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RCLIP
NEWSLETTER
Research Center for the Legal System of Intellectual Property

Brazil IP Seminar

（2012/9/20）

【Moderator】 Mr. Kazuhiro Ando, Waseda University IIIPS-Forum, Visiting Senior Researcher

Speech (1): “Trends and Issues on Brazil Trademark and Copyright Law”
Mr. Roberto Carapeto, Brazilian Attorney /Waseda Graduate School of Law
Speech (2): “Recent improvements on patent examination activity by the Brazilian Patent Office”
Mr. Luiz Otavio Beaklini, Brazilian National Industrial Property Institute (INPI) General Coordinator of the Quality
Speech (3):“The Brazilian patent system: Lessons from the recent past, current issues & planning for the future”
Mr. Otto B. Licks, Licks Attorneys Partner

The Brazil IP Seminar was held on September 20, 2012, co-hosted by Research Center for the Legal System of Intellectual Property (RCLIP), Waseda Law School, Franklin Pierce Center, School of Law, University of New Hampshire, and supported by the law firm Licks Attorneys.

In order to introduce Brazil IPR protection, which is not yet well-known in Japan, this symposium invited researchers in Japan, members of Brazil INPI (National Institute of Industrial Property) and experienced lawyers in practicing IP Law in Brazil, to speak on the current issues in the establishment and exercise of the right for patent, trademark, and copyright.

First, Mr. Roberto Carapeto spoke on the theme of “Trends and Issues on Brazil Trademark and Copyright Law”. As to the increase of economic exchange between Japan and Brazil, he pointed out that the first Japanese company came to Brazil in 1958 and recently, the economic exchange with Japan was increasing again. In 2011, there are 271 companies whose shares are wholly owned by Japanese companies. In addition, he emphasized the historical fact that Brazil is the country that received the most Japanese immigrants in the world. Next, he explained some current considerations on trademark and copyright protection in Brazil, dividing it into three parts: (1) Trademark Law, (2) World Cup Law and Olympic Law, and (3) Copyright Law.

First, explaining the basic information about Brazil’s practice, he illustrated the differences with Japan’s trademark system. After explaining that pre-grant opposition system is still in place in Brazil, he expounded the necessity of the system and introduced the details of the procedure. Then, concerning famous trademark, he stated that the famous trademark can receive a wide range of protections in the all kinds of fields when it satisfies the requirements. He indicated the requirement of verifying the fact that the trademark has been already registered and is famous in Brazil in order to receive the protection of famous trademark. In addition, as to the protection of unregistered trademark, he explained prior users with good intentions, well-known trademark, well-known trademark

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abroad which is not well-known in Brazil, and nuances under the cases of unfair competition. Then, the judicial precedents were introduced concerning the approval of secondary meaning in Brazil.

Also, as to the World Cup law and Olympic law, he explained that the special protection will be provided for official trademark. Especially, under the World Cup law of Brazil, after analyzing the possibility of limiting commercial reasons (use of trademark) and the provisions regarding ambush marketing, he pointed out that a wide range of binding power was given to FIFA. He also mentioned the possibility of interfering with the lawful activities by the companies who are not official sponsors under the current rules.

As to the copyright law, he stated that even the basic information about Brazil has not been communicated in Japan. He emphasized the necessity of providing Japan with the information of copyright system in Brazil, valuing the exchange and cooperative relations between Brazil and Japan. Then, after explaining that Brazil's Copyright Law has a lot of influences from French laws, he briefly introduced the whole system. In addition, he introduced practical handling in Brazil concerning the considerations for companies, for example, the issue of author's moral right and work for hire.

As the second speaker, Mr. Luiz Otavio Beaklini first introduced the history of the INPI and explained the facilities and systems that are currently used. With that, he explained the relations between the improvement of examination activities and the increase of applications. Then, he introduced the most updated statistic data indicating the increase of applications concerning IPR in Brazil. The data reported that the INPI received 155,000 trademark applications, 31,000 patent applications, and 6000 design applications by September in 2012.

After introducing the improvement plan of services provided by the INPI, he stated that major purposes are to accelerate the examination process and to provide better information to the public about the examination status. He said that the current biggest issue for the INPI was the waiting order and backlog of examination. As measures against backlog, he explained the current project and the plans for the next five years. The measures against the waiting order have three pillars: (1) operational efficiency, (2) improvements of procedures and so forth, and (3) digitization and networking.

