10. Copyright and the Technological Development

OKAMOTO Kaoru, Professor, National Graduate Research Institute for Policy Studies, Japan

Introduction

The present paper was prepared for the National Workshop for Copyright Awareness and Production and Utilisation of the Mongolian Version of the “Asian Copyright Handbook” held in Ulaanbaatar, Mongolia in October 2006. As the author was requested by the organizer of the Workshop to divide the presentation of the paper into two 30-minute parts on two sub-issues, this paper also deals with two separate sub-issues, which are of somewhat different aspects but interlinked to each other under the main topic: "Copyright and the Technological Development".

The purpose of this paper is to briefly delineate some significant impacts of recent technological developments on copyright systems, however, while such impacts have been brought about in terms of an extremely wide range of aspects of copyright systems in general, the scope of this paper is limited to only a few aspects of the recent changes due to the time constraint of its presentation. In more concrete terms, the two sub-issues taken up for the description and analysis in this paper are: (a) the expansion of the acts covered by copyright legislation and (b) political implications for norm-setting in both domestic and international contexts.

As to the former, the development of "digitization and networking" symbolized by the advent of digital/cloning copies and the Internet respectively brought about a wide range of influence over a number of aspects of copyright protection. However, with a view to avoiding any excessive complexity, this paper focuses on the issue of the expansion of the scope of the rights and other legal systems related to the act of "communication to the public". Therefore, such issues as "digital/private copying levy" and "temporary/ephemeral storage", which are relevant to the right of reproduction, are not dealt with in this paper.

Also, the issues of contract systems and business models are not discussed here, either though they will be key factors for the efficient use of copyrighted works as well as the benefits of both right owners and users. This is because of the time constraint for the presentation at the Workshop, however, those issues should be taken up in due course in some other occasions organized by ACCU and/or any other affiliated organizations.

As to the above latter sub-issue, copyright systems, which are inevitably accompanied with harsh conflicts of diversified interests among various stakeholders, can be and should be considered as a "school of democracy" as any domestic norm-setting calls for a democratic decision-making to overcome the disparity of interests among the members of a given society, and this process is much more challenging in the field of copyright than others. In the International context, for which there is no democratic rule to govern all countries with full enforceability, it is the international political power that is the only decisive factor to construct any international norm, and therefore, any country should consider what kind of international rules would be beneficial to the people of the country and how it could be pursued and achieved.

Part I.
Development of Legal Systems to Cope with Technological Changes

1. Existing Rights as "Expedients"

Copyrighted works have economic "value". This is obvious by the fact that people pay money for such embodiments of copyrighted works as books, phonograms, movies, computer games, etc. One of the functions/purposes of copyright is to let the authors of such works monopolize for a certain period of time the economic value brought about by the use of their works, viz. the money paid by the users or at least part of it.

Do such users, however, pay money for the works because they want to copy them? The answer should be "no". They pay money for books, phonograms, movies, etc. because they want to read, listen to and/or watch them, i.e. to "perceive" them. Works can create economic value only upon "perception" by the users, and they would have no economic value without being perceived. The act of copying (reproduction) *per se* never leads to any economic benefit or value without perception by end users. This means that the one and only act that should be covered by copyright of the author is "perception" (by end users) and no other right would be needed.

Even if someone reproduced a pre-existing book in quantity and sold them without authorization, for example, it would not cause any problem to the author, who rather could avoid troubles to republish it. However, it is so under one but crucial condition. This condition is that all readers of the unauthorized copies of the book would surely contact the author before reading it and obtain his authorization to read (perceive) it by, if necessary, paying the amount of money beforehand requested by him.

In other words, if the author was granted the "right of perception", which is to control the act of perceiving (viz. reading, listening to, watching, etc.) his works, and if this right worked perfectly, all the other rights could be abolished. However, such a legal system by no means seems to be realistic as it is absolutely impossible for the author to find, chase and/or stop all the acts of perception by all end users.

Therefore, the world's copyright system took a "second best approach" to let authors indirectly monopolize the economic value of their works. This second best approach is to grant exclusive rights to authors so that they may control the acts which take place just before perception by end users. Such acts to realize perception (at the next step) by end users can be called "perception-contributory acts". It is these acts that the present copyright treaties and laws cover by exclusive rights, viz. reproduction, public distribution, public rental, public performance, broadcasting, interactive transmission through the Internet, etc. All of them take place before, and realize at a following stage, perception by end users. Chart 1 shows this structure.

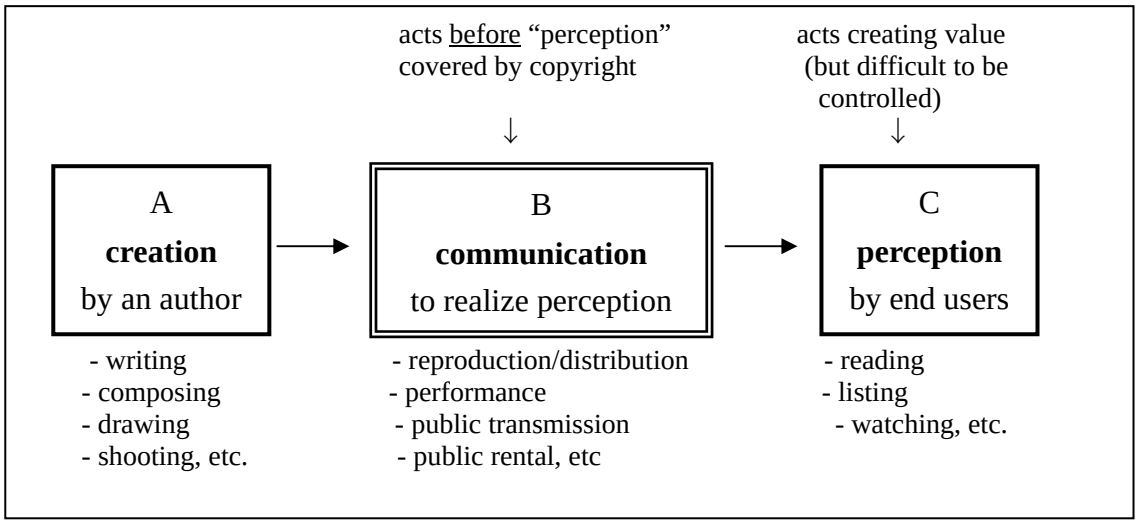

Chart 1

note: - The acts included in "C", for which people pay money, bring about the economic value of works, and therefore, it should be sufficient in theory to cover the acts included in this part by copyright.
- As it is impossible to control perception (C) by end users, the present copyright system covers the acts included in "B" as an expedient.

Therefore, all the rights provided for in the copyright treaties/laws corresponding to such acts as reproduction, public distribution, public rental, public performance, broadcasting, interactive transmission, etc. are just "expedients" to let authors indirectly monopolize the value created by their works as much as possible.

