15 Consideration on the General Principles of Intellectual Property Protection Method

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The intellectual property system generally has the following functions even though there are some levels of differences in each regulation. i) Protecting the rights of the natural law of producers, ii) promoting industrial development by stimulating the production of intellectual property and iii) maintaining the order of business competition. However, in this paper we understand that the function to protect a privilege of an intellectual property producer is a means to accomplish another function. In other words, on the premise that intellectual property is different from a privilege in natural law and also, it is not there is no such compensation for such privileges in natural law, we approach the way of protecting intellectual property. To introduce the new protection method, the judgment about the necessity of the protection must be precede this first, and this is a judgment in policy to stimulate creation or induce investment and to choose a much better way in comparison between the profit of the public which is created by the establishment of fair competition order and the loss of the public masses by artificial limits which cause the restricted usage of intellectual property. And, the way to protect intellectual property has a close relation with the characteristic of the protection object but, in this paper, we analyze the contents of privilege which are subordinately decided according to the protection method without relation to the protection object and through this way, we examined the general principle in introducing new protection methods unrelated with the protection object. Such principles present the limit regarding the range which can be considered in policy in the case of minimizing the privilege procedure or changing the degree of the protection in a new protection method.

Ⅰ Introduction

The methods of protecting intellectual property are very extensive and general and it is arguable from a difference of viewpoint to understand intellectual property system. So, we need to clarify what the intellectual property is and why we have to protect it, first we need to discuss the ways to protect intellectual property. For this reason, before we discuss protection methods, I will briefly look into the nature and attributes of the intellectual property system and will mention my personal opinion to approach the theory of protection method to avoid any possibility of unnecessary misunderstanding before taking up the main subject.

And then I will look into traditional protection method of the intellectual property based on a patent law protection method and copyright legal protection method and will also look into a hybrid protection system(*1), which has been tried, recently. Lastly, I try to make the conclusion presenting the design methodology of new protection method based on these examinations about protection methods.

Ⅱ Nature and Necessity of Intellectual Property System

1 Intellectual Property

The term, intellectual property in Korean originates from the translation of the English

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(*1) In the process to find new protection methods which can supplement the defects of existing protection methods or which are most suitable to unexpected new protection objects, new protection methods that can not be classified to traditional protection methods of intellectual property as like patent law protection method or copyright legal protection method or illegal competition prevention protection method, are being tried. In these kinds of protection methods, hybrid characteristics by adding or optional mixing of distinctive elements of different protection methods have developed. In this paper, such kinds of new protection methods were classified and considered as the hybrid protection system.

word "intellectual property".(*2) First, the term, "intellectual" means the results of human mental and spiritual activity but this became inappropriate to use this term for all intellectual property, which recently expands more and more. The reason that business trust which is a substantial object of protection trademark right can be handled as intellectual property, not like experience or educational background and/or connections, is because of today's market mechanism which is able to easily steal other's business trust, with mediation of service marks rather than the result of spiritual activity or intangible property, and as the concept of intellectual property was recently expanded to databases, which have has no creative characteristics and are regarded as the result of just simple effort or investment, and these databases are included as intellectual property(*3), and if we consider neighboring literary property, which have a separate privilege similar to copyright because the level of creation is not recognized as much as the level of creation in literature properties, the term, "intellectual" will be more appropriate to creations, a representative of intellectual property.(*4)

In this paper, I define intellectual property, as "information which keeps property value, and it will be able to create a public benefit through use control".

The reason I use the concept of information is, when considering the deployment process hereafter of the intellectual property system, I believe it is the right method to decide the area of intellectual property based on the characteristic of such objects after I examine the common characteristics of the object which the necessity of the protection have been discussed as the intellectual property. And the characteristic, which cannot occupy and can use at the same time,(*5) easily be imitated,(*6) value is relative and use is undecided, are very much similar with information as an economic good.(*7)

2 Protection Necessity of Intellectual Property

I limited the object of intellectual property to which can create the benefit of the public through use control and this is to clarify excluding the so called natural right theory.. In this case, the treatment of moral right can be a problem, however, actually, there is no theoretically necessary reason to include moral right, as a part of intellectual property, and also, it is not unified, internationally because of the difference in origin

(*2) Property is classified as "Real Property" and "Personal Property" and real property is roughly equal to the immovable property but for historical reasons, "the right of lease"(lease) is classified as the latter. And personal property is divided into "chattel" and "intangible property' including deposit, stock, credit and "intellectual property" (Dictionary of English/American law, Tokyo Univ. Press, 2000, Article 675). So, Property means more broad right of property generally rather than "ownership (Eigentum)", the ownership of the absolute and conceptional supremacy in continent legal system (Nobuhiro Nakayama, (Industrial ownership Act (first volume)), Koubundou publishers Inc., 2000, Article 3-4).
That is, the concept of thing in English and American law is not defined, generally and universally, not to be, according to the right of action, it only cements the definite object and furthermore, the concept of "thing(s)" itself is not completely separated from "property" like the concept of thing in Roman law and just regarded as one concept. From this point of view, there are some difficulties in accepting or referring to the concept as it is in the countries following Pandekten law system (Kyung-Jin Choi, "Investigation on things in civil law", SungKyunKwan Univ., 2004, page 46).
In addition, such classification in English and American law does not regard intellectual property as a protection object of semi-real right like the thing, object of the ownership, regard it as a right like credit which can prohibit the act by third party and this is also the results they don't approach this issue from the natural right.