He stated that the number of examiners would be continuously increased for acceleration of examination. He also commented on the training system of examiners and revealed that they had a plan to hire more 700 examiners by 2014. Furthermore, he introduced the future system of electronic application and electronic procedures. He mentioned that the electronic patent application would be available this year, they were working on the general examination standards that had been unavailable in Brazil, and a joint examination in South America had already

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started on a trial basis. Last, he explained that sound search became available by changing the system for trademark examination, making faster examination possible and placing Brazil closer to be able to comply with Madrid protocol standards.

As the third speaker, Attorney Licks made a presentation, focusing on patents.

First, he examined the possibility of direct domestic adoption of the agreements in Brazil because every article in the agreements of which Brazil is a member is not necessarily reflected in the current laws. In Brazil, it is impossible to directly adopt the agreement by being signed and then, ratified by the Federal Senate. For domestic direct adoption, it is necessary to promulgate the article with the translation in Portuguese as an executive order. By that executive order, the agreement can be directly adopted and executed. Afterward judges and governmental agencies in Brazil normally apply the rules of an international treaty. As an example, he raised the Mailbox patent issue.

As to the patent requirements, he stated that the decisions in Brazil were relatively close to the EPO and usually, the USPTO's examination reports did not serve as useful references. In addition, he explained, as to the similar family patents, the more than 80 % of the result of the INPI's examination had the same conclusion as the EPO's examination.

After that, he illustrated the considerations when making claims as to domestic priority right and international priority right. For example, he explained the cases where the translation in Portuguese is necessary. Also, he illustrated the protection scope, exclusive rights, and compensation damages. He stated that the amount of compensation in Brazil was not so expensive as that in the US and it was relatively easy to obtain an interim injunction order as a provisional injunction.

After the all presentation ended, the QA session

took place. The discussions included the following topics. The future direction remains unknown in the revision of Brazil Copyright law. Concerning the division of patents, there is no statutory limit under the laws in Brazil. In the case of the division of medical related patents, in some cases, it is limited to the matters in the first claim chart and it is impossible to add claims from the specification. Next, to the question about the additional certificate, Mr. Beaklini explained that, in requesting the additional certificate, there is no time limitation but the period of duration of the additional certificate would be the same as the original patent.

As an impression on this seminar, we realized that many aspects of Brazilian IP system were not yet known in Japan and there was a substantial need for further exchange. As stated above, the seminar successfully ended with the attendance of lots of people.

（Roberto Carapeto, Brazilian Attorney）

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The JASRAC Open Lecture of 2012 No.1 (2012/10/6)

Part I: International Consideration on Public Transmission Right in the Age of Cloud

【Moderator】
Tatsuhiro Ueno, Professor of Rikkyo University
【Speeches】
"Characteristics of Public Transmission Rights under Japanese Copyright Law"
Shigeki Chaen, Professor of Osaka University
"International Examination of Public Transmission Rights in the Age of Cloud – Dismal US Law and US's Dismals?"
Koji Okumura, Associate Professor of Kanagawa University
"International Examination of Public Transmission Rights in the Age of Cloud – Light and Shadow of Umbrella Solution"
Tatsuhiro Ueno, Professor of Rikkyo University

(1) Theme

As result of the development of cloud technology, we see a growing importance of the issues surrounding public transmission rights or right to make transmittable on the Internet. In Japan, there has been a lot of discussions on the case of Maneki TV in which a service to make TV programs available to the public became an issue and the case of MYUTA in which an online storage service of music files became an issue. In other countries, various discussions were also ongoing on the similar services.

Obviously, as to the transmission on the Internet, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (1996) have already accomplished a certain harmonization. However, considering the rights stipulated in national laws, it seems that their concrete contents do not necessarily correspond.

In such circumstance, what kind of characteristics do public transmission rights under Japanese Copyright Law have from the international perspective? In addition, do these characteristics make any difference in the conclusions of the issues surrounding public transmission rights?

This symposium aims to clarify the international positioning of public transmission rights under Japanese Copyright Law in comparison with Europe or the US and to examine the ideal shape of public transmission rights in the age of cloud.

(2) Professor Chaen's Speech

Professor Chaen pointed out three points as the characteristics of the concept of public transmission rights under Japanese Copyright Law.

