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Debates on Introduction of "Fair use" to the Copyright Act of Japan and Korea -Do Japan and Korea need Fair use?-

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Abstract

With the development of the digital network society, ways to use copyrighted works have been changing rapidly. As new types of use have emerged, it has raised a legal issue as to how we should strike a balance between the protection of copyright and the public interest for free use.

In Japan and Korea, copyright exceptions are enumerated in copyright laws such as copying for private use, education purposes, copying for disabled and so on. There is criticism for this enumeration list since it is hard to cover the all new types of use, promptly. It seems that ‘limitation through the judicial judgment’ is better to keep the balance than ‘exceptions through the legislation’. That is why some scholars have proposed that a general provision for copyright limitation such as the “fair use” clause of the American Copyright Act should be introduced.

Both Japan and Korea are reviewing their own versions of fair use to solve the current problem. I can sympathize that the freedom and interest of the user are not protected enough at present. But I think that Japan and Korea do not need fair use exceptions.

Fair use may be incompatible with the current international law, and there also are certain advantages of enumerated exceptions, and, above all, fair use is also insufficient to solve all the mentioned concerns. Introduction of fair use is not the only or best solution to this situation.

It is necessary to set the all parties equally for balancing interests. For that end, I suggested the “Balancing approach based on Human rights”. The “Balancing approach based on Human rights” treats every party without distinction, and considers the every act by multi-dimensional standards. Courts should consider the promotion of dissemination of an idea and knowledge and not only the protection of property rights and moral rights of the author because every party concerning with certain copyright infringement has human rights as a person. Moreover, this approach can be used practically both in Continental and Anglo-American Law systems.

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I. Introduction

With the development of the digital network society, ways to use copyrighted works have been changing rapidly. As new types of use have emerged, it has raised a legal issue as to how we should strike a balance between the protection of copyright and the public interest for free use.

In order to find a balance, there could be two approaches; “What kind of copyrights and exceptions are needed?” and “What is fair to limit the copyright?”. I would like to distinguish the former as “exception” and the latter as “limitation”.

The exceptions of the Civil Law system are exemptions from norms, and the scope shall be decided through legislation. The “fair use

¹⁾ functions as a limitation presenting configuration of the copyright through the judicial judgment.

In Japan and Korea, copyright exceptions are enumerated in copyright laws such as copying for private use, education purposes, copying for disabled and so on.

There is criticism for this enumeration list since it is hard to cover the all new types of use, promptly²⁾. Also, there is ‘minoritarian bias³⁾’. This theory was originally mentioned in the policy making procedure, but I think it also can be applied to the law making procedure. The ‘organized and concentrated high interest of copyright holders’ tends to be easily reflected to the legislation such as lobbying, but ‘unorganized and decentralized low interest of individual users’ is hardly reflected. Moreover, legislation procedure usually takes time.

It seems that ‘limitation through the judicial judgment’ is better to keep the balance than ‘exceptions through the legislation’, because at least we assume that there is no ‘minoritarian bias’ in the court. That is why some scholars have proposed that a general provision for copyright limitation such as the “fair use” clause of the American Copyright Act should be introduced, and the court should judge whether defendant’s use in question is infringement or not on a case-by-case basis with this provision.

In Japan, the "Introduction of the so-called Japanese version Fair use" was proposed in November, 2008 by the Intellectual Property Expert Examination Committee in the Digital Network Society of the Intellectual Property Strategy Headquarters of the Cabinet. Now the Legal Issue Panel of Copyright Subcommittee of Agency for Cultural Affairs is reviewing the issue of introduction of general provision of copyright limitation⁴⁾.

On the other hand, Korea, which entered into a Free Trade Agreement (FTA) with the United

States in 2007, has been proceeding to draft amendments to all intellectual property laws, and some reform bills including the "Korean type of Fair use", which were proposed in 2008 and 2009.

In this paper, I will introduce the heated debate of "fair use" introduction argued in Japan, and Korea. I will also illustrate whether a general provision for copyright limitation such as "fair use" is compatible with the continental law system referring to debates in France and Germany.

Finally, I would like to propose a new approach, so-called the "Balancing approach based on human rights⁵", as the method for balancing of interests between authors (copyright holders) and users.

II. Debate on the introduction of Fair use clause in Japan

1. Conventional theory and court precedents

The provisions of copyright exceptions are enumerated from Article 30 to Article 49 of the Japanese Copyright Act. The conventional theory has interpreted that copyright exception is 'only an exception to the principle' and it should be interpreted strictly⁶.

For example, in the Social Insurance Agency LAN case⁷, a legal issue was whether the defendant's posting of an article⁸ on the LAN in Social Insurance Agency(SIA) infringed the reproduction right or/and public transmission right.