(*3) The privilege of database author which does not possess creativity, was introduced at the revision of copyright act in 2003 (2 of §73 and/or 9 of §73, Korea copyright act).

(*4) It implies the meaning, where the privilege is generated by the results of intellectual activity. So especially, in the case of creations, it explicitly explains the relation of the privilege with the subject,.

(*5) These are "non-rival" and "nonexclusive" characteristics of intellectual property. For this reason, they are distinguished from goods, which the amount is limited. And non-exclusivity of consumption requires a different legal system from the real right law that starts from the basic prerequisite, "goods are limited but desire of humans is unlimited".

(*6) Sufficient incentive for initial manufacturer must be guaranteed to induce reproduction of intellectual property because it is easy to reproduce and imitate with the limit cost of nearly zero.

(*7) In Yukio Noguchi, (Economic theory of Information), Tokyo Keizai Shimbun. Inc., 1974(re-quotation by Uemura Shuichi and Kurata Keiko coauthor and The theory of occurrence and transmission of information, Keizin Bunkasha, 1998), the information as economic goods is described that "it is able to be copied as the essential characteristics of information, and as its original form is not destroyed by copying, the social limit cost is zero and the transaction is indispensable. And the level of use by individual depends on the amount held by other individuals and hence strong outside effectiveness occurs. There are many cases that cannot be separated and have uncertainty in consumption."

of generation between continental law and English/American law.(*8)

In my personal opinion, though I do not deny the existence of such a natural legal privilege or the necessity of protection, such privilege in natural law is a different right to intellectual property and intellectual property should not be a compensation of such a privilege in natural law.(*9)

As the restrictions of the privilege for public interest is regulated together with the allowance of intellectual property in all current intellectual property law, the actual benefit of such discussion is doubtful but, both parts change the position in the treatment of new intellectual property. In the natural right theory, (*10) we will request that it must be protected in principle based on the similarity and position with existing intellectual property holder, but, in the policy theory(*11) we will award the privilege as an exception after consideration of the benefit to the public which is created through the protection of the intellectual property. In this paper, on such a premise, intellectual property system exists to expedite the production of intellectual property through the allowance of incentives, diffusion of use and establishment of a fair transaction order and we will regard that intellectual property system exists to create the benefit to the public. And we will discuss the protection method of intellectual property, hereafter.

Ⅲ Traditional Protection Method of Intellectual Property

1 Classification of traditional protection methods

As somebody's possession does not hinder the use of another person in intellectual property, we can use intellectual property at the same time and it has the characteristic of an object, which does not become extinct. So, to legally protect intellectual property that cannot occupy and cannot control the usage, realistically, the authority to forbid the deed to use intellectual property without just authority must be awarded and the illegality must be recognized about unjust usage deed of intellectual property. Such protection method of intellectual property can be classified into privilege allowance type protection method and deed restriction type protection method in accordance to the theoretical constitution method that considers unjust usage deed by the third party as an unlawful deed.

Privilege allowance type protection method

(*8) The relationship between copyright, property right and moral right and the relationship between its privilege and copyright, there are three opposing opinions, i) the opinion that regard the copyright as a copyright property right and understand moral right as a separate right from copyright, ii) the opinion that moral right is included in the copyright, however, it is opposed to and coexists with copyright property right and iii) the opinion that copyright property right and moral right have a close relationship and hence can not be divided, and, copyright is one privilege including all of these. Refer to the details in Masao Handa, (Introduction of copyright act (9th edition)), Ichiryusha, 1999, Article 1-7.

(*9) We cannot deny the generation of privilege to a producer of intellectual property in natural law, but intellectual property right given by the positive law are different with this. Allowance of intellectual property right is justified on the premise that we can create the benefit over social loss of the public due to the usage control of intellectual property, through protection of intellectual property, ultimately though the procedure by each intellectual property is different. But in the countries following a continental legal system, intellectual property law was taken place in the position of the natural right theory and still such a position remains in Korean law. Particularly, in the case of the copyright act, it is stating the cultural development as an ultimate purpose but the theory criticizing the natural right theory (protection of the applicant only, protection of best applicant only etc.) in patent law and, if we consider moral right etc., it will be easier to explain Korean copyright act by natural right theory. However, it could not be an appropriate approach to decide the way to understand intellectual property right repetitively taking the enactment purpose of the local law or historical consideration of a main industrialized country.