First, in Japan, the right to make transmittable is regulated as a preparatory act of automatic public transmission, which is a type of public transmission. Transmission by way of the act of making transmittable is considered as automatic public transmission and is not included in the act of making transmittable. It was pointed out that, in contrast, the right of communication to public in Article 8 of WIPO Copyright Treaty included the act of making works available to the public and transmitting them.

Second, the act of making transmittable in Japan is required to use automatic public transmission equipment which is defined by technical characteristics. In contrast, the act of making available in Article 8 of WIPO Copyright Treaty is not required to use automatic public transmission equipment.

Third, information is transmitted by individual user's access. The case of transmitting simultaneously like co-called Internet broadcasting is considered as automatic public transmission in

Japan. In contrast, it is considered as broadcasts or wire-broadcasts in WIPO Copyright Treaty, EU Information Society Directive, and German law.

Japan considers the case of simultaneous transmission as automatic public transmission instead of broadcasting. He pointed out that Japan was unusual from the international perspective and we should recognize it.

However, there is a possibility of having problems when treating it as broadcasting. It was pointed out that, especially as to distribution on the Internet, we should examine how to regulate it in each case.

(3) Associate Professor Okumura's Speech

Associate Professor Okumura first introduced how the US Copyright Act stipulates "the right of making available to the public". In the US Copyright Act, there is no right named as public transmission rights or the right to making available to the public. Instead, it is said to be substantially secured by the combination of reproduction rights, distribution rights, public performance rights, and public exhibition rights. Concretely saying, the cases will be grouped into the case of distribution right and the case of public performance right by the difference of transmission form. In short, the case in which copies are made is subject to "distribution right" and the case such as streaming is subject to "performance right". Whether to watch the transmission itself becomes a border of "distribution right" and "performance right".

However, it was pointed out that there would be some cases having problems. For example, suppose that A leaves a movie file that legally exists on a hard disc of A's PC shared with others by using a file-swapping software. If the transmission (sharing) is actually conducted, it will be distribution right infringement. However, before actually conducting transmission, or in the case in which the act of transmission is not clear, it is questionable whether it constitutes infringement or not. In this point, the question is whether the act of simply making available to the public constitutes infringement of distribution right under the U.S. law. It is said that there are different opinions.

Based on the stated above, he introduced the cases. The appeal court decision on the case of Cablevision concluded that it was not considered as "public" because the transmission of recorded copies was made only to the original person who created the copies. The case of Aereo was decided based on this decision.

He stated that, in the end, the opinions vary in the US on whether the US Copyright Act stipulates properly the right of making available to the public stipulated in the WIPO Treaty.

(4) Ueno's Speech

Responding to the speeches stated above, I made the following speech with the subtitle of "Light and Shadow of Umbrella Solution".

Umbrella solution was a special solution proposed by Dr. Ficsor, Chairman in the process of shaping the WIPO Treaties of 1996. An agreement emerged in the WIPO committees that the transmission of works on the Internet should be the object of an exclusive right. However, legal circumstances are different in countries. Therefore, the WIPO committees apply the umbrella solution that while they defined the transmission in a neutral way such as "making available to the public" under the Treaty, they left the concrete form or name to national legislation.

As a result, the right of making available to the public varies in different national laws: public transmission right in Europe, distribution right, public performance right and so forth in the US, and the right of making available to the public in Japan.

Of course, umbrella solution accomplished harmonization beyond differences among national laws. On the other hand, however, the interpretation of "making available to the public" under the WIPO Treaty might make differences in the "concrete" scope of the rights in each

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country.

For example, the interpretation on whether simultaneous broadcasting or webcasting should be considered as “making available to the public” differs among countries. Because of that, the content also differs; grant exclusive right under the Treaty or remain remuneration right. Therefore, there is an opinion criticizing it as “peculiar institutional design”.

The interpretation also differs among countries in terms of that “making available to the public” under the Treaties should be interpreted as only uploading which is a preliminary step of transmission or should be interpreted as covering the transmission after uploading.

In addition, the interpretation of “the public” is not defined under the Treaty and left to national legislation. Recently, there was a conflict in Europe as well. For example, there was a decision by the ECJ in 2012, concluding that hotel bedrooms should be regarded as the public but dentist waiting rooms should not be regarded as the public.

