Historical Development of the Design Rights in Modern Japan, the US and Europe (*)

Invited Researcher: Satoshi TSURUOKA

Historical research on industrial property rights has been conducted mainly on patent history or trademark history, but has not been conducted so much on design history.

Design history, however, is also important in the history of industrial property rights, and it is necessary to conduct research.

Therefore, this study examines the history of modern Japanese industrial property rights, especially design rights, from the 1870s to 1899, while comparing with the design histories of Western countries.

I. Introduction

In recent years, much research has been conducted on modern Japanese industrial property.

Most of them, however, focus on the modern Japanese patent history or trademark history. Modern Japanese design history is also important in modern Japanese industrial property, and it is necessary to conduct research.

This study, therefore, focusing on modern Japanese design history, aims to clarify the modern Japanese history of industrial property rights while comparing with Western countries.

II. The model of Japanese historical development

1. Classification of international infringement case

Problems concerning protection of industrial property rights such as counterfeiting of foreign trademarks are often found in the process of introducing technology or culture from other countries.

International infringement cases are categorized as follows:

(Ⅰ) Both the exporting country and importing country are developed ones.

(Ⅱ) The exporting country is a developed one and the importing country is a developing one.

(Ⅲ) The exporting country is a developing one and the importing country is a developed one.

(Ⅳ) Both the exporting country and importing country are developing ones.

In case (Ⅰ) or (Ⅳ), the power disparity between the two countries seems to be smaller than in case (Ⅱ) or (Ⅲ).

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Although the relationship between modern Japan and Western countries seems to correspond to case (II), the correspondence does not seem adequate. Modern Japan had undergone economic development since the middle of the 1880s and the technical or economic disparity between modern Japan and Western countries had come to shrink. Meanwhile, technological or economic disparities still existed between modern Japan and the Western countries.

Given this situation, it seems reasonable to provide a "transition country," which is between the developing one and the developed one, and is moving from a developing country to a developed country.

In case (V) where the exporting country of technology or culture is the "developed country" and the importing country is the transition one, the technical or economic disparity between the two countries should be smaller than in case (II).

2. The outline from industrial development to counterfeit problem

Problems concerning protection of industrial property rights often occur in the process of introducing technology or culture from overseas for the development of domestic industry. This was the same in modern Japan. In order to promote the domestic industry, the Japanese government introduced many technologies and culture from Western countries.

The modern Japanese industrial property rights law, however, was not legislated until 1884, after the abolition of the patent monopoly rule ("Senbai-ryaku-kisoku") of 1872. In Japan, therefore, many foreign goods or Japanese traditional crafts were counterfeited, and many complaints from in and outside Japan were received by the Japanese government.

3. The outline from the counterfeit problem to the diplomatic negotiations

After a problem regarding the protection of industrial property rights occurred, the existence of the legal remedy method is judged. If it exists, the related companies or citizens judge whether the problem was solved or not. If it is judged that it was solved by the related companies or citizens, the problem will be solved. But if it is judged that it was not resolved, the related companies or citizens will contact their own government. In cases where there is no legal remedy method or where the related companies or citizens contact their own government, the government considers based on their damages whether the government should relieve their interest or not. If it is judged that it should be relieved by the government, the correspondence will be started. But if it is judged that it should not be relieved by the government, the problem will be pending.

After the start of the correspondence, the government judges whether it can be resolved by its

own government. If it is possible to resolve it by its own government, the related companies or citizens or government officials judge whether the problem was solved or not. If it is judged that it was solved by the related companies or citizens or government officials, the problem will be solved. But if it is judged that it was not resolved, the related companies or citizens or government officials will contact their own government (the Ministry of Foreign Affairs). In cases where it is impossible to resolve the problem by the domestic government, or when the related companies or citizens or government officials contact the Ministry of Foreign Affairs, the Ministry of Foreign Affairs considers whether the government should ask for a response from the partner country or not, based on their damage or the relationship with the partner country. If the Ministry of Foreign Affairs asks for a response from the partner country, diplomatic negotiations will be started, and if they do not ask for a response, the problem will be pending.

