

Copyright Enforcement in Japan  
- Infringement and Remedies -

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May 28, 2007

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## I. INTRODUCTION

### A. Introduction

Japan has a history of copyright enforcement for over 100 years.<sup>1</sup> The current Copyright Law (*Chosakuken Ho*) was enacted in 1970 and amended numerous times, most recently in 2006. As Japan is presently a member of the Berne Convention, the Rome Convention, the TRIPs Agreement, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, it confers broad protection to works and other creation including computer programs and databases.

Under the present copyright law, infringement of copyright, moral right or neighboring right causes (1) civil remedies of damages, injunction and honor-recovery measures as well as provisional remedies, (2) criminal sanctions of fines and imprisonment, and (3) border measures.

### B. Statistics

In Japan, the total number of lawsuits is much smaller than in other developed countries.

Civil Cases Filed with the District Courts Nationwide

	2000	2001	2002	2003	2004	2005
<b>Copyright Law</b>	97	127	113	113	-	-
Patent Law	176	153	165	189	-	-
Design Law	38	29	27	27	-	-
Trademark Law	89	67	99	106	-	-
Unfair Competition Law	143	136	141	166	-	-
<b>Total</b>	<b>543</b>	<b>512</b>	<b>545</b>	<b>601</b>	<b>-</b>	<b>-</b>

Source: Supreme Court of Japan, Administrative Bureau

As you see in the above table, the number of civil lawsuits to enforce copyright is around 100 cases a year, but the amount claimed there has rapidly increased.

Criminal Cases Transferred to the Prosecutors Office

	2000	2001	2002	2003	2004	2005
<b>Copyright Law</b>	304	187	147	229	315	-
Patent Law	1	3	2	2	-	-
Design Law	-	7	2	-	1	-
Trademark Law	504	417	476	542	910	-
Unfair Competition Law	22	42	24	27	20	-
<b>Total</b>	<b>831</b>	<b>656</b>	<b>651</b>	<b>800</b>	<b>1,246</b>	<b>-</b>

Source: National Police Agency, "Crimes in 2004"

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<sup>1</sup> After Meiji Restoration of 1868, Japan modernized the legal system: the first Constitution was enacted in 1889, the first Civil Code in 1896, the first Commercial Code in 1890, the first Code of Civil Procedure in 1890, the first Penal Code in 1880 and the first Code of Criminal Procedure in 1880. Meanwhile, the first copyright law in Japan was enacted earlier as the Publication Statute in 1869. Under the Publication Statute, the government granted a patent letter to authors upon an application, and criminally punished infringing publication. The Publication Statute was replaced by the Copyright Statute of 1887. Then, Japan modernized copyright law by adhering to the Berne Convention and enacting the Copyright Law of 1899.

As you see in the above table, the number of criminal cases reported is 150 through 300 a year. Against approximately 70% of them, criminal lawsuits are filed with courts. 50 points of the 70 points are punished by fine, and the rest 20 points are punished by imprisonment while the execution of the sentence are suspended in almost all cases. The most typical amount of fine is ¥300,000 and the most typical duration of imprisonment sentenced is one year.

**Customs Cases (Exclusion for Infringement of Copyright or Other Intellectual Property Rights)**

	2000	2001	2002	2003	2004	2005
<b>Copyright Law</b>	108	76	108	80	119	174
Patent Law	2	1	7	1	80	66
Design Law	15	14	13	12	39	42
Trademark Law	1,478	2,727	6,859	7,332	8,922	13,228
<b>Total</b>	<b>1,603</b>	<b>2,812</b>	<b>6,978</b>	<b>7,425</b>	<b>9,160</b>	<b>13,510</b>

Source: Ministry of Finance, “Status of Excluding Items Which Are Suspected to Infringe Intellectual Property Rights in 2006” (Press Release, April 4, 2006)

**C. Court System**

1. Unitary Court System

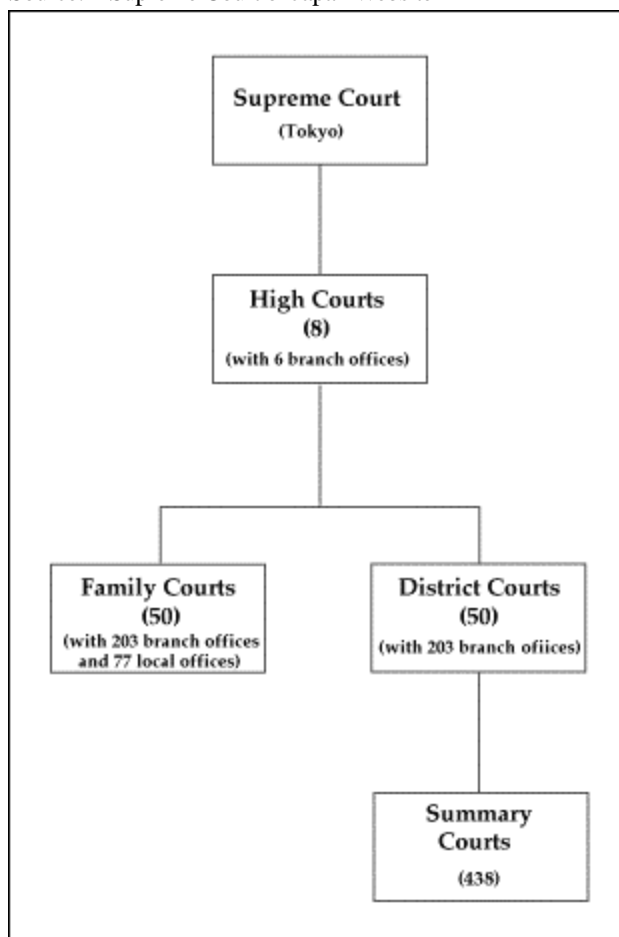
Japan has a unitary national court system. The highest court in Japan is the Supreme Court. Below there are 8 High Courts. Below the High Courts there are 50 District Courts and 50 Family Courts. Finally there are Summary Courts below the District Courts.

- **Supreme Court (*Saiko Saibansho*)**  
The Supreme Court is the highest court in Japan and is located in Tokyo. It is composed of the Chief Justice (designated by the Cabinet and appointed by the Emperor) and 14 Justices (appointed by the Cabinet). It has appellate jurisdiction over appeals from the High Courts. Proceedings are held either before the Grand Bench (composed of all 15 Justices) or the Petty Bench (composed of 5 Justices).

In addition to judicial functions, the Supreme Court also has functions to establish Rules concerning judicial proceedings, attorneys, internal discipline of the courts, and administrative matters of courts.

