
Articles

Rethinking the Provisions on Limitations of Rights in the Japanese Copyright Act * – Toward a Japanese-style “Fair Use” Clause –

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Summary

While the Japanese Copyright Act contains provisions on limitations of rights, they merely stipulate specific cases in which an author’s rights shall be limited. Furthermore, these provisions have been strictly interpreted, according to conventionally accepted theories and precedents. This seems to reflect the understanding that the Copyright Act primarily aims to protect authors’ interests and limits authors’ rights only in exceptional cases.

Consequently, there have been many cases where the exploitation of a work at least technically constituted an infringement. In some of these cases, the court found the exploitation at issue to be non-infringing based on various legal grounds. This current practice has raised the concern that courts could inevitably make *ad hoc* judgments.

To improve this situation, it is necessary to examine the possibility of adding a general clause on limitation of rights as a “general saving clause” (“Japanese-style ‘fair use’ clause”) to the end of the existing provisions on limitations of rights. Such a general clause should require specific criteria in order to limit its applicability to some extent. In fact, concrete legislative discussions on the details of such a clause have already been underway in Japan since 2009. These recent developments and discussions in Japan provide an opportunity especially for continental law countries to examine the possibility of introducing a general clause on limitation of rights and deserve attention from the international perspective as well.

The purpose of this paper is to outline the issues and the relevant discussions in Japan and to explore interpretation and legislation as possible solutions.

* This paper is a translated and modified version of the recorded lecture given at the meeting held in Tokyo by the Copyright Research and Information Center on September 19, 2007 (See Tatsuhiko Ueno, Chosakukenhō ni okeru kenriseigenkitei no saikentō –Nihonban fair use no kanōsei– [Rethinking of the provisions on limitations of rights of the Copyright Act –Possibility of the Japanese-style “fair use” clause–], 560 Kopiraito [Copyright] 2 (2007)).

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I. Introduction

1. Background

In recent years, discussions on the provisions on limitations of copyrights have intensified worldwide.^{1,2} The main subject of the discussions has been whether overly strict interpretations of such provisions on limitations of copyrights have caused negative effects. The discussions have covered various issues, such as interpretations that promote flexible applications of provisions on limitations of rights and the three-step test adopted by relevant treaties, as well as legislative measures that promote the establishment of a general clause on limitation of rights.

In tandem with this worldwide trend, Japan has also seen increasing discussions on provisions on limitations of rights, especially since 2007. Japan shares the same concerns with other countries.

The discussions have led the Japanese government to adopt a policy of establishing a general clause on limitation of rights, a so-called "Japanese-style 'fair use' clause".³ Based on this policy, concrete discussions have begun. If such a general clause on limitation of rights is established in the Japanese Copyright Act, it would mark a significant turning point for continental copyright laws as a whole. This is why the establishment of such a general clause would be very important from an international perspective.

Against this background, the purpose of this paper is to outline the issues concerning provisions on limitations of rights in Japan and the relevant discussions in the past, and also to explore interpretation and legislation as possible solutions.

2. Current issues

The Japanese Copyright Act (JCA)⁴ contains provisions that stipulate authors' rights and limit those rights to some extent. Arts. 30 through 49 of the JCA fall under this type of provisions on limitations of copyrights. These provisions limit only copyrights and do not directly affect the author's moral rights (JCA Art. 50). Instead, there are other specific provisions that limit moral rights in substance (JCA Art. 18(2)-(4), Art. 19(2) and (3), Art. 20(2)).

These provisions on limitations of rights are considered to have been established in order to promote fair use of works while protecting authors' rights. For instance, reproductions for private use (JCA Art. 30(1)) and reproductions in libraries (JCA Art. 31) are types of reproductions that do not constitute infringements on the right of reproduction. Provisions on limitations of copyrights following Art. 30 merely stipulate specific cases, in which copyrights shall be limited, for purposes of limitation and not illustration. None of the provisions is equivalent to a general clause such as the fair use provision found in Section 107 of the U.S. copyright law. The German copyright law has the "Freie Benutzung [free use]" provision (Art. 24 of the German Copyright Act), which is, in a sense, a general clause concerning the limitation of author's rights⁵. But there is no such provision in the JCA.

The lack of such a general clause means that the exploitation of a work constitutes a copyright infringement unless the exploitation falls under any of the provisions on limitations of rights stipulating specific cases in which copyrights shall be limited. Furthermore, in conventionally accepted theories and

precedents, provisions on limitations of rights have been considered to be applicable only to “exceptional” cases that inevitably require limitations of rights. Based on this understanding, those provisions have been strictly (narrowly) interpreted.

The provisions on limitations of rights stipulating specific cases in which copyrights shall be limited would not apply unless the requirements are strictly satisfied. This means that any act that fails to satisfy the requirements would be considered an infringement under the JCA. For example, using another person’s work in a parody must be considered a copyright infringement as long as the creative expression presented in the original work remains perceptible in the parody.

The same applies to the author’s moral rights. Although there is no general clause limiting these rights, there are some provisions that limit specific types of moral rights. Conventionally accepted theories and precedents have taken the stance that these provisions on limitations of the author’s moral rights should be interpreted strictly.

For instance, courts have rarely applied Art. 20(2)(iv) of the JCA, which limits the right to maintain integrity. This judicial practice could lead to the interpretation that the aforementioned parodic use of a work infringes not only the copyright but also the author’s moral rights.

In short, while the JCA contains provisions on limitations of rights, these provisions merely stipulate specific cases in which authors’ rights shall be limited. Conventionally accepted theories and precedents have adopted the view that these provisions should be interpreted

strictly. Consequently, any use of a work would constitute an infringement under the JCA unless such use falls under any of the aforementioned provisions on limitations of rights.

In some cases, strictly interpreting these provisions on limitations of rights will cause inconvenience when these provisions are applied to specific cases. In an actual trial, it would not be unusual for a court to judge the use of a work to be non-infringing based on various legal grounds. For example, a court may broadly interpret an existing provision on limitation of rights, apply such a provision by analogy, or find an abuse of a right or an implicit authorization.

However, the fact that conventionally accepted theories and precedents deem the use of a work to constitute an infringement of rights would significantly discourage such use. It would be a longstanding hope of legal practitioners to finally stop saying, “It constitutes an infringement, at least strictly speaking,” to those who seek their legal advice.

The purpose of this paper is to explore interpretation as solutions to these problems. And for problems that interpretation cannot solve, legislative measures will also be discussed.

II. Conventional Arguments

First, I will analyze strict interpretations of provisions on limitations of rights and the reason for employing such interpretations.

1. Strict interpretations of provisions on limitations of copyrights

In conventionally accepted theories and precedents, it has been widely be-

lieved that the JCA's provisions on limitations of rights should be considered as "exceptions" to the primary principle of the Copyright Act: "The Act primarily aims to protect authors." Therefore, according to conventionally accepted theories and precedents, all of those provisions should be subject to strict interpretation. The following is the most typical example, cited from the former of two textbooks by Professor Hiroshi Saitô:

Professor Saitô states, "Even if the Act seeks fair use, the Act still places primary emphasis on protection of rights. Rights are limited only in exceptional cases where certain criteria are satisfied. Therefore, when we interpret or apply provisions on limitations of rights such as Art. 30, we need to keep in mind that these provisions are 'exceptional.' Naturally, we need to interpret and apply these provisions as strictly as possible."⁶

2. Strict interpretations of provisions on limitations of moral rights

Similarly, in conventionally accepted theories and precedents, the provisions on limitations of author's moral rights have been considered "exceptional" and thus have been interpreted strictly. This way of thinking is most clearly reflected in Art. 20(2), which limits the right to maintain integrity.

In conventionally accepted theories and precedents, Art. 20(2) has been interpreted strictly. The exemption of application specified in the Article is permitted only in exceptional cases. For example, the JCA drafter said that "(JCA Art. 20(2)) aims to permit truly unavoidable modification to a minimum degree and to prevent the right to maintain integrity specified in paragraph (1) from being exercised against such modification. In

this sense, the items of this paragraph should be interpreted and applied in a quite strict manner. Broad interpretation of these items should be carefully avoided."⁷

In particular, since Art. 20(2)(iv), which specifies that "in addition to those listed in the preceding three items, modifications that are considered unavoidable in light of the nature of a work as well as the purpose of and the manner of its exploitation," is a general clause, "extremely strict interpretation and application" of this provision has been required due to its vague scope of application.⁸ Professor Saitô also mentioned that, "This provision requires careful interpretation and application because it contains ambiguous, uncertain expressions. Based on the understanding that Art. 20(2)(iii) [item (iv) of the current Act – Noted by the person who made the quotation] is an exceptional provision that inevitably limits the author's right to maintain integrity, it would be impossible to limit said right to a great extent based on said item."⁹

III. Problems Caused by Strict Interpretations

As mentioned earlier, conventionally accepted theories and precedents have advocated strict interpretations of the provisions on limitations of rights of the JCA. However, such interpretations must be reconsidered for both theoretical and practical reasons.

1. Theoretical problems

Conventionally accepted theories and precedents have advocated strict interpretations of the provisions on limitations

of rights, based on the understanding that such provisions are “exceptions” to the major principle of the JCA, i.e., that “The Act primarily aims to protect authors,” and therefore that all of these provisions must be strictly interpreted.

It is understandable to advocate the theory of strict interpretation of exceptional provisions.¹⁰ However, strict interpretations of the provisions on limitations of rights based on these grounds would be inappropriate unless such provisions on limitations of rights are proven to be really “exceptional.”

According to conventionally accepted theories, it has widely been accepted that the “principle” is to protect authors’ rights and that any limitation on rights (in other words, permission for “fair use”) is “exceptional.”

The following is a quotation from the aforementioned textbook written by Professor Saitô:

“When permitting fair use of cultural properties, it would be inappropriate to consider protection of rights in contrast with fair use. Art. 1 of the JCA, which specifies ‘The purpose of this Act is to secure protection of the rights of authors, while giving due regard to the fair exploitation of these cultural products,’ might, at first glance, give an impression that the fair use of a work and the protection of rights of authors, etc., should be pursued in parallel or that due regard to the fair exploitation would be a prerequisite for protection of the rights of authors, etc. However, such impression is incorrect. The Copyright Act primarily aims to protect the rights of authors, etc. Even though the Act requires due regard to the fair exploitation, the rights of authors may be limited only in exceptional cases because the Act primarily

aims to protect rights. Therefore, when interpreting and applying provisions on limitations of rights including Art. 30, we need to keep in mind that those provisions are ‘exceptional’”.¹¹

The same way of thinking may be observed in the legislative process of establishing Art. 20(2)(iv) (item (iii) of the original version of the current Act) of the JCA, which is a general clause specifying that an “unavoidable” modification would not constitute an infringement of the right to maintain integrity. In the course of the legislative process, right holders were concerned that the broad interpretation of this provision would leave the author’s moral rights practically without substance. This was why authors strongly opposed the introduction of such an item.¹² Professor Saitô was one of those opponents at that time. He criticized the introduction of Act. 20(2)(iv) by saying that it “places too much importance on the use of works”¹³ and that “The meaning of the ambiguous concept could gradually expand and consequently limit the author’s moral rights to a great extent. It is problematic to introduce a general clause as a provision on limitation of rights.”¹⁴

In response, the governmental committee countered that such a provision would be subject to narrow interpretation¹⁵. The committee based its argument on its interpretation of Art. 1 [Purpose] of the JCA, insisting that the “Copyright Act primarily aims to protect authors.” In response to the criticism that the term “giving due regard to the fair exploitation” contained in Art. 1 prevented authors from receiving sufficient protection, the Deputy Commissioner for Cultural Affairs Kenji Adachi repeatedly explained that the comma at the end of

the phrase, “while giving due regard to the fair exploitation of these cultural products,” clearly indicated that the protection of authors came before “fair use.”¹⁶

It is unclear how the insertion of a comma actually modified the meaning of the provision, but his explanation succeeded in silencing the opponents.¹⁷

These facts suggest that strict interpretations of the provisions on limitations of rights have been supported based on the premises that the JCA “primarily aims to protect authors” in principle and that authors’ interests should inherently come before users’ interests. These premises have been consistently supported since the legislative stage and have influenced various interpretations of the JCA.

Based on the premise that the “protection” of authors is more important than “fair use” of works, the provisions on limitations of rights would naturally be considered to be “exceptional.” Consequently, such exceptional provisions would require strict interpretation.

However, times have changed since the establishment of the JCA. By now, the JCA has fully established its presence in society. Moreover, technological developments and the prevalence of digital technology and networking technology have made it possible for ordinary people to exploit works (such as reproduction and public transmission) in a way that used to be technically possible only for certain companies (for example, broadcasters and publishers). For instance, any person can easily create a DVD or transmit a work to the public through the Internet. As a result, acts that are “technically” possible for any person to conduct are “legally” prohibited by the JCA. In a

sense, the era in which one simply expects the Copyright Act to stipulate how to protect the author’s rights is over. Today, the Copyright Act faces a new challenge of preventing overprotection and its adverse effects.¹⁸

Against this background, the key is to maintain a proper balance between protecting authors’ rights and the freedom of users. In recent years, discussions on the balance between the protection and the use of works have intensified.

In my opinion, authors’ rights and users’ rights are both derived from the fundamental rights specified in the Constitution. These two types of fundamental rights have been in conflict with each other without explicit rules to prevent such conflict. In order to settle such a conflict, it would be necessary to strike a balance between the two different principles. A proper balance would be achieved through the Copyright Act, which is a private law, and appropriate interpretation thereof. In this respect, it is not predetermined which type of rights comes before others.¹⁹

Based on the understanding that the purpose of the JCA is to maintain a balance between authors and users, we should not unquestioningly accept the premise that the JCA “primarily aims to protect authors”. We must also review the long-standing practice of placing a higher priority on protection of authors’ rights in Japan.

Based on these grounds, it is theoretically problematic to adopt the premise reflected in conventionally accepted theories and precedents that all the provisions on limitations of rights should be strictly interpreted because they are “exceptions” to the principle of the JCA.

2. Practical problems

Strict interpretations of the JCA's provisions on limitations of rights have caused practical problems in many cases. In some cases, such interpretations may be considered inconvenient or inappropriate in a practical sense.

(1) Provisions on limitations of copyrights

Strict interpretations of provisions on limitations of copyrights could cause various problems.

(i) Art. 30 of the JCA (Reproduction for private use)

Art. 30 of the JCA is a provision concerning reproduction for private use. Paragraph (1) of said Article stipulates that "Except in the cases listed below, it shall be permissible for the user of a work that is the subject of a copyright to reproduce the work for his personal use or family use or other equivalent uses within a limited scope." While this paragraph permits reproduction for private use, the scope of "his personal use or family use or other equivalent uses within a limited scope" (in short, "private use") has often been a subject of dispute.