(*10) In the opinion finding the allowance basis of intellectual property right in the process of generation, it is interpreted that natural right, namely, the right recognized by natural law like the right to live, civil liberties and pursuit of happiness is allowed to producers of intellectual property though there is no rationale by the positive law and intellectual property law to confirm these rights.
This kind of idea converts intellectual property system from so called, "favor principle" to "privilege principle" and in the whirlpool of extinguishing of all privilege in the modern revolution, it could make into the ownership and could keep continuance of the intellectual property system (Y.S. Song· S. Lee, Intellectual property law, SaeChang publishing company, 2003, page 17).

(*11) In the opinion finding the allowance basis of intellectual property right in the protection results, the right recognized in current positive law like patent law and copyright is not regarded as a naturally recognized right in natural law and is interpreted that the law awards to create the benefit to the public through achievement of specific purpose by the protection result of intellectual property right.
Such opinion was described as "policy theory" contrast with natural right theory in this paper and again, this policy theory is divided into incentive theory, open compensation theory and maintenance of business competition order theory depending on the type of effect to create the benefit to the public.

is a protection method which allows semi-real right like ownership to intellectual property, itself and awards the authority of overall utility, earnings and disposition of intellectual property and constitutes a theory of privilege infringement in the case to use without just authority. Deed restriction type protection method prescribes specific intellectual property usage deed without just authority as a type of special unlawfulness and allows relief means like infringement prevention claims and damage reparation claims in civil and criminal affairs.

2 Deed Restriction Type Protection Method

Deed restriction type protection method(*12) is representatively implemented in the unfair competition prevention law, and on the premise that it is free to use the intellectual property in principle, it regulates the specific deed of use through separate protection requisites on objective damage of law and order.(*13)

Though there is difficulty in changing it to assets,(*14) the role of the protection method by deed restriction must be emphasized more, today because, if understanding gain and loss according to the privilege allowance can not be determined, we can minimize the minus effect of intellectual property system like the monopoly of information, deepening the technical gap etc., through this kind of protection method.

3 Privilege Allowance Type Protection Method

Privilege allowance type protection method has two kinds of protection method – "patent law protection method" that awards the right after related authorities decide the validity of the privilege in advance and "copyright legal protection method" which awards the right without separate procedure or method if it is a literary property.

Due to the difference in privilege allowance way, the right by patent law protection method is monopolistic and exclusive right that validity of the privilege is regarded or presumed but in the case of the right by copyright legal protection method, the validity of the right has to be proved and the right is restricted by an imitation prohibition right which cannot exercise the right if it is not their own literary property and is used for independent creation.(*15)

But it is necessary to consider the legal basis to restrict copyright by imitation prohibition right, contrary to patents. Contrary to the provision that "the patentee exclusively possesses the

(*12) In Nobuhiro Nakayama, (Multimedia and Copyright), Iwanami Shoten, Publishers, 1996, article 7, contrary to the regulation such as a traffic regulation to impose a limit, the expression, "provision" is being used in the point to form a legal order.

(*13) In the privilege allowance type protection method, we regard the use deed by a third party of intellectual property as the privilege infringement in principle and access to the contrast to the way to allow free use in the case for the reason to correspond to the privilege limit, exceptionally. And in the privilege allowance type protection method, the privilege infringement is acknowledged by the fact that a man who has no just authority, uses intellectual property but, on the other hand, the deed restriction type protection method, the illegality is recognized on the condition that the separate benefit and protection of law is infringed by the use of intellectual property without permission. For instance, to be regarded as an unfair competition deed, it must cause mistake and confusion in the case of using a service mark and it must mediate unjust acquisition in the case to use business secrets. In other words, the illegality on the deed of use of intellectual property is decided depending whether the benefit and protection of law is infringed or not caused by use of intellectual property without permission in the deed restriction protection method.

(*14) In the unfair competition prevention law, unfair competition deed is limited in the case that it is in the competition based on the purpose of system and hence is restrictive and it is uncertain the right, itself can be extinguished in the case to lose the fixed position. So, actually, it is impossible to transfer the intellectual property either to set up a right of pledge separate with the business and it is possible to use the right, indirectly through the way that a person can prohibit unfair competition deed, approve the use to a specific person.