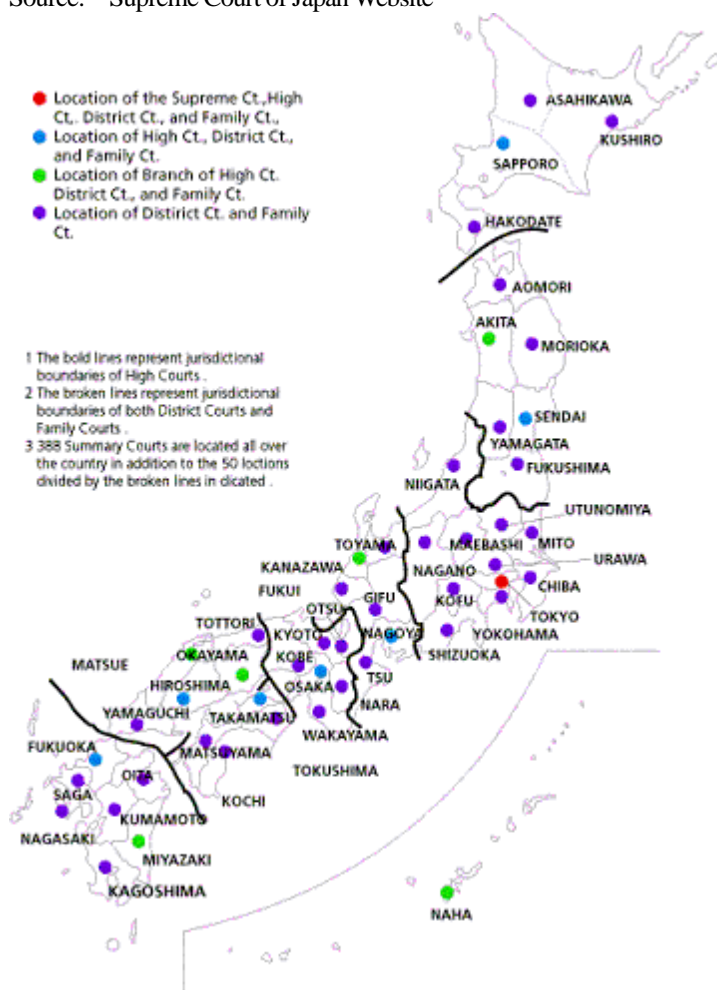
- **High Courts (*Koto Saibansho*)**  
The High Courts have appellate jurisdiction over judgments of the District, Family or Summary Courts, and original jurisdiction over some administrative cases. Proceedings

Source: Supreme Court of Japan Website



are held before a panel of 3 judges (or of 5 judges in some cases). The High Courts are located in Sapporo, Sendai, Tokyo, Nagoya, Osaka, Hiroshima, Takamatsu, and Fukuoka. There are also 6 branch offices (Akita Branch for Sendai High Court, Kanazawa for Nagoya, Okayama and Matsue for Hiroshima, and Miyazaki and Naha for Fukuoka). Additionally, IP High Court has been established as a branch of Tokyo High Court since April 2005. The IP High Court has an exclusive subject matter jurisdiction over patent and other industrial property law cases, which is expected to conduct the same function as the USCA for the Federal Circuit, while it has only a non-exclusive subject matter jurisdiction over copyright cases.

Source: Supreme Court of Japan Website



● District Courts (*Chiho Saibansho*)

Each Prefecture has one District Court (except Hokkaido, which has 4). There are also 203 branch offices. The District Courts have original jurisdiction in most cases (civil, criminal and administrative) except those belonging to the original jurisdiction of the other courts. They also have appellate jurisdiction over civil judgments of the Summary Courts. Proceedings are held before a single-judge court or before a three-judge panel.

● Family Courts (*Katei Saibansho*)

The Family Courts (and their branch offices) are located in the same place as the District Courts (and

their branch offices). There are also 77 local offices located in the same place as 77 of the Summary Courts. As their name indicates, the Family Courts specialize in family affairs (e.g., adoption, divorce, appointment of guardians) and juvenile delinquency cases. Proceedings are held before a single-judge court.

● Summary Courts (*Kan'i Saibansho*)

There are 438 Summary Courts in Japan. They have the original jurisdiction over civil claims not exceeding 1,400,000 yen and over criminal cases concerning petty offenses.

Copyright infringement suits are typically filed with District Courts and handled by three-judge panels. Losing parties may appeal to High Courts and then to the Supreme Court of Japan.

## 2. Jurisdiction/Venue

Jurisdiction of the court and venue in each case is determined in accordance with the Code of Civil Procedure. With regard to copyright infringement suits, the following courts usually have jurisdiction over them:

- Court located in the judicial district where the defendant has domicile or principal office (Art. 4);
- Court located in the judicial district where the defendant was engaged in the act of infringement (Art. 5, Para. 1, Item (ix));
- Court located in the judicial district where the plaintiff has domicile or principal office (Art. 5, Para. 1, Item (i))<sup>2</sup>;
- the Tokyo District Court or the Osaka District Court (Arts. 6 and 6<sup>bis</sup>)<sup>3</sup>.

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<sup>2</sup> The clause provides that in the suit for proprietary claim, the aggrieved party may bring the suit to the court with jurisdiction over the place of performance. If the plaintiff claims damages, his domicile or principal office is the place where the damages should be paid; therefore, the District Court where the plaintiff has domicile or principal office has jurisdiction over the damages claim. In addition, if the plaintiff claims injunction together with damages, the District Court with jurisdiction over the damages claim also has jurisdiction over the injunction claim as joint claim.

<sup>3</sup> The Tokyo District Court shall also have non-exclusive jurisdiction concerning copyright infringement suit if the District Court which otherwise has jurisdiction over the complaint is located in eastern part of Japan (the judicial district of Tokyo, Nagoya, Sendai or Sapporo High Court), or the Osaka District Court if in western part of Japan (the judicial district of Osaka, Hiroshima, Fukuoka or Takamatsu High Court). For the suit concerning copyright to computer programs, however, their jurisdiction is exclusive.

## II. CIVIL REMEDIES

### A. Cause of Action

#### 1. Prima Facie Case of Copyright Infringement

In a claim based on copyright infringement, the minimum elements which the plaintiff must prove are:

- (i) that the plaintiff owns copyright to the work at issue, and
- (ii) that the defendant reproduced or otherwise utilized the copyrighted work.

##### a. Ownership of Copyright

Copyright subsists in a work in which thoughts or sentiments are expressed in a *creative* way and which falls in the literary, scientific, artistic or music domain (Art. 2, Para. 1, Item (i)). Accordingly, the key requirement is *creativity* in the work. According to case law, the term “*creativity*” means presentation of creator’s personality, not novelty or uniqueness, embodied in an expression. Judged from court cases, *creativity* is found unless (i) the work is a simple copy of another work, (ii) the alteration in the expression of the work is hardly distinguishable from that of another work, (iii) the expression of the work is inevitable to express the idea embodied in the work, or (iv) the expression of the work is commonplace to express the idea embodied in the work<sup>4</sup>.