2. An Increasing Number of Rights related to "Communication to the Public"

As mentioned above, the present copyright system in the world took the "second best approach" as an "expedient", which was to grant some rights to authors to control the "perception-contributory acts" of works rather than "perception" *per se*. If the system of copyright had consisted of the right to authorize the act of perception alone, technological changes in the past would not have caused any necessity to develop the system, because any perception is done by people's eyes and ears, and therefore, no technological change would have been relevant. However, as the system was constructed by granting rights in terms of the perception-contributory acts before perception, which were inevitably related to various technologies, the technological developments in the past, *inter alia* those in the last decade, caused an extremely wide range of impacts on copyright systems.

Before discussing the changes and developments, the structure of the present copyright system is worth reviewing. Chart 2 below shows the structure of "author's right" under the present copyright system in the world. (Neighbouring rights are not indicated to avoid complexity.)

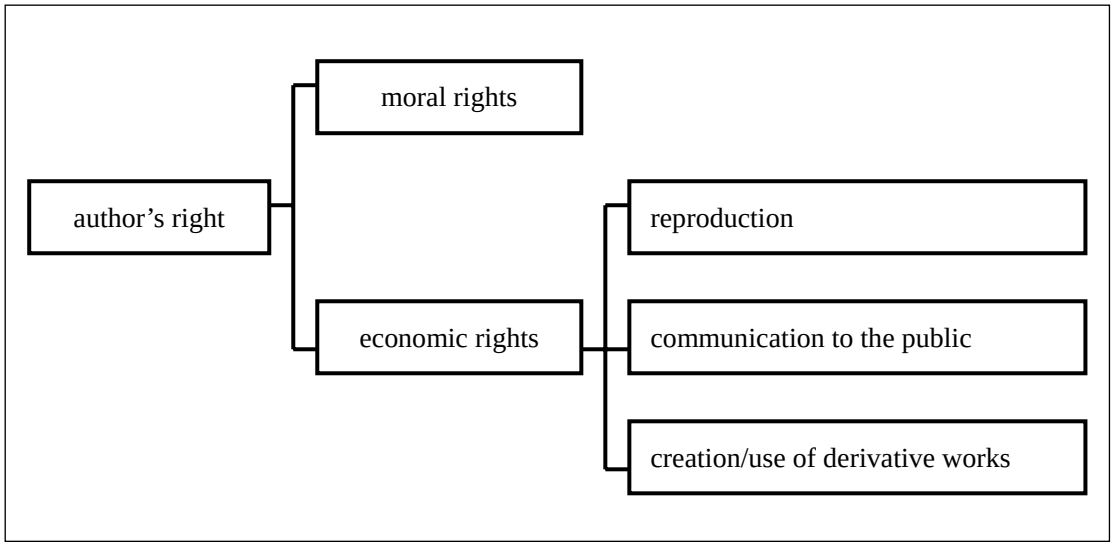

Chart 2

Among the above rights granted to authors, the right of "reproduction" has been "technology-free" from the beginning. When the same thing as the original is produced by any means it always constitutes an act of reproduction regardless of the format, method or technology. Therefore, the formats of analogue, digital and those which will be invented in the future are all already covered by the right of reproduction, and this is the reason why this right has been less affected by technological changes.

The right always most seriously affected by technological changes has been the right of "communication to the public", which is actually not a single right but is composed of a number of different rights in a number of countries, *e.g.* the rights of public performance, broadcasting and interactive transmission. It seems that when copyright protection started more than 100 years ago the only possible method to communicate a work to the public was "public performance", *viz.* playing music, performing dramas, reciting stories/poems, etc., in front of the public or in a place open to the public.

As relevant communication technologies develop through a number of inventions in the past, the coverage of the communication-related rights was also expanded gradually.

Chart 3 below shows some major examples of such inventions as well as the expansion of relevant rights caused by them.

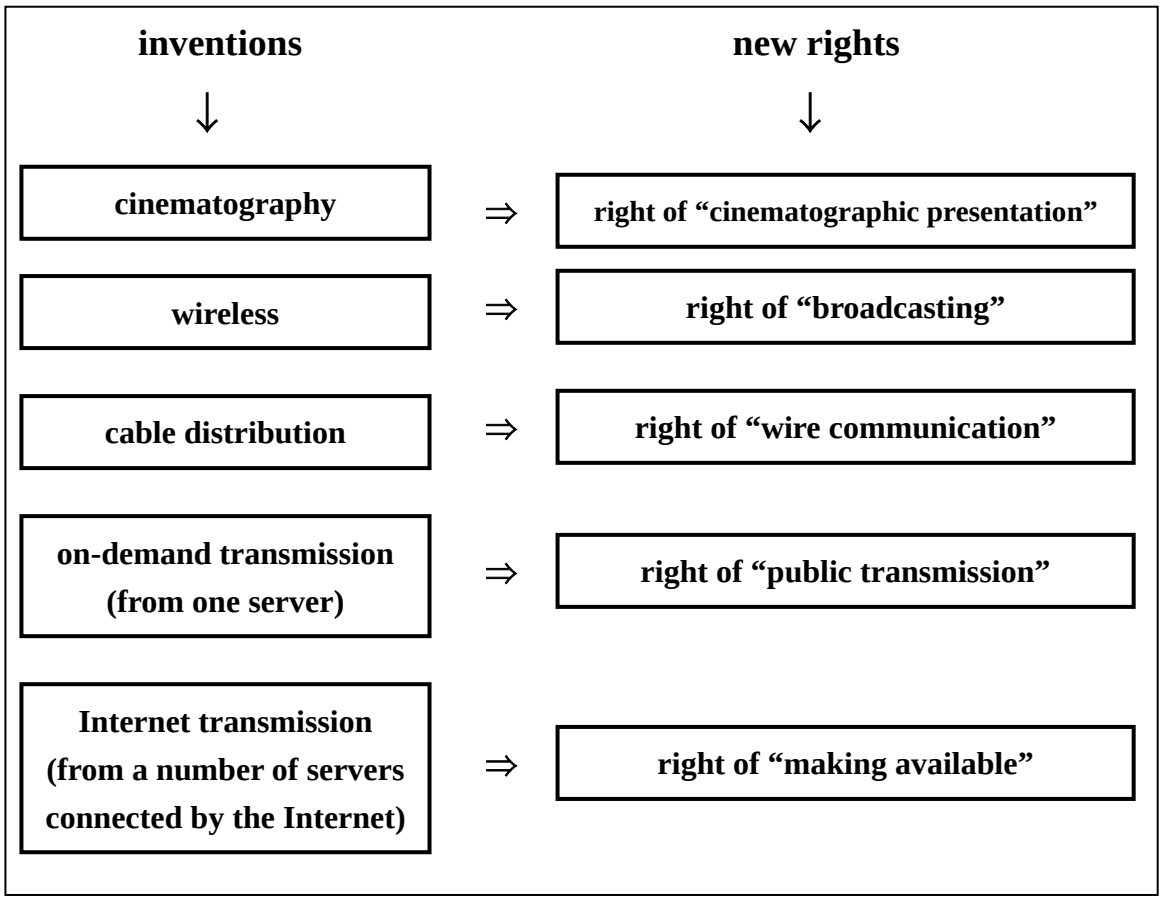

Chart 3

Among the above-mentioned developments, the rights of "public transmission" and "making available" may need further clarification and explanation. The world's copyright system (relevant treaties) granted to authors the right of "broadcasting" and "wire communication" many years ago, however, it did not cope with a newly emerging type of transmission to the public, which was called "on-demand transmission" or "interactive transmission". Chart 4 and 5 indicate the difference between the two categories of transmission to the public.