Similarly, in the case of allotting devices to each user, whether it should be considered as the transmission to the public becomes problem in cloud services such as personal online video recorder or online storage service. In Japan, courts found infringement for the reproduction right and the right of making transmittable in the decision on Maneki TV case, Rokuraku II case, and MYUTA case. On the other hand, infringement was rejected for both rights in German cases such as Shift.TV case or Save.TV case (although it concluded the act was regarded as rebroadcasting). Also, direct infringement responsibility was rejected in Cablevision case and Aereo case in the US.

Having observed as such, while umbrella solution accomplished a certain harmonization, it might cause the situation of “Do-sho Imu”(同床異夢) which is a Japanese proverb meaning “different dreams on the one same bed”. In the age of cloud, businesses seem to be conducted beyond specific one country. It is necessary to examine the substantive scope of the making available right in each country. Based on that, we should consider whether Japanese law must be revised or should be communicated to the world.

(5) Conclusion

Based on the speech stated above, some discussions were made between the panelists and the floor. Many people participated to the symposium and we could have valuable discussions.

Part II: The Acceptable “Minor” Use of Copyrighted Works within Companies

【Moderator】Tetsuo Maeda, Attorney at law
【Speakers】
Hiroki Saito, Attorney at law
Yoshiyuki Miyashita, Attorney at law

(1) Theme

Triggered by increasing recognition of corporate compliance, there is a growing concern as to whether there is a scope for allowing "minor" business use of documents or web-published materials within companies or if so, to what extent. Traditionally, it was understood that the provision in Article 30 (private copy) of Copyright Act was not applicable to copying within companies or work-related copying. However, a way of considering the Article flexibly to a certain extent is arising. Concerning the topics as such, we had a free discussion by

two speakers and a moderator, raising concrete examples with a view to 2012 revision of Copyright Act.

(2) Contents

Attorney Maeda raised the concrete issues as the following and all participants had a discussion based on that.

First, as the scope of Article 30 of Copyright Act, they discussed the scope included copying within a party and work-related copying by individuals.

Then, they continued the discussion as to whether internal copying within companies and so forth can be permissible, raising various concrete examples.

For example, there is a case of making 10 copies of a press release of new product development published at the rival company's web site, for the purpose of handing out them to 10 attendees as materials at the meeting of product development section in the company.

Also there is a case in which an employee happened to see a magazine article on his business trip to France (in French. A page in the 200-page magazine. This issue is not available in the bookstore anymore. The price is 100 JPY. It is not included in the articles of concentrate processing in Japan). The article is about the development of new product by their rival company in France. The article is interpreted into Japanese by one of employees and ten copies will be made and distributed to the attendees at the meeting within the product development section.

Furthermore, the case was also raised in which a company gatheres clipping of an article introducing their new product at the news site of newspaper company, at Evernote, which is used for their work., for the purpose of making use of the article for their future work.

In addition, a question was raised as to the use of public documents.

For example, the question is how about making 10 copies of a document on the METI's web site for the purpose of using it at the company's product planning meeting. In this case, METI's web site indicated that "users shall not copy, publish, transmit, distribute, transfer, license, reprint, and reuse the information and the related contents (regardless of in whole or in part) except in the case of having a prior consent of METI or information providers to METI".

Furthermore, as to copying by individual business owner or specialists, the question was also raised to what extent the copying should be allowed when the copying was related to their occupation or businesses. Also, the issues were raised about the copying of other's thesis by scholars to write a thesis and by researchers who belong to company's research institute.

As stated above, very diverse and concrete examples were prepared and the issue of copying, which many companies must have as a problem in reality, was examined. From the speakers, an opinion was presented that not everything was considered as illegal and it would be possible to have flexible judgments. Useful discussions were made as such.

（Tatsuhiro Ueno, Professor of Rikkyo University）

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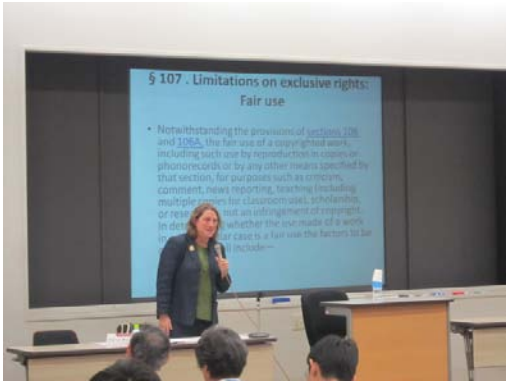
The JASRAC Open Lecture of 2012 No.2 (2012/10/13)



The JASRAC Open Lecture of 2012 No.2 was held on October 13, 2012, inviting Professor Jane C. Ginsberg at Columbia University School of Law to speak on the theme of "Criticism, Commentary and Just for Laughs: Fair Use and Humor in US Copyright Law".