An *author* of a work initially holds the copyright except to cinematographic works<sup>5</sup>. The concept of “author” is construed as one who creates a work, *i.e.*, one who actually engages in translating an idea into expression. However, we have the so-called Works Made For Hire doctrine. In case of a work prepared by an employee, the author of the work is his/her employer if the work, “on the initiative of a legal person or other employer (herein after in this Article referred to as “Legal Person”) is made by his employee in the course of his duties and is made public under the name of such Legal Person as the author.” (Art 15, Para. 1)

An *author* may transfer his copyright to a third party, which does not require a written instrument. The owner of copyright may file a suit for the civil remedies discussed later, regardless of whether such right is registered or whether appropriate copyright notice has been affixed to the relevant work.

On the other hand, neither an exclusive licensee nor non-exclusive licensee may prevent a third party from infringing the copyright or neighboring right. The only difference between an exclusive license and non-exclusive license is whether or not it accompanies the licensor's covenant not to grant another license to any third party. As a practical matter, however, an exclusive licensee has been generally allowed to recover damages from infringers, and some courts have allowed an exclusive licensee to prevent a third party from infringement under the subrogation theory of the Civil Code.

##### b. Reproduction

Copyright owner has the exclusive right to *reproduce* his work (Art. 21) and other

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<sup>4</sup> See Concept of Originality and the Merger Doctrine in Conjunction with Copyright Law, IV/4 Software Protection 1 (1990, USA), which is available at the web site of InfoTech Law Offices (<http://www.itlaw.jp>).

<sup>5</sup> Under Article 29, the ownership of the copyright to cinematographic works belongs to producers if the authors have undertaken to participate the production thereof.

exclusive rights to utilize his work. According to case law<sup>6</sup>, reproduction is found where (i) the creator of the allegedly infringing work has based the work on the copyrighted work and (ii) the allegedly infringing work is so identical to the copyrighted work that observers can see in the former the essential features of the latter. The requirement (i) corresponds to combination of the so-called elements of “access” and “evidential similarity” in American copyright law. The requirement (ii) corresponds to the standard of “substantial similarity” in American copyright law.

### **The SMAP Interview Case**

(Heisei 7 (wa) 19455, Judgment of Tokyo District Court, October 29, 1998)

**FACTS:** Plaintiff Publishers published articles containing interview with the members of entertainer group “SMAP.” Some of the articles were written by Plaintiff Publishers’ employees, others by freelance writers, both based on the Publishers’ plans. Defendant published a book on SMAP, which was based partially on Plaintiff Publishers’ articles. Plaintiff Publishers and SMAP members sought damages, injunction and apology notice against Defendant.

#### **ISSUES:**

1. Copyrightability of Plaintiff Articles
2. Ownership of copyright and moral rights to Plaintiff Articles
3. Infringement of copyright
4. Infringement of moral rights
5. Injunction against publication
6. Amount of damages
7. Apology notice

**HELD:** Judgment for Plaintiff Publishers. SMAP members’ claims are denied.

#### 1. Copyrightability of Plaintiff Articles

“A **work** is ‘a production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain.’ (Copyright Law, Art. 2, Para. 1, Item (i)). This includes ‘novels, dramas, articles, lectures and other literary works’ (Art. 10, Para. 1, Item (i)) but ‘news of the day and miscellaneous facts having the character of mere items of information’ do not constitute works (Art. 10, Para. 2).

“The ‘thoughts or sentiments’ referred to above means mental activities of mankind in general; materials which merely states facts (societal facts, historical facts, facts on natural phenomena, etc.) do not constitute works. Moreover, the element of ‘**creative**’ does not require any uniqueness or novelty in the contents of expression, but is satisfied if the specific form of expressing thoughts or sentiments demonstrates the personality of its maker. Accordingly, even if the expression is based on objective facts, it constitutes a work if creativity is recognized in selection and arrangement of the subject matter, choice of specific terms, wording and other written expression, so that it expresses the maker’s opinion, criticism or other thoughts or sentiments. The provision of Article 10, Paragraph 2 of the Copyright Law confirms that mere reports of daily social events as they occur or articles which list personnel matters, obituaries or other facts, are not copyrightable works. Furthermore, the element of ‘fall[ing] within literary, scientific, artistic or musical domain’ means that the work is the product of intellectual and cultural activities of man’s mind in general.

<sup>6</sup> See Judgment of Supreme Court, September 7, 1978, MINSHU 32-6-1145; Judgment of Supreme Court, March 28, 1980, MINSHU 34-3-244.



“In addition, a work is considered copyrightable if only a part thereof can be considered creative expression of thoughts or sentiments as discussed above.

## 2. Ownership of Copyright and Moral Rights to Plaintiff Articles

“An **author** is the ‘a person who creates a work’ (Copyright Law, Art. 2, Para. 1, Item (ii)). The person who actually engaged in the act of creating the work becomes the author thereof; the person who, judging from the extent or manner of his engagement, cannot be considered as expressing his thoughts or sentiments in a creative way in the work, such as one who merely provided the idea or material in creating the work or who merely played a supplementary role, is not considered the author. In case of a literary work expressed as a document, . . . , its author is the person who actually engaged in preparation of the document in a creative manner and created the expression as a document.

“The authorship of a work which, on the initiative of a legal person or other employer, is made by his employee in the course of his duties and is made public under the name of such legal person as the author shall be attributed to that legal person, unless otherwise stipulated (Copyright Law, Art. 15, Para. 1). Here “**employee**” is understood as including not only the person in employment relationship with the legal person but also the person who is under direction of the legal person with regard to creation of the work and who is in relationship premised on making the copyright to the work vest in the legal person.

...  
“Based on the aggregate of the aforementioned facts, it was the writer of the respective article who actually engaged in preparation of the Plaintiff Articles and created them; nevertheless, each writer wrote the articles upon request from and under direction of Plaintiff Publishers, and understood that copyright to the Plaintiff Articles would creatively vest in Plaintiff Publishers. Accordingly, the Plaintiff Articles can be considered works which, on the initiative of Plaintiff Publishers, is made by their “employees” in the course of their duties. Moreover, Defendants do not contest the fact that the Plaintiff Articles were made public under the name of Plaintiff Publishers, and there is no evidence which suggests any contrary agreement as to the identity of the author of the Plaintiff Articles. Therefore, [Plaintiff Publishers are considered authors of the Plaintiff Articles.]”

## 3. Infringement of Copyright

“**Reproduction** means ‘the reproduction in a tangible form by means of printing, photography, polygraphy, sound or visual recording or otherwise’ (Copyright Law, Art. 2, Para. 1, Item (xv)). It means creation of an item which is based on an existing work and which makes one sufficiently perceive its contents and form of the existing work, *i.e.*, which is similar to the existing work in its form of expression. Reproduction includes not only the cases where the expression is completely identical to that of the existing work, but also those where the specific form of expression (which is, in case of literary works, order of narratives, terms, wording and other expression in writing) is modified or altered to some extent but the similarity in the form of expression is substantially maintained; nevertheless, we believe that the scope of similarity is narrower in the case where everyone writes with similar expression or where there are only limited ways to express the subject matter thoughts or sentiments.

