

Recent Legal Developments Concerning Digital Contents Business*

Digital Contents Committee

(Abstract)

As for the trend of legal systems relevant to the digital contents business, there have been the enforcements of; Law on Management Business of Copyright and Neighboring Rights (October, 2001) which grants the freedom of entering into management business of copyrights; a law to clarify the scope of responsibility that has to be borne by a provider with regard to the acts of infringements and other illegal acts that occur over Internet and to provide a right to claim the disclosure of the address etc. of a sender of the infringing information (May, 2002); and a law to have the timing of formation of contracts made via Internet to be based on the principle of arrival (December, 2001).

Furthermore, as for cases that should be noted, there are; a decision finding used game software sales as a tort; a decision finding a right to claim compensation of the damages caused by torts in the use of a database; a decision relevant to the publicity right of a famous article; and a decision ruling the sales of memory cards used for game software as a tort on the ground that it assisted the infringement of the right of preserving the integrity.

In this paper, the authors would like to introduce these laws and cases, and make remarks.

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1. Introduction

The rapid development of digitization and networking has a large impact on business activities. Such development is named "IT Revolution", and every company is busy with its efforts to swim with the tide. Digital contents businesses belong to a new field of business moving along that tide, and it is impossible to drive businesses by ignoring the trend of the legal environment around it. In this paper, we would like to introduce the recent movements in terms of revisions in the legal systems pertinent to digital contents and those decisions made in the relevant remarkable cases.¹

2. Trend of the Amendment in the Legal System

2.1 Law on Management Business of Copyright and Neighboring Rights

(1) Background

Law on Management Business of Copyright and Neighboring Rights was enforced on

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October 1, 2001 as a law to rule anyone in the business of copyright management in place of the ex-intermediary business law². The ex-intermediary business law that had remained in force for over 60 years was pointed out to have the following detriments.

- (i) The business practice was based on license, and there is no freedom for new entry.
- (ii) It included even those forms of acts not likely to damage the profit of original right holders as the subjects for regulation.
- (iii) The scope of subject matters was limited to “novels”, “dramas”, “music” and “lyrics” so that it no longer complies with the present circumstances of the copyright exploitation.
- (iv) While it allows an extensive breadth of administrative disposition, it lacks sufficient provisions with regard to those operations necessary to protect right holders and users.

It is expected that the newly provided Law on Management Business of Copyright and Neighboring Rights will eliminate such detriments and further facilitate the contents distribution.

(2) Purpose of the Law

The purpose of Law on Management Business of Copyright and Neighboring Rights is, “... to protect those who consign the management of copyright and neighboring rights, to facilitate the exploitation of works, performances, phonograms, broadcasts and wire diffusions, and thereby to contribute to the development of culture.”

In reality, whether a digital contents business using Internet succeeds or not is largely affected by the facilitation of contents distribution, so that the effectiveness of this law is attracting attentions.

(3) The scope of subject matters of the Law

The subject matter of Law on Management Business of Copyright and Neighboring Rights includes all matters that are protected under copyright and neighboring rights (Article 2(1)). Therefore, photographic works and artistic works etc. that had not been regulated un-

der the ex-intermediary business law have been added as the subjects to be regulated, and from one aspect, this may be seen as an enhancement of the regulatory power. For example, a photographic agency which manages photographic works has to consider whether its business falls under the definition of the management business of copyright and neighboring rights.

(4) Management business of copyright and neighboring rights

“Management business of copyright and neighboring rights” means an act of undertaking consignment from a right holder, of the management of the exploitation of works etc. including determination of royalty under a “management consignment contract” (Article 2(2)). The “management consignment contract” is defined as either of the following contracts made between the consignee and consignor (Article 2(1));

- (i) a trust contract by which a consignor transfers his or her copyright or neighboring rights to a consignee who is entrusted to authorize the exploitation of his or her works, etc. or otherwise manage those rights concerned;
- (ii) a mandate contract by which a consignor entrusts a consignee to act as an agent³ or a proxy⁴ to authorize the exploitation of his or her works, etc. and manage those rights correspondingly.

Since many of contents distribution businesses using Internet we see today do not satisfy the above definition, they do not fall under the category of the management business of copyright and neighboring rights.

(5) Registration and notification

A person who intends to operate the management business of copyright and neighboring rights is required to be registered by Agency of Cultural Affairs and to notify his or her management consignment contract and royalty rules.

(6) Designated management business operator

The Commissioner of the Agency for Cultural Affairs may designate a management business operator as a designated management business operator in the case where that operator

is an exclusive operator who satisfies certain requirements (Article 23(1)).

The designated management business operator is obliged to correspond when a representative of users requests a consultation with regard to the royalty rules, and where an agreement is not reached, the designated management business operator or the representative of users may apply for an arbitration by the Commissioner of the Agency for Cultural Affairs (Article 24(1)).

(7) Penal provision

In Law on Management Business of Copyright and Neighboring Rights, penal provisions are provided as follows;

- (i) any person who conducted the management business without registration, or with a registration obtained by dishonest means shall be punishable by a fine not exceeding one million Yen;
- (ii) any person who violates the order to suspend the management business shall be punishable by a fine not exceeding five hundred thousand Yen; and
- (iii) any person who concluded a management consignment contract that differs from the reported management consignment contract, or any person who received a royalty which contradicts the reported royalty rules shall be punishable by a fine not exceeding three hundred thousand Yen.

2.2 Laws Relevant to the Responsibility of Intermediaries of Information (Law to Limit the Liability for Damage of Specified Telecommunications Service Providers and Permit the Disclosure of User Information)

(1) Background

A person whose rights of some kind were infringed by a piece of information sent by another over the Internet may often find it difficult to pursue legal remedies. A typical example is where an illegal content that forms defamation, unauthorized disclosure of privacy or copyright infringement is posted on a bulletin board.

In such a case, it is well presumable that the victim may go to the intermediary of distri-

bution of such illegal content and ask for remedy. For example, the victim may ask the bulletin board operator to delete the subject information, and may ask for the disclosure of the sender information to the Internet service provider (ISP) with which the sender has a subscription contract.

However, it is not always easy for the intermediary to address the victim's request. This is because it is not easy for the intermediary to judge whether or not the subject information is illegal. Even if the subject information is found illegal, there still is an ambiguity whether or not the intermediary is obliged to delete the information immediately. Further, even if the intermediary had the right to delete such information in accordance with its Terms of Use, the sender of the information might assert breach of contract (undue stoppage of service provision), if the right to deletion were misused. The intermediary may also have to respect the right of free expression of the sender. In this way, the intermediary can be torn in a dilemma between the claim for deletion from the victim and contractual obligation to the sender.

The intermediary may also fall into a serious dilemma between legitimate interests when the victim asks the intermediary to disclose the sender information, such as the name and address thereof, to pursue a judicial remedy by the court. That is, where the intermediary falls under the definition of a "telecommunications carrier", as defined in the Telecommunications Business Law (TBL), it is obliged not to violate "the secrecy of communications" as provided in the Article 4 of the TBL. Since the violation of this provision could be subject to a criminal punishment, the intermediary may not correspond to such the disclosure request, even when there seems to exist a need to remediate the victim, unless there is a justifiable cause.

