

Interpretative Guidelines on Electronic Commerce

March 2002

Ministry of Economy, Trade and Industry (METI)

Introduction

Laws are based on the technology of the time when they were established or amended. New technology causes changes in the facts presupposed by the laws, such as the reality of disputes. Therefore, laws have to be interpreted flexibly along with advances in technology. When such flexible interpretation does not suffice, new laws have to be established.

The Internet is producing new economic activities, such as electronic commerce. However, since most laws in operation, including the Civil Code, were established before the advent of such new technology, it is not necessarily clear how they will apply to new economic activities. That is, the legal environment does not allow electronic commerce to be conducted without anxiety. Ideally, if there is any doubt about the interpretation of a law, the accumulation of court decisions will automatically resolve the disputed point, thus establishing reasonable rules. In reality, however, discussions have just begun on the reformation of our judicial system to make it ready for the new era, and it is difficult to expect a rapid accumulation of judicial precedents.

The objective of these interpretative guidelines is to show how various legal problems will be handled under the Civil Code and other laws related to electronic commerce in order to make transactions more highly predictable and easier to execute. Needless to say, it is the court that ultimately decides how laws should be applied to concrete cases. It is hoped that these interpretative guidelines will serve as a guide to the specific interpretation of laws and will thus help in the establishment of new rules.

In these interpretative guidelines, METI presents specific interpretation of laws, referring to a proposal made by the Rule Establishment Subcommittee of the Information Economy Committee of the Industrial Structure Council. In preparing the proposal, the subcommittee, chaired by Nobuhiro Nakayama, a professor at Tokyo University, received advice on various disputed points from observers from consumer groups, trade associations, and related government agencies, including the Cabinet Office, the Ministry of Justice, the Fair Trade Commission, and the Agency for Cultural Affairs. It is hoped that these guidelines will serve to interpret those laws concerned with electronic commerce.

These interpretative guidelines should be amended flexibly according to the actual practice of electronic commerce, changes in relevant technology, and progress in the making of international rules. We are hoping to present approaches to concrete cases as well as basic concepts. For this purpose, we would like to hear concrete views from a wide range of business people and consumers already engaged in electronic commerce. These interpretative guidelines include some concrete examples, and we would like to ask those who have more appropriate examples to present them to the following institutions:

For the Interpretative Guidelines on Electronic Commerce, please contact:

Information Economy Division,
Commerce and Information Policy Bureau,
METI

FAX: 03-3501-6639

E-mail: qqibbd@meti.go.jp

Interpretative Guidelines on Electronic Commerce

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Part 1: Online Transactions

This part discusses various problems arising from the fact that electronic commerce is a new type of economic activity conducted within online environments, including the Internet and other computer networks.

1. Problems Concerning the Conclusion of Contracts

(1) Time when Contracts are Formed (Arrival of Electronic Notice of Acceptance)

[Disputed Point]

When, specifically, is the time of arrival of a notice of acceptance, at which an electronic contract is formed (Article 4 of the Electronic Contract Law)?

[Approach]

In the case of e-mail, the time is when (I) the mail has been recorded in the mailbox in the designated mail server or the one usually used by the intended recipient of the notice of acceptance (offeror), (II) in a readable condition.

(I) Recorded in the mailbox in the mail server of the intended recipient of the notice of acceptance (offeror)

Cases meeting this requirement (contracts formed)

- The notice of acceptance has been lost due to a system failure or something similar after it has been recorded in the mailbox.
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Cases not meeting this requirement (contracts are not formed)

- The notice of acceptance has not been recorded due to the offeror's mail server being down.
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(II) Recorded in a readable condition

Cases not meeting this requirement (contracts are not formed)

- The notice of acceptance transmitted cannot be read because it is garbled.
- When the notice of acceptance is transmitted as an attached file, the offeror cannot decode and read it. (For example, if the notice is written using application software that the offeror does not have, the offeror cannot decode and read it.)
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[Explanations]

1. Time when Electronic Contracts are Formed (Arrival of Notice of Acceptance)

In principle, a notice of acceptance of a contract offer given by electronic means, such as e-mail, reaches the opposite party in an extremely short time. Therefore, Paragraphs 1 of Article 526 and Article 527 of the Civil Code do not apply in cases where a notice of acceptance of a contract offer is given electronically, such as by e-mail, between remote parties. Instead, the contract is formed at the time when the notice of acceptance has reached the opposite party (Article 4 of the Law Concerning Exceptions to the Civil Code Related to Electronic Consumer Contract and Electronic Notice of Acceptance ("the Electronic Contract Law") and Paragraph 1 of Article 97 of the Civil Code).

2. Meaning of "Arrival"

The Civil Code does not expressly define the time of arrival. It is construed that an expression of intention has reached the opposite party at the time of generation of an objective state in which the opposite party can recognize it (Third Petty Bench, Supreme Court, Judgment of Dec. 17, 1968; p. 2998 of Min-Shu vol. 22, No. 13). It is understood that when given electronically, a notice of acceptance has reached the opposite party at the time when it is possible for the opposite party to access the electromagnetic record of the information pertaining to the notice. For example, when a notice is transmitted by e-mail, the information pertaining to the notice has reached the opposite party at the time when it has been recorded in the mailbox of the mail server used by the intended recipient (offeror) in a readable condition. This can be summarized as follows:

- (A) In cases where the information and telecommunications equipment to be used by the opposite party for receiving notices is designated by its mail address or the like, or in cases where in the absence of such designation, there is specific information equipment that is reasonably believed to be regularly used by the opposite party for receiving notices concerning the type of transactions in question, a notice of acceptance is deemed to have reached the opposite party at the time when it has been recorded in the information and telecommunications equipment.
- (B) In cases other than those mentioned in (A), it is understood that a notice of acceptance is deemed to have reached the opposite party not at the time when it has been recorded in the information and telecommunications equipment but at the time when the opposite party has actually retrieved the information. (It is not necessary for the opposite party to recognize its contents.)

If a notice of acceptance has not been recorded because the offeror's mail server was down, it should be understood that the notice has not reached because the offeror cannot access it.

On the other hand, if a notice of acceptance is lost for some reason after it was recorded, it is understood that the notice has reached the opposite party at the time when it was recorded.

3. Meaning of "Readable Condition"

In cases where a transmitted notice of acceptance is so garbled that it is unreadable, the notice is deemed not to have reached the opposite party. (Whether a notice of acceptance is unreadable is judged based not only on the presence of garbling but also on all other pertinent factors in each particular case. For example, in cases where the offeror cannot decode information because the offeror does not have the information literacy that is reasonably required in the type of transactions in question (such as the offeror's being unable to set the character code selection that enables decoding), the party expressing the intention (acceptor) cannot be blamed. Whether a notice of acceptance is in a readable condition should be judged on the assumption that the offeror had the literacy level reasonably required. In cases where a notice of acceptance is in a file created using specific application software (such as the latest version of a word processing package) that the offeror does not have and thus cannot be decoded into a readable form, it does not seem reasonable to require the offeror to obtain the application software in order to read the information. Instead, it is considered that it is the acceptor's responsibility to transmit information in such a way that the offeror can decode it into a readable form. Therefore, when it is impossible for the offeror to decode and read a notice of acceptance, it should be deemed, in principle, that the notice has not reached the offeror.

(2) Effects of Expression of Intention by a Spoofer on the Real Person

[Disputed Point]

Are there cases, when what is called "spoofing" is committed, where the person whom the spoofer has disguised himself as has to bear any responsibility?

[Approach]

(I) Problems about settlements in Internet trading

In Internet trading, spoofing mainly poses problems in the stage of settlement. In particular, when the consumer buys a product from one party and pays the price to another, such as in credit card or Internet banking settlements, complex problems can occur about the legal relationships between the multiple parties.

The problems concern (i) whether a contract is formed between the person whom the spoofer has disguised himself as and the seller (i.e. the legal relationship between the person whom the spoofer has disguised himself as and the seller) and (ii) whether a settlement agency (a credit card company or bank) can request the real person to pay the fee or whether an account transfer made according to the instructions of the spoofer is valid (i.e. the legal relationship between the real person and a settlement agency).

(i) Is a contract formed between the real person and the seller?

(A) Cases where there is no prior agreement on how the person should be identified (one-time transactions)

When there is no prior agreement on how the person should be identified, the effects of an expression of intention by a spoofer do not belong to the person, and no contract is formed between the person and the seller.

However, the requirements prescribed by the Civil Code: (a) presence of a (plausible) appearance, (b) the opposite party's being bona fide without fault, and (c) the principal's being blamable, are met, there are cases in which the effects of an expression of intention by a spoofer belong to the principal through the analogical application of the clauses for apparent agency (Articles 109, 110, and 112 of the Civil Code), and a contract is formed.

Cases where effects may belong to the real person

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Cases where effects are unlikely to belong to the real person

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(B) Cases where there is a prior agreement on how the person should be identified (continuing transactions)

In the case of continuing transactions, a prior agreement is usually reached on how the person should be identified, such as the use of a specific ID or password. In this case, if the identification method agreed on is used, effects belong to the real person in principle and a contract is formed between the real person and the opposite party.

However, in cases where a prior agreement is reached without the person recognizing the degree of system security provided by the seller, if the security level is considerably lower than that reasonably expected by the person, then the effects of the prior agreement could be limited. In addition, a prior agreement may be considered invalid if the person is a consumer and is always held responsible, irrespective of whether the person can actually be blamed. In such cases, that mentioned in (A) will apply.

Cases where a prior agreement may be considered invalid

- The agreement stipulates that the effects of an expression of intention by a spoofer belong to the real person (consumer), irrespective of whether the person is actually to blame, so long as the other party (seller) carries out personal identification based on the ID or password.
- A prior agreement was reached only on a personal identification method, without any agreement on a concrete security system, but because the system security set by the seller is so low that there is a strong likelihood of leakage of information for personal identification.
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Cases where a prior agreement may be considered valid

- Data is transmitted after being encoded using SSL, and the system security set by the seller is so high that there is very little likelihood of data leakage.
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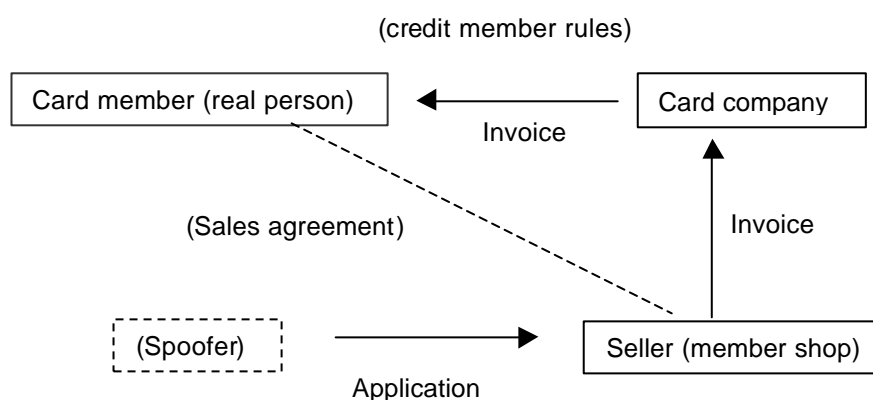
(ii) Relationship between the real person and the settlement agency

(A) Cases of credit card settlement

When a credit card is used for settlement, such as in Internet trading, settlement is performed by entering the credit card number, expiry date, and other details. When spoofing is committed in such cases, will the real person (card holder) be obliged to pay the price?

According to existing credit card membership rules, the card company is not obliged to pay the price or damages, except in cases where the apparent agency holds or where the real person (card holder) can be blamed for reasons such as violation of duties under the credit card member rules.

According to existing regulations and practice, the following relationships hold:



(a) Cases where the real person is responsible

In these cases, the real person is obliged to pay the price or damages.

However, the price to be paid the real person is covered by the card company or by insurance contained in the card member agreement, except where the real person knew about the spoofing or did not know it by gross negligence or is seriously irresponsible, such as in cases where the card was used by a relative of the card holder. Meanwhile, in cases where the card is used by an unauthorized third party, the card company will investigate the case and may refrain from invoicing the real person.

Cases where the real person is responsible

- The person's family or someone else living with the person used his card.
- The person lent his card to another person, who used it.
- In addition to the credit card, the spoofer used the ID, password, or similar that should be kept secret from others.
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(b) Cases where the real person is not responsible

In these cases, the real person is not obliged to pay the price.

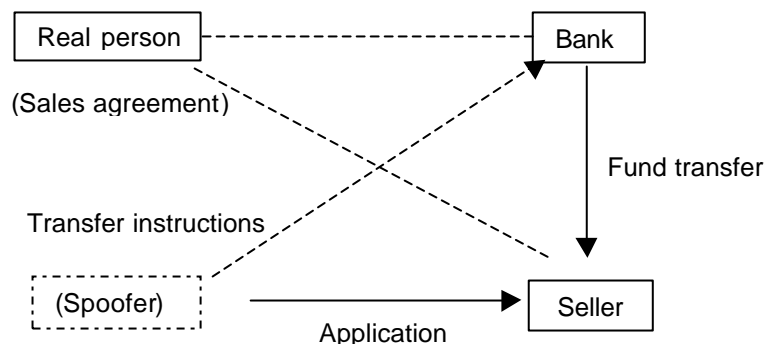
Cases where the real person is not responsible

- Although the credit card number and the expiry date were used, the real person had properly managed and stored the credit card, credit card number, and so forth.
- Information necessary for card settlement was leaked from a member shop, and was used.
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(B) Cases of settlement through Internet banking

When a bank's Internet banking service is used to pay a fee, a third party instructs the bank to transfer it, disguising himself as another person.

According to banking practice, if a prior agreement is reached on personal identification and if the agreed identification method is used, a fund transfer made according to a spoofer's instructions is treated as valid under a banking clause. The validity of this clause is judged in consideration of the degree of the bank's system security and other factors. Based on the existing technology, the following relationships will hold:



Cases where the escape clause is considered valid

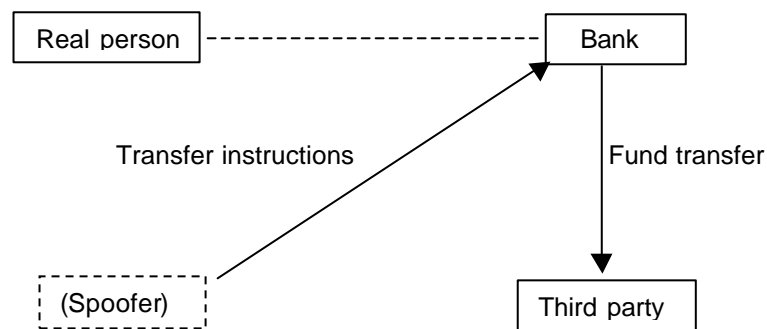
- Multiple passwords are used for personal identification, and data is transmitted after being encrypted using SSL.
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Cases where the escape clause is considered invalid

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(II) Problems about fund transfers in Internet banking

The problem occurs when a third party, disguising himself as another person, instructs a fund transfer in Internet banking. Is the fund transfer made from the real person's account valid?



According to banking practice, if a prior agreement is reached on personal identification and if the agreed identification method is used, a fund transfer made according to a spoofer's instructions is treated as valid under a banking clause. The validity of this clause is judged in consideration of the degree of the bank's system security and other factors. Based on the existing technology, this problem is considered as follows:

Cases where the escape clause is considered valid

- Multiple passwords are used for personal identification, and data is transmitted after being encrypted using SSL.
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Cases where the escape clause is considered invalid

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[Explanations]

1. Location of the Problem

In electronic commerce, where parties carrying out a transaction do not meet face-to-face, it is easy for an unauthorized person to make a transaction by abusing the name of another person. Progress in electronic signature, authentication, and other systems that provide personal identification methods is expected to reduce the danger of spoofing. However, when spoofing is committed, are there any cases in which the person, whose name is used by an unauthorized person, is held responsible?

This section will discuss problems in Internet trading (especially settlement problems), where spoofing is likely to cause problems in electronic commerce and Internet banking.

2. Problems in Internet Trading

In Internet trading, spoofing mainly poses problems at the settlement stage.

In particular, when the consumer buys a product from one party and pays the fee to another, such as in credit card or Internet banking settlements, complex problems can occur around the legal relationship between the multiple parties.

