8 Research and Study on Recent Trends of Digital Contents Protective Legislation in the US and Europe

The demand for digitized contents based on the rapid technological advances of recent years along with new industries engaged in the production, processing, distribution and transmission of those contents are expected to demonstrate even greater growth in the 21st century. The creation of new rules that accommodate new product forms is required to provide support for that growth, and it will be necessary to conduct studies based on the actual state of the establishment of international protection systems by organizations such as the World Intellectual Property Organization (WIPO). Thus, it is extremely important to actually survey and understand the situation in the U.S. and Europe that are currently in the lead in many respects. This year's committee conducted surveys and research consisting primarily of local surveys based on the establishment of various types of legislation by the WIPO, EU and U.S., the status of the enactment of legislation and its effects on industry and so forth while paying attention to a series of legal revisions of the Japanese Copyright Law and Unfair Competition Prevention Law implemented last year. This report provides a summary of a report dealing with the results of a survey of recent trends in digital contents protective legislation in the U.S. and Europe that was conducted from the above viewpoint.

I Survey Outline

1 Survey Contents

Those themes that are currently pending surrounding protective legislation for digital contents can be broadly divided into (1) the state of protection of databases not protected by the Copyright Law, and (2) the state of regulations for the providing of avoidance measures and programs of technical measures for securing the collection of compensation for viewing, listening and copying of digital contents. In Japan, accommodation of the latter was made through revision of the Unfair Competition Prevention Law and Copyright Law in 1999. Steps are being taken to establish laws in the U.S. and Europe with respect to these two themes. With respect to legislation for the protection of databases, while domestic laws were established in member countries of the EU based on the database protection directive of 1996, in the U.S., two database protection bills (H.R. 354 and H.R. 1858) are currently being deliberated in the House of Representatives. In addition, an examination of a database protection treaty is continuing to be conducted by the WIPO Standing Committee on Copyrights.

Moreover, with respect to protection of technical measures, while the WCT (WIPO Copyright Treaty) and WPPT (WIPO Performances and Phonograms Treaty) enacted in 1996 were adopted as domestic law, and the DMCA (Digital Millennium Copyright Act) was enacted in the U.S. in 1998, in the EU, the proposal for a copyright directive is still under deliberation. In addition, the EU has already ratified protection of access management technology according to the Conditional Access directive of 1998.

In this survey, the following local surveys were conducted with respect to legislation trends in the U.S. and Europe and their effects on the market and so forth.

(1) Database Protection Legislation

① Attendance at the WIPO Standing Committee on Copyrights and gathering of information

② Conducting of interview surveys at EU authorities and local law firms in relation to the protection of databases in the EU

③ Conducting of interview surveys on congressional staff members and experts in the field focusing primarily on U.S. database protection bills (H.R. 354 and H.R. 1858) in relation to the protection of databases in the U.S.

(2) Regulation of Unauthorized Access and Copying

① Conducting of interview surveys with EU authorities regarding the status of accommodation by EU countries of the proposed EU copyright directive and the Condition Access directive adopted in 1998

② Conducting of interview surveys with government officials, local corporations and so forth regarding the effects of the enactment of the DMCA in 1998 on domestic industry in the U.S.

2 Summary of Overseas Survey Trips

The survey periods and survey locations of interview surveys conducted in Europe and the U.S. are as indicated below.

(1) European Destinations:

① WIPO (Geneva) (attendance at the 3rd meeting of the WIPO Standing Committee on Copyrights (SCCR))
② European Committee DG15 (Brussels)
③ Morrison & Foerster LLP (Brussels)
④ Max Planck Institute (Munich)

(2) U.S. Destinations:

① Prof. Paul Goldstein (Stanford University) (San Francisco)
② Liquid Audio Inc. (San Francisco)
③ Prof. Jane C. Ginsburg (Columbia University) (New York)
④ American Society of Composers, Authors and Publishers (ASCAP) (New York)
⑤ Broadcast Music, Inc. (BMI) (New York)
⑥ Prof. Peter A. Jaszi (American University) (Washington DC)
⑦ U.S. Patent and Trademark Office (USPTO) (Washington DC)
⑧ Fujitsu Limited's Washington Office (Washington DC)

II Database Protective Legislation

1 Status of Examination of Database Protection Treaty by WIPO Standing Committee on Copyrights

(1) In the 3rd meeting of the SCCR, the draft of the WIPO database protection treaty was continued to be examined as was decided at the previous 2nd meeting of the SCCR. The following conclusions were reached as a result of that examination.