(2) Expectation toward the new law

In order to solve such problems, "Law to Limit the Liability of Specified Telecommunications Service Providers and Permit the Disclosure of User Information" (hereinafter called the "ISP Law") has come into effect on May 27, 2002. This Law provides the framework as follows in order to facilitate the spontaneous actions by intermediaries against the posting of illegal contents, and to provide an environment

to improve the effectiveness of legal remedies for victims.

1) Scope of “intermediaries”

“Intermediaries” subject of the ISP Law is defined in Article 2(3) as “specified telecommunication service providers”. Included in this definition are; i.e. ISPs, management/operator of servers, and bulletin board operators. However, if an ISP mediates an e-mail communication that is the one-on-one communication, as opposed to the “transmission of telecommunications to be received by the unspecified persons (Article 2(1) of the ISP Law),” the ISP does not fall under the definition of “specified telecommunication service provider” with regard to that mediation.

2) Clarification of the obligation of intermediaries

As in the above case, where a victim requests deletion of information which has been posted by a sender, the intermediary will fall into a dilemma that it would be sued by the victim if it doesn’t delete the information (in other words, if it leaves the information untouched), and by the sender if it does delete the information. In order to solve such a contradiction, the ISP Law clarified the responsibilities of intermediaries for both victims and senders.

(a) Limit on the liability for damages of victims

An Intermediary will be exempted from liability for the damages for the victim even if it does not delete the information unless either one of the conditions mentioned in the clauses (i) and (ii) applies (Article 3(1)).

- (i) If the intermediary knew that the right of another was injured.
- (ii) If the intermediary knew the existence of the infringing information, and there is an appropriate reason to consider that the intermediary knew the fact the right of another was being injured.

(b) Limit on the liability for damages of senders

An intermediary will be exempted from liability for the damages for sender even if it does delete the information if either one of the conditions mentioned in the clauses (i) and (ii) applies (Article 3(2)).

- (i) If the intermediary has an appropriate reason to believe that a person’s right has been unjustly infringed.
- (ii) When the intermediary inquires the

sender that a person who believes that his or her right has been infringed provided a request to the intermediary to delete the infringing information, and the sender does not respond counter-argument within 7 days after the receipt of the inquiry (notice and takedown proceeding).

3) Provision of sender information disclosure system

As previously mentioned, since telecommunication service providers are obliged to keep the secrecy of communications, they cannot agree to disclose information relevant to their subscribers. In order to breakthrough this situation, a system for disclosure of sender information has been newly created (Article 4 of the ISP Law).

(a) Grant of a right to claim disclosure of sender information to victims

A victim may claim for disclosure of sender information to the intermediary where the situation meets both (i) and (ii) below (Article 4(1)).

- (i) When the right of the victim has been obviously infringed.
- (ii) When the disclosure is necessary in order to commence litigation for the purpose of obtaining monetary damages or there are otherwise justifiable reasons.

(b) Obligation of intermediary to inquire opinions from the sender

An intermediary who was requested by a victim for the disclosure of sender information is obliged to inquire the opinions of the sender on whether to disclose the subject information unless it is unable to contact the sender (Article 4(2)).

(c) Exemption for intermediaries

The intermediary is exempted from any damages incurred by the victim who requested the disclosure as a result of refusal of disclosure by the intermediary unless such refusal is made intentionally or with gross negligence (Article 4(4)).

(3) Future problems to be addressed

Following is a list of problems in the practices of intermediaries after the enforcement of the ISP Law.

- 1) Provisions for clarifying responsibilities
First of all, where the intermediary does

not delete the infringing information, from a counter construction of Article 3(1), wouldn't the intermediary be held responsible if "it knew the infringement of right", or "there is an appropriate reason to believe that it could know the infringement of the right"?

The decision of Tokyo District Court on September 24, 1999, given for Tokyo Metropolitan University case⁵ ruled that even when the server operator actually recognizes the fact that the allegedly defamatory information is posted, he or she is obliged to delete such information, only when it is apparently obvious to the server operator that the extraordinary conditions such as follows are met;

- (i) the information falls under the definition of defamation;
- (ii) the state of the harmful act is extraordinarily malignant; and
- (iii) the degree of the harm suffered is extensive.

Furthermore, according to the decision given by Tokyo High Court on September 5, 2001 for the Nifty Gendai-Shiso Forum case,⁶ although the court recognized that the logical obligation to delete any defamation written by members occurs to the ISP, the court settled the requirements of such occurrence in an extremely limited manner.

As in the above cases, court decisions tend to hold the view that even if an intermediary comes to know the existence of any infringing information, the obligation to immediately delete such information does not necessarily occur. According to the provisions of the ISP Law, there still remain some ambiguities in the definition of the conditions when the obligation to deletion occurs. We still need to wait until further cases are accumulated.

Furthermore, there still is a need for clarification of criteria to see whether or not the notifications by victims are adequate. There is a case where an intermediary is notified by a party who claims to be a delegate of a victim (i.e. a copyright management organization), or a third party who has no relationship with the victim (i.e. a civil right advocacy organization) that the victim has suffered from an infringement. However, in a case where the intermediary deletes the subject information in response to such the notification, that notification is eligible enough to give the intermediary exemption from the sender of the information? Isn't it necessary,

in order to prevent any frivolous claims, to make it an obligation for the notifier to present a power of attorney from the victim or an official certificate that verifies the authentication of the notifier itself?

2) Sender information disclosure system

For a victim to exercise the right to claim the disclosure of sender information, there is an extremely large obstacle to overcome, that is, the victim has to demonstrate the fact that "the rights of the claimant (victim) have been obviously infringed". Even if the information is apparently right-infringing, there may be a possibility that its illegality is actually cured by justifiable cause of the accused matter. For example, public welfare purposes in a case of defamation, or independent development in a case of copyright infringement are the typical justifiable causes to cure the illegality. The case "where the right of the claimant has been obviously infringed" from the viewpoint of the intermediary seems extremely limited. On the other hand, the intermediary has to judge the illegality of the information only by studying what is actually posted, and would never be able to know any outside circumstances that might serve as a justifiable cause. Since the intermediary is urged to make such a delicate determination, it is more likely for the intermediary, from the practical point of view, to wait for the final court decision in favor of the victim and then make such the disclosure in accordance with that court decision.

2.3 Civil Code Related to Electronic Consumer Contract and Electronic Notice of Acceptance

This Code, which came into effect on December 25, 2001, is intended to provide special provisions of the Civil Code from the viewpoint of electronic commerce for two points, namely, invalidation of a consumer contract made by mistake and the time when a contract is formed. Following discusses how these are handled.