The problems concern (i) whether a contract is formed between the person whose name was abused (the person whom the spoofer has disguised himself as, and the member shop (seller) (i.e. the legal relationship between the person whose name was abused and the seller) and, (ii) whether a settlement agency (a card company or bank) can request the person whose name was abused to pay the fee or whether an account transfer made according to the instructions of the unauthorized person is valid (i.e. the legal relationship between the person whose name was abused and a settlement agency).

(1) Legal Relationship between the person whose name was abused and the seller

(A) Principles (Cases where there is no prior agreement)

Except when a third party has the power to represent the principal, the effects of an expression of intention made by the third party do not belong to the principal. However, the Civil Code has provided for apparent agency (Articles 109, 110, and 112) under which the effects of an expression of intention made by the third party with no power of

representation belong to the principal if certain requirements are met. These requirements are (i) the presence of an appearance as if a third party had the power of representation, (ii) the opposite party's not knowing about the absence of the power of representation without fault, and (iii) the principal's being to blame. Requirements (ii) and (iii) ensure reasonable solutions by adjusting the interests of the opposite party who believed an unauthorized agent had the power of representation and those of the principal. The apparent agency system applies to cases in which the opposite party to a transaction believed that an unauthorized agent had the power of representation and does not directly apply to cases of proof. However, a judicial precedent admits the analogical application of the clauses of Article 110 of the Civil Code to cases in which an agent (who, as judged by the court, had certain basic powers of representation) performed an unauthorized act directly in the name of the principal and in which the opposite party believed that it was an act of the principal (Second Petty Bench, Supreme Court, Judgment of Dec. 19, 1969; p. 2539 of Min-Shu vol. 23, No. 12).

In electronic commerce, it should be possible to admit that the effects of an expression of intention made by a spoofer belong to the person whose name was abused by analogically applying the clauses for apparent representation to cases in which the spoofer was given certain basic powers of representation or the principal was otherwise not to blame.

(B) Cases where there is a prior agreement

The parties who have a continuing legal relationship often conclude in advance a special agreement (basic agreement) on requirements for the effects of an expression of intention made by an unauthorized agent belonging to the principal, including the method of identifying the principal. That is, under such agreements, the principal is identified based on his ID or password, and so long as personal identification is performed by this method, the effects of an expression of intention made by an unauthorized agent belong to the principal. If such agreements are always considered valid, the following problems will arise.

In view of the freedom of contract, such agreements on the method of personal identification should be judged valid in principle as long as they are made between equal parties, such as firms.

However, in cases where a prior agreement is made with the opposite party not knowing the degree of system security provided by the seller, if the actual security level is considerably lower than the level reasonably expected by the opposite party, the validity of the prior agreement may be limited. For example, if a prior agreement is made on the

assumption of the system security reasonably expected, then it should be difficult for the seller to assert that the effects of a transaction made by an unauthorized person under such inadequate system security belong to the principal on the strength of the prior agreement (thus demanding the execution of the transaction). System security in this context will include not only system security in the narrow sense, such as the establishment of a firewall and the encryption of data transmitted, but also the way of managing customer information.

Meanwhile, when the opposite party is a consumer, he may be unable to fully judge the reasonability or safety of a selected system, which is usually unilaterally specified by the firm with the consumer given no choice. In such cases, therefore, prior agreements that invariably admit that the effects of a transaction made by an unauthorized person belong to the principal, irrespective of whether the principal is to blame or not, may be judged invalid under Article 10 of the Consumer Contract Act or Article 90 of the Civil Code.

(2) Legal Relationship between the person whose name was abused and a settlement Agency

(A) Cases of settlement by credit card

The sales agreement between the person whose name was abused (card member) and the seller (member shop) is separate from the payment agreement between the card member and the card company. Therefore, it is necessary to discuss the settlement between the card member and the card company separately from whether the sales agreement is valid.

When credit cards are used for settlements in Internet trading, settlements are usually made by entering the credit card number, the expiry date, and other details. When spoofing is committed in this situation, it poses the question of whether the card member is obliged to pay the fee under the membership rules concluded between the card member and the card company.

Under the existing credit card membership rules, the card member is not obliged to pay the price except in cases where apparent representation holds or where the card member is to blame, as a result of violating the credit card membership rules, for example.

The existing credit card membership rules are summarized below.

The card member is obliged to manage and store his credit card and PIN number carefully as would a good administrator. If his credit card is abused as a result of his failing to perform these obligations, he is obliged to pay the amount stolen. The card member is also obliged to make payments if his card is abused after being lost or stolen. Even in cases where the card member is obliged to make payments, those payments are covered by the card company or by insurance contained in the card member agreement, except where the real person knew of the spoofing or did not know it though gross negligence or is seriously irresponsible, such as in cases where his card was used by a relative.

That is, except in cases where the card member has violated his duty to be a good administrator or is otherwise to blame, he is not obliged to make payments. Conversely, in cases where the card member has violated his duty to be a good administrator or is otherwise to blame, he is obliged to make payments. In practice, however, the card member is not actually required to make payments unless he is seriously to blame, such as in cases where he knew of the abuse or did not know about it through gross negligence. In transactions in which signatures are not used, such as Internet transactions, if the card is used by an unauthorized third party, the card company will investigate the case and may refrain from invoicing the card member.

(B) Cases of Internet banking settlement

When a bank's Internet banking service is used to pay a fee, a third party can instruct the bank to transfer the price, disguising himself as another person.

According to banking practice, if a prior agreement is reached using personal identification and, if the agreed identification method is used, the bank is not held responsible for a fund transfer made according to a spoofer's instructions.

The Second Petty Bench, Supreme Court, Judgment of July 19, 1993 (p. 111 of Hanrei Jiho No. 1489) was instrumental in considering the validity of the banking clause concerning fund transfers to an unauthorized person. This judgment admitted the validity of the banking clause, saying, "In cases in which a person other than a depositor withdrew an amount from the depositor's account using an ATM installed by a bank, if the genuine cash card delivered by the bank to the depositor was used and the correct PIN number was entered, it is reasonable to consider that the bank is exempted from the responsibility under the escape clause as long as the withdrawal was effected based on the confirmation of the cash card and the PIN number by the ATM, except when there were special circumstances such as inadequate management of the PIN number by the bank." What is noteworthy about this judgment is that it refers not only to the escape

clause but also to the security of the payment system adopted by the bank at the time when the accident occurred.

If a similar accident occurs in the future, the degree of system security at that time would also be considered when judging the validity of the banking clause.

Based on the existing technology, it is highly likely that the clause will be judged valid if multiple passwords are used for personal identification and data is transmitted after being encrypted using SSL.

3. Problems in Internet Banking

If a third party, disguising himself as another person, instructed a fund transfer in Internet banking, is the fund transfer made by the bank, as instructed by the real person's account, valid?

(1) Cases where there is no prior agreement

Article 478 of the Civil Code applies to a payment made to a person with no authority to receive it. According to this provision, the payment is valid if (i) the person appeared to be the creditor and (ii) the payer did not know through no fault of his or her own that the payee was not the creditor. This applies to electronic fund transfers as well.

(2) Cases where there is a prior agreement

As mentioned in 2(2)(B) above, according to banking practice, if a prior agreement is reached on personal identification, and if the agreed identification method is used, the bank is not held responsible for a fund transfer made according to a spoofer's instructions. The validity of this banking clause has already been discussed.

(3) Responsibilities of a Certification Authority in Spoofing

[Disputed Point]

If spoofing is attributable to inadequate personal identification by an electronic signature certification authority, what responsibilities will the certification authority bear for those who have suffered damage as a result of trusting the certificate?

(Example) Based on inadequate personal identification, an electronic signature certification authority issued an electronic certificate to a third party who disguised himself as another person (principal). Although the opposite party to a transaction who received the certificate from the spoofer believed that the spoofer was the principal, the effects of the transaction did not belong to the principal and the opposite party suffered damage. What responsibilities does the certification authority have to that opposite party?

[Approach]

(I) Cases of inadequate personal identification

(i) Principle: Tort liability

In cases where an electronic signature certification authority issues an electronic certificate without carrying out adequate personal identification, if another party receives and trusts the certificate but suffers damage because the effects of his transaction with the spoofer do not belong to the principal (the name of the electronic signature), the certification authority bears tort liability to the recipient of the certificate. In this case, the recipient bears the burden of proof as to the negligence (inadequate personal identification) of the certification authority.

(ii) Exception: Contractual liability

Since there is usually no contractual relationship between the certification authority and the recipient, the certification authority, in principle, bears no contractual liability.

However, in cases where a third party receives the certificate, if the certification authority shows its CPS (certification practice standards) and the recipient acknowledges it, a contractual relationship might be recognized between them. If a contractual relationship is

recognized, the certification authority is obliged to abide by the CPS and, if it does not follow the personal identification procedure prescribed in the CPS, it will have to bear contractual liability for the failure to meet this obligation. In this case, the certification authority bears the burden of proof as to the absence of fault on its side.

Cases where a contractual relationship is recognized
<ul style="list-style-type: none">•••
Cases where no contractual relationship is recognized
<ul style="list-style-type: none">•••

(II) Validity of an escape clause of a certification authority

There are cases where a certification authority limits the amount of its liability for compensation in its CPS (escape clause). Its validity has to be discussed.

(i) Cases where no contractual relationship is recognized between the recipient and the certification authority

The parties concerned are not bound by the clause at all.

(ii) Cases where a contractual relationship is recognized between the recipient and the certification authority

The parties concerned are bound, in principle, by the clause.

However, in consumer contracts, for example, the escape clause of the certification authority will be judged invalid if it totally exempts or partly exempts the certification authority (on condition that there is no knowledge or gross negligence on the part of the certification authority) from the liability to compensate for damage resulting from the non-performance of an obligation or from a tort committed during the performance of an obligation (Article 8 of the Consumer Contract Act). There will be other cases where the validity of the escape clause is called into question when considering the surrounding conditions.

Examples of valid escape clauses

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Examples of invalid escape clauses

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[Explanations]

1. Tort Liability

In cases where an electronic signature certification authority issues an electronic certificate without carrying out adequate personal identification, if another party receives and trusts the certificate but suffers damage because the effects of his transaction with the spoofer do not belong to the principal (the name of the electronic signature), the certification authority bears tort liability, in principle, to the recipient of the certificate.

Conversely, if the effects of the transaction are judged to belong to the principal, the certification authority bears tort liability to the principal, who, in principle, suffers damage as a result.

In the case of tort liability, the party that demands damages bears the burden of proof as to the negligence of the certification authority.

2. Contractual Liability

Since there is usually no contractual relationship between the certification authority and the recipient or the principal, the certification authority will, in principle, bear no contractual liability. However, since the certification authority makes public its CPS, which is equal to its certification business conditions, on its Web site, some experts argue that in cases where a third party receives the certificate, if the certification authority shows its CPS and the recipient acknowledges it, a contractual relationship might be recognized between them. When a contractual relationship is recognized, the certification authority will have to bear contractual liability if, for example, it violates the CPS.

In this case, the certification authority bears the burden of proof as to the absence of fault on its side.

3. Validity of the Escape Clause

Since damage in electronic commerce can involve enormous amounts, there are cases where the certification business conditions of certification authorities contain escape clauses. On this point, the first question is, as already mentioned, whether there is a contractual relationship (agreement on exemption) between the recipient of an electronic certificate and the certification authority. Even in cases where the answer to this question is affirmative, the escape clause of the certification authority will be judged invalid in consumer contracts if it totally exempts or partly exempts the certification authority (on condition that there is no knowledge or gross negligence on the part of the certification authority) from the liability to compensate for damage resulting from the non-performance of an obligation or from a tort committed during the performance of an obligation (Article 8 of the Consumer Contract Act). There will be other cases where the validity of the escape clause is called into question when considering the surrounding conditions.

(4) Expression of Intention by a Minor

[Disputed Point]

When a party to an electronic contract is a minor, he can deny the validity of the contract by revoking, in principle, his expression of intention (Article 4 of the Civil Code). However, depending on the way a minor responds to the age confirmation screen, are there cases where the minor is not permitted to revoke his expression of intention by Article 20 (fraudulent means) of the Civil Code?

(Example) In Internet trading, if a minor buys a product by entering a false date of birth in order to pretend that he is of age, can he avoid paying the price by disaffirming the contract?

[Approach]

In cases where a firm has an age confirmation screen for electronic transactions, if a minor intentionally enters a false date of birth and if, as a consequence, the firm considers that he is of age, the minor may be deprived of the right to revoke his expression of intention by Article 20 of the Civil Code.

Cases where a minor might not be permitted to revoke

- The firm makes sure of potential buyers' ages, warning that parental consent is required for minors to conclude contracts.
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-

Cases where a minor would be permitted to revoke

- The screen simply asks, "Are you of age?" and prompts potential buyers to click on "Yes".
-
-

[Explanations]

1. Principle

A minor may revoke an expression of intention made without parental consent (Article 4 of the Civil Code).

In face-to-face transactions, it is fairly easy for one party to judge whether the other party is a minor by assessing his appearance, including his face, or by asking him to present an ID card. In electronic transactions, more minors are likely to appear than in face-to-face transactions because they cannot be seen. From the viewpoint of the safety of transactions, it might be considered that the clauses for minors' legal capacity should be applied more narrowly. However, this is a problem encountered in non face-to-face transactions in general, and it does not seem necessary to treat electronic-only transactions as exceptions.

2. Restriction of the Right to Revoke

Article 20 of the Civil Code provides that if a minor uses a fraudulent means to make the opposite party to a transaction believe that he is of age or has the consent of his legal representatives, he may not revoke his expression of intention. The use of a fraudulent means is not limited to cases where a minor positively tricks the opposite party to make the party mistakenly believe that his capacity is not limited. It includes cases where a person whose capacity is limited causes the opposite party to have a mistaken belief or strengthen a mistaken belief by using speech or behavior that is usually deceptive (First Petty Bench, Supreme Court, Judgment of Feb. 13, 1969; p. 291 of Min-Shu vol. 23, No. 2).

It is understood, therefore, that in cases where a firm engaged in electronic commerce has taken measures to confirm the age of customers, such as by providing an age confirmation screen, if a minor intentionally enters a false age and thus causes the firm to mistakenly believe that he is of age, he may be deprived of his right to revoke.

Whether a fraudulent means was used is judged not simply by whether a minor replied that he was of age but by considering other factors as well, such as the character of the transaction, the nature of the product, and the screen configuration (whether the screen is intentionally designed to draw out specific answers).

At any rate, it is difficult to completely eliminate the possibility of the opposite party's disaffirming a contract on the grounds that he is a minor. Therefore, the firm will adopt reasonable confirmation methods in consideration of the amounts of transactions and the cost of personal identification.

(5) Validity of Agreement on the Competent Court

[Disputed Point]

An agreement on the competent court has to be made in writing (Paragraph 2 of Article 11 of the Code of Civil Procedure). If such an agreement is not made in writing for an online transaction, is it valid?

[Approach]

An agreement on the competent court has to be made in writing. Such an agreement not made in writing for an online transaction is considered invalid.

[Explanations]

An agreement on the competent court is invalid unless it is made with respect to suits pertaining to a certain legal relationship and in writing (Paragraph 2 of Article 11 of the Code of Civil Procedure). Therefore, it is understood that the court is not bound by such an agreement made in an online contract.

Therefore, even if a suit is filed in the agreed court, the court does not have jurisdiction unless it also has statutory jurisdiction or jurisdiction created by the defendant's response to the action (refer to Article 12 of the Code of Civil Procedure). If the court has statutory jurisdiction, it will proceed to hearing the case.

2. Problems Arising from the Development of New Transactions

Responsibilities of the Operator of a Cybermall

[Disputed Point]

Are there cases in which the operator of a cybermall is held responsible for the damage suffered by a consumer from a transaction with a cyber shop?

(Example) A consumer has found a defect in a product he has bought from a cyber shop in a cybermall. The shop operator's whereabouts is unknown, and the consumer cannot contact the shop. Can he demand damages from the operator of the cybermall?

[Approach]

(I) Principle: The cybermall operator is not responsible

There is usually no direct contractual relationship between the operator of a cybermall and a consumer. Therefore, the cybermall operator is not responsible, in principle, for any damage arising from the consumer's transactions with individual cyber shops.

(II) Exception: There are cases in which the cybermall operator is responsible

In cases where (i) there is an appearance from which the consumer can unavoidably misjudge that the business of the cyber shop is conducted by the cybermall operator itself (presence of an appearance), (ii) the cybermall operator is responsible for the presence of the appearance (degree of blame), and (iii) the consumer conducted a transaction, misidentifying the operator of the cyber shop without gross negligence (the opposite party's ignorance without gross negligence), the cybermall operator could be held responsible through the analogical application of Article 23 of the Commercial Code.