(*15) The meaning of imitation prohibition is represented by the word, "relative monopoly". For example, in Sakka Humio, (Copyright act (Basis and Application)), Japan Institute of Invention and Innovation, 2003, Article 79-80, it is stated that "Copyright act awards an exclusive privilege which is a real right privilege having general effect to the author, but the characteristic is a so-called relative monopoly and hence, if it is created independently, it is protected as a literary property even though it is identical. So, from this relativity, we must judge whether it is produced based on its literary property, to recognize the infringement of copyright". And in Takahashi Akihiro, (Meaning of competition principle of law during R&D procedures in intellectual property), KokusaiSyoin, 2003, in Article 100, it is stated that "As copyright is only a relative monopoly contrary to patent law, even though it is recognized that another person's expression, independently created, is similar with my expression, we can not employ a prevention claim or damage reparation claim in copyright act with only the reason, itself". On the other hand, determining whether it is infringement or not, we use the expression, weak privilege, recently from the point it demands subjective conditions. (*ref.* 2nd Design system subcommittee, Strategic Council on Intellectual Property of Industrial Structure Council of Japan, material 1-, the policy of Industrial design system, Article 15).

privilege to execute the patent invention as the work" in Article 68 of the Japanese patent law, it is regulated that "exclusively possess the right to copy, play, transmit its (sono) literary property" in Article 21 and below of the Copyright Act. I think the statement, "sono" could be the legal basis of imitation prohibition right.(*16) It will not be appropriate to say that the characteristic of imitation prohibition right is from only interpretation theory if we consider the impact to the privilege and hence legislative supplement will be needed if we cannot find a legal basis.
And in the patent law protection method, it basically protects the idea, but in the copyright legal protection method, it only protects the representation, and hence the effect of the copyright is not reached if the expression is changed even though the idea included in the literary property is used.

But the legal basis of the so-called idea-expression dichotomy theory is doubtful in Korea or Japan because there is no explicit provision, which excludes the protection of the idea in this theory.(*17) In Japan, it shows, indirectly that the thought or the feeling itself is not the object of protection through the definition provision on the literary property as a object of protection like "the thing to express the thought or feeling, creatively" in Article 2 (1) but, in Article 2 (1) ofthe Korean Copyright Act, it defines literary property, simply as "a creation which is included in the range of literature, science or art".(*18) So the legal basis of idea-expression dichotomy theory is doubtful.(*19)
To sum up, the traditional privilege allowance type method is classified as patent law protection method and copyright legal protection method and traditionally, patent law method and copyright legal method have played a role to represent intellectual property law. However, if we consider that the current status that the borderline of the culture and industry disappears, the creation in the limit area of the idea and expression happen anew and the concept of the invention or literary property have been enhanced, it became a thing to classify both, by the difference of law purpose like industrial development or cultural development; or the difference of the protection object like an invention or literary property, does not have any more significant meaning.
Both have the distinction actual benefit as the difference as the protection method, and whether it is limited by imitation prohibition right and/or idea-expression dichotomy, nowadays are the most important elements to distinguish between them.

Ⅳ Hybrid Protection System

1 Generation Background of New Protection Method

Recently new protection method has been tried because the new protection subject, not predicted in traditional protection method, like the investment result by new protection based on inducing investment and intellectual property of cyberspace such as computer programs, which is in the limit area of the idea and expression etc., have appeared. Also, it is because that the incentive guaranteed in traditional protection method cannot be practically used in today's industrial structure.

In the case of the new protection subject, i) Due to the necessity of another protection to induce the investment to related industry, there will be a case that the protection condition should be decided regardless of the creation, ii) in the dichotomic thought of 'idea protection' and 'expression protection', we cannot decide on an appropriate protection range and iii) by the various use pattern in cyberspace, not predicted in traditional protection method, re-evaluation of the balance between rightful claimant and user may be required or the case which is difficult to accept this, may happen. So, on the premise that we cannot resolve it through the way to simply add protection subjects to the traditional

(*16) If we look into the Berne Convention, the term, "these works" is used in only the reproduction right (Article 9) which can interpret the condition of 'dependence' as a concept of reproduction but, all in the public performance right (Article 11), broadcasting right (2 of Article 11), recitation right (3 of Article 11) and secondary right of literary property writing (Article 12), the term of possessive case, "their works" is used.

(*17) In the Article 2 of WIPO copyright treaty and 2 of Article 9 of TRIPs, it states plainly that "the protection of copyright reaches expression but doesn't reach thought, procedure, operation method or mathematical concept", and it is putting the provision of the same purpose in 102(b) of the American Copyright Act.

(*18) In the revision of the Copyright Act before 1984, the vocabulary to be a thought and feeling had been inserted but since then, at the advisory meeting for revision of copyright act, the opinion was raised that there is a possibility to misunderstanding "thought" as a political ideology in Korea and in this reason, it was deleted from revisions. (Hee-Sung Huh, Point by point introduction of new copyright act, Bumwoosa, 1988, page 20).

(*19) The Copyright Act does not prescribe such conditions but the requisite of literary property is recognized through the precedent (The Supreme Court, decision of judgment No. 77Nu76 on 13 Dec. 1977 and decision of judgment No. 79Do1482 on 28 Dec. 1979). However, considering the point that the protection range of copyright is restricted by this requisite of copyright and it became a legal basis of so-called idea-expression dichotomy, I think this is a matter which needs legislation supplementation.

protection method, independent protection method that is suggested for the protection of semiconductor chip arrangement plan, computer program, type pace, database and digital contents, have the same generation background.