“**Adaptation** is to ‘translate, arrange musically or transform, or dramatize, cinematize . . . [a] work’ as referred to in Article 27 of the Copyright Law, or to create a work with the basic contents identical to an existing work, so that, when one sees either of the two works, he senses similarity to the other, *i.e.*, to create a work based on an existing work so that, although having a different form of expression, one can directly perceive the essential characteristics of the existing work.

“On the other hand, since copyright protects creative expression, the use of an existing is considered infringement of copyright only if it is reproduction or adaptation of creative form of

expression in the existing work. If one uses only the parts where creativity in the existing work cannot be recognized, such as extracting and duplicating only the facts incorporated into the existing work, he does not infringe the right of reproduction or adaptation.”

4. Infringement of Moral Rights

“As we discussed above, Defendants infringed the rights of reproduction and adaptation to a part of Plaintiff Articles. Despite the fact that Defendant Book contains statements which reproduced or adapted Plaintiff Articles, it does not indicate the name of Plaintiff Publishers as their authors. . . . Accordingly, Defendants infringed Plaintiff Publishers’ right of indicating author’s name (Copyright Law, Art. 19, Para. 1) to the infringed part of Plaintiff Articles.

“In addition, Defendants made distortion, mutilation or other modification to the expression of Plaintiff Articles while reproducing or adapting the Plaintiff Articles. Accordingly, we find that Defendants infringed Plaintiff Publishers’ right of integrity (Copyright Law, Art. 20, Para. 1) to the pertinent parts of the Plaintiff Articles.”

5. Injunction against Publication

“According to [the evidence before the court], we find the following: Defendants published and sold Defendant Book despite attorneys of [SMAP members] warned them in writing that a substantial part of Defendant Book infringe Plaintiffs’ copyright and the right of integrity and thus the book should not be published; while Plaintiffs’ application for preliminary injunction against sales, delivery and other acts concerning Defendant Book [citation omitted] was pending, Defendant Rokusaisha notified the wholesale distributors that Defendant Book was out of press but on the other hand distributed to the mass media a written statement that it would fight Plaintiffs to the end; after Plaintiffs’ application for preliminary injunction was granted, Defendant Rokusaisha [publisher of Defendant Book] published 10 or more books on the agency [SMAP members] belong, one of which was subject to preliminary injunction against publication for violation of privacy; Defendant Matsuoka [author of Defendant Book] referred to this and other cases where injunction against publication of books is sought that he could not but take up the gauntlet thrown.

“Based on the above facts, we find that Defendants have infringed copyright and moral rights to Plaintiff Articles by publishing Defendant Book, that they are disputing whether they infringed said rights, and that there is **likelihood** that they repeat similar acts of infringement in the future. Accordingly, we cannot deny the necessity of injunction in this case.”

6. Amount of Damages

“It is not disputed that Defendant Rokusaisha gained a profit in the amount of 15,609,171 yen by the publication of the Defendant Book. As a profit amount of defendant is presumed to be **damages** of plaintiff under Article 114 (1) of Copyright Law, Plaintiffs claim one half of the profit amount gained by Defendant Rokusaisha. . . . Accordingly, we find it reasonable that, in apportionment of infringed amount, the amounts of damages are 2,500,000 yen for Plaintiff Shufutoseikatsusha, 150,000 yen for Plaintiff Fuyosha, 150,000 yen for Plaintiff Gakken, and 1,200,000 yen for Plaintiff Magazine House.

“With regard to Plaintiffs’ claim for **attorneys’ fees** concerning infringement of copyright, considering the amount of profits we find, the substance and process of this case and other circumstances, we find it reasonable that the amounts of attorneys’ fees to be borne by Defendants as a part of damages to Plaintiff Publishers and are in reasonable causation with Defendants’ act of copyright infringement, are 400,000 yen for Plaintiff Shufutoseikatsusha, 30,000 yen for Plaintiff Fuyosha, 30,000 yen for Plaintiff Gakken, and 200,000 yen for Plaintiff Magazine House.

“Next we consider the damages for infringement of moral rights. Plaintiff Publishers, the authors in this case, are legal entities and cannot be found to have suffered **mental distress** in particular. Moreover, infringement of copyright and of moral rights occurred in the same act of

Defendants, and we accepted Plaintiff Publishers' claim for damages as discussed above for copyright infringement. In light of these facts, it is reasonable to find that granting award of damages for copyright infringement is sufficient for Plaintiff Publishers to recover from the distress they suffered, and that there is no need to grant additional damages award for infringement of moral rights."

7. Apology Notice

"An author may demand a person who has infringed his moral rights intentionally or negligently to take measures necessary to recover his honor or reputation (Copyright Law, Art. 115). Here the 'necessary measures' include publication of **apology notice**. The author's 'honor or reputation' is understood as objective assessment by the society of the author's fame, credit or other personal value, *i.e.*, societal honor or reputation, and does not include the person's subjective assessment of his own personal value, *i.e.*, sense of honor.

"In this case, there is no evidence suggesting that publication of Defendant Book damaged societal honor of Plaintiff Publishers. Accordingly, we do not find that publication of apology notice is necessary to recover their honor or reputation."

## 2. Affirmative Defenses

The Copyright Law provides for limitations on copyright, which work as affirmative defenses to the claim of copyright infringement. They include:

- Private use (Art. 30);
- Quotations (Art. 32);
- Reproduction in schools and other educational institutions (Art. 35);
- Reproduction for the disabled (Arts. 37, 37<sup>bis</sup>)
- Reproduction of articles on current topics (Art. 39)

## 3. Prima Facie Case of Torts

Copyright infringement is not a tort itself. To claim damages based on torts, the plaintiff must prove (i) the defendant's illegal conduct (including copyright infringement), (ii) the defendant's intention or negligence in the illegal conduct, (iii) harm to the plaintiff, and (iv) reasonable causation between the defendant's illegal conduct and harm to the plaintiff (Civil Code, Art. 709).

If (i) is satisfied as discussed in 1. above, the remaining requirements to satisfy are (ii), (iii) and (iv). As to (iii) harm to the plaintiff, burden to prove the amount of harm is reduced by the statutory assumptions discussed later.

## B. Injunction and Destruction

### 1. Permanent Injunction

The Copyright Law provides for injunctive relief to existing or imminent infringement of copyright, moral right or neighboring right. Article 112, Paragraph 1 provides:

**“Against those who infringe or are likely to infringe moral rights, copyright, right of publication, moral rights of performers or neighboring rights, the authors as well as the owners of these rights may make a demand for cessation or prevention of such infringements.”**

### 2. Destruction

In addition to injunctive relief, a right holder may demand destruction of infringing copies and materials for reproduction thereof, or other measures necessary to stop or prevent infringement (Art. 112, Para. 2).

