CONSIGLIO NAZIONALE FORENSE

Country Paper (Japan Federation of Bar Associations)

1. Company's Freedom and Protection of Intellectual Property Right

Companies often encounter conflict with third party intellectual property rights such as software and content copyrights when they consider introducing useful services for customers or efficient business operation with the full utilization of new information technology. It is needless to say that the protection of copyrights contributes to the development of culture, but the interest of society as a whole will be harmed if they are overly protected and cause unreasonable interference to the development and use of information technology.

The current Copyright Act of Japan imposes limitations/exceptions to the copyright owner's rights by identifying specific ways of exploitation that should be permitted for the development of information technology. These specific limitations/exceptions have been added through several revisions to follow up the progress of information technology. However, it has been persistently criticized that with such reactive measures, companies have no choice but to scale down the development and adoption of latest information technology out of concern over infringement of copyrights. In order to deal with the situation, legislative action to introduce general fair use provisions limiting the exercise of copyrights had been advocated.

Under such circumstances, the Government states in the "Japan Revitalization Strategy 2016" formulated in June 2016 by the Headquarters for Japan's Economic Revitalization that it considers "the fourth industrial revolution" that uses the technological breakthrough of IoT, Big Data, artificial intelligence and other technologies as a key to the improvement of future productivity in Japan. The Government also states that, as part of its efforts to realize an intellectual property system compatible with "the fourth industrial revolution", it will take necessary measures for an early amendment of the Copyright Act to introduce provisions that could limit rights of copyright owners in a flexible manner. In response to this, the Council for Cultural Affairs released a report in February 2017 proposing desirable systems to limit rights that precisely address the needs of the new era. Examining six needs in particular: whereabouts search service; information analysis service; backend duplication of systems; translation service; reverse engineering; and other CPS services, this report suggested classification of the needs into three types of exploitation based on the degree of disadvantage which a copyright owner may suffer and proposed the

establishment of provisions which ensure appropriate flexibility corresponding to the type of exploitation. The JFBA voiced its opinion in favor of this introduction of general provisions to limit rights under certain conditions (the JFBA's opinion dated March 16, 2017).

The JFBA believes that the provisions to limit rights should be established with due consideration to the degree of flexibility required in accordance with the nature and the background of exploitation of copyrighted materials, and welcomes the report as the proposal is made with the understanding of current and future needs of companies and individuals and is based on various factors such as Japan' legal system, social environment and the public's attitudes toward legal action,. Furthermore, in light of the principle of legality (*nulla poena sine lege*), the report is highly evaluated for its careful examination of clarity according to the description method of permitted exploitation. While further examination is necessary to achieve clarity of those provisions to the extent possible, on the other hand, the provisions should maintain a balance between clarity and flexibility in view of changes in situations of future copyrights and other matters.

2. Freedom of Expression and Privacy

Regarding the freedom of expression and privacy on the Internet, the Supreme Court of Japan did not allow for removal of a plaintiff's criminal record (violations of the law banning child prostitution) which appeared on search results of Google, an Internet search engine, dismissing his petition for provisional disposition to have the reference to his criminal history expunged from the search results on January 31, 2017.

The Supreme Court noted that search results can be removed only in case where by balancing between a search site company's freedom of expression and the protection of privacy of a person whose information appears on the site, the legal interests of non-disclosure of privacy clearly overweighs other interests. It also stated that the factors to be examined are: a nature and content of a fact; an extent where the fact relating to privacy of a person in question can be spread by information such as URLs and a degree of detailed damage suffered by the person; a social status and influence of the person; purposes and meanings of those articles, etc.; social circumstances at the time when the article was posted on the Internet and any changes afterward; and necessity to post such facts on those articles, etc..

The ruling of the first instance for this case referred to "the right to be forgotten" represented by the preliminary ruling of the Court of Justice of the European Union, but

Japan's Supreme Court did not mention this right.

3. Hate Speech

Hate speech, mainly targeted at Korean residents[i] in Japan, has been becoming rampant in recent years in Japan, disseminating illegal information which poses a risk of inciting discrimination and hatred based on race, religion and gender or harms their dignity through social media.