In addition, the necessity to introduce new protection method has been presented concerning the protection subject that is protected in current intellectual property law and actually, the industrial structure of the today is greatly different from the time that traditional protection method has been formed. That is to say, incentive, which is guaranteed in traditional protection methods, can be practically affected in many cases today, and though it gives an opportunity of formal protection, , there is also a case that it is practically impossible to apply this in the aspects of time or charge. Such requests for practical protection introduce new protection methods during the search for a procedure for protection methods to minimize the time and cost, needed to generate privilege in the area mainly adopting patent law protection method.

This kind of new protection method is not totally separate and has appeared as a hybrid system adopting the advantage of traditional protection method and such protection method is classified i) the system to introduce (a part of) non evaluation system based on the patent law protection method or the system to add the protection by no formalities before the generation of privilege (modification of a patent law approach method),ii) the system to introduce the registration system based on the copyright legal protection method (modification of a copyright legal approach method) and iii) the system to add the privilege allowance type protection method based on deed restriction type protection method (modification of deed restriction type approach method).

2 Modification of Patent Law Approach Method

Firstly, there is a protection method adopting a part of a non-evaluation system based on a patent law protection method like the Korean industrial design non-evaluation system or utility model pre-registration system in the modified patent law approach method.

In the utility model act, there is a separate procedure called the "technical assessment system", and contrary to Japanese law, if a revocation decision is made through a technical assessment or demurrer, the utility model right retroactively lapses in Korean utility model act. This can be regarded as the purpose to improve the uncertainty of the privilege but paradoxically, even though it is a registered privilege, we cannot escape the uncertainty until we receive the technique assessment. And, since technical assessment system has been recognized as a procedure to determine a privilege, technical assessment application has increased and become a judgment burden. An exclusive privilege event is limited to the infringement deed of another person until it is decided to maintain the technical assessment as actual judgment to the necessary condition of entities.

In Korean industrial design non-evaluation system, it has the characteristic at the point limiting the object to some very popular products. But, it is doubtful whether the recently designated five kinds of non-evaluation objects, clothes, bedding, official papers, wrapping paper and textile fabric are decided based on popularity or life cycle. And in the past, pre-registration review process to the non-evaluation objects was limited to the requests on the procedure, however, in the existing law, the actual necessary condition that is relatively easy to judge and cited design is not necessary, is examined to minimize the occurrences of infirm right. And in the revised law, we can be judging about all refusal reason in case there is information offer.(*20)

As the separate procedure to enable recovery to complete privilege like technical assessment system is not prepared in the aspect of the effect of privilege, there is only a provision that the negligence is presumed in case of non-evaluation registration design right owner infringe other's design right considering infirm right which can occur through non-evaluation registration(*21) and it gives the same privilege to the design right through non-evaluation with the evaluation registration design right and this is the difference from the utility model right pre-registration system.

However, it cannot be an early privilege with just a utility model right that limits exclusive rights and industrial design non-evaluation system which the user has to check the effectiveness of the infirm privilege registered by non-evaluation, also there cannot be a fundamental solution for the weak point in patent law protection method, the time and cost required

(*20) In the revision of the design law (the name of the law was changed to the "design protection law"), which will come into force from July 2005, Article 26 (3) is newly included and we can judge refusal for all refusal reasons if information is provided.

(*21) In the case of non-evaluation registration design right, there is a separate provision that it recognizes the possibility of occurrence of infirm right and apply the provision of negligence presumption in case that non-evaluation registration design right owner infringe other's design right etc. (Korean Design Right law, Article 65(2)).

to make it a right. Also, the utility model right pre-registration system and industrial design non-evaluation system are under thorough re-investigation now in Korea also.

As another protection method of modified patent law, there is the so-called design approach.(*22) This is the new protection method that complements patent law protection method side by side with copyright legal protection method or deed restriction type protection method prior to receiving a privilege. In other words, this method complements the weak point of patent law protection method which requires regular procedure, cost and time as the necessary conditions to receive privilege by preparation of separate privilege before generation of right, not through non-evaluation system or formal evaluation system.