Cases where the cybermall operator might be held responsible

- The screen is configured in such a way that if a consumer selects a product on the homepage of the cybermall, he is automatically taken to a purchase screen in a unified format of the cybermall.
-
-

Cases where the cybermall operator will not be held responsible

- At its Web site, the cybermall displays a message, in a form usually recognizable to potential customers, to the effect that each shop is operated by its owner on its own responsibility and, except otherwise expressly stated, is not managed or operated by the cybermall or any of its affiliates.
-
-

[Explanations]

1. Location of the Problem

If a consumer suffers any damage from a transaction with a cyber shop in a cybermall, he can pursue the shop's contractual responsibilities. Can he also pursue the responsibilities of the operator of the cybermall? There is usually no direct contractual relationship between the operator of a cybermall and a consumer. It is considered, therefore, that the cybermall operator is not responsible for any damage arising from the consumer's transactions with individual cyber shops. However, will the cybermall operator have to bear contractual responsibilities in cases where such conditions are generated through certain relationship between the cybermall and the cyber shop as will make the consumer mistakenly believe that the cybermall operator is the seller?

2. Analogical Application of Article 23 of the Commercial Code

There is a judicial precedent pertinent to this point. This is a case in which a consumer made a purchase from a tenant shop in a supermarket. The court said that since the supermarket generated, by concluding a tenancy agreement with the shop, such an appearance as would make potential customers unavoidably believe that the shop was operated by the supermarket, the company operating the supermarket had to bear the same responsibilities as those of a person who permitted another person to use his name through the analogical application of Article 23 of the Commercial Code (First Petty Bench, Supreme Court, Judgment of Nov. 30, 1995; p. 2972 of Min-Shu vol. 49, No. 9).

The requirements for the application of Article 23 of the Commercial Code are as follows: (i) the presence of an appearance that makes potential customers believe that the person who has

permitted another person operates the business, (ii) the permitting person's level of blame (i.e. permitting another person to use his name), and (iii) the opposite party's believing, without gross negligence, that the permitting person is the operator of the business. In the above case, requirement (ii) is not met but the person was involved in the generation of such an appearance as is mentioned above. Therefore, the judgment affirmed that the analogical application of Article 23 of the Commercial Code based on the principle of rights based on appearance, on which Article 23 of the Commercial Code is based.

3. Possibility of the Cybermall Operator's being Held Responsible

In the case of a cybermall, if (i) there is an appearance from which potential customers can unavoidably misjudge that the business of the cyber shop is conducted by the cybermall operator, (ii) the cybermall operator is responsible for the generation of the appearance, and (iii) the consumer conducted a transaction, misidentifying the operator of the cyber shop, without gross negligence, then the cybermall operator could be held responsible through the analogical application of Article 23 of the Commercial Code.

Meanwhile, if at its Web site, the cybermall displays a message, in a form usually recognizable to potential customers, to the effect that each shop is operated by its owner on its own responsibility and, except otherwise expressly stated, is not managed or operated by the cybermall or any of its affiliates, then the display would be considered a powerful factor for denying the responsibility of the cybermall operator.

At any rate, whether a cybermall operator is held responsible through the analogical application of Article 23 of the Commercial Code would be judged not simply based on the appearance of the cybermall and the way the cybermall is operated but on the overall evaluation of such factors as the degree of involvement of the cybermall operator in the business of the cyber shop in question to determine the level of blame of the cybermall operator for the generation of the appearance.

3. Consumer Protection

(1) Mistake Resulting from the Consumer's Misoperation

[Disputed Point]

In BtoC electronic transactions, if the firm has not taken measures to confirm the consumer's intention, such as regarding the details of an offer, a contract by the consumer's misoperation is, in principle, invalid (Article 3 of the Electronic Contract Law). Conversely, if the firm has taken measures for confirmation, the firm can assert the formation of a contract provided that there is gross negligence on the part of the consumer. What specifically are these confirmation measures?

[Approach]

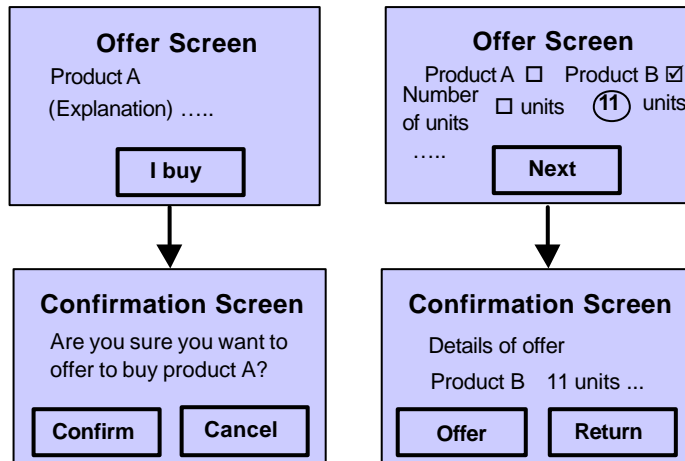
(I) Remedy for the consumer's misoperation

In BtoC electronic transactions, the expression of intention made by the consumer by misoperation corresponding to a mistake of essential element is invalid, except in cases where (i) the firm has not taken measures to confirm the consumer's intention, such as about the details of an offer, before the consumer makes the offer or where (ii) the consumer has expressly abandoned the need for confirmation (Article 3 of the Electronic Contract Law). In cases (i) and (ii), if there is gross negligence on the part of the consumer, the firm can assert the formation of a contract (proviso of Article 95 of the Civil Code).

(II) Confirmation measures to be taken by the firm

Confirmation measures must be such that the firm substantially asks the consumer to confirm whether he has the intention to make an offer and whether he intends to make an offer of the contents entered through the screen. For example, the firm needs to set (i) a screen on which the consumer can clearly recognize that clicking a certain button means expressing his intention to make an offer and (ii) a screen that gives the consumer an opportunity to make any necessary corrections to the displayed contents of the offer before he presses the transmission button to finalize the expression of his intention.

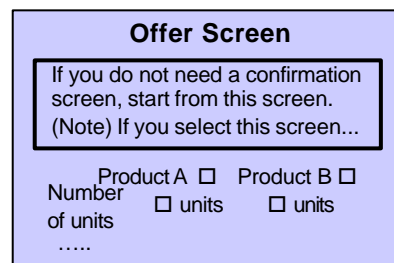
Examples that will be considered "confirmation measures"



(III) Consumer's expression of intention

It is necessary that the consumer expressly chooses to abandon the need for confirmation. Whether the consumer does so is carefully checked. For example, it will not be judged that the consumer did so if he was forced by the firm to do so or he was intentionally induced to do so.

Cases considered falling into this category



Cases considered not falling into this category



[Explanations]

1. Special Measures Concerning Invalidity Due to a Mistake

In cases where the consumer is expected to make an offer to conclude a contract with a firm in accordance with the procedure displayed on its Web screen, if he makes an unintended offer (for example, makes an offer by misoperation without actually intending to do so) or makes an offer of different contents (for example, enters the contents of an offer by misoperation but, without correcting them, makes an expression that is assumed to be an offer of the contents different from the intention), then he can assert the invalidity of the offer of the unintended contract or the expression of the intention that is different from his intention. The proviso of Article 95 of the Civil Code is not applicable except in cases where the firm has taken measures to ask the consumer to confirm his intention to make the offer and the contents of the offer or where the consumer expressly abandons the need for the confirmation of his intention to make the offer and the contents of the offer (Article 3 of the Electronic Contract Law).

An example of an unintended offer is a case in which the consumer mistakenly presses a button for a contract for value, considering it a cancellation button. An example of an offer of contents different from what is intended is a case in which the consumer presses the offer button after mistakenly entering 11 units instead of 1 unit.

2. "Confirmation Measures" in Article 3 of the Electronic Contract Law

If the firm has taken measures to ask the consumer to confirm his intention to make an application and the contents of the application are on the screen, the main part of Article 3 of the Electronic Contract Law does not apply, then the firm can, under the proviso of Article 95 of the Civil Code, assert that there is gross negligence resulting from the consumer's act of making an unintentional application or making an application of unintended contents (proviso of Article 3 of the Electronic Contract Law).

Such confirmation measures have to be such that the consumer is substantially asked to confirm whether he has the intention to make an application and whether he has the intention to make the application using the entered contents.

For example, such measures will have to involve a screen:

- On which the consumer can clearly recognize that clicking a certain button means expressing his intention to make an application, and

- That gives the consumer an opportunity to make any necessary corrections to the displayed contents of the application before he presses the transmission button to finalize his intentions.

3. "Expression of Intention" in Article 3 of the Electronic Contract Law

When the consumer expressly abandons the need for the confirmation measures mentioned above, the main part of Article 3 of the Electronic Contract Law does not apply, and the firm can, under the proviso of Article 95 of the Civil Code, assert that there is gross negligence involved in the consumer's act of making an unintended application or making an application of unintended contents (proviso of Article 3 of the Electronic Contract Law).

The "expression of intention" is the consumer's act of positively telling the firm that, by his own judgment, he does not need to be given the confirmation measures. It will be carefully judged whether this expression of intention is made. This expression of intention is lacking if the consumer is forced, or intentionally induced, by the firm to consent to the abandonment. Other examples of this expression of intention include cases in which the firm displays the message: "The consumer is deemed to have consented to the abandonment of confirmation measures" or in which the consumer cannot buy a product unless he clicks the button: "I expressly abandon confirmation measures". In short, the intention to abandon the need for confirmation measures must be expressed clearly and be based on the individual consumer's voluntary action.

With respect to the presence of this expression of intention, the firm bears the burden of assertion and proof.

(2) Duty to Design an Easy-to-use Application Screen for Internet Trading

[Disputed Point]

In Internet trading, what, specifically, is the "action to have the customer request a contract by being contrary to the customer's wishes", which is regulated by Article 14 of the Specified Commercial Transactions Law?

[Approach]

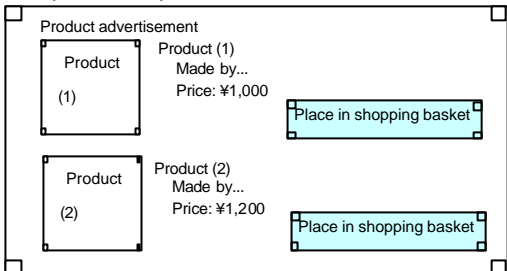
In Internet trading, a firm is subject to administrative penalties when (I) there is no easily recognizable display for consumers that involves pressing a certain button resulting in an application for a contract for value or, if (II) such measures are not taken that will enable consumers to check easily and, if necessary, correct, the contents of their applications.

(I) Cases where there is no display indicating an application for a contract for value

Cases considered not falling into this category

[Screen example 1]

- Step 1: Select product



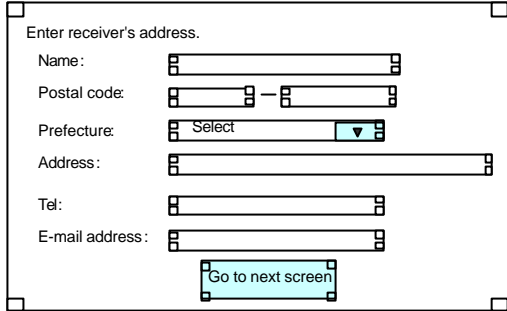
Product advertisement

Product (1) Made by... Price: ¥1,000

Product (2) Made by... Price: ¥1,200

Product	Unit price	Quantity	Subtotal	
Product (1)	¥1,000	1	¥1,000	Delete

- Step 2: Enter personal information



Enter receiver's address.

Name:

Postal code: -

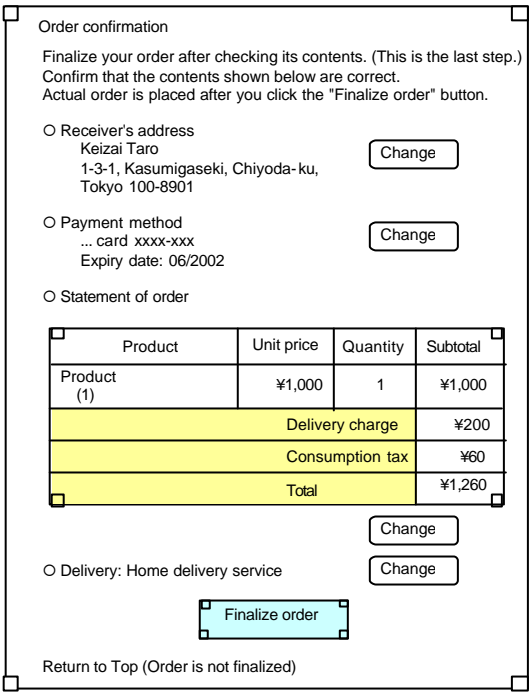
Prefecture: ▼

Address:

Tel:

E-mail address:

- Step 3: Display final confirmation screen



Order confirmation

Finalize your order after checking its contents. (This is the last step.)
Confirm that the contents shown below are correct.
Actual order is placed after you click the "Finalize order" button.

Receiver's address
Keizai Taro
1-3-1, Kasumigaseki, Chiyoda-ku,
Tokyo 100-8901

Payment method
... card xxxx-xxx
Expiry date: 06/2002

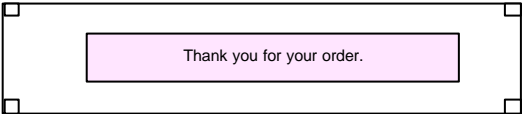
Statement of order

Product	Unit price	Quantity	Subtotal
Product (1)	¥1,000	1	¥1,000
Delivery charge			¥200
Consumption tax			¥60
Total			¥1,260

Delivery: Home delivery service

Return to Top (Order is not finalized)

- Step 4: Completion



[Screen example 2]

Order form

Choose the product you want

(1)

(2)

Receiver's address

Name:

Postal code: -

Prefecture:

Address:

Tel:

E-mail address:

Cases that could fall into this category

[Screen example 3]

(Page 1)

Application Form

- Application procedure
- About return
- Payment method

(Page 2)

- About gift
- Application
Product A Product B
(Please check)
Product 01 Product 02 Product 03
.....
.....
Product 13 Product 14 Product 15
(Please check)

(Page 3)

Applicant

E-mail:

Postal code:

Address:

Tel:

- Payment method
Bank transfer Postal transfer
Cash on delivery (COD)
(Please check)
- Delivery charge
When payment is made by bank transfer or postal transfer, delivery charge is ¥00, irrespective of area. When payment is cash on delivery, delivery charge will vary according to area. (See attached table.) A ¥xx COD charge is added to the delivery charge.

(II) Cases where no opportunities are provided for confirmation and correction

Cases considered not falling into this category

[Screen example 4]

Order confirmation

The following e-mail will be sent:
If these contents are OK, please click on "Order with these contents". If you want to correct the contents, return to previous page by using the browser button.

- Products you order

Product	Unit price	Quantity	Subtotal
Product (1)	¥1,000	1	¥1,000
Delivery charge			¥200
Consumption tax			¥60
Total			¥1,260

- Customer
 - Name:
 - Address:
 - Tel:
 - E-mail:
- Receiver
 - Same as customer
- Payment method
 - Cash on delivery

Cases that could fall into this category

[Screen example 5]

<Screen 1>

Product name	Image	Product description	Price
●●●			¥ 5,340

<Screen 2>

Cash on Delivery
Enter receiver's address.

Name:

Company:

Address:

Postal code:

Tel:

E-mail:

[Screen example 6]

This is the order form.
Fill out all the blanks and click on the "Apply for product"

☆Name:

☆ Name in kana:

☆Address: Postal code:

Prefecture:

Address:

☆Tel:

Order I

- Product A ¥10,000
- Product B ¥15,800
- Size

Order II

- Product A ¥10,000
- Product B ¥15,800
- Size

◇ Price yen

◇ Consumption tax yen

◇ Total yen

◇ Payment method

Thank you for your order.

[Explanations]

1. Regulation under Article 14 of the Specified Commercial Transactions Law

In cases where a sales company, etc., forces customers to apply for sales contracts or service contracts against their will, if the act is considered likely to harm the fairness in trading, the customers' interests, etc., the Minister of Economy, Trade and Industry may instruct that necessary measures be taken (Article 14 of the Specified Commercial Transactions Law).