Saying that fair use had been established by judges through 100-year case law, Professor Ginsburg first introduced section 107 of the 1976 Copyright Act. There is no automatic exception in fair use. Fair use is determined upon consideration of a series of factors. The fact is stressed in finding fair use. Section 107 stipulates factors to be considered and courts make decisions case by case. For example, in the case of criticism or parody, fair use is not automatically found but determined upon consideration of four factors in section 107.

Campbell v. Acuff-Rose Music, Inc. (92-1-292), 510 U.S.569 (1994) was a lawsuit that the publisher of the original work sued the rap music group (performer) and its record company, claiming the rap music group's song called "Oh Pretty Woman" violated the copyright of "Pretty Woman" that was a theme song of a famous movie. The defendant claimed fair use and the lower court accepted. The Supreme Courte examined whether the defendant's work diminishes the original work or makes other things the subject of laughter and in the result, it denied fair use.

Based on this case, Professor Ginsburg explained the factors to be considered. The first factor is whether such use is of a commercial use. The second factor is the nature of the copyrighted work and if the purpose is entertainment, it has a disadvantage for fair use. The third factor is the amount and substantiality of the portion used. It questions whether the copies were made more than necessary. If it is a parody, it is necessary to use the essential part of the original work. The amount of copies should be limited if the purpose is to criticize others. She pointed out that the court did not seem to be successful in distinguishing parody from satire. She concluded that even in the case a satire, a substantial portion was sometimes permitted to be used, just seen as the case of Koons[1]. The fourth factor is whether the defendant's work has the effect on the sales of the original work, as the substitute of the original work. In other words, if it is a parody, it cannot substitute for the original work. In addition to the economic effect, this point is also important.

Professor Ginsburg also explained the parody of Barbie Doll, showing pictures. The case 2 was that the head of Barbie was used as the material of Dangeon doll and the doll was dressed in a different type of outfit from normal Barbie. The case questioned whether Suzan Pitt, the defendant, made Barbie transformative or not. The court found that there was a difference in a style of outfit and if the doll was dressed in a style of cheerleader outfit, the situation would differ. It concluded that the doll was transformative because Mattel did not have such a style. In addition, it stated that the doll did not substitute for the original because children would not buy Dangeon doll instead of Barbie Doll. Because Barbie Doll is very famous, it is used as a parody in various shapes. Mattel also filed a lawsuit against the use of Barbie in the nude

[1] Blanch v. Koons, No. 05-6433 (2nd Circuit, October 26, 2006)

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called Food Chain Barbie[2]. In the case, it was claimed that parodying Barbie Doll satirized American society itself. However, Mattel expressed an objection to the use of Barbie as a tool of social satire. It insisted that there were problems in terms of the third factor: the amount and substantiality because it was not necessary to use the entire body of Barbie in such use. The 9th U.S. Circuit Court concluded that it is not in the public interest to allow Mattel complete control over the types of work of art that use Barbie as a reference for criticism and comments.

Next, she introduced the case 3 about a picture used as promotion of a movie whose posing is the same as the nude photo of a famous actress used on the front cover of a fashion magazine. The actress was pregnant and the nude photo drew controversy. The photo was used as promotion of the movie, which was an action thriller, but it had no relation with the actress, the photographer, and the magazine on which the photo was published. The photo of the movie promotion was created by making another model pose in the same way and combing the face of the actor who was a character of the movie. It was not the direct copy of the original work but reproduction of the same pose. It was said that they created the parody because the subject in the original work looked pompous. The court found that the photo was a fair use although it was an advertisement.

In addition, she introduced various works of parody subjects which were not taken to trial.

In response to Professor Ginsburg's speech, Professor Yasuto Komada made comments. First he introduced some pictures that exist as parodies in Japan. Then, he outlined the case of parody montage[3]. The plaintiff's photo was not really well-known and was not reminded of the defendant's work. Also, there was no inevitability to use the original for the defendant's expression. Saying so, many of scholars at that time had agreed the Supreme Court's decision that found infringement. However, he said that it might be a satire rather than parody in the US concept and made two questions: (1) what is the difference between satire and parody in the US and (2) whether it is necessary to be known to the public in order for parody to be a fair use.

