

4. Publishing and Copyright in Today's Digital Age

Ms. DAIRAKU Mitsue

Professor of Law, Hokuriku University

1. Introduction

It is a great honor and pleasure to have been invited by the ACCU and IKAPI to give a speech on the *Publishing and Copyright in Today's Digital Age*. I would like to sincerely thank Mr. Makfudin Wiryatmaja, President of IKAPI, and Mr. Koji Nakanishi, Director General of the ACCU.

The number of Internet users in Japan was 79.48 million as of the end of 2004, an increase of 2.18 million over the previous year, and the ratio of population coverage has increased to 62.3%, growing by 1.7 percentage points over the previous year, according to the Ministry of Internal Affairs and Communications¹.

The ratio of broadband user households has grown to 62.0%, increasing by 14.2 percentage points over the previous year, and those for other methods, including ISDN and PSTN, are continually decreasing².

We are clearly living in the *Internet Society*, and it is digitization technology that has enabled us to enjoy the Internet society.

The digitization technology also enables us to make copies easily, quickly, and without any deterioration in quality. It was certainly a great advancement in technology, but on the other hand, it has brought us a serious headache, the problem of piracy. For those who wish to copy somebody's copyrighted work, be it a computer program, a story in a book, or a movie, it is just a simple and almost instantaneous operation to get perfect reproductions. They do not need any planning or development costs, or advertisement costs, because they just steal the fruits of business efforts of the producer of genuine copyrighted products. Therefore, it is only natural that they can sell their pirated products, CDs, DVDs, etc. at very low prices, and of course, cheaper goods sell so much more compared to genuine ones.

In addition, there is other source of headaches, too. It is the Internet. For example, Peer-to-peer network system, or P2P, has caused a lot of troubles in many countries including Japan. There have been so many litigations brought by various stake holders such as copyright owner companies and copyright management organizations³. Although the P2P technology certainly could be useful for general business purposes, as in the case of exchanging files of original business-related documents prepared within a company among its employees, it was also

true that countless number of files containing infringing copies, music, movies, etc. were shared or exchanged on the particular network system.

Thus, digital technology and the Internet society have brought us both good news and bad news.

Then, how should we cope with today's digital age? Let us review the situation with an emphasis on the publishing business. Shall we start from the dark side?

2. Publishing Business and Internet Infringement

Newspapers, for example, have been facing with gray-zone use of their articles and headlines. They could of course fight against dead copy of their original news reporting by somebody else, if the news article is more than just a reporting of mere facts. There was a case of using headlines of a newspaper articles appeared in the newspaper company's website by another Internet website operator offering a service for profit, called *line topics* in Japan⁴. The court held that although those headlines in question fell short of copyrighted works due to lack of creativeness, the plaintiff was still entitled to damages, because the newspaper company had spent considerable efforts to form those headlines.

This might be one of the cases indicating the possible beginning of printed media's full involvement in the copyright infringement cases over Internet, because there is no reason to deny possibility of infringing use of printed novels, photographs, children's picture books over Internet in the near future.

Actually, there is a recent class-action case in the United States against Google over its *Library Program*. The Internet giant was sued by the Author's Guild⁵ and other individuals⁶ in a federal court in Manhattan over its unauthorized scanning and copying of books through its Google Library program on September 20, 2005⁷. According to the Author's Guild, through its Library program, Google is reproducing works still under the protection of copyright as well as public domain works from the collection of the library of University of Michigan⁸. Google has agreements with four academic libraries – those of Stanford, Harvard, Oxford and the University of Michigan – and with the New York Public Library to create digital copies of substantial parts of their collections and to make those collections available for searching online⁹. Google

has not sought the approval of the authors of these works for this program¹⁰. The complaint seeks damages and an injunction to halt further infringements¹¹. The class-action case is pending.

This also shows that more and more people get information of various nature from internet : news reporting, encyclopedia information, entertaining information (audio, audio-visual, visual, printed materials) over internet such as novels), job-openings, government information, secrets of successful business, and even match-making service information for those who wish to find an ideal husband or wife! Actually, last year, my students terribly disappointed me by saying that they are not familiar with reading newspapers, but the truth was that they would simply check online digital newspapers. For the generation of university students, digital internet information and communication is just a normal way of life, although it is often pointed out that many of youngsters are ipc-addicted. I have rather found more imobile-phone addicts among the students. They make friends through mobile mails. They enjoy (legitimately- or illegitimately-) downloaded musics, literatures, TV programs, movies, shopping news. In addition, they use their mobile phone as their wallets by using the prepaid-card functions. Truly, mobile phones are their lifeline these days.