The court held that "Clause 1 of Article 42⁹ is a provision which provides that copying is not a 'reproduction right' infringement in certain situations, and this provision is not applied to 'public transmission'", "Clause 1 of Article 42 allows the copying only for a limited scope of internal use by administrative agencies. So in this case it is apparent that there is no room for broad interpretation".

Courts would not be bound by strict interpretation, but as a result, there are few judgments which accepted an analogical application of provisions of copyright exceptions as a method of gap-filling to lead to a reasonable conclusion. Similarly, it has been thought that analogical application for provision of copyright exceptions is not permitted in Japan.

2. Problems and criticism

However, such a strict construction has raised various problems. When copyright exceptions are interpreted too strictly, the use of works is excessively limited, and theoretically, most daily uses of the copyrighted works may constitute a copyright infringement.

For example, according to court precedents and theories, copying for using in a company is not within the scope of Article 30¹⁰, because this article clearly provides that it applies only to “reproduction for *private use*”¹¹.

Article 31¹² provides that "it shall be permissible to *reproduce* a work" in libraries, so both a user and a library may mail the reproduction of copyrighted works made lawfully under this provision, but it is generally interpreted that transmission by fax or e-mail is not permissible¹³.

Related with Article 32¹⁴, Internet auctions used to be a heated legal issue. When put art works up for internet auction, the auctioneer usually takes picture of that art work and uploads the picture on an auction site. But it was said that this could not be a lawful quotation under Article 32 because it was not for news reporting, critic or research, and the reproduction was made for entire art works not a part. This theoretical conclusion was so unreasonable that the Copyright Act was amended in 2009¹⁵ by making lawful the act of the auctioneer that takes a picture of the art works and post the picture on an auction site without permission of the copyright holders.

In addition, other new types of works' use such as incidental copying, blog posting of the souvenir picture of Disneyland, and search engines¹⁶ have become the legal issue of interpretation of enumerated copyright exceptions.

As mentioned above, if copyright exceptions are interpreted strictly by courts, most daily use might be copyright infringements.

3. Debate on the Fair use introduction

There can be three types of solutions to the issues mentioned above.

(1) Flexible Construction

There are some court precedents which applied a broad interpretation in Japan. For example,

in the Picture on City bus body case¹⁷, a legal issue was whether the publication of the picture¹⁸ drawn on the body of the city bus as a book was within the scope of Article 46¹⁹ which permits users to exploit artistic works permanently located in open places such as street and parks. Tokyo district court held that "from the purpose of the provision, there is no reason to interpret the '*permanently installed*' in a limited way such as adhered to the estate or fixed to certain place." As a result, the court applied article 46 to this case, thereby leading to a reasonable conclusion.

Similarly, the analogy also can be used in consideration of the purpose of the clause. There are no court precedents about copyright, but concerning the moral rights, there is a rare case. In Noguchi Room transfer case²⁰, in spite of being an *obiter dictum*, the court applied Clause 2 of Article 20 ('*building*') to the "*garden*".

There are also some other ways to apply other doctrines stemming from the Civil Code to copyright infringement cases, such as "abuse of right" or "the implicit license", to lead a reasonable conclusion.

(2) Establish a general provision of copyright limitation

It is most desirable that individual copyright exceptions can cover all the unexpected situations although the rapid change of society by new technology makes it difficult to do so. Moreover, if the copyright exception provisions have extremely narrow scope, it can be interpreted by argument from the contrary.

These disadvantages might make it more persuasive and appealing that a general provision should be introduced to Copyright Act. For that reason, a research on "Introduction of general provision of copyright limitation (the Japanese version of fair use)" by Legal Issue Panel of Copyright Subcommittee of Agency for Cultural Affairs is proceeding in Japan.

The Japanese version of fair use seems somehow narrow, because it will be provided parallel with existing exceptions, and will only regard the cases which may not be covered by the enumerated copyright exceptions²¹.

(3) Addition of the copyright exception

As mentioned above, addition of new copyright exceptions to the Japanese Copyright Act can

be one option to be considered. The Council of Japanese government said that, even if the general provision of copyright limitation is introduced, addition of the copyright exceptions should be considered as an option because a clear criterion is still needed.

III. Debate on the Fair use introduction and reform bills in Korea

1. Background of the Debate on the Fair use

There has also been a debate on an introduction of a fair use clause into Copyright Act in Korea so far, but it was not until the drafting of a Free Trade Agreement (FTA) dealing with United States that it started to be argued in earnest.

With the modern trend of copyright strengthening, users should be guaranteed to use copyrighted works without permission from copyright holders in certain situations because the users are another axis of the copyright institution. That is why fair use introduction has started being discussed.

