Copyright and Freedom of Expression:
From the Perspective of Cultural Policy and the Role of Intermediaries

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I previously had a chance to make presentations on this topic at several workshops held at *Kyushu Koho Hanrei Kenkyukai* (Kyushu Public Law Seminar), *Zenkoku Kenpo Kenkyukai* (Japan Association for Studies of Constitutional Law), and Hokkaido University Graduate School of Law Global COE Program. I am extremely grateful to the participants for their comments. Remaining errors are, of course, attributable to me.

1. Introduction

(1) Previous Situation

In this presentation, I would like to focus on copyright and freedom of expression from the perspective of cultural policy and the role of intermediaries.[1]

Traditionally, we did not see an active debate on this issue within and between constitutional law and intellectual property law. From an historical point of view, however, the copyright system was created as a kind of "guild" to regulate stationers and was, consequently, closely related with the notion of "censorship". By nature, copyright has always had a complex and intimate relationship with the problem of freedom of expression.[2,3]

The Statute of Ann,[4,5] the first modern copyright law in the world enacted in 1710,

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[1] I have written several articles where the premise of this presentation was argued. Ryu Kojima, *Information Transactions in the Digital Environment: From the Perspective of Intellectual Property Law*, 11 INTELLECTUAL PROPERTY LAW AND POLICY JOURNAL 185 (Hokkaido University 21st Century COE Program 2006), Tatsuhiro Ueno & Ryu Kojima, *Indirect Infringement and Provisions Restricting Rights in Copyright Law*, ZJAPANR / J.JAPAN.L 28 (2009), pp.236; Ryu Kojima, *Chosakuken Hogo to Hyogen no Jiyu [Copyright Protection and Freedom of Expression]*, in Shigeru Minanino (ed.), *Hogaku Nyumon* [Introduction to Legal Studies], pp.213(Shinzansha 2009).

[2] Concerning the history of copyright, *see* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (Harvard University Press 1993); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, REPUBLISHED (AND CONTRIBUTIONS FROM FRIENDS) (Matthew Bender 2005); RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775) (Hart Publishing 2004); RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE (Edward Elgar 2006).

[3] Daniel Defoe, who was punished writing a political pamphlet, made very interesting statement concerning censorship and authorial rights, which is as follows: “The Law we are upon, effectively suppresses this most villainous Practice, for every Author being oblig’d to set his Name to the Book he writes, has, by this Law, an undoubted exclusive Right to the Property of it. The Clause in the Law is a Patent to the Author, and settles the Propriety of the Work wholly in himself, or in such to whom he shall assign it; and ‘tis reasonable it should be so: For if an Author has not the right of a Book, after he has made it, and the benefit be not his own, and the Law will not protect him in that benefit, ‘twould be very hard the Law should pretend to punish him for it.” However, this view is completely different from modern copyright law based on property rights. *See* Rose, *supra* note 2, at 35.

[4] The year 2009-2010 is tercentennial anniversary of the establishment of modern copyright law. In June 2009, annual conference of International Copyright Law Association (ALAI) was held in London, whose title was ""From 1710 to Cyberspace", celebrating 300 years of copyright and looking to its future". Discussion of the conference can be seen at http://www.alai2009.org/programme.aspx (Last visited on February 6th, 2010)

[5] There are two opinions about the enactment year of the Statute of Anne either in 1709 or 1710. It seems that the in the legislation of Great Britain the new year started from March, which creates a confusion about the enactment year of the Statute of Anne (it was changed due to the introduction of Gregorian calendar in 1750). Based on the current calendar, the year 1710 must be correct as the enactment year.

acknowledged that authors have a right in creative expression, but stationers still had real power in information distribution. With the emergence of the "romanticism" movement in the arts, a concept of "authorship" where authors have an exclusive right in creative expression, was established.[6] The transition to the concept of authorship therefore, overlaps with the establishment of individualism, the development of a market economy, and the progress of modern legal principles.

In accordance with the establishment of a modern copyright system, however, its "distance" from debates around notions of freedom of expression became greater. Possible reasons are as follows.

First, copyright has not been conceptualized as a "privilege" granted to stationers, but a "property right" granted to authors, and few people have questioned the exercise of this entitlement. Once labeled as "property", it has very powerful connotations.

Second, several “safe harbors” are already built into the copyright system, therefore, people tend to believe that the tension between copyright and freedom of expression is internally reconciled. Such safe harbors are the idea/expression dichotomy, creativity, enumerated lists of exploitation, requirement of access, scope of protection (i.e. substantial similarity), copyright limitations and exceptions, term of protection, etc.

Third, opportunities for free expression were more limited before the advent of the Internet because the mass media existed as "gatekeepers". It was once perceived that copyright law governs limited business areas such as publishers or music industries. Practically speaking, it was unnecessary for ordinary people to seriously think about the relationship with freedom of expression in everyday life.

(2) Contemporary Debates

There are several reasons why debates surrounding copyright and freedom of expression have heated up recently. Perhaps most obviously, the development and proliferation of digital technology has dramatically changed the scenery of the basic structure of information distribution from what we seen in the so-called “analog world”. Digital technology has brought us enormous benefits, for example, almost cost-free copying and information dissemination. Although copyright law used to relate to limited industries, now everybody has become a stakeholder in copyright law.

On the one hand, we have seen the rampancy of illegal copying facilitated by P2P file

[6] Traditionally, “creation” was only possible by the God, and creators were thought to be a slave of its mastery. In addition, “technologies” where the subject matter of current patent law and “arts” where that of current copyright law were not separated. This argument is extremely interesting, however, I would like to leave this issue to aesthetics.

sharing software, and the resulting so called "copyright anarchy".[7] On the other hand, the problem of copyright management, which is based on the combination of technological protection measures and contract has been pointed out ("perfect control").[8] On top of that, reflecting the strengthened copyright protection since the 1980s (such as the enlargement of subject matter and extension of copyright duration) in the trend of "pro-patent policy",[9] arguments of copyright and freedom of expression were reignited at the end of 1990s first in the US law,[10] which subsequently affected Japanese discussions as well.