In Internet trading, the "action to have the customer request a contract by being contrary to the customer's wishes" specifically refers to (i) cases in which there is no easily recognizable display for consumers, in other words that pressing a certain button means applying for a contract of value (Subparagraph 1, Paragraph 1 of the Regulations for the Enforcement for the Specified Commercial Transactions Law) and (ii) cases in which such measures are not taken that enable consumers to easily check and, if necessary, correct, the contents of their application (Subparagraph 2, Paragraph 1 of the Regulations).

2. Guidelines Concerning the " Action to Have the Customer Request a Contract by Being Contrary to the Customer's Wishes"

The Ministry of Economy, Trade and Industry has formulated guidelines concerning the "action to have the customer request a contract by being contrary to the customer's wishes". The guidelines include the following standards for interpretation:

(1) Display the fact that pressing a button means applying for a contract (Subparagraph 1)

(i) It is considered that the following cases do not fall under Subparagraph 1:

(A) Cases where a screen entitled "Order Confirmation" etc. (the final confirmation screen) is always displayed at the final stage of application and where an application is made only after the button "Order with these contents" etc. is clicked on the screen.

(B) Cases where, in the absence of the final confirmation screen, the following measures are taken to remind customers specifically that what they are going to do is the final operation for making an application:

(a) The text of the final application button reads: "I buy (order or apply for) the above product".

- (b) There is a message: "Do you buy (order or apply for)...?" near the final application button. When the button is tested it reads "Yes".
- (ii) The following cases are likely to fall under Subparagraph 1:
 - (A) Cases where a word such as "Send" is used, instead of "Buy (order or apply for)", on the final application button and where there is no indication on the rest of the screen that clicking the button means making an application.
 - (B) Cases where a message such as "Gift" is displayed near the final application button or there is any other message that might cause customers to misunderstand that clicking the button does not mean making an application for a contract for value.

(2) Provision of opportunities for confirmation and correction (Subparagraph 2)

- (i) It is considered that cases where the following requirements, I and II, are both generally satisfied, do not fall under Subparagraph 2:
 - I. Either of the following measures is taken at the final application stage to enable customers to easily understand the contents of their applications:
 - (a) Cases where the contents of an application are displayed on the screen at the final application stage.
 - (b) Cases where the contents of an application are not displayed on the screen at the final application stage but where a button such as "Confirm the contents of the order" is provided so that customers can confirm the contents of their applications by clicking the button, or cases where there is an explanation such as "For confirmation, please return to the previous page by clicking the return button of the browser".
 - II. Configuration that enables customers to make any necessary corrections easily by either of the following measures after checking the contents of their applications in I above:
 - (a) Cases where buttons such as "Change" and "Cancel" are provided on the screen at the final application stage to enable customers to make any necessary corrections by clicking those buttons.
 - (b) Cases where there is an explanation such as "For correction, please return to the previous page by clicking the return button of the browser".

- (ii) The following cases could fall under Subparagraph 2:
- (A) Cases where the contents of an application are not displayed on the screen at the final application stage and where no button, such as "Confirm the contents of the order", or other means are provided to check the contents and no explanation is given to the effect that customers can return to the previous page by clicking the return button of the browser.
 - (B) Cases where no button, such as "Change", or other means are provided to make necessary corrections and no explanation is given to the effect that customers can return to the previous page by clicking the return button of the browser on the screen at the final application stage.
 - (C) Cases where usual settings are made in advance as to the contents of an application, such as applying for multiple units of the same product if customers do not change the settings, and customers, unless extremely careful, tend to make applications without being fully aware of the contents.

Note: Guidelines are made public as to what screens fall under the respective cases mentioned above (Guidelines Concerning the "Action to Have the Customer Request a Contract by Being Contrary to the Customer's Wishes" in Internet Trading).

<http://www.meti.go.jp/kohosys/press/0002003/index.html>

(3) Regularization of Representations in Web Advertising

(A) Regulation under the Premiums and Representations Act

[Disputed Point]

Which Web advertisements are prohibited as misleading representations defined by Article 4 of the Premiums and Representations Act?

[Approach]

The representations of the contents of products or services and transaction conditions displayed by firms on their Web sites are also regulated by the Premiums and Representations Act.

Examples of misrepresentation problems

- There is a representation that computers will be leased free of charge. They are actually not free because a charge, not a lease fee, is collected.
- There is a representation that a vaccine program has been prepared for all viruses and features a detection rate of 100 percent. In reality, however, it is not ready for all viruses.
-

[Explanations]

1. Misleading Representations Defined by Article 4 of the Premiums and Representations Act

"Representations", defined by Paragraph 2, Article 2 of the Act against Unjustifiable Premiums and Misleading Representations ("the Premiums and Representations Act"), and regulated by the law include advertisements on equipment used for information processing, including the Internet. That is, the representations of the contents of products or services and transaction conditions displayed by firms at their Web sites are also regulated by the Premiums and Representations Act.

Here are some examples posing problems of misrepresentation under the Premiums and Representations Act.

- There is a representation that computers will be leased free of charge. They are actually not free because a charge, not a lease fee, is collected.

- There is a representation that a vaccine program has been prepared for all viruses and features a detection rate of 100 percent. In fact, it is not ready for all viruses.
- In addition, there are cases where representations are made in such a way as to cause the general consumer to misunderstand that the quality, sales conditions, and other details of products or services (by not making representations or making representations hard to see), including cases where a firm hides important information such as standards used by consumers to select products and services that are unfavorable to the firm or where products or services are charged later when there were not initially stated that they were a chargeable item. Combined with other representations, these may pose problems under the Premiums and Representations Act as misrepresentations.

2. Guidelines Announcement

The Fair Trade Commission (FTC) has made public the following guidelines entitled: "The Fair Trade Commission's Actions Concerning B2C Electronic Commerce - Primarily Concerning Representations in Advertising" to describe how the FTC is dealing with representations in electronic commerce with consumers from the viewpoint of consumer protection under the Premiums and Representations Act and how representations should be presented in order to be easily understood by consumers.

<http://www.jftc.go.jp/pressrelease/01.january/010119.pdf>

(B) Regulation under the Specified Commercial Transactions Law

[Disputed Point]

How do Articles 11 and 12 of the Specified Commercial Transactions Law apply to Web advertisements?

[Approach]

In accordance with the advertising regulations of the Specified Commercial Transactions Law, the firm that sells products specified by the law over the Internet, must (I) present certain matters (Article 11) and, (II) is prohibited from exaggerated advertising (Article 12).

(I) Duty to present

Matters that must be presented

- Sales price, delivery charge, etc. of the product, service, etc.
- Time and method of payment of the price of the product, service, etc.
- Time of delivery of the product, service, etc.
- Return of the product, service, etc. and, if returnable, the conditions for returning it.
- Name, address, and telephone number of the seller (and the name of the representative or business manager if the seller is a corporation).
- Date of expiry of the effective period, if any, of an offer.
- Description and the amount of any money that the purchaser has to pay in addition to the price of the product, service, etc.
- Contents of the clauses, if any, of the seller's responsibility for any hidden defect in the product.
- Contents of special sales conditions, if any, of the product, service, etc., such as a limited sales quantity.
- E-mail address, if advertising is by e-mail.
- If advertising is by e-mail, the method, by which consumers, who do not want e-mails, can tell the seller of their wishes. (If the seller has no such method, the seller must write "No communication method!" at the head of the subject space and in the text of the e-mail.)
- When the seller sends advertisements by e-mail without being requested by consumers or without obtaining their consent, the seller must write "Advertisement!" at the head of the subject space and in the text of the e-mail.

(II) Prohibition of exaggerated advertisements

Prohibited matters for exaggerated advertising

- Performance, quality, and efficacy of a product; contents and effectiveness of a service; contents of rights, effectiveness of the service pertaining to rights.
- Special agreements on the delivery of a product and on the taking of delivery and return of a product after the transfer of its title.
- Involvement of the national government, local governments, and other public entities in products, rights, services; in sellers and service providers; in the business conducted by sellers and service providers (Examples: Endorsements such as "Certified by XX Ministry" or "Recommended by XX Prefecture" for products, firms, and others).
- Country of origin, place of production, and manufacturer
- Matters shown in (I) above

[Explanations]

1. Advertising Regulations under the Specified Commercial Transactions Law

Transactions made by accepting applications over the Internet fall under the category of mail order selling defined in the Specified Commercial Transactions Law. Therefore, firms that sell "specified products, rights, or services" defined in the law (Paragraph 4, Article 2 of the law and Schedules 1 to 3 of the Ordinance for Enforcement of the Specified Commercial Transactions Law) are obliged to advertise in compliance with the advertising regulations under the Specified Commercial Transactions Law (Articles 11 and 12 of the law). If they violate the regulations, they will be subjected to administrative or other penalties.

2. Duty to Present

When sellers advertise, they must present the following matters (Article 11 of the Specified Commercial Transactions Law and Article 8 of the Regulations for Enforcement of the Specified Commercial Transactions Law):

- Sales price, delivery charge, etc. of the product, service, etc.
- Time and method of payment of the price of the product, service, etc.
- Time of delivery of the product, service, etc.
- Return of the product, service, etc. and, if returnable, the conditions for returning it.

- Name, address, and telephone number of the seller (and the name of the representative or business manager if the seller is a corporation).
- Date of expiry of the effective period, if any, of an offer.
- Description and the amount of any money that the purchaser has to pay in addition to the price of the product, service, etc.
- Contents of the clauses, if any, of the seller's responsibility for any hidden defect in the product.
- Contents of special sales conditions, if any, of the product, service, etc., such as a limited sales quantity.
- E-mail address, if advertising is by e-mail.
- If advertising is by e-mail, the method by which consumers, who do not want e-mails, can inform the seller of their wishes. If the seller has no such method, the seller must write "!No communication method!" at the head of the subject space and similarly in the text of the e-mail.
- When the seller sends advertisements by e-mail without being requested by consumers or without obtaining their consent, the seller must write "!Advertisement!" at the head of the subject space and similarly in the text of the e-mail.

In advertising on PC screens, etc., such as on home pages on the Web, it is desirable that all the above matters be displayed for confirmation without requiring screen scrolling or screen switching. In particular, the seller's name, address, and telephone number (and the name of the representative or business manager if the seller is a corporation) should be displayed in such a way that they can be recognized when the first part of an advertisement is displayed on the screen. When they cannot be displayed in this way for unavoidable reasons, measures should be taken in advance to enable the consumer to move easily from the start of the advertisement to the part where these matters are shown or require the consumer to go through the screen showing these matters in order to reach the screen for applying for a purchase contract.

3. Prohibition of Exaggerated Advertisements

When advertising, sellers must not present the following matters in a way that is substantially different from what they are or in a way that will cause the consumer to understand that what is advertised is better or advantageous than it really is (Article 12 of the Specified

Commercial Transactions Law and Article 11 of the Regulations for Enforcement of the Specified Commercial Transactions Law):

- Performance, quality, and efficacy of a product; contents and effectiveness of a service; contents of rights, and effectiveness of the service pertaining to rights.
- Special agreements on the delivery of a product and on the taking of delivery and return of a product after the transfer of its title.
- Involvement of the national government, local governments, and other public entities in products, rights, services; in sellers and service providers; in the business conducted by sellers and service providers. For example, endorsements such as "Certified by XX Ministry" or "Recommended by XX Prefecture" for products, firms, and others.
- Country of origin, place of production, and manufacturer
- Matters shown in 2 above

Part 2: Information Property Trading

1. License Agreements

Trading in information property, such as programs and digital contents, is often done not only under ordinary sales agreements but also under license agreements that are concluded between the information property vendor (hereinafter called the "vendor") and the user for the use of the property in question. This part discusses the legal problems concerning license agreements.

The license agreement is a contract that is formed when the licensor (vendor) agrees to allow the licensee (user) to use and benefit from, certain information property within a certain scope and the licensee agrees to it. These interpretative guidelines only cover contracts for value that are usually used for licensing.

Information property that is the object of license agreements refers to sound, images (pictures), and other information that can be recorded in a form available for use on a computer (the so-called "digital form"). Specifically, information property includes programs and other instructions to the computer as well as data that can be the object of information processing by the computer (including digital contents such as music, movies, and computer graphics). In the case of custom-made information property, it is considered that contents, conditions, and other details will be determined by the agreement between the parties. Therefore, this part only discusses information property distributed in the market as ready-made products.

(1) Formation of a Contract and Return by the User

(A) Cases where information property is provided via media

[Disputed Point]

When consumers buy media-type package software from a store, they usually read the license agreements only after paying the price. Therefore, the question is whether they can return the product and demand a refund if they cannot agree to the contents of the license agreements. License agreements are usually supposed to be concluded either as (i) a shrink-wrap contract or as (ii) a click-on contract. Under what circumstances can the consumer return the product and demand a refund?

[Approach]

(I) Principle

It is reasonable to consider that if the user does not consent to the contents of the license agreement, he can return the product and demand a refund. The only ground to consider this is that the contract between the store and the user contains a tacit agreement that if the user does not consent to the contents of the license agreement, he can return the product and demand a refund.

In practice, two types of contracts are usually used: a shrink-wrap contract and a click-on contract. These two types of contracts will be discussed below.

(i) Shrink-wrap contract

If the user knows the contents of the license agreement before breaking the seal of the media (such as the film wrap or seal) and breaks the seal with intent to conclude a license agreement, the license agreement is formed (Paragraph 2, Article 526 of the Civil Code), therefore, he cannot return the product on the grounds that he does not consent to the agreement.

It is considered, therefore, that in cases where the film wrap, seal, etc., is broken, the store need not accept the return of the product so long as the store checks the adequacy of the information on the film wrap, seal, etc. and confirms that the information is usually recognizable.

Cases where the product is considered not be returnable after the seal is broken (i.e. where the license agreement is considered concluded)

- It can be shown by the film wrap, seal, etc. in a manner usually recognizable before the user breaks it, that the user is requested to check the license agreement form and that if he breaks the film wrap, seal, etc., that the license agreement is formed.
-
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Cases where the product is considered returnable even after the user breaks the seal so long as he does not consent to the license agreement (the license agreement not formed)

- No mention is made of the license agreement on the film wrap, seal, etc. of the media.
- No mention is made on the film wrap, seal, etc. of the media about the location of the contents of the license agreement and it is not easy to find that information.
-

(ii) Click-on contract

If the user knows the contents of the license agreement before clicking the "Agree (to the license agreement)" button on the screen and clicks the button with intent to conclude a license agreement, the license agreement is formed (Paragraph 2, Article 526 of the Civil Code). Therefore, he cannot return the product on the grounds that he does not consent to the agreement.

Although it is usually difficult for the store, etc. to judge whether the button was clicked, it is considered that if the store can determine by some means that the license agreement has been concluded, the store need not accept the return of the product.

Cases where the product is considered non-returnable after the Agreement button is pressed (i.e. where the license agreement is considered concluded)

- The user pressed the Agreement button after scrolling through the license agreement form to the last part of the screen.
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Cases where the product is considered returnable even after the user presses the Agreement button so long as he does not consent to the license agreement (the license agreement not formed)

- The screen configuration to seek the consent to the license agreement or the Agreement button is not externally different from other screen configurations or other buttons, and no screen is provided for the user to confirm his consent to the license agreement.
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Cases where the formation of a license agreement is known by some means or other

- A user registration card bearing the user's signature in the column "I agree to the license agreement" has reached the vendor.
- A license agreement concluded online or by telephone is registered with the vendor.
-

(II) Exceptions

(i) Cases where the agreement between the store and the user is considered a sales agreement for a copy of information property

It is considered that in cases where the agreement between the store and the user is considered a sales agreement for a copy of information property, there is no license agreement between them. Therefore, no problem can occur about the return of the product on the grounds that the user does not agree to the license agreement. The user can freely use the information property as long as he does not violate the Copyright Law. Even if a license agreement is presented after the payment of the price, the user is not bound by it.

Cases where information property is considered freely usable with no license agreement present

- The user did not recognize the presence of a license agreement; no mention was made of the presence of a license agreement on the outer case; and the store did not tell the user that there was a license agreement.
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(ii) Cases where the contents of a license agreement are clearly shown when the price is paid at the store

In cases where it is considered that the user has paid the price after recognizing the contents of a license agreement, he cannot return the product and demand a refund.