#### **The Salvador Dali Exhibition Case**

(Heisei 3 (wa) 3682, Case of Claim for Injunction against Copyright Infringement and other Remedies, Judgment of Tokyo District Court, September 5, 1997)

FACTS: Defendants prepared and sold catalogues of Salvador Dali’s paintings in their exhibition. Plaintiff, who acquired copyright to the paintings from Dali, sought injunction and damages against Defendants.

HELD: Judgment partially for Plaintiff.

#### 6. Injunction

“Defendant Asahi Shinbun engaged in an act of copyright infringement by reproducing the Paintings in the Catalogue, and there is no evidence which sufficiently supports the fact of having disposed of the printing plate for the Catalogue, which in turn suggests that Defendant Asahi still possesses such plate. Moreover, in light of its attitude of adamantly denying Plaintiff’s ownership of copyright even after Plaintiff showed it specific evidence thereof, we find that there is **likelihood** that Defendant Asahi may produce and distribute the Catalogue with reproduction of the Paintings by using the printing plate of the Paintings.”

#### **The Sekisan-kun Case**

(Heisei 10 (wa) 13577, Case of Claim for Injunction against Copyright Infringement, Judgment of Osaka District Court, March 30, 2000)

FACTS: Defendants developed and sold computer programs to estimate building construction costs named “WARP 1.03” by copying Plaintiff’s programs, and after this suit was filed, independently developed one named “WARP 2.00”.

HELD: Judgment partially for Defendant.

#### 3. Injunction

“Once the Defendant graded up the version, there is no **possibility** that the Defendant will grade down the version or sell and distribute the old version as well as the new version at the same time.”

## C. Damages

Under Japanese law, negligent or intentional infringement of copyright, moral right or neighboring right causes tort liability for injury incurred by the right holder under Civil Code, Art. 709, which provides:

**“Any person who intentionally or negligently infringes other person’s right shall be liable to compensate the damages caused thereby.”**

On the other hand, an innocent or non-negligent infringer is not liable for damages, while he may be enjoined as the direct effect of copyright, moral rights or neighboring rights.

### 1. Standard of Damages

#### a. Actual Damages

The scope of tort liability under Japanese law is limited to compensatory damages, covering direct losses and “foreseeable” consequential losses. They include **lost profits** and **actual expenses** incurred by the right holder.

For the calculation of **lost profits**, it is lost sales volume by profit rate. The Japanese courts consider that the profit rate be **marginal profit rate**, which is price minus direct costs and variable portion of overhead costs, rather than net profit rate, which is price minus only direct costs<sup>7</sup>.

As to **lost sales volume**, it is usually plaintiff’s lost sales volume. As it is very difficult to prove plaintiff’s lost sales volume, however, the Copyright Law as revised in 2003 allows plaintiff to use the **infringer’s sales volume** of infringing products instead of plaintiff’s lost sales volume (Art. 114, Para. 1).

Furthermore, Japanese law has not yet developed the **entire market value rule**. Accordingly, the basis of the profit is only the price of the copyrighted work, not the whole of an infringing piece, even if the work is an essential component of the whole infringing piece such as a compilation of various works.

#### b. Infringer’s Profit

The Copyright Law presumes that the profit gained by an infringer from the relevant infringement is the losses suffered by the right holder (Art. 114, Para. 2). Accordingly, a right holder may take the infringer’s profits if the amount is substantially large. It is usually difficult to prove the amount of profit gained by an infringer because Japanese civil procedure does not adopt discovery system and each party must obtain evidence on its own. However, the Copyright Law provides that a right holder may demand infringer to submit evidence of its profit (Art. 114<sup>ter</sup>).

#### c. Reasonable Royalty

The Copyright Law allows a right holder to recover the amount of “reasonable royalty” instead of actual damages (Art. 114, Para. 3). If the right holder so elects, he does not

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<sup>7</sup> see Judgment of Tokyo District Court, October 30, 1995, HANJI 1560-24; Judgment of Tokyo District Court, February 21, 1997, HANJI 1617-120

have to prove his actual losses or the infringer's actual profits. A right holder may elect recovery of reasonable royalty even if there are no actual losses suffered by him or no actual profits gained by the infringer. The courts typically find the reasonable royalty rate to be 5-10% of sale price.

**The System Science Case (Trial Court Judgment)**

(Heisei 1 (wa) 8292 and Heisei 2 (wa) 8050, Cases of Claim for Damages and Other Remedies, Judgment of Tokyo District Court, October 30, 1995)

FACTS: Defendant A ordered certain measuring devices to Plaintiff, who developed software and hardware for the devices and delivered them to Defendant A. Defendant A ordered similar devices to Defendants B and C, whose devices incorporated software based on Plaintiff Software. Plaintiff sued three companies and their representatives for injunctive relief, damages and apology notice.

ISSUES:

1. Determination of Author
2. Ownership of Copyright
3. Infringement of Copyright
4. Right to Seek Injunctive Relief
5. Tort Liability
6. Scope of Remedies

HELD: Judgment for Plaintiff.

6. Scope of Remedies

“In the case where an owner of copyright claims compensation for damages from a person who has infringed intentionally or negligently his copyright, the **profit obtained by the infringer** from that infringement, if any, shall be presumed to be the amount of damages suffered by the owner (Copyright Law, Art. 114, Para. 1).

“We understand the policy objectives behind the foregoing presumption as follows: When a copyright owner seeks compensation for damages based on tort of copyright infringement, there are issues of the scope of damages due to loss of profit he would have gained (lost profit), which often become main portion of his damages, and calculation of the amount of damages. As they rely on inferences based on presumed facts different from the actual events, in many cases it becomes difficult to prove causation between act of infringement and damages, various amounts to base calculation of damages on, and other issues. By presuming the amount of profits which infringer obtained from his act constituting infringement to be the amount of lost profit to the copyright owner, Article 114, Paragraph 1 is understood as an attempt to relieve copyright owners by adding alternatives to the method of proving their damages, and to afford copyright owners objectively reasonable amount of lost profit by leaving room for infringers’ counter proof. We also understand that, the above provision presupposes the societal fact supporting the presumption that, as far as the infringer actually obtains certain profit, the rightful copyright owner is likely to obtain the same profit if he uses the work in the same way.

“Accordingly, the meaning of ‘profit obtained by the infringer from that infringement,’ which is the basis of the presumption of damages to the copyright owner, should be determined irrespective of the accounting concept of profit but in relationship to the facts presumed. Where an owner of copyright to the device control program, such as Plaintiff in this case, has completed development of the device to be controlled by the program and has undertaken commercial

manufacturing and sale, the manufacturing equipments, training of employees directly engaging in manufacturing and sales of the devices, or employment of employees in administrative department has been already ascertained. As far as the devices can be manufactured and sold without new investment in equipment or employment or training of employees, Plaintiff's lost profit shall be understood as lost sales per device minus the amount of variable cost for manufacturing and sale of such device only, multiplied by the number of devices. . . ."