Before moving on to the following discussion, it may be helpful to identify how the situation differs between US and Japanese debates.

First, federal preemption is acknowledged under the so-called "intellectual property

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[7] *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); Judgment of the Osaka High Court on October 8th, 2009 (*Winny* case). Also *see* "File-sharing: Handle Winny at your own risk", Japan Times, October 27th, 2009, *available at* http://search.japantimes.co.jp/cgi-bin/nn20091027i1.html (Last visited on February 6th, 2010)

[8] LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE (Basic Books 1999). The current version is 2nd edition published in 2006, *available at* http://pdf.codev2.cc/Lessig-Codev2.pdf (Last visited on February 6th, 2010)

Famous case related to contractual regulation is *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). Also *see* Kojima, *supra* note 1, *Information Transactions in the Digital Environment*, at 190.

[9] This terminology only mentions "patent", but the concept embraces all areas of intellectual property rights.

[10] Representative articles are as follows: Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147 (1998); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L. J. 1 (2002); James Boyle, *The First Amendment and Cyberspace: The Clinton Years*, 63 LAW & CONTEMP. PROB. 337 (2000); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000); Hannibal Travis, *Comment, Pirates of the Infromation Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L. J. 777 (2000); Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173 (Winter/Spring 2003); Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031 (2002); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Pamela Samuelson, Copyright and Freedom of Expression in Historical Perspective, 10 J. INTELL. PROP. L. 319 (2003); Michael Birnhack, *The Copyright and Free Speech Affair: Making-up and Breaking-up*, 43 IDEA 233, 283 (2003); David McGowan, *Why The First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281 (2004); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (Oxford University Press 2008); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (Yale University Press 2008); Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 STAN. TECH. L. REV. 2 (2009).

In 2006, copyright and freedom of expression was discussed in the annual conference of the International Copyright Law Association (ALAI) held in Barcelona. We can observe that this issue is becoming a hot topic of debate not only in the United States but also in Europe. *See* COPYRIGHT AND FREEDOM OF EXPRESSION: PROCEEDINGS OF ALAI STUDY DAYS, 19-20 JUNE 2006 (ALAI 2008).

clause" of the United States Constitution (Article 1 Section 8 Paragraph 8).[11] First Amendment protection is guaranteed in addition to preemption, therefore, some arguments have focused on that relationship.

We do not have an issue of preemption in Japan, therefore, we cannot directly refer to this discussion. Still, it is helpful to learn from any argument related to the First Amendment.

Second, US copyright law has a general provision of copyright limitations and exceptions, namely "Fair Use" (17 U.S.C. §107) and there is a debate whether the problem of freedom of expression is internally reconciled by fair use. Fair use factors in US law are (1) the purpose and character of the use, including whether such use is of a 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; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

However, Japanese copyright limitations and exceptions are enumerated (Articles 30-50 of the Japanese Copyright Act) and we do not have a general provision such as US style of "fair use", where each individual exemptions such as "reproduction for private use" (Article 30), "quotations" (Article 32) or "reproduction, etc. in schools and other educational institutions" (Article 35), are listed in a comprehensive manner. We should be careful whether the existence of a general provision might result in any difference in conclusions.

Third, the element of moral right is weak in US law. In Japanese law, however, we should pay attention to the fact that the level of "right to maintain integrity" (Article 20)[12] is extremely strong when compared to international treaties.[13] I would like to touch on this issue at a later stage.

When we are engaged in comparative research between the United States and Japan, we should bear in mind these above-mentioned factors.

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[11] Article 1 Section 8 Paragraph 8 of the United States Constitution stipulates as follows: “The Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

[12] Article 20 Section 1 of the Japanese Copyright Act stipulates as follows: “The author shall have the right to maintain the integrity of his work and its title, and no distortion, mutilation or other modification thereof shall be made against his intent.”

[13] Berne Convention Article 6bis (1) stipulates as follows: “Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”

Although the approaches are different from that of the United States, theoretical considerations have also deepened in Europe,[14] where we can take a look at arguments on the concept of property from the perspective of constitutional law or the relationship between intellectual property right and human rights developed in EU treaties.

In the next part, I would like to discuss how we should approach the problem of copyright and freedom of speech. By introducing an argument of cultural policy, I hope that via such a move new light will be shed on this issue.

2. Copyright Law and Cultural Policy

(1) "Portfolios" of Cultural Policy

I believe that the primary purpose of copyright law is to diversify "cultural expressions" in society.[15,16] In order to achieve this goal, it is important to stabilize an economic foundation of the creators and relevant stakeholders. We should bear in mind that states can take several possible policy measures,[17,18] and considerations based on

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[14] Christopher Geiger, *The Constitutional Dimension of Intellectual Property*, PAUL L.C. TORREMANS (ED.), INTELLECTUAL PROPERTY AND HUMAN RIGHTS 101 (Kluwer International 2008); Uma Suthersanen, *Copyright as an Engine of Free Expression: An English Perspective*, COPYRIGHT AND FREEDOM OF EXPRESSION: PROCEEDINGS OF ALAI STUDY DAYS, 19-20 JUNE 2006, pp.167 (ALAI 2008). Also *see* Productores de Música de España (Promusicae) v. Telefónica de España SAU (Case C-275/06), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0275:EN:HTML (Last visited on February 6th, 2010)

[15] The term "cultural expressions" is borrowed from the "UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions" adopted in October 2005, entered into force on 18 March 2007. "Cultural expressions" is not only limited to copyrighted works but has a broader scope.

[16] The most famous phrase about copyright and free speech is a statement made by Justice O'Conner in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), which is as follows: "…it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."

[17] TYLER COWEN, GOOD & PLENTY: THE SUCCESSES OF AMERICAN ARTS FUNDING (Princeton University Press 2005); MARJORIE GARBER, PATRONIZING THE ARTS (Princeton University Press 2008).