In diplomatic negotiations, the partner country judges whether the partner country accepts the request or not, based on the interests of its own country. If the partner country accepts, the related companies or citizens or government officials judge whether it was solved by this method. If it is judged that it was solved by the related companies or citizens or government officials, the problem will be solved. But if it is judged that it was not resolved, the related companies or citizens or government officials will contact their own government (the Ministry of Foreign Affairs) again. In cases where the partner country does not accepts the request, or where the related companies or citizens or government officials contact the Ministry of Foreign Affairs again, the Ministry of Foreign Affairs considers whether the government should ask for a response from the partner country or not again, based on their damage or the relationship with the partner country. If the Ministry of Foreign Affairs asks for a response to the partner country again, additional diplomatic negotiations will be started, and if they do not ask for a response, the problem will be pending.

III. Modern Japanese design history

1. The Start of industrial property policy

In 1867, the new Japanese government (Meiji government) was established. In order to promote modernization, the Meiji government started various industry promotion policies.

In 1869, "Minbu-sho" (the Ministry of Popular Affairs), which had jurisdiction over taxation, irrigation and reclamation, and "Okura-sho" (the Ministry of Finance), which had jurisdiction over finances etc., were merged.

In the first half of 1870, the establishment of an organization which was named the "Hougen-kyoku" was proposed by "Minbu-Okura-sho." Although this proposal was not adopted,

"Minbu-Okura-sho" was aimed at nurturing craft workers, protecting inventors and authors, and improving conventional techniques.

In June 1870, proposals for the codes, rules and regulations concerning rewards for inventions were submitted by "Minbu-Okura-sho." In the reward codes draft, it was prescribed that a prize and deed were given to those worthy of reward, and a monopoly right was also stipulated. In the reward rules draft, it was prescribed what kind of persons would be rewarded.
In the reward regulations draft, it was prescribed in what cases the right to be monopolized was given.

Although these proposals had been rejected, "Minbu-sho" was aimed at granting manufacturing and monopoly permission to inventors, improved inventors, imitators and operators of foreign technologies, authors, and translators of foreign books to promote the domestic industry.

2. The formulation of the Monopoly Rules in 1871

In July, 1870, "Minbu-sho" and "Okura-sho" were separated again.

In March 1871, "Minbu-sho" prepared the bill for the purpose of securing interests of inventors. The bill of "Minbu-sho" was adopted as the Monopoly Rule in 1871, but this act was abolished in 1872.

3. Eestablishment of the Ministry of Interior

In November 1873, "Naimu-sho"(the Ministry of the Interior) was established. The ministry aimed to promote the "crafts" invention, and submitted a patent rule draft in May 1874. But, because of the opposition from "Koubu-sho" (the Ministry of Engineering), the draft was rejected.

Reports regarding the Vienna World Expo were submitted from 1875 to 1876, and various policies were considered by the Ministry of the Interior. As a result, the Ministry of the Interior decided to collect or draw Japanese traditional arts or crafts to publish books about Japanese arts or crafts.

In May 1876, a new bureau, which was named "Kansho-kyoku," was established in the Ministry of the Interior. The bureau aimed to collect not only Japanese arts or crafts but also overseas ones. The same bureau submitted a trademark act draft in 1877 and published books about Japanese traditional arts.

In December 1878, however, the bureau was to be transferred to the Ministry of Finance.

4. The design act draft by the Ministry of Finance

In January 1879, the Ministry of Finance succeeded to the bureau mentioned above. In 1879, 1880 and 1881, the design act draft and the trademark act draft were prepared by the Ministry of Finance.

The bureau, however, was transferred to the Ministry of Agriculture and Commerce established in April 1881.

5. Establishment of the Ministry of Agriculture and Commerce

In April 1881, the Ministry of Agriculture and Commerce was established.
A new bureau, which was named "Koumu-kyoku," was established in the Ministry of Agriculture and Commerce. The same bureau created a new bill regarding trademarks and patents in 1882 and 1884 and these bills were adopted in 1884 and 1885.

In addition, the same bureau held the meeting about Japanese traditional crafts such as silk fabric, pottery, lacquerware, in 1884. At the meeting, it was reported that the traditional craft industry had declined since the Meiji era, because of many counterfeit goods. For this reason, many proposals for promoting Japanese traditional industry were made at the meeting.

In 1885, the same bureau also held another meeting for the promotion of Japanese traditional craft industry. At the meeting, attendees at the meeting discussed using the term "design," and pointed out that "shape" and "pattern" were important to distinguish Japanese traditional crafts from counterfeit goods or to protect inventors of new Japanese craft products.

In the 1886, Korekiyo Takahashi researched the industrial property rights systems of Western countries and pointed out the necessity of the design system, and prepared the bill regarding the design act, which was adopted in 1888.