Cases where it is considered that the user cannot return the product and demand a refund on the grounds that he has already agreed to the license agreement

- The contents of the agreement are printed on the outer case in a type size large enough for the user to usually recognize.
- The store made sure that the user agreed to the license agreement at the time of payment of the price.
-

(iii) Cases where it is clearly stated that the price is not returnable even if the user does not agree to the license agreement

Even in cases where it is clearly stated that the price is not returnable, even if the user does not agree to the license agreement, users who do not agree to the license agreement may return the products to the store unless they paid the prices after individually agreeing to the license agreement.

Cases where it is considered that users cannot return products even if they do not agree to the license agreement

- When the user paid the price at the store, the store told the user, and he agreed, that he could not return the product even if he did not agree to the license agreement.
-
-

Cases where it is considered that the user can return the product if he does not agree to the license agreement

- It is not shown when the user paid the price, but shown after opening the package, that the user cannot return the product even if he does not agree to the license agreement.
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-

[Explanations]

1. Problem Location

When information property is sold through stores in CD-ROM or other media, it is trade practice that the licensor unilaterally determines the licensing conditions and that with no agreement made on the licensing conditions at the time of delivery of the media, the license agreement is reached at a later time, such as at the time when the user breaks the film wrap, seal, etc. or at the time when the user runs the program for the first time and agrees to the license agreement on the screen at the conclusion of the agreement. The former is called a "shrink-wrap contract" and the latter, a "click-on contract". In these cases, it is not necessarily clear which is the stage at which a licensing agreement is formed and whether the user who does not agree to the licensing agreement can return the product and demand a refund.

Therefore, this section discusses the characters of the agreement between parties to a medium-based transaction.

2. Characters of the Agreement between the Store and the User

When the user has taken delivery of information property by paying the price in a store, the parties' intention is reasonably interpreted either to conclude (i) a sales agreement for a copy of the information property or, (ii) an agreement to the effect that the store assigns to the user the position of being able to conclude a license agreement and delivers tangible objects such as the medium and manuals to the user (hereinafter called the "provision agreement"). Whether their intent is to conclude the agreement (i) or (ii) will be determined following consideration of various factors, including general knowledge on transactions in information property. However, it is likely that their intent will be interpreted as concluding the provision agreement, (ii), if the need to conclude a license agreement is clearly stated on the outer case

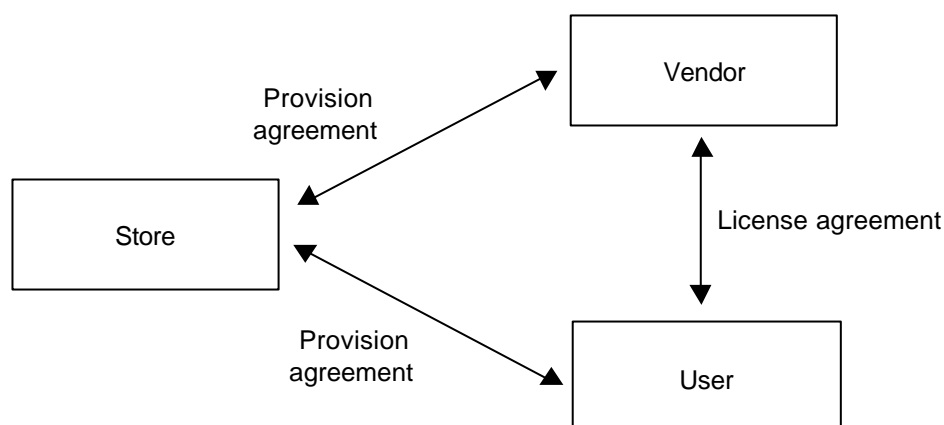
of the medium in a form usually recognizable to the user or if the store has verbally explained the need to conclude a license agreement.

First, in the case of (i), i.e. when their intent is interpreted as concluding a sales agreement for a copy of information property, it is not reasonable that the user should be bound by an agreement of which the user is not aware. In this case, therefore, the user can use the information property freely so long as he does not violate the Copyright Law. More specifically, the user can reproduce the information property for personal use, except by avoiding any technical means of protection (Paragraph 1, Article 30 of the Copyright Law) and can also reproduce and adapt information property to the extent necessary if it is a program (Paragraph 1, Article 47-2 of the Copyright Law). In addition, since no license agreement has been concluded, difficulties should not occur regarding the return of the product on the grounds that the user does not agree with the license agreement.

Meanwhile, in cases where no agreement is reached on the need to conclude a license agreement, if a license agreement is clearly presented after its purchase (such as being enclosed in the outer case), there will usually be no legal consequence.

Next, under the provision agreement, (ii), the store assigns to the user the right to use the information property by concluding a license agreement. In other words, the store assigns to the user the ability to conclude a license agreement and delivers tangible objects such as the medium and manuals to the user. That is, the provision agreement provides for both the assignment of the right and the delivery of such objects.

In this case, the user concludes two different agreements. Firstly, the user concludes a provision agreement with the store and then concludes a license agreement with the vendor for the use of the information property. This license agreement allows the user to use the information property (see figure below).



3. Requirements for, and Time of, License Agreement Formation

In the case described in 2(ii), where the agreement between the store and the user is a provision agreement, the contents of a license agreement may be clearly presented (A) before the conclusion of the provision agreement (i.e. the payment of the price) or (B) after the conclusion of the provision agreement (i.e. the payment of the price). When is the license agreement formed in each of these cases?

When information property provided in media form, the license agreement between the vendor and the user is a contract between remote parties. This means that, in principle, it is necessary for the user to express his intention to accept the offer in order that the license agreement is formed. However, if the acceptance notice is not required, as a result of the intention expressed by the offeror or trade customer, then the agreement is formed with an act of implementing the intention to accept the offer (Paragraph 2, Article 526 of the Civil Code). This is because an act of implementing the intention to accept the offer can be considered equivalent to the acceptor's notice as a result of the intention expressed by the offeror or trade customer. It is considered that the formation of a contract by an act of implementing the intention to accept the offer can also apply to license agreements as well.

Firstly, in the case of (A), the user's act of paying the price under the provision agreement with the knowledge of the contents of a license agreement is interpreted as an act of implementing the intention to accept the offer of the license agreement. Therefore, the license agreement is formed at the time as the conclusion of the provision agreement. Examples are cases where the contents of the agreement are printed on the outer case in a type size large enough for the user to usually recognize and where the store made sure that the user agreed to the license agreement at the time of payment of the price.

Next, in the case of (B), since the contents of a license agreement are not clearly presented at the time of conclusion of the provision agreement, a license agreement is formed at a later time. In the case of the shrink-wrap and click-on contracts, which are now widely available in the industry, the formation of a license agreement depends on whether there is an act of implementing the user's intention on the part of the user.

In the case of the shrink-wrap contract, the question is whether the act of breaking a film wrap, seal, etc. is an act of implementing the user's intention. It is considered that a license agreement is formed if the user breaks the film wrap, seal, etc. with the knowledge of the contents of the license agreement and the intention to conclude the license agreement before breaking it. For example, in cases where a statement requiring the confirmation of a license agreement and a statement to the effect that breaking the film wrap, seal, etc. is the act of forming the license agreement are printed on the film wrap, seal, etc. in a form that the user

can usually recognize before breaking it, it will often be interpreted that the act of breaking is an act of implementing the intention and that the license agreement has been formed. However, it will be considered that if no mention is made of the license agreement on the film wrap, seal, etc. of the media or if no mention is made on the film wrap, seal, etc. of the media about the location of the contents of the license agreement and it is not easy to find them, then the license agreement is not formed even if the user breaks the film wrap, seal, etc.

Next, in the case of the click-on contract, the question is whether the act of clicking the "Agree (to the license agreement)" button (hereinafter called the "Agreement button") on the screen is an act of implementing the intention. It is considered that if the user knows the contents of the license agreement before clicking the Agreement button on the screen and clicks the button with intent to conclude a license agreement, the license agreement is formed. For example, if the screen is configured in such a way that the user can usually recognize the contents of the license agreement before clicking the Agreement button (in other words the screen configuration is such that the user cannot click the Agreement button unless he scrolls the contents of the license agreement through to the end), then it will often be considered that the license agreement has been formed. However, if the screen configuration to seek the consent to the license agreement or the Agreement button is not externally different from other screen configurations or other buttons, and if no screen is provided for the user to confirm his consent to the license agreement, then it is considered that the formation of the license agreement could not be recognized.

4. Termination of the Provision Agreement in Case of Not Agreeing to the License Agreement

In the case mentioned in 3(B) above, that is, the case where the contents of a license agreement is presented at a time later than the conclusion of a provision agreement (the payment of the price), the question is whether the user who does not agree to the licensing agreement can return the product and demand a refund of the price he has already paid.

The license agreement and the provision agreement are essentially mutually independent contracts. However, since the primary objective of the provision agreement is to enable the user to use the information property, the agreement is very closely linked to the license agreement. What is more, a large part of the compensation for the provision agreement is considered to cover the position to conclude the license agreement, that is, the right to use the information property. Therefore, it should conform to the parties' intentions and thus it should be reasonable to consider that the user who does not agree to the license agreement can return the product and demand a refund of the price he has already paid. The only possible grounds

to consider this is that according to the construction of existing law, there is a tacit agreement to grant the user the right to transmit if the user does not agree to the license agreement.

Unless otherwise agreed, this right to transmit can be exercised for a period of 10 years (Paragraph 1, Article 167 of the Civil Code) or five years (Article 522 of the Commercial Code).

If it is considered that the user has a tacit right to terminate, unless agreed to negate it, under the provision agreement, the right to terminate will not be negated even if it is stated that the product is not returnable after the outer case is opened.

Meanwhile, if a license agreement has already been formed, the user cannot return the product on the grounds that he does not agree to the license agreement. The question is how the store judges whether a license agreement has been formed.

First, in the case of the shrink-wrap contract, the film wrap, seal, etc. may be (i) broken or (ii) not broken. In the latter case, it is considered the license agreement is not formed, and the store has to accept the return. In the former case, the question is whether the statements on the film wrap, seal, etc. are adequate. If it is stated on the film wrap, seal, etc., in a manner usually recognizable to the user, that the user is requested to check the license agreement form and that if he breaks the film wrap, seal, etc., then it is considered that the license agreement is formed, then the store need not accept the item's return.

Next, in the case of the click-on contract, it is usually difficult for the store to judge whether the button was clicked. However, there can be cases where the store can check the formation of a license agreement by contacting the vendor (such as cases where a user registration card has reached the vendor or a license agreement has been concluded online or by telephone and is registered with the vendor). In these cases, if the store can confirm the formation of a license agreement, it need not accept the return of the product.

Another problem is whether the store, that has received a product returned by a user who does not agree to the license agreement, can return the product to the wholesaler or the vendor. In cases where it is not stated that the user cannot return the product even if he does not agree to the license agreement (see section 5 below), it is understood that the user who does not agree to the license agreement may terminate the provision agreement. Accordingly, it is considered that the vendor, the wholesaler, the store, and any other parties have concluded contracts based on this assumption. Therefore, it is reasonable to consider that the store that has a product returned by a user can return it to the wholesaler or the vendor. That is, it is construed that the parties have an express or implied agreement that if a user returns a product on the

grounds that he does not agree to the license agreement, the store may return it to the wholesaler, who in turn may return it to the vendor.

Meanwhile, it is when the user does not agree to the license agreement that the store may return the product to the wholesaler or the vendor. Since the wholesaler and the vendor have no direct contractual relationships with the user, they will not be able to learn whether the store is returning the product as a result of the user not agreeing to the license agreement. For prompt and smooth settlement of this problem between the parties concerned, it may be wise to agree with the user at the time of conclusion of the provision agreement that if the user should terminate the provision agreement, he must submit a document stating the reason for it. (Paragraph 3, Article 30-4 of the Installment Sales Law expressly provides for this.)

5. Cases where it is Stated that the Product is Not Returnable

It is reasonable to construe that the provision agreement grants the user a tacit right to terminate it if he does not agree to the license agreement. Can the user return the product even if it is clearly stated at the time of conclusion of the provision agreement (that is, at the time of payment of the price at the store) that he cannot return the product even if he does not agree to the license agreement?

It is not reasonable to consider that the product cannot be returned simply because it is stated that the product is not returnable. Instead, it should be construed that the user cannot return the product simply by not agreeing to the license agreement but only in those cases where it is recognized that the user has individually agreed that he cannot return the product even if he does not agree to the license agreement. For example, in the case where the user has paid the price after agreeing to the store's verbal explanation that he cannot return the product or to a similar, clearly recognizable statement on the outer case of the medium.

The user, who has individually agreed that he cannot return the product even if he does not agree to a license agreement, has to conclude a license agreement in accordance with the contents shown after the payment of the price. Needless to say, however, the validity of contractual clauses falling under the category "(3) Unreasonable Contractual Clauses" may be negated. In such cases, the user is not bound by such clauses.

(B) Cases where information property is provided online

[Disputed Point]

A consumer has downloaded chargeable information property from a vendor's server through an online contract screen. Are there cases where he can demand a refund?

[Approach]

(I) Cases where the contents of a license agreement are presented at the time of online contract

If it is considered that the consumer clicked the Purchase (Contract) button after agreeing to the contents of the license agreement, he cannot demand a refund.

Examples of cases where it is considered that the consumer agreed to the license agreement and cannot demand a refund

- When the contents of a license agreement are clearly presented on the screen, the Agreement button and the Purchase button are conspicuous and are arranged differently from other buttons used for downloading, and the consumer clicked the Purchase button after clicking the Agreement button.
- When the screen is configured in such a way that when contractual text is too long to be displayed on a single screen, the Agreement button cannot be clicked unless consumers scroll through the text right to the end, and the consumer clicked the Purchase button after clicking the Agreement button.
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Examples of cases where it is considered that the consumer did not agree to the license agreement and can demand a refund

- When the online screen is configured in such a way that consumers will move from an online contract screen to a license agreement screen using a link, the link is hard to find and the consumers' agreement to the license agreement is not required in order to click the Purchase button.
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Meanwhile, in BtoC contracts, if measures are taken for the consumer to confirm the intention for a contract, any expression of intention made by the consumer through mismanagement is invalid (Article 3 of the Electronic Contract Law and Article 95 of the Civil Code).

(II) Cases where the necessity of concluding a license agreement is not clearly shown at the time of online contract

Since it is considered that no license agreement is concluded, there can be no difficulties about the reimbursement on the grounds that the consumer does not agree to the license agreement. The user can use the information property freely so long as he does not violate the Copyright Law. Even if a license agreement is presented after the click of the Purchase button, the consumer is not bound by it.

Examples of cases where it is considered that the consumer is not bound by the license agreement

- In cases where the presence of a license agreement is not indicated on the online contract screen, a readme.txt file is created when a downloaded file is decompressed, and the contents of a license agreement are displayed when the file is opened.

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Meanwhile, there can be cases where the necessity of concluding a license agreement is not shown on the online contract screen but where the contents of the license agreement can be seen only following downloading and not before the Purchase button is clicked. Considering that it is quite easy to display the contents of a license agreement on the screen, this method of selling seems unusual. It is considered that in this case, the user can legitimately demand a refund if he does not agree to the license agreement.

[Explanations]

1. Problem Location

In online trading of information property, media that are copies of information property are not delivered; instead, intangible information property is downloaded, for example, from a vendor's server to a user's hard disk, etc. When information property is provided online, the contract between the vendor and the consumer is also usually concluded online. At present, transactions are often made directly between the user and the vendor or its agent.

This section discusses the characters of contracts concerning online transactions in information property in this form.

2. Cases where the Necessity of Concluding a License Agreement is Not Shown in Advance

In cases where the necessity of concluding a license agreement is not clearly shown on an online contract screen, it is considered, in principle, that the user concludes a contract for acquiring the ownership of a copy of information property by downloading it. This is the same as in the sale of a copy of information property described in (A) above, "Cases where information property is provided via media". In this case, the user can use the information property freely so long as he does not violate the Copyright Law. There can be no difficulties about the return of the product on the grounds that the consumer does not agree to the license agreement. Even if a license agreement is presented after the click of the button for purchasing information property (hereinafter called the "Purchase button"), that is, after the payment of the price, the consumer is not bound by it.

3. Cases where the Necessity of Concluding a License Agreement is Shown in Advance

In cases where the necessity of concluding a license agreement is clearly shown on an online contract screen, it is considered, in principle, that the user concludes a contract that enables the user to use, and benefit from, within a certain scope, the information property provided (transmitted) to the user, that is, a license agreement combined with a contract for the provision (transmission) of information property.