[18] William Fisher pointed out that governments can take at least 5 possible options to solve "public goods" problem. First, governments sometimes supply public goods by themselves. Second, governments sometimes pay private sectors to produce public goods. Third, governments sometimes issue *post-hoc* prizes or rewards to persons or organizations that provide public goods. Fourth, governments sometimes protect the suppliers of public goods against competition, typically granting them exclusive rights to make their products available to the public. Fifth, governments sometimes assist private parties in devising or deploying devices that increase the "excludability" of such goods---and thus enhance the ability of producers to charge consumers for access to them. *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF

the overarching framework of “cultural policy” is becoming more and more important.

Possible policy choices taken by states are as follows. First there is a "direct subsidy" coming from the government, namely funding for culture. Although "Grants-in-Aid for Scientific Research" in Japan are channeled through the Japan Society for the Promotion of Science (JSPS) commissioned by the Ministry of Education, Culture, Sports, Science and Technology (MEXT), we can probably put such grants in this category. Here the decision on how to allocate the resources is mainly made through a political process, which can be characterized as a more "centralized" form of decision-making.

Second, there is private/corporate philanthropy for art-related sectors such as symphony orchestras, music halls, theaters and Art NPOs.[19] This technique is widely adopted in the United States and people or corporations engaged in philanthropy can enjoy tax deductions. Therefore, it can be conceptualized as an "indirect subsidy".

Third is to rely on intellectual property including copyright. Intellectual property gives an exclusive right for intellectual creation, and right holders can recoup the investment and take advantage of market mechanisms.

In the second and third options, the decision-making of which institution is to be supported is up to each individual or corporation. Although government supports and facilitates the system by preparing certain legal mechanisms, the actual decision-making is "decentralized" compared to direct government funding for culture. In the real world, states' cultural policy consists of a combination of these "portfolios".

(2) Role of Copyright Law in Cultural Policy

What is the function of copyright law in these "portfolios" related to cultural policy? One view toward arts and culture is that "art is genius, and genius cannot belong to a profession". This was famously advocated by the 19th Century British writer, William Hazlitt.[20] This may well be true if we presuppose 19th Century values, such as a vision of romantic authorship. States should, under this view, limit their commitment as much as possible.

Copyright law backs up the "self-responsibility" of those who are related to arts and

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ENTERTAINMENT 200 (Stanford University Press 2004).

[19] PETER FRUMKIN, ON BEING NONPROFIT: A CONCEPTUAL AND POLICY PRIMER (Harvard University Press 2002); PETER FRUMKIN, STRATEGIC GIVING: THE ART AND SCIENCE OF PHILANTHROPY (The University of Chicago Press 2006).

[20] Garber, *supra* note 17, at 52.

culture.[21] If copyrighted works gain popularity in the marketplace, right holders can recoup their investment and those who "win the bet" can survive without relying on patronage from the states, individuals or corporations.

However, copyright law may only serve for recouping the investment of "marketable" goods and may not be significant for small to middle-sized creators who have vulnerable economic foundations or those who do not care economic return. Rather, it can be said that copyright law may be an obstacle considering the fact of paying loyalty to the right holders. Government funding for culture or philanthropy may be important for those stakeholders from the perspective of stabilization of economic foundations for creative activities.

It should be noted that copyright only functions in the market on reproduction, and it is weak in terms of the creation of original works such as sculptures or paintings, and the promotion of public performance.

Despite the fact that there is a strong incentive to encourage creative "process" from the perspective of the promotion of culture,[22] copyright functions as a mechanism to recoup the investment only after the copyrighted works gain attractivity in the marketplace (*ex post*). As is mentioned, creators should "take the risk and win the bet".

Do all creators satisfy this condition? We can easily imagine that a number of creators run out of steam halfway to winning the game. If this is the case, we should take other funding mechanisms into consideration. Copyright law should not offer disincentives for those creator's willingness, and institution-building based on cultural policy includes not only copyright-internal mechanisms but also a combination of copyright-external ones as well.

Take a look at copyright term extension as an example. One of the main rationales of the extension of copyright term is to provide an incentive for the authors. However, it is not easy to resolve this issue if we approach it from a cultural policy perspective.

Suppose we have mass cultural industries such as Hollywood movies in Japan and it generates a significant trade surplus in cultural contents. From the perspective of industrial policy, copyright term extension may be conceivable if this is the case. However, it is already pointed out that copyright term extension is favorable to cultural industries having commercially attractive contents, and works as opposed to small to

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[21] James Boyle mentioned as follows: "...intellectual property rights are designed to shape our information marketplace. Copyright law is supposed to give us a "self regulatory" cultural policy in which the right to exclude others from one 's original expression fuels a vibrant public sphere indirectly driven by popular demand". *See* Boyle, *supra* note 10, at 7.

[22] Garber, *supra* note 17, at 5. Here the story of patronage between Samuel Johnson and Lord Chesterfield is vividly depicted.

medium-sized stakeholders in terms of cultural diversity. If copyright term extension creates negative effects and we really would like to support the economic sustainability of small to medium-sized creators, one possibility is to take into account the possibility of combining copyright protection with government subsidies, which can offset such negative effects (although we may face WTO related issues).

Copyright term extension definitely increases transaction costs not only for the people in the cultural sectors but also users including ordinary citizens, therefore, the story does not end at the stage of funding for culture. Even if we extend the copyright term of protection, we need imagination in institutional design in order to minimize the disadvantages for the users of information goods.

(3) What is the Role of Copyright?

So far we have discussed the role of copyright law in cultural policy. It shows that copyright law is not a "one-size-fits-all" mechanism for all stakeholders in an area of arts and culture. It may be contradictory to the above-mentioned statement, however, I would like to still believe in the possibility of copyright law.