3 Modification of Copyright Legal Approach Method

These minimize the social cost according to generated rights by rights generated without a system under the copyright legal protection method, but the characteristics of the occurring rights have some unstable aspects. Namely it is uncertain whether acquiring the rights or not and can define protection limit only in the abstract due to widespread objects of protection of creation or expression and there are some cases that the act of usage which is the object of regulation is vague in the case of special protection objects because rights have just been generated without any procedure or system at the same time as creation. It has been tried that the protection method revised the copyright legal protection method by individual registration on specific intellectual property for these reasons. i.e. i) to specify protection objects by independent legislation, ii) to make certain whether acquiring rights or not for taking registration as the rights occurring elements, iii) to regulate separately whether controlling or not for special usage act of this intellectual property, iv) to exclude or weaken the personality right, v) to restrict the excessive rights to shorten the protection period. The representative regulation examples of Korea classified into this protection method are the arrangement design for semiconductor monolithic circuit and the enacting of the model regulation(*23) for protecting computer software of WIPO have been discussed as new protection methods for computer programs inside and outside of the country. It could be evaluated basically as amended one of copyright legal protection method on the aspect that material protection factors are judged by individual cases and the character of the rights are restricted by the imitation prohibition rights not to fundamentally allow block effect in spite of the fact that this protection method is different from the copyright legal protection method of the non-style system from the aspect that it is excluded from protection objects by introducing a registration system if there isn't a declaration of intention (application, deposition) and stabilize the legal relation by announcing officially the subject and the object and the existing period of the rights.

4 Modification of Deed Restriction Type Approach Method

Another type of new protection method is the constructing plan not that different from the privilege allowance type protection method in substance, which adopts a deed restriction type as a base but sets up a protection period. This protection method was tried in the online digital contents industry development Act enacted independently to foster a digital contents industry in Korea in 2001, but we can assume the situation on the aspect of converting from the privilege allowance type protection method which allows so-called "Digitalization Rights" to the deed restriction type protection method during legislation process. A digital contents producer can have authority to control certain usage act for digital contents,(*24) but basically there are a few differences from the general deed restriction type protection method even accepting the deed restriction type protection method. It is discriminative to set up the protection period as mentioned before. But setting protection period under the deed restriction type protection method as introduced in the unfair competition prevention law for protecting the product type in Japan in1993 (Japan, the unfair competition prevent law, Article 2(1) -3). Namely, it specifies an imitation act of product type as a type of unfair competition under the Japanese Unfair

(*22) Unregistered designs have been protected from prohibiting copy for relevantly short period under what is known as the "Design Approach" which gives the differential rights to non-registration Design and registration designs under the one regulation of design protection. The Copyright, Designs and Patent Act of England 1989 protecting non-registration designs for short period and they approve the right of non-registration designs in "The EC regulation for protecting public designs.

(*23) Like the WIPO Model provisions on the protection of computer software Geneva 1978, WIPO prepared a draft provision in 1976 and 1983 but has not concluded it.

(*24) WIPO Model provisions on the protection of computer software Geneva 1978.

Competition Prevention law and restrict the protection period by excluding the one passed over 3 years from the day of first selling. This regulation was introduced in the amended unfair competition prevention law acted in Korea since July 2004 as an analogical type.

In principle, the Korean online digital contents industry development law adopting deed restriction type protection method is distinctive as this establishes the protection period and also a mark of digital contents producer is a necessary condition of protection.

There are two meanings for allowing the mark as a protection element. A Social cost followed by the rights occurrence could be minimized as equivalent to the copyright legal protection method to generate the rights by a non-system on an aspect of determining whether protecting or not by the producer's own mark not public organization. The other is that the object can have limits set for intellectual property which the producer expresses positively their intention to protect and it is different from the copyright legal protection method by the meaning of protecting exclusively in the case of expressing a certain way.

Ⅴ Design Methodology of New Protection Method

1 Introduction of a New Protection Method

If we look into considerations of the introduction of the new protection method, first, we need to examine the necessity of protection, characteristics of protection object and degree of protection.

Especially, further examination on the need of protection must precede this in order to choose the protection method for new objects.(*25) In intellectual property law, without extra legislation, there is a limit of usage by public in intellectual property and by contract; usage of intellectual property is limited in society.(*26) On the policy side, extra legislation is requested when it is vague to decide on protection of intellectual property. When this situation is prolonged, it can bring social damage in the future or now. This means that even if intellectual property benefits society, it may not expand and will reduce development of related areas. Therefore, by limiting the usage of intellectual property, it is necessary to have a definite benefit to the public that is created.

This is a judgment in policy to stimulate the creation or induce investment and to choose a much better way in comparison between the benefit of the public, which is created by establishment of fair competition order, and the loss to the public by artificial limits, which cause restricted usage of the intellectual property.(*27)

It is necessary to acknowledge the need for new way of protection if there is agreement on the need of protection. First of all, we need to figure out the reason why we can not bring it over from protection object under the existing law. Then necessary condition of protection has to be established to create a common benefit. It is necessary to grasp the current situation of use and find out how intellectual property producers can receive incentives.

In addition, policy judgments about the degree of the protection on cost and time to request right, bond characteristic, length of protection and criminal discipline or personal accusation, are necessary.

The protection method has a close relation with the characteristics of the object of protection but in this paper the general principle, which is not related with the object of protection, was also examined through the analysis of the content of the privilege to be subordinately decided according to the protection method regardless of the object of protection.