In this case, the contents of a license agreement (A) may be clearly presented before the payment of the price or (B) may not be clearly presented before the payment of the price. When is the license agreement formed in each of these cases?

Firstly, in case (A), if the contents of a license agreement is clearly presented on the contract screen before the payment of the price, and if the consumer clicks the Purchase button after agreeing to the contents of the license agreement, the whole contract, including the license agreement, is formed at the time when the information that the consumer has clicked the Purchase button is recorded in the opposite party's server (Article 4 of the Electronic Contract Law). Meanwhile, in BtoC contracts, if measures are taken by the consumer to check the contents of an application for a contract, any expression of intention made by the consumer by mistake is invalid (Article 3 of the Electronic Contract Law and Article 95 of the Civil Code).

For example, in cases where clear presentation of the contents of a license agreement on the online screen, the Agreement button and the Purchase button are obvious and are arranged differently from other buttons used for downloading, or where the screen is configured in such a way that when contractual text is too long to be displayed on a single screen, the Agreement

button cannot be clicked unless consumers scroll through the text to the end, if the consumer clicks the Purchase button after clicking the Agreement button, then the license agreement is formed, and it is considered that the consumer may not demand a refund.

However, in cases where it is configured in such a way that consumers will move from an online contract screen to a license agreement screen using a link, which is hard to find and where the consumer's agreement to the license agreement is not required for clicking the Purchase button, the license agreement is not formed even if the consumer clicks the Purchase button. It can therefore be considered that the consumer may demand a refund.

Next, in case (B), the whole contract, including the license agreement, is formed at the time when the user clicks the Agreement button with the knowledge of the contents of the license agreement and with the intention to conclude the contract. For example, in cases where a readme.txt file is created following the decompression of a downloaded file and where the contents of a license agreement are displayed when the file is opened, it is considered that if the user does not agree to the contents of the license agreement, the agreement is not formed and therefore, the user may return the product and demand a refund.

However, it should be quite easy for the vendor to display the contents of a license agreement on the online contract screen. Unlike transactions made through media, there are usually no physical restrictions on presenting the full text of a license agreement clearly. Therefore, it is considered that there can be some cases where, so long as the contents of the license agreement are not clearly presented in advance, the user concludes a contract for acquiring the ownership of a copy of information property by downloading the information property, with no special conditions for the use of the information property, just as in the case described in 2 above.

(2) Effects of Not Presenting Important Matters

[Disputed Point]

When the user pays the price for the provision of information property, what information must the vendor or the store provide? What happens if they do not provide such information?

(Example) A consumer paid for a program and took delivery of it in a store. However, since the store did not provide the consumer with the information on the operating system environment appropriate to the program, the consumer was unable to use it. In this case, can the consumer return the product and demand a refund?

[Approach]

(I) Cases where important matters are not provided

There are cases where the vendor or the store is obliged to provide the user with the information necessary for the use of the information property (i.e. important matters). If such important matters are not provided and if, as a result, the user cannot use the information property, the user could return the product and demand a refund (Paragraph 2, Article 1 of the Civil Code).

(II) Specific contents of important matters

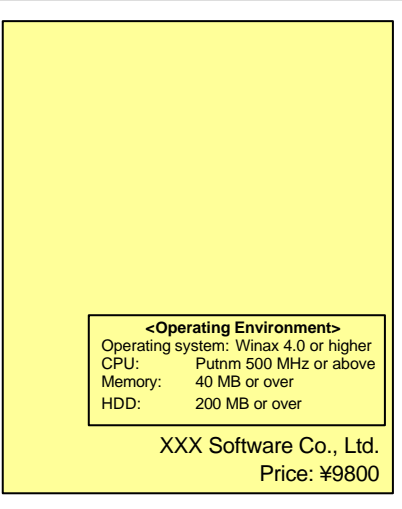
At present, the following could fall under the category of important matters:

Matters that could fall under the category of important matters

- (1) Types and versions of the operating system and platform software. (Type and version of either the operating system or the platform software, if that is sufficient.)
- (2) Type of CPU and its operating speed
- (3) Main memory capacity
- (4) Hard disk capacity

(III) Actual methods of providing information

Since only the vendor has information, such as that mentioned above, the information needed will usually be written on the outer case, in the case of a medium-type transaction, and be displayed on the contract screen, in the case of online transaction.

<p>Cases where it is considered that important matters are provided</p> <ul style="list-style-type: none">• Important matters are clearly shown, in an enclosure entitled "Operating Environment" etc., at an easily recognizable position for the user, such as a position near the price on the outer case of package software (see example at right).••	
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[Explanations]

1. Problem Location

Information property is more highly dependent on an operating environment than other types of property. If used in the wrong environment, information property may not function at all. It may be, therefore, that a user who has taken delivery of packaged software from a store by purchasing it cannot actually use it because he was not been provided with information about its operating environment. The question in this case is whether the user can cancel the provision agreement and return the packaged software to the store.

Based on the principle of faith and trust prescribed in Paragraph 2, Article 1 of the Civil Code, there are cases where one of the parties to a contract is obliged to provide the other party with certain information and where such other party may cancel the contract if the obligation is not performed.

The problem is how this principle actually applies to trading in information property.

2. Duty to Provide Information at the Stage of Conclusion of a Contract

It is understood that in some cases where there is a wide gap between the parties to a contract in terms of information or expertise, the superior party is obliged by the principle of faith and trust (Paragraph 2, Article 1 of the Civil Code) to provide the other party with information on the important matters for the conclusion of the contract (hereinafter called "important matters") in the process of conclusion.

In the case of information property, the user cannot use it unless the operating environment requirements, such as those concerning the operating system and the platform software, are met. Therefore, the explanation of the operating environment of information property, which is a supplementary duty at the time of providing the information property, can sometimes be important information (important matters) for judging whether the information property can actually be used. It is considered that based on the principle of faith and trust, it is required that the minimum operating environment at the time of conclusion of a provision agreement or a license agreement be shown.

3. Effects of Violation of the Duty to Provide Information

There are judicial precedents that affirm such duty based on the principle of faith and trust. These judicial precedents recognize either (i) liability for damage or, (ii) the right to terminate the contract.

Judicial precedents recognizing (i) concern cases where transactions were made in financial products or a long time has passed between the conclusion of a contract and the plaintiff's claim for compensation for damages.

Judicial precedents recognizing (ii) all concern real estate transactions. These judicial precedents say that it is a supplementary duty at the conclusion of a sales contract that the potential seller provide the potential buyer with important matters, such as information about the supporting environment, and that since these are important information for deciding whether to conclude a sales contract, the buyer may terminate the sales contract by reason of the seller's violation of this duty.

In many cases where the buyer cannot use information property because no information on its operating environment was provided at the time of conclusion of a contract, it is considered that the buyer may terminate the contract and demand a refund of the price already paid.

4. Contents of the Duty to Provide Information

In cases where the user who has paid the price of information property cannot use it because its operating environment is not clearly shown, the user might be protected by being allowed to terminate the provision agreement or the license agreement.

Judging from actual cases of trouble, the following would constitute essential matters that need to be shown clearly about the operating environment:

- (1) Types and versions of the operating system and the platform software. (Type and version of either the operating system or the platform software, if that is sufficient.)
- (2) Type of CPU and its operating speed
- (3) Main memory capacity
- (4) Hard disk capacity

5. Actual Methods of Providing Information

Since only the vendor has such information, as mentioned above, it will usually be written the outer case in the case of medium-type transactions and be displayed on the contract screen in the case of online transactions. For example, if important matters are clearly shown, in an enclosure entitled "Operating Environment" etc., at an easily recognizable position for the user, such as a position near the price on the outer case of package software, then it would be considered that information has been provided. Needless to say, the store may receive information from the vendor and provide the user with the information at the time of delivering the information property to the user.

(3) Unreasonable Contractual Clauses

[Disputed Point]

What clauses of the license agreement will be interpreted as being unreasonable and therefore invalid?

[Approach]

The contractual clauses shown below could be interpreted as being invalid. If they are invalid, the user is not bound by them.

(I) Contractual clauses contrary to public policy

Contractual clauses contrary to public policy prescribed in Article 90 of the Civil Code could be interpreted as being invalid.

Examples of clauses that could be unreasonable

- Clauses setting extremely advantageous conditions for the vendor to terminate the contract
- Clauses setting an extremely small amount of damages payable by the vendor
-

(II) Contractual clauses violating the Consumer Contract Act

In the case of consumer contracts, the following clauses could be interpreted as being invalid under Articles 8 to 10 of the Consumer Contract Act:

- Clauses totally excluding the vendor from liability
- Clauses excluding the vendor from liability arising by intent or gross negligence
- Clauses stipulating the unreasonably larger amount of damages or penalty than the amount of damages to the vendor
- Clauses restricting the rights or expanding the duties of consumers unfairly

Examples of clauses that could be unreasonable:

- Excluding the vendor from all liabilities for bugs
- All repairs of bugs are chargeable
- Setting an extremely short period of warranty
-

(III) Contractual clauses restricting competition

Contractual clauses that are illegal under the Antimonopoly Act could also be interpreted as being invalid under private law since they violate public policy prescribed in Article 90 of the Civil Code.

Examples of clauses that could be unreasonable:

- Restricting research or experimentation which could thus impede fair competition in the market
- Prohibiting the use of other specific products or competing products, these could thus impede fair competition in the market
- Prohibiting reverse engineering, which could thus impede fair competition in the market
-

(IV) Contractual clauses restricting the user's use of the parts for which rights are restricted under the Copyright Law

Articles 30 to 49 of the Copyright Law partly restrict copyright, that is, allow users to use such parts. There is a view that since these clauses are basically discretionary clauses, their application can be restricted by contracts. On the other hand, there also is a view that the clauses of license agreements that more narrowly restrict the use by users than those clauses are invalid.

Examples of clauses that could be unreasonable according to the view that contractual clauses are invalid if they more narrowly restrict the user's use of the parts for which rights are restricted under the Copyright Law:

- Clauses completely forbidding copying for personal use and the making of backup copies
-
-

[Explanations]

It is considered that the following clauses of license agreements could be invalid:

1. Contractual Clauses Contrary to Public Policy Prescribed in Article 90 of the Civil Code

Article 90 of the Civil Code provides that a juristic act, the purpose of which is contrary to public policy, shall be invalid. This is based on the view that a contract should be interpreted as being invalid if recognizing its effects is excessively unreasonable from a social point of view. For example, there is a judicial precedent in which a clause limiting the amount of damages in an aircraft accident to 1 million yen is judged invalid as being contrary to public policy (Osaka District Court judgment of June 12, 1967; p. 641 of Lower-Court Min-Shu vol. 18, Nos. 5 & 6). The same principle could apply to the unreasonable contents of license agreements.

For example, clauses setting extremely advantageous conditions for the vendor to terminate the contract and clauses setting an extremely small amount of damages payable by the vendor could be judged invalid in accordance with the principle mentioned above.

2. Contractual Clauses that Violate the Consumer Contract Act

In the case of consumer contracts, the following clauses could be interpreted as being invalid under Articles 8 to 10 of the Consumer Contract Act:

- Clauses totally excluding the vendor from liability
- Clauses excluding the vendor from liability arising by intent or gross negligence
- Clauses stipulating the unreasonably larger amount of damages or penalty than the amount of damages to the vendor
- Clauses restricting the rights or expanding the duties of consumers unfairly

For example, in accordance with the above, clauses excluding the vendor from all liabilities for bugs or clauses setting an extremely short period of warranty could be interpreted as being invalid.

3. Contractual Clauses Restricting Competition

Contractual clauses that are illegal under the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade ("the Antimonopoly Act") could also be

interpreted as being invalid under private law because they violate public policy prescribed in Article 90 of the Civil Code.

For example, in accordance with the above, clauses that restrict research or experimentation, those that prohibit the use of other specific products or competing products, and those that prohibit reverse engineering, could be interpreted as invalid if they impede fair competition in the market.

4. Contractual Clauses Restricting the User's Use of The Parts for Which Rights are Restricted under the Copyright Law

When information property is protected by the Copyright Law, copyrights are restricted by the law in some parts (Articles 30 to 49 of the Copyright Law). The Copyright Law allows users to use these parts. There is a view that since these clauses are basically discretionary clauses, their application can be restricted by contracts. On the other hand, there is also the view that the clauses of license agreements that more narrowly restrict the use by users than those clauses, are invalid. According to this view, clauses completely forbidding copying for personal use and the making of backup copies could be interpreted as being invalid.

(4) Contents of the Duties the User Owes when the Contract Expires

[Disputed Point]

When a license agreement is terminated or otherwise ended, what specific duties does the user owe?

(Example) After terminating the license agreement, can the user retain the information property without being held responsible for it?

[Approach]

(I) User's duty after the termination of the license agreement (Restoration)

As the duty to restore the original condition after the termination of the license agreement, the user must stop using the information property. To ensure that this duty is performed, it is reasonable to consider that the vendor may demand that the user erase the information property.

(II) User's duty in such cases as non-formation of a license agreement (Duty to return unjust enrichment)

As the duty to return unjust enrichment in such cases as non-formation of a license agreement, the user may not use the information property. To ensure that this duty is performed, it is reasonable to consider that the vendor may demand that the user erase the information property.

(III) User's duty at the expiry of (the effective term of) the license agreement (Contractual duty)

When the license agreement has expired, the user owes such duty as is prescribed in the agreement. Therefore, although the user cannot continue using the information property after the expiry of the license agreement, he is not obliged to erase it unless so required by the license agreement.

[Explanations]

This problem will be considered in terms of three cases: (1) early termination of the license agreement, (2) non-formation of the agreement, and (3) expiry of (the effective term of) the agreement.

1. Contents of the User's Duty After The Termination of the License Agreement

(1) Problem location

When a contract is terminated, each party has a duty to restore the original condition of the other party (hereinafter called the "restoration duty") under Article 545 of the Civil Code. The restoration duty is essentially a duty to return unjust enrichment, except that its scope is expanded to the restoration. It is considered that, in principle, the duty specifically means the return of any tangible object already delivered by the vendor who has terminated the contract. (It is considered that if what has already been delivered cannot be returned in its original form, due to its nature, then the objective monetary value of the object must be returned.)

Therefore, when a license agreement for information property is terminated, it might be considered that the user not only has to stop using the information property but also has to return the copy of the information property made by the user as a benefit from the use of the information property. However, since the return (the transfer of possession) of information property, an intangible object, is impossible, a question arises about the specific contents of the restoration duty prescribed in Article 545 of the Civil Code.

(2) Contents of the restoration duty

If a license agreement is terminated, the user has to stop using the information property because he no longer has the right to use it. However, if the user retains the information property, he might continue using it after the termination without having the right to do so.

What is the most important for the vendor of information property is to take the information property out of the user's control so that he cannot use, or otherwise benefit from, the information property anymore.

Therefore, as the restoration duty, prescribed in Article 545 of the Civil Code, at the time of termination of a license agreement, it is reasonable to consider that the user has to stop using

the information property. In order to ensure the performance of this duty, the vendor may demand that the user completely erases (deletes) the information property.

Meanwhile, Paragraph 2, Article 47-2 of the Copyright Law provides: "The owner of a copy of a program shall not retain other copies of the program after ceasing to have the ownership of the copy". It is understood that the reason that this provision does not allow the owner to retain copies is that if, after transferring any of the copies, the owner is allowed to use the remaining copies, he can use the program any number of times once he has obtained a copy, thus unduly harming the interests of the copyright holder. Therefore, the idea of erasing a copy of information property is consistent with the idea in the Copyright Law.

2. Contents of the User's Duty in Such Cases as Non-formation of a License Agreement

(1) Problem location

In cases where certain information property has been provided (transmitted) to a user for the conclusion of a contract, if a license agreement is not formed or has become invalid, it might be considered that the user not only has to stop using the information property but also has to return the copy of the information property made by the user since this constitutes a benefit from the information property under Article 703 of the Civil Code, which provides for the return of unjust enrichment.

However, since the return (the transfer of possession) of information property, by nature an intangible object, is impossible, a question arises about the specific contents of the duty to return unjust enrichment prescribed in Article 703 of the Civil Code.

(2) Contents of the duty to return unjust enrichment

When the user has made a copy of information property, it might be considered that the vendor does not suffer any loss because the cost of the copy is borne by the user.