This is because a significant problem underlies both government funding for culture and private/corporate philanthropy.[23] The system of patronage sometimes leads to a "patronizing" of the recipient and undermines the artistic freedom of the creators. Government funding for culture may create the possibility of "government speech" or the effect of "endorsement" that are quite problematic from the perspective of cultural diversity. These issues have been already discussed in constitutional law.

I previously used the metaphor of "winning the bet" when illustrating the characteristics of copyright law, which inherently has a structure of "taking the risk and winning the freedom". In this sense, copyright law is extremely important to help an independence of the creators and relevant stakeholders, and I strongly believe that the copyright system has significance role to play in supporting freedom of expression at its core.

In recent debates, it was emphasized that copyright is an "obstacle" to the freedom speech. However, I recently came to think that copyright touches on the fundamentals of

[23] As a condition of good government funding for culture, Michael Straight, a former deputy chairman of the U.S. National Endowment for the Arts, raised 3 elements, namely “discernment”, “resources”, and “restraint” (Garber, *supra* note 17, at 44). It is important for the funding agency to ascertain what is worth funding (“discernment”), give sufficient resources (“resources”), and cautionary watch without sticking their nose (“restraint”).

freedom of expression and we should reevaluate its importance in this light.[24] Therefore, I do not side with "copyright abolitionists" such as the "Pirate Party" in Europe.[25]

At the same time, however, the general public's view toward copyright law is becoming increasingly critical. The recent tendency of strengthening copyright protection has been outstanding, and many users have an increased level of distrust towards the copyright system.[26] It is true that the "Pirate Party" may be problematic as a "single-issue party". Nevertheless, the emergence of the party is indicative of the fact that an increasing number of people share a sense of dissatisfaction towards the current copyright system. In order for the legal system to be acknowledged by the society, it should conform to our normative consciousness to some extent.[27] It is undoubtedly true that the copyright system faces difficulties in this sense. I think that we need reforms in copyright law to be recognized by the general public and today's presentation is based on that perspective.

Previous legal studies have not been mature in each of the following fields, namely government funding for culture, private/corporate philanthropy, and copyright system and little attention was paid to the interrelation between them. In the near future, we should consider the relationship of state's possible policy measures and theoretical integration, and I would like to engage in "brainstorming" as a preliminary stage. I would like to continue research on cultural policy and the theoretical integration of government funding for culture, private/corporate philanthropy and copyright system would be my medium to- long-term goal.

Here I would like to offer a brief overview of traditional argument on copyright and freedom expression.

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[24] When I made a presentation in front of constitutional scholars in October 2009 at Japan Association for Studies of Constitutional Law, I got a question from Toshiyuki Munesue (Professor of Law at Osaka University) as follows: "Kojima emphasized that copyright is an "obstacle" of freedom of expression, but isn't copyright an "essence" of freedom of expression?"

In answering this difficult question, I touched on the above-mentioned points and answered that copyright is a mechanism to help the independence of the author, but the argument was not clearly articulated at that time.

[25] The Pirate Party states as follows: "A five years copyright term for commercial use is more than enough. Non-commercial use should be free from day one." *See* http://www.piratpartiet.se/international/english (Last visited on February 6th, 2010)

[26] Netanel pointed out that the character of copyright as "taking the risk and winning the bet" creates high premium price and strong enforcement of copyright by cultural industries. See Netanel, *supra* note 10, COPYRIGHT'S PARADOX, at 135.

[27] Blanislav Hazucha, *Freedom to Innovate and Copyright Protection: A role of Social Norms in the Regulation of New Technologies* (January 2009), *available at* http://www.juris.hokudai.ac.jp/gcoe/article/Hazucha-paper.pdf (Last visited on February 3rd, 2010)

3. Previous Discussion

(1) Injunctive Relief to Prohibit the Creation of Derivative Works

One of the problems discussed in recent debates has been the right holder's exercise of injunctive relief to prohibit the creation of derivative works. An interesting argument has been made on this issue by Jed Rubenfeld.[28]

In terms of freedom of expression, Rubenfeld clearly pointed out that the right holder's exercise of injunctive relief to prohibit the creation of derivative works is unconstitutional.[29]

Rubenfeld's argument is as follows: In the context of free speech, it is generally understood that "prior restraint" should be limited as much as possible. However, it is extremely odd that an exercise of injunctive relief is taken for granted in intellectual property law. Why should an area of intellectual property law be a "sanctuary" of the First Amendment? Is this situation really justifiable only because a property right is granted to right holders?

Rubenfeld argued that freedom of expression guaranteed under the First Amendment is "freedom of imagination". Exercise of injunctive relief to prohibit the creation of derivative works means that copyright law prohibits the expression of certain information after people receive information and release their imagination. This structure is a challenge to "freedom of imagination", therefore, it cannot be exempted from an unconstitutional result.

Although mentioned-above, Rubenfeld acknowledged that a special doctrine should be made in terms of derivative works in order for copyright law to be "constitutionalized" in the same manner as the First Amendment created a special doctrine for defamation.[30] Rubenfeld concludes that the right holders need to be rewarded and advocated interesting system of "profit allocation".[31] It also relates to the discussion of Property Rules and Liability Rules.[32]

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[28] Rubenfeld, *supra* note 10, at 11.
[29] Rubenfeld, *supra* note 10, at 53.
[30] Rubenfeld, *supra* note 10, at 52.
[31] Rubenfeld, *supra* note 10, at 53.
[32] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Representative articles on this issue are as follows: A. M. Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 442 (1995); James E. Krier & Stewart J. Schwab, *The Cathedral at Twenty-Five: Citations and Impressions*, 106 YALE L. J. 2121 (1997); Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Unconsensual*

Counter arguments against Rubenfeld must be possible. Although he is against the exercise of injunctive relief to prohibit the creation of derivative works based on "freedom of imagination", the question is, whether limitless "freedom of imagination" would really bring diversification of information in the society. David McGowan, for instance, pointed out that "freedom of imagination" does not serve for cultural diversity, but brings "obsolescence" of the quality of information in the society as long as creation is repeated in this manner.[33] McGowan would say that although the "quantity" of information would increase, it may not lead to an improvement in "quality".