6. The treaty revision negotiations between Japan and Western countries

On the other hand, the Meiji government had tackled the treaty revision negotiations between Japan and Western countries since the 1870s.

Munenori Terashima, who was a Foreign Minister in 1873, signed the Japan-U.S. Agreement in July 1878. But there was no agreement on industrial property rights.

Kaoru Inoue, who was a Foreign Minister in September 1879, held conferences to revise the treaties in 1882 and 1886. Initially, he wanted to negotiate a special agreement on the issue

concerning the protection of industrial property rights, but he decided to negotiate it at the conference in 1885. As a result, agreement was reached that Japan would accept foreign patents, trademarks and designs in Japan, instead of Western countries observing Japanese laws and regulations. But he resigned in September 1887 because of criticism from within and outside the Meiji government, saying that elimination of extraterritorial rights was not achieved.

Shigenobu Okuma, who was a Foreign Minister in February 1888, took over the Inoue draft in terms of protection of industrial property rights, and, in February 1889, signed the Japan-US treaty, and, in June of the same year, signed the Japan-German treaty. In addition, despite almost agreeing on negotiations between Japan and the UK, he also received criticism both inside and outside of the government, saying that elimination of extraterritorial rights was not achieved. He was distressed in 1889, and the Kuroda cabinet decided to collapse.

Aoki Shuzo, who was a Foreign Minister in December 1889, was requested to join the Paris convention and the Berne convention from the UK. But he resigned in May 1891 due to his responsibility in the Otsu Incident that occurred in May 1891. Takeki Enomoto, who was Minister of Foreign Affairs in May 1891, considered joining the Paris convention and the Berne convention, but he resigned as Foreign Minister because of the collapse of the Matsukata cabinet in August 1892.

Munemitsu Mutsu, who was a Foreign Minister in August 1892, negotiated the treaty revision negotiations with Western countries and concluded the Japan-UK treaty in July, 1894. As a result, Japan decided to join the Paris convention and the Berne convention before the abolition of consular jurisdictions. In November of the same year, he concluded the Japan-U.S. treaty and signed the Japan-Germany treaty in April 1896. But the ratification exchange was delayed due to the difference in the interpretation of Japan and Germany concerning Article 21 of the treaty, which stipulated that industrial property rights would be protected immediately after the ratification exchange. In the end, ratification exchanges were held in November of the same year, as the Japanese side conceded.

IV. The outline of Western design history

1. Outline of French design history

The French design history is said to begin with the Lyon stewardship order in 1711. Under the order, plagiarism and use of designs commissioned by merchants, etc. in the silk textile industry was prohibited, but it was limited to Lyon. Then, by the Council (Conseild'Etat), the imitation of other people's designs was prohibited in 1744 and expanded throughout France in 1787.

The Councilor ordinance was abolished by the French Revolution, but in 1806 the "Law on Establishment of the Lyon Industrial Trial Council" was enacted and designs were protected by the same law.

In 1902, the French copyright law was revised, and decorative sculptures and designs were also protected under the same law. In 1909, the current law " LOI DU 14 JUILLET 1909 sur les Dessins et Modèles " was enacted, and has reached the present after amendment in 1925 and 1979.

2. Outline of the UK design history

The UK design history is said to begin with "the Act for the Encouragement of the Arts of Designing and Printing Linens, Cottons, Calicos and Muslins by vesting the Properties thereof in the Designers, Printers and Proprietors for a Limited Time 27 Geo.III c.38 (1787)." Thereafter, the protection term was extended in 1794, and, in 1839, metal products, etc. were also subject to protection, and design registration was obliged before the publication.

In the Ornamental Designs Act 1842, new and creative decorative designs on all substances were protected, and in the Utility Designs Act 1843, practical designs were protected.

In the Patents, Designs, and Trade Marks Act 1883, the distinction between a decorative design and a practical design was eliminated, all designs were protected, and in the Patents and Designs Act 1907, the protection term was further extended.

In 1911, the Copyright Act was revised, and design drawings, sculptures and arts and crafts were also protected. On the other hand, in Article 22 of the same law, clauses were established to minimize duplication.

In the Registered Designs Act 1949, the design of articles with literary or artistic character was excluded from protection.

In accordance with the Gregory Committee Recommendation in 1952, Article 22 of the copyright law of 1911 was abolished and the Copyright Act of 1956 was enacted. In Article 10 of the law, amendments were made to minimize duplication. This amendment was also made under the Design Copyright Act 1968.