① Database protection will be a future topic of the SCCR.
② The WIPO international secretariat will promptly survey the updating of existing reference materials and the economic effects of database protection on developing countries.

(2) A summary of the discussions is described below.

① Although an explanation of the course of events up to that point and related materials was provided at the outset by the international secretariat, there was hardly any new information, and the report on the economic effects on developing countries are currently being evaluated. Next, comments were given from each country in the form of a report of the results of regional meetings held on the previous day of November 15 by SCCR.
There were numerous opinions indicating that the economic effects on developing countries are an important issue, as well as numerous opinions requesting prompt submission of the report on the economic effects on developing countries by the WIPO international secretariat.
② Next, comments were made by government representatives and NGO. Comments made by the U.S., which asserts an umbrella-type solution, were as indicated below.
"This issue has been discussed for many years, and at present, two bills (H.R. 354 and H.R. 1858) have been submitted to the House of Representatives, and these bills apply the unauthorized use prevention (misappropriation) approach. Even if the treaty is in the form of copyrights, special (sui generis) rights or competition laws in each country, it should be dealt with within the framework of domestic law. Although foreign databases are handled while giving priority to domestic citizens, excessive protection will have an effect on education and research."
In addition, there were also opinions indicating that compulsory license and fair use regulations are necessary in order to prevent abuse due to monopolization. NGO were of the opinion that exceptional provisions are required with respect to public information.

(3) Furthermore, the following comments were obtained from interviewed persons with respect to the WIPO database treaty.

(DG15) It appears that the treaty will take considerable time. Although the problem is how to adjust the opinions between advanced countries and developing countries, agreement within the EU alone has taken nearly ten years. The EU is prepared to negotiate the treaty, but this depends on the situation that exists in the U. S. In the protection of databases, relief by the Unfair Competition Prevention Law does not take the place of sui generis rights. This is because relief by the Unfair Competition Prevention Law usually requires a competitive relationship.

2 EU Database Protection Directive (EU Database Directive 96/9/EC of March 11, 1996)

(1) Status of Establishment of Domestic Laws of Each Country

According to the EU database directive adopted in March 1996, all member countries are to enact laws relating to database protection

based on this directive by January 1, 1998. At the stage of this survey, 11 of the 15 EU countries (consisting of Germany, the U.K., France, Italy, Austria, Sweden, Spain, Finland, Denmark, Belgium and the Netherlands) had accommodated the directive in the form of either law revision or the enactment of a new law. Legislation work in the remaining four countries (consisting of Luxembourg, Portugal, Greece and Ireland) had been delayed, and the European committee had expressed relegation to the European judicial court.

DG15 comments regarding the four countries in which deliberation was still in progress were as indicated below.

① Ireland

Although work in this country has been delayed since an attempt is being made to comprehensively revise the entire copyright law, legislation is expected to be enacted in the early part of next year.

② Greece

It appears that considerable progress has been made over the past two months.

③ Luxembourg

This country is the farthest behind schedule; the problem is at the level of domestic politics and is unrelated to copyright law.

④ Portugal

Registration is expected soon.

Furthermore, it appears that laws will be applied retroactively in those countries that were delayed due to the expiration date of the directive even with respect to those 11 countries in which laws have already been enacted. In addition, the manner (in which domestic laws were enacted) differs among the countries. In Germany and Austria, protection is employed in accordance with neighboring rights. In addition, countries that are employing what is called catalog rule in which catalogs are protected separately from copyrights are enacting laws by applying this as in the Scandinavian countries.