The related provision in the FTA is the following²². This text looks like the “Three-Step Test” in the Berne Convention that is related to copyright exceptions.

Kor-U.S. FTA § 18.4.10.(a)

With respect to this Article and Articles 18.5 and 18.6, each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.

2. Debate on the "Korean type of Fair use Clause"

Although a ratification procedure by the Diet is still under way, the FTA between Korea and the U.S. was concluded on April 2, 2007²³. Various Copyright Act reform bills which including “Korean type of Fair use clause” are filed to perform the FTA. Following is one example.

Article 35-2 (Fair use of copyrighted works)

1. In the cases which are not provided on Article 23 to Article 35, every person shall use copyrighted works in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.

2. To determine whether the use made of work comes under the clause 1, following factors should be considered:

i)The purpose and means of the use, including whether such use is commercial or non-commercial;

ii) The nature and character of the copyrighted work;

iii)The amount and relative importance of the portion used in relation to the copyrighted work as a whole; and

iv)The effect of the use upon the present and potential market for or value of the copyrighted work.

In this article seems that Three-Step Test and Fair use are combined. According to the comments proposed by the government, it will introduce Fair use provision to activate uses of copyrighted works on the user's side in considering that copyright is strengthened more in Kor-US FTA²⁴²⁵. After that, other reform bills²⁶ of Copyright Act proposed by members of the Diet also examined the Fair use-like clause but none of them has been passed yet.

3. Pros and Cons about Fair use introduction in Korea²⁷

(1) Pros

The fair use is a very flexible doctrine so that the courts can apply it to various copyright infringement cases involving new technologies. With fair use clause, the transaction costs of use of works will be considerably decreased²⁸. Moreover when the statutory law leaves much to be desired, fair use can offer a flexible standard to courts to fill the gap. These are main reasons why the introduction of fair use to Korean Copyright Act²⁹ is the best solution to these complex problems.

Of course they admit that the four factors of fair use are somehow abstract and courts might

be confused when applying the fair use clause to the case. The key issue of fair use introduction is that whether Korean courts will be able to utilize properly this doctrine in copyright infringement cases. Moreover, those in favor insist that Korean courts have enough ability to handle the fair use doctrine.

(2) Eclecticism

It might be difficult to predict the scope of application and how to apply a fair use clause, thereby leading to unpredictability and instability.

To guarantee the legal stability, some scholars argue that a restrictive fair use clause should be introduced to confine to certain uses with particular purposes such as non-commercial purpose, private study or research purpose³⁰, which are similar to the Fair Dealing clause of the Copyright Act of United Kingdom³¹.

(3) Cons

The fair use doctrine has been established based upon enormous numbers of precedents for a long time in the United States. On the other hand, the Korean Copyright Act enumerates the exceptions and applies the provisions to copyright infringement cases on a case-by-case basis. These two legal systems are so different in the first place that fair use cannot be consistent with the Korean legal system.

Opponents also argue that if court may create a new 'right' or 'interest' for users by applying fair use, it would weaken copyright holder's interest, and impair the stability and predictability of law. Because copyright is exclusive property right, creating a new property right should go through a democratic legislative procedure³² of parliament.

Moreover, opponents argue that Korean courts have already been using a fair use-like standard such as "the normal usage", "a proper scope", in deciding copyright infringement cases³³. Therefore an introduction of a fair use clause is not necessary in the Korean Copyright Act besides a declaratory meaning.

Although some opponents reluctantly admit the necessity of the general provision of copyright exception, they are afraid that, it may cause uncontrolled situations due to a lack of court precedents.

In conclusion, they argue that it is better to deal with the problem by adding individual exceptions promptly to the Copyright Act than relying on an abstract general provision³⁴.

IV. The Compatibility of Fair use clause in Continental law system

1. Debate in Europe³⁵

The Information Society Directive³⁶ provides many limitations and exceptions as a directory statute, not a mandatory statute. The Directive is somehow general because each Member States' situations are different. In order for Member States not to restrict copyright excessively, the directive provides a "Three-Step Test" in Clause 5 of Article 5. The Three-Step Test originally came from the Berne Convention Clause 2 of Article 9 involving the reproduction right.

Directive Article 5 Clause 5

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

When a Member State establishes copyright restrictions of the Directive into its domestic law, it should not conflict with the Three-Step Test. This is also applied to previously existing right restrictions, so Member States should revise the provision to be consistent with the Directive.

To implement the Information Society Directive into domestic law, both France and Germany took a considerable amount of time. In France, "DADVSI³⁷" law was enacted in August 2006, while in Germany, "erster Korb" passed in September, 2003 and "zweiter Korb³⁸" in October, 2007.