As an example of parodies that were often seen at posting sits, he introduced one scene from a movie called "Downfall" released in 2004 in which the subtitle was changed to different caption. He asked the US view on such works.

To this question, Professor Ginsburg showed the types of satire and remix in addition to parody. She introduced a decision refusing a fair use in the case of presenting a message of "no message" which is now under an appeal. In the cases such as "Downfall", it became a cultural icon just as the case of a fashion magazine[4]. There is no point in bringing a lawsuit at the side of authors of the original works in such cases. She explained it as the concept of so-called "permissive use".

With more than 100 participants, the seminar successfully ended, having interesting comments on the theme amid the laughter caused by parody works.

（Research Associate Akiko Ogawa）

[2] Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003)

[3] 1980.03.28 Decision of the Third Petit Bench of the Supreme Court, 1976, (O)923

[4] footnote 4

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The JASRAC Open Lecture of 2012 No. 3 (2012/10/27)

The Current Conditions and
Challenges in Music Copyright Business

【Moderator】Kazuhiro Ando, Visiting Senior Researcher, Waseda University IIIPS-Forum

【Speakers】

Kazuo Munakata, SEPTIMA LEY

Kazuhiro Hara, Media Pulpo

In the first part, Mr. Ando, who was the moderator, explained to see the whole picture of the issues and challenges that the music industry was facing, using statistical data. In his explanation, he pointed out that the sales of music software (CD, DVD, and music distribution) had been drastically decreasing since 1998 and especially, music distribution continued to stagnate for the past few years, and that, on the other hand, the use of music did not decrease alghouth JASRAC's copyright royalty fee had stayed flat. In addition, he introduced the current condition as to music distribution that new types of services such as Spofity or Pandora Radio gained popularity overseas.

After that, Mr. Munakata clearly explained the situation of the music industry, based on his 40-year practical experience. Then, he stated that the music industry was not in a gloomy picture and the new music distribution business such as Spotify or Pandora Radio attracted a lot of attention from users. He introduced that the services received broad attention overseas as an innovative service to find new buyers and revitalize the music industry. Also, while four major companies are aggressively working on new music distribution services in the Western countries, Japan has been slow to adopt such new services. JASRAC is not a barrier. Because domestic record companies and major management offices hold most of master disc rights (neighboring right of records) concerning Japanese music, it is necessary to gain permissions from record companies and major management offices to start such services. Their negative attitude toward the adoption of such services was pointed out as one of major reasons for Japan's delay.

Next, based on concrete data, Mr. Hara elaborated on "how concerts are produced", taking a live event named "LIVE BURGER SPECIAL", as an example, which Mr. Hara held at ZEPP TOKYO on September 5, 2012 as a producer. He stated that the lineup (who performs in what order) was the big key for success and the order of asking artists for participation to the event was an important point. Furthermore, he explained that the goods sales at the site had a big impact on revenues and expenditures of the live event. Especially, T-shirt can be sold at a higher price (2,000 to 3,000 JPY) despite of its low cost. Showing concrete figures, he explained that T-shirt's profit margin was high and the sales contributed to the profit of the event. He also pointed out that one night event was not so profitable, however, concert business would be very profitable when we could have a long concert tour of a famous artist without having large-scale stage sets.

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Last, Mr. Ando elaborated what impact the downturn of the CD sales was having in the field of the music industry. First, the downturn of the music market causes the decrease of recording costs, threatening to lower quality. The decrease of PR costs is developing the strong tendency to depend on tie-ups. The sales downturn also decreases subsidiary payment or contract paid by record companies to the management offices which artists belong to. Because of that, the management offices are forced to be financially independent. In addition, he introduced examples that big artists like Eikichi Yazawa or Noriyuki Makihara established their own record label and conduct a music activity free from traditional approach of major labels, under such circumstances. As the future of the music industry, he pointed out that ① it remained difficult for a new artist to become popular if he did not belong to a big management office, ② middle-ranking artists should decrease the dependence on record business and place more weight on music distribution, live, and goods, ③ the effect of tie-up would decrease because more casting tie-up for dramas and more sponsor tie-up for animations. With that indication, he ended his presentation.