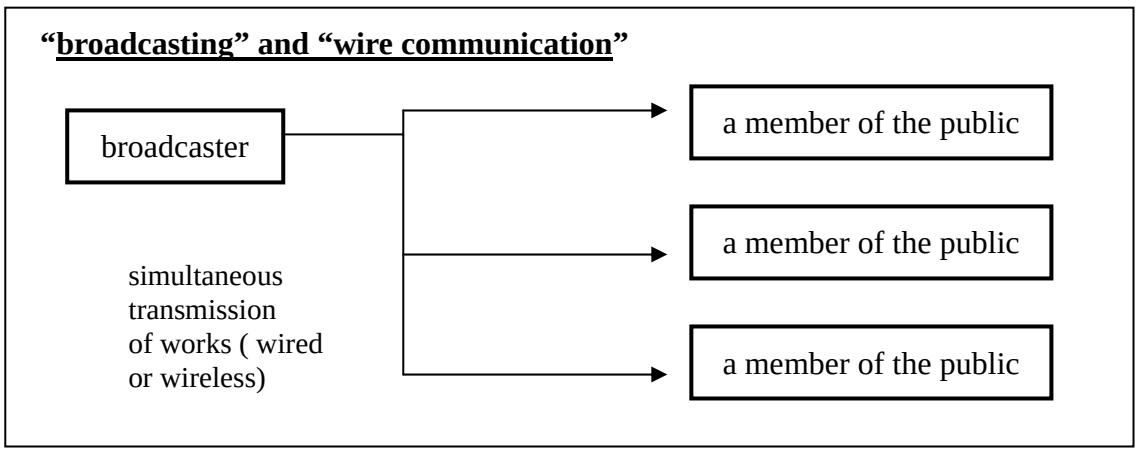

Chart 4

note: In this type of transmission to the public, the transmitted work (signal) is always reaching the members of the public (receivers) and they cannot choose the work to be transmitted to them.

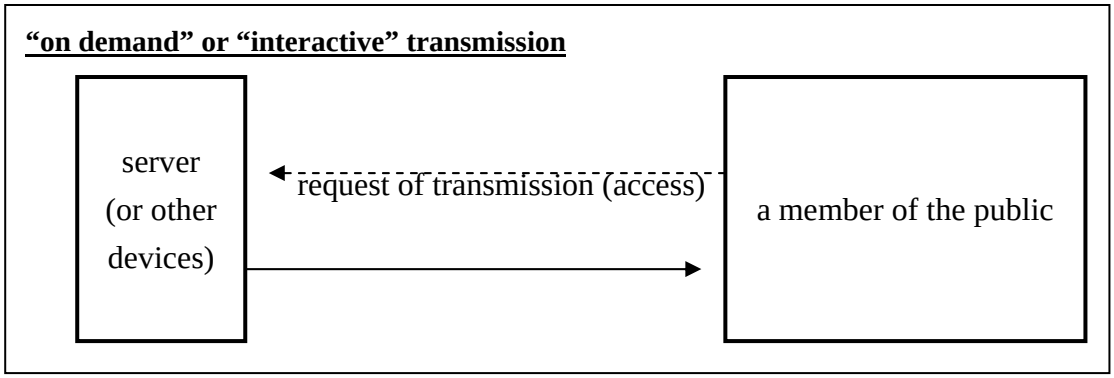

Chart 5

note: In this type of transmission to the public, the transmission takes place only upon the request (access) from a member of the public (receiver) and he/she can choose the work to be transmitted.

The new right to cover "on-demand" or "interactive" transmission to the public (the right of public transmission) was stipulated, for the first time in the world, in the Copyright Law of Japan in 1986 far before the advent of the Internet for public use, and the United Kingdom followed it later, introducing a similar provision in its Copyright Law. Also, in 1996, exactly 10 years later than the establishment of this right in Japan, the WIPO finally adopted the same rule in the new treaty called the WCT (WIPO Copyright Treaty).

In this treaty the relevant right is called by the general name of (or incorporated in) the right of "communication to the public" so that the contracting countries may freely choose the name of the right in their national laws.

Reason for the Necessity of the New Right of "Making Available"

However, the new right of public transmission, which was to cover the act of transmission from a server to members of the public, was not enough to cope with a totally new situation caused by the advent of the Internet. When the Japanese Copyright Law provided for the new right of public transmission to cover on-demand/interactive transmission in 1986, the relevant transmission system usually consisted of only one server and a number of receivers. Therefore, it was quite easy to find out who transmitted the work received.

However, after the invention and diffusion of the Internet, such servers started to be connected to each other and it became extremely difficult to identify who transmitted what, from which server, through which server, and then to which receiver.

For example, if an author finds his work received through the Internet and stored in a personal computer of someone, he will surely come to the owner of the server directly connected to that personal computer (receiver), saying that he must have transmitted it without authorization. However, the owner of the server may say, "My server is connected with a number of other servers. Your work must have been transmitted from one of such other servers just through my server. If you say that it was surely transmitted from my server, please prove it by showing evidence." In such a case, it would be extremely difficult for the author to prove it.

Also, if an author finds his work stored in a server ready to be transmitted upon access from members of the public, he will surely come to the owner of that server, saying that his work must have been transmitted without authorization. However, the owner of the server will surely say, "Yes, your work is here. But it is not popular at all, and no one has ever accessed it. Therefore, it has not been transmitted yet. If you say that it has surely been transmitted from here, please prove it by showing evidence." In this case, it would be almost impossible for the author to prove it.

This means that the advent of the Internet, which connects a number of servers to each other to realize a global information network, made the right of public transmission virtually impossible to be exercised or enforced. Therefore, a still new right turned out to be necessary with a view to controlling the act of "putting a work into a server" (*e.g.* uploading a work so that it may be available (transmittable) anytime upon access from members of the public with personal computers).

This new right of "making available" (in a server) was provided for in the two new treaties of the WIPO, *i.e.* the WCT (WIPO Copyright Treaty) and the WPPT (WIPO Performances and Phonograms Treaty), both of which were adopted in 1996. With this new right, the author of a work, which has been uploaded in a server without his authorization, does not have to prove any more that it has been transmitted to the public. He can sue the infringer just by proving that his work is in the server ready to be transmitted (*i.e.* made available) without his authorization. Chart 6 below shows the relation and difference of the two rights.