(a) In-house reproduction

According to conventionally accepted theories and precedents, reproducing a work for use in an organization such as a company is not considered to be a reproduction for private use in principle regardless of the scale of the reproduction, etc. The JCA drafter said, "The legality of an act of reproducing a work for internal use by a company, etc., has often been debated. It should be noted that such an act of reproduction does not fall under 'other equivalent uses within a limited

scope' specified in the Copyright Act."²⁰ There is, in fact, a court decision where the court found that an "act of reproducing a work for internal business use by an organization such as a company" should not be regarded as reproduction for private use.²¹

Based on this interpretation, copying a news article or a book for use within a company would not fall under Art. 30(1), and it therefore requires the right holder's authorization. In fact, in some cases, a company may obtain comprehensive authorizations to permit internal reproduction of a certain number of works from the Japan Reprographic Rights Center²² or by individual agreement with right holders.²³

Strictly speaking, however, there must be many cases in which works are reproduced in a company without due authorization. According to the JCA, the term "reproduction" means "reproduction in a tangible form" (JCA Art. 2(1)(xv)). Based on this definition, an act of printing out another company's website or storing information from the website on a hard disk should be regarded as an in-house reproduction. Therefore, such an act constitutes a violation of the right of reproduction, at least technically speaking. This interpretation also applies to an act of "creating a file by compiling copies of such parts of books purchased by a department that are relevant to the ongoing project"²⁴ and an act of "sending copies of some pages of a book purchased by a department in response to a request from the department director participating in a meeting at a remote location."²⁵

Considering the current situation, it is appropriate to review the interpretation that the in-house reproduction of a work by an organization such as a company

never fulfills the criteria required by Art. 30(1). In fact, in dealing with cases of in-house reproduction by companies, Professor Tamura has suggested applying Art. 30(1) by analogy or asserting a claim for an abuse of rights.²⁶ Although the right of reproduction may cover an act of printing out an image of a company's website, the fact that a company created the website implies that it has granted an implicit authorization to a website visitor for the reproduction of information from the website.²⁷ As Professor Tamura points out, if the website of a company displays a person's work without his or her authorization, the company itself has no right to authorize the exploitation of the work.²⁸ In this case, the aforementioned presumption of implicit authorization would not provide a sufficient justification.

(b) Video libraries

Art. 30(1) also raises the issue of video libraries. According to the JCA drafter, the purpose of the Article is to "permit a small amount of reproduction for use in a closed private realm."²⁹ Based on this interpretation, reproduction for private use would constitute a copyright infringement unless the amount of reproduction is "small." The drafter said that "An act of recording TV programs and keeping them as video library collections at home, even if those recordings have been made only for private use, would not meet the requirement in the Berne Convention, which permits reproduction of a work as long as 'such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.' This is based on the understanding that the purpose of this

Article is to permit a small-scale exploitation of a work within a closed realm. Therefore, based on a strict interpretation of this Article, excessive exploitation should be prohibited under this Article."³⁰

Based on this interpretation, recording and storing many TV programs using a home hard-disk recorder would constitute an infringement of the right of reproduction, even if the recordings have been made only for personal use. This suggests that the drafter's interpretation of the Article has been stricter than the literal interpretation of the Article.

(ii) Art. 31 of the JCA (Reproduction in libraries)

Art. 31 of the JCA stipulates that, "in the following cases, it shall be permissible to reproduce a work included in library materials (in this Article, "library materials" means books, documents and other materials held in libraries, etc.) as an activity falling within the scope of the non-profit-making activities of libraries, etc."

(a) "Part" of a work

Item (i) of Art. 31 specifies application "where, in response to the request of a user of a library, etc. and for the purpose of his research or study, such user is furnished with a single reproduction of (a) a part of a work already made public, or (b) in the case of an individual work reproduced in a periodical already published for a considerable period of time, all of such individual work."

In this Article, according to the JCA drafter, the term "a part of a work" means "at least, a half or smaller portion of an entire work".³¹ Therefore, it has been interpreted that, except for a "periodical"

(mentioned in parentheses in said item), the reproduction of a part or a couple of pages of a novel or an academic paper would be permissible, while reproduction of a half or larger part of an entire work would be prohibited. For example, the reproduction of an article within an encyclopedia would be prohibited because each article has a different author and thus constitutes an “individual work” in its entirety.³²

Currently, a user of the National Diet Library can send a request to the library through the Internet and obtain a copy of a document by post.³³ In fact, I am one of the regular users of this convenient service. The other day, I had an urgent need to read a paper occupying a couple of pages of a certain book and sent a request to the library through the Internet for a copy of the paper. I was disappointed to receive a refusal from the library by fax. The fax message explained that the paper, which occupied only a small part of the book consisting of a collection of papers, should be regarded as an individual work and, that reproduction of the entire paper was prohibited while reproduction of a half or smaller portion of the paper would be permissible.

Analogously to the example above, a library would be permitted to copy only a half or smaller portion of a paper contained in a collection of papers. This interpretation would apply to a book entitled “Selection of 100 precedents [Hanrei hyakusen],” a series of collections of papers each occupying a two-page spread, that is popular in Japan. Since each two-page paper is regarded as an individual work, a library is permitted to copy only one page of each two-page paper from the “Selection of 100 precedents” in order to comply with the rule that permits

reproduction of only a “half or a smaller portion of an entire work.”

Regarding this general practice of interpreting a “part” as a “half or a smaller portion of an entire work,” the JCA drafter even mentioned that: “In the case of an indivisible work, such as a photographic work, or an artistic work, such as a painting, reproduction of a part of such a work would be meaningless and even raise the issue of infringement of the right to maintain integrity. For this reason, such a work would rarely be reproduced in practice.”³⁴

This interpretation, which seems problematic to begin with, would raise the following problem. If I were to copy a part (a few pages) of a novel for research or study and one of the pages happened to carry an illustration, the copies of those pages would include an “entire” artistic work, i.e., a book illustration, and I would technically not be permitted to copy those pages. Strictly speaking, copying those pages would be permitted only if the part carrying the illustration is, for example, covered by a piece of paper. This would greatly increase the workload of the person making such copies.

For instance, in the case of a book consisting of a collection of *haikus*, which is a form of Japanese poetry consisting of 17 *moras*, a copy of one page out of such a book would contain many *haikus* in their entirety, each of which may be considered an individual work. Based on the interpretation that one *haiku* is an individual work, a library would be permitted to copy only a “part,” i.e., a “half or smaller portion,” of an entire *haiku*. This means that only a part of a *haiku* can be copied, which is absolutely meaningless.

Furthermore, in the case of a dictionary consisting of many articles, each of which may often be regarded as an individual work, only a half or smaller portion of each article may be copied at a library. Such a copy of a portion of an article would not be useful for “research or study.”

These examples raise difficult questions on how to determine what constitutes “a work” or “one unit of a work”³⁵. Although this difficult question cannot be explored in this paper in detail, the drafter’s interpretation of Art. 31(i) would cause inconveniences, as described above.

Strangely, if one were to borrow a book from a library and copy it at a convenience store, Art. 30(1) would apply, whereas Art. 31 would apply to a reproduction of a work at a library. This means that the reproduction of an entire book would be permissible at a convenience store as long as it is for private use.³⁶

Against this background, five organizations, including the Japan Library Association, and six organizations of right holders created a guideline entitled “Chosakubutsu no utsurikomi ni kansuru guideline [Guideline for incidental inclusion of a work]” (January 1, 2006).³⁷ This guideline specifies that “When a library makes a hardcopy of a work by a copier in response to a user request, the library is permitted to reproduce only a part of the work (hereinafter referred to as the “subject of reproduction”). If the copy of a certain page (one page constitutes one unit of reproduction in principle) includes a copy of a work other than the subject of reproduction (incidental inclusion), the library is not required to obtain the right holder’s

authorization and is not required to prevent such an incidental inclusion by covering up the parts other than the subject of reproduction.”

According to the Q&A section of this guideline, “When copying a page carrying more than one work,” “a library is permitted to copy the entire page if it is difficult to copy only a specific work independently.”³⁸ Based on this interpretation, a library is permitted to copy a whole page of a dictionary or a collection of *haikus*.

However, since this guideline was created based on the principle that only a “part” of a work can be copied, a library would be prohibited from copying a two-page spread from the “Selection of 100 precedents.”

Furtherer discussion would be necessary to determine whether certain measures must be taken to resolve these issues.

(b) Web archives

Art. 31 has raised issues regarding web archives as well.

Since the provisions on limitations of rights are interpreted as stipulating the only specific cases in which copyrights shall be limited, Art. 31 permits reproduction only if it falls under any of the items (i) through (iii). While item (ii) permits reproduction where “the reproduction is necessary for the purpose of preserving library materials,” it would prohibit the archiving of websites created all over the world.

Currently, the National Diet Library is implementing a project called WARP (Web Archiving Project),³⁹ a project involving obtaining the authorizations of right holders before adding their websites to its archive.⁴⁰

In the United States, the Internet Archive is operating a very useful Web archive called the “Wayback Machine,”⁴¹ which is an archive of websites from all over the world recorded at certain points in time since 1996.

However, because Japan has no fair use provision, creating a similar web archive in Japan would constitute an infringement of the right of reproduction and the right of public transmission.

(c) Public transmission

Art. 31 merely permits “reproduction”. The general interpretation has been that a library is permitted to send a copy of a work to another library or a user by post but is prohibited from sending it by fax or e-mail. To remedy this inconvenience, discussions are underway regarding the possibility of revising this provision.⁴²

Internet archives have raised issues regarding public transmission. For example, the National Diet Library has made the “Digital Library from the Meiji Era” available to the public through the Internet.⁴³ The Library contains the entire texts of the library’s collection of books that were published during the Meiji and Taishō eras in Japan (1868-1926). This project is very meaningful. Even though a library may add a work whose term of protection has expired to its collection without any restrictions, it must obtain the right holder’s authorization before adding any work whose term of protection has not yet expired. In the case of an orphan work whose copyright holder is unknown, a judicial ruling must be obtained (JCA Art. 67).

There is an archive called “Aozora Bunko [Blue Sky Library]” on the Internet that was created by a private volun-

teer organization.⁴⁴ This archive does not fall under the category of “libraries, etc.” specified in Art. 31. Aozora Bunko engages not only in reproduction but also in public transmission. Since such activities are outside the scope of the Article, Aozora Bunko must obtain the right holder’s authorization or the ruling of the Commissioner of the Agency for Cultural Affairs to add to its archive any work whose copyright has not yet expired.

It would be safe to say that these web archives are useful for the public. If the provisions on limitations of rights are found to be too strict, some legislative measures should be taken.

(iii) Art. 32 of the JCA (Quotations)

Art. 32(1) stipulates that “It shall be permissible to quote from and thereby exploit a work already made public, provided that such quotation is compatible with fair practice and to the extent justified by the purpose of the quotation, such as news reporting, critique or research.” Since the term “exploit” is used in this provision, any type of “exploitation” is in principle permissible, such as a quotation, recitation, screen presentation, public transmission, etc. In this sense, this provision is broader than the JCA’s other provisions on limitations of rights in terms of the scope of its applicability.

(a) Two-requirements theory

In conventionally accepted theories and precedents, for a certain type of exploitation to qualify as a “quotation,” it must meet two requirements. The Supreme Court first developed these requirements in the so-called *Parody Case*.⁴⁵ They are: (i) clear distinctiveness (meaning that the quoting work is clearly distinguishable from the quoted work)

and (ii) master-servant relationship (meaning that the quoting work is superior, while the quoted work is subordinate). Since then, courts have also adopted this two-requirements theory in principle.

Some conventionally accepted theories and precedents have discussed the possibility of adding another requirement to the two requirements.⁴⁶ For example, many of them require the scope of a quotation to be “very minimal”⁴⁷ or require a quotation to be “indispensable” or “necessary.”⁴⁸

If a quotation is required to be “indispensable” or “necessary” or if the scope of the quotation is required to be “very minimal,” the applicability of Art. 32 would be very limited. For instance, in the course of posting a comment on his blog about a current event (e.g., the 9.11 terrorist attacks), if a person copies and pastes a photograph that he obtained from an online newspaper website (such as a photograph of the World Trade Center in flames), Art. 32(1) would apply only if the purpose of quoting the photographic work is to review the photograph itself. More often than not, however, the purpose of quoting the photograph is not to review the photograph *per se* but to discuss the terrorist attacks shown in the photograph. In this case, the quoting work – that is, the blog post – is not directly reviewing the quoted work, the photograph. Furthermore, such a quotation is neither “indispensable” nor “necessary.” Technically, however, such a quotation of the photograph for use on the blog would constitute a copyright infringement.

(b) Reconstruction of the requirements for quotation

In recent years, various interpretations were established with regard to quotations.⁴⁹

Art. 32 permits quotations to the “extent justified” but not to the “extent necessary.” Therefore, the conventional interpretation that the Article requires quotations to be “very minimal” and “necessary” is stricter than a literal interpretation of this paragraph.

In my opinion, since the two-requirements theory was developed when the former JCA was in effect, the theory is outdated, as demonstrated by the great differences between the former Act and the current Act in terms of wording. Therefore, the two-requirements theory must be reconstructed.⁵⁰ In fact, many recently-made court decisions were based on a literal interpretation of Art. 32(1).⁵¹ Such an interpretation would permit the following quotation.

For example, when a person posts on a website a review of a piece of music or performance recorded in a CD, he might also want to post an image of the CD jacket beside the review. In this case, the subject of review is the musical work on the CD and not the jacket as a work of art independent of the musical work. Likewise, the review is not directly related to the jacket. However, it is common for an image of the CD jacket to accompany a review of a piece of music or performance recorded in the CD jacket. Such a quotation should be regarded as “compatible with fair practice” and “to the extent justified”.

(c) Parody

A literal interpretation of Art. 32(1) could make said Article applicable not only to “review-type” quotations (where the quoting work is required to be expressed in language and must be clearly distinguishable from the quoted work) but also to other cases. For instance, the Article could permit “incorporated-type” quotations (meaning that there is no clear distinction between the quoting work and the quoted work) such as a parody and quotations where the quoting work is not a literary work.

Professor Tamura recognized the applicability of Art. 32(1) to certain types of parodies, observing that “‘incorporated-type’ quotations should be permitted as long as the following three criteria are satisfied: (i) the quotation in question is inevitable and irreplaceable by any other means in order to achieve the purpose of expressing the quoting work, (ii) the quotation is limited to a very minimal amount, and (iii) the copyright holder suffers only a slight economic disadvantage.”⁵²

In some cases, U.S. courts have permitted certain works comprising of parody based on the fair use doctrine. In France, there is an explicit provision concerning parodies (Art. L112-5(4) of the French Intellectual Property Code). In German Copyright Law, parodies are addressed in Art. 24 (Freie Benutzung [Free Use]).⁵³ In contrast, the JCA does not have a provision applicable to parodies. This is why the aforementioned interpretation is necessary to deem a parody to be non-infringing.⁵⁴

(d) Internet auction

Internet auction websites raise other issues. For example, when a person uses an auction website to sell a painting that

he owns, it is common to photograph the painting and post its image onto the website. If he does not have a copyright to the painting, as is often the case, his action may potentially be regarded as an unauthorized public transmission of another’s work. Since the purpose of posting the image is not to review the painting, the seller’s action would not be subject to Art. 32(1) and would therefore constitute an infringement of the right of public transmission.