- (1) Exclusionary provision for the invalidation of electronic consumer contracts made by mistake

In a consumer transaction using the Internet, a consumer makes an application typically by inputting necessary information on a screen

of the web page presented by a business enterprise. Troubles are likely to occur at this point of time due to miss-manipulation by the consumer such as by entering a wrong quantity of the commodity he or she intends to buy. For example, where the consumer wants to buy 1 unit, but he or she mistakenly enters 11 units instead of 1 without knowing it.

Article 95 of the Civil Code provides that any expression of intention with a mistake of essential element is invalid, however, there is a proviso that where there is a gross negligence on the part of the person who expressed the intention, that person may not assert the invalidation. In a case of miss-operation as mentioned above, the consumer might want to assert the invalidation of the contract, but the firm may refute that there has been a gross negligence on the consumer side, and it is possible that the contract is not invalidated.

With this regard, the present Code provides exceptions to the application of the proviso in Article 95 of the Civil Code. That is, as for any expression of intention of offer or acceptance in consumer contracts made using an electromagnetic means via computer screen, where there is a mistake in an element of the contract and either of the following is met, the proviso in Article 95 of the Civil Code is not applied (Article 3);

- (i) where the consumer had no intention to express his or her intention; or
- (ii) where the consumer had an intention to express a different intention.

However, where the firm provides confirmation window to ask consumers to confirm the contents of their intension, or where the consumer expressed that such confirmation is unnecessary, the case is not handled as an exception, and the proviso of Article 95 of the Civil Code is applied as it is (Proviso to Article 3).

- (2) Clarification of time when electronic contracts are formed

According to the Civil Code, any expression of intention made between remote parties (parties between which the conveyance of the expression of intention takes time) is effective when such expression is reached to the other party (Article 97, Civil Code: referred to as "principle of arrival"). However, there is an exception of this principle provided for contracts,

and any contract is formed at the time of transmitting the notice of acceptance (Paragraph 1, Article 526 of the Civil Code; referred to as "principle of transmission"). The reason why the principle of transmission were adopted as for the time when contracts are formed had been that there was the view, it is preferable to form a contract in a prompt and indisputable manner.

However, as an electronic transaction via the Internet, where an expression of intention is notified via an electronic means, that notification would instantly arrive at the other party, so that there is no necessity to stick to the principle of transmission. Furthermore, based on the international trend where many of nations are adapting the principle of arrival, the Code converts from the principle of transmission to the principle of arrival as for the time when contract is formed between remote parties (Article 4). Included as the type of notice that should be ruled under the present Code are not only limited to cases where computers are used, but also those cases where facsimile, telex or telephone is used (Paragraph 4, Article 2).

3. Recent Remarkable Cases

3.1 Case of Used Game Software Sales; Right of Distribution

- (1) Outline of the case

Would the sales of used game software such as role playing game and dancing game etc. be legitimate? Litigations of separate cases of used game software sales were brought up almost simultaneously in Tokyo and Osaka.

In Osaka, a game software maker sued used software retailers for injunction of the sales of the used game software and disposition of its stock based on the copyright of game software (right of distribution) (the decision of Osaka District Court made on October 7, 1999,⁷ and as its appeal, the decision of Osaka High Court made on March 29, 2001).⁸

On the other hand, in Tokyo, a used software retailer sued a game software maker, for declaration that the injunction of sales of used game software is not allowed based on the copyright of game software (the decision of Tokyo District Court made on May 27, 1999,⁹ and as its appeal, the decision of Tokyo High Court on

March 27, 2001).¹⁰

The issues contested were the following three points in either of the cases.

* Issue 1

Whether a piece of game software falls within the definition of “cinematographic works” under the Copyright Law?

* Issue 2

Whether a piece of game software falls under the definition of cinematographic

works “having the right of distribution”?

* Issue 3

Whether there is a limitation on the distribution right of cinematographic works; i.e. is it exhausted upon the first sales?

Table 1 below compares the decisions of the respective Courts for each of the above issues.

Table 1 Comparison between the decisions of the Courts

Issue	Tokyo District Court	Tokyo High Court	Osaka District Court	Osaka High Court
1	The subject game software is not a cinematographic work	The subject game software is a cinematographic work	The subject game software is a cinematographic work	The subject game software is a cinematographic work
2	N/A	It is a cinematographic work with the “right of distribution” but such the right is not found in the copies of the game software*	It is a cinematographic work with the “right of distribution”	It is a cinematographic work with the “right of distribution”
3			The right of distribution does not exhaust	The right of distribution exhausts
Result	Game software maker lost	Game software maker lost	Game software maker won	Game software maker lost

* Copies of the game software: copies of the game software under distribution

These litigations were concluded by the Supreme Court (decision made on April 25, 2002)¹¹ who supported the decision given by the Osaka District Court (see (6) below).

(2) Background

We can find the root of the series of these litigations in the fact that game software makers pursued royalty payments by used game software retailers based on the distribution right of the game software as a result of the expansion of the used game software market.

In several cases in the past, game software that is expressed by a series of images has been classified as “cinematographic works”.¹² However, in these cases, whether or not the distribution rights shall be applied to those pieces of game software was not contested.

Right of distribution (Article 26 of the Copyright Law) is an exclusive right to demand injunction and/or permit the “distribution” of “cinematographic works” (as for the definition

of “distribution”, see (5) below).

To those works other than “cinematographic works”, the right of distribution would not be applied, and instead, right of transfer (Article 26 bis.) is applied. The right of transfer shall not be applied to those transfers of copies of works that have once been transferred lawfully in the domestic or foreign country (domestic exhaustion and international exhaustion) (Article 26 bis.(2)). However, there is no substantive provision with regard to the exhaustion of right of distribution.

If a right of distribution which does not exhaust is found for game software, then game software makers may be able to control the distribution of their game software. Accordingly, the above issues were contested between the game software makers and used game software retailers.

(3) Issue 1: whether a piece of game software falls within the definition of “cinematographic works” under the Copyright Law?

As for this issue, only the Tokyo District Court denied, and other courts affirmed.

1) Decision of Tokyo District Court

The Tokyo District Court assumed the “cinematographic works” as works having a characteristic of theatrical movies, and constituted its own requirement that mainly concerned whether “the identical contents of images are always presented in the identical sequence”. Then, the Court ruled that the game software does not fall under the definition of “cinematographic works” since the contents of game software does not satisfy the requirement as it varies according to the manipulation by a user.

2) Decision of Tokyo High Court

On the other hand, the Tokyo High Court judged that, the requirement “identical contents in identical sequence” cannot be found in Article 2 (3), and there is no substantial ground to find such. The High Court judged that, any works even other than cinematographic works originally intended (i.e. theatrical movies), if it satisfies the following requirements, then it shall fall under the definition of “cinematographic works”;

- (i) if it is expressed by a process producing visual or audio-visual effects analogous to those of cinematography ;
- (ii) if it is fixed in a tangible medium ; and
- (iii) if it is a work protected under the copyright.