What Rubenfeld and McGowan are arguing about relates to the concept of "chilling effect" in constitutional law. In making certain expressions, we presuppose external communication and inevitably have to bear in mind to what extent copyright law regulates our expressive activities.

Unlike patent law, copyright law requires "access" as a necessary condition to acknowledge copyright infringement, which means that independent creations are exempted even if there is substantial similarity. This is significant from a chilling effect point of view. However, the situation that Rubenfeld questions probably accompanies access to the original works, therefore, the authors of the derivative works should take the risk of prohibition of their creations.

The problem is to what extent we should conceptualize the restriction to third parties brought by copyright law as "chilling effect". In certain cases, statutory bars such as "creativity" prescribed in copyright law function as a hurdle to improve the quality of information in the society.

(2) Content Regulation and Content Neutral Regulation

a. Dichotomy of Content Regulation and Content Neutral Regulation

Another argument is what kind of regulation should be adopted in terms of copyright and freedom of expression.[34] After the publication of an article written by Mark

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Advantages of Liability Rules, 105 YALE L. J. 235 (1995); Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L. J. 703 (1996); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Richard Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L. J. 2091 (1997); Dephana Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEXAS L. REV. 219 (2001); Robert P. Merges, *Of Property Rules, and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994).

[33] McGowan, *supra* note 10, at 285. Also *see* Netanel, *supra* note 10, Copyright's Paradox, at 158.

[34] Concerning "content regulation" and "content neutral regulation", *see Turner Broad. Sys., Inc. v FCC*, 512 U.S. 622, 642-643 (1994); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803

Lemley and Eugene Volokh,[35] and the lawsuit of "Copyright Term Extension Act", discussion on this point became active especially in US law.

Generally speaking, right holders' exercise of injunctive relief is regarded as "content neutral regulation".[36] Regardless of the purpose or the character of the use, right holders just want to prohibit exploitation of their works, which is categorized as content neutral regulation. However, it is already pointed out that the exercise of injunctive relief to prohibit the creation of derivative works may fall on the category of content regulation. Above all, injunctive relief to prohibit the creation of parodies could be made from the specific viewpoint, therefore, there is a high probability of being judged as content regulation.

I have some doubts as to the usefulness of the dichotomy of content regulation and content neutral regulation itself. If a right holder explicitly mentions that she does not like specific expression, it is regarded as content regulation. If she exercises injunctive relief without telling any motivations or reasons, it is regarded as content neutral regulation. It sounds odd whether the existence of explicit disclosure of reasons would make such a striking difference.

b. Problem of the Dichotomy

Arguments on technological protection measures clearly illustrate the underlying problems of this dichotomy. For example, restriction of access to the information brought by access control is categorized as content neutral regulation.[37] It must be content neutral regulation in the sense that exploitation of information will be blocked without any exception.

However, we have seen a lot of arguments made by scholars such as Lawrence Lessig whether "regulation by code" is superior to "regulation by law".[38] In regulation by law (namely copyright law), users can exploit information if they run the risk of being sued (under the circumstances where general provision of copyright limitations and exceptions exist such as “fair use” in the United States, situation is more probable). In regulation by the code (namely technological protection measures), users' exploitation is automatically blocked irrespective of their intentions or purposes. Impact for the creative activities must be bigger in some sense.

(2000).

[35] Lemley & Volokh, *supra* note 10, at 147.

[36] Netanel, *supra* note 10, Copyright's Paradox, at 117.

[37] Boyle, *supra* note 10, at 83.

[38] LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, VERSION 2.0 (Basic Books 2006), at 120. Lessig raised 4 elements in the modality of social regulation to regulate people's behaviors, namely "law", "markets", "norms" and "code (technology)".

We should bear in mind the fact that there is a high probability of being recognized as content regulation if freedom of expression is introduced in "fair use" analysis, because one of the fair use factors takes the purpose or the character of the use into consideration (17 U.S.C. §107). However, once the restriction brought by technological protection measures is labeled as content neutral regulation, the level of scrutiny gets less dense, which means that the legislation on technological protection measures is less likely to be found to be unconstitutional.[39] This situation seems to be ironic and it exemplifies that the dichotomy of content regulation and content neutral regulation is not always helpful for our conceptualization of this issue.

(3) Copyright Limitations and Exceptions

In recent copyright law, we have seen very intensive debates on how to construct copyright limitations and exceptions including legislative forms, taking the perspective of "institutionalism" into account.[40] Interestingly, in Japan courts are thought to be more insulated from the lobbying of interest groups and better situated to strike a proper balance in copyright limitations and exceptions. This view also pushes the introduction of general provision of copyright limitations and exceptions (Japanese version of fair use) from a theoretical point of view.[41]

If we enumerate copyright limitations and exceptions like the current Japanese Copyright Act, it is much easier for interest groups to target specific provisions. Even if we try to introduce new limitations and exceptions, there is a concern that the provision cannot satisfy a sufficient level (in other words, the level of copyright protection remains higher) due to the interest group's pressures of lobbying. Courts that may well

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[39] McGowan, *supra* note 10, at 296.

[40] Antonina Bakardjieva Engelbrekt, *Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation*, REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES, 2007, vol. 4(2), pp. 65., *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144289 (Last visited on February 5th, 2010) Concerning institutionalism, also *see* NEIL KOMESAR, LAW'S LIMITS: RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (Cambridge University Press 2001); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (Harvard University Press 2006).