But, the problem of "industrial copyright" arose, and in 1988, in the Copyright, Designs and Patents Act 1988, "Design rights" automatically generated without registration were newly set up.

In addition, Section 52 of the copyright design patent law in 1988 was to be abolished.

3. Outline of German design history

The German design system is said to begin with "Gesetz betreffend das Urheberrecht an

Mustern und Modellen" (Old Design Law) in 1876. Under the Law, the right to reproduce industrial designs or models in whole or in part belongs to the author, and only new and creative works are protected.

Later, in 1907, "Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie vom 9.1.1907" was enacted, and art-made works were included in works of figurative art. As a result, the distinction between protected areas of design rights and protected areas of art copyright was abandoned, and aesthetic expressions in industrial designs were no longer excluded from copyright protection targets.

Although the 1876 Old Design Law was amended in 1986, it was to survive without major revision for more than 100 years until 2004.

4. Outline of the US design history

In the US, design rights are protected by the US patent law (35U.S.C.§171-173, 289), by the US copyright law (17U.S.C.§101,102), and by the US trademark law (15U.S.C.§1125).

The first US federal patent law was enacted in 1790. As a result of amendment in 1793, it was decided to transition to a no-examination principle once, but the law of 1836 was enacted and it returned to the examination system again. In the revision of 1842, provisions concerning protection of industrial design were established, and the US design system is said to begin. After that, the protection term of the design right was expanded by the amendment of 1861, it was absorbed as Article 171 to 173 of United States Code Title 35-Patents in the amendment of 1902, and the existing law revised in 1952 has reached the present.

After the Statute of Anne in 1710, the federal copyright law of the US was enacted in 1790. In 1831, 1870, 1909 and 1976, the same law was revised, and it has reached the present. According to the US copyright law in 1976, a provision to protect the design of utility was established in Article 101.

The first US federal trademark laws were enacted in 1870 and 1876. In 1879, however, these laws were judged unconstitutional by the Federal Supreme Court. For this reason, Congress enacted new ones in 1881 and 1905. In 1946, thereafter, the Lanham Law was enacted and it was decided to provide provisions on infringement of trade dress in Article 43 (a) (1) (A) of that law.

V. Conclusion

Problems concerning the protection of industrial property rights often occur when trying to introduce various technologies and cultures from abroad for promoting domestic industry. For

problems concerning the protection of industrial property rights, in many cases, developed countries, which are exporters of technology and culture, have been understood in the analysis framework of requiring protection for developing countries, which are importing countries.

However, when considering the historical development process of modern Japan, this framework alone is insufficient because, although there were technological and economic disparities with Western countries, modern Japan began to achieve rapid economic development since the middle of the Meiji era, shrinking the differences. So to speak, there was a change in "power balance."

For this reason, in order to better understand the relationship between modern Japan and Western countries on issues concerning the protection of industrial property rights, it seems appropriate to establish a new framework of "transition countries" as countries located between developed countries and developing countries and which are moving from developing countries to developed countries.

Also, when problems concerning the protection of industrial property rights occurred, diplomatic negotiations did not necessarily immediately take place, and it was seen that various solutions existed.

Legislation did not materialize until the trademark regulation in 1884.

Meanwhile, at the same time, consideration was made on promotion policies of the traditional craft industry, and in addition to terms such as "design," in order to implement countermeasures against counterfeit items and quality improvement, recognition of the importance of “shape” and “pattern” was gradually formed. After that, the necessity of protection of designs was pointed out in the "opinion letter" of Korekiyo Takahashi, and it was to be developed in the design regulation of 1888.

Regarding the modern Japanese Industrial Property Rights System, though legislation was attempted at the beginning, it is said that after failing in the long run, delays in maintenance ultimately increased the subsequent impact. Counterfeit goods flooded the domestic market, and many complaints were received from in and outside Japan. In particular, dissatisfactions of Western countries spread to the negotiations on revising treaties that had been undertaken at the same time, and were also affected not least by diplomacy.

The Design Ordinance was gradually recognized by the Meiji Government as the necessity of "crafting" and "design" accompanied by a change in meaning while various industrial promotion policies, especially promotion measures of the traditional craft industry, were being implemented. It was enacted and it can be said that it was the result of being separated and clarified from copyright and patent rights, unlike the historical development process of Western countries where relations with copyright and patent rights were closely related.