Now, should this seller be prohibited from posting the image, viewers of the auction webpage would not have the opportunity to see the painting prior to bidding. To prevent such an inconvenience, Professor Tamura has proposed an interpretation that permits the act of posting a “thumbnail” image of a painting on an auction website, on the grounds that such an act may be regarded as a quotation permitted under Art. 32(1).⁵⁵

Regarding the aforementioned scenario, a new provision on limitation of rights (JCA Art. 47-2 after January 1, 2010) has been established in the recent amendments of the JCA that will be enacted on August 19, 2009 and will come into effect as of January 1, 2010.

(iv) Art. 41 of the JCA (Reporting of current events)

Art. 41 of the JCA specifies that, “For the purpose of reporting current events by means of photography, cinematography, broadcast or otherwise, it shall be permissible to reproduce a work involved in such event or a work seen or heard in the course of the event, and to exploit any such work in conjunction with the reporting of such event, in each case to the extent justified for purposes of news reporting.”

For instance, in order to report a theft of a painting from a museum, it is permissible to broadcast an image or publish a photograph of the stolen painting (i.e., the “work involved in such event”) in a newspaper. It is also permissible for the media to broadcast images of other works of art (i.e., works “seen or heard of in the course of the event”) that were on display inside the robbed museum.⁵⁶

(a) Current events

With respect to the reporting of current events, Art. 41 permits the exploitation both of a work that is an integral part of an event as well as other works that may necessarily appear in the course of reporting.

Generally, the phrase “reporting current events” has been interpreted to mean that the event in question must have the “character of news.” Therefore, this Article would not apply to the reporting of a subject that is valuable only as an historical record.⁵⁷ For example, the Article would not be applicable to the shooting and broadcasting images of the permanent collection of a museum unless relevant “current events” were taking place at the museum.

(b) Incidental inclusion

This interpretation raises the issue of the so-called incidental inclusion of a work. For instance, when filming an interview for television broadcasting, if a piece of art on the wall in the background behind the interviewee happens to be included in the clip, the unauthorized broadcasting of the artwork could constitute an infringement of the right of broadcasting. This is because Art. 41 is not applicable to a work that does not qualify

as a “work seen or heard in the course of the event” as specified in the Article.

Such incidental inclusion of a work as a background image could technically constitute an act of broadcasting a work. However, such an exploitation is merely incidental. Since there is no intention to exploit the artistic work itself, some argue that such an inclusion should be permitted. In fact, the JCA drafter himself cited an example of a case “where a TV video clip or a photograph of an interview with a celebrity conducted in a reception room inevitably includes an image of a painting hung on the wall behind the celebrity.” The drafter mentioned that, “even if an apparent image of a painting is included in the background of the main photographic subject, such inclusion would be too insignificant to be regarded as actual exploitation of a work. Such inclusion is outside the scope of copyright,” and said further: “To begin with, an insignificant appearance of an image of a work in the background is not deemed to be an actual exploitation of a work.”⁵⁸

The JCA drafter’s explanation that the exploitation at issue is “too insignificant to be regarded as actual exploitation” has no clear legal basis. Instead, these explanations only show the drafter’s subjective conclusion that such an “incidental” inclusion does not constitute a copyright infringement.

On another occasion, however, the drafter also commented that “it would be another story if the painting in the background were intentionally brought into focus.”⁵⁹ This comment has made me wonder what the value or sense of balance is behind the drafter’s interpretations and what exactly was going on in his mind when he made such interpreta-

tions. It is necessary to recognize that such interpretations were made based on subjective value judgments and to identify the components thereof.

There is a court decision called the *Lighting Catalog Case* that involves the incidental inclusion of an image of a piece of artwork in the background of a photograph. In this case, a work of calligraphy written as “雪月花” (*Setsugekka*), meaning “snow, moon and flower”, happened to be included in the background of a photograph taken for use in a catalogue of lighting equipment.⁶⁰ While it is true that an image of the plaintiff’s calligraphy was included in the catalogue, the image was extremely small and only comprised a part of the background.

In this case, the court found the inclusion to be non-infringing, based on the grounds that it was difficult to perceive directly the creative expression of the disputed calligraphy, namely, artistic elements such as the tone and variations in the color of the black ink and the force of the brushwork (Figure 1).

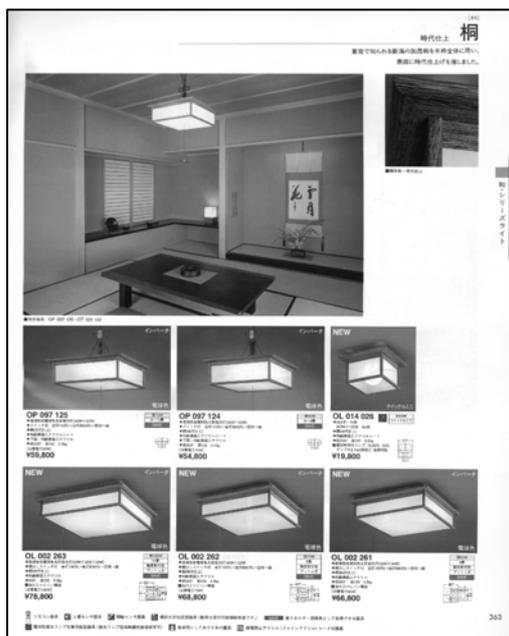


Figure 1

Other countries’ copyright laws have provisions that explicitly state that incidental inclusions of works shall not constitute copyright infringements.⁶¹ Since the JCA lacks such a provision, the aforementioned incidental inclusion in *Lighting Catalogue* constitutes a copyright infringement, at least technically speaking. As mentioned, the court decision found the inclusion to be non-infringing based on the so-called “theory on direct perception of essentiality of works.”⁶² Nevertheless, this interpretation would not be applicable to all instances where a work is included as part of a background. Therefore, further study is necessary.

(v) **Art. 43 of the JCA (Exploitation by means of translation, adaptation, etc.)**

The JCA’s provisions on limitations of rights, such as Art. 30 and thereafter, permit certain types of exploitation (e.g., reproduction). When a provision on limitation of rights permits the exploitation of a work, it is necessary in some cases not only to exploit the work without any modification but also either to create a derivative work by means of translation or adaptation, or to exploit such a derivative work in itself.

In particular, Art. 43 lists certain types of exploitations permitted under the provisions on limitations of rights and permits such exploitations to be made not only without modification but also by means of translation, adaptation, etc.

For example, any person who reproduces a work at home for personal use (JCA Art. 30(1)) is permitted to reproduce it by means of translation, arrange-

ment, transformation, and adaptation pursuant to Art. 43(i). Any person who quotes the work of another person (JCA Art. 32(1)) is permitted to quote it by means of translation under Art. 43(ii).

Based on the understanding that the provisions on limitations of rights stipulate only specific cases in which copyrights shall be limited, Art. 43 would be subject to interpretation by *argumentum a contrario*. Consequently, any act not listed in the Article may not be permitted under it.

(a) Arrangements in nonprofit performances

Since, for example, nonprofit and free performances are permitted under Art. 38(1), a person may publicly perform another person's work in a free concert at a school festival. However, Art. 38(1) is not addressed in Art. 43. Consequently, a person is permitted to provide a nonprofit and free performance of another person's musical work at a school festival but is prohibited from arranging the work, which is also the JCA drafter's interpretation.⁶³

However, under the JCA, any modification of an existing work by adding a creative expression is regarded as an arrangement of a work. But, it is not easy to give a performance without any arrangement of the work whatsoever.

Regarding this issue, the JCA drafter states, "A musical work, especially popular music, is sometimes performed with a great deal of arrangement. In some cases, such performance could constitute an infringement of the right of arrangement."⁶⁴ This statement, especially the phrase "In some cases, such performance could constitute," shows that the drafter does not interpret

nonprofit performances of an arranged musical work to constitute a copyright infringement in principle. While this interpretation seems reasonable, the drafter has not provided any legal grounds.

(b) Summarized quotations

Art. 43 also raises issues pertaining to summarized quotations.

When a quotation is made under Art. 32(1), translation of the quote is permitted under Art. 43(ii). Art. 43(ii) permits "translations" only, whereas Art. 43(i) permits not only translations but also arrangements, transformations, and adaptations of a work. Consequently, it may be interpreted that while a translated quotation is permitted, an adapted quotation, especially a summarized quotation, is prohibited.⁶⁵

According to the JCA drafter, a summarized quotation (i.e., "digest quotation") is prohibited while a translated quotation is permitted.⁶⁶ In reality, however, a summarized quotation of another person's work seems to be common practice. Therefore, some theorists argue that summarized quotations should be permitted.

In the *Blood Type and Character Case*, the court permitted a summarized quotation, holding that "it would be reasonable to interpret that item (ii) of said Article is applicable to exploitation of a summarized work, which is a type of an adapted work."⁶⁷

This interpretation seems rather unreasonable in light of the wording of Art. 43. Some people who interpret that a summarized quotation is prohibited under Art. 43 consider summarized quotations to be non-infringing as long as the summary is a greatly compressed version of

the long, original writing, based on the grounds that none of the creative expressions of the original work would remain in such a greatly compressed version.⁶⁸

This interpretation, namely that a summarized quotation is permitted under Art. 43, was used to settle the *Blood Type and Character Case*. However, this interpretation cannot solve all cases involving summarized quotations. Further study is necessary to resolve this issue.

(c) Private adaptation without reproduction

Since Art. 43(i) lists Art. 30(1), translation, adaptation, etc., conducted in the course of reproduction for private use are permitted. For example, writing down a Japanese translation of a German book in a notebook is permitted because it is regarded as translation in the course of a private reproduction.

Art. 30(1) and Art. 43(i) are applicable only because the act of writing down a translation in a notebook is regarded as a "reproduction." Such an act in the private sphere would be interpreted differently if the translation were made without reproduction. For instance, a person may orally translate a German book into Japanese. Such an oral translation does not involve reproduction and therefore does not constitute a private reproduction. This case is subject to neither Art. 30(1) nor Art. 43(i). Consequently, such an oral translation could constitute a copyright infringement if the translation is made without the copyright holder's authorization because there is no provision on limitation of rights that permits a simple act of translation.

An act of writing down a Japanese translation of a German book on a notebook may be regarded as translation in

the course of private reproduction specified in Art. 30(1) and therefore permissible under Art. 43(i). However, a person who orally translates a German book into Japanese in his room without writing down the translation on a notebook, if such a person exists, could be infringing the right of translation.

The same issue would arise if a person were to perform an arrangement of another person's musical work in his room. Such a performance is common in reality; however, it could constitute an infringement of the right of arrangement because arrangement takes place without an act of reproducing such as writing a musical score.⁶⁹

The root of this problem lies in the unique structure of the JCA. The JCA provisions are arranged as follows: Arts. 21 through 26-3 stipulate the right to exploit an original work without modification, Art. 27 specifies an act of creating a derivative work, and Art. 28 provides for the right to exploit such a derivative work.

In my opinion, this structure of rights, which is unique from the perspective of comparative law, is highly systematic. However, this very structure coupled with strict interpretations of provisions on limitations of rights has caused the aforementioned inconveniences. This may be a topic of discussion preferred only by pedantic scholars of the JCA (in other words, "*copyright law otakus*"), like me. In reality, even if a person who performed an arrangement of a musical work in his room were to be brought before a court, he would not be judged to have infringed the right of arrangement.

Still, the principle of strictly interpreting provisions on limitations of rights would not allow a court to find such a performance to be non-infringing without

certain legal grounds. It should be regarded as problematic.

(vi) Art. 45 and Art. 46 of the Copyright Act (artistic works)

Art. 46 of the JCA states, “With the exception of the following instances, it shall be permissible to exploit, by any means whatsoever, an artistic work permanently installed in an open place, as provided for in paragraph (2) of the preceding Article, and an architectural work.”

For instance, since a park monument or a painting on an exterior wall may be regarded as being “permanently installed in an open place,” it would be permissible to photograph either one with a digital camera and post the image on the Internet.

According to the JCA drafter, the phrase “permanently installed” means “installed for constant public viewing.”⁷⁰ The phrase “permanently installed” usually suggests that the work is fixed onto the ground to some extent.

However, in the *City Bus Case*, which concerned a dispute over the legality of the inclusion of a photograph of a route bus in a picture book, the court judged that the painting on the body of the route bus may be regarded as “permanently installed.”⁷¹ (Figure 2)



Figure 2

In this case, the court found the inclusion of the photograph of the painting in the picture book to be non-infringing, holding that, “in consideration of the aforementioned spirit, it would be reasonable to interpret, in light of social norms, that the phrase ‘permanently installed’ included in said Article means to be placed for public viewing for a certain period of time. The disputed bus with plaintiff’s work painted on the body was not procured for short-time bus service for a specific event. The bus has been continuously operated just as one of the ordinary city buses. Therefore, plaintiff’s work painted on the body of a city bus scheduled to be procured for regular bus service on public roads shall be regarded as an artistic work ‘permanently installed.’”

The court’s focus on the phrase “shall be regarded as an artistic work ‘permanently installed’” indicates that the court considered Art. 46 to be applicable in this case based on the broad interpretation and not applicable by analogy. Some might think that such an interpretation is rather unreasonable when considering the wording of the Article. However, the important point is not whether the placement of a work falls under the wording “permanently installed.” Rather, what is crucial is to recognize the value judgment or political ideals held by the judge (Judge Toshiaki Iimura) who decided that the disputed act was non-infringing. An objective evaluation of the thinking process behind Iimura’s judgment is necessary to explore the desirable future direction of interpretation and legislation.

(vii) Art. 49 of the JCA (Uses, etc. of reproductions for other purposes)

Many of the provisions on limitations of rights contain the phrase “permissible to reproduce.” Naturally, reproductions made under these provisions come into existence. Since these provisions on limitations of rights permit reproductions for certain purposes only, the resulting reproductions should not be exploited for any purpose other than the express original purpose. Use of a work for any purpose other than the original purpose is prohibited under Art. 49 of the JCA.

Art. 49(1)(i) stipulates that “a person who either (a) distributed reproductions of works made pursuant to these provisions or (b) made available to the public works through such reproductions” for any purpose other than the original purpose shall be deemed to have made a reproduction at the time when such distribution, or dissemination to the public, of the work, took place. Such an act of reproduction would once again constitute a copyright infringement.