The JFBA called on the Government to diligently consider legislative regulation given the prevalence of discriminatory statements against people, including Burakumin[ii] and Korean school students, on the Internet and through propaganda activities in Japan (the JFBA President's statement dated April 6, 2010). Also, the JFBA stated that the Government should: (i) conduct a survey on discriminatory treatment such as the refusal of foreigners' entry to restaurants and shops and of their renting apartments due to racism, and on racial discrimination through speech, behavior and other acts that incite or inflame racial hatred and discrimination; (ii) enact legislation on the principle of prohibiting racial discrimination and on a basic framework for national and local governments' implementation of measures for the elimination of racial discrimination; and (iii) promptly establish a national human rights institution that is independent of the Government and take measures to enable the use of an individual complaints mechanism in order to improve an institutional framework for preventing racial discrimination and providing relief against the discrimination.

The Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan ("Anti-hate speech Act") was enacted in 2016. Below are issues found in this Act.

The Act only set out guiding principles and lacks prohibition provisions. The scope of persons who are subject to "unfair discriminatory speech and behavior" is only limited to those originating from outside Japan and their descendants with "a legitimate residential status".

The JFBA stated its opinion that the act should also ban any discriminatory speech and behavior based on race, color, descent, or national or ethnic origin without limiting to those originating from outside Japan pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination to which Japan is a party (the JFBA President's statement dated May 10, 2016).

Moreover, the requirement for the applicability of the law to be a legitimate resident

should be removed for its violation of the general recommendation No. 30 on discrimination against non-citizens by the Committee on the Elimination of Racial Discrimination.

The JFBA considers that a bar association's role in relation to hate speech on social media and by other manners is: to assess the law; to continuously call on the Government to conduct a fact-finding survey; and to cooperate with relevant ministries and agencies in every possible way, as well as to understand the current situation of detailed measures for awareness-raising, education and other purposes which are required for national and local governments. It believes that actions taken under public-private partnership is important as seen in EU's Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law dated November 28, 2008, and subsequent actions such as the release of the Code of Conduct on countering illegal online hate speech by the European Commission and IT enterprises.

4. Thorough Guarantee of Right to Privacy and Right to Know and Promotion of Information Disclosure

(1) Criminalization of Conspiracy

The criminalization of conspiracy newly expanded by the Amended Act on Punishment of Organized Crime s and Control of Crime Proceeds ("Anti-Conspiracy Act")" should be repealed. The criminalization of conspiracy is feared to strengthen surveillance and have great chilling effect over the citizens' freedom.

The Anti-Conspiracy Act which includes a new stipulation of the " crime of preparation for terrorism and other acts" (referred to as "crime of conspiracy" in 4(1)) in the Anti-Conspiracy Act was passed and enacted in June 15, 2017, and was enforced in July 11 2017. The JFBA has consistently opposed the establishment of this act.

The enforcement of the Anti-Conspiracy Act now allows for punishment against as many as 277 types of crimes if a person merely conspire a crime of those types even before actually attempting or preparing for it. Many of the 277 types of crimes are not subject to punishment under the current laws even if they are attempted.

In addition, the scope of punishment for the crime of conspiracy remains ambiguous. JFBA is seriously concerned that there will be risks of excessive investigation and arbitrary charge by investigative authorities for purposes of proving facts of "conspiracy" which leaves very few objective traces and "preparatory action" which is difficult to distinguish from daily activities. In fact, the deliberation at the Committee on Judicial

Affairs of the House of Representatives revealed that there is a possibility of the tailing and surveillance of a person prior to the planning (conspiracy) stages. Furthermore, there is a risk that the law will lead to wider use of images taken by both public and private surveillance cameras and collection of GPS position information in addition to further expansion of the scope of wiretapping of communications and the interception of conversations.

Also, the provision to reduce or exempt punishment by surrender poses a danger of encouraging people to turn informer, consequently promoting surveillance among citizens.

If such risks materialize, society will be subject to a high risk of strengthened surveillance, excessive infringement of the people's right to privacy and chilling effect on the freedom of speech and expression.

Professor Joseph Cannatici, the UN Special Rapporteur on the right to privacy, pointed out issues relating to the Anti-Conspiracy Act in the open letter dated May 18, 2017, including: an adverse affect on the exercise of the right to privacy as well as other public freedoms; possible inadequacy of oversight of surveillance by investigative agencies; and problems with the process from the drafting of the bill to the enactment of the Anti-Conspiracy Act (http://www.ohchr.org/Documents/Issue/Privacy/OL_JPN.pdf).

(2) Public Records and Archives Management Act ("PRAMA")

It is necessary to establish a mechanism to properly prepare, preserve, and dispose public records and archives through the amendment of the PRAMA and by introduction of a complete set of measures to ensure appropriate implementation of a system for management of public records and archives.