The High Court stated that the subject piece of game software satisfies the above requirement (i) since “it shows animated images utilizing persistence of human vision”, and the requirement (iii) in view of its production processes. Furthermore, the requirement (ii) is provided with an intention to exclude from “cinematographic works”, those sequential images that are lost as they are produced, such as a live TV program, and determined that the subject piece of game software satisfies this requirement as it is stored as data on a medium (a CD-ROM) in a reproducible manner.

The similar decisions were given also by the Osaka District Court and Osaka High Court, and such decisions meet other precedent cases.

- (4) Issue 2: Whether a piece of game software falls under the definition of cinematographic works “having right of distribution”?

As for this issue , the Osaka District Court

and Osaka High Court had given almost the same judgment, and the Tokyo High Court had given a different judgment. Furthermore, the Tokyo District Court which ruled in the first place that the subject game software does not fall under the definition of “cinematographic works” did not make any judgment with this regard.

1) Judgment of Tokyo High Court

The Tokyo High Court ruled that, as long as the subject piece of game software is a “cinematographic work”, the software maker has the right of distribution.

However, the High Court judged that those copies of the game software placed for distribution (the subject game software copies) do not fall under the definition of the “copies” as provided Article 26(1) (right of distribution), and the right of distribution shall not be applied to the subject game software copies. In Article 26(1), it is provided that “the author of a cinematographic work shall have the exclusive right to distribute copies of his work” however, the right of distribution is granted with a presupposition of the distribution system for theatrical movies. Therefore, “copies” with this regard usually means a small number of copies each of which is viewed by a large number of people such as a theatrical movie, and those copies produced in a large quantity, each of which are viewed by a small number of people, shall be construed as being outside that definition.

2) Judgment of Osaka High Court

On the other hand, the Osaka High Court simply granted the rights of distribution for each pieces of the subject game software since there is no discrimination within cinematographic works between those having and not having the right of distribution under the Copyright Law.

The High Court recognized the fact that the right of distribution is based on the distribution system of theatrical movies, and the distribution of the subject game software is done in a totally different fashion from the distribution system of theatrical movies, however, it judged that this fact only is insufficient as a ground to deny the right stipulated in the Law.

- (5) Issue 3: Whether there is a limitation on the distribution right of cinematographic works, i.e. is it exhausted upon the first sales?

Since the Tokyo High Court, in the first

place, determined that the right of distribution is not found for “the subject game software copies”, it did not make any determination on the exhaustion of the right.

On the other hand, the Osaka High Court judged that the subject game software falls within the definition of cinematographic works having the right of distribution, however, the right of distribution is exhausted after the first transfer of the copies. As for the transfer of a copy occurring at least after it has been transferred to an end user, the effect of prohibition of distribution cannot be extended, and overruled the decision of the Osaka District Court, which ruled that such right of distribution shall not be exhausted.

1) Decision of Osaka District Court

The Osaka District Court, even though it added a comment that it seems to give the owner of copyright an excessive protection, ruled that the right of distribution does not exhaust. This is because, it is hard to interpret that only the right of transfer exhaust while the right of lending among the rights of distribution does not exhaust (the rights of distribution is defined as including lending; see below), and also, while the exhaustion of the right of transfer (each of the paragraphs of Article 26 bis. (2)) is specified by the revision of the Copyright Law in 1999, there is no specific revision with regard to the provisions of the rights of distribution, and furthermore, the reasonableness of pursuing a chance to recover the investment through the right of distribution should not be denied.

2) Decision of Osaka High Court

The Osaka High Court ruled that the principle of exhaustion of right shall be acknowledged since the Copyright Law is also based on the principle of free trade of commodities, and that fact is not affected by the existence or non-existence of an explicit provision therefor, so that the rights of distribution shall, naturally, be in compliance with the principle of exhaustion of right, and only exceptionally, it does not exhaust when it does not impair free production and sales market of commodities.

The High Court showed the view that the transfer and lending of theatrical movies under the distribution system intended for making it available for public (later part of Article 2(1)(xix)) do not exhaust because they don't impair the free production and sales market of

commodities, however, the right of distribution is exhausted, and its efficacy do not extend, for those transfers that the distribution system does not anticipate, such as a transfer of a copy of a cinematographic work which has once been lawfully transferred to the market (first part of Article 2 (1)(xix)).

The High Court ruled that the right of lending, which is included within the rights of distribution, does not exhaust. This is because the right of lending has a close relationship with the reproduction, and if it does exhaust, the same effect as granting the production of plural copies for the consideration of only the first transfer may be resulted, and such is not justifiable.

(6) Decision of the Supreme Court

The Supreme Court supported the decision of Osaka High Court.

The Supreme Court had given the decision that each of the subject game software falls within the definition of cinematographic works, and an owner of copyright owns the right of distribution.

The Supreme Court also judged that there is a necessity of securing the smooth distribution within the market, and since an owner of copyright is given a chance to secure the compensation upon the first transfer, the principle of domestic exhaustion is reasonable to a copyright and the transfer of its copies. It also stated that, as long as the Article 26 does not provide any provision that rules whether there is, or there is not the exhaustion of the rights of distribution, the judgment of such shall be left mainly to the interpretation in each case. As for a cinematographic work that is made for the use on a TV game machine, which is not intended to be represented in public, the Supreme Court ruled that the right of distribution therefore shall exhaust after it is once lawfully transferred.

(7) Comments

These litigations resulted in the opposing conclusions between the Tokyo District Court and the Osaka District Court, and the decisions of the respective appeals reached the same conclusion but with different reasoning. Accordingly, a unified interpretation by the Supreme Court was awaited.

The Supreme Court, as explained in the

above, supported the judgment of the Osaka High Court, making it clear that the right of distribution of the game software that is a cinematographic work shall exhaust after the first transfer.

A similar lower court decision had been given¹³ for a piece of video software, so that it was made clear to a certain point that the distribution rights of cinematographic works distributed within the market in packages exhaust domestically after their first transfer.

However, as for the future issue to be considered, a further discussion seems necessary as to whether the right of distribution does, or does not exhaust internationally like the right of transfer.¹⁴

Furthermore, it seems necessary to pursue legislative actions so as to clarify the constitutional interpretation of the right of distribution.

3.2 Motor Vehicle Database Case; Legal Protection for Database

(1) Introduction

There are various types of databases such as one containing customer data of a firm, or one stored digital contents on a CD-ROM. Self-Submitted search engines used for homepage search over the Internet also may be considered as a kind of database because they contain collected and systematized URLs.

In order for a database to be protected by the Copyright Law, a database must exhibit creativity in its selection of data constituting the database, or in its systematic construction. In Japan, most of databases may be already be legally protected under the Copyright Law,¹⁵ however there are databases that are not protected under the Copyright Law due to the lack of creativity in their data selection and systematic construction. Those databases may include one that allows a selection method which anyone would commonly take when selecting the data subject for entry, or one constituting its data merely in an alphabetical order or chronological order.

However, apart from the existence or non-existence of creativity, the production of a database may require significant costs and labor. There has been a controversy, disputing whether or not the legislative protection should be reached to those acts of using of databases

which do not have the creativity.