In both France and Germany, copyright exceptions are enumerated and limited in number³⁹. There are no general provision to limit the scope of copyrights like fair use. Copyright

exceptions are few and the coverage is also restrictive. The orthodox construction to these copyright exceptions seems as strict as in Japan. We can see the attitude that protecting the right of copyright holders is the principle, and the copyright exception is only an exception so that it should be interpreted strictly. Because of this stance, broad interpretation, analogy and any construction creating a new right restraint are prohibited without a clear provision.

Does the Three-Step Test function as a standard for construction of the existing law not only as a standard for legislation? In France, it was argued intensely in the Mulholland Drive case⁴⁰. French courts applied the Three-Step Test as an interpretation standard for existing copyright exceptions in the end, but there are many critical opinions for this decision⁴¹.

In Germany, because the possibility that the courts may abuse the Three-Step Test has raised, volunteer researchers at the Max Planck Institute publicized a Declaration in September 2008 calling for more balanced interpretation of the Three-Step Test⁴². And in my understanding, there are certain debates concerning the fair use for Germany in recent times.

2. Is it possible to introduce a fair use-like general provision into the EU law system?

Even if it is desirable to introduce a general provision concerning right restrictions, there are debates on whether transplanting the fair use-like general provision into European law is possible or not. The Directive enumerates the list of right restraints which should or may be introduced to their domestic laws (Article 5). If it is an exhaustive enumeration list, introduction of the fair use-like general provision will be denied.

For example, Schack points out that Clause 2 and 3 of Article 5 provide that "in the following cases, (members) may establish exception or limitations" about rights in Article 2 and 3. By this wording, he observes that "the directive hereby applies the brakes to member states making new copyright exceptions"⁴³.

Poeppl rather pays his attention to Clause 32 of the preamble of Directive. The EU legislator considered various legal traditions of the Member States so that they made many right restrictions as a directory provision. But it is understood that Member States were only given the discretionary powers in scope of those provisions. Poeppl's view is that every possible right restriction is already "exhaustively enumerated" in the Directive⁴⁴. Then it will be expected

that the introduction of the fair use-like general provision is not permitted under European law.

However, if the Directive really limits a range of right restrictions, unless Directive is revised, the Member States cannot legislate any regulation anymore corresponding to the development of technology in the future.

From the structure of the Directive, it is opportune to understand like said above, but it is hard to share with the conclusion. There is much obscurity about the conformation of the Directive, and it should be clear the range of the discretion of each Member State by future debate in Europe.

3. Do Japan and Korea need Fair use?

Now in Japan the importance of the general provision for copyright restriction is being recognized enough. However, there is an indication that when Japan introduces fair use, it should be verified that the form and the substance of provision are consistent with the international treaty.

In Korea, the reform bills including the Korean type of Fair use provision have been introduced. The bills combine the Three-Step Test of Berne Convention and the American Fair use so that it can escape from the suspicion that this may be inconsistent with the international treaty.

Both Japan and Korea recognize the characteristic of the continental law system, and they review the necessity of the fair use-like general provision concerning with the conditions of the domestic.

I can share the idea that freedom and interest of the user are not protected enough at present. But I think that Japan and Korea do not need Fair use.

Because fair use may be incompatible with the current international law, and there also are certain advantages of enumerated exceptions, and above all, fair use is also insufficient to solve all the concerns. Overall, I think that the introduction of fair use is not the only or best solution to this situation.

V. The necessity for a new framework

1. Fair use to straighten the precarious balance

In the first place, the reason why the debate on an introduction of fair use arose is that the user's freedom might be daunted as a result of strengthening of copyright in the digital network era.

Thus, as an effective method to strike a balance, the argument that fair use should be introduced has been more popular and persuasive because fair use is a highly flexible standard for copyright infringement.

The fair use surely functions to protect the users' freedom and interests to some degree. As a matter of fact, fair use was considered as a user's privilege⁴⁵ and a series of precedents also consider it as an effective defense in copyright infringement cases⁴⁶.

However, there are innumerable indications that the fair use, which has been used as a defense in the copyright infringement cases for a long time, are now in danger after the DMCA⁴⁷.

There is a strong doubt as to whether fair use in the 18th century's copyright-centered frame can protect the user's interest (or user's '*right*') enough in the 21st century.

2. Why is fair use insufficient?

(1) Although the fair use doctrine is said to be as a "user's privilege" or "user's *right*" by theories and precedents, fair use is only a defense in litigation in the end. And in the current copyright institution, it is not a narrow meaning of "right"⁴⁸ which enables users to "claim" the right to use copyrighted works freely.