For instance, if a person reproduces a musical work from a CD to an MD at first for private use but then afterwards transfers the MD to the public (viz., an unspecified person or a large number of specified persons (JCA Art. 2(5))) through an Internet auction website because he no longer needs the MD, his act is regarded as a distribution of a reproduction specified in Art. 49(1)(i). Regardless of whether or not the distribution is made for a fee, when the MD is distributed, it is deemed to be reproduced for a purpose other than the original purpose. Consequently, such an act constitutes an infringement of the right of reproduction.

Furthermore, said item also explicitly mentions a “person who made available to the public works through such reproductions.” A typical example would be a person who plays for the public an MD that was originally reproduced for private use. However, according to the drafter, an act of performing a piece of music to the public by reading a musical score that was originally reproduced for private use, for example, could fall under a case of “a person who made available to the public works through such reproductions” specified in said item.⁷²

Based on this interpretation, if an amateur musician participates in a non-profit free concert and performs a piece of music by reading a musical score originally reproduced for private use, such an act would constitute an infringement of the right of reproduction.⁷³ If the musician only has a copy of a musical score and not the original score, he is required to perform the piece of music by ear (from memory) on stage. Some critics have found this interpretation to be unreasonable.⁷⁴

In either event, if a person records a TV program on videotape for private use and afterward plays the videotape at a nonprofit free video-screening event, such an act would constitute an infringement of the right of reproduction.

Furthermore, if a teacher records a TV program on videotape for private use and afterward plays the videotape in a school classroom, such an instance would count as one where “a person made available to the public works through such reproductions”, as specified in Art. 49(1)(i). Consequently, the work would be considered to have been exploited for a purpose other than the original purpose and would therefore be deemed to have

been reproduced at the time of the screening in the classroom. However, such a reproduction would not constitute an infringement of the right of reproduction. Art. 35(1) stipulates that a person who teaches a lesson at a school or other educational institution may, "if and to the extent deemed necessary for use in the course of the lesson, reproduce a work already made public." Since this provision states that such a person "may reproduce," it is applicable to the aforementioned act that is deemed a reproduction. In short, even if a work is exploited for any purpose other than the original purpose and therefore is deemed to have been reproduced, such an act of reproduction will be subject to provisions on limitations of rights once again and will therefore be considered to be non-infringing of the right of reproduction (by a two-stage application theory).⁷⁵

On the other hand, while Art. 38(1) permits a person to play a DVD or CD at a nonprofit free event, said Article merely permits "screen presentation." Consequently, the act of using a work for any purpose other than the original purpose remains to be deemed a "reproduction," which constitutes an infringement of the right of reproduction.

For instance, strictly speaking, when a person who plans to hold a nonprofit free concert entitled "Listen to Historic Record Albums" under Art. 38(1) goes to the concert hall on the day of a concert and finds the record player broken, if he happens to have an MD containing those albums copied for private use and decides to play the MD instead of the record albums, such an act would be regarded as an exploitation of a work for a purpose other than the original purpose and would

constitute an infringement of the right of reproduction.

The above two cases are equivalent insofar as a work is exploited at a nonprofit free concert. Whether such exploitation constitutes an infringement or not depends on which medium (commercially available CDs or privately reproduced MDs) is used. For instance, if a movie is broadcast on TV, any person is prohibited from making a recording of the movie and playing the recording at a nonprofit free video-screening event. He must wait until the DVD release of the movie and purchase it for the screen presentation.

With respect to the aforementioned example, this interpretation could be reasonable.⁷⁶ However, this interpretation may cause an inconvenience in a case such as the following. Take, for example, a person who recently found in his closet a color copy of a famous painting given by his ex-girlfriend. He considered the painting beautiful and worthy of display. If he puts the copy on the wall of his office, his act would be regarded as an infringement of the right of reproduction based on the grounds that the reproduction of the artistic work was made for private use and that he subsequently "made available to the public works through such reproductions."

In the case of an artistic work, the right of exhibition covers only an act of exhibiting "the original" of an artistic work (JCA Art. 25). Therefore, an act of exhibiting a reproduction of an artistic work is not covered by a copyright to begin with. Furthermore the act of distributing objects which were made by an act infringing on copyrights, by a person aware of such infringement, is deemed to constitute a copyright infringement (JCA Art. 113(1)(ii)).

However, the act of making available to the public (e.g., exhibition, broadcasting) such objects is not deemed to constitute a copyright infringement under said item. In sum, in a case where a reproduction of an artistic work is legally made under provisions on limitations of rights, if a person subsequently exhibits the reproduction, such an act would constitute an infringement of the right of reproduction. In contrast, an act of exhibiting an illegally-made reproduction of an artistic work would be considered legal.

Professor Tamura argues that “it should be interpreted that any act outside the scope of the copyright, such as an act of showing a reproduction of a work to the public, may not be regarded as an act of making a reproduction available to the public as specified in Art. 49(1)(i).”⁷⁷

(viii) Others

Other examples are as follows:

(a) Posting a commemorative photograph on the Internet

For example, when a person goes to Disneyland and has a photograph taken with Mickey Mouse, if he posts the photograph on his website or blog with the comment “I went to the Disneyland,” such an act could constitute an unauthorized public transmission of a work. If the copyright of Mickey Mouse is still effective, such an act could constitute a copyright infringement due to the absence of applicable provisions on limitations of rights.

The current JCA has many provisions on limitations of rights, many of which are not applicable to the right of public transmission. As a result, the unauthorized posting of another person’s work

on a nonprofit free website created by an individual could constitute an infringement of the right of public transmission. Therefore, in order to legalize the aforementioned posting of the photograph taken with Mickey Mouse, it is necessary to adopt the interpretation that an implicit authorization has been granted or that the posting may be regarded as a quotation, as specified in Art. 32(1) of the JCA.⁷⁸

(b) Search engines

Search engines are said to crawl and discover websites on the Internet and reproduce them to create a database. They are designed to provide website links in response to user requests. In some cases, search engines create website summaries and thumbnail images and transmit them to the public. Furthermore, search engines store already-deleted websites in the form of a cache and, in some cases, transmit them to the public.

Search engines and caches are undoubtedly useful. Furthermore, there are some archives, including the aforementioned “Wayback Machine”, that periodically store websites. Technically speaking, however, these acts may be regarded as exploitations of works by way of reproduction and public transmission. Since the current JCA does not have any provisions on limitations of rights applicable to such exploitations, search engines could be considered to have infringed the rights of reproduction and the rights of public transmission. In fact, in the United States^{79,80} and Germany,⁸¹ lawsuits have been instituted against Google.

Under the current JCA (as of 2009), if a lawsuit is instituted against a search engine, the court is likely to adopt the implicit authorization theory and find the

search engine to be non-infringing. Those who have created their own websites are presumed to be aware that their websites will be crawled through, reproduced and partially transmitted to the public through search engine websites. Furthermore, they could prevent search engine crawling by using a "robot.txt" file. These facts suggest that, in many cases, one may consider an implicit authorization for reproduction or public transmission to have been granted. However, if a person creates a website and posts another person's work on the website without his or her authorization (for example, if a person scans a commercially available comic book and posts the image on a website without obtaining the copyright holder's authorization), the person who created the website would not have the right to authorize the exploitation of the other person's work. In this case, it should be interpreted that no implicit authorization has been granted by the copyright holder for reproduction or transmission of the website by search engines.⁸² This indicates that the implicit authorization theory alone would not settle every case.

To resolve this issue, Japan has taken action. The Subdivision on Copyright of the Council for Cultural Affairs has discussed necessary legislative measures in respect of search engines, and has ensured that the draft of the revised JCA of 2009 reflects the result of the discussion⁸³; furthermore, a new provision on limitation of rights (JCA Art. 47-6 after January 1, 2010) has been established in recent amendments of the JCA to be enacted on August 19, 2009, which shall come into effect as of January 1, 2010.

(c) Exploitation for research

Most of the provisions on limitations of rights in the JCA are not applicable to the exploitation of a work for research. For instance, Art. 30(1) of the JCA does not distinguish reproduction for research from reproduction for hobby.

As an expert (or *copyright law otaku*) on copyright infringement cases, I collect a lot of judicially disputed works and materials for research. Some of them are judged as infringements of other persons' copyrights. I collect such works because I consider it very important to analyze them directly. I purchase such works at stores if they are commercially available. If not, I use other means of acquisition such as auctions and Internet downloading.

For example, in a lawsuit called the *Hell's Taxi Case*, the court found the defendant's TV drama to be non-infringing of the plaintiff's copyright to his comic.⁸⁴ Since the drama is not commercially available in DVD form, I had been unable to watch it. However, I recently found the drama uploaded on the YouTube website, downloaded it, and made a reproduction for private use because I considered it necessary to watch the video for research. It is obviously illegal to upload another person's work on a video posting website without his or her authorization. While such unauthorized uploading should be found unjustifiable, an act of downloading the uploaded video for research should be permitted as private reproduction.

Under the current JCA (as of 2009), such downloading is permitted under Art. 30(1). However, a new provision on limitation of rights (JCA Art. 30(1)(i) after January 1, 2010) has been established for the upcoming amendments of

the JCA, to be enacted on August 19, 2009 and to come into effect as of January 1, 2010. Under the revised JCA, Art. 30(1), which permits private reproduction under certain conditions, will no longer be applicable to an act of making, in bad faith, a sound or visual recording of a sound or visual recording illegally uploaded on the Internet. This will include the act of downloading a video from an illegal website.

Once the revised Act takes effect, if a person studying an important judgment called the *Kinenju Case*,⁸⁵ for example, makes a reproduction of the defendant's musical composition, "*Kinenju* [memorial tree]," for the purpose of research, this act would be regarded as an infringement of the right of reproduction based on the grounds that the composition was ultimately found to be infringing of the plaintiff's copyright and that the person was aware that the composition was illegal.

In some respects, it might be meaningful to revise Art. 30(1) of the JCA so that the Article would not be applied to an act of making a copy of a sound or visual recording illegally uploaded on the Internet. In my opinion, if such a revision is to be made, it is necessary to discuss the introduction of a provision that exempts such recordings made for the purpose of research under certain conditions.

In the United States, there is a website entitled the "Copyright Infringement Project," which is designed to help viewers conduct a comparative study on musical compositions, etc., disputed in lawsuits concerning copyright infringement.⁸⁶ On this website, the musical compositions of the plaintiffs and defendants of copyright infringement cases concerning musical works dating

back over 100 years have been uploaded in the form of digital files containing music, images, or musical scores. For instance, regarding a famous lawsuit concerning a parody of "Pretty Woman,"⁸⁷ the website offers not only the music file and lyrics of both the plaintiff and the defendant but also the musical score and a video clip of the plaintiff's work. Furthermore, the website offers information on many lawsuits easily comprehensible by non-experts, such as one where the theme music from "Phantom of the Opera" was disputed,⁸⁸ and another in which the theme song "How Deep Is Your Love" from the movie "Saturday Night Fever" was in dispute.⁸⁹ This website is extremely useful for studying the issue of similarity between works.

The creation of such a website could itself be regarded as a copyright infringement. However, it seems that the exploitation of works on this website is considered fair use based on the grounds that the music files and other files posted on this website are not likely to affect the sales of commercially marketed CDs and other products due to their rather poor sound quality and short durations and furthermore, the fact that this website was created for the purpose of research and education.

However, if the same exact website were established in Japan, it would constitute an infringement of the right of public transmission, even if the purpose of its establishment is to contribute to research activities.

These various problems described above are attributable to the fact that the JCA's provisions on limitations of rights stipulate only specific cases in which copyrights shall be limited, and especially

because those provisions have been strictly interpreted.

(2) Provisions on limitation of moral rights

The strict interpretation of moral rights raises a particular issue concerning the right to maintain integrity.⁹⁰

In conventionally accepted theories and precedents, Art. 20(2), concerning the exclusion of the application of the right to maintain integrity, has been very strictly interpreted as a provision listing "exceptions." In particular, item (iv) of said paragraph has been interpreted too strictly to be applicable to any actual cases. According to the JCA drafter, item (iv) would be applicable only to special cases, such as where the colors of a painting are rendered differently from the original due to color-publishing technology, where a musical work is performed differently from the original due to poor performance skills, and where the TV broadcasting of a work necessitates the four corners of the image on the screen to be cut out (although this is rarely necessary these days). Prior to 1993, there were no precedents where item (iv) was explicitly applied.

Conventionally accepted theories and precedents suggest that Art. 20(2)(iv) has been "very strictly" interpreted. Consequently, any modification against the will of the author has simply been regarded as an infringement of the right to maintain integrity.

In reality, however, modification does not necessarily cause an infringement. For instance, if a person who has obtained the right of translation translates another person's novel based on this right, his act would not constitute an infringement of the right to maintain integrity.

Similarly, if a person purchases a book and writes down comments on the book in his room, such an act would not constitute an infringement of the right to maintain integrity. These acts, which are modifications of works, at least technically speaking, have not been interpreted as infringements of the right to maintain integrity.

Since Art. 20(2) is not applicable to such acts, it is necessary to provide legal grounds to find these acts to be non-infringing of the right to maintain integrity. Conventionally accepted theories and precedents have developed various interpretations based on the so-called "implicit exclusion of application" theory.

For example, according to the JCA drafter, translation, arrangement, adaptation, and other modifications that do not affect the fundamental nature of the original work do not constitute an infringement of the right to maintain integrity as long as the authorization of the author who has the copyrights has been obtained.⁹¹

Regarding parody, which inevitably modifies a work, the JCA drafter mentioned that a parody should be interpreted to be non-infringing of the right to maintain integrity under certain conditions despite the absence of explicit provisions.⁹² Additionally, the disposal or destruction of the original of a work would not constitute an infringement of the right to maintain integrity.⁹³ Thus, in accordance with the drafter's statements, it has been concluded that there are various types of modifications that do not constitute an infringement of the right to maintain integrity. However, the legal grounds for such an interpretation have not been clarified.

Technically speaking, a private modification of a work should be regarded as a modification of a work as specified in Art. 20(1). In recent discussions, it has been concluded that a private modification should generally be interpreted to be non-infringing of the right to maintain integrity.⁹⁴

The “implicit exclusion of application” theory has also been employed in many cases. For example, in the *Sweet Home Case*, the court of the first instance found commercial breaks of a movie broadcasted on TV program to be non-infringing, holding that “[c]ommercial breaks are inevitable for commercial broadcasting of a movie, which tends to last for a long time. Therefore, such breaks shall not be regarded as defendant’s modification of the disputed movie.”⁹⁵

There is a court decision, called the *Haiku Modification Case*, where the court of the first instance recognized that a modification had occurred but found the modification to be non-infringing of the right to maintain integrity based on the interpretation that an implicit authorization had been given for such a modification.⁹⁶ This is a case where the court examined the legality of an act of modifying a *haiku* that the plaintiff wrote and published in a magazine. The court found that the author “ha[d] given his authorization for modification, at least implicitly” and judged that “the defendant’s act of modifying the disputed *haikus* did not constitute an infringement of the right to maintain integrity.”

