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ARTICLE 2B AND MASS MARKET LICENSE CONTRACTS: A JAPANESE PERSPECTIVE

By Tsuneo Matsumoto †

ABSTRACT

In Japan, a concrete plan to enact legislation similar to Article 2B does not exist. The enactment of Article 2B in the United States may have a significant impact on the general rules of electronic contracting and on informational transactions in Japan. As such, Japanese scholars are closely monitoring the progress of Article 2B.

I. INTRODUCTION

In Japan, a plan to enact comprehensive legislation comparable to Article 2B does not exist. Currently, such issues are addressed only by piecemeal legislative initiatives. The Japanese Ministry of Justice has proposed the enactment of a law relating to digital signatures and certification authorities.[1] In addition, various governmental agencies have been discussing methods for protecting uncopyrightable data, such as a *sui generis* right as provided by an European Union (EU) directive, an amendment to the Unfair Competition Law, or an extension of protection under the Copyright Law of Japan.[2]

Despite the lack of a concrete plan to enact sweeping legislation similar to Article 2B in Japan, Article 2B is gaining more attention. Recently, several articles that discuss various provisions of Article 2B have been published.[3] For the past two years, the Software Information Center of Ja-

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1. *See* HŌMUSHŌ MINJI-KYOKU, DENSHI TORIHIKI HŌSEI NI KANSURU KENKYŪKAI (SEIDO KANKEI SHO-IINKAI) HŌKOKUSHO [MINISTRY OF JUSTICE, CIVIL AFFAIRS BUREAU, RESEARCH GROUP REPORT ON LAW RELATING TO ELECTRONIC TRANSACTIONS (SUBCOMMITTEE ON SYSTEMS)] (Mar. 1998) *reprinted in* 1138 JURISUTO 14 (1998).

2. *See generally* CHITEKI ZAISAN KENKYŪSHO, DATABASE NO HŌTEKI HOGO NO ARIKATA NI KANSURU CHOSA KENKYŪ HOKOKUSHO [INSTITUTE FOR INTELLECTUAL PROPERTY, RESEARCH REPORT ON LEGAL PROTECTION OF DATABASES] (1998).

3. *See, e.g.*, Seiji Nakajima, *Shrinkwrap Keiyaku no Yūkōsei [Enforceability of Shrink Wrap Contracts]*, (pts. 1 & 2), 634 NBL 22 (1998), 637 NBL 53 (1998); Hideaki Serizawa, ProCD v. Zeidenberg *no Bunseki [An Analysis of* ProCD v. Zeidenberg], 61 HOGAKU 189 (1997); Hiroo Sono, *Jōhō Torihiki ni Okeru Keiyaku Hōri no Kakuritsu ni*

pan (SOFTIC) has been sponsoring an Article 2B Research Group, of which I currently serve as chair. In November 1997, SOFTIC held its 6th International Symposium on Protection of Computer Software, entitled *A Balance Between Protection and Exploitation of Digital Content.* Professor Ray Nimmer, chair of the Article 2B drafting committee, delivered the keynote speech. An international panel, which included guests from the United States, engaged in a heated debate over the implications of Article 2B.

One reason for the intense debate is the perceived impact that Article 2B may have on U.S. software products imported into Japan. Computer software products that are developed in the United States and then modified for the Japanese market currently dominate in Japan. These products even dominate the Japanese word processing software import market.[4] I myself use—or rather, I am forced to use—Microsoft Word. Following the enactment of Article 2B, a large proportion of computer software products sold in the Japanese mass market will be sold just like in the U.S. mass market.

II. THE ENFORCEABILITY OF SHRINK WRAP AND MASS MARKET LICENSE CONTRACTS UNDER JAPANESE LAW

Shrinkwrap contracts, in a strict sense, bind a user even if the user did not read the contractual terms prior to breaking the seal and opening the software package. Under current Japanese law, shrinkwrap contracts are likely to be unenforceable. This leads to some uncertainty for the Japanese user. For instance, without an enforceable license, can a consumer use the program legally? Two plausible arguments can be made for the legality of such use. The predominant argument is that a sale of software technically represents a sale of a copy.[5] As such, the owner of the copy may use it freely unless he or she infringes the copyright of the copyright holder. Article 47[bis] of the Copyright Law of Japan allows the owner of the program copy to reproduce the program to the extent deemed necessary for the pur-

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Mukete (Chūkan Hōkoku) [*Toward Principles of Contract in Information Transactions (an Interim Report)*], (pts. 1 & 2), 626 NBL 24 (1997), 627 NBL 32 (1997).

4. *See* Japan Electronic Industry Development Association, *Statistics of Software (Export/Import)*, (visited Sept. 30, 1998) <http://www.jeida.or.jp/toukei/software/1997/soft1997.html> (statistics only in Japanese); Japan Electronic Industry Development Association, *Statistics of Software (Export/Import)*, (visited Sept. 30, 1998) <http://www.jeida.or.jp/toukei/software/soft1.gif> (statistics in Japanese and English).