In the latter part, watching video comments from Mr. Noriyuki Makihara and Mr. Suneo Hair who are artists, and Mr. Shinya Aochi at King Records, Mr. Chikara Yoshida at the management office of The Bawdies (SEEZ RECORDS), three panelists respectively stated their opinions and comments and had vigorous discussions on the future shape of the music industry.

(Kazuhiro Ando, Visiting Senior Researcher, IIIPS-Forum)

Part II: The Issues and Future Challenges in Criminalization of Downloading

【Moderator 】Ryuta Hirashima, Professor of Tsukuba University

【Speakers】

Toshimitsu Dan, Attorney at law, bureau chief of lawyers for the Winny case

Taro Komukai, Senior Consultant, Infocom Research Inc.

At JASRAC Open Seminar of 2012 No.3, which was held on October 27, 2012, the second part invited Attorney Toshimitsu Dan and Mr. Taro Komukai, Infocom Research, as speakers to deliver presentations and have discussions on the theme of "Problems and Future Challenges in Criminalizing Downloading", moderated by Professor Ryuta Hirashima at Tsukuba University.

First, Attorney Dan pointed out the problems in the revised law. When downloading became illegal in 2009 (under civil law), the reason of not being subject to punishment should be that “illegality is considered as low, compared to those who illegally conducted uploading” (Satoshi Ikemura『copyright law commentaries, separate volume, 2009, revised comments』,p.16). Questions were raised what changes happened during these three years. In addition, in the legislative process, he pointed out that sufficient discussions were not held because there was no hearing at user side or public comment (for example, Movements for Internet Active Users (Miau) expressed opinions against criminalization of illegal downloading. http://miau.jp/1338800400.phtml).

As the legal issues, he pointed out that what “paid” was meant to be for was uncertain in the requirement of “paid works and others”. For example, Tokyo District Court’s decision on the

case of File Rogue on March 31, 2005 concluded "direct profit was gained" was assessed by advertising revenues. Based on that, it is not possible to say that TV programs of terrestrial broadcasting should be paid (Q&A at Agency for Cultural Affairs says that "the programs which were broadcast on TV but not are provided or presented with charge are not considered as paid works and others" http://www.bunka.go.jp/chosakuken/download_qa/pdf/dl_qa_ver2.pdf).

In addition, as to the requirement of "digital recording of audio or video", a question was made whether progressive download, which was adopted by Youtube and so forth, should be deemed as this category. Agency for Cultural Affairs "some user-generated video sites have a system of replaying data while downloading it and in this case, viewing the movie is accompanied with reproduction (audio or video recording). However, such a reproduction (cash) does not fall under copyright infringement because the stipulation of Article 47- 8 (Reproduction required for the exploitation of works on computer) is applied. It does not meet the requirement of 『violating copyright or copyright neighboring right』"(the Q&A). This means that progressive download is assessed as "reproduction in viewing". However, it could be assessed as "viewing what is reproduced". The possibility was pointed out that Article 47-8 would not be applied as a result.

Also, for copyright infringement, there is a law penalizing crimes committed outside Japan (Article 27-1, Act for Enforcement of the Penal Code). If someone conducts legal downloading in a country outside Japan, the act could be illegal in Japanese law. The speaker pointed out that this issue should have been examined at least.

Last, the issues in operations were pointed out. For investigative organizations, it is difficult to build a case for all massive downloading. Possibly, they might take arbitrary responses like simply setting the target of investigation and seizure on those who caught their eyes from inquiries from ISPs. In addition, when they conduct investigation and seizure for the alleged facts but they could not find any evidence, they check the suspect's PC and arrest the suspect for a violation of copyright law when illegal downloading is found. The possibility of "antiskid arrest" as such was also pointed out. Furthermore, it is possible to build a case against minors (for example, a thirteen-year- old boy was just arrested for a so-called creating virus related crime the other day and we cannot say for sure minors are not arrested). However, it was also pointed out that it would be not desirable.

Currently, copyright issues are not examined from the perspective of criminal law as well as the perspective of market. The necessity was urged in the speech.

Following that, Mr. Komukai raised the issues from the perspective of information and telecommunications.

It was pointed out that merits gained by its adoption might be uncertain in the criminalization of illegal downloading, comparing to the concerns such as the broadening of subject acts and the possibility of arbitrary investigations. From the beginning, there might be a big difference in the thinking about author's rights and the belief in investigative organizations between the pros and cons of the adoption.