(2) Major Issues

① Term of Rights

Although the term of rights in the EU database directive is 15 years from the initial investment, in the case of continuing investment, judgment of starting point becomes difficult and there is the risk of protection substantially being perpetual. In response to this view, there were many replies which indicated that such protection is not perpetual. The case of offline databases is simple. Older editions lose their rights in 15 years from the initial year of release. Although the case of online databases is comparatively complex, what is important is to judge renewal while focusing on the initial investment in terms of whether or not later additional investment amounts are inadequate as compared with the initial investment. If additional investments are adequate, the database is protected as a new database.

② Interpretation of "Substantial Investment"

The meaning of substantial investment refers to investment in the act of creating a database itself, and other matters are not considered at all. In other words, this means that the "price of copyrighted materials" that is the subject of copyright laws is not considered. This "substantiality" is a tradition in British Law, and courts make rulings in consideration of the effect on the market. Evaluation of investment is not an absolute amount, but rather in cases handled in the Berlin Court, roughly 100 cases of online advertisements were treated as being subjects of protection.

(3) Impact on Industry

① Effects due to Database Protection

There were many opinions that it is difficult to quantitatively determine the effects resulting from the special use of rights. Since free access to public documents is recognized in Article 13 of the database directive, there are cases in which problems do not arise for education and scientific research organizations.

② Report of Article 16, Paragraph 3 of the Database Directive

Although the survey itself is completed on a report evaluating the effects of special rights use by the European committee itself as defined in Article 16, paragraph 3 of the database directive, it appears that slightly more time will be required to prepare the report.

(4) Preceding Judicial Precedents

Examples of noteworthy decisions relating to database protection are related to the following telephone number information. In addition, even though there are a considerable number of disputes per se, there is also information indicating that many cases are resolved amicably.

[Tele-Info-CD Case (BGH Urt. v. 6.5.1999, I ZR 199/96)]

(Federal Common Court (German Supreme Court) decision, May 6, 1999)

(Summary)

This case involved a legal suit filed by DeTe Medien (plaintiff), a subsidiary of the Deutsche Telecom in charge of the issuing of

telephone books, against defendants who had copied described matters by scanning and transcription from said telephone books without the permission of the plaintiff, and produced and sold a telephone book CD-ROM containing those described matters. The Federal Common Court recognized injunction and demand for compensation of damages stating that, "Although telephone books are generally not eligible for protection as copyrighted materials subject to copyright law, they have received protection as a result of revision of the copyright law based on the database directive."

3 US Database Protection Bills (HR. 354 and HR. 1858)

(1) Deliberation Status in Congress

Database protection bills submitted to the 105th session of the U.S. Congress (H.R. 2652 and SR. 2291, etc.) had all been abolished, and in the new 106th session of congress, the following two bills (H.R. 354 and H.R. 1858) were submitted by the House of Representatives.

① H.R. 354 (Collections of Information Anti-piracy Act)
This bill was submitted to the judicial committee by Representative Coble. Its contents are basically the same as the bill submitted to the previous session (H.R. 2652). Although House hearings were held in March and the bill was approved by the judicial committee in the end of May, it has yet to be submitted to Congress.

② H.R. 1858 (Consumer and Investor Access to Information Act)
This bill was submitted to the commercial affairs committee by Representative Bliley who also chairs the above committee. It was approved by the commercial affairs committee in August.

In looking at the overall deliberation status, there were opinions indicating that it is necessary for scholars to deliberate these two bills as to whether or not protection under the existing laws (Copyright Law and Antitrust Law) is adequate.

With respect to the deliberation of bills, since both bills were submitted during a Republican administration, there is a considerably possibility of their being affected by the outcome of elections. Although the revised edition of H.R. 354 was submitted in November 1999, it appears there is no action being taken at all with respect to H.R. 1858.

With respect to the outlook for the future, since this year is an election year and those persons promoting both bills in Congress will be leaving due to reshuffling and so forth. Thus, the majority of opinions indicate that the fate of these bills is uncertain. It also appears unlikely that these bills will be resubmitted as new bills from the upper house.