Furthermore, the *Manga Modification Case* involves a dispute over an act of modifying the comic entitled “*Yappari Busu ga suki* [I like the plain woman after all]” that the plaintiff created and

published in a magazine.⁹⁷ The court found that the plaintiff’s claim was an abuse of the right to maintain integrity and therefore unacceptable under Art. 1(3) of the Japanese Civil Code.

In the appeal judgment for the *Haiku Modification Case*, the court recognized the modification of publishing *haikus* after correction as “customary practice” under Art. 92 of the Japanese Civil Code and found the modification to be non-infringing of the right to maintain integrity.⁹⁸

As described above, due to strict interpretations of Art. 20(2), other legal grounds are necessary in some cases in order to find a certain act to be non-infringing of the right to maintain integrity. This is why the “implicit exclusion of application” theory, which was not based on Art. 20(2), has been adopted in a large number of cases. A court that avoids applying Art. 20(2)(iv) would end up basing its judgment on unclear legal grounds such as the “implicit exclusion of application” theory. Consequently, the court could potentially hand down *ad hoc* judgments as to whether or not a disputed act constitutes an infringement.

In order to clarify the criteria for judging what act constitutes an infringement of the right to maintain integrity, I have been proposing that the criteria for infringement specified in Art. 20 be fully utilized as legal grounds. In particular, Art. 20(2)(iv) is a general clause, which presents such criteria as the “nature of a work” and the “purpose of and the manner of its exploitation.” I have been arguing that it would be appropriate to reconsider the strict interpretation of the Article and to start discussing the possibility of making full use of this provision to balance the interests between authors

and users of works.⁹⁹ Recently, an increasing number of court decisions and theories have chosen not to interpret Art. 20(2)(iv) strictly.

IV. Toward Solutions

As described above, the provisions on limitations of rights stipulate specific cases in which copyrights shall be limited. The JCA drafter and conventionally accepted theories have interpreted these provisions more strictly than the literal interpretations of their texts. As a result, there have been many cases where an act of exploiting a work has been technically found to be infringing.

As mentioned at the beginning of this article, the purpose of the Copyright Act is not only to maximize the protection of the rights of authors but also to maintain a proper balance between the protection of authors' rights and the use of works. Therefore, it would be too simplistic to find an exploitation of a work as infringing based only on the fact that, technically, it does not fall under any of the provisions on limitations of rights, which only stipulate specific cases in which copyrights shall be limited.

This problem will be explored in the following section. I will first discuss possible interpretations and then potential legislative measures.

1. Interpretations

If finding an infringement in an act of exploiting a work eventually causes inconvenience, it becomes necessary to develop an interpretation to find such an act to be non-infringing. The following interpretations of how to do this have been under discussion.

(1) Broad interpretation and analogical application approaches

The aforementioned *City Bus Case* seems to have employed the "broad interpretation" approach.¹⁰⁰ The court judged the painting on the body of a city bus to be "an artistic work permanently installed" specified in Art. 46 of the JCA.

This broad interpretation approach was also used in the aforementioned *Blood Type and Character Case*, where the court permitted a summarized quotation under Art. 43 of the JCA.¹⁰¹

It is safe to say that these judgments were made through the broad interpretation approach because certain provisions on limitations of rights were applied, based on their purposes, to types of exploitation to which said provisions were usually considered not applicable. If it is permissible to broadly apply a provision on limitation of rights to various types of exploitations in consideration of their purposes, it seems possible to develop an interpretation that permits the analogical application of the provisions on limitations of rights.

Thus far, there have been no court decisions where the court analogically applied these provisions to limit copyrights. However, regarding the right to maintain integrity, which is one of the author's moral rights, there is a court decision, called the *Noguchi Room Case*, where the court analogically applied Art. 20(2)(ii) extending the term "architectural work" to include "garden."¹⁰²

Furthermore, there is a theory advocating the analogical application of provisions on limitations of rights by taking into consideration the three-step test, which has been adopted by some interna-

tional treaties, including the Berne Convention, when interpreting the JCA.¹⁰³

The broad interpretation and analogical application approaches are examples of interpretations based on which exploitations of a work may be found to be non-infringing. In view of the fact that the conventionally accepted theories (the JCA drafter's theory in particular) have interpreted certain provisions on limitations of rights more strictly than the literal interpretations of their texts, simply relaxing the strict interpretation of those provisions could bring about noticeable effects.

For example, with regard to Art. 32(1) concerning quotations, the so-called "two-requirements theory" has been under discussion. For adequate resolution of relevant issues, it seems more appropriate to interpret this provision literally based on the requirements presented within the provision.

Regarding the issue of private reproduction, the drafter mentioned that the creation of a home library would not fall under Art. 30(1) and would therefore constitute an infringement of the right of reproduction. However, this Article specifically applies only to "his personal use or family use or other equivalent uses within a limited scope." Based on the literal interpretation of this provision, a reproduction should be subject to this provision as long as the reproduction is made for private use regardless of its scale.

This suggests that, if we stop interpreting the provisions on limitations of rights more strictly than the literal interpretations of their texts and start interpreting them literally, this in and of itself could function as a kind of interpretation to determine which types of

exploitation of a work may be found to be non-infringing.

(2) Theory on direct perception of essentiality of works

The theory on direct perception of essentiality of works interprets certain types of exploitations of a work to be non-infringing on the grounds that the unauthorized exploitation of creative expressions contained in another person's work cannot be regarded as exploitation *per se* because the "essentiality" of the work cannot be "directly perceived." One of the court decisions made based on this theory is the aforementioned *Lighting Catalog Case*.¹⁰⁴

In a recent discussion concerning this issue, it has been proposed that parodies should be permitted based on this theory.¹⁰⁵ For example, even if the creative expressions contained in another person's work remain perceivable in a parody, as often is the case, the parody may be interpreted as non-infringing on the grounds that the "essentiality" of the another person's work cannot be "directly perceived" in the parody from a normative or evaluative viewpoint.

Admittedly, this theory has, in a broad sense, played a role in facilitating judgments as to whether or not certain exploitations of a work constitute infringement. However, the *Lighting Catalog Case* was special in the way that the subject in dispute was a calligraphic work and that the creative expressions lay not in the style of the characters or the style of the calligraphy but only in the "force of brushwork", etc. As a result, the court easily judged that "the artistic elements of the calligraphic work [could not] be directly perceived" once the work had been reduced in size. If the subject in dispute had been a painting, the court

would have been unable to hand down such a judgment.

Since “the artistic elements of the calligraphic work [could not] be directly perceived” due to its size reduction, even if the defendant had intentionally included the calligraphic work in the catalog, the judgment that the exploitation of the work was non-infringing would have remained the same. This may raise the issue of the reasonableness of the judgment. In fact, the drafter stated that “it would be another story if the painting in the background [was] intentionally brought into focus.”¹⁰⁶

Furthermore, since the “the artistic elements of the calligraphic work [could not] be directly perceived” due to its size reduction, even if a person were to cut out part of the calligraphic work from the catalog and make a key holder out of it or to distribute the image of the work as a wallpaper for cell-phones, a court would find this act to be non-infringing. Again, this would raise the issue of the reasonableness of such a judgment.

As described above, if an exploitation of a work is found non-infringing based simply on the grounds that the “essentiality” of the work cannot be “directly perceived,” the same grounds may be used to justify its exploitation as non-infringing regardless of the subjective intent of the user of the work or the economic impact on the right holder. Thus, the theory on direct perception of essentiality of works, in a broad sense, has great ramifications, while it also promotes sound judgments in some cases. It would be safe to conclude that this interpretation alone cannot solve all disputes.

(3) Implicit authorization

In the aforementioned *Haiku Modification Case*, the court of the first instance held that the disputed modification of a *haiku* did not infringe on the right to maintain integrity on the grounds that the author had given implicit authorization for the modification of the *haiku*.¹⁰⁷

In some cases, a person who has created a website could be said to have implicitly authorized search engines to search for, reproduce, and publicly transmit his site. However, it should be noted that the implicit authorization theory alone cannot resolve cases where the author of a website explicitly posts that his site may not be searched for, or where a website illegally contains another person’s work without that person’s authorization.

(4) Abuse of rights

As of now, there have been no decisions where the court has found the disputed exploitation of a work to be non-infringing of a copyright on the grounds of abuse of the right. However, in the aforementioned *Manga Modification Case*, the court found the disputed act to be non-infringing of the right to maintain integrity, which is one of the author’s moral rights, on the grounds of abuse of the right.¹⁰⁸

Conversely, there are many cases arising from the Trademark Act where the court found the disputed act to be non-infringing of the trademark right on the grounds of abuse of the right. Still, for cases arising from the JCA, courts seem to take a more cautious approach to recognizing the abuse of rights as a legitimate basis for non-infringement.

(5) Exhaustion of rights

There is a court decision, called the *Second-hand Game Software Case*, where the court found the disputed sale of a second-hand game software product to be non-infringing of the right of distribution.¹⁰⁹ In the judgment, the court held that the right to transfer to the public copies of game software, which is technically a cinematographic work, had been exhausted once a lawful transfer of ownership had taken place and rendered the right unnecessary. On these grounds, the court held that further transfers of the reproduction did not infringe on the author's right of distribution.

(6) Others

In addition to the theories mentioned above, there are other possible interpretations of the JCA, as follows.

(i) Use of a "Fair use" defense without an explicit provision

There are some theories that an act that does not fall under any listed provision on limitation of rights can still be considered to be "fair use" under certain conditions and therefore non-infringing.¹¹⁰ For example, in the *Parody Case*, the court of the appeals held that "the creation of the disputed montage photograph should be permitted as a 'fair use' of another person's work."¹¹¹ This judgment is said to have been "fiercely criticized" and to have been the "target of aggressive disparagement." Subsequently, this judgment was overturned by the Supreme Court.¹¹² Since then, there have been no cases in Japan where the court has accepted a "fair use" defense without an explicit provision to support it.¹¹³

All of the provisions on limitations of rights contained in the JCA are specific provisions, each of which strictly

specifies the requirements necessary to trigger the provision and the provision's legal effects. Therefore, each of those specific provisions may be subject to interpretation by *argumentum a contrario*, in principle. In this situation, it would be inappropriate to officially accept a "fair use" defense without any explicit provisions supporting it.

(ii) Considering certain types of acts to not constitute exploitations of works

There is an interpretation of the JCA that finds certain types of acts to be non-infringing by presuming that they do not constitute exploitations of works. For instance, there is a court decision called the *Star Digio Case*, where the court found that the temporary and transitory storage of a work in a RAM (Random Access Memory) did not fall under the term "reproduction" as specified in the JCA.¹¹⁴ Since such storage did not fall under "reproduction," it did not constitute an infringement of the author's right of reproduction.

Also, in the first instance of the so-called *Sweet Home Case*, the court held that commercial breaks in a movie broadcasted on television are non-infringing based on the grounds that such breaks "do not constitute modification of the movie."¹¹⁵

This interpretation is the same as the aforementioned theory, in that both of them have been used to find certain acts to be categorically non-infringing. However, they differ on legal grounds: this theory finds an act to be non-infringing on the grounds that it is outside the scope of an author's rights. If an act is found to be outside the scope of an author's rights, then it is completely exempt from the

author's exercise of any particular right. Since this theory could have significant ramifications, further study is necessary.

(iii) Declaring a subject to be excluded from protection

This is an interpretation that finds certain acts of exploitations to be non-infringing on the grounds that the work or subject allegedly being exploited is excluded from protection. For example, Art. 13 of the JCA lists works that "shall not constitute the subject of the rights" such as "laws and regulations" (item (i)) and "judgments of courts" (item (iii)). According to the JCA drafter, the term "laws and regulations" in this context means not only statutory laws but also bills prepared by the government in the course of the legislative process.¹¹⁶

There is a court decision called the *PC-VAN Case*, where the court held that a message posted on a BBS did not fall within the definition of a work in the JCA, stating that "[a message posted on a] BBS contains a conversation held by use of the OLT (Online Talk) service of PC-VAN, which is a PC communication service," and that "the conversation, which is not particularly different from an everyday conversation in terms of content, does not, in any way, fall within the literary or scientific domain."¹¹⁷ In this judgment, the writing, although conversational, was not considered to be a "work" according to the JCA on the grounds that it did not "fall within the literary domain." This interpretation *per se* deserves criticism as being exceptional.¹¹⁸ However, it might be the case that the court handed down its judgment based on its belief that an act of posting such a conversational message should be permitted. In an effort to provide legal

grounds for the decision, the court may have then employed the interpretation that a message posted on a BBS did not constitute a "work" as defined in the JCA.¹¹⁹ If this is the case, this interpretation may be considered to be another theory developed in order to find certain acts to be non-infringing.

However, if a certain subject does not fall within the JCA's definition of a "work", or if a certain work is excluded from protection under this theory, this may mean that the subject or work is categorically excluded from the scope of protection in the JCA. Consequently, regardless of how the work is exploited, it would receive no copyright protections. Therefore, the applicability of this theory must be determined on a case-by-case basis.

2. Legislative measures

As described above, various interpretations have been developed to resolve copyright disputes. These interpretations will, to some extent, remain useful in resolving similar disputes in the future.

However, these interpretations can be problematic in certain situations: when a user of a work is aware that his use of the work, technically speaking, constitutes an infringement under the JCA, he may continue his use anyway because he is certain that, once brought before a court, his use will be found to be non-infringing. In other words, there may be instances where a court is not certain about what legal grounds it will judge an act but is certain that the act is non-infringing based on some legal theory. When the parties are not certain which legal grounds will be used, it is impossible to expect which factors the court will take into consideration in its judgment.

Consequently, the court could hand down *ad hoc* judgments on a case-by-case basis.

Furthermore, cases may also arise where a court subjectively finds a certain act deserving of its active support, although the act cannot be found non-infringing under any interpretation of the JCA. These cases include disputes over parodies, search engines, the “Copyright Infringement Project” website mentioned earlier, and website archives. If courts truly wish to support these types of exploitations of works, legislative measures need to be taken to find them to be deemed non-infringing. There are two potential legislative measures which can be taken: revisions of specific provisions and an establishment of a general clause.

(1) Revisions of specific provisions

The JCA’s provisions on limitations of rights have been revised in many ways, including the addition of new provisions, in order to adapt to the development of new technologies. One merit of revising a specific provisions is that the revised version can present clear criteria for certain types of acts that should be found non-infringing, thereby providing courts with solid legal grounds for making their judgments. In this sense, if there is a consensus for finding a certain type of act to be non-infringing, we should not hesitate to revise an existing provision or to establish a new one on limitation of rights, whenever it becomes necessary.

