducted. The seminar ended with a great success.

（RC　Motoki Kato）

JASRAC Copyright Seminar　No.6
"Fair Use surrounding the Recent IP Laws"
（2009/12/19）

Lecturer: Keiji Sugiyama, Attorney at Law, South Toranomon Law Offices

Moderator: Ryuta Hirashima, Associate Professor of Tsukuba University

Moderated by Associate Professor Hirashima, this seminar invited Attorney Sugiyama to have a lecture on "Fair Use surrounding the Recent IP Laws" which is currently one of the biggest

issues in copyright law concerning the adoption of “Japanese version fair use”. Coincidentally, it was right after his newest book “Copyright Theory” (Nihon Hyoron Sya, December 2009) was just published. So this lecture was made along the book (specifically p.70 - in the book).

First, he said that Japan’s copyright law classified the restrictive regulations from Article 30 by the political grounds and if there was an individual concrete case permitted other than those, there would be two possible legislative measures: ①Increase the number of individual restrictive regulations and ②Establish a general clause. He introduced the fair use regulation in Section 107 of the U.S. Copyright Act in 1976 as a typical example of general clause and raised the so-called four factors for fair use. Then, he introduced the so-called Betamax case and the Pretty Woman case. In contrast with these, after showing the difficulties of adopting general fair use in terms of interpretative theory on Japanese precedents, he pointed out the necessity of establishing the fair use regulation in Japan in terms of legislative theory. As the reason, he raised the following points: The difference between common law (case law system) and civil law (statutory law system), which was one of the strongest evidence for the objection to adopting the general clause of fair use, was not so absolute. In statutory law countries like Japan, the rules concerning the copyright law are actively being developed through judicial decisions (Tokyo District Court, October 27, 1999, Setsugekka Case). He pointed out the efficacy of the general clause as a system of leading appropriate decisions more simply. Furthermore, through the general clause, it is possible to develop sub rules based on individual clauses, foreign cases, precedents, and discussions or theories of the society responding to the possible cases. Then, as his opinion, he suggested the fair use clause should be Article 29 preceding the current restrictive regulations starting from Article 30 (the current Article 29 should be moved to right after Article 26). Adding ①“ practices in the field of related copyrighted works to forms and nature of works” and so forth, his suggestion considered the five factors that he added his own opinion based on Section 107 of the U.S. Copyright Act and concluded the use did not constitute infringement if it falls into the fair use.

Following the lecture, Associate Professor Hirashima made a comment. In “appearance”, the copyright law stipulates fairly-extensive exclusive rights for the use of expression. However, granting improper comprehensive exclusive right might cause fatal impact on human activities. Appropriate adjustments have been taken by addition or interpretation of the restrictive regulations. When the scope of right is too broad as such, the fair use regulation only functions to confirm that there are some restrictive fields which are not fully covered in the text but should not be judged as copyright infringing act obviously. In other words, the fair use regulation does not make the obvious infringing acts out to be non-infringement. The difference is only whether or not the stipulation to confirm obvious non-infringing acts is present. In the current circumstances of general discussions surrounding fair use, those who hold a negative view on the adoption of fair use have the perception that the fair use regulation recognizes infringing acts as non-infringement. Pointing out the difference with the perception of those who hold a positive view, he expressed his opinion the conditions making such a difference: Despite various perceptions of how far the copyright law can protect expressions in nature, we have not had enough discussions at that level. Technical discussions for legislation have preceded other things and there have not been enough considerations from the perspective of fundamental theories including the discussions about the Constitution (the freedom of expression, property right) or general civil laws.

In the following QA session, Professor Tetsuya Obuchi, University of Tokyo, asked about the

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comparison with the regulation by fair dealing in the UK which is a common law country like the U.S. and pointed out that there were various perceptions about the significance of the rule even among those who hold a positive opinion. As such, active discussions took place in the session.

(Research Associate Noriyuki Shiga)

The IP Precedents Database Project

※ The database is available in English at: http://www.globalcoe-waseda-law-commerce.org/rclip/db/

IP Database Project: China

We completed the collection of a total of 100 cases from five regions such as Beijing, Shanghai and Guangzhou.

(Global COE Research Associate Yu Fenglei)

IP Database Project: Indonesia

New 20 cases will be prepared within this fiscal year with the cooperation of the Supreme Court and Attorney Fiona Butar-Butar. .

(Research Associate Noriyuki Shiga)

IP Database Project: Thailand

Currently 422 Thai precedents have already been placed at the database. More 40 cases will be added this year. (RC Tetsuya Imamura)

IP Database Project: Taiwan

By the end of the year, 60 cases will be newly added to the database.

(RCLIP Director Ryu Takabayashi)

IP Database Project: Vietnam

Collecting judicial decisions has started in People's High Court of Vietnam. No concrete progress has been made yet to date, but we will continue the collaborative work with the Court.

(RC Asuka Gomi)

IP Database Project: Europe

We received 50 cases from Germany and 60 cases from France. Now we started working on translation. (Research Associate Akiko Ogawa)

IP Database Project: Korea

Currently a total of 119 Korean precedents are placed at the database. We planned to add more 30 cases by March with the support of the College of Law, Hanyang University. However, we changed the number to 20 due to scarcity of the precedents to be added. Those cases will be added at the beginning of March this year.

(RC Lea Chang)

IP Database Project: Europe

We plan to collect 125 German cases, 50 Italian cases, and 85 French cases in the fiscal year of 2009. Currently, with the cooperation of collaborators in each country and CASRIP, editing and translating is ongoing. Also we are preparing to collect Spanish precedents from the next fiscal year.

(RCLIP Office Chieko Kamijyo)

IP Database Project: India

We plan to add 40 precedents this year with the continuing support of Deli University and CASRIP. (RCLIP Office Chieko Kamijyo)

Editor/issuer
Ryu Takabayashi,
Director of Research Center for the Legal System of Intellectual Property (RCLIP)
Waseda Global COE Program
Web-RCLIP@list.waseda.jp
http://www.globalcoe-waseda-law-commerce.org/rclip/e_index.html