(2) Major Issues

① Definition of Databases
With respect to the question as to whether the definition itself of databases (collections of information) in H.R. 354 is too broad, the comment was made that the definition is quite narrow in comparison with the definition of the EU database directive.
In addition, an opinion was given regarding H.R. 1858 that the target of regulation of right infringement only being duplication of entire databases presents a problem. This is because there are many cases in which only a portion of databases is used.

② Potential Market
H.R. 354 regulates acts of extraction and reuse that "harm existing or potential markets with respect to the products and services of others". Although this potential market has been criticized as being abstract, in the most recent draft of this bill, it has been clearly determined that the definition of a potential market itself has been omitted. Many scholars agree with the opinion that if this definition of potential market remains ambiguous, the bill will end up being substantially not different from the EU database directive, and it appears that this point has been taken into consideration.

③ Substantial Portion
With respect to "infringement of an entire collection of information or a quantitatively or qualitatively substantial portion" that is subject to regulation, it appears that "infringement" specifically may be interpreted as "infringement of business profit", while "substantial portion" may be interpreted as "the portion for which considerable investment was made for database construction". It should be noted that in the new draft of this bill, judging from the phrase "substantial portion" subject to regulation, decorative terms like "quantitatively or qualitatively" have been omitted so that the text simply reads "substantial portion". Opinions are divided as to whether the omission of these decorative terms makes the definition clearer.

④ Possibility of Information Monopolization
There were numerous opinions indicating that there is no problem regarding the risk of monopolization of information belonging to

the public domain in the case the above definition of substantial is ambiguous for reasons that the U.S. bills allow judgment of partial databases and fair use. In addition, the comment was also made that it is traditional in the U.S. to be able to make accommodations on a case-by-case basis by providing a broad definition when enacting laws.

However, with respect to relief according to the Antitrust Law, there were many opinions indicating that H.R. 1858 not recognizing legal actions by private individuals while only enabling enforcement by the FTC is a problem.

⑤ Term of Rights

Similar to the case of the EU, with respect to the question that rights may be able to be substantially granted indefinitely beyond the protection term of 15 years as a result of investments in database renewal continuing to be made, the comment was made that this does not present a problem because the term of protection for the portion produced by the initial investment is not extended by following additional investments. However, opinions were made by scholars that this may present a problem in terms of actual practice. This is because it is difficult to extract the portion produced by the initial investment, and in particular, it will be increasingly difficult to determine the starting point of an investment by addition of databases updated on a network in the future.

(3) Reaction of Industry

It appears that those supporting organizations of both bills are as indicated below. It should be noted that according to scholars, the comment was made that the group in support of H.R. 1858 actually consists of a group that considers protection unnecessary, and is simply supporting this bill in opposition to H.R. 354.

① Groups Supporting H.R. 354
Publishers
Database companies
National Realtors
American Medical Association
e-Bay (Auction web site)

② Groups Supporting HR. 1858
Library Association
ATT, MCI
Yahoo and many other Internet companies
Stock exchangers

III Technical Measures Protective Legislation

1 EU Copyright Directive

The initial draft of the "Harmonization Directive of Fixed Aspects of Copyrights and Related Rights in an Information Society" (hereinafter referred to as the "EU Copyright Directive") was publicly announced by the European committee in December 1997. A revised draft was adopted by the European assembly in February 1999, and this was bias toward the standpoint of right holders, and the scope of application exemption regulations such as exceptions to temporary copying was narrowed. Consequently, a revised draft of the European committee was again publicly announced in May 1999. In this manner, in addition to differences of opinion between the European assembly and European committee and differences in opinion due to differences in existing legislation among member countries, a complicated situation resulted due to lobby activities by affected industries. A survey of the following situation was conducted in this study.

(1) Deliberation Status in the Assembly

According to DG15, although the current deliberation status of the draft of the copyright directive was such that a common position on the draft of the copyright directive was expected to be adopted within 2 to 3 months, attorneys and scholars were pessimistic. Since there inherently have been member countries that did not desire adoption of the directive itself and disputes still exist over the text of the directive, there were numerous opinions indicating that it is difficult to predict the outcome. It appears that the prediction of DG15 is quite optimistic.