2 General Principle Not Related with the Object of Protection

(1) Protection Method

The protection method for new objects has to proceed from protection by deed restriction. Introducing privilege allowance type protection method without confidence in social loss and gain

(*25) The thing to decide first on planning new protection method of the intellectual property is whether to protect it. Recently there're some opinions, which any creation has to be protected for pro-patent trend, but still it has to be investigated whether to protect. It has to be considered about necessity of protection and then what to prohibit in order, but there are some cases that there are no acts as result of investigating whether to prohibit in reverse. Namely there is no need to protect if investments can happen without artificial protection, it is the intellectual property that has to be protected through such screening. (Shimizu Megumi, (Pro-patent and competition policy), Shinzansha Publisher Co., Ltd., 1999, article 20).

(*26) Tamura Yoshiyuki, (Theory of functional intellectual property law), Shinzansha Publisher Co., Ltd., 1996, Article 14, it is explained below that the return is asked, because usage is restricted on the occasion that physical access or legal access is impossible, and it can individually be treated with the illegal act law on the civil law if that is enough.

(*27) Which imitation act has to be prohibited depends on the age, the social situation, the industrial structure, the technology level and so on, and the regulation following the request of the time is always needed on the field of the intellectual property right (Nobuhiro Nakayama, (Multimedia and copyright), Iwanami Shoten Pulishers, 1996, article 7).

following deed restriction control would result in the risk of trial and error. Although privilege allowance type protection method could be against the law because this type of method takes advantage of intellectual property, deed restriction type protection method can minimize adverse effects from the restriction on the use because generally this type requires impinging on another benefit and protection of the law. In other words, privilege types can guarantee free use if needed because there are restrictions only when someone causes confusion/ misconception for users or when someone makes dishonest earnings disturbing the business of an intellectual property producer. As was said, "The world became advanced and prosperous by imitating others"; it is not a good idea to define the use of intellectual property itself as illegal when there is no plus factor greater than a counter result according to the restriction on the use.

We also need to be reminded of the fact that the privilege once endowed can not be diluted to the degree of deed restriction type protection, although degrees of protection can be increased from deed restriction type protection method to privilege allowance type to meet the needs of the times.(*28) Also, in the case of privilege allowance type, social costs are required to maintain our registration system or screening and that is why we need to approach gradually the privilege allowance type, which accepts social costs, and counter results.

Unfair competition prevention law in Korea uses a deed restriction type protection method and lists all the protection objects clearly. On the other side, protection objects are defined abstractly in laws, which pursue privilege allowance type protection method such as patent law or copyright. And this is why privilege allowance type protection method makes it easier to accept new protection object for intellectual property system. It is also necessary to examine if adopting a new protection object by extending the concepts of invention or literary property is appropriate way of approaching.(*29)

(2) Judgment of Efficiency

The validity of a decision for privilege has to be preceded to allow exclusive rights. In other words, prearranged inspection on specific matter is definitely required to allow the privilege that can control the use of intellectual property produced independently. When judgment in policy (Progressivity) and professional search (Freshness) is needed, throwing the judgment on an interested party about whether the condition of protection is fulfilled or not is very irresponsible behavior and this damages the meaning of the presence of intellectual property system. Although each interested party has a different opinion on whether conditions of protection are fulfilled or not, those privileges from perfunctory examination has to be restricted by imitation prohibition right in principle. In some cases, it could be a good idea to put off the time for exercising rights when certain procedure for the validity of a decision is arranged.

(3) Block Effect

When privilege is being issued, certain procedures and methods are required to allow the block effect. To allow a block effect each object has to be granted single privilege. Also, we need certain standards such as principle of early creation or application and proper procedures have to be made for those standards. Then the privilege would be created accordingly by these arrangements. If we give block effect to the privileges created by no rules there are chances to affect legal stability causing serious trouble and destroying the meaning of the presence of intellectual property system.

(4) Protection Period

When arranging incentives for intellectual property producers depend on the protection period we should be careful not to apply a rule to the protection object whose protection period has not expired. The principles created in the past should be respected and vested rights should not be abused when the protection period is reduced. But there is no reason to apply this in principle when the protection period is extended because common benefits in intellectual property system are either achieved through the privilege procedure (application procedure) already or going to be made by encouraging creation and investment.(*30) That is, the retroactive

(*28) Because lowering the level of protection is very difficult once getting to protect as right, it seems proper to introduce the deed restriction type protection first unless the necessity of protection by rights establishment type is uncertain like this (Industrial Institute, (Consideration about intellectual property system toward 21st century), Institute of Intellectual Property, 2000, article 43).

(*29) Even if it is possible with the construction of existing law for protection of new information, it is necessary to choose a proper system after examining that it is appropriate protecting under which system (Industrial Institute, (Consideration about intellectual property system toward 21st century), Institute of Intellectual Property, 2000, article 43).