As one example, he introduced the witness interview in the Committee of Education at the

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House of Councilors. In short, in the witness interview, there are statements including: illegal downloading is equal to shoplifting at real shops (Professor Hiroyuki Kishi, Keio University, former official of METI), we should make our country proper by disseminating what we should not do and letting the nation exercise criminal authorities, it would not happen that a case is built by a small number of downloading (Attorney Hideaki Kubota) and so forth (http://www.itmedia.co.jp/news/articles/1206/19/news089.html). In this respect, Mr. Komukai pointed out that it would be a viewpoint of "those who catch" instead of user (= "those who are caught") because a certain belief in investigative organizations was presumed.

On the other hand, it is true that there are problems in traditional legal remedies for rights infringement and so forth on the Internet. For example, there is a hurdle such as "secrecy of communications" if providers try to get involved with the countermeasures against rights infringement.

In short, it is prescribed that "secrecy of communications during the handling telecommunications carriers shall not be violated" (Article 4 of Telecommunications Business Act). It is understood that the access log of server connected to the Internet (IP address time stamp) shall fall under "secrecy of communications during the handling telecommunications carriers" when telecommunications carriers own the server. Therefore, if the server is owned by a telecommunications carrier, the carrier cannot disclose the access log to the victim asking the access log of the infringer ("disclosure" is one kind of infringements of secrecy of communications). So, provider liability limitation law (Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders) set down "disclosure procedure of information of the sender"(Article 4), it is a considerable burden for the victim to specify the infringer through the disclosure procedure.

In addition to this case, there are various cases in which secrecy of communications becomes a hurdle. Indicating that the system surrounding secrecy of communications becomes irrelevant to the reality, he talked about the necessity of essential revision.

Following the arguments stated above, vigorous discussions were made, having opinions from participants.

(RC　Shun Kuwabara)

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Events and Seminars

Please visit RCLIP's webpage for the detail.

【Date】December 8, Saturday, 2012
【Venue】Waseda University, Waseda Campus, Bldg 8, Room B101
(Simultaneous Interpretation is provided)

Part I 13:30～15:45

The JASRAC Open Lecture of 2012 No.5

【Keynote Speech】
Online Copyright Infringement:
ISP Liability under US Copyright Law
【Speaker】
M. Margaret McKeown, federal judge on the United States Court of Appeals for the Ninth Circuit
【Moderator】Toshiko Takenaka, Professor of University of Washington School of Law
【Panel Discussion】Present Issues Over Copyright of Video Games
【Discussants】
Takashi Yoichi, Bandai Namco Games
Yuko Yasuda, Camcom
Yasunori Mitsuda, Procyon Studio
Masato Shibata, Producer
【Moderator of Panel Discussion】
Kazuhiro Ando, Visiting Senior Researcher, Waseda University IIIPS-Forum

Part II 16:00～18:00

International IP Seminar - IP Litigation and TLO in China

(Simultaneous Interpretation is provided)
【Speakers】
JIANG ZHIPEI, Former president of Intellectual Property Tribunal of the Supreme People`s Court
LI SHUNDE, Professor of Graduate University of Chinese Academy of Sciences
QIN YUGONG, Partner and Lawyer of the King&Wood Mallesons
ZHANG RONGYAN, Professor of Graduate University of Chinese Academy of Sciences
【Moderator】QIN YUGONG Chinese Attorney at law, Patent Attorney
【Commentator】
Ryu Takabayashi, Professor of Waseda University

【Date】February 24, Sunday, 2013, 13:30-17:30
【Venue】Ono Memorial Hall, Waseda University

Waseda Conference on Global Patent Strategies: The Boundaries of Patent Rights in the EU and Japan and Celebration of Partnership on Judicial Education between Waseda University and Düsseldorf High Court
【Keynote Speaker】Dr. Thomas Kühnen, Presiding Judge, Patent Senate Düsseldorf High Court
【Panelists】
Dr. Tilman Müller-Stoy, Bardehle Pagenberg
Judge Toshiaki Iimura, IP High Court
Dr. Christof Karl, Bardehle Pagenberg
Toshiko Takenaka, Professor at University of Washington School of Law
Fumihiko Moriya, VP, Senior General Manager, Intellectual Property Division, Sony Corporation
And Others
【Moderator】Christoph Rademacher, Assistant Professor of Waseda Institute for Advanced Study
Details will be announced at the RCLIP's web page.as soon as confirmed

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