That means there should be still a huge promising market for publishing business to be developed in relation to mobile phones and internet, but before reaching that subject, let us further probe possible counter-measures : 1) updating legislation, and 2) technological measures against piracy.

3. How do we tackle with the problem of piracy ?

As I said before, copying is very easy for digital information, and digitization of analogue information is not difficult, either, because it only takes scanning of the original analogue information for the conversion to digital information. The use of Internet would make the situation worse, because Internet users can send infringing copies to other users without any problem. Even after sending the infringing copies to someone, the infringing copies still remain with the original sender. Infringing copies have just propagated or multiplied. What shall we do? There are some possibilities for tackling the piracy problem. They are updating legislation, technological measures, strengthening of enforcement, and concerted efforts of awareness-raising. Since I am expected to talk about the last two topics, namely enforcement and promotion of copyright, tomorrow, I will focus on legislative measures and technological counter-measures.

3.1 Updating legislation (e.g. Making- Available Right)

In 1996, the World Intellectual Property Organization, or WIPO, introduced two latest copyright treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. For these important treaties, Ms. Totcharova gave us excellent lecture in the morning session. They are called iInternet treaties, because they showed some possibilities of fighting arms against piracy in the so-called iInternet society. For example, both of the treaties have introduced a new iright of making available to the public.

This is the right for copyright owners to protect themselves from unauthorized uploading their copyrighted works over the Internet. This right is included in ithe right of transmission, which covers all wire/ wireless, digital/ analogue and simultaneous/ interactive transmissions to the public. Performers and Record Producers are given only imaking available right.

Japanese Copyright Law had already introduced a forerunner of this kind of protection in 1986 as ithe right of interactive transmission. It was called as the icable-transmission right covering interactive cable transmission or the making available for transmission by cable. The current imaking available right under the Japanese Copyright Law has complied with these Treaties provisions since the amendments in 1997. The right is actually a part of the right to communicate to the public.

iMaking available or transmittable is a preparatory act for iautomatic public transmission. Specifically, it includes such act as storing information at the hard disc within a server, putting a disc storing information at a server, conducting live relaying, for example, a rock concert by istreaming (continuously inputting information without storing memory) technology.

This right has been invoked often to fight against copyright infringements over the Internet, as in the case of the P2P cases which I referred to earlier.

This imaking-available right is useful to tackle with copyright infringement cases over Internet, because you will not need to show any evidence of actual public transmission.. Otherwise, you have to invoke, for example, the right to copy to seek damages in such Internet copyright infringement cases. The right to copy, however, may invite troublesome discussions on the nature of transient reproductions, or temporary copies, since there are strong arguments that making such a temporary copy is not an infringement of copyright, if the copy is made incidentally as part of the technical process of making or receiving the communication. With the imaking-

available right, you could avoid that arguments and catch the infringement at an earlier stage, or at the time of the act of uploading infringing material to the Internet server, even before actual transmission to the public.

Why is this right of making available so important? It is because that, nowadays, more and more copyrighted works can be enjoyed over the Internet. Until very recently, you might find in most of Internet copyright infringement cases, music pieces, songs and movies as the targets of infringements. I am afraid, however, there is no guarantee for the publishing business not to be involved in Internet copyright infringement cases.

3.2 Possible Countermeasures against Piracy in Publishing business

- 1) Technological measures for protecting of copyrighted works (e.g. copy-guard) is secured by criminal sanctions against the sale of apparatus to circumvent technological measures (e.g. anti copy-guard system).
- 2) Rights Management Information, which specifies works, copyright owners, or information relating to manners and conditions of the authorized exploitation.
- 3) In practice, seals indicating genuine copyrighted products could be useful, and especially, holograph seals are often used, because it is difficult to copy those seals.
- 4) In the Internet, robot programs are sometimes used for searching and identifying unauthorized use of copyrighted works. This is actually used by the JASRAC, the biggest copyright management organization, to find out infringers of the songs which they were entrusted.

4. What is the Good News of Today's Digital Age?

The digitization technology and the propagation of Internet has also brought us good news, too. First, digitization enables us to fuse various types of information. We could converge stories, photos, music, animation clips, etc. into one single DVD, for example, and it is very easy to transmit all the aggregated information over the Internet. You can dramatically decrease the costs of distribution as well as production cost. Take i-Pod for instance. It absorbs almost any kind of information, from news to movies, as far as it is digital. People will soon become accustomed to reading books on an electronic book, which simply looks like a small notebook.

4.1 iProduction Committee System for Realizing Mega-Hits

Recently, there are many cases of collaborating companies from diversified industries in Japan. iPoke-Mon was one of those projects starting from a video game to comics, animation films, TV broadcasting, innumerous number of character merchandizing products such as a ipikachu baron.