Revisions of the provisions on limitations of rights do not necessarily push the provisions in the direction of minimizing the scope of authors’ exclusive rights. For example, even if a copyright is limited through the revision of such a provision, the author’s right to receive compensation may be maintained by

obliging a user of a work to pay him for exploiting the work. Art. 36 of the current JCA stipulates that a person who, for profit-making purposes, reproduces a work that has already been made public, shall “pay to the copyright holder compensation in an amount which corresponds to the ordinary royalty rate” (JCA Art. 36(2)), although it is permissible to reproduce such a work for use in an examination.

In sum, most legislation advocating revisions of the specific provisions on limitations of rights tend to seek further limitations to authors’ rights. However, strictly speaking, some of these revisions could swing in the opposite direction because implementing such revisions is a matter of balancing the interests of the authors and the users of their works. In other words, there could be some cases where an act that is considered not to infringe on any copyright under the current JCA should nonetheless be considered an infringement.

An example of such an act is the use of a hyperlink on a website. Posting an ordinary link, which only provides the URL of another person’s website, is not regarded as infringement under the JCA. However, an in-line link or a link to an image may enable a person to display, on his website, an image taken from another person’s site. Although this is technically another type of a link, from the viewpoint of visitors to the website, it is the same as copying and posting another person’s image file. Further study is necessary to determine if it is appropriate to find such a link to be completely non-infringing under the JCA. There is a theory that states that a person who “provides a link to another person’s website as if the linked material were an inherent part of

his website” should be regarded as infringing on the original poster’s right of public transmission.¹²⁰

In *manga cafes* (Japanese-style comic cafes), the act of making comic books available for customers is considered to be non-infringing of the rights of rental.¹²¹ On the other hand, *manga cafes* obtain through the relevant organization the right-holders’ authorizations for the exploitations of game software products,¹²² because game software is subject to the right of screen presentation. This situation makes us wonder whether it is appropriate to find the act of displaying comics in a *manga cafe* for customers to read to be completely non-infringing under the JCA.

As described above, if there is a consensus that an act currently found to be non-infringing under the JCA should be considered to be infringing in one way or another, legislative measures should be taken, such as revising the relevant provision to deem that particular act to be infringing. In this way, the revisions of specific provisions constitute important legislative measures. However, it is questionable whether these revisions, which are designed to be case-specific, are sufficient to resolve all copyright disputes properly.

This does not mean that the diligent efforts of relevant councils to improve provisions on limitations of rights are meaningless. Such efforts have been and remain to be important. However, the downside of revising specific provisions is that these revisions usually only come after a technological or social change has occurred. In recent revisions, some of the newly established provisions on limitations of rights specify extremely detailed and complex requirements. For example,

Art. 47-3, established in the 2006 revision, permits the ephemeral recording of back-up data in for maintenance or repairs of a reproducing machine with a built-in memory, such as a cell-phone. In principle, this provision applies only to an act of recording “in the case of maintenance or repairs” and not to an act of recording “in the case of replacement of the old machine in use with a new one due to a change in owner’s preference or due to deterioration of the old one in use.”¹²³ This trend of case-specific revisions of provisions on limitations of rights will promote interpretation by *argumentum a contrario*.

If the specific provisions could sufficiently handle all copyright disputes, this would be ideal, as then those provisions would always provide clear requirements. However, no matter how promptly the legislature revises these specific provisions, in some cases where the situation is constantly changing or diversifying, the application of a series of these provisions is still not enough to fully resolve the dispute.

In this sense, it is necessary to consider developing other legislation that promotes the establishment of a general clause on limitation of rights in addition to the already established specific provisions on limitations of rights.

(2) Establishment of a general clause

One of the legislative measures associated with the establishment of a general clause is a theory that promotes the introduction of the fair use doctrine into the Japanese legal system. Some people have been advocating that a provision equivalent to the fair use provision contained in the U.S. law should be incorporated into the JCA.¹²⁴

However, this proposal for the introduction of a U.S.-style fair use provision has evoked a considerable amount of opposition.¹²⁵ For instance, Professor Saitô noted, “The fair use doctrine was functionally created through accumulation of precedents. The doctrine will be further honed by future court decisions. This mechanism would not function properly in the Japanese legal system, which places importance on statutory laws.”¹²⁶

Certainly, there would be strong opposition to inserting a general clause clearly stating the basic principle of limitation of rights before Art. 30 of the JCA, the Japanese counterpart to Section 107 of the U.S. copyright law.

The issue here may simply be a matter of the positioning of the provision within the JCA. Opponents of a general clause might be concerned that, if it were to be inserted before all of the other provisions on limitations of rights, it could give the impression that copyrights are generally limited in principle.

Therefore, if a general clause were to be added to the JCA’s provisions on limitations of rights, it would be more probable to discuss the possibility of inserting it after all of the other provisions on limitations of rights, i.e., Arts. 30 through 49 of the JCA, for example as Art. 49-2. This legislative measure would be more acceptable to Japan because the purpose of including a general clause is simply to supplement the preceding specific provisions to cover the types of acts that have not been covered already by those specific provisions.

The possible wording of Art. 49-2 could begin as follows: “In addition to the acts listed in Arts. 30 through the preceding Article, an act of exploiting a

work shall be permitted if such exploitation is considered to be reasonable [unavoidable] in light of” This sentence may then be followed by the proviso, “provided, however, that the foregoing shall not apply in the case where such act is likely to unreasonably prejudice the interests of the copyright holder in light of”

This type of a general clause is called a “general saving clause” or “small general clause,” and serves as a safety net just in case an act equivalent to those specified in the preceding specific provisions escapes the coverage of those provisions. In other words, the specific provisions embody the spirit of the general clause.

Due to the absence of a general clause in the provisions on limitations of rights, proposing such a legislative measure may come as a surprise to some people. However, this type of clause was already established in the JCA when Art. 20(2), concerning exceptions to the author’s right to maintain integrity, was established in the current JCA. This Article initially lists three specific provisions, items (i) through (iii), defining the types of modifications that would not constitute infringements of the right to maintain integrity. Those types of modifications are as follows: a change of ideographs or words or other modifications for use in textbooks, etc. (item (i)), an extension, rebuilding, etc., of an architectural work (item (ii)), and a debugging or updating of a computer program (item (iii)). After these specific provisions, item (iv), a general saving clause, stipulates that consideration should be made to, “in addition to those listed in the preceding three items, modifications that are considered

unavoidable in light of the nature of a work as well as the purpose of and the manner of its exploitation". While item (iv) contains the term "unavoidable," it does not affect the fact that said item is a general saving clause.

This type of legislation, that is, the establishment of a flexible general clause combined with strict specific provisions, makes it possible to formulate judgment criteria that ensure both specific justice through the general clause and legal stability through the specific provisions. This legislation appears to be especially effective in providing criteria for making judgments concerning such intangible subjects as works.

Although Art. 20(2)(iv) is a general clause, it prospectively specifies the factors for consideration by stating that it should be applied "in light of the nature of [the] work [in the dispute] as well as the purpose of and the manner of its exploitation." This indicates that the provision limits its applicability to a certain extent, while maintaining its flexibility as a general clause.¹²⁷

As described so far, a general clause, if established, should be inserted not before the provisions on limitations of rights but after them as a general saving clause. Furthermore, the general clause should specify its applicability criteria by using phrases such as "in light of." Establishment of this type of general clause in Japan deserves consideration as a likely scenario. This is what I call the "Japanese-style 'fair use' clause".

If Japanese lawmakers decide to establish a general clause, the next step after this initial decision would be to determine the clause's content. For instance, establishment of too simplistic a provision with many potential interpreta-

tions, such as "the fair use of a work shall be permitted," would invite opposition. At the very least, it is necessary to specify applicability criteria by use of such phrases as "in light of."

Further study is necessary to determine exactly which criteria should be included in the general clause. Possible criteria would include the "nature of a work" and "the purpose of and the manner of its exploitation," both of which sometimes appear in the current JCA, as well as the criteria adopted by the fair use doctrine in the U.S. Copyright Act¹²⁸ and the three-step test.¹²⁹

The Japanese-style "fair use" clause, if introduced as a general clause, must be in line with the "three-step test"¹³⁰ required by international treaties.¹³¹ For example, Art. 10(1) of the WCT stipulates that "Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." Therefore, a general clause on limitation of rights, if introduced in the JCA, must reflect the concept of the three-step test (in particular, the phrase "certain special cases"). This can be done by including a proviso that stipulates that "the foregoing shall not apply in the case where such use is likely to unreasonably prejudice the interests of the copyright holder" or specifying that "a person shall pay to the copyright holder compensation in an amount which corresponds to the ordinary royalty rate."

According to a declaration on the three-step test published in 2008, which

is supported by a number of signatories, the fact that the test restricts limitations and exceptions to authors' exclusive rights to "certain special cases" does not prevent "legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable".¹³²

However, a Japanese-style "fair use" clause could challenge critics' belief that the establishment of a general clause would make the criteria for judging infringement unclear.

While the current JCA has provisions on limitations of rights, these provisions only stipulate specific cases in which copyrights shall be limited. In recent years, there have been many court decisions concerning acts that do not fall under any of those provisions on limitations of rights, where courts have found the acts to be non-infringing based on one of the above-described interpretations. This practice may be called the "implicit limitation of rights". This practice demonstrates that the judgment criteria are currently unclear. In other words, if a court considers a certain act to be permissible, the court will find the act to be non-infringing based on a legal theory such as the theory of abuse of right, the theory of implicit authorization, or the theory on direct perception of essentiality of works. Due to this range of theories, there are currently no concrete judgment criteria prospectively specifying which factors should be taken into consideration and how they should be analyzed in judging whether a certain act is infringing or not. As a result, courts may hand down *ad hoc* judgments on a case-by-case basis.

It would be more appropriate to establish a general clause stipulating which factors should be taken into

consideration and to allow courts to determine the applicability of this clause in each case they encounter. This general clause would provide courts with legitimate legal grounds and would maximize their predictability.

Based on the interpretation that the specific provisions should embody the spirit of the general clause, if a consensus is formed to apply the general clause to a certain type of act, a new specific provision covering this act could then be added to the JCA.¹³³ Therefore, the process of revising specific provisions would remain important.

Inevitably, the applicability of the general clause will be unclear, at least to some extent, regardless of how clearly the applicability criteria are specified. It should be noted that unclear rules are not necessarily undesirable. While clear rules have the advantage of making court rulings more predictable, they are still not capable of resolving all possible disputes. This is exactly why laws have general clauses in many countries worldwide, including Japan. For instance, Art. 90 [Public Policy] and Art. 709 [Damages in Torts] of the Japanese Civil Code are general clauses. In a sense, the *raison d'être* of these general clauses lies in their vagueness.

If now were the time immediately after the enactment of the current JCA, or if the conventionally accepted theories were adopted, the proposal for the establishment of a general clause of limitation of rights would meet strong opposition from people who claim that that provisions on limitations of rights should be used in "exceptional" cases only and should never be "general." What I have discussed thus far in this paper will easily prove that such opposition is groundless.

3. General theory on limitation of rights

If any provision on limitation of rights is to be established, the first step is to determine which acts should be considered to be non-infringing. Similarly, in developing an interpretation of the existing provisions, the first step is the same. In other words, if there is a consensus that a certain act should be considered to be non-infringing, it is important to objectively identify the grounds on which this consideration is made. While some legal grounds might be provided, at least officially, it is more important to identify the real grounds or intention for considering the act to be non-infringing.

For example, the JCA drafter has stated, “[s]ome of the acts that are considered to be infringing of copyrights under the Copyright Act should be permitted as socially acceptable practices. In contrast, some of the acts that are considered to be non-infringing under the Copyright Act should be prohibited based on the fundamental spirit of said Act. This is the inevitable consequence of having to draw a line somewhere.”¹³⁴ In looking at this interpretation, it is understandable that some acts should ultimately be found to be non-infringing. However, it is unclear which criteria one should use to determine whether an act “should be permitted as a socially acceptable practice” and how those criteria may be justified. Therefore, it is important to identify and analyze those criteria.

There are cases, such as the aforementioned *Lighting Catalog Case* and *City Bus Case*, where the court found the disputed act to be non-infringing based on some interpretation. In these judgments, the courts, at least officially, based

their holdings on legal grounds including the theory on direct perception of essentiality of works and the broad interpretation of Art. 46 of the JCA. In the end, it is important to identify the criteria which should be used to judge whether a disputed act is non-infringing. In other words, it is important to analyze the underlying value judgments themselves. The findings of such analysis would be beneficial for developing new interpretations concerning the limitation of rights and for establishing more concrete legislation.

V. Conclusion

1. Summary

The provisions on limitations of rights of the Japanese Copyright Act only stipulate specific cases in which authors’ rights shall be limited. Furthermore, those provisions have been strictly interpreted. As a result, there are various cases where a disputed act must be judged as infringing, at least technically speaking, even if it would be more reasonable to permit it. In this sense, copyright infringements have become a part of everyday life.

In conventional discussion, the JCA’s provisions on limitations of rights have been strictly interpreted based on the principles that the primary purpose of the JCA is to protect authors, and that any limitations of rights should be exceptions to this principle. However, both the rights of authors and the rights of users are guaranteed by the constitutional fundamental rights. Therefore, it is possible to infer that the purpose of the Copyright Act is to balance the interests between authors and users of works. If this same reasoning is applied to interpretations of

the JCA, the role of these interpretations is to achieve and maintain such a balance. Based on this reasoning, the conventional claim that the protection of author's rights is the "primary purpose" of the JCA and that limitations of rights should "exceptional" is groundless.

In practice, a number of interpretations have been developed to find certain types of acts to be non-infringing (e.g., broad interpretation and analogical application of provisions on limitations of rights, implicit authorization, abuse of rights, and the theory on direct perception of essentiality of works). These theories have been employed in some of the recent precedents and theories that state that acts that technically constitute infringements should be found to be non-infringing because this is the reasonable conclusion.

Due to the lack of a general clause concerning limitations of copyrights, the so-called "implicit exclusion of application" theory has been used instead. As a result, it is unclear which factors will be taken into consideration by a court and how they will be analyzed in judging whether a certain act is infringing or not. Without such guidance, courts may hand down *ad hoc* judgments. If a certain type of exploitation of a work constitutes copyright infringement under an explicit provision or a conventionally accepted theory, such exploitation may be significantly discouraged.

To prevent these problems, it seems appropriate to consider a legislative measure that promotes the establishment of a general clause on limitation of rights. Such a general clause would specify certain criteria (including the "nature of the work" and the "purpose of and the manner of its exploitation," as well as

"whether such exploitation is likely to unreasonably prejudice the interests of the copyright holder") and would be placed at the end of the provisions on limitations of rights as a "general saving clause" (or what I have called a "Japanese-style 'fair use' clause").

Establishment of such a general clause would have the technical merit of serving as an explicit provision through which certain acts may be found to be non-infringing. It will also have the overall merit of prospectively specifying which factors should be taken into consideration in judging whether a certain act is non-infringing. Furthermore, since specific provisions should embody the spirit of a general clause, lawmakers could continuously revise the specific provisions to contribute to maintaining a proper balance between concrete reasonableness and legal stability.