[41] Tatsuhiro Ueno, *Chosakukenho ni okeru Kenri Seigen Kitei no Saikento: Nihon-ban Fair Use no Kanosei* [Reconceptualizing limitations and exceptions in copyright law: Possibility of "Japanese version of Fair Use"], *Kopiraito* [Copyright], No.560, pp.2 (2007); *Chiteki Zaisan Senryaku Honbu Dejitaru Netto Jidai ni okeru Chizai Seido Senmon Chosakai, Dejitaru Netto Jidai ni okeru Chizai Seido no Arikata ni Tsuite (Hokoku)* [Expert Panel on Intellectual Property System in Digital Net Era, Intellectual Property Strategy Headquarters, Report on Intellectual Property System in Digital Net Era] (November 27th, 2008), *available at* http://www.kantei.go.jp/jp/singi/titeki2/houkoku/081127digital.pdf (Last visited on February 5th, 2010)

be more insulated from lobbying are thus expected to make a proper interpretation if the general provision of copyright limitations and exceptions is introduced. Our understanding of the circumstances we should choose clear and specific provisions or general provisions has been deepened by debates around "Rules and Standards".[42]

Like Japan, more flexible interpretation of copyright limitations and exceptions has been extensively argued in European countries where an enumerated style of copyright limitations and exceptions are dominant. In September 2008, Max Planck Institute for Intellectual Property, Competition and Tax Law made a declaration on the interpretation of "Three-Step Test" international treaties,[43] and mentioned that proper and well-balanced interpretation of copyright limitations and exceptions should be guaranteed.[44] It is noteworthy that the issue related to freedom of expression was spelled out in this declaration.

4. Contemporary Issues and Freedom of Expression: From the Perspective of Intermediaries

(1) What is "Indirect Infringement"?

Intermediaries' liability has been discussed under the framework of "secondary liability" or "third party liability". In Japan, it is labeled as "indirect infringement".[45] From a physical point of view, it is sometimes difficult to evaluate the conduct as a copyright infringement because she is not engaged in exploitation within the scope of copyright. From a normative perspective, however, a person who is involved in a third party's copyright infringement sometimes should be liable for an injunction or damages.[46] This normative doctrine is called "indirect infringement".[47] Especially

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[42] Concerning "Rules" and "Standards", Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65 (1983); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

[43] Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works stipulates as follows: "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." (Emphasis added by the author)

[44] Max Planck Institute for Intellectual Property, Competition and Tax Law, *Declaration: A Balanced Interpretation of the "Three-Step Test" in Copyright Law*, *available at* http://www.ip.mpg.de/shared/data/pdf/extranet/declaration_three_step_test_final_english.pdf (Last visited on February 5th, 2010)

[45] Ueno & Kojima, *supra* note 1, at 236.

[46] For a theoretically interesting article, *see* Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J. L. T. 253 (2006).

[47] Judgment of the Supreme Court on March 15th, 1988, Minshu Vol.42, No.3, pp.199 (*Club Cat's*

under the Japanese copyright law, we should bear in mind that the level of argument is different from other countries because injunctive relief is not given in general tort liability under Article 709 of the Civil Code.

We cannot conceptualize today's copyright law without considering the existence of intermediaries. Intermediaries are entities situated between stakeholders such as right holders and users. Typical examples are ISP (internet service providers) or manufacturers of equipment. Libraries or museums also fall in this definition, although they exist as nonprofit organizations (NPOs).

Contents will not be widely disseminated without equipment to play them back, reproduce or distribute them. Also, we cannot access contents or send information without connecting to the Internet. Intermediaries play an important role in the information flow in today's society and we are therefore required to construct a system which does not inhibit the activities of intermediaries while at the same time not depriving the legitimate interests of authors or right holders.

Every time new technologies developed, right holders and intermediaries have always conflicted with each other. New technologies made reproduction easier, while they have been conceived to deprive the interests of the right holders. Regarding new types of TV program viewing service using broadband Internet, broadcasting companies did not provide a license to intermediaries that wanted to open a new service and ended up in a lawsuit.

If we take a look at the recent Google Book Search settlement,[48] intermediaries not only provide a forum where users can disseminate information, but also play a more active role. Here intermediaries (in this case, Google) make reproduction by themselves, where they are not liable for "secondary liability (indirect infringement)" any longer, but are liable for "primary liability (direct infringement)". Reflecting the rapid change of scenery, legal regulation of intermediaries is becoming more and more important.

In Japan, the scope of direct infringement is broader than other countries (for example,

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Eye case); P2P file sharing service (Judgment of the Tokyo High Court on March 31st, 2005 [*File Rogue* case: Appeal decision]); storage service (Judgment of the Tokyo District Court on May 25th, 2007, Hanrei Jiho No.1979, pp.100 [*Myuta* case]); TV program viewing service (Decesion of the Intellectual Property High Court, November 15th, 2005 [*Internet Video Recording* case: appeal for a temporary injunction decision]), Judgment of the Osaka High Court on June 14th, 2008, Hanrei Jiho No. 1991, pp.122 [*Yoridori-midori* Case: appeal decision], Judgment of the Tokyo District Court on May 28th, 2008 [*Rokuraku II* case]). As an example of a case where infringement was denied, Judgment of the Intellectual High Court decision on December 15th, 2008 (*Maneki TV* case: appeal decision), Judgment of the Intellectual Property High Court on January 27th, 2009 (*Rokuraku II* case).

[48] Netanel, *supra* note 10, COPYRIGHT'S PARADOX at 23; James Grimmelmann, *The Google Dilemma*, 53 N.Y.L. SCH. L. REV. 939 (2008); James Grimmelmann, *How to Fix the Google Book Search Settlement*, J. INTERNET L., Apr. 2009.

"Karaoke doctrine" is a doctrine of direct infringement).[49] It seems that "fair use" (general provision of copyright limitations and exceptions) supporters expect further chipping away at the problem of indirect infringement by introducing "fair use" provision in Japanese copyright act.[50]

(2) Intermediaries' Liability and Freedom of Expression

Concerning intermediaries' liability, how can we approach from the perspective of freedom of expression? I would like to make a rough sketch as follows.

First, could an interest in intermediaries be reduced solely to "economic liberties" or does it relate to "freedom of expression"?