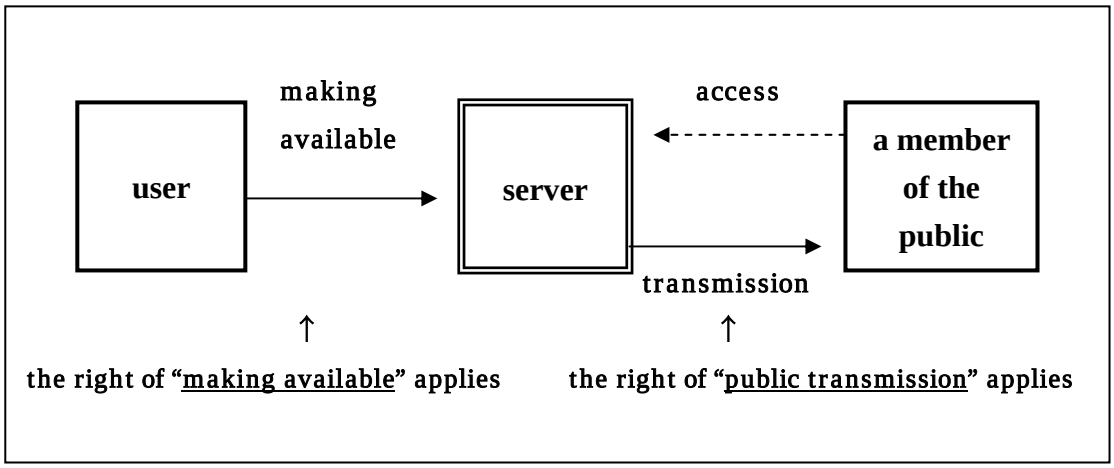

Chart 6

note: If a work is made available in a server without authorization the act constitutes infringement of the right of "making available" even if the work has not yet transmitted. (The right of "public transmission" applies after the transmission from the server takes place upon access.)

Also, Chart 7 below indicates the significance of the change described above. As has been discussed, copyright covers the "perception-contributory acts" including public transmission rather than "perception" itself, because it is absolutely impossible to control the latter act of all end users. This means that copyright has been addressed to the acts in an earlier stage (before perception) than the one (*i.e.* perception) that really creates economic value.

However, the advent of the Internet created a totally new situation in which the act of transmission from a server to the public, which takes place before perception, is also difficult to be found or controlled. It, therefore, became necessary to do the same thing again, namely to cover by copyright another act in a still earlier stage before the transmission from the server. Chart 7 shows such a new movement.

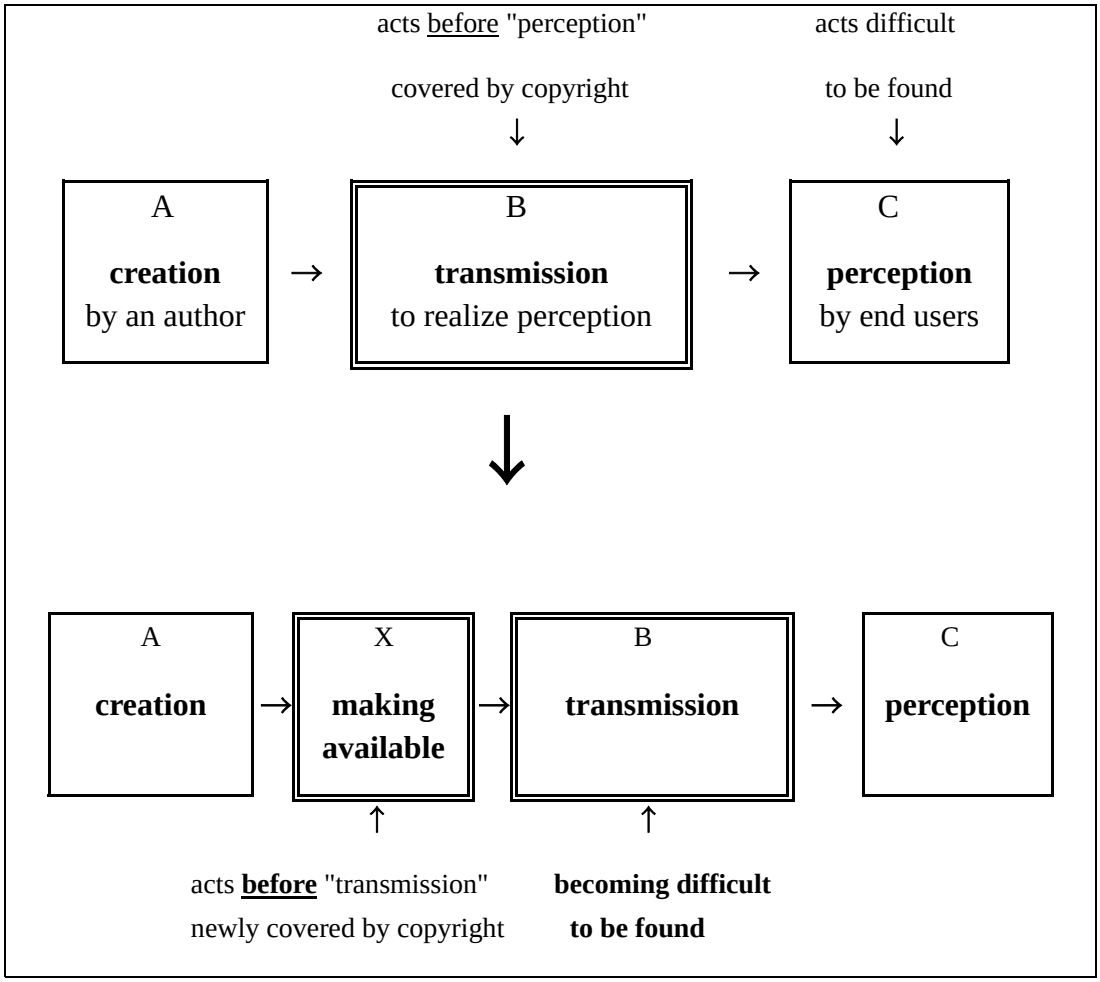

Chart 7

3. New International Rules to Cope with the Impossibility to Find Infringement

The above-mentioned new WIPO treaties adopted in 1996, which are often called the "Internet Treaties", also introduced some other new international norms to cope with the new Internet age.

Copyright is a kind of "private right", which means that no civil/criminal remedy process starts without a claim from a right owner. The right owner of a pirated work should find the infringement by himself/herself, prepare the relevant evidence to be submitted and then go to the police and/or the court. This internationally shared common legal system has been based on the assumption that an author can surely find any infringement easily.

This system used to be appropriate in the past when the majority of works were distributed and used in the form of tangible "copies". Still now for some works which are mainly circulated in the traditional forms of copies, *e.g.* books, it would not be too difficult for an author to look for and find pirated editions of his/her book by taking a leave for three days and running around all big bookshops in the city. The infringer should sell the pirated copies for the sake of his benefit, and this at the same time means that he cannot help showing them to the

public including the author.