However, if the user retains the copy of the information property, he might continue using it without having any right despite the non-formation of a contract. This is highly likely to cause damage to the vendor. In addition, it is difficult to quantitatively estimate the extent of the damage.

What is the most important for the vendor of information property is to take the information property out of the user's control so that he cannot use, or otherwise benefit from it anymore.

Therefore, as the contents of the duty to return unjust enrichment under Article 703 of the Civil Code (or at least through the analogical application of Article 703 of the Civil Code if its clauses do not directly apply), it is reasonable to consider that the user may not use the information property if a license agreement is not formed and, that in order to ensure that the user will not use it, the vendor may demand that the user completely erases (deletes) the information property.

3. Contents of the User's Duty at the Expiry of (the Effective Term of) the License Agreement

The user's duty at the expiry of (the effective term of) the license agreement can be expressly defined as “contractual obligations”. The user's duty is just if defined as such. Therefore, although the user cannot continue using the information property after the expiry of the licence agreement, he is not obliged to erase it unless so required by the license agreement.

(5) Validity of Security Measures to Prepare for the End of a Contract

[Disputed Point]

Will the vendor have to assume any responsibility if he takes some technical means to forcibly prevent the user from illegally using the information property after the end of its license agreement?

(Example) A program has suddenly stopped functioning because of technical measures taken in advance by its vendor to prepare for the expiry of the effective term of the license agreement. In this case, will the vendor have to assume any responsibility?

[Approach]

(I) Principle

Such a technical means of restricting use could be interpreted as a means of compulsory execution other than by the court and thus as an exercise of rights that constitutes a tort (i.e. the violation of the principle of prohibiting self-help).

(II) Exception

However, it is likely that if at least the following three requirements are met that such technical means will not be interpreted as self-help:

(i) The user has agreed, in advance, that the vendor may take such technical means.

Examples probably meeting this requirement

- The taking of such technical means is clearly described in the license agreement, and the user has agreed to this agreement.
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(ii) Such technical means is limited to the extent of preventing the continued use of the information property.

Examples probably meeting this requirement

- Means that stop the operation of the information property only after giving a prior warning.
-
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Examples probably not meeting this requirement

- Means that destroy the files created using the information property.
- Means that cause the computer system trouble.
-

(iii) Such technical means have been taken in advance.

Examples probably not meeting this requirement

- Methods in which operations are artificially added at the time of maintenance.
- Methods in which operations are added by sending signals that work on the information property through networks such as the Internet.
-

[Explanations]

1. Problem Location

After the end of a license agreement for information property, the user could continue using the information property without paying compensation. To prevent it, the vendor may apply to the information property a technical means for forcibly terminating its use, such as making the information property unavailable for use or eliminating it.

Paragraph 1, Article 414 of the Civil Code provides that if the user voluntarily executes his obligation, the vendor may demand compulsory execution from the court. Conversely, this means that the vendor is not allowed to directly force the user to execute his obligation (i.e. the prohibition of self-help). That is, it is prohibited in principle that the vendor enforces his right (claim) in person (by personal force). Although it is not expressly stipulated by the Civil Code, most scholars and judicial precedents agree that the exercise of a right contrary to this principle constitutes a tort.

Therefore, when the vendor uses a technical means to forcibly terminate the use of information property at the end of its license agreement, the question arises whether this act violates the principle of self-help.

2. Standards for Judgment

(1) Presence of a prior agreement

When the vendor has obtained the user's prior consent to making the information property unavailable for use, the principle of prohibiting self-help could not apply.

However, it is generally considered that, in a sales contract with a special agreement attached for the seller to reserve the ownership of the object, self-help is not permitted only because that contract has what is called a "recovery clause", under which the seller may take back the object in person if the buyer defaults and the buyer agrees not to raise any objections to this happening. A judicial precedent (Fukushima District Court Judgment, Feb. 24, 1972; p. 201, Hanrei Times No. 278) concerns a case in which an act of recovery was performed under a recovery clause. The judgment says that, in consideration of the principle of prohibiting self-help, the clause could be interpreted as being invalid under Article 90 of the Civil Code.

Therefore, the validity of a prior agreement as to the presence of a technical means of restriction could be denied in consideration of the principle of prohibiting self-help.

(2) Technical means of restriction limited to the extent of terminating continued use (ensuring the end of the contract)

In a license agreement, it could be agreed in advance as to the possible use of a technical means of restriction that goes beyond the termination of use. However, if the vendor forces the user to execute his obligations, such as the payment of a usage fee, by the possibility of enforcing restrictions not limited to the information property (for example, erasing other information such as files, etc. created by using the information property, in the hard disk as well as or causing the computer system problems), the validity of the prior agreement could be denied. This would be due to the unreasonable restrictions placed on the user in terms of the gap, such as in bargaining power, between the parties at the time of concluding the contract.

(3) Technical means of restriction taken in advance

Based on a prior agreement, technical means of restriction may be applied later, not in advance, such as by operating the user's computer system at the time of maintenance in such a way as to make the information property unavailable for use. This might be after a certain period or by sending specific signals that make the information property unavailable for use

through a network such as the Internet. This pattern is highly likely to be used arbitrarily by the vendor. Therefore, despite a prior agreement, this pattern could be judged an abuse of rights.

3. Summary

In summary, it is highly likely that such technical means of restriction will be judged legal, not being a means of self-help, if (i) the user has agreed in advance that the vendor may take the technical means, (ii) the technical means is limited to the extent of preventing the continued use of the information property (ensuring the end of the contract), and (iii) the technical means has been taken in advance.

(6) Warranty on Programs from Vendors

[Disputed Point]

If a program malfunctions because of a "bug", what responsibility does the vendor have to the user?

(Example) There are cases where a program warranty period (such as within XX days of delivery) is set in a license agreement. When the user has found a bug equivalent to a defect after the completion of that period, can he demand that the vendor take responsibility for it?

[Approach]

(I) What are the bugs (equivalent to defects) that the vendor is responsible for?

(i) If a program does not have the usual functions or quality that the program can be reasonably expected to have according to the trade norm and, (ii) if any malfunction occurs when the program is used within such an operating environment and by such a method as is usually used, then the program bug is considered equivalent to a defect, and the user can hold the vendor responsible for it.

(i) Cases where a program does not have the usual functions or quality that the program can be reasonably expected to have according to the trade norm

Examples that are considered to fall into this category

- A program does not operate at all.
-
-

Examples that are considered not to fall into this category

- Although the user tried to combine ruled lines, shading, rotation, and double size using word-processing software, the intended result was not obtained.
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(ii) Cases where a malfunction occurs when a program is used within such an operating environment and by such methods as are usually used

Examples considered not falling into this category

- A malfunction occurred when a program was used in an operating environment not meeting the operating requirements shown on the outer case.
- A malfunction occurred because the user modified the program code.
-

(II) When a bug is equivalent to a defect, what responsibilities does the vendor have to the user?

When considering the peculiarities of programs as property, the user may first demand, in principle, that (i) the vendor repair the bug, which is equivalent to a defect, or provide a replacement, and if this demand is not promptly met, may (ii) demand damages or terminate the contract.

(III) How long is the period during which the vendor can be held responsible for bugs that are equivalent to defects?

In cases where a license agreement contains a special clause setting a shorter warranty period for those bugs equivalent to defects, a question arises as to the license's validity.

(i) Cases where the user is a consumer

Article 10 of the Consumer Contract Act stipulates that clauses extremely disadvantageous to the consumer are invalid. For example, clauses setting an extremely short warranty period for those bugs equivalent to defects could be judged invalid.

Cases that could be judged invalid as violating the Consumer Contract Act

- Clauses setting an extremely short period of warranty for a program
-
-

The Civil Code applies in cases where such clauses are judged invalid or where there is no special clause. Therefore, the vendor can be held responsible (A) within a period of one year after those bugs equivalent to defects are found or (B) within five years of taking delivery of

the product. The period during which a warranty against defects (Articles 570, etc. of the Civil Code) is effective is one year after a defect has been found (Article 566 of the Civil Code). The period within which a liability for default (Articles 415, etc. of the Civil Code) can be pursued is 10 years after delivery (Paragraph 1, Article 167 of the Civil Code). However, since the vendor is usually a firm, the Commercial Code applies in this case, and the period is five years after delivery (Article 522 of the Commercial Code).

(ii) Cases where the user is not a consumer

Since the Consumer Contract Act does not apply, a special clause applies in principle. If there is no special clause, the Civil Code applies. That is, the vendor can be held responsible (A) within one year after a bug equivalent to a defect is found or (B) within five years after delivery is taken.

Cases where a special clause could be judged invalid as being contrary to public policy, etc.

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-
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[Explanations]

1. Problem Location

Programs are a type of information property that can cause problems, such as causing the computer to perform information processing in an unintended manner, if there is a programming error (hereinafter called a "bug"). Bugs will prevent the user from fully using the program.

Either of the following clauses could apply to this problem:

- (A) Warranty against defect (Article 566 of the Civil Code, which applies *mutatis mutandis* under Article 570 of the Civil Code, and *mutatis mutandis* under Article 559 of the Civil Code). A claim can be filed within one year of finding a defect.
- (B) Liability for default (Article 415 of the Civil Code - damages for default; demand for complete performance. Article 541 of the Civil Code - termination due to delays in the user's performance, and Article 543 of the Civil Code - termination due to impossibility of performance). A claim can be filed within 10 years of delivery.

For the purpose of applying these clauses, the following questions need to be answered: (i) (a) What are the cases where the vendor can be held responsible for program bugs? (b) How long is the period within which the vendor can be held responsible? (ii) When a license agreement contains a special clause exempting the vendor from these responsibilities, is the special clause valid?

2. Defects in Programs

(1) Considerations when judging whether there are program defects

If the program that is the object of a contract does not have the usual functions or quality that the program can be reasonably expected to have, according to the trade norm, it will be judged in principle that the program has a defect.

However, programs sold on the market are provided for use by large numbers of general users, and since environments in which programs are used (hereinafter called "using environments") are various, it is not practicable to create programs that can operate in all such environments. Therefore, it is almost inevitable that some difficulties or other will occur during the use of programs, depending on their using environments. It would be unfair to say that the vendor is always responsible for all defects in programs.

Since program operations depend on the using environment, its operating environment is usually clearly stated. In this case, if any trouble occurs while the program is being used outside of the operating environment clearly stated, the vendor will not be held responsible for it.

Meanwhile, the user can reasonably judge how to use a program, usually by referring to its manual, Help facility, etc. Therefore, it will not be considered that the vendor is responsible for some problem occurring when the program is used other than by a method that is usually used (for example, problems arising as a result of the user's modification of the program code).

It would follow from this that if a program does not have the usual functions or quality that the program can be reasonably expected to have, according to the trade norm, and if any malfunction occurs when the program is used within such an using environment and by such methods as are usually used, then the bug will be considered equivalent to a defect. In other

words, it is considered that minor bugs that can be used without problems are not defects (and the vendor cannot be held responsible for them).

(2) Contents of the vendor's responsibilities

(i) Approach

In the case of an ordinary tangible product, there are usually a large number of normal units and a few defective units. By contrast, the units of a commercially available program delivered to users have the same contents, and if there is a bug in the program, the bug is present in all the units delivered.

On the other hand, in contrast to tangible products that have to be repaired, unit-by-unit, the vendor of a program can easily deliver a modification program or a normal, defect-free program. Using this, each user can easily modify their program. Even if a bug causing the program to malfunction is serious, it might be possible for the user to eliminate the bug through a simple repair procedure.

As described above, programs are a type of property that can easily develop defects but can also be easily repaired. When considering this peculiarity, it would be reasonable to consider that if there is a bug in a program, the user should, in accordance with the principle of faith and trust, first demand the repair of the program or the provision of a replacement, which is usually preferable to the vendor. (However, if the bug is too serious, there should be cases where the user can immediately demand damages or terminate the contract.)

Meanwhile, a judicial precedent (Tokyo District Court Judgment, Feb. 18, 1997; p. 172, Hanrei Times No. 964) states that since programs can have bugs, vendors are not liable to damages if they repair the bugs promptly after being told that those are defects or if they promptly take reasonable, alternative steps after consultation with users.

This judgment concerns a custom-made program made under a development contract and required to operate only in a specific using environment. In the case of commercially available programs intended for use by large numbers of people, it is even more difficult to make the programs ready for the diverse operating environments of all those users. It is considered, therefore, that at least the same standards as those applicable to custom-made programs apply to these commercially available programs. That is, if the vendor repairs a bug pointed out by the user or takes an alternative step, the user would not be allowed to demand damages, etc. from the vendor.

(ii) Applying the clauses of the Civil Code

If a defective program is delivered to the user in exchange for its price, the vendor is responsible for it. Under the Civil Code, the vendor will be either (A) warrant for a defect (Article 570 of the Civil Code) or (B) liable for default (Article 415 of the Civil Code).

(A) Cases of being warrant for a defect

The user could (a) terminate the contract or (b) demand damages.

However, the termination of a contract is limited to "cases where the objective of the contract cannot be achieved". If repaired, a program will perform its intended functions, that is, the objective of the contract will be achieved. Therefore, if as demanded by the user, the program is repaired or a replacement is provided, it is a "case where the objective of the contract is achieved", and it is considered that the user cannot terminate the contract.

As for (b), in consideration of the program's ability to be easily repaired, and in accordance with the principle of faith and trust, the user should, as mentioned above, first demand the repair of the program or the provision of a replacement, which being an easier option for the vendor. This is considered consistent with the intentions of the parties to the program transaction.

(B) Cases of being liable for default

It is considered that if there is a defect that prevents the program that is the object of a contract from performing its functions, it is a default on the part of the vendor. Therefore, the user will be allowed to (a) terminate the contract, (b) demand damages, or (c) complete performance.

(a) Termination of the contract

Article 541 or 543 of the Civil Code stipulates that a party may terminate a contract if the party demands that the other party perform their obligation within a reasonable specified period of time and yet the other such party does not perform the obligation or if it is impossible to perform the obligation. It is considered, therefore, that if the user demands the vendor's performance within a reasonable period specified by the user, and if the vendor repairs the program or provides a replacement within the period, then the user may not terminate the contract.

(b) Damages

Article 415 of the Civil Code stipulates that if a party cannot carry out the performance that is the tenor and purport of the obligation, then the other party may demand damages. According to the article, the user may also demand damages if the user suffers any damage from a delay in the vendor's performance. However, in consideration of the program's ability to be repaired easily and in accordance with the principle of faith and trust, the user should, as mentioned above, first demand the repair of the program or the provision of a replacement, which being generally more acceptable to the vendor. This is considered consistent with the intentions of the parties to the program transaction.

(c) Complete performance

It is considered possible for the user to demand the repair or replacement of the item under Article 415 of the Civil Code.

It would follow from the above that even if the bug were equivalent to a defect in a program, the vendor would bear no more responsibility so long as the vendor repairs it or provides a replacement promptly.

It is also considered that the user should first demand the repair of the program or the provision of a replacement from the vendor and that if the repair of the program or the provision of a replacement is delayed, the user may demand damages from the vendor or terminate the contract.

This view is based on the fact that it is usually less troublesome to the vendor to repair a program or provide a replacement. Therefore, in cases where it is difficult for the vendor to repair a program or provide a replacement, such as a case where the vendor has ceased to support the program, the payment of damages or the termination of the contract would be a reasonable solution.

3. Period within which the Vendor is Warrant for a Defect and Liable for a Default

The period within which the vendor is warrant for a defect is one year after the user becomes aware of the defect (Articles 570 and 566 of the Civil Code).

The liability for default is nullified by the passing of 10 years after the delivery of a program (Paragraph 1, Article 167 of the Civil Code). However, since the vendor is usually a firm, the liability for default is nullified by the passing of five years under Article 522 of the Commercial Code.

Meanwhile, it might be necessary to reconsider which of these periods are appropriate for programs, which are distributed as products for very short periods of time.

4. Treatment when a License Agreement has a Special Escape Clause Concerning Warranty for Defect or Liability for Default

(1) Cases where the user is a consumer

Some license agreements have special escape clauses concerning warranty for defect or liability for default. In the case of consumer contracts, the following special clauses are likely to be judged invalid as violations of Subparagraphs 1, 2, or 5, Paragraph 1, Article 8 of the Consumer Contract Act or Article 10 of the Law:

- Clauses which totally exclude a vendor from liability to compensate damages to a consumer arising by vendor's non-performance
- Clauses which partially exclude a vendor from liability to compensate damages to a consumer arising by vendor's non-performance by intent or gross negligence
- Clauses which totally excludes a vendor from liability to compensate the damage to a consumer caused by defect which exists in the subject of a contract
- Clauses which restrict the rights of consumers or expand the duties of consumers unfairly

For example, clauses which exclude the vendor from all liabilities for bugs and clauses that all bugs will be repaired only on a chargeable basis, could be judged invalid under Article 8 of the Consumer Contract Act. Clauses setting an unduly shorter period of program warranty than a period considered reasonable from the characteristics of the program, could be judged invalid under Article 10 of the Consumer Contract Act.