Even if fair use is a privilege or/and a immunity of copyright user, it is not strong enough compare to the claim right. In the first place fair use is established to limit the copyright which is a "property right". The property rights are very strong in a market economy so that it will be difficult to constitute fair use as a "*rights*" of the user who has obligation against to the property right holder.

An introduction of fair use does not mean that the interest of users will be protected directly because in this "copyright holder-centered frame", there are certain limits when a court examines the case.

(2) Of course fair use is more flexible compared to enumerated copyright exceptions in Continental law system, but actually, the winning rate of the fair use defense is not so high in general.

According to the recent research⁴⁹, the winning rate of the fair use is relatively low, such as 24.1% in provisional injunctions at district court level, and 30.4% at the bench trial.

(3) Because the character of the American Copyright Law put emphasis on the economic aspects of copyright, the aspect of the public interest and author's moral right are hardly considered

For these reasons, I think that fair use is insufficient for protecting user's interest. After all, we need to find the solution from a completely different angle.

3. Beyond the fair use

The relationship of authors and users has largely changed in accordance with the environmental change⁵⁰. Because a large number of users who used to consume the copyrighted works have changed into active and creative, so now many users have chance to be an author potentially.

It means that current "copyright holder-centered frame" is not enough to cover the new types of users. It is necessary to make a new frame to strike a balance of interests, respect the diversity of this era, and treat authors and users equally.

As a new frame which is not bound with a limit of the existing copyright frame, I propose the "Balancing approach based on Human rights". It has been not so long since the relationship between Intellectual property law and Human right⁵¹ is discussed. Emerging information society changed the environment, and especially in copyright field, the relationship between intellectual property law and human rights draws our attention⁵². As we can see in the issue of Digital Divide⁵³, now it is the problem whether we can participate in the information society or not, and in this sense, copyright is concerned with human rights.

"Balancing approach based on Human rights" treats every party – an author, a creative user, a traditional user and so on - without distinction, apart from the current copyright frame based on the antagonism composition of the authors and the users.

This approach may consider various types of act – access to copyrighted works, use, derivative works, separate creation inspired by existing works and so on - by multi-dimensional standards such as politics, economics, society, culture, not by one-dimensional criterion that whether a certain use "infringes on the copyright" or not.

With this "Balancing approach based on Human rights", courts should consider the promotion

of dissemination of idea and knowledge not only the protection of property rights and moral rights (which has been ignored in U.S. law but important in continental law) of the author because every party concerning with certain copyright infringement have human rights as a person.

Especially, dealing with cases related to the social change by the development of the technology which has caused many problems involving interests of copyright holders and users, the “Balancing approach based on Human rights” can be a guideline to solve the puzzle. With this context, I am sure that this “Balancing approach based on Human rights” could be very useful.

Of course, concrete factors for the balance should be studied further. There can be a criticism that the concrete factors for the balance are not so different from the four factors of fair use⁵⁴, but as I already explained, fair use is not enough to protect the user in this era. We need a new framework which could treat every person equally.

In a recent report of the European Commission, it was mentioned that "States could be encouraged to review their legislations in order to assess and consider the benefits of introducing new exemptions which, in the framework of the digital environment, are necessary to ensure the exercise of fundamental freedoms, especially freedom of expression and information, which includes the freedom to hold opinions and to receive and impart information and ideas. Standard-setting work which defines limitations and exceptions in terms of positive rights or user freedoms in the digital environment could contribute to development and promotion of a European human rights based approach and to greater coherence between the legal systems of European states⁵⁵". It will be the problem that should be studied in future.

VI. Conclusions

In this paper, I illustrated the debates on the introduction of fair use in Japan and Korea referring to the debates in Europe. Both Japan and Korea are reviewing their own versions of fair use to solve the current problem. I can sympathize that the freedom and interest of the user are not protected enough at present. But I think that Japan and Korea do not need fair use exceptions.

Fair use may be incompatible with the current international law, and there also are certain advantages of enumerated exceptions, and, above all, fair use is also insufficient to solve all the mentioned concerns. Introduction of fair use is not the only or best solution to this situation.

It is necessary to set the all parties equally for balancing interests. For that end, I suggested the “Balancing approach based on Human rights”. The “Balancing approach based on Human rights” treats every party without distinction, and considers the every act by multi-dimensional standards. Courts should consider the promotion of dissemination of an idea and knowledge and not only the protection of property rights and moral rights of the author because every party concerning with certain copyright infringement has human rights as a person. Moreover, this approach can be used practically both in Continental and Anglo-American Law systems⁵⁶.

A further study is now being carried out to specify the essential factors for this approach to strike a balance⁵⁷ between copyright holders and users.