However, in terms of digital copies and transmission through the Internet, the *status quo* is now totally different. As mentioned above, pirated books may be found easily, but if a part of a book is copied without authorization and reproduced in a CD it would be almost impossible for the author to find it. Moreover, if a part of a book is copied without authorization and transmitted through the Internet it would be absolutely impossible for the author to find the fact of infringement (unauthorized transmission) *per se*, not to mention the identification of the infringer, the preparation of the evidence and the calculation of the damages.

This new situation is undermining the very basis of the whole copyright system, which has been developed based on the idea that any infringement can be found by the author. With a view to coping with this serious problem, the WIPO's new Internet Treaties established two new legal systems.

To explain the two systems, it might be useful to use a metaphor of a "bicycle left in a park". Even if someone left his bicycle in a park, taking it without authorization would of course constitute a crime. However, if a bicycle is left in a park there could be someone who dares to steal it. The owner, who has the property right of the bicycle, of course can start criminal remedy process by calling the police, however, a better strategy for him/her might be to make some efforts beforehand to cope with a possible theft because it is often difficult even for the police to find a stolen bicycle (also to identify that it is really that bicycle) and arrest the thief afterward.

If someone cannot help leaving a bicycle in a park it should be suggested that he/she do at least two things beforehand to cope with any possible theft. One is to "lock" the bicycle by a latch, a chain, etc. This way he/she can prevent theft beforehand at least to some extent. The other is to put a very small "hidden name plate" on a part of the bicycle which is difficult to be found by a thief. This will make it easier for the owner to find the bicycle after it was stolen as well as to prove that it is really his/hers.

The same thing as the above applies to works in the digital form circulated through the Internet. If the right owner would like to prevent the unauthorized reproduction of his work, he should make efforts to prevent piracy beforehand by "locking" the work by so-called "copy guard". Also, the "hidden name plate" can easily be put in works in digital form, an example of the relevant technologies of which is called "electronic watermark". By making use of such a technology, the right owner can make his/her works accompanied with relevant information, *e.g.* the author's name, the authorized users, etc.

The application of the "copy guard" technologies is becoming indispensable for a lot of works because, as the number of servers in the world is increasing rapidly, it is now difficult for a right owner to look for and find his/her work uploaded (made available)in a server without authorization. This means that the new right of "making available", which was recently/newly made because the right of "public transmission" had become difficult to be exercised, is also becoming difficult to be enforced.

Therefore, it again turned out to be necessary to make further efforts to prevent unauthorized "making available" by addressing a still earlier stage, *viz*. before uploading (making available). Such efforts can be made by applying "copy guard" technologies, because uploading (making available) usually takes place by "storing" a work in a memory within a server. This storing is actually an act of "copying" (reproduction in the server), and therefore, "copy guard" can also function as "transmission guard" by stopping unauthorized uploading.

As those technologies for "copy guard" and "electronic watermark" developed and became widely used among a number of right owners, those who try to cancel, circumvent, delete and/or destroy such technologies, unfortunately, also increased rapidly. With a view to coping with this still new situation, the above-mentioned WIPO's new Internet Treaties (the WCT and WPPT) adopted in 1996 introduced new norms to protect "copy guard" and "electronic watermark".

The relevant technologies are called in the two treaties "technological measures" and "right management information" respectively. As to the "technological measures" including copy guard, the contracting countries of the WCT and/or WPPT should provide by their national laws adequate legal protection and effective legal remedies against the circumvention of effective "technological measures". Examples of such legal protection and remedies are the prohibition of private copying after circumvention and the manufacture, importation, distribution, etc. of circumvention tools/components/programs as well as civil/criminal remedies against such acts.

Also, as to the "rights management information" including electronic watermark, the contracting

parties of the two treaties should provide by their national laws adequate and effective legal remedies against such acts as the removal and alteration of electronic rights management information as well as some other related acts.

This new movement means that the world's copyright system again tried to cover the act taking place in a still earlier stage, and it is shown in Chart 8 below.