Japan's freedom of information system solely covers documents which are actually prepared. In other words, official information cannot be obtained if documents which should be prepared were not actually prepared or if documents which should be preserved were already disposed.

Proper management of public records is thus essential in order to make the freedom of information system viable.

The current PRAMA, however, which covers paper documents in principle, does not apply to electronic data that is mainly used in public administration, no matter how important they are. This means that the electronic data can be arbitrarily disposed, notwithstanding the PRAMA. Although the PRAMA requires the government to review it including the scope of the application of the PRAMA, the above issues have not been

discussed at all.

It is also necessary to ensure proper implementation of the management system of public records and archives. There is no end to cases where the management of public records does not conform to the PRAMA's intent. Recently, the documents which contained processes of a controversial sale of government land to a private education institution were disposed after a short period of time. In addition, the documents that indicated a process of the opening of a new department by another private education institution was regarded as nonexistent. This shows a lack of recognition of the value of public records and archives. The JFBA is calling for the establishment of a more appropriate system for the guarantee of the public's right to know through the opinions released in 2008 and 2009 (Opinion Calling for Early Enactment of Public Records and Archives Management Act and Revision of Information Disclosure Act dated October 22, 2008, and Opinion Calling for Modification of Bill of Public Records and Archives Management Act and Revision of Information Disclosure Act dated April 24, 2009).

(3) Specially Designated Secret Act

With regard to the protection and promotion of people's rights on the internet, we would like to touch upon some issues on the Specially Designated Secret Act, which came into force in 2014.

Under this Act, first, the definition of the SDS is too broad and vague to restrict people's rights on access to information.

Second, there is no adequate provision which protects journalists from criminal punishments.

Article 22 of the said Act provides as follows:

(1) When this Act is applied, its interpretation must not be expanded to unfairly violate the fundamental human rights of the citizens, and due consideration must be paid to the freedom of news reporting or news coverage, which contributes to guaranteeing the citizens' right to know.

(2) The act of news coverage by persons engaged in publishing or news reporting shall be treated as an act in pursuit of lawful business as long as it has the **sole aim of furthering the public interest** and is **not found to have been done in violation of laws or regulations or through the use of extremely unjustifiable means**.

Article 25 set out criminal penalties and the protection under Article 22(2) from such

penalties is limited for journalists who meet the specified conditions as above.

However, in the context of the right of access to documents held by public authorities, the European Court of Human Rights has held that the public interest in particular information could override duty of confidentiality, and that a journalist or a civil servant should not be prosecuted or sanctioned in connection with such information because of the use of illegally obtained documents or breach of duty of confidentiality (ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire* v. *France*; ECtHR 25 April 2006, Case No. 77551/01, *Dammann* v. *Switzerland*; ECtHR 7 June 2007, Case No. 1914/02, *Dupuis and Others* v. *France*; ECtHR 26 July 2007, Case No. 64209/01, *Peev* v. *Bulgaria* and ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja* v. *Moldova*.) (*Dirk VOORHOOF,* On the Road to more Transparency: Access to Information under Article 10 ECHR, 2014)

Therefore, the scope of protection under Article 22(2) is narrower compared to the EU standard as adopted in the above precedents of the European Court of Human Rights.

In addition, the terms "the sole aim" and "extremely unjustifiable means" are vague and give the authority the broad discretion to determine whether a journalist is protected or not.

The Special Rapporteur on Freedom of Expression also specifically showed concerns on these points in his recent report published on 29 May 2017.

According to the report of the Special Rapporteur, he has remaining concerns. First, as the Human Rights Committee noted in its 2014 periodic review, the SDS does not adequately define the matters that can be designated secret or the preconditions for classification.

Second, the SDS puts journalists and their sources at risk of penalties. Of particular concern are Article 22 and Article 25 of the Act. The Special Rapporteur remains concerned about the way in which Article 22 would be interpreted by the Government in a case involving unauthorized disclosure (e.g., whistleblowing).

(Excerpts from paras. 44-47 of Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Japan, A/HRC/35/22/Add.1).

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[i] As of the end of 2015, there are about 400,000 Korean residents in Japan with a permanent residence permit, out of which approximately 340,000 Koreans are those who were forced to reside in Japan when Japan occupied the Korean Peninsula in the

early 20th century, and their descendants.

[ii] The JFBA takes a position that discrimination against the Burakumin should be included in the discrimination based on descent pursuant to the Convention on the Elimination of Racial Discrimination.