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¹ Section 107 (Title 17 U. S. C) contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair:

- 1.The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes
- 2.The nature of the copyrighted work
- 3.The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- 4.The effect of the use upon the potential market for, or value of, the copyrighted work

The distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission.

U.S. Copyright Office (<http://www.copyright.gov/fls/fl102.html>)

² For further details, see II.2. and III.3. of this paper.

³ Neil K. Komisar, *Imperfect Alternatives. Choosing Institution in Law. Economics and Public Policy*, Chicago and London: The University of Chicago Press. 1994; *Law's limits: the rule of law and the supply and demand of rights*,2001; Antonina Bakardjieva Engelbrekt, *Copyright from an Institutional Perspective : Actors, Interests, Stakes and the Logic of Participation*,*Review of Economic Research on Copyright Issue*, 2007, vol. 4(2), pp. 65-97.

⁴ This panel started its first meeting in May 2009, and the 6th meeting was held on 18 September 2009. For further details, see the book of minutes, available at <http://www.bunka.go.jp/chosakuken/singikai/housei/index.html>.

⁵ Human rights are basic rights and freedoms to which all humans are entitled. Such as the right to life and liberty, freedom of expression, and equality before the law; and economic, social and cultural rights,

including the right to participate in culture, the right to food, the right to work, and the right to education are considered as human rights too.

⁶ Hiroshi Saito, " Copyright Law Outline " the 3rd edition, Ichiryusha, 1994 p.14

⁷ Tokyo District Court,2008.2.26. Heisei19(Wa)15231, Supreme Court HP

⁸ The article was about the claim to the Social Insurance Agency, which was copyright work of the plaintiff.

⁹ Japanese Copyright Act Article 42 (Reproduction for judicial proceedings, etc.) It shall be permissible to reproduce a work if and to the extent deemed necessary for the purpose of judicial proceedings or for internal use by legislative or administrative organs; provided, however, that the foregoing shall not apply where such reproduction is likely to unreasonably prejudice the interests of the copyright holder in light of the type and the usage of the work as well as the number of reproductions and the manner of reproduction.

¹⁰Article 30 (Reproduction for private use) Except in the cases listed below, it shall be permissible for the user of a work that is the subject of a copyright (below in this Subsection simply referred to as a "work") to reproduce the work for his personal use or family use or other equivalent uses within a limited scope (hereinafter referred to as "private use"): (following abbreviation) ; see Cabinet Secretariat Cabinet Secretariat, "Translations of Laws and Regulations" for the English translation of the Japanese Copyright Law. (<http://www.japaneselawtranslation.go.jp/law>).

¹¹Moriyuki Kato, Annotated Copyright Law of Japan, CRIC, 2006, p.226.

¹²Article 31 (Reproduction in libraries) 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 [the collection of] libraries, etc.) as an activity falling within the scope of the non-profit-making activities of libraries, etc. (in this Article, "libraries, etc." means libraries and other establishments designated by Cabinet Order and having among their purposes, the providing of library materials for use by the public): (following abbreviation)

¹³Tatsuhiko Ueno, "Possibility of Japanese Fair use- in the review of copyright exception of Copyright Act", Monthly Copyright, 2007, pp.560

¹⁴ Article 32 (Quotations) 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.

(2) It shall also be permissible to reproduce, as explanatory materials, in newspapers, magazines and other publications informational materials, public relations materials, statistical materials, reports and other similar works which have been prepared by organs of the State or local public entities or incorporated administrative agencies or local incorporated administrative agencies for the purpose of general public dissemination and made public under their authorship; provided, however, that the foregoing shall not apply where there is an express indication [on the work] that such reproduction has

been expressly prohibited.

¹⁵ Japanese Copyright Act was amended in June 2009, and come into force on January 1, 2010

¹⁶ By a copyright amendment (shall come into force on the 1st of January, 2010) of June 2009, using cache in a search engine is legalized in this respect.

¹⁷ Tokyo District Court, July 25, 2001. Heisei13(Wa)56, Supreme Court HP

¹⁸ The plaintiff's artwork was painted on the bus body, and the picture of the city bus was published as a part of the book.

¹⁹ Article 46(Exploitation of an artistic work, etc. located in open places) 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:(following abbreviation)

²⁰Tokyo District Court , June 11, 2003.Heisei15(Yo)22031, Supreme Court HP

²¹Tatsuhiko Ueno, "Possibility of Japanese Fair use- in the review of copyright exception of Copyright Act", Monthly Copyright, 2007,pp.560

²² The Final Text of Kor-U.S FTA in English is available at

<http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>

²³ See Yeyoung CHANG, "Intellectual property provisions of the FTA between Korea and U.S.A." A.I.P.P.I. (a monthly report) Vol. 52, title 9, September, 2007, pp17-24,

²⁴ The public hearing material of the revision bill of Copyright Act, The Ministry of Culture and Tourism, September 12, 2007,p.7.