(2) Major Issues

① Temporary Copying (Article 2 and Article 5, Paragraph 1)

Although temporary copying that occurs in communication networks, including the Internet, tentatively fell under the "copying" stipulated in Article 2 in the initial draft of the directive, since the exemption provisions of Article 5, paragraph 1 were applied, copyright protection was removed. Although a statement of the purport that "the consent of the rights holder is required for temporary copying as well" was added by the European assembly with respect to this temporary copying, this was rejected by the European committee. Whether or not to require consent represented the different approaches adopted by the European assembly and European committee. Since service providers do not know what requires consent in the case of Internet access and so forth, the presence or

absence of regulations is an important issue and appears to have generated considerable interest.

② Private Reproduction (Article 5, Paragraph 2)
In the draft of the directive, different from Japan, a levy was proposed with respect to private recording of sound and images to analog equipment. This is because of the background in which nearly all member countries already apply a levy on recording of sound and images to analog equipment.

③ Avoidance of Technical Protection Measures (Article 6)
Similar to the Japanese Unfair Competition Prevention Law revised last year, the EU draft adopts a form of regulating avoidance equipment and not the act of avoidance per se. In addition, avoidance for the purpose of testing and research, or so-called reverse engineering purpose, appears to be excluded from regulation in the same manner as in Japan.

(3) Reaction of Industry

Although discussions are still in progress regarding the current draft, it appears that service providers are opposing excessive protection such that they are subjected to regulation in fields that cannot be controlled such as temporary copying. On the other hand, holders of rights appear to be dissatisfied because the revised proposal of the European committee narrows the scope of rights protection of Article 5, paragraph 1 and Article 6.

2 EU Conditional Access Directive (Conditional Access Directive 98/84/EU of 20 November 1998)

With respect to adoption of the EU "Directive Relating to Protection of Services Based on or Complying with Conditional Access" (hereinafter referred to as the "Conditional Access Directive"), this directive began with the public announcement of a government paper entitled, "Legal Protection of Encoding Services on the International Market" published in June 1996. Later, the European committee published the initial draft in July 1997, and following the adoption of a common position in June 1998, it was adopted in the EU Cabinet Board in November 1998 that resulted in its effectuation.

The conditional access directive stipulates from the viewpoint of protecting service providers providing contents using access management technology. As can be understood from the point that persons demanding rights are information service providers that have suffered infringement of rights and interests, this is interpreted independently from protection of intellectual property rights of contents themselves. Since the deadline for legislation of the directive within the EU region is the end of May 2000 and there is still time before the deadline, this study consisted of conducting surveys focusing on the status of enactment in each country.

(1) Status of Law Establishment in Each Country

It appears that the three countries of The Netherlands, Finland and Denmark have enacted laws. However, according to DG15, it appears there is a question as to whether the laws are in line with the directive. The situation is such that substantial legislation has yet to be enacted.

(2) Interpretation of the Directive

The conditional access directive and draft of the copyright directive cover separate fields, with the conditional access directive protecting signals and the draft of the copyright directive protecting contents. However, similar to the draft of the copyright directive, the production of equipment for the purpose of testing and research is exempt from regulation.

3 US Digital Millennium Copyright Act (abbreviated as DMCA)

DMCA was established in October 1998 following revision and annexation of the domestic legislation bill of the WCT adopted in December 1996 and a bill relating to limitation of liability of service providers.

In comparison with the Unfair Competition Prevention Law of Japan, it is characterized by regulating not only avoidance equipment of technical protection measures, but also acts of avoidance themselves.

(1) Interpretation of Regulation

① Handling of Non-Copyrighted Materials for which Technical Protection Measures have been Deployed
There were numerous opinions, including those obtained from scholars, regarding protection of non-copyrighted materials for which technical protection measures have been deployed. However, according to the USPTO, DMCA is an act that is targeted only on copyrighted materials, and the interpretation that non-copyrighted materials are included is inherently incorrect. Thus, this act only focuses on technical protection measures deployed for copyrighted materials, and does not apply to technical protection measures deployed for non-copyrighted materials.