On May 25, 2001, the Tokyo District Court decision provided a protection over a database not having creativity,¹⁶ by finding a tort in the act of defendant based on the reason that; (i) the plaintiff invested costs and labor to collect and organize the data, (ii) the plaintiff's business activity is based on the manufacture and sales of the database, and (iii) the defendant's database that had been produced by copying the data of the plaintiff's database is sold in a competing area with the plaintiff's sales area. Since this is the first case where the decision was given on the database not having creativity, we would like to introduce the outline of the decision below.

(2) Outline the fact

*1986

The plaintiff developed a system for automobile maintenance businesses (making of quotations and invoices etc./simplification of the production of database containing customers and vehicles). The system included a database of motor vehicles (the subject database) which actually exist in Japan as constituent elements.

* March, 1986

The defendant sold a similar system for automobile maintenance businesses.

* 1994

The plaintiff started selling 1994 version of the subject database.

* End of 1994

The defendant delivered its automobile database that is similar to the subject database to its customers.

(3) Issues contested

The issues contested are as follows.

* Issue 1

Whether or not the subject database is a copyrighted work?

* Issue 2

Whether or not the defendant copied the subject database or its vehicle data?

* Issue 3

Whether or not the act of the defendant falls under the definition of tortious act?

(4) Issue 1: Whether or not the subject database is a copyrighted work?

Article 12 bis.(1) of the Copyright Law provides that databases which, by reason of the selection or systematic construction of information contained therein, have creativity shall be protected as copyrightable works. The Court denied the creativity of the subject database neither in its selection of data nor in the systematic construction, and concluded that the subject database was not a copyrighted work.

1) Creativity in the selection of the data

(a) Selection of subject vehicle

Since all the model numbers of vehicles indicated in an official gazette do not necessarily exist due to changes of plans by manufacturers, the plaintiff investigated the actual existence of them through materials such as automobile examination certificates and catalogs, and included to the subject database only those determined to exist. However, the Court found no creativity in the subject database since the selection of only vehicles that actually exist is commonly performed for automobile databases made and sold to domestic automobile maintenance businesses. Although a certain level of evaluation and determination are required during the investigation on the existence of the vehicles, such efforts merely require a certain level of intellectual works during the course of data collection, and that would not serve as a factor of creativity in data selection.

In addition, although the subject database included dummy data for the purpose to prevent unauthorized duplication, such a measure was also determined not to serve as a factor of creativity.

(b) Selection of data items relevant to vehicles

The data items of the subject database do not cover all the information regarding vehicles subject for collection, but include those selected data for the purpose to mainly assist the production of automobile inspection certificates. However, due to the existence of same kinds of databases created by other companies, that include items as vehicle data that should be described on the automobile inspection certificates, the Court found no creativity in the selection of data items since the data items included herein are those which are commonly selected for databases of the same kind.

Other than the above, the Court stated that the creativity in data selection is found in none

of the fact that the subject database uses names for the manufacturers and model types that differ from ones normally used, the fact that it includes own codes, nor the fact that the various numerical data are verified by the plaintiff.

2) Creativity in the systematic construction of the subject database

The Court found no creativity in the systematic construction of the subject database based on the reasons that the data is a merely listed in accordance with models in a chronological order and not classified in a different format, and such a constitution is found in databases created by other firms.

(5) Issue 2: Whether or not the defendant copied the subject database

The court judged that the defendant's database was a copy of the subject database based on the fact that the database, which were sold to automobile maintenance companies, included the dummy data that had been included in the subject database, the fact that the data entries of the subject database that uses a significant number of uncommon names that differ from those names to be used in automobile inspection certificates are used, as they are, as the names of manufacturers and models in the defendant's database, and the fact that several ten thousands of vehicle data in the defendant's database matched to the subject database.

(6) Issue 3: whether or not the act of the defendant falls under the definition of tortious act?

The Court first stated a general idea that, when a person created a database by bearing costs and labor, and engaged in the business activities therefor, the act of copying such database and selling the copies in an area that compete with that person's sales area may fall under the definition of tortious act, and that it infringes the person's right in his or her business activities that deserve legal protection. In the case of the subject database, the Court judged that the defendant's act significantly deviates from a fair and free competition of transaction, and such act falls under the definition of tortuous act that infringes the plaintiff's business activity that deserves legal protection, based on the following facts; (i) the subject database required signifi-

cant costs and labor for collection and management of the data of vehicles that actually exist, (ii) the plaintiff and the defendant are competitors, (iii) both selling the systems to nationwide automobile maintenance companies, and (iv) the defendant was found to have copied a significant number of data as they are sold to its customers.

(7) Issues to be solved in the future

This decision may be seen as the one to protect a database without creativity from a volume dissemination of unauthorized copies based on tortious claim

We have not yet established a statute in Japan such as the one seen in EU, and never reached a point to create the relevant bills like in the US. There are both pros and cons for and against providing legal protection to those databases without creativity, and we hope that further discussion will bring about some adequate protection rules.

There are various opinions with this regard. Some said it is sufficient to leave it to remedial measures against any unauthorized act such as the above case without providing any legislative measures, or some point out the importance of the provision of a statute to grant a right to claim an injunction which is not currently granted and to clarify the determination criteria. It is believed that the discussion shall be continued including these issues.

The Ministry of International Trade and Industry (the current Ministry of Economy, Trade and Industry) summarized that two methods are discussed in parallel with regard to the regulations over the unauthorized use of databases without creativity; (i) a method to grant an exclusive right with regard to the use of contents within a database; and (ii) a method to prohibit specific acts as tortious.

If the exclusive right is granted as mentioned above (i), that may be effective to prevent the act of illegal use, as the existence of the right is clear. A strong concern has been pointed out, however, that there may be a detrimental effect that is permits monopoly of information which should be placed within the public domain.

Therefore, in a case where a legislative action is considered, the method to prohibit specific acts as tortuous seems a more appropriate approach, as it can flexibly correspond to vari-

ous conditions while it does not limit the fair exploitation by users.

3.3 Publicity Case of the Names of Racing Horses; Publicity Right of an Article

(1) Introduction

The decision of the Nagoya District Court given on January 19, 2000¹⁷ and the decision of Nagoya High Court given on March 8, 2001¹⁸ (hereinafter, both referred to as "Tecmo case"), and the decision of Tokyo District Court given on August 27, 2001¹⁹ (hereinafter referred to as "Ascii case") relate to "publicity right of an article", in which the publicity rights of the names of racing horses used in game software were contested. For the Tecmo case, for which the decision by the Supreme Court is currently awaited, the Nagoya District Court granted the "publicity right of an article" for the names of racing horses and the Nagoya High Court also supported the decision of the Nagoya District Court. On the other hand, the Tokyo District Court denied the "publicity right of an article" in the Ascii case.