## 2. Compensation for Mental Distress

In case of infringement of moral rights, compensation for mental distress may be recovered while recovery for economic losses may not. The amount of compensation for mental distress is typically in the range from ¥500,000 to ¥1,000,000.

## 3. Attorneys' Fees and Court Fees

Among actual expenses, court fees may be recovered (Code of Civil Procedure, Art. 61). In Japan, stamp duty for court fees must be paid to file a suit. In addition, filing of a request for witnesses requires the requesting party to pay travel and other expenses for the witnesses.

On the other hand, attorney's fees may not be recovered by a prevailing party of litigation from a losing party except under such tortious circumstances as the infringer unreasonably neglects right holder's warning<sup>8</sup>. However, attorney's fees for usual litigation would be much smaller than claimed or awarded amount in Japan, unlike in the United States. The amount of attorney's fees awarded is typically in the range from 10% to 20% of the awarded damages.

## 4. Punitive Damages

Japanese law does not allow punitive damages. As punitive damages are considered to be contrary to the public order of Japan, Japanese courts neither award punitive damages nor enforce any foreign judgment that awards punitive damages<sup>9</sup>.

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<sup>8</sup> See Judgment of Supreme Court, February 27, 1969, MINSHU 23-2-441.

<sup>9</sup> This principle had been repeatedly upheld by lower courts and was confirmed in a recent Supreme Court case. In this case, an Oregon partnership sought to enforce in Japan a California judgment which ordered a Japanese corporation to pay both compensatory and punitive damages for fraudulent conduct in execution of certain lease agreement. The Supreme Court held that "The part of foreign judgment before us which ordered the Appellee corporation payment of the amount as exemplary and punitive damages in addition to the compensatory damages and cost of litigation, is against the public order of our country and therefore is invalid." The Court reasoned that the function of punitive damages, which is to punish the tortfeasor and to prevent similar act in the future, is left for criminal or administrative sanctions in Japan and is not what our civil relief intends. Judgment of Supreme Court, July 11, 1997, MINSHU 51-6-2573. For decisions of lower courts in the same case, see Judgment of Tokyo High Court, June 28, 1993, HANJI 1471-89 and Judgment of Tokyo District Court, February 18, 1991, HANJI 1376-79.



### **The Kadokawa mini Bunko Logo Case**

(Heisei 11 (wa) 13459 Case of Claims for Damages and Other Remedies Based on Copyright, Judgment of Tokyo District Court, September 28, 2000)

FACTS: Plaintiff, a famed graphic designer, created book jacket illustration for a book published by Defendant (publisher). Later, Defendant scanned the illustration and created marks for its new paperback series called “Kadokawa mini Bunko.” Defendant used the marks on the paperback books in the series as well as in its advertisement. Plaintiff sought damages and publication of apology notice, arguing that Defendant’s creation and use of the marks constituted infringement of copyright (right of reproduction) and moral right (right of integrity).

#### ISSUES:

1. Infringement of Copyright and Moral Right
2. Amount of Damages

HELD: Judgment for Plaintiff.

#### 2. Amount of Damages

- “1. Proprietary Damages for Infringement of Copyright (Right of Reproduction)

“... Article 114, Paragraph 2 of the Copyright Law provides that a copyright holder may claim damages from the person who intentionally or negligently infringed his/her copyright in the amount corresponding to the amount which the rightholder would *ordinarily* receive through the exercise of his/her right. Generally speaking, as a work reflects its author’s individual character in its contents, it is more difficult to determine a standard of royalties than in the case involving patent or other industrial property rights. However, in the case involving commercial designs such as this case, the amount of **royalties** significantly differs depending not only on the skills of individual designer but also on the past accomplishments and social reputation of the designers. Thus, it is reasonable to determine “the amount which the rightholder would *ordinarily* receive through the exercise of his/her right” in the above provision with reference to the amount of royalties for similar works which the author created in the past.

“In this case, with regard to consideration for creation and license of a symbol mark, we should consider the fact that Plaintiff received payment of 5.25 million yen as consideration for creation and license of the symbol mark for “Himeji Welcome 21” event sponsored by the City of Himeji in August 1998. (It is true that there are some difference in nature between “Himeji Welcome 21,” which is an event, and this case, which deals with a series of *bunko* paperbacks. Nevertheless, as stated above, while the main substance of the contract for “Himeji Welcome 21” is Plaintiff’s creation and license of a symbol mark, and the event was of regional nature and ended after a limited period, the sale of *bunko* series is nationwide and continues over a long period of time. Thus, the amount of consideration in the “Himeji Welcome 21” event cannot be excessive comparing to the amount of royalties in the case before us.) Between Plaintiff and Defendant, there were payments of remuneration . . . from 1988 to 1999 for creation of cover designs, book jacket designs, and illustrations for serial novels on monthly magazines, the maximum amount of which was 154,000 yen (these were for design for particular pieces of hardback or paperback or illustration for serial novels on monthly magazines, and by their nature much smaller than the amount of royalties in the case before us). Considering these circumstances, it is reasonable to say that the amount of royalties for use of the Work corresponding to Defendant’s act of infringement shall be 3 million yen.

- “2. Compensation for Mental Distress for Infringement of Copyright and Moral Right

“... Defendant created Defendant’s Marks by separating part of the Work, reproducing it

and reducing its size, and combining it with letters and other components. Defendant then used Defendant's Marks on covers of the books in the "mini *Bunko*" paperback series and in advertisement for the series. By these acts of Defendant, Plaintiff suffered from partial modification and use of her Work against her will. Thus, the Work was modified against Plaintiff's will and used in a large-scale advertisement. In addition, . . . because Defendant does not take unsold "mini *Bunko*" books back from the retailers, the books already in store have not been withdrawn, and some of the display case [with Defendant's Marks] for the bookstores are still in use.

"On this issue, Plaintiff argues that Defendant's use of the Defendant's Marks for the "mini *Bunko*" series which contain some books dealing with indecent adultery or stirring up readers' gambling spirit damaged Plaintiff's societal honor as a designer. However, . . . the "mini *Bunko*" series is not limited to a particular category and embrace a wide variety of books such as novels, essays, documentaries and practical how-to books. It is true that some of the books deal with experiences in adultery or how to be a successful gambler; however, on the other hand, there are books of such famed authors as Miyazawa Kenji, Akutagawa Ryunosuke, Sakaguchi Ango, Yokomizo Seishi, Terayama Shuji, Itsuki Hiroyuki, Mori Yoko, Morimura Seiichi, and Akagawa Jiro. In light of the fact that the "mini *Bunko*" series embrace such wide variety of books, we cannot find damage to Plaintiff's societal honor as a designer from the fact that the Work is used for the "mini *Bunko*" series.