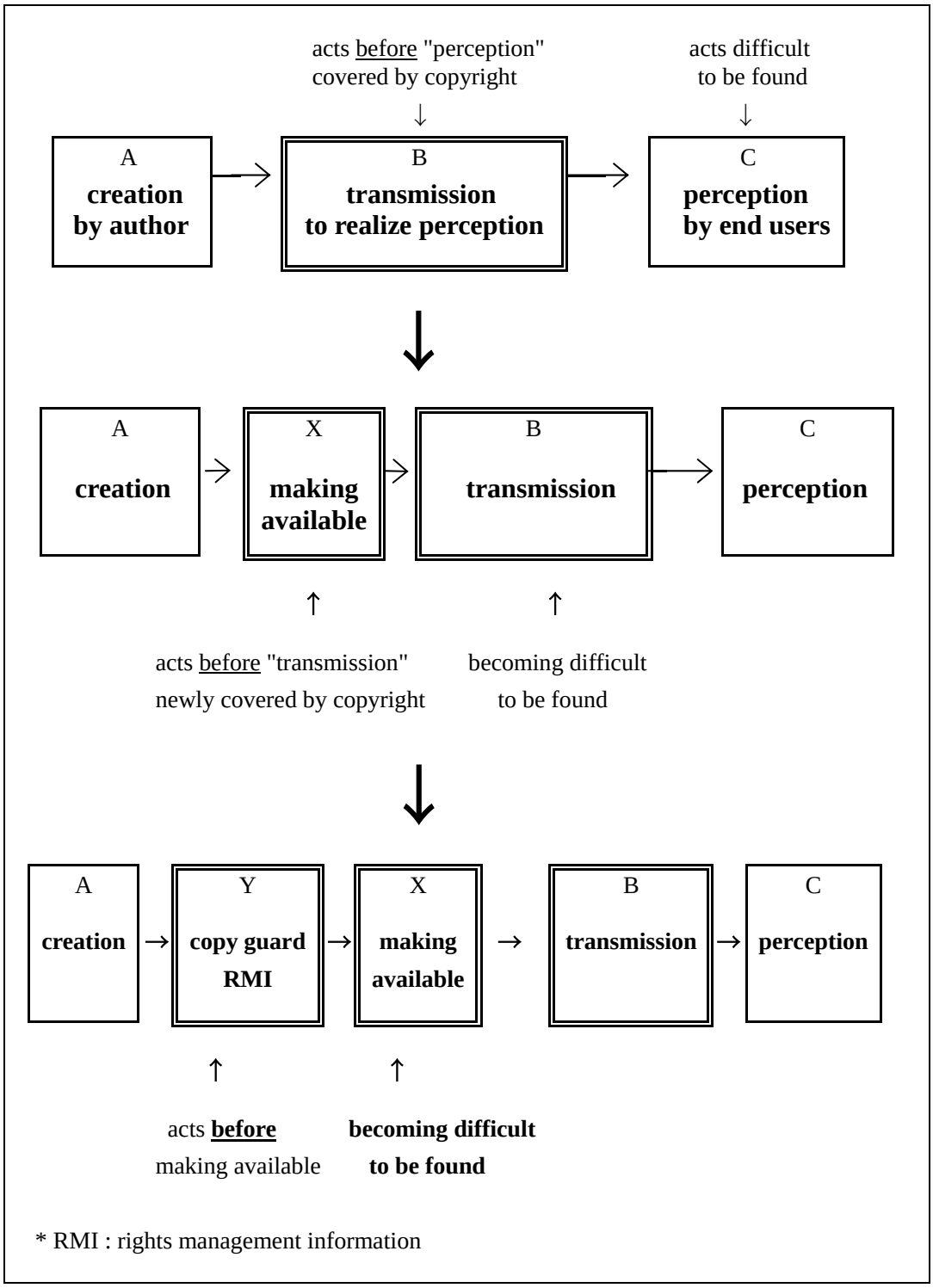

Chart 8

Part II. Implications for Domestic/International Politics

Digital and networking technologies have had significant impacts on not only concrete methods of "communication to the public" (and consequently on the structure and coverage of relevant rights incorporated in copyright) but also the "process of legislation" for norm-setting. The latter impacts and structural changes in terms of norm-setting processes are found in both domestic and international contexts. This part of the present paper will discuss and analyze such impacts and recent changes.

1. Domestic Context: Copyright Norm-Setting as A School of Democracy

Copyright protection started more than 100 years ago, however, it is quite recently that copyright issues are discussed widely by a number of people and taken up as crucial and controversial issues in various occasions. This new movement also stemmed from the rapid development of technologies, which suddenly started recently.

Expansion from "A Limited Number of Professionals" to "All People"

Just a couple of decades ago, the "creators" of economically significant and meaningful works were limited to a small number of professional artists/creators. (Works created by amateurs were also protected, however, they usually did not have a wide range of economic/industrial significance.) Also, as to the "users" of such works, they were limited to a small number of professionals in a small number of industrial enterprises such as publishers, phonogram producers, broadcasters, movie companies, etc. Therefore, those who should know copyright rules and use them in contracts and/or litigation, if necessary, in daily lives and business were limited to an extremely small number of professional people.

However, because of the rapid development of relevant technologies, the number of the people concerned with copyright suddenly expanded to almost all people in any society. Few people now can live, having no relation to copyrighted works nor acts covered by copyright.

The new movement started with the diffusion of devices to exploit (use) copyrighted works. In the past, such devices, *viz*. copying/printing machines, sound recording devices, photo/video cameras, wire/wireless transmission equipments, etc. were all monopolized by a small number of professionals working in specialized companies or organizations. However, it is now quite easy for anyone in the world to obtain such devices. Digital video cameras and personal computers connected to the Internet are symbolic examples, and a number of people now have such machines, being able to do the same thing as the BBC and CNN.

This means that all people suddenly became "users" of pre-existing works, which used to be limited to a small number of professionals. It was, therefore, quite normal that an increasing number of people started to say that works should be used more easily with a lower level of copyright protection.

However, there soon came another contradictory movement by which an increasing number of people started to assert a higher level of the protection of copyright. The above-mentioned devices brought about and diffused by the rapid technological development, e.g. digital video cameras and personal computers, can be used to exploit pre-existing works, however, at the same time they can be used to create new works of the users themselves. An increasing number of people then started to create their own works, noticing that they were also protected by copyright as "creators" (right owners). This made many people claim for stronger copyright protection, *inter alia*, those whose works, which had been uploaded and transmitted through the Internet by themselves, were widely used without authorization.

Attention should be drawn to the following two crucial points in terms of the above new movements: (a) the people concerned with copyright suddenly expanded to almost all people; and (b) they are "users" but at the same time "creators" simultaneously.

Urgent Need to Develop Copyright Education

The above-mentioned new movement calls for, first of all, the development of education systems of copyright rules for all people including children and adults. If the *status quo* is likened to the case of "automobiles", it will be that, while only a limited number of professionals used to drive a car in the past, a number of people now have and drive a car thanks to the development of automobile technologies, however, only few people know relevant traffic rules such as the meaning of traffic lights. This story may make it easier to understand today's extremely dangerous situation, in which a great many people are using digital video cameras and personal computers connected to the Internet without having enough knowledge of copyright

rules. They are always on the edge of infringing the right of others and at the same time being infringed without knowing what infringement is.

Everybody knows that murder and theft are prohibited but few have ever read relevant articles of the Penal Code. Then, why do they know that such acts constitute crimes? It is because parents and teachers have frequently told them not to kill and not to steal. This way, the knowledge of basic rules in a society is transferred from one generation to another spontaneously without reading or learning the relevant articles of the law. However, in the case of the knowledge of copyright rules, as the new situation that everybody is concerned with copyright came about suddenly, neither parents nor teachers are ready to transfer it to the next generation. They do not have the knowledge themselves, either, and they also should learn the same things as children.

This situation and problem are sometimes compared in Japan to that in 1945 in terms of democracy. In 1945 Japan suddenly became a democratic country, overcoming totalitarianism and militarism, however, neither parents nor teachers knew what democracy was, not to mention how to teach it to children. What functioned to cope with this serious problem were the efforts made by education experts in both formal and non-formal sectors. The same efforts are needed now to tackle the similar problems of copyright education, and therefore, the teaching of copyright rules was made compulsory for lower and upper secondary schools in Japan in 2002.

However, the scope of copyright education should not be limited to mere teaching and memorizing of the present legal rules. It should cover at least the following three aspects:

(a) knowledge of the existing legal rules
(b) knowledge and attitude to develop/change legal rules by democratic processes
(c) knowledge, skills and attitude to use legal rules (by contracts and litigation)

Among the above three aspects, (b) seems to be becoming the key factor for the democratic control/development of copyright legislation, and this point will be further developed in the following section.

Inevitable Disparity of Interests: A Challenge to Democracy

One may argue that not only copyright laws but also all the other ones should be established and/or amended by democratic processes and in this sense there is no difference. However, there actually is an extremely important factor to distinguish the two. With regard to such policy issues as environments and social welfare, for example, there seems to be a more or less common/general direction of relevant policies shared by the majority of the people in a given country, *viz*. keeping good environments and developing better social welfare systems. However, in the case of copyright policy/legislation there always is an inevitable and severe disparity of directions between the right owners' side and the users' side.

Moreover, while it is usually the case, when there is a disparity of opinions in terms of certain laws, that some people say the present law is good and some others say it is bad and should be changed, the case of copyright law is always totally different. Namely, everybody on both (creators' and users') sides always says that the present copyright law is horrible and should be amended immediately (though the claimed directions of possible amendments are totally different from each other). This is always the normal situation for the copyright law of any country; *i.e*. no body is satisfied.