(2) About publicity right

The publicity right is not a statutory right, however, it is a right that is said to deserve protection as a value that is separate and independent from a privacy right, and a name and portrait of a celebrity that gained inherent distinction, social admiration, and name recognition etc. are not only his or her private information, but also is recognized as an exclusive right that rules economic profits or values produced by his or her name or portrait etc. when they come to gain goodwill. Also in the past cases, injunctions and compensations have been granted for claims of celebrities for the unauthorized use of their names, so that "publicity right" can be seen as an established right.

However, as to the question whether or not the publicity right equivalent to that given to a "person" shall be granted to an owner of a well-known "article", there were only a few cases, and since the right is related to the possession of an "article" that is different from the publicity right of a person that belongs to that person, there also is an aspect that the scope of the right cannot be determined only as the exten-

sion of the publicity right of a person with regard to the relationship between that "article" and the ownership thereof, the holder of the right, and the term of the right etc.

The outline of the both cases will be introduced below as well as the scope of "publicity right of an article" in the Tecmo case, and the decision of the Tokyo District Court in the Ascii case.

(3) Tecmo case

1) Outline of the case

The plaintiffs of the present case are 22 racing horse owners including individuals and companies. The plaintiffs filed a law suit before the Nagoya District Court against the defendant (Tecmo), claiming that the use of the names of their horses in the game software the defendant produces and sells ("Gallop Racer" and "Gallop Racer II") infringed their publicity right, and claimed for the injunction of production, sales, lent, and exhibition for sales and lent, and payment of damages incurred from the illegal act conducted by the defendant. In the subject game software "Gallop Racer" and "Gallop Racer II", a user plays a role of a jockey to play a simulated race with a horse the user selects. Almost all the horse name entries of both the games were the names of the horses that actually exist.

The Nagoya District Court, in response to this claim, judged that the "publicity right of an article" covers the names of the racing horses actually exist, and demanded the damage compensations to be made to 20 plaintiffs, but denied the claim for injunction. The Nagoya High Court supported the District Court's decision for the scope and constitutional requirements of the publicity right of the name of the racing horses, however, it demanded the payment of the damage compensation only for those hoses that won G1 races.

2) Issues contested

Issues contested in the present case were following two;

- i) whether the right of publicity can be found in the names of racing horses etc.? If so, what the nature and contents of the right, constitutional requirements and the duration would be?
- ii) whether the use of names etc. of the respective racing horses can form the in-

fringement of the publicity right in the game software?

3) Issue i): existence of the publicity right of an article and the nature of the right

With regard to this Tecmo case, the Nagoya District Court stated that, when the public comes to have a desire for possession of a particular article from the affection derived from an interest, affinity, or admiration etc. for the commodity having a name of particular article such as a racing horse, in a similar manner as a commodity having a name or portrait of a celebrity, then the name etc. of the article has goodwill, and there is a room for acknowledging its economic profitability or value (value of the publicity). Furthermore, a publicity right in a case of a person is an economic value that is independent from a privacy right, so that holders of such are not necessarily limited to persons. It is also said that the "publicity of an article" that should be protected as a proprietary profit or a right having a nature that belongs to the owner of the article or that attaches to the proprietary right since it derives from the publicity of the article, social evaluation and name recognition.

The defendant of the case asserted that there is no provision which recognizes the publicity right in the current law, and since names of articles etc. are protected under the Trademark Law, Corporation Law (as for trade names) and Unfair Competition Prevention Law, there is no need for creating a new right. In response, the Nagoya District Court stated that the current Intellectual Property Law solely does not provide the sufficient protection for those asset values derived from well-known articles, and "publicity right of an article" should be protected as a right newly recognized due to the change in the social conditions. Based on these speculations, the Court considered the necessity of determining the requirements, term of the right and scope of the effect of transfer while it acknowledged that there is a problem in the ambiguity in its publication means, and showed the nature of the "publicity right of an article" as follows.

i) Requirements

Same as the case where the publicity right is formed for a celebrity. It is necessary for the name of the article to gain special fame, social appreciation and high recognition, and itself needs to be viewed objectively as having goodwill. The pub-

licity right belongs to the owner of the article who can economically use the article.

ii) Transfer of the right

Since goodwill occurs on the daily basis, when the right of possession is transferred, the publicity right is also transferred upon the transfer of the right of possession.

iii) Extinction of the subject of right

Even after the extinction of the subject article, the owner of the subject article as of the time of extinction may assert the publicity right as long as the publicity value exists.

iv) Remedies

Compensations for damages only. It is understood that injunctions are not allowed. The “publicity right of an article” is merely a right to obtain an economical value, and granting of injunction may result in a significant amount of profit derived from the infringement.

4) Issue ii): whether the infringement of the publicity right can be formed?

The subject games incorporate the data of actually existing horses such as name, distinction of sex, breed, color of hair, composition of legs, handicap, distance aptitude, and the like. The Nagoya District Court stated that only names of the horses shall be considered as an element that promotes the publicity value as for those horses expressed in fictive images (non-actual racing horse). As for goodwill of the names of the racing horses, it was found in only those horses that had been entered to the G1 races to be exposed by various media and newspapers. On the other hand, the Nagoya High Court ruled that horses that gained goodwill are only those which won the G1 races.

As for the method of calculating damages, 3% of the price of the product, which was the amount paid to those owners of the horses other than the plaintiffs under contract for the use of horse's names, was used as the basis of calculation.

(4) Ascii case

1) Outline of the case

In this case, the horse owners sued the defendant who were producing and selling the subject home game software entitled “Darby Stallion” for the infringement of the publicity right of the racing horses owned by the plaintiffs,

and claimed for injunction of production, sales, lease, and exhibition for sales and lease, and the license of the subject game software, as well as the damage compensation therefor. The subject game software is a simulation game for breeding racing horses in which a player virtually grows a racing horse and obtains prizes in simulated races to finally aim the championship of the G1 race etc.

The Tokyo District Court ruled that, the plaintiffs had not given the legal ground as for the “publicity right of an article”, and the plaintiffs’ claim that the “right to possess an article” can enjoy the property right that exclusively rules the economic profits such as the article’s goodwill, is a misfeasance, stating that the conduct of producing game software that uses names of actually existing racing horses is lawful.

2) Issues contested

The issues contested in this case were two; (i) the content and the legal ground of the publicity right; and (ii) damage compensation.

3) Decision of Tokyo District Court

As for the “property right to exclusively possess economic values such as the goodwill of an article” that had been asserted by the plaintiffs, the Tokyo District Court rejected the plaintiffs’ claim on the grounds that (a) such the right shall not find basis only by the extensive interpretation of the right of possession or right of privacy unless the ground is found in positive law; and (b) the exclusive right may not exist outside the range of the Intellectual Property Law, and it has not even reached the domain of customary rules.

The name etc. of an article was said to entitle an exclusive right of use within a specified range under specific requirements based on the intellectual property right under the Copyright Law, Trademark Law and Unfair Competition Prevention Law etc., and this exclusive range is provided for indicating the limits of legitimacy of conducts to third parties, and finding an exclusive right beyond this range would disturb free economic activities, therefore, there is no need to pursue the protection in the range where the intellectual property right cannot reach. Furthermore, as for the fact that there had been some actual cases where licenses were granted for the use of names etc. of articles, there had been such cases for the purpose to

avoid conflicts, and such practices had not yet been reached the domain of customary rules.