(*30) As an incentive to inspire the creation desire about new literary property, it protects the literary property. A copyright system will brings rather big contrary effect at the culture development if it is limited to the present time (Nobuhiro Nakayama, (Industrial ownership Act (first volume)), Koubundou publishers Inc., 2000, article 8).

application of the extension of the patent period is far from the original purpose of the intellectual property system and it is only possible to discuss at the level of international diplomacy and trade through the unification of protection level to conclude a treaty, for example.

In 1998, the U.S. established copyright protection lengthening law (Sonny Bono Copyright Term Extension Act: Effective 10.28.1998) that extends 20 more years on copyrights and applied to all copyrights that had not expired at that time. Once, it was questioned whether it corresponded to U.S. Federal law. However, on Jan 15, 2003, the U.S. Federal court pronounced that the copyright protection lengthening law does not violate Article 1 of the U.S. Federal copyright law in the Eldred vs. Ashcroft case.(*31) Major evidence for this rule are congress's admission of retroactive application on extension of copyrights and patents, previous judgment of retroactive application on extension of patents, and 70 year extension on copyrights by European alliance, U.S. copyrights holders emphasize that they should have the same protection rights. However, the evidence listed above lacks logical sense. The strongest evidence to support it is that if there wasn't an extension on protection law, the fact that Walt Disney's characters Mickey Mouse copyright would have ended in 2003, Pluto in 2006, and Goofy in 2008 seems more convincing to explain the background of the constitutional judgment.

(5) Duplication of Protection

When introducing new protection methods through independent legislation it is important to have a clear relationship with existing laws. This becomes an issue of discussion mainly as a matter of possibility of double protection(*32) by copyright when privilege is created from no rules.(*33) In order to do that, separating the roles of existing laws should precede this. When making an independent law in the future the principle of mutual adjustment should be provided for in the law. Because in the independent legislation as discussed in the following, the effectiveness not to intend, happens for another property in the similar position and the balance between the rightful person and user, agreed in the existing law can be damaged.

3 Adequacy of Independent Legislation

In principle, for the adequacy of independent legislation, whether the existing law system can accept should be precede this and the decision has to be made depending on how much it would confuse the legal system.

Serious distortion of intellectual property based on new protection methods is the first concern. In this case, as we cannot help changing the law purpose or protection requisite, it will be proper to solve this through the legislation in a separate way.

Also, as traditional law system have been bisected and fixed by the protection of idea and expression for a long time, exceptional regulation at a specific intellectual property, which differently interprets the range of protection, has also possibility to seriously distort the existing law system,. Most of all, such independent legislation has the advantage that protection can be set to meet individual protection objectives and range but as mentioned, previously, until other intellectual properties that are in a similar place have laws for them, protection may be limited and bring an unexpected effect and the social cost to establish and enforce a new system and then settle down, should be considered, too.

Ⅵ Conclusion

Intellectual property system generally has the following functions even though there are some levels of differences in each regulation. i) Protecting the rights of the natural law of producers, ii) promoting industrial development by stimulating the production of intellectual property and iii) maintaining the order of business competition. However, in this paper we understand that the function to protect a privilege of intellectual property producer means the way to accomplish another function. In other words, on the premise that intellectual property is different from a privilege in natural law and also, there is no compensation for such privilege in natural law, we are approaching the way to protect intellectual property.

(*31) Eldred v. Ashcroft 537 U.S. 186(2003)

(*32) The accumulation of protection can be used instead of double protection. Double protection is the system to allow double rights to the same person on the same object with different types of rights. It is the concept that must separate that double protection, which can request a protection to one of them or both of them by choice and can be protected by more than two laws at the same time, and co-existence of protestation, which cannot appeal to the other law only if choosing one, merely leaving the possibility of the choice. (WIPO, Intellectual Property Reading Material, 1995, p. 417).

(*33) Refer to Ikegami Takashi, "Consideration of proper protection area by each intellectual property system", periodical publications, Institute of Intellectual Property, 2002, article 27-28 about the mixture of copyright and another intellectual property rights.

On these points of view, granting the intellectual property rights could not be justified if public benefits could not be generated to diffuse usage and maintain the order of business competition by stimulating production of intellectual property, and the protection method has to be designed only for maximizing public benefit, not for consideration of rights of the natural law. This paper revaluates the protection method of the intellectual property supposing these ideas.

But these discussions can only be an opportunity to again think over the criteria and principles in its own way. It might not be a right approaching way to decide uniformly how to understand intellectual property law, because it is a dynamic concept which changes appearances sensitively according to the situation. The issue of how to understand the intellectual property law under "the situation of each country" and "the present point of time," has to be the starting point for all areas of the intellectual property law, and it is the case to be newly established to fulfill a duty of the intellectual property law hereafter.