Taking into account these facts as well other circumstances found in the entire evidence in this case, it is reasonable to say that the amount sufficient to compensate for **mental distress** which Plaintiff suffered from Defendant's acts shall be 500,000 yen.

"3. Attorney's Fees

"Taking the substance of Plaintiff's claims, the nature of the facts of this case, progress of trial of this case and other matters into consideration, we find it reasonable that the amount of **attorney's fees** which Defendant should bear as reasonably caused by illegal acts of Defendant is 700,000 yen.

"4. Honor Recovery Measures

"Taking the form of Defendant's illegal acts, substance of mental distress suffered by Plaintiff and other facts found in this case into account, we find that there is no need to order Defendant to publish an **apology notice** in addition to the damages set forth above."

#### D. Honor Recovery Measures

A moral right holder, an author or a performer, may demand an infringer to post an apology notice on newspapers or other media and other measures necessary to recover his reputation where the infringement injures the right holder's honor or reputation on business (Art. 115). On the other hand, copyright or neighboring right holder may not. Although plaintiffs always seek such remedies in infringement of moral right, courts are fairly strict to accord them.

##### **The Case of Yukio Mishima's Letters**

(Heisei 10 (wa) 8761, Case of Claims for Injunction against Publication of Work and other Remedies, Judgment of Tokyo District Court, October 18, 1999)

FACTS: Defendants wrote and published a book on late author Yukio Mishima with various private letters received from Mishima. Plaintiffs, Mishima's family, sought injunction and damages against Defendant, based on copyright and moral right to the letters.

##### ISSUES:

1. Copyrightability of letters
2. Defendants' tortious acts
3. Amount of damages
4. Apology notice

HELD: Judgment for Plaintiffs (affirmed by Tokyo High Court, May 23, 2000)

##### 4. Apology notice

"As noted above, Defendants' act of publishing the Book constitute "an act which would be prejudicial to the moral rights of the author if Mishima were alive" (Copyright Law, Art. 60). Judging from the aggregate of such facts as (1) that Defendant Publisher extensively advertised the Book in [major newspaper, special feature article and advertisement in Defendant Publisher's magazine], (2) that Plaintiffs sent a content-certified letter dated March 14, 2000 to Defendants to warn that publication of the Book constitutes copyright infringement and to demand them termination of publication of the Books, withdrawal of the Books already published, payment of damages, and publication of apology ad on [the newspaper, Defendant Publisher's magazines and other publications where the Book was advertised], but Defendants did not follow Plaintiffs' warning and instead continued the act violating Article 60 of the Copyright Law, (3) that, in a short period, more than 90,000 copies of the Book was sold, (4) that the Letters were private letters personally exchanged between Mishima and Defendant and, in light of their style and contents, were written without anticipating publication to third parties, (5) Defendants have not taken any appropriate measures to restore Mishima's honor and reputation in the society to date, we understand that ordering Defendants to publish **apology notice** as appropriate measure to restore Mishima's honor is necessary to restore his honor and reputation in the society under Articles 116(1) and 115 of the Copyright Law."

...

## APOLOGY NOTICE

*The Yukio Mishima's Letter case*

Announcement of “Mishima Yukio-Tsurugi To Kanbeni” written by Jiro Fukushima

All the postcards and letters addressed and sent to Jiro Fukushima from the late Mr. Yukio Mishima that appear on “Mishima Yukio-Tsurugi To Kanbeni” written by Jiro Fukushima (published on March 20, 1998 by Bungeishunju Ltd.) have been published without Mr. Yukio Mishima's consent and against his bereaved family's will.

This act should have been an infringement of publicity rights if the late Mr. Yukio Mishima was still alive, and we have already ceased publishing and distribution. We are very sorry we have caused a trouble. With apologies, we are announcing the above.

Publisher: Bungei Shunju Ltd.

Author: Jiro Fukushima

## E. Provisional Remedies

### 1. Preliminary Injunction

A copyright, moral right or neighboring right holder may seek a preliminary injunction against an infringer to cease the alleged infringement when (i) the right holder is considered likely to win the suit and (ii) a preliminary injunction is considered necessary to avoid considerable harm or imminent danger the right holder would otherwise suffer.

If a court judge finds that requirement (i) is satisfied, he usually finds the requirement (ii), too. If he considers a preliminary injunction to be issued through hearing both parties, he determines how much bond should be posted and, upon the bond being posted, may issue a preliminary injunction order. The amount of bond to be posted varies according to expected damages to the alleged infringer in the case where the preliminary injunction is held unfounded, but the typical amount is the defendant's lost profits expected during coming one year. Japanese law does not have a system equivalent to temporary restraining order (TRO), which is issued without hearing defendant.

### 2. Impoundment Order

When a plaintiff may demand a preliminary injunction, he may also demand impoundment of infringing copies and materials for reproduction thereof by a marshal.

#### **The File Rogue Case**

(Heisei 14 (yo) 22011 Case of Application for Preliminary Injunction against Infringement of Neighboring Right, Decision of Tokyo District Court, April 9, 2002)

FACTS: Respondent made available on the Internet a computer software "File Rogue," which enable its users to exchange various electronic files. Applicants, recording companies, sought preliminary injunction ordering Respondent not to allow transmission of MP3 audio files of their phonograms.

#### ISSUES:

1. Respondent's infringing act as principal
2. Respondent's infringing act as accessory
3. Necessity of injunction

HELD: Preliminary injunction granted.

### 3. Necessity of injunction

"As we found above, (1) more than 40,000 members have registered with Respondent Services as of December 2001 and more than 300 members access to Respondent Server in average to freely receive electronic files of their choice, and none of the users have been identified; (2) Respondent has not taken any measures such as blocking access to the information for file exchanges; and (3) there is likelihood that such information will be publicly available in the future. In light of these and other facts, it is obvious that if Applicant Phonograms are made available for transmission without Applicants' authorization and if users continue to freely obtain the MP3 Files, Applicants will suffer significant damages.

"Accordingly, in this case, there is **necessity for protective measure**.

...

"As Respondent Server does not make available for transmission the MP3 Files themselves stored in the users' common folders, it cannot identify what MP3 files are transmitted between the users. Thus, granting injunction against sending or receiving the MP3 Files themselves cannot

accomplish the objectives of the application before us.

“On the other hand, even if the user (sender) stores the MP3 Files in the common folder in its PC, his making them available for transmission can be prevented by injunction against sending of file information (e.g., file name) from Respondent Server to other users (recipients), because the recipients cannot select the MP3 files they want. Accordingly, we understand that Applicants’ objectives in this application before us can be accomplished by injunction against act of sending file information from Respondent Server to the users.

“Therefore, we decide that it is reasonable to grant injunction against act of sending file information to users of Respondent Services.”