5. *See* NOBUHIRO NAKAYAMA, SOFTWARE NO HŌTEKI HOGO (SHIN-BAN) [LEGAL PROTECTION OF SOFTWARE] 78 (2d ed. 1988); YOSHIYUKI TAMURA, CHOSAKUKEN HŌ [TEXTBOOK ON COPYRIGHT LAW] 188 (1998).

pose of exploiting that work on a computer by the user.[6] Therefore, even installation of the software onto the hard drive by the user, which involves reproduction, is legal. In contrast, a second argument relies on the premise that the sale of software at a retail outlet creates an implied-in-fact contract between the copyright holder and the consumer. However, since an agreement over the terms of the license does not take place in this scenario, a default set of rules under copyright law will govern the license contract. Both arguments inevitably lead to the same result: a user may legally use software in any manner as long he or she does not violate copyright law.

Box top licenses provide another interesting dilemma. In this type of license, the terms of the licensing contract are printed on the exterior of the box. The visibility of the contract provides the opportunity for the user to read and consent to the terms before deciding to purchase the item at a retail store. In this case, the licensing contract will likely *prima facie* bind the consumer. It is important to note, however, that the terms of a box top licensing contract are standardized; consumers may take it or leave it. If a term in a standard form contract is unfair to the non-drafting party, Japanese courts may strike the offending term.

In January 1998, the Consumer Policy Section of the Social Policy Council, an advisory committee to the Prime Minister of Japan, proposed enactment of the Consumer Contract Law.[7] The proposed law provides that any term in a consumer contract that is unreasonably unfavorable to the consumer is unenforceable. Member countries of the EU already have similar laws based on the EU Directive on Unfair Terms in Consumer Contracts.[8] The proposed Consumer Contract Law of Japan, like the EU Directive, will include an indicative and non-exclusive list of unfair terms. However, none of the proposed terms listed seem to address whether a contract may limit the users' rights, which copyright law would ordinarily permit.

III. MANDATORY LAW

Since Japan does not have a federal system, controversial issues of federal preemption do not arise as they would in the United States. How-

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6. *See* Article 47[bis] of the Copyright Law of Japan (1985).

7. *See* KOKUMIN SEIKATSU SHINGIKAI SHOHISHA SEISAKU BUKAI, (SHŌHISHA KEIYAKU HŌ (KASHŌ) NO GUTAITEKI NAIYŌ NI TSUITE) [INTERIM REPORT BY THE CONSUMER POLICY COMMITTEE OF THE SOCIAL POLICY COUNCIL, THE CONCRETE CONTENTS OF CONSUMER CONTRACTS LAW (TENTATIVE NAME)] (1998).

8. *See* 1993 O.J. (L 95) 29.

ever, Japan has a system of both mandatory rules [kyoko hoki—*ius cogens*] and default rules [nin'i hoki—*ius dispositivum*]. Contracting parties may not void mandatory rules.[9] If copyright law establishes a set of mandatory rules based upon public policy, any contractual licensing term that limits the user's right to use the software product will be judged unenforceable. Case law regarding the establishment of mandatory rules under copyright law does not presently exist. In my view, most provisions of copyright law are not mandatory. Moreover, in Japan, individually negotiated license contracts, especially development contracts, often limit users' rights. These limitations have not been criticized by scholars as violating public policy. In spite of this freedom to negotiate contract terms, if mandatory rules do exist under copyright law, any term that is inconsistent with the mandatory provision will be unenforceable whether the term is individually negotiated or standardized.

In Germany, the theory that default rules should be transformed into mandatory rules is quite popular. Some Japanese scholars also subscribe to this principle.[10] The premise underlying this theory is that default rules may act as guidelines in determining the fairness of any particular term in standard form contracts.[11] Thus, in the case of a mass market license via standard form contracts, a term may be voidable if it would limit rights that copyright law originally would allow users.

The following hypothetical illustrates such a case. A user buys packaged software and brings it home. There, he or she finds a license contract document inside the package. The document states that if the user agrees to the conditions listed, permission is granted to unseal the envelope containing the CD-ROM and install it on the computer. If the user does not agree to the terms, he or she may return the product and receive a refund. The latter alternative is burdensome; the consumer must expend time and effort to return the software product to the retail store or manufacturer if he or she is not prepared to agree to the licensing terms. Users who choose to use the program may be bound by the license, but may claim as unenforceable those terms which are unreasonably unfair to the user.

Another difficult question is whether Japanese courts would enforce a choice of law clause in the licensing contract stating that, for example, the law of the state of California should govern the license. In this case, con-

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9. Article 91 of the Civil Code provides that if the parties to a juristic act have declared an intention which differs from any provisions of laws or ordinances that are not concerned with public policy, such intention shall prevail.

10. *See, e.g.*, SHŌJI KAWAKAMI, YAKKAN KISEI NO HŌRI [THE THEORIES FOR CONTROL OF STANDARDIZED CONTRACTS] 383 (1988).

11. *See id.* at 386-87.

siderations of consumer protection may intervene. However, consumer protection is generally weak in Japan.[12]

In conclusion, there is a growing interest in the Article 2B project in Japan. Japanese legal scholars will continue to closely monitor the development of Article 2B because of its potential impact on the general rules of electronic contracting and on contracts pertaining to informational transactions.

12. *See generally* Jason F. Cohen, Note, *The Japanese Product Liability Law: Sending a Pro-Consumer Tsunami Through Japan's Corporate and Judicial Worlds*, 21 FORDHAM INT'L L.J. 108, 112-13 (1997) (discussing the history of Japanese product liability protection in the context of the Japanese legal system and culture); Wendy A. Green, Comment, *Japan's New Product Liability Law: Making Strides or Business as Usual?*, 9 TRANSNAT'L LAW. 543, 544-57 (1996) (discussing the development of product liability law in Japan).