2. Recent developments in Japan

Since I first gave a lecture on the Japanese-style "fair use" clause in 2007, the discussion on the issue of the JCA's provisions on limitations of rights has intensified in Japan. On May 24, 2008, the Copyright Law Association of Japan held a symposium on the subject of the "limitation of rights,"¹³⁵ which I chaired. It was after this symposium that the discussion of legislation on the Japanese-style "fair use" clause began to develop rapidly.

First, on June 18, 2008, the Intellectual Property Strategic Program 2008, issued by the Intellectual Property Strategy Headquarters declared, "[i]n order to promote the content industry in the increasingly digitized and networked world, it is urgent to discuss such issues as the future intellectual property system

that can handle newly developed technologies and ways of exploitation and the reinforcement of measures against illegal exploitation of works on the Internet. The discussion should include such topics as the framework to promote distribution in consideration of new ways of content exploitation and the introduction of comprehensive provisions on limitations of rights. It would be desirable to form a conclusion within the fiscal year 2008 (p. 86).¹³⁶ This discussion was conducted by the Specialized Committee on the Intellectual Property System for the Digital-Network Generation, of which I am a member, established by the aforementioned Headquarters.¹³⁷ On November 27, 2008, the Committee issued a report entitled “Intellectual Property System for the Digital-Network Age”, which stated that “[w]hile the current Act has specific provisions on limitations of rights that stipulate specific cases only in which copyrights shall be limited, it would be appropriate to add to those provisions a general clause on limitation of rights (Japanese-style “fair use” clause) that comprehensively permits fair use of a work to the extent that does not unreasonably prejudice the legitimate interests of right holders” (p. 11).¹³⁸

Currently, the details are under discussion by the Subcommittee on Legal Affairs of the Subdivision on Copyright of the Council for Cultural Affairs in the fiscal year 2009¹³⁹, and as a member of the subcommittee, I am engaged in the discussion.

If such a general clause on the limitation of rights is established in the JCA, it would mark a significant turning point for continental copyright laws as a whole. In recent years, discussions on the provi-

sions on limitations of copyrights have intensified worldwide.¹⁴⁰ Therefore, these recent developments and discussions in Japan deserve attention from the international perspective as well, as they may provide a model for other continental law countries to examine the possibility of introducing general clauses on the limitation of rights into their own copyright laws.

(Notes)

¹ Peter Raue, *Zum Dogma von der restriktiven Auslegung der Schrankenbestimmungen des Urheberrechtsgesetzes*, FS-Nordemann, 2004 S.327; Jan Poeppel, *Die Neuordnung der urheberrechtlichen Schranken im digitalen Umfeld*, 2005; Frank Findeisen, *Die Auslegung urheberrechtlicher Schrankenbestimmungen*, 2005; Robert Burrell-Allison Coleman, *Copyright Exceptions: The Digital Impact*, 2005; Heimo Schack, *Urheberrechtliche Schranken, übergesetzlicher Notstand und verfassungskonforme Auslegung*, FS-Schricker, 2005 S.510; Christophe Geiger, *Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law*, 2006/2 IIC 178; Geiger, *The Three-Step Test, a Threat to a Balanced Copyright Law?*, 2006/6 IIC 683; Thomas Hoeren, *Die Schranken des Urheberrechts in Deutschland, Impulse für eine europäische Harmonisierung des Urheberrechts*, 2007, S.265; Achim Förster, *Fair Use: Ein Systemvergleich der Schrankengeneralklausel des US-amerikanischen Copyright Act mit dem Schrankenkatalog des deutschen Urheberrechtsgesetzes*, 2008; Mario Rehse, *Zulässigkeit und Grenzen ungeschriebener Schranken des Urheberrechts*, 2008; Christophe Geiger, *Rethinking Copyright Limitations in the Information Society – The Swiss Supreme Court Leads the Way*, 8/2008 IIC 943; Susen Sattler, *Der Status quo der urheberrechtlichen Schranken für Bildung und Wissenschaft*, 2009.

² See also Christophe Geiger, Reto M. Hilty, Jonathan Griffiths, Uma Suthersanen et al., *DECLARATION, A BALANCED INTERPRETATION OF THE “THREE-STEP TEST” IN COPYRIGHT LAW*, (2008) <http://www.ip.mpg.de/shared/data/pdf/declaration_three_step_test_final_english.pdf>

- ³ See *infra* Part V.2.
- ⁴ Translations of the Japanese Copyright Act are available at <<http://www.japaneselawtranslation.go.jp/>> and <http://www.cric.or.jp/cric_e/clj/clj.html>. Regarding the outline written in English of the Japanese Copyright Act and major cases, see Tatsuihiro Ueno, Chapter 22(Japan), in Silke von Lewinski (ed.), COPYRIGHT THROUGHOUT THE WORLD (2008).
- ⁵ Tatsuihiro Ueno, Doitsu-hô ni okeru honan – “Honshitsutekitokuchô no chokusetsu-kantoku” ron no saikôsei – [Adaptation in the German law –Reconstruction of “the theory on direct perception of essentiality of works”], 34 Copyright law journal 28 (2008).
- ⁶ Hiroshi Saitô, GAISETSU CHOSAKUKENHÔ [Outline of the Copyright Act], 3rd ed., 13 et seq. (1994).
- ⁷ Moriyuki Kato, CHOSAKUKENHÔ CHIKUJÔ KÔGI [Commentary on the Copyright Act], 5th revised ed., 173 (2006).
- ⁸ See the materials referred to in Tatsuihiro Ueno, Chosakubutsu no kaihen to chosakushajinkakukuen wo meguru ichikôsatsu –Doitsu chosakukenhô ni okeru “Rieki kôryô” karano shisa– (1) [An inquiry into modifications of a work and the right of integrity –suggestions from “balance of interests” [Interessenabwägung] under the German Copyright Law (1)], 120-4=5 Minshôhō Zasshi 755 footnote 2 (1999).
- ⁹ Saitô, *supra* note 6, at 106.
- ¹⁰ Takahiro Hattori, Gensoku to reigai – Hôkyôgigaku no ichi sokumen– [Principles and exceptions –One aspect of legal doctrine study–], in Masao Yamashita (ed.), HÔTEKI SHIKÔ NO KENKYÛ [Study of legal thinking], 119 (1993).
- ¹¹ Saitô, *supra* note 6, at 14 et seq.
- ¹² Hiroshi Saitô, Shin chosakukenhô to jinkakukuen no hogo [New Copyright Act and protection of personal rights], 4 Copyright law journal 85 et seq. (1971).
- ¹³ Saitô, *supra* note 12 at 84.
- ¹⁴ Saitô, *supra* note 12 at 99.
- ¹⁵ See, e.g., DAI 63 KAI KOKKAI SHÛGIIN BUNKYÔINKAI CHOSAKUKENHÔAN SHINSASHÔINKAI GIROKU [Minutes of the sub-committee for examination of draft copyright act of the committee on education of the house of representatives at the 63rd diet session], vol.3 p.20 (1970); Saitô, *supra* note 12 at 86.
- ¹⁶ See, e.g., DAI 61 KAI KOKKAI SHÛGIIN BUNKYÔINKAI GIROKU [Minutes of the committee on education of the house of representatives at the 61st diet session], vol.21 p.10 (1969).
- ¹⁷ Shinichi Obata, Chosakushajinkakukuen oyobi ippantekijinkakukuen ni tsuiteno jisshitsuteki ichikôsatsu [Substantive study of author’s moral rights and general personal rights], 16 Copyright law journal 39 (1989).
- ¹⁸ Yoshiyuki Tamura, Gijutsu no henka ni taiô shita chosakukuen no seigen no kanôsei ni tsuite [Possibility of limitation of copyrights in tune with the changing technical environment], 1255 Jurist 128 et seq. (2003) also describes the spread of Internet use as the “third wave” and calls for a review of copyright limitation.
- ¹⁹ See Ueno, *supra* note 8, 120-6 Minshôhō Zasshi 959 et seq.
- ²⁰ Kato, *supra* note 7 at 227.
- ²¹ Tokyo District Court, July 22, 1977, Mutaisaishû Vol.9 No.2: 534 [Stage set design Case]. The court found that the defendant company’s act of reproducing a design drawing for internal use as an infringement of the right of reproduction.
- ²² <http://www.jrrc.or.jp/>
- ²³ For example, Nikkei Inc., which is a news media organization in Japan, concludes a fixed-term agreement to permit company and university etc. to continuously reproduce its news articles, etc., for internal use. <<http://www.nikkei.co.jp/privacy/shinsei.html>>
- ²⁴ Tamura, *supra* note 18 at 130 et seq.
- ²⁵ Yoshiyuki Tamura, CHOSAKUKENHÔ GAISETSU [Outline of the Copyright Act], 200 (2001).
- ²⁶ Tamura, *supra* note 25 at 200.
- ²⁷ Ministry of Economy, Trade and Industry, DENSHI SHÔTORIHIKI OYOBI JÔHÔZAI TORIHIKITÔ NI KANSURU JUNSOKU [Guidelines concerning electric business transactions and information goods transactions, etc.] (August 2008) <http://www.meti.go.jp/press/20080829004/03_t.pdf>, 238 et seq.
- ²⁸ Tamura, *supra* note 18 at 131.
- ²⁹ Kato, *supra* note 7 at 225.
- ³⁰ Kato, *supra* note 7 at 225. See also Takashi Yamamoto, Kenriseigen no hôri to shiteki-fukusei no genkai [Legal theories on limitation of rights and limits of reproduction for private use], in CHITEKIZAISANKENHÔ TO KYÔSÔHÔ NO GENDAITEKI TENKAI [Recent developments in intellectual property law and competition law] (Writings in Honour of Prof. Nobuo Monya), 893 et seq. (2006).
- ³¹ Kato, *supra* note 7 at 239.
- ³² Tokyo High Court, November 8, 1995, Chitekisaishû Vol.27 No.4: 778 [Reproduction at Library Case]. The court held that each of

- the seven-page articles contained in a book entitled “Civil Engineering Dictionary” (822 pages in total) had a specific topic and indicated the author’s name and, therefore, that said article shall not be regarded as a “part of a work” specified in Art.31(i) of the Copyright Act.
- ³³ <http://opac.ndl.go.jp/>
- ³⁴ Kato, *supra* note 7 at 239.
- ³⁵ Yasuto Komada, Chosakubutsu to sakuin gainen tonô idô ni tsuite [Differences and similarities between “copyrighted work” as legal concept and the “work” in ordinary meaning], 11 Intellectual property law and policy journal 145, (2006) <http://www.juris.hokudai.ac.jp/coe/pressinfo/journal/vol_11/11_7.pdf>.
- ³⁶ Furthermore, Art.31(i) permits reproduction only if it is for the purpose of research or study. In conventionally accepted theories, it has been interpreted that reproduction for “artistic appreciation” or “hobby or leisure” should be prohibited under said provision (*See* Kato, *supra* note 7 at 238; Saitô, *supra* note 6, at 176). However, Art.30(1) does not impose such requirement.
- ³⁷ <http://www.jla.or.jp/fukusya/uturikomi.pdf>
- ³⁸ <http://www.jla.or.jp/fukusya/q&a.pdf>
- ³⁹ <http://warp.ndl.go.jp/>
- ⁴⁰ http://warp.ndl.go.jp/WARP_Intro.html
- ⁴¹ <http://web.archive.org/>
- ⁴² BUNKA SHINGIKAI CHOSAKUKEN BUNKAKAI HÔKOKUSHO [Report of the subdivision on copyright of the council for cultural affairs] (January 12, 2006) <http://www.cric.or.jp/houkoku/h18_1b/h18_1b.html>.
- ⁴³ <http://kindai.ndl.go.jp/>
- ⁴⁴ <http://www.aozora.gr.jp/>
- ⁴⁵ Supreme Court, March 28, 1980, Minshû Vol.34 No.3: 244 [*Parody Case*]. A translation is available at <[http://www.tomeika.jur.kyushu-u.ac.jp/chizai/pdf/28%20 March%201980.pdf](http://www.tomeika.jur.kyushu-u.ac.jp/chizai/pdf/28%20March%201980.pdf)>.
- ⁴⁶ For further information, *see* Ueno, *supra* note 49 at 312 et seq.
- ⁴⁷ Saitô, *supra* note 6, at 180; Tamura, *supra* note 25 at 244 and 260.
- ⁴⁸ Hiroshi Saitô, CHOSAKUKENHÔ [Copyright act], 3rd ed., 242 (2007); Kato, *supra* note 7 at 243; Fumio Sakka, SHÔKAI CHOSAKUKENHÔ [Detailed explanation of the copyright act], 3rd ed., 335 (2004) etc.
- ⁴⁹ *See* Tatsuhiro Ueno, Inyô wo meguru yôkenron no saikôksei [Reconstruction of the theories on requirements concerning quotation], in CHOSAKUKENHÔ TO MINPÔ NO GENDAITEKI KADAI [Current issues concerning the copyright act and the civil code] (Writings in Honour of Prof. Masao Handa), 307 et seq. (2003); Toshiaki Iimura, Saibanrei ni okeru inyô no kijun ni tsuite [Criteria concerning the quotation in court decisions], 26 Copyright law journal 94 (2000).
- ⁵⁰ Ueno, *supra* note 49 at 325 et seq.
- ⁵¹ Tokyo High Court, April 11, 2002 [*Absolute Pitch Case*]; Tokyo High Court, November 29, 2004 [*Seikyô Graph Case*].
- ⁵² Tamura, *supra* note 25 at 243 (*See also* Kensaku Fukui, Chosakukenhô no shôraizô – Parody oyobi appropriation– [Future of the Copyright Act –Parody and Appropriation] in Tatsuki Shibuya, Toshiko Takenaka, Ryû Takabayashi, CHIZAI NENPÔ I.P. ANNUAL REPORT 2005, 255).
- ⁵³ Ueno, *supra* note 5 at 29 et seq. Regarding a parody, the German copyright law stipulates that, even if another person’s work remains perceivable in the newly created work, the use of another such person’s work may be regarded as “free use [Freie Benutzung]” as long as the individual characteristics of the existing original work are “verblassen [faded]” in the newly created work.
- ⁵⁴ In the United States, the *Pretty Woman* case is a famous precedent concerning the issue of parody. However, professor Tamura considers that such type of parody should not be permitted under the Japanese law either (*See* Yoshiyuki Tamura, Chosakukenhô 32 jô 1 kô “Inyô” hôri no gendaiteki igi [Current significance of the “Quotation” doctrine of Art. 32(1) of the Copyright Act], 554 *Kopiraito* [Copyright] 15 (2007)).
- ⁵⁵ Yoshiyuki Tamura, Kaiga no auction site eno gazô no keisai to chosakukenhô [Posting of an image of a painting on an auction website and the Copyright Act], 56-9 Intellectual Property Management 1307 (2006). In connection with the right to maintain integrity, Professor Tamura has also stated that posting of a part of a work should not be regarded as “modification” specified in Art. 20(1) or that such posting may be permitted under Art. 20(2)(iv). *See id.* at 1315 et seq.
- ⁵⁶ *See also* Tokyo District Court, February 20, 1998, Hanrei Jihô No.1643:176 [*Barnes Collection Case*] concerning the legality of posting images of Pablo Picasso’s paintings on the front page of the *Yomiuri* newspaper dated December 2, 1992.
- ⁵⁷ Kato, *supra* note 7 at 286.
- ⁵⁸ Kato, *supra* note 7 at 288.
- ⁵⁹ Kato, *supra* note 7 at 288.