It is normal that no one is satisfied and everybody is full of complaints against the copyright law in any country, because the wants of the people are unlimited. On the one hand, users will not be 100% satisfied until the copyright law is abolished and any work can be used freely, while on the other hand, creators always seek for stronger rights for higher income. Moreover, their wants are not only those related to economic benefits but also their goodwill to contribute to the society. Both creators and users of works are more or less contributing to the development of culture, industry, education, etc. of a given society, and therefore, both of them think that they should be granted much better treatment. This "better treatment" means "stronger copyright" to creators and "weaker copyright" to users, *i.e*. always totally different directions.

The above-mentioned new situation with inevitable disparity of interests among all people, which was created by the development of relevant technologies and the diffusion of creating/using devices, made copyright a serious challenge to democracy in any country, because (a) there always is a disparity of interests and no one is satisfied, and (b) copyright is now an issue of all people. It is, therefore, a challenge to democracy of all countries whether the democratic legislation process can overcome the disparity for norm-setting.

A Challenge to Politicians -- Protection of Domestic Works not Covered by Treaties

Another factor, which makes copyright a serious issue of democracy, is the fact that, while the copyright legislation used to be dealt with by a limited number of experts within the government and relevant organizations, it is now an issue to be taken by all politicians. Government officials may function as a coordinator among a limited number of sectors, industries, etc., however, with regard to an issue related to all the people in a country, *inter alia* such an issue as copyright with the big disparity of opinions, it should not be the officials but the democratically and directly elected politicians who take the initiatives of coordination and decision-making.

Therefore, each politician should have detailed (or at least basic) knowledge of copyright systems and relevant practices in business/industry, determine his/her own position in terms of whose interests he/she supports, and clearly indicate the position to the public. Also, the Parliament as a whole should function to cope with this issue by discussing, analyzing, debating and finally making a decision by majority.

One can find in many copyright books a number of plausible explanations on the complexity of copyright laws, however, most of them seem to be just *ex post facto* explanations made by the experts who would like to hide the fact that such complicated provisions are nothing but the results of political compromises.

For example, movie/video companies are communicating "moving images" fixed in films, tapes, DVDs, etc. to the public; phonogram companies are communicating "sounds" fixed in tapes, CDs, etc. to the public; and publishers are communicating "non-moving images" fixed on paper (books) to the public. They are doing basically the same things, however, their legal statuses in the international copyright rule as well as domestic laws in various countries vary as shown in Chart 9 below.

		International Rule	US Law	UK Law
		↓	↓	↓
movie company	⇒	**author's right**	author's right	author's right
phonogram company	⇒	**neighbouring right**	author's right	author's right
publishing company	⇒	**(no right)**	(no right)	neighbouring right

Chart 9

Although phonogram producers are to be granted neighbouring rights according to the international rule (as the minimum obligation), they had a strong political power in the US, and were granted author's right, which is stronger than neighbouring rights. Also, although book publishers are to be granted no right, they were politically strong enough in the UK to be granted certain rights (similar to neighbouring rights). This clearly shows that the debate and decision-making by politicians can and should determine the country's own legal system of copyright.

An extremely important point to be mentioned here is the fact that the international copyright treaties, including the Berne Convention, the Rome Convention, the TRIPS Agreement (a part of the WTO Agreement), the WCT, the WPPT, etc. do not stipulate any obligation to protect domestic works, performances, phonograms or broadcasts. The obligation of contracting countries under the treaties is just to protect such contents of "other contracting countries". Article 5 of the Berne Convention (also incorporated in the TRIPS Agreement), for example, provides for as follows:

Article 5
(3) Protection in the country of origin is governed by domestic law.

As is provided for in the relevant treaties, the protection of domestic works and other contents is at the discretion of each country, and therefore, all the people including *(or inter alia)* politicians in all countries may have to discuss this issue, starting with the question of whether domestic works should be protected by copyright, and, if so, to what extent, for whose benefits, with which exceptions/limitations, etc.

Copyright protection *per se* never has any value at all. All laws, legal systems and policies including those addressed to copyright are nothing but "means" for the ultimate purpose to make people's lives happier and better. Therefore, what should be discussed and identified in Mongolia and other countries, before discussing concrete copyright laws which are just means, seems to be what kind of situation is good for the people as the goal to be pursued.

2. International Context: Copyright Issue as an International Power Game

The international copyright treaties do not proved for any obligation to protect domestic works/contents, however, such treaties are still meaningful to control the domestic laws to protect imported works and other contents. This means that the copyright treaties have been established basically for the benefit of exporting countries of works/contents such as computer programs, phonograms, movies, etc.

For importing countries, lower level of protection would be better, however, because of the strong international political power of exporting countries, the relevant rights provided for in the treaties have been strengthened. In this sense, the issue of the international copyright rule is similar to that of "free trade". For exporting countries free trade is good, however, for importing countries it is not necessarily favourable.

However, it is actually difficult to find any country that is only importing works and never exports. For the works exported from the country, stronger copyright protection (in other countries) would be better. Therefore, the most desirable international legal system for a given country would be the one in which the works created a lot within the country could not be copied in other countries and those created in other countries could be copied freely within it. One can actually find one or two countries which are really pursuing such international copyright rules.

The above means that the inevitable disparity of interests between creators and users, which was already mentioned, exists also in the international context among various countries. In the case of domestic legislation, this disparity could be and should be overcome by the democratic decision-making process in the Parliament (decision by the majority) under the rule determined by the Constitution of the country. However, in the case of international norm-setting there is no Constitution or common rule to govern all countries in the world.

This means that any international rule is established, reflecting the political powers of relevant countries, and the interests of politically stronger countries are better reflected and treated than those of other countries in any treaty. Therefore, with a view to realizing the interests of Mongolia, for example, in the international context, the Mongolian people should: (a) identify what is good for Mongolian people through domestic and democratic deliberations; (b) find political means to cope with the big powers; and (c) seek for an alliance with other countries sharing common interests (if above (b) seems difficult to be pursued alone).

In the first half of 1990s when the WIPO member countries were discussing possible new Internet Treaties, a number of countries made efforts to establish such an alliance to cope with the US, which was the only country that could pursue its national interests independently. For example, the EU member countries of course always spoke collectively; Latin-American countries organized a group called Groulac; African countries got together to form the African Group, overcoming the problems between English-speaking and French-speaking countries; Russia succeeded in organizing a Central European countries' group; and even the four developed countries which did not belong to any of the above groups, viz. Canada, Japan, Australia and New Zealand, organized an informal group called CAJAN.

These groups, as well as "Group B" composed of all developed countries, more or less functioned toward the adoption of the Internet Treaties (WCT/WPPT) in Geneva in 1996, facilitating the discussions by consultations within each group as well as among these groups. However, Asian countries were left behind such a movement to organize groups and they could not get together for any collective action after all.