For example, Japanese people living abroad could not access Japanese TV programs. Because of the development of digital and network technologies, transnational distribution of TV programs became possible. The problem is whether intermediaries should be deemed as a "passive conduit". In conclusion, the activities of intermediaries cannot be understood as “expressive activities” protected under freedom of expression.

In the lawsuit of Google search engine in the Unites States, applicability of fair use defense for Google to show thumbnails in the search result was argued. Interestingly, the Court of Appeals acknowledged fair use defense.[51] The Appellate Court concluded as follows: “In conducting our case-specific analysis of fair use in light of the purposes of copyright, we must weigh Google's superseding and commercial uses of thumbnail images against Google's significant transformative use, as well as the extent to which Google's search engine promotes the purposes of copyright and serves the interests of the public”.[52]

When intermediaries are under pressure to decide whether or not to delete a message from its Internet bulletin board, they are not “passive conduit” any longer but need proactive judgment. Because intermediaries should take what is good and leave what is bad, we might think that they are engaged in expressive activities.

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[49] "Karaoke doctrine" is a concept which normatively assesses the subject of the exploitation focusing on two elements “management (control) and profit” of a person whom it would be difficult to call the subject of the physical exploitation. *See* Ueno & Kojima, *supra* note 1, at 236.

[50] *See* Tatsuhiro Ueno & Ryu Kojima, *Chosakukenho ni okeru Kenri Seigen Kitei to Kansetsu Shingai* [Copyright Limitations and Exceptions and Secondary Liability in Copyright Law], *NBL* No.800, at 83 (a remark by Mr. Naoya Bessho (Chief Compliance Officer and Head of Legal Office, Yahoo Japan Corporation)).

[51] *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701(9th Cir. 2007). However, the District Court did not acknowledge fair use defense and confirmed contributory liability. *See Perfect 10 v. Google, Inc., et al.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

[52] Id, at 487 F.3d 722.

As to the problem of intermediaries, we need to analogize media regulation discussed in constitutional law. Traditionally, problems in digital environments have been mainly developed as a result of the Internet, but distribution process of digital contents is now being multiplied more than ever, which makes the situation even more complicated. In the Japanese TV industry, for example, analogue broadcasting will terminate and terrestrial digital broadcasting will start in the year 2011. As you can see in the recent pioneering amendment on "IP multicast broadcasting", the convergence of telecommunications and broadcasting is dramatically accelerating.

If we take a look at the problems such as Google Book Search, it is becoming more and more important how to regulate intermediaries, while securing the user's access to information or free speech. We should not only expect the doctrine of freedom of expression, but also rely on competition law such as antimonopoly law, to some extent, in terms of commercial activities in the marketplace.[53]

Another interesting perspective is how traditional archives such as libraries or museums are coping with the current situation of Google Book Search. In Japan it is reported that the National Diet Library is considering charged distribution of their collection in addition to "Digital Library from the Meiji Era".[54] In France, on the other hand, the National Library (Bibliothèque nationale de France) was reported to have collaborated with Google.[55] The question raised by Google Book Search is whether an international profit-making enterprise can compete with traditional intermediaries of archives. We are required to reconsider the necessity of government funding for national intermediaries in order to secure their cultural diversity.

Second, we have to bear a serious problem of "commercial speech" if we allow intermediaries to claim free speech interest. It has a spillover effect not only limited to an intermediaries' liability.

Under the Japanese law, the scope of an employee's creation is very broad (Article 15

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[53] Jan Rosén, *Freedom of Ideas, Facts, Concepts, Systems, Functional Features*, COPYRIGHT AND FREEDOM OF EXPRESSION: PROCEEDINGS OF ALAI STUDY DAYS, 19-20 JUNE 2006, pp.290 (ALAI 2008).

[54] http://kindai.ndl.go.jp/ (Last visited on February 6th, 2010) *See* "Japanese e-library project could lose out to Google Book Search without government flex", The Mainichi Daily News, July 23rd, 2009, *available at* http://mdn.mainichi.jp/perspectives/editorial/archive/news/2009/07/20090723p2a00m0na015000c.html; "Copyright law and online books", Japan Times, August 23rd, 2009, *available at* http://search.japantimes.co.jp/cgi-bin/ed20090823a2.html (Last visited on February 3rd, 2010)

[55] *See* "Google bruises Gallic pride as national library does deal with search giant", Times Online, August 19th, 2009, *available at* http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article6800864.ece (Last visited on February 6th, 2010)

of the Copyright Act)[56] and both economic and moral rights belong to the corporation. When corporations enforce their rights, we have not seen the cases where they brought up the doctrine of free speech. If the argument of freedom of expression gets activated in terms of intermediaries' liability, its aftereffects will be definitely expanded into the entire copyright law.

We have already seen cases where corporations exercised moral rights in order to pursue their economic interests.[57] What I would like to argue here is that intellectual property law has not been sensitive to the issues of a corporation's enforcement of copyright and moral rights. If intellectual property law opens up an argument of freedom of expression, it means that we should be well prepared to tackle the challenges of the enforcement by corporation and commercial speech.

(3) International Aspects and Freedom of Expression

In considering intermediaries' liability, we should pay attention to the arguments of international jurisdiction, applicable law and recognition of foreign judgment discussed in private international law or international civil procedure because of the international coverage of their activities, where a confluence of arguments of freedom of expression can be seen.[58] Take a look at the following hypothetical case in terms of applicable law.

(Case) The internet service provider Z in country A runs a bulletin board (BBS) on the internet. Y (residing in country B) uploaded the copyrighted works of X without authorization, which resulted in copyright infringement in country C. In addition to pursuing the liability of Y based on direct copyright infringement, X wants legal

[56] Article 15(1) of the Japanese Copyright Act stipulates as follows: "The authorship of a work (except a computer program work) which, on the initiative of a juridical person or other employer (hereinafter in this Article 12 referred to as "juridical person, etc."), is made by an employee in the course of the performance of his duties in connection with the juridical person, etc.'s business and is made public by such juridical person, etc. as a work under its own name, shall be attributed to such juridical person, etc., unless otherwise stipulated by contract, work regulations or the like at the time of the making of the work."