In May 2004, a movie entitled iCry for love at the Center of the World was released. The movie was based on a story under the same title, which had become a million seller. Many people said, iWell, it was just a sentimental love story, but nevertheless, the book sold very well. Immediately before the release of the movie, the CD containing its theme song and the sound track was put on the market in April 2004, and a comic book of the story and a photo book were also published at the same time. Two months after the release of the movie, its TV drama version was broadcasted, and toward the end of the year, a DVD of the theater version was sold.

In this project, publishing company, record company, movie company, broadcasting company and an advertisement agency participated in the project's iProduction Committee. And these various companies, respectively activated the promotion very widely, for example, through publishing announcement events, giving film-previews, promotion by TV commercials, advertisement on a portal website, campaigning in front of convenience stores, etc.

With this iProduction Committee system, you do not necessarily need to have a gigantic conglomerate like Time Warner or Walt Disney.

4.2 How to Find Promising Authors?

I suppose that finding and growing promising authors are still critical for the publishing business. Japanese publishers have actively used internet or mobile phones to recruit future Shakespeare by holding contests for literature Awards.

In addition, there was a recent case of a book produced by collecting entries to a BBS. The book entitled iTrain Man also attracted huge number of readers, and was immediately made into a TV drama series.

5. Conclusion

Thus, today's idigital and Internet society could give us a dramatic opportunity, if we properly utilize the assistance of copyrights.

(Footnotes)

¹ iCommunications Usage Trend Surveyî, MIC (the Ministry of Internal Affairs and Communications) Press Release, May 10, 2005.

MIC implemented and compiled the Survey as of the end of CY2004, in order to grasp the usage trends in telecommunications and broadcasting services within households (those making up households), offices (establishments) and companies (enterprises). Id.

The Survey, which is composed on the following 3 sections: iHouseholds/household members,î iOffices (establishments)î and iCompanies (enterprises),î has been conducted annually since 1990 as a statistical survey authorized by MIC in accordance with the Statistical Report Coordination Law. Id.

² *Supra*, n.1.

³ Civil cases include iFile Rogue casesî, where defendant P2P service company was sued by JASRAC (Japanese Society for Rights of Authors, Composers and Publishers) and record companies respectively on the grounds of copyright infringement (JASRAC case) and neighboring right infringement (record companies case) for injunctions against communication of infringing MP3 files and damages (e.g. Toshiba EMI KK, et al. v. Nihon MMO, Heisei 14(wa)4249, Tokyo District Court, January 29, 2003) and the court granted judgment in favor of the plaintiffs.

JASRAC is a member of CISAC (International Confederation of Societies of Authors and Composers) and BIEM (International Bureau of the Music-mechanical Edition) and mutually exchanges information on the protection of copyright with other member associations of such international organizations (Japan Copyright Office (JCO, Agency for Cultural Affairs) iCopyright System in Japanî Nov. 2005, published by CRIC (Copyright Research and Information Center) p.41).

JASRAC is a voluntary non-profit-making organization established in 1939 in order to protect copyright of musical works and to facilitate fair exploitation of such works. It is a musical copyright clearance organization in Japan and is registered with the Agency for Cultural Affairs to conduct collective management. Almost all Japanese musical authors and composers entrust their rights to JASRAC directly or through musical publishers. It also administers copyrights of foreign musical works under contracts with 96 organizations which is entrusted the right of performance in 83 countries and regions and 74 organizations which is entrusted the right of reproduction in 68 countries and regions. Id.

⁴ *Yomiuri Shinbun (Newspaper) v. Yugen-Gaisha Digital Alliance* (Appeal case (Heisei 17(Ne) 10049, Oct.6, 2005)decision at the Intellectual Property High Court, a

Special Branch of the Tokyo High Court specializing in the IP cases, established in Apr. 1 , 2005).

⁵ The Authors Guild (www.authorsguild.org), the largest and oldest society of published authors writers in the United States, represents more than 8,000 authors. http://www.authorsguild.org/news/sues_google_citing.htm (the Authorsí Guild Website, Press Release, Sept. 20, 2005).

⁶ The individual plaintiffs are Herbert Mitgang, a former New York Times editorial writer and the author of numerous fiction and nonfiction books, including iThe Fiery Trial: A Life of Lincoln,î published by Viking Press; Betty Miles, the award-winning author of many works for children and young adults, and the co-author of iJust Think,î published by Alfred A. Knopf; and Daniel Hoffman, the author and editor of many volumes of poetry, translation, and literary criticism, including iBarbarous Knowledge: Myth in the Poetry of Yeats, Graves and Muirî and iStriking the Stones,î both published by Oxford University Press. Mr. Hoffman was the 1973-74 Poet Laureate of the United States. Id.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.