Looking at this situation toward 1996, the author of the present paper, who was the Director of International Copyright Division of the JCO (Japan Copyright Office) of the Japanese Government, took the initiative to provide an annual occasion for the Asian and Pacific countries at least to get together, to exchange information and to talk each other. The JCO started the "Tokyo Seminar" on copyright and neighbouring rights in 1999, inviting 14 Asian countries including Mongolia and 12 Pacific countries to Tokyo. This effort was expected to turn over a new leaf toward a possible alliance in the Asia-Pacific region in the future.

Technological Development and the Politicization of Copyright Issues

The above-mentioned "politicization" of copyright issues in the international context also stemmed from the technological development. As is symbolized by the fact that the Berne Convention was drafted by European artists including Victor Hugo, the international copyright rule was envisaged, planned and established for the sake of culture, which was believed to have a common value shared by all the people in the world. In other words, the copyright system was made for one common purpose (cultural development) through the protection of individual artists and their works.

However, technological developments gradually changed the above-mentioned very basis of copyright protection. Firstly, protected works have changed from such works as novels, music, drawings, photos, etc. to computer programs, databases, video games and so on. The latter group of works are produced more by companies than individual artists. Secondly, the media used for the most traditional means of the exploitation of works, *i.e.* reproduction, have changed from paper, phonogram discs, cassette tapes, films, etc. to CDs, DVDs, hard disks, etc. The latter group of reproduction media and the devices to use them are mass-produced by firms and are of big interests of relevant industries. Thirdly, the means to exploit works other than reproduction have changed from traditional public performance, broadcasting, cinematographic presentation, etc. to interactive transmission through the Internet, satellite broadcasting, subscription cable distribution and so on. The latter group of communication means to the public are usually implemented on a business basis.

Through such changes, copyright issues, which used to be cultural matters and for individual artists, are now more economic/industrial matters. This new movement is reflected in the composition of the delegations of participating countries in WIPO meetings in Geneva. Among more than 100 delegations, some 30% are from the Ministries of Culture, another 30% are from the Ministries of Industry, still other 30% are from Ministries of Justice with some others from National/Parliament Libraries and other organizations, and the number of delegations from the Ministries of Industry is gradually increasing.

The above discussion is on the recent movement that the nature of copyright issues is changing from culture to the economy. However, there is another movement which, together with the first movement, brought about a new situation that copyright has become one of the crucial issues of international politics. It is that economic issues have become international political issues.

One can find more than 180 independent and sovereign countries in the world, and this sovereignty means that each country can identify its own justice. As has been mentioned, there is no legitimate authority in the world to determine any common justice, and therefore, each country has the right to determine and pursue its own justice and interests.

Such justice and interests used to be pursued often by military actions in the past, however, it has become difficult now to justify any military action in many cases. Therefore, almost all countries changed the strategy to pursue their national interests from military to economic means. In more concrete terms, what is crucial and decisive in the pursuit of the national interests of any country is now whether or not that country succeeds in realizing preferable and favourable (if possible, privileged) environments for international trade.

Putting together the above two movements, *viz.* copyright has become an economic issue; and economic issues have become international political issues, the result should be that copyright has become an international political issue. This is what is happening to copyright now in the international context as is indicated in Chart 10.

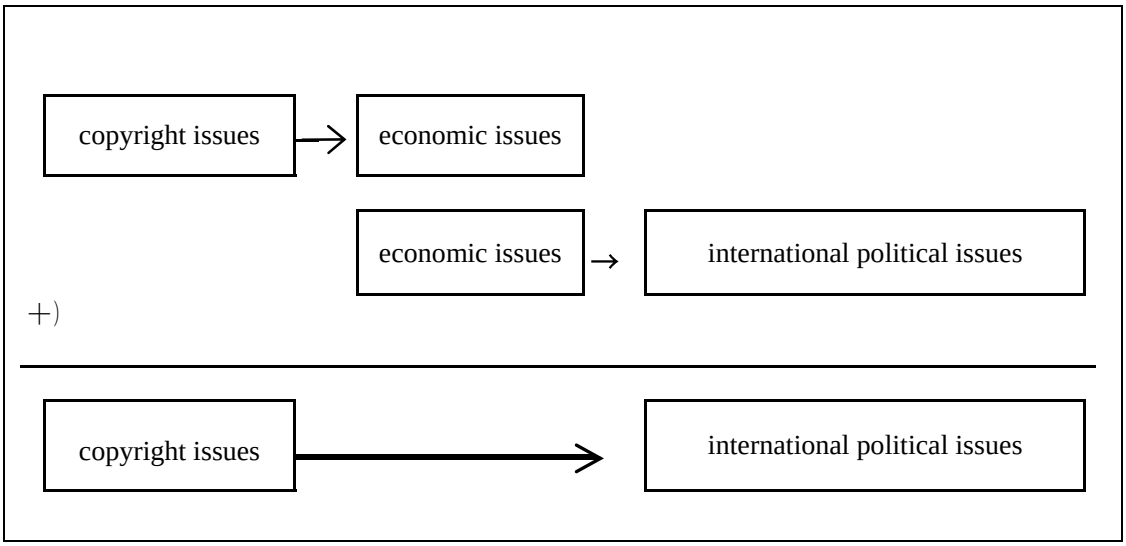

Chart 10

Some say that copyright recently became an international issue, however, this comment is wrong. Copyright has always been an international issue at least from 1886 when the Berne Convention was adopted as the first treaty on copyright. What is really happening now is not the internationalization of copyright issues but rather the international "politicization" of them.

This means, in other words, that the purpose of the international copyright system *per se* (which used to be just one: the development of "culture" with a common value shared by all the people in the world) has now been diversified into "different national interests of different countries". The present international copyright rules have been established and developed by the developed countries, and therefore, it is always those from such countries who explain and try to justify the *status quo*. However, listening to the positions and directions of such people and countries carefully, one can find a big disparity among them *e.g.* between the US and the EU; between the UK/France and the Nordic countries in Europe; etc.

The developing countries used to be simply trying to catch up with the developed countries in terms of copyright legislation. However, as the developed countries are now pursuing different national interests (because of the difference in the trade interests: works and other contents exported and/or imported), the developing countries also have to consider and determine their national interests.

The most typical example of such new movements raised by the developing counties is a possible new treaty for the protection of "folklore". A number of composers, singers, dancers, designers, writers, etc. in the developed countries have been making use of pre-existing traditional things in the developing counties without paying anything at all. This situation as well as the above new international movement made the developing countries aware that they also have the right to claim for international protection of traditional works, knowledge, expressions, etc. However, this effort has not yet succeeded in realizing any concrete treaty to protect folklore. It seems that there should be more efforts toward concrete draft texts of a possible treaty as well as more solidarity and collective actions among the relevant developing countries.

Conclusion

As discussed and analyzed in the present paper, the technological changes have had an extremely wide range of impacts on copyright systems, encompassing from the changes in copying devices to international politics. Facing the changes and reality of the creation, trade and use of various works/contents as well as the *status quo* of domestic and international politics, the people in all countries including Mongolia should think, first of all, of what kind of domestic and international situation would be good for the people as the goal, and then, how it could be achieved.