As for the damage compensation (Issue (ii)), there is no reason found in the claim of the plaintiffs in the first place since the existence of the “publicity right of an article” had been denied. The Court also stated that even if the plaintiffs gain actual profits from the names of the horses and filed a claim based on the reason of an illegal conduct against it, the names of the racing horses in the subject game software appear as an element within the game, and the names are not used to advertise the game, thus, the claim of damage compensation would not be granted.

(5) Comparison between Tecmo case and Ascii case

In the two cases, the decisions of the first trials revealed the opposing judgments for the “publicity right of an article”. In the Tecmo case, the District Court indicated certain requirements for the “publicity right of an article” although it pointed out there still are some problems such as the public notice of the right. The High Court in its appeal trial, while recognizing the decision of the District Court, showed a rather prudent view that infringements resulted from the unauthorized use of the “publicity right of an article” shall be limited to those stallions which gained publicity through the coverage of press by winning the G1 races, not all of the stallions that entered to those G1 races, and it indicated the necessity of having a evaluation of a certain level or higher in terms of the extent of effort made to obtain the economic value, social assessment, and fame etc. in order to claim the right. On the other hand, the Tokyo District Court, in the Ascii case, denied the existence itself of the “publicity right of an article”.

The Tokyo District Court held the view that the intellectual property right will give the sufficient protection for the use of the name etc. of an article. On the other hand, the Nagoya District Court indicated an opposing view that the current Intellectual Property Law does not provide sufficient protection over the economic values derived from the name etc. of an article.

(6) Issues to be discussed in the future

Presently, the Ascii case has been ap-

pealed to the Tokyo High Court,²⁰ and the Tecmo case has been appealed to the Supreme Court, so that the decisions from the respective courts are awaited. The legal characterization of “publicity right of an article” is awaited for future cases to show the clear indication of the scope, and to organize the relationship between the right of possession of an article and the intellectual property right, and the criteria and means for independency and remedial measures. Furthermore, the needs for using existing names and portraits of articles are expected to increase in the future in production and use of digital contents in a practical sense. When using such, it is necessary for a producer to know the scope to clear the right administrations of rights, and the owner of an article to know to what extent he or she may claim his or her right in order to avoid unwanted controversy. As the Nagoya District Court indicated, there is a limitation for the scope of protection for intellectual property rights, and it would be a quite obligation for an owner of an article to file a trademark application of, i.e. the names of racing horses that usually are not expected to distribute within the market, for multiple specified goods in the preventive manner.

3.4 *Tokimeki Memorial Case; Scope of the Right of Preserving the Integrity*

(1) Introduction

Along with the development of digital technologies, the types of matters produced are being further diversified, and now attracting attention is how the current Copyright Law is applied to those matters which had never been assumed to be handled by the Copyright Law.

Game software is one category of such matters of production, and as previously mentioned, there is a controversy whether it falls under the definition of a cinematographic work, whether or not the right holder has the right of distribution, and if he or she has the right of distribution, then whether or not the right exhausts upon the first sales. Similarly, there is a controversy whether the liability can or cannot be sought based on the right of preserving the integrity for a product that had been made to allow its users to change the story line of the original game by using along with the game software. The following introduces a decision

of the Supreme Court²¹ given on February 13, 2001 which decided whether or not the infringement of the right of preserving the identity of a piece of simulation game software could be formed.

(2) Outline of the case

In the subject case, the appellee (plaintiff in the first instance court and appellant of the second instance court) having the moral right of the computer game software entitled "Tokimeki Memorial" (hereinafter referred to as "the subject game software") claimed for the payment of compensation from the appellant (defendant of the first instance court and appellant of the second instance court) asserting that the conducts of the appellant, who imported and sold memory cards (hereinafter referred to as "the subject memory card") on which parameters for the subject game software were recorded, infringed the plaintiff's right of preserving the integrity.

The subject game software is a romance simulation game. The player as the hero of the game becomes a pupil in a fictitious high school and selects a girl student to yearn for out of the set of characters in the game, by accumulating his parameters of abilities with the aim of receiving a profession of love from that girl on graduation. There are nine kinds of manifest parameters (physical condition, record, talent, knowledge, appearance, etc.) and three kinds of hidden parameters (ability to thrill the female student, degrees of friendliness and heartbreak; these parameters and the above manifest parameters are collectively referred to as "the parameters"), and whether or not he can receive a declaration of love from the girl student will depend on the numerical values of the parameters that the player has attained.

The hero starts out from a low capability value, and the story develops with a certain range under certain conditions such as that any girl student won't appear until the manifest parameters reach certain levels, or the 9 manifest parameters cannot be increased solely by the players operation etc.

The memory card the appellant imported and sold stored the parameters as data separately in the blocks 1 through 13, and the data in the memory card's discretionary block can be read into the hardware of the game machine and used by the player. If the data in blocks 1 through

11 of the memory card are used, most of the numerical values of the manifest parameters except for stress are very high from the time right after the hero enters high school, and the girl student appears right after matriculation, although ordinarily that would not be the case. Furthermore, if the data in blocks 12 and 13 of the memory card are used, the game jumps from its starting point to the time near graduation, and at that point the numerical values of all the manifest parameters except stress are changed to values much higher than they would normally be. Moreover, with data being stored that provides numerical values for the hidden parameters necessary to receive a declaration of love from the girl whom the hero yearns for, it becomes certain that the hero can get the girl to confess her love for him.

The appellee asserted that the act of importing and selling such memory cards infringes the right of preserving the integrity of the present game software.

In the first instance court, the infringement of the right of preserving the integrity was denied.

In the second instance court, the infringement of the right was found, so that the appellant appealed to the Supreme Court.

(3) Outline of the decision of Supreme Court

The Supreme Court judged on the following two issues.

- 1) Whether the use of the subject memory card infringes the right of preserving the of the subject game software

The Court acknowledged that the images of the subject game software is a copyrighted work, and the use of the subject memory card causes the modification of the subject game software, therefore, the right of preserving the integrity held by the appellee was found to be infringed.

As for the reasons, the following were pointed out;

- (i) The parameters of the subject game software represent the hero's characteristics, and the story develops according to changes in these characteristics. The use of the subject memory card will change the characteristics of the hero that the subject game software intended.
- (ii) As a result, the story is developed beyond

the scope that had originally been planned, thus, the story is altered.

2) Responsibility of the importer/seller of the subject memory card

The appellant, who imported and sold the memory cards, the sole purpose of which was to alter the game software, and distribute then with the intent that they will be used by others, brought about the infringement of the right of preserving the integrity of the game software due to other person's use, so that the appellant was found liable to the appellee for damage based on the tort.

(4) Comments on this decision

In the Supreme Court decision, there are some issues that had not been clarified, such as the scope of the integrity of the subject game software, and here, we would like to comment on "infringement of the right of preserving the integrity due to the private use by a user" as a most questionable issue.