② Intent of Regulation of Acts
The intent of DMCA in incorporating regulations on equipment but also on acts is to accommodate persons having technology that allows the performing of avoidance acts without using equipment.

③ Handling of Technical Measures Implemented by a Third Party
Whether or not technical protection measures implemented by a person other than the holder of rights to a copyrighted material are included in the "technical protection measures" protected in DMCA is dependent on whether or not the consent of the rights holder has been obtained. Thus, technical protection measures implemented by a person making illegal copies are not included.

④ Application Exemption Regulations
According to DMCA, although the providing of avoidance equipment to the "public" is regulated, the opinion was given with respect to the case of avoidance equipment being provided to a specific individual that acts of an individual partner would naturally be excluded in terms of the text. However, since this does not take into consideration the objective at the production level of avoidance equipment, there was also the opinion that there would be no problem with substantial accommodation by suppressing persons engaged in the production of avoidance equipment.
It should be noted that since application is excluded in the case the objective is research and development, equipment for the purpose of research and development of encoding technology and so forth are excluded. In this case, although it does not mean that there are no restrictions, considerably strict verification of the objective in writing is required, and it appears that development of more powerful technical protection measures will require the consent of the holders of rights of the target technical protection measures.

(2) Previous Judicial Precedents

The following describes some specific representative cases and decisions relating to DMCA.

○ DVD Copy Control Association, Inc. (DVD-CCA) v. Andrew Thomas McLaughlin, et al. (CV786804, California State High Court, Order for Temporary Injunction, January 21, 2000)

DVDCCA, composed of movie distribution companies and DVD equipment manufacturers, filed a suit against individuals creating web sites containing DeCSS(*) and individuals linking to said web site for the reason of unauthorized use of business secrets.

* DeCSS: A program for deciphering content scrambling systems (CSS), a form of DVD encoding technology that was developed by a Norwegian networker.

○ Universal City Studio, Inc. et al. v. Shawn C. Reimerdes, et al.
(82F. Supp. 2d 211, S.D.N.Y. 2000)

Eight movie studies filed a suit against individuals distributing DeCSS for the reason of violation of DMCA. The order for preriminary injunction denied the defense of reverse engineering of the defendant for the purpose using DeCSS to play back DVD on Linux OS.

○ Realnetworks, Inc. v. Streambox, Inc.
(LEXIS 1889, W.D. Wash. 2000)

Realnetworks Inc. filed a suit against Streambox, which developed a program for converting music contents in the Realaudio music format to a different format such as MP3, for the reason of violation of DMCA.

○ Kelly v. Arriba Soft Corp.
(77F. Supp. 2d 1116, C.D. Cal. 1999)

Plaintiff of an individual photographer carried his own scenery photographs on their own web sites. Although the defendant provided link information to the web site of the plaintiff on his own web site, the defendant created compressed files (thumbnails) of photograph files carried on the plaintiff's web sites and used them for the icon of that link. This case is an example of a suit being filed based on the modification of photographic files constituting modification of copyrighted data. The court ruled that, since clicking on said icon links to the proper information, it does not constitute deletion of copyrighted data.

○ RIAA v. Napster
(LEXIS 11862, N.D. Cal. 2000)

The "Napster" software developed by the Napster Corp. allows users of this software to search for MP3 files on the hard disk of other users over the Internet and mutually transfer (copy) those files. The plaintiff RIAA filed a suit against the defendant claiming that said software assists in the illegal copying of MP3 files.

IV Conclusion

In this research and study, a local survey was conducted on legislative trends in the U.S. and Europe and their effects on the market. Judging from the results of those surveys, legislation that has already been implemented in each country is not presenting any particular problems at the present time, and both right holders and users are adapting relatively smoothly to the new legislation.

On the other hand, U.S. database bills and draft of the EU copyright directive that are still being deliberated currently contain numerous points of contention, and the outlook for the future towards their enactment remains unclear. Since these bills and directive drafts will have a significant effect on future international trends relating to the protection of digital contents, it will be necessary to continue to closely monitor those trends in the future.

(Researcher: Hidehiro Yoshida)