- ⁶⁰ Tokyo High Court, February 18, 2002, Hanrei Jihô No.1786: 136 [*Lighting Catalog Case*].
- ⁶¹ See e.g., Art.57 (Unwesentliches Beiwerk [Insignificant Works]) of the German Copyright Act; Sec.31 (Incidental inclusion) of the U.K. Copyright, Design and Patent Act.
- ⁶² See also Ueno, *supra* note 5 at 42 et seq. concerning the theory.
- ⁶³ Kato, *supra* note 7 at 274.
- ⁶⁴ Kato, *supra* note 7 at 274.
- ⁶⁵ Regarding the current discussions, see Ueno, *supra* note 49 at 318, footnote 26.
- ⁶⁶ Kato, *supra* note 7 at 245.
- ⁶⁷ Tokyo District Court, October 30, 1998, Hanrei Jihô No.1674: 132 [*Blood Type and Character Case*].
- ⁶⁸ Tamura, *supra* note 25 at 246 et seq. See also “abstract quotation” mentioned in Kato, *supra* note 7 at 245.
- ⁶⁹ See also Tatsuki Shibuya, CHITEKI-ZAISANHÔ KÔGI II [Lectures on Intellectual Property Laws II], 1st ed., 91 (2004).
- ⁷⁰ Kato, *supra* note 7 at 305.
- ⁷¹ Tokyo District Court, July 25, 2001, Hanrei Jihô No.1758: 137 [*City Bus Case*].
- ⁷² Kato, *supra* note 7 at 326.
- ⁷³ Kato, *supra* note 7 at 326.
- ⁷⁴ Tamura, *supra* note 25 at 202.
- ⁷⁵ Kato, *supra* note 7 at 324.
- ⁷⁶ Tamura, *supra* note 25 at 203 also considers such act to be infringement of the right of reproduction by saying that “It should be noted that the screen presentation of privately reproduced movies would deprive the copyright holder of the opportunity to receive remuneration.”
- ⁷⁷ Tamura, *supra* note 25 at 202.
- ⁷⁸ See The Ministry of Economy, Trade and Industry, *supra* note 27 at 236.
- ⁷⁹ Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); Field v. Google, Inc., 412 F.Supp.2d 1106 (D.Nev. 2006); Perfect 10. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007).
- ⁸⁰ See also Fumio Sakka, Google no kensaku system wo meguru hôteki fungsô to seidojô no kadai [Legal disputes over Google's search system and issues in legal system], 555 Kopiraito [Copyright] 27 and 556 Kopiraito [Copyright] 28 (2007); Yoshiyuki Tamura, Kensaku site wo meguru chosakukenhō no shomondai (1) –Kiyō shingai, kansetsu shingai, fair use, inyō, tō– [Copyright issues on search engines (1) –Contributory infringement, indirect infringement, fair use, quotation, etc.–], 16 Intellectual property law and policy journal 73 (2007).
- ⁸¹ LG Erfurt, Urteil v. 15.3.2007 - Az.: 3 O 1108/05, OLG Jena, Urteil v. 27.02.2008 - Az.: 2 U 319/07; LG Hamburg, Urteil v. 26.09.2008 - Az.: 308 O 42/06.
- ⁸² Tamura, *supra* note 18 at 131.
- ⁸³ BUNKA SHINGIKAI CHOSAKUKEN BUNKAKAI HÔKOKUSHO [Report of the subdivision on copyright of the council for cultural affairs] (January 2009) 54 et seq. <http://www.bunka.go.jp/chosakuken/singikai/pdf/shingi_hokokusho_2101.pdf>
- ⁸⁴ Tokyo District Court, June 29, 1998, Hanrei Jihô No.1667: 137 [*Hell's Taxi Case*].
- ⁸⁵ Tokyo High Court, September 6, 2002, Hanrei Jihô No.1794: 3 [*Kinenju Case*]. A translation is available at <<http://www.tomeika.jur.kyushu-u.ac.jp/chizai/pdf/2002%209%206E.pdf>>.
- ⁸⁶ <http://cip.law.ucla.edu/>
- ⁸⁷ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 114 S.Ct. 1164 (1994).
- ⁸⁸ Repp v. Webber, 132 F.3d 882 (2d Cir. 1997).
- ⁸⁹ Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984).
- ⁹⁰ Regarding the following statements, see Ueno, *supra* note 8 at 120-4=5 Minshôhō Zasshi 757 et seq.
- ⁹¹ Kato, *supra* note 7 at 172.
- ⁹² Kato, *supra* note 7 at 172.
- ⁹³ Kato, *supra* note 7 at 173.
- ⁹⁴ Kato, *supra* note 7 at 173.
- ⁹⁵ Tokyo District Court, July 31, 1995 [*Sweet Home Case*].
- ⁹⁶ Tokyo District Court, August 29, 1997 [*Haiku Modification Case: First instance*].
- ⁹⁷ Tokyo District Court, February 23, 1996 [*Manga Modification Case*].
- ⁹⁸ Tokyo High Court, August 4, 1998 [*Haiku Modification Case: Appeal trial*].
- ⁹⁹ Ueno, *supra* note 8 at 120-6 Minshôhō Zasshi 959 et seq.
- ¹⁰⁰ Tokyo District Court, July 25, 2001, Hanrei Jihô No.1758: 137 [*City Bus Case*].
- ¹⁰¹ Tokyo District Court, October 30, 1998, Hanrei Jihô No.1674: 132 [*Blood Type and Character Case*].
- ¹⁰² Tokyo District Court, June 11, 2003, Hanrei Jihô No.1840: 106 [*Noguchi Room Case*].
- ¹⁰³ Tetsuo Maeda, Chosakukenhō 30 jō to three-step test [Art. 30 of the Copyright Act and the three-step test], in I.P. ANNUAL REPORT 2005, 266.
- ¹⁰⁴ Tokyo High Court, February 18, 2002, Hanrei Jihô No.1786: 136 [*Lighting Catalog Case*].
- ¹⁰⁵ See discussion at Symposium 2007 on Adaptation of The Copyright Law Association of Japan (34 Copyright law journal 102 et seq. (2008)).
- ¹⁰⁶ Kato, *supra* note 7 at 288.

- ¹⁰⁷ Tokyo District Court, August 29, 1997, Hanrei Jihô No.1616: 148 [*Haiku Modification Case: First instance*]. In the appeal trial of this case (Tokyo High Court, August 4, 1998, Hanrei Jihô No.1667: 131), the court found the disputed act as non-infringing of the right to maintain integrity by holding that “There was the so-called customary practice that the work may be corrected and then posted.”
- ¹⁰⁸ Tokyo District Court, February 23, 1996, Hanrei Jihô No.1561: 123 [*Manga Modification Case*].
- ¹⁰⁹ Supreme Court, April 25, 2002, Minshû Vol.56 No.4: 808 [*Second-hand Game Software Case*]. A translation is available at <<http://www.tomeika.jur.kyushu-u.ac.jp/chizai/pdf/25%20April%202002.pdf>>.
- ¹¹⁰ Nobuhiro Nakayama, SOFTWARE NO HÔTEKI HOGO [Legal protection for software], new ed., 131 (1988) (Concerning reproduction for reverse engineering); Kôji Abe, Nihon chosakukenhō to fair use no riron [Japanese Copyright Act and fair use doctrine], 482 *Kopiraito* [Copyright] 18 (2001); Hidetaka Aizawa & Nishimura & Partners, CHITEKI ZAISANHÔ GAISETSU [Outline of intellectual property laws], 2nd ed., 173 authored by Genta Saitô (2006); Keiji Sugiyama, Fair use to kyôikuriyô [Fair use and educational use], in CHOSAKUKENHÔ TO MINPÔ NO GENDAITEKI KADAI [Current issues concerning the copyright act and the civil code] (Writings in Honour of Prof. Masao Handa), 299 (2003).
- ¹¹¹ Tokyo High Court, May 19, 1976, Mutaisaishû vol.8 no.1: 200 [*Parody Case: Appeal trial*].
- ¹¹² Supreme Court, March 28, 1980, Minshû vol.34 No.3: 244 [*Parody Case*].
- ¹¹³ See Tokyo District Court, December 18, 1995, Hanrei Jihô No.1567: 126 [*Last Message Case*]; Tokyo High Court, October 27, 1994, Chitekisaishû Vol.26 No.3: 1151 [*Wall Street Journal Case*].
- ¹¹⁴ Tokyo District Court, May 16, 2000, Hanrei Jihô No.1751: 128 [*Star Digio Case*].
- ¹¹⁵ Tokyo District Court, July 31, 1995 [*Sweet Home Case*].
- ¹¹⁶ Kato, *supra* note 7 at 137.
- ¹¹⁷ Tokyo District Court, December 22, 1997, Hanrei Jihô No. 1637: 66 [*PC-VAN Case*].
- ¹¹⁸ See also Tamura, *supra* note 25 at 31 footnote 1.
- ¹¹⁹ Tamura, *supra* note 18 at 126.
- ¹²⁰ Tamura, *supra* note 25 at 187.
- ¹²¹ But see Sakka, *supra* note 48 at 284 et seq. presents the opposite interpretation.
- ¹²² Japan complex cafe association. <<http://www.jcca.ne.jp/>>
- ¹²³ See the explanation by the Subdivision on Copyright of the Agency for Cultural Affairs. <http://www.bunka.go.jp/1tyosaku/chosakuke-nhou_kaisei_4_q8.html>
- ¹²⁴ Hidetaka Aizawa, Chosakukenhō no paradigm eno shōron [Essay on the paradigm of the Copyright Act], in CHITEKI ZAISANHÔ NO RIRON TO GENDAITEKI KADAI [Theories and recent issues concerning intellectual property law], (Writings in Honour of Prof. Nobuhiro Nakayama) 348 (2005); Sugiyama, *supra* note 110 at 300 et seq.
- ¹²⁵ Saitô, *supra* note 48 at 224; Hiroshi Saitô, Chosakuken no seigen matawa reigai ni kansuru ichikôsatsu [Study on limitations or exceptions on copyrights], 55-9 *Chizaikanri* 1193 and 55-10 *Chizaikanri* 1355 (2005); Maeda, *supra* note 103 at 257.
- ¹²⁶ Saitô, *supra* note 48 at 224.
- ¹²⁷ Regarding its meaning from the perspective of legal theory, see Ueno, *supra* note 8 at 120-6 *Minshôhō Zasshi* 966 footnote 245.
- ¹²⁸ Regarding recent discussions on the fair use doctrine in the U.S. copyright law, see also Tamura, *supra* note 18 at 124 et seq.; Maiko Murai, Shijô no seisei to fair use –Texaco hanketsu wo tansho toshite (1) (2) [Market creation and fair use –with the focus on the Texaco Judgment (1) (2)], 6 *Intellectual property law and policy journal* 155 and 7 *Intellectual property law and policy journal* 139 (2005), etc.
- ¹²⁹ See also Martin R. F. Senftleben, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW (2004).
- ¹³⁰ Art.9(2) of the Berne Convention, Art.10 of the WIPO Copyright Treaty (WCT), Art.16 of the WIPO Performances and Phonograms Treaty (WPPT), Art.13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (See also Art.5(5) of the EC Information Society Directive (2001/29/EC)).
- ¹³¹ See also Ryû Kojima, Jôyaku ni okeru kenriseigen [Limitations of rights under treaties], 35 *Copyright law journal* 72 (2008).
- ¹³² See Christophe Geiger et al., DECLARATION, *supra* note 2 at 4.
- ¹³³ In fact, with regard to the right to maintain integrity, Art.20(2)(iii) was added as a result of the revision of 1985. Until then, the current Art.20(2)(iv) had been Art.20(2)(iii).
- ¹³⁴ Kato, *supra* note 7 at 224.

- ¹³⁵ Tatsuhiro Ueno, *Sôron –Symposium “kenriseigen” no shushi* [Overview – Symposium of the “limitation of rights”], 35 Copyright law journal 2 (2008); Hisayoshi Yokoyama, *Eibei-hô ni okeru kenriseigen* [Limitation of rights in Anglo-American Law], 35 Copyright law journal 11 (2008); Yasuto Komada, *Tairiku-hô ni okeru kenriseigen* [Limitation of rights in continental law], 35 Copyright law journal 52 (2008); Kojima, *supra* note 131 at 72, Ryô Shimanami, *Kenriseigen no rippôkeishiki* [Types of legislation on limitation of rights], 35 Copyright law journal 90 (2008); Toshiaki Imura, *Kenriseigenkitei no kaishaku ni okeru kadai* [Issues related to the interpretation of provisions on limitations of rights], 35 Copyright law journal 109 (2008); Takashi Yamamoto, *Kenriseigen no kyôhanjûzokusei –kenriseiken no jûzokusei to isshinsei–* [Complicity dependence of limitation of rights –Dependence and independence of limitation of rights], 35 Copyright law journal 127 (2008). In addition, Yasuto Komada, *three-step test wa dokomade yûyôna gensoku ka –*
- France ni okeru giron wo sankôni– [Effectiveness of the three-step test –with focus on discussions in France], 51-3=4 Legal studies of Sophia Univ. 39 (2008).
- ¹³⁶ <http://www.kantei.go.jp/jp/singi/titeki2/2008/keikaku.pdf>
- ¹³⁷ Professor Nobuhiro Nakayama (Former professor of The University of Tokyo), who chaired said Committee, used to have a negative view on a proposal for introduction of a fair use provision to the Japanese Copyright Act, while supporting, to some extent, a proposal for introduction of a so-called “small general clause” (Nobuhiro Nakayama, *CHOSAKUKENHÔ* [Copyright act], 309 et seq. (2007)). From 2008, however, he started to actively take action on the introduction of a fair use provision. *See* the statement made by Prof. Nakayama (35 Copyright law journal 164 (2008)).
- ¹³⁸ <http://www.kantei.go.jp/jp/singi/titeki2/houkoku/081127digital.pdf>
- ¹³⁹ <http://www.bunka.go.jp/chosakuken/singikai/housei/index.html>
- ¹⁴⁰ *See supra* note 1.