The Supreme Court acknowledged the liability of the appellant for its tortious act based on the premise that there is illegality in the use of the subject memory card by users. Is this decision really justifiable? That is, can we say that the right of preserving the identity of the subject game software was infringed just because the subject game software was altered by a user?

Since the subject memory card can be considered as being used in a range of private use by users, so that the question here would be whether or not the infringement of the right of preserving the integrity of works is constituted by this use in the range of private use. In the Copyright Law, however, while for a copyright (property right) the alternation of a copyright work in a range of private use is acknowledged (Article 43 of the Copyright Law), there is no provision to provide such in the case of the moral rights of an author. Furthermore, the provision of the same is said not to affect the moral rights of an author (Article 50 of the Copyright Law), so that it also seems as if the infringement of the right of preserving the integrity by use even in the range of private use can be formed in any cases.

However, such the interpretation would have a deficiency in its incoherency that, for the same mode of use of a copyrighted work, in one

aspect it is lawful, but in another it constitutes unlawful.

As for a reasoning to rationally interpret this point, there are following ideas;

- (i) In a case where the adaptation is lawful by the application of Article 43, consider it is not infringement of the right of preserving the integrity because the adaptation necessitates the modification.²²
- (ii) Consider the infringement of the right of preserving the integrity occurs only when the modified work is published and flows out to the society, damaging the personal benefit of an author (social evaluation given to the work of the author).²³

If, based on these ideas, the use of the subject memory card by a user is not the infringement of the right of preserving the integrity, and the conclusion would be led so that also the liability is not formed by the conduct of the appellant.

Furthermore, assuming actual private use of copyrighted works, many conducts are being performed such as a user copying his or her favorite songs only from a music CD he or she purchased, or clipping only necessary sections of newspapers for filing, and it is not justifiable to acknowledge these actions as infringements of the right of preserving the integrity like the above decision by the Supreme Court. And if such is acknowledged, the meaning of the existence of Article 43 is drastically reduced.

It is considered that the fact the Supreme Court acknowledged the infringement of the right of preserving the integrity by users, even though there could be a problem such as the above, is believed to weigh the protection of game software developers. However, can't this mean that the framework of the current Copyright Law is becoming outdated in order to provide adequate correspondence to the protection of new copyrighted works such as game software (for protection of right holders and keeping balance of fair use), and isn't this a indication of the need for updating of the Law?

4. Conclusion

Those businesses relevant to digital contents belong to a new field of businesses, and are still growing. Especially, we are now entering

into the new stage of broadband era, and will encounter various many new businesses. The legal system with this regard is also under development, and we have not yet accumulated sufficient number of relevant cases. In order to enhance these businesses, it is important to keep our eyes on the relevant trends, and understand them. We should see how the new laws that appeared in this paper are operated, and decisions of respective cases to follow in the future should be carefully watched.

Notes:

- ¹ Writing of the present paper was shared among the members of the Digital Contents Committee (Hagiwara, Matsuzawa, Kamei, Kuratani, Moriya, Watanabe, and Uchiyama), and the comments attached to the each law and case are the views of respective writers.
- ² Law on Intermediary Business Concerning Copyright
- ³ “to act as an agent” is an act of accepting to use its own name and calculation of others to conduct a legislative action. (Article 502(11) of the Commercial Code, “*Toritsugi*”)
- ⁴ “proxy” is a system in which a person B who has a certain relationship with a person A acts for the person A to declare the intention on behalf of the person A to a person C, or receive the declaration of intention of the person C thereby to reflect the legal effect of the declaration of the intention directly to the person A (Article 99 of the Civil Code, “*Dairi*”)
- ⁵ Hanrei Jiho Vol. 1707 p.139
- ⁶ Hanrei Times Vol.1088 p.94
- ⁷ Hanrei Jiho Vol.1699 p.48
- ⁸ Hanrei Jiho Vol.1749 p.3
- ⁹ Hanrei Jiho Vol. 1679 p.3
- ¹⁰ Hanrei Jiho Vol. 1747 p.60
- ¹¹ Supreme Court 1st Petty Bench Decision: Hanrei Jiho Vol.1785 p.3
- ¹² PAC-MAN game case decision of Tokyo District Court given on September 28, 1984 Hanrei Jiho Vol. 1129 p.120; DIGDUG game case decision of Tokyo District Court given on March 8, 1985, Hanrei Times Vol. 561 p.169; PAC-MAN shareware case decision of Tokyo District Court given on January 31, 1994, Hanrei Jiho Vol. 1496 p.111

- ¹³ Used video software sales case; decision by Tokyo District Court on January 31, 2002
- ¹⁴ The Tokyo District Court acknowledged the right of distribution for a parallel import of a video tape, Hanrei Jiho Vol. 1501 p.78
- ¹⁵ In order to understand the fact of protections by the Copyright Law, the following cases may help; Town Page database case, decision by Tokyo District Court on March 17, 2000, Hanrei Jiho Vol. 1714 P.128. In this decision, the Town Page database is found to have worked unique devise of the plaintiff, and has a creativity due to its systematic configuration as a whole since it was configured to cover telephone numbers of all professions by classifying individual professions and forming them in a hierarchical structure from the view point of utility for search.
- ¹⁶ Interim decision of Tokyo District Court on May 25, 2001, Hanrei Jiho Vol. 1774 p.132
- ¹⁷ Not included in Hanrei Jiho
- ¹⁸ Not included in Hanrei Jiho
- ¹⁹ Hanrei Jiho Vol. 1758 p.3
- ²⁰ Tokyo Hight Court decided the case on September 12, 2002, and the appeal by the plaintiff (Tecmo) was denied
- ²¹ Supreme Court, 3rd Petty Bench Decision, Hanrei Jiho Vol. 1740 p.78
Furthermore, there is a similar case that contested the infringement of right to preserve identity, namely Sangokushi III game case, decision of Tokyo High Court on March 18, 1999, Hanrei Jiho Vol. 1648 p.112.
- ²² Decision of Tokyo District Court given on October 30, 1998, “Social History of Blood Type and Personality” case, Hanrei Jiho Vol. 1674 p.132; it was decided to fall under the definition of “modification that deemed unavoidable” (Article 20(2)(iv) of the Copyright Law)
- ²³ Opinions with similar intention may be seen in the following; “Sofutouea-no-Tyosakuken, Tokkyoken (Copyright and Patent Right of Software)” authored by Keiji Sugiyama, p.27 (1999); Nippon Hyoronsha, “Gemu-no-Sutori-no-Kaihen (Modification of Stories of Games)” authored by Osamu Watanabe, Special Edition of Jurist, Chosakuken-Hanrei-Hyakusen Ver.3, p. 118(2001), Yuhikaku, “Chosakusya-Jinkakuken-no-Genkainitsuite (About Limitation of Moral Right)”
http://www.ne.jp/asahi/law/y.fujita/copy_r/iden.html

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