²⁵For the same background with Copyright Act, the Korean government submitted a reform bill to the Computer Program Protection Act. (The public hearing material of the revision bill of Copyright Act, The Ministry of Information and Communication, September 12, 2007,p.8.)

²⁶Legislative bill number 1802888, proposed on 2008-12-05 (the 278th session of 18th Diet); legislative bill number 1804389 proposed on 2009-04-02(the 282th session of 18th Diet)

²⁷In-Hwan Park, "Debate of the introduction of the fair utilization provision", Software and the Law (December, 2007); Dae-Jong Yu; "Copyright Law reform bill; Introduction of the fair utilization principle", Copyright Culture Vol.159 ,November, 2007.

²⁸ See Lunney, Jr., Glynn S., Fair Use and Market Failure: Sony Revisited (February 21, 2002). Available at SSRN: <http://ssrn.com/abstract=301389>; Gordon, Wendy J., Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives (January 2002). THE COMMODIFICATION OF INFORMATION, Niva Elkin-Koren & Neil Weinstock Netanel, eds., Kluwer Law International, 2002. Available at SSRN: <http://ssrn.com/abstract=293690> or DOI: 10.2139/ssrn.293690

²⁹ Dae-Hee Lee, "Introduction of the fair utilization in the Korea copyright system", copyright culture, November, 2007, p.9

³⁰ Argumentation part of Byung-Il Kim, on the partial revision bill of Copyright Act's public hearing

material, The Ministry of Culture and Tourism, September 12, 2007, p.60

³¹ Section 29 and 30 of the Copyright, Designs and Patents Act 1988 (CDPA).

³² Argumentation part of Hyung-Doo Nam, The public hearing material of the revision bill of Copyright Act. The Ministry of Culture and Tourism, September 12, 2007, p.18

³³"...infringing interest of the owner of copyright unfairly" of Article 23 (duplication in judiciary proceedings), "... in a proper scope..." of Article 26 (utilization for current event news reports) and Article 28 (the citation of works already made public) provides uncertainty concept, so the court has interpreted the concept with certain standards similar to Fair use. ;When Korean Supreme court interprets Article 28(Quotation), it seems that Fair use-alike doctrine is already invoked; "Quotation corresponding to the fair practice in a justifiable scope, should be judged by following factors considered synthetically; i)the purpose of the quotation, ii)the substance and amount of the quotation, iii)the means and forms of the quotation, iv)a general notion of readers, ⑤the possibility of substitution of original works. "(Korean Supreme Court 97 Do 2227, 1997.11.25. see also WASEDA RCLIP DB citation No. KR-26/2003)

³⁴ Won-Sung Lim, Copyright Law for Practitioner, Board of Arbitration of Copyright, 2006, p183-184.

³⁵ Yasuto Komada, "Is Three Step Test useful? -mainly on debate in France -", Sophia law Vol.51, issue 3&4 ,March, 2008.

³⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJL 167 22. 6. 2001 pp.10-19

³⁷ "Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information"(DADVSI) is a bill reforming French copyright law, mostly in order to implement the 2001 European directive on copyright, which in turn implements a 1996 WIPO treaty.

³⁸ "zweiter Korb" is the second reform of the German Copyright Act governing copyright in the information society. One of the most controversial aspects of the new law is the regulation of copies for private use. Already in the "erster Korb" the private copying limitation was debated.

³⁹The restraint provision concerning the copyright is established in Article L.122-5, neighboring rights in L.211-3 in existing French law. In German Copyright Law, restraint provision of the copyright is established in the Chapter 1 Section 6, and this is also applied to neighboring rights.

⁴⁰ The French Supreme Court held that private reproduction is "only a exception" for the copyright, and it is not the "right" granted to the users. (Cour de Cassation, 28 February 2006,Studio Canal SA and Universal Pictures Video France SAS v. Mr. Stephane X and Others).

⁴¹ C. Geiger, "From Berne to National Law, via the Copyright Directive: the dangerous mutation of the Three-step test", EIPR, 2007, pp.486.

⁴² Declaration a Balanced Interpretation of the Three-Step Test in Copyright Law. (http://www.ip.mpg.de/shared/data/pdf/declaration_three_step_test_final_english.pdf)

⁴³ H.SCHACK, Urheberrechtliche Schranken, ubergesetzlicher Notstand und verfassungskonforme

Auslegung in Perspektiven des Geistiges Eigentums und Wettbewerbsrechts : Festschrift für G. SCHRICKER, A. OHLY et al.(Hrg.), C. H. Beck 2005, S. 511 f. (quoted by Komada p.96)

⁴⁴ J. POEPPPEL, Die Neuordnung der urheberrechtlichen Schranken im digitalen Umfeld, V&R unipress 2005,. (quoted by Komada p.96.)