## F. Time

Japan is, or at least used to be, somewhat notorious for long trials (which may have contributed to preference of out-of-court resolution of disputes). In the past, it took on average two years from filing a complaint with a court to obtaining a judgment. If the case is appealed, the time may be trebled or quadrupled, depending on the complexity of the case.

Today, because of faster court procedure under the new Code of Civil Procedure and of increased expertise of the judges in intellectual property cases, judgment may be typically obtained in approximately one year.

## G. Cost

### 1. Court Fees

When the plaintiff files a complaint with the court, it must also affix certain amounts of revenue stamps as filing fee. The amount of the filing fee depends on the type of claim and the amount claimed by the plaintiff. As a rule of thumb, the following formulae as revised on January 1, 2004 may be useful:

<u>Amount Claimed (n)</u>	<u>Filing Fee</u>
$0 < n \leq \text{¥}1 \text{ million}$	$n \times 1\%$
$\text{¥}1 \text{ million} < n \leq \text{¥}5 \text{ million}$	$n \times 0.5\% + \text{¥}5,000$
$\text{¥}5 \text{ million} < n \leq \text{¥}10 \text{ million}$	$n \times 0.4\% + \text{¥}10,000$
$\text{¥}10 \text{ million} < n \leq \text{¥}1 \text{ billion}$	$n \times 0.3\% + \text{¥}20,000$
$\text{¥}1 \text{ billion} < n \leq \text{¥} 5 \text{ billion}$	$n \times 0.2\% + \text{¥}1,020,000$
$\text{¥}5 \text{ billion} < n$	$n \times 0.1\% + \text{¥}6,020,000$

Some other expenses may be necessary depending on how the proceedings take place. For example, if a party requests examination of witnesses during the proceedings, he must pay travel and other expenses for the witnesses.

### 2. Attorney's Fees

The attorney's fees had been, before March 31, 2004, regulated by the Rules of Standards of Attorney's Fees of the Japan Federation of Bar Associations as adopted by local Bar Associations. The following is the schedule of attorney's fees for civil matters, which still work as the standard in fact:

<u>Amount of Economic Benefit Sought</u> <u>(Amount Claimed/Awarded = n)</u>	<u>Initial Fee</u> <u>(chakushu-kin)</u>	<u>Success Fee</u> <u>(hoshu-kin)</u>
$0 < n \leq \text{¥}300,000$	$n \times 8\%$ <sup>10</sup>	$n \times 16\%$
$\text{¥}300,000 < n \leq \text{¥}3 \text{ million}$	$n \times 5\% + \text{¥}90,000$	$n \times 10\% + \text{¥}180,000$
$\text{¥}3 \text{ million} < n \leq \text{¥}300 \text{ million}$	$n \times 3\% + \text{¥}690,000$	$n \times 6\% + \text{¥}1,380,000$
$\text{¥}300 \text{ million} < n$	$n \times 2\% + \text{¥}3,690,000$	$n \times 4\% + \text{¥}7,380,000$

The prevailing party may recover the "cost of proceedings" (*sosho hiyo*) when the judgment is so entered (Code of Civil Procedure, Art. 61). However, the recoverable "cost of proceedings" is limited to the filing fee and does not include the attorney's fees.

<sup>10</sup> Minimum initial fee is ¥100,000.

### III. OTHER MEASURES OF ENFORCING COPYRIGHT

#### A. Criminal Sanctions

##### 1. Crimes under Copyright Law

The following acts constitute crimes under the Copyright Law. Penalties was increased in June, 2004 and come into effect on January 1, 2005.

Acts Constituting Crime	Penalties
*Intentional infringement of copyright, moral rights, or neighboring rights (Art. 119, Item (i))	Up to 5 years imprisonment and/or up to 5 million yen fines
*Causing others for profit-making purposes to use automatic reproducing machines for infringing reproduction of works or performances (Art. 119, Item (ii))	
Infringement of moral rights of the deceased author (Art. 120)	Up to 5 million yen fines
Circumvention of technological protection measures (Art. 120 <sup>bis</sup> , Cls. 1 and 2)	Up to 3 year imprisonment and/or up to 3 million yen fines
*Falsification of rights management information for profit-making purposes (Art. 120 <sup>bis</sup> , Item (iii))	
Distribution of copies of works with false authorship (Art. 121)	Up to 3 year imprisonment and/or up to 3 million yen fines
*Certain distribution of commercial phonograms (Art. 121 <sup>bis</sup> )	Up to 3 year imprisonment and/or up to 3 million yen fines
Failure to indicate source (Art. 122)	Up to 500,000 yen fines

The crimes marked " \*" need formal complaint (*kokuso*) from right holders to Public Prosecutor or Police Department in order to commence prosecution (Copyright Law, Art. 123). A proper formal complaint against these crimes must be filed within 6 months from awareness of the crime and the infringer.

##### 2. Aiding and Abetting

Anyone who induces another person to commit a crime is punished by the same penalty as the induced person (Penal Code, Art. 61). In addition, anyone who assists another person in committing a crime is punished by reduced penalty (Arts. 62 and 63).

##### 3. Penalty to Corporations

When a representative, agent, employee or other worker of a corporation or other business entity intentionally infringes copyright or neighboring right in connection with its business, the principal is punished by fines up to 150 million yen. For other crime under the Copyright Law, the principal is punished by the fines under the respective provisions (Art. 124).

#### B. Border Measures

The Customs Law prohibits importation of goods infringing intellectual property such as patent, design right, trademark, copyright, neighboring right and semiconductor chip right (Art. 69-11). However, exclusion of goods is not mandatory. Under the Customs Tariff Law, the customs authorities have discretion to exclude the goods from clearance.



## APPENDIX

### [Questions]

1. What kinds of remedies are available: criminal, civil or administrative?
2. Which court has jurisdiction over copyright infringement case in civil suit?
3. What elements shall be alleged and established for copyright infringement?
4. What work is copyrightable?
5. Who owns the copyright to the work: the doctrine of works made for hire?
6. What rights are infringed?
7. Does Defendant have a good defense or excuse?
8. Is an injunction order available?
9. Is a destruction order available?
10. What are the requirements for damages: negligence theory?
11. How much damages may be claimed?

### [Hypothetical Case]

1. Plaintiff, a game maker, produced GameA. 20,000 units of the Game A were sold for ¥ 5,000 per unit. Plaintiff's marginal profit is 20 % of the sales.
  2. Defendant, a game maker, produced and sold Game B, which copied the user interface of the Game A with some alteration. 30,000 units of the Game B were sold for ¥3,000 per unit. Defendant's marginal profit is 30 % of the sales.
  3. Plaintiff claims injunction, damages and apology notice against the Defendant.
12. How are moral rights remedied: compensation for mental distress and apology notice?
  13. What are recoverable: court fees or attorney's fees?
  14. Are provisional remedies available?
  15. How long does it take to complete civil procedure?