[57] Typical example in Japan can be seen in Judgment of the Supreme Court on February 13th, 2001, *Minshu* Vol.55, No.1, pp.87 (*Tokimeki Memorial* case)

[58] Graeme B. Dinwoodie, Rochelle Dreyfuss and Annette Kur, *The Law Applicable to Secondary Liability in Intellectual Property Cases*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1502244 (Last visited on February 6th, 2010) Concerning general issues of applicable law in intellectual property infringement, *see* Ryu Kojima, *Applicable Law in Intellectual Property Infringement*, *available at* http://www.tomeika.jur.kyushu-u.ac.jp/chizai/symposium/paper/007_01_08May09_Kojima.pdf (Last visited on February 6th, 2010)

remedies against company Z. How should we determine the applicable law for the liability of company Z?

Direct copyright infringement occurs in country C. Therefore applying the "law of the place where the result of direct infringement occurred" (namely law of the country C) to the intermediaries' liability may be one possibility.[59] The problem here is that company Z is caught short if country C provides for strict liability of intermediaries. Company Z cannot completely monitor which user from what country subscribes to their service and is engaged in an infringement act targeting which country.

If Z has a duty of care to prevent the result of direct infringement, the question is whether they should search all the laws throughout the world and take precautionary measures to eliminate infringement. Taking into account the importance of intermediaries in today's world, this would be an excessive restriction that does a poor job of balancing economic liberties and would bring an unnecessary chilling effect on their activities. On top of that, in a situation of so-called "ubiquitous infringement", it has become widely accepted that the law of one single country should be applied to all of the infringements throughout the world.[60] We are thus hesitant to apply a law that is completely unforeseeable from the standpoint of intermediaries.

Therefore, another possibility is to apply the law of the habitual residence of the intermediaries. It is true that there is a certain level of duty of care to eliminate direct infringement, and it is not a huge problem to determine the applicable law based on this criterion because intermediaries are engaged in business activities following the regulation of their habitual residence. In practice, most intermediaries which are influential in society have a habitual residence in developed countries, where the level of protection is basically in harmony with international treaties and relatively higher. Therefore, it is not harsh for the victims (right holders) as long as the law of those countries is applied.

Nevertheless, there is a concern that intermediaries intentionally put their habitual residence in countries with lower protection and will engage in infringement acts if we always apply the law of the country of habitual residence. If this situation is too overt,

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[59] THE AMERICAN LAW INSTITUTE, INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES 125 (2008).

[60] Examples are Section 321 of the ALI Principles (ALI, *supra* note 59, at 153), Article 3:603 of the CLIP Principles (*available at* http://www.ip.mpg.de/shared/data/pdf/draft-clip-principles-06-06-2009.pdf), and Article 302 of the "Tranceparency" Proposal (*available at* http://www.tomeika.jur.kyushu-u.ac.jp/ip/pdf/Transparency%20RULES%20%202009%20Nov1.pdf) (Last visited on February 6th, 2010)

application of the law of the place where direct infringement occurs should be seriously taken into consideration as a safety bulb.

In addition to the interests of right holders and intermediaries, the free speech interests of users are also crucial. Because users are heavily dependent upon the existence of intermediaries when they express their thoughts, this perspective cannot be overlooked. Concerning the issue of the applicable law for intermediaries, the interests between the stakeholders are extremely complicated and lots of problems have yet to be discussed.

The above-mentioned arguments imply that constitutional provision of other countries may affect the national legal order through the channel of applicable law and it leaves a room for an argument of national constitutional order and that of other countries. Traditional arguments were based on "territoriality" in both constitutional law and intellectual property law, however, the problem of applicable law for intermediaries' liability does not allow us to remain seated in such a "peaceful" environment.

5. Concluding Remark

In this presentation, I examined copyright and freedom of expression from the perspective of cultural policy and the role of intermediaries. I wanted to point out that the copyright system should be located within an overarching framework of cultural policy and also better understood through a comparative institutional analysis. In comparison with government funding for culture or private/corporate philanthropy, the advantages and disadvantages of copyright law have been highlighted.

It also became clear that because of the development of digital and network technology we should properly locate intermediaries, namely entities situated between right holders and users, such as libraries, Google, collective management society, etc in this modern era.

As mentioned, we are commemorating the tercentennial anniversary of the Statute of Anne, the pioneer of modern copyright law, from 2009 to 2010. However, the annual conference of the International Copyright Law Association (ALAI) was somewhat thrown into chaos due to the problem of the Google Book Search settlement. In other words, Google was a shadow main character at the event commemorating the tercentennial anniversary of copyright law, which I do not think was just a coincidence.

Originally the prototype of copyright law used to be the protection of stationers, who can be seen as intermediaries from a modern point of view. Battles after the enactment of the Statute of Anne including numerous lawsuits focused on how stationers retained

their powers in book selling. Now is the time to reexamine the significance of this historical development because intermediaries are now gaining their powers in accordance with the progress of digital era. It is often said that "A man who reviews the old so as to find out the new is qualified to teach others.", and I fully appreciate the best part of learning law from this proverb.

In addition to the problems argued in this presentation, issues such as internet provider's sharing information with investigating authority[61] or forced disconnection of the internet (so-called "three strike rules") are widely discussed in Europe, which are also closely related to freedom of expression.

By focusing on cultural policy and the role of intermediaries, I strongly believe that we will be able to shed a new light on the configuration of stakeholder's and the institutional turn in modern copyright law.

[61] *See* Productores de Música de España (Promusicae) v. Telefónica de España SAU (Case C-275/06), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0275:EN:HTML (Last visited on February 6th, 2010)