⁴⁵ William F. Patry, The Fair use Privilege in Copyright Law (1995); Dan L. Burk & Julie E. Cohen, "Fair use Infrastructure for Copyright Management Systems" (2001)

⁴⁶ And in Canada, the Supreme Court even declares the Fair Dealing as "user's right". See *Theberge v. Galerie d'Art du Petit Champlain Inc.* 2002 SCR 336 ; *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13 ; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* , 2004 SCC 45 SCR 336.

⁴⁷ The Digital Millennium Copyright Act of 1998 (DMCA). See Jane C. Ginsburg, "Copyright Use and Excuse on the Internet", *Columbia -VLA Journal of Law & the Arts*, Vol. 24, Fall 2000; Dan L. Burk & Julie E. Cohen, "Fair Use Infrastructure for Copyright Management Systems", *Harvard Journal of Law and Technology*, Vol. 15, pp. 41-83, 2001; Jessica Litman, "Lawful Personal Use", *Texas Law Review*, Vol. 85, p. 1871, 2007,

⁴⁸ W.N. Hohfeld attempted to disambiguate the term *rights* by breaking it into eight distinct concepts. To eliminate ambiguity, he defined these terms relative to one another, grouping them into four pairs of Jural Opposites (1. Right/No-Right 2. Privilege/Duty 3. Power/Disability 4. Immunity/Liability) and four pairs of Jural Correlatives (1. Right/Duty 2. Privilege/No-Right 3. Power/Liability 4. Immunity/Disability). This use of the words *right* and *privilege* correspond respectively to the concepts of claim rights and liberty rights. W.N. Hohfeld, *Fundamental Legal Conceptions* (3rd printing, original in 1919), 1964, Yale University Press, pp.23-64)

⁴⁹ Barton Beebe, "An Empirical Study of the U.S. Fair use Cases, 1978-2005", (2008)

⁵⁰ See Alvin Toffler, *The Third Wave*, Pan Books (New edition, 1981); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 *Fed. Comm. L. J.* 561 (2000); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, *Boston College Law Review*, Vol. 44 (2003); Julie E. Cohen, *The Place of Users in Copyright Law*, 74 *Fordham L. Rev.* (2005); Tim Wu, *Tolerated Use*, *Columbia Law and Economics Working Paper No. 333* (2008).

⁵¹ Audrey R. Chapman, *Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)*, *Copyright Bulletin Vol XXXV. No.3*, July-September 2001, UNESCO Publishing ; Davinia Ovet, *INTELLECTUAL PROPERTY AND HUMAN RIGHTS: IS THE DISTINCTION CLEAR NOW? AN ASSESSMENT OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS' GENERAL COMMENT NO. 17* (2005) OCTOBER 2006.

⁵¹ M. Sayal, *Copyright and Freedom of the Media : A Balancing Exercise ?* [1995] 7 *Ent.L. Rev.* 263 et seq.

⁵² The Group of Specialists on Human Rights in the Information Society (MC-S-IS), Copyright and human rights, Directorate General of Human Rights and Legal Affairs of Council of Europe(Strasbourg), June 2009.

⁵³ The term digital divide refers to the gap between people with effective access to digital and information technology and those with very limited or no access at all. It includes the imbalances in physical access to technology as well as the imbalances in resources and skills needed to effectively participate as a digital citizen. In other words, it is the unequal access by some members of society to information and communication technology, and the unequal acquisition of related skills. The term is closely related to the knowledge divide as the lack of technology causes lack of useful information and knowledge. The digital divide may be classified based on gender, income, and race groups, and by locations. The term global digital divide refers to differences in technology access between countries or the whole world. (http://en.wikipedia.org/wiki/Digital_divide)

⁵⁴ See footnote 2.

⁵⁵ The Group of Specialists on Human Rights in the Information Society (MC-S-IS), Copyright and human rights, Directorate General of Human Rights and Legal Affairs of Council of Europe(Strasbourg), June 2009, at 8.

⁵⁶ Many experts already insist similar theory. See Tatsuhiro Ueno(Japan, concerning moral right), Christopher Geiger(France, concerning information receiving right), Ray Patterson(US, concerning learning right).

⁵⁷ Yeyoung CHANG, “Do Users have a right? – Human right as a new frame for Copyright” based on the presentation at the RCLIP monthly workshop (27 March 2009) , “IP Report 2009”, Shouji-Houmu, 2009.