(2) Cases where the user is not a consumer

When the user is not a consumer, the Consumer Contract Act does not apply, and a special clause applies in principle.

(7) Assertion of the User's Rights Compared with the Rights of the Assignee of Intellectual Property

[Disputed Point]

The user (licensee) is only allowed to use the information property under a contract made with the vendor (licensor). If the intellectual property rights to the information property are assigned to a third party, can the user effectively assert their right to continue using the information property against the assignee?

(Examples)

1. If the intellectual property rights to certain information property are assigned to a third party, can the user (licensee) of the information property under a license agreement continue using the information property?
2. If the vendor (licensor) goes bankrupt, can the user (licensee) of the information property under a license agreement continue using the information property?

[Approach]

(I) Cases where the intellectual property rights to information property are assigned to a third party.

(i) Cases where the position of licensor of information property is transferred.

It could be considered that such transfer can be carried out under a contract between the assignor and the assignee of the information property. In such cases, the user (licensee) may continue using the information property.

(ii) Cases where the intellectual property rights only are assigned.

(a) Cases where copyrights are assigned.

Simply using information property does not involve using its copyright. Therefore, the user (licensee) may continue to use the information property as long as the user does not violate the assignee's copyright.

(b) Cases where patent rights are assigned.

Except in such cases as where a non-exclusive license of the patent right is registered, the user may not continue using the information property because that use violates the assignee's patent rights. However, when the user is a consumer, he may continue using the information property because the use for private purpose usually does not constitute a violation of the patent rights.

(II) Cases where the vendor (licensor) has gone bankrupt

The trustee could terminate the license agreement. In that case, the user (licensee) may not continue using the information property.

However, the trustee would not usually terminate license agreements for information property, for example, generic packaged software, under which no further payments are required other than the initial payment of price.

[Explanations]

1. Problem Location

The user (licensee) is only allowed to use the information property under contract with the vendor (licensor). Therefore, it is questionable whether the user will be able to effectively assert the right to use the information property against a third party to whom the intellectual property rights to the information property have been assigned by the vendor (licensor). Meanwhile, if the vendor (licensor) goes bankrupt, the trustee in bankruptcy may unilaterally terminate the bankrupt's contracts under certain cases (Paragraph 1, Article 59 of the Bankruptcy Law; similar clauses can be found in Paragraph 1, Article 103 of the Corporate Rehabilitation Law and Paragraph 1, Article 49 of the Civil Rehabilitation Law). It is pointed out that if the trustee terminates a license agreement, the user (licensee) may immediately be unable to use the information property.

2. Cases where Intellectual Property Rights are Assigned to a Third Party.

When the vendor (licensor) assigns the intellectual property rights to information property, the vendor may actually (1) transfer its position as the licensor of the information property or, (2) assign only the intellectual property rights.

(1) Cases where the position of licensor of information property is transferred.

The transfer of the position of a party to a contract is a combination of the assignment of claims and the acceptance of obligations. Therefore, the transfer requires not only an agreement between the assignor and the assignee but also the consent of the other party to the contract.

However, in a case in which the ownership of a plot of land is assigned, together with the position of being the lessor of the land under a lease agreement, it is held that, except when there are special circumstances, the new owner may take over the rights and duties of the former owner as the lessor under an agreement between the former and the new owner, without requiring the consent of the lessee. This is possible in part due to the way the lessor's duty is performed since it does not specifically differ depending on who the lessor is, and partly because it is advantageous for the lessee to allow the new owner of the land to take over the lessor's duties (Second Petty Bench, Supreme Court, judgment, Apr. 23, 1971; p. 388, Min-Shu vol. 25, No. 3).

In consideration of what this judgment means, it could be considered that the position of the licensor may be assigned under an agreement between the assignor and the assignee of the intellectual property rights. This is partly due to the way in which the vendor's (licensor's) obligation, which is to allow the user (licensee) to use the information property, would not differ in some cases depending on who the licensor is. It is also partly because it would be advantageous for the user (licensee) to allow the assignee of the intellectual property to take over the obligation. In this case, the user (licensee) may effectively assert the right to continue using the information property.

In this case, when a license fee is payable annually, the new licensor may receive license fees for the next year on if, (i) an assignment agreement is concluded between the three parties, (2) the former licensor notifies the user (licensee) that the right to receive license fees has been assigned to the new licensor, or (iii) the user (licensee) notifies the former licensor or the new licensor of his consent to the assignment of the right to receive license fees (Paragraph 1, Article 467 of the Civil Code).

(2) Cases where only the intellectual property rights are assigned.

In this case, the assignee of the intellectual property rights to information property could refuse the use of the information property by the user (licensee) by asserting a violation of the intellectual property rights. This problem will be studied in two different cases: where the intellectual property right is a copyright and where it is a patent right.

(i) Cases where the intellectual property right is a copyright.

The simple use of information property protected by a copyright does not constitute the use of a work of authorship protected by the Copyright Law. Therefore, it is considered that the user (licensee) may continue to use the information property so long as he does not otherwise violate the assignee's copyright.

Some acts other than simple use, such as the copying of information property other than for personal use, and the modification of information property (alteration or adaptation), are highly likely to constitute violations of the copyright.

Meanwhile, the Copyright Law has no system under which the license can perfect its rights in order that it can assert the right to third parties.

(ii) Cases where the intellectual property right is a patent right.

The use of information property protected by a patent right is an act of exploiting the patent right (Subparagraph 1, Paragraph 3, Article 2 of the Patent Law) and thus constitutes a violation of the assignee's patent rights. Therefore, it is considered that the user (licensee) may not continue to use the information property. However, if the use is not considered use for business purposes, it does not constitute a violation of the patent right, and the user (licensee) may continue to use the information property (Article 68 of the Patent Law).

When a non-exclusive license of a patent right is registered, it can be effectively asserted against a third party (Paragraph 1, Article 99 of the Patent Law). Therefore, even if using the information property by the user (licensee) is for business purposes, the user (licensee) may continue to use the information property as long as non-exclusive licenses of all patent rights to the information property are registered.

In both cases (i) and (ii), the user (licensee), who has become unable to continue using the information property as a result of the assignment of the intellectual property right to a third party, may demand damages from the vendor (licensor).

3. Cases where the Vendor (licensor) has Gone Bankrupt.

When both parties to a bilateral contract have not yet completed the performance of their obligations, bankruptcy laws allow the trustee to choose between terminating the contract and demanding the performance under the contract (Paragraph 1, Article 59 of the Bankruptcy Law, Paragraph 1, Article 103 of the Corporate Rehabilitation Law, and Paragraph 1, Article 49 of the Civil Rehabilitation Law).

Therefore, if the vendor (licensor) goes bankrupt, the trustee could terminate the license agreement. If the trustee chooses to terminate the contract, the user (licensee) may not continue using the information property unless the user (licensee) concludes a new license agreement with the trustee or a third party (assignee) to whom the trustee has assigned the right.

It should be noted that the trustee may terminate only those bilateral contracts under which both parties have not yet performed their respective obligations. Therefore, it is considered that license agreements for information property (for example, generic packaged software) under which no further payments are required other than the initial payment of its price, do not fall under this category.

2. Intellectual Property

(1) PtoP File Exchange Software

[Disputed Point]

Is the Copyright Law violated by the uploading of music and other files to the Internet or downloading such files from the Internet using PtoP file exchange software?

[Approach]

PtoP file exchange software has two functions: (i) uploading, that is, making it possible to transmit files to the Internet and (ii) downloading, that is, copying files from the Internet to the user's media.

(i) Uploading

The act of uploading music or other files to the Internet without obtaining the consent of the rights holder is a violation of the copyright or neighboring rights, or more specifically, a violation of the right of transmission to the public or the right of making transmittable.

(ii) Downloading

The act of downloading music or other files from the Internet does not violate the copyright or neighboring rights so long as it is limited to copying for personal use.

[Explanations]

1. Problem Location

In recent years, software that supports the exchange of music and other files between users over the Internet (hereinafter called "PtoP file exchange software"), such as Napster and Gnutella, has appeared, posing the danger of harming the interests of the holders of copyrights and neighboring rights.

PtoP file exchange software has two functions: the uploading function that makes it possible to transmit files to the Internet and the downloading function that copies files from the Internet to the user's media.

The Copyright Law provides for the right of transmission to the public, the right of making transmittable, and other rights (Article 23, Article 92-2, and Article 96-2 of the Copyright Law). The question is whether using PtoP file exchange software violates these rights.

2. Uploading

Under the Copyright Law, the act of making music and other files ready for transmission over the Internet (uploading) corresponds to the act of making transmittable defined in Subparagraph 9-5, Paragraph 1, Article 2 of the law. The right of making transmittable is monopolized by the copyright holder and the neighboring rights holder (Articles 23, 92-2, and 96-2 of the law).

Therefore, any person who makes, intentionally or through negligence, music or other files ready for transmission over the Internet using PtoP file exchange software without obtaining the consent of the rights holder, violates the right of transmission to the public or the right of making transmittable (Articles 23, 92-2, and 96-2 of the law) and will be liable for damages (Article 709 of the Civil Code). In addition, if there is, or is likely to be, a violation of rights, whether intentional or through negligence, the rights holder may demand that it be stopped (Article 112 of the Copyright Law). Furthermore, a violator is liable for imprisonment for up to three years or a fine of up to 3 million yen (Article 119 of the law).

3. Downloading

The act of receiving music and other files from other users via the Internet and copying them, without the consent of the rights holders, using PtoP file exchange software (downloading), corresponds to copying for personal use as long as the copying is not done by avoiding technical protection means or the like and the copies are used for personal or household use or used within a similar sphere, and it is considered that the act does not violate the copyrights or neighboring rights (Paragraph 1, Article 30 and Paragraph 1, Article 102 of the law).

If a person uses such copies for purposes other than personal use, the act violates the right to reproduce (Articles 21, 96, 98, and 100-2 of the law) (Subparagraph 1, Paragraph 1, Article 49 and Paragraph 4, Article 102 of the law), and the person could be liable for damages (Article

709 of the Civil Code), demands to cease reproduction by the rights holder (Article 112 of the Copyright Law), and criminal responsibility (Article 119 of the law).

Meanwhile, if a downloaded file immediately becomes ready for transmission over the Internet (i.e. where the act of downloading is, at the same time, the act of uploading), the act of uploading violates the right of transmission to the public or the right of making transmittable. In addition, it is considered that the act of downloading violates the right to reproduce because it does not correspond to copying for personal use.

(2) Illegal Acquisition, etc. of Domain Names

[Disputed Point]

The illegal acquisition of a domain name is defined as "unfair competition" in Subparagraph 12, Paragraph 1, Article 2 of the Unfair Competition Prevention Law. What are the specific acts that fall under the term "unfair competition"?

[Approach]

(I) Definition and objects of unfair competition under the Unfair Competition Prevention Law

Subparagraph 12, Paragraph 1, Article 2 of the Unfair Competition Prevention Law defines as "unfair competition" an act of (i) acquiring or holding the right to use a domain name or of using the domain name, (ii) that is the identical with or similar to another party's specific trademark, service mark or the like, (iii) for the purpose of obtaining an illegal profit (profit-making purpose) or causing damage to the party (damage-causing purpose).

The Unfair Competition Prevention Law covers not only JP domain names, those that end with ".jp", but also generic domain names that do not end with the country code (such as those ending with ".com" and ".org").

(II) Cases falling under the category of unfair competition

Shown below are some of the (1) cases where the acquisition or use of domain names was judged to have been made in bad faith and, (2) cases where domain names were judged the identical with, or similar to, other parties' trademarks, service marks, etc. in judicial precedents and civil disputes. These cases are highly likely to fall under the category of unfair competition.

(i) Cases where the acquisition or use of domain names was judged to have been made for illegal purposes, etc.

- Cases of acquiring the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and selling products that take advantage of the reputation and the customer-attracting aspects of the firm.
- Cases of acquiring the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and using it to harm the reputation of the firm by displaying a message defaming or disparaging the firm on the Web site.
- Cases of using the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and opening a pornographic Web site.
- Cases of using the domain name which is identical with or similar to a trademark, for example, of a well-known firm for the purpose of transferring to another Web site.
- Cases of acquiring the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and continuing to hold it in order to make the firm difficult to set up a Web site.
- Cases of registering the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and demanding a payment of unreasonable price (decided that they are for the purpose of reselling).
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(ii) Cases where domain names were judged the identical with, or similar to, another party's trade marks, service marks, etc.

- "jaccs.co.jp" and JACCS
- "j-phone.co.jp" and J-PHONE
- "sunkist.co.jp" and SUNKIST or Sunkist
- "sonybank.co.jp" and SONY
- "itoyokado.co.jp" and Ito Yokado
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(III) Effects of the Unfair Competition Prevention Law

Those whose business profit or reputation is harmed by unfair competition may demand (i) that the use of the domain name be stopped (Article 3 of the Unfair Competition Prevention Law), (ii) damages (Articles 4 and 5 of the law), and (iii) action to recover the firm's reputation (Article 7 of the law).

(IV) Handling in accordance with dispute settlement policies

The settlement of disputes can be sought not only through the procedures prescribed by the Unfair Competition Prevention Law but also in accordance with dispute resolution policies formulated by private organizations.

(i) Handling of JP domain names

When a dispute concerns a JP domain name, it is possible to seek a settlement from a dispute settlement agency certified by the Japan Network Information Center (JPNIC) in accordance with the JP Domain Name Disputes Resolution Policy established by JPNIC. The applicant can demand the cancellation of the registered domain name or its transfer to the applicant. The award given by the agency is not final, since the party dissatisfied with the award can file a suit through an appropriate court.

(ii) Handling of generic domain names

When a dispute concerns a generic domain name, it is possible to seek a settlement from a dispute settlement agency certified by the Internet Corporation for Assigned Names and Numbers (ICANN) in accordance with the Uniform Domain Name Dispute Resolution Policy established by ICANN. The applicant can demand the cancellation of the registered domain name or its transfer to the applicant. The award given by the agency is not final, since the party dissatisfied with the award can file a suit through the appropriate court.

[Explanations]

1. Regulation of Illegal Acquisition, etc. of Domain Names under the Unfair Competition Prevention Law

The rapidly growing use of the Internet in recent years has been making it increasingly important for firms to conduct sales, advertising, and other business activities via the Internet. The value of domain names has been rising as a result. Anyone can have domain names registered on a first-come, first-served basis. As a result, there have been many cases in the world in which a person has registered a string of characters, numerals, etc. that was the identical with, or similar to, the name of a well-known company or trademark, service mark

as a domain name and then demanded that the company buy the domain name at an unreasonably high price or harmed the reputation of the company through the Web site.

Paragraph 7, Article 2 of the Unfair Competition Prevention Law defines a domain name as "the characters, numerals, signs, or the combination of any of them corresponding to the characters, numerals, signs, or the combination of any of them assigned to each electronic computer on the Internet." Subparagraph 12, Paragraph 1, Article 2 of the law describes as "unfair competition" an individual's act of (i) acquiring or holding the right to use a domain name or of using the domain name, (ii) that is the identical with or similar to another party's specific trademark, service mark or the like, (iii) for the purpose of obtaining an illegal profit or causing damage to the party.

As is clear from the above definition of a domain name, the Unfair Competition Prevention Law covers not only domain names with the country code of Japan, which end with ".jp" (hereinafter called "JP domain names") but also domain names that end with the country codes of other countries such as those ending with ".uk", ".kr", ".de" or do not end with a country code (such as those ending with ".com", ".net", ".org", or ".info") (hereinafter called "generic domain names").

2. What Acts Fall under the Category of "Unfair Competition"?

(1) Having the purpose of obtaining an illegal profit or causing damage to a party (profit-making or damage-causing)

As subjective requirements, the Unfair Competition Prevention Law defines two types of purpose: profit-making and damage-causing. It is considered that the former means in order to make a profit for oneself or for a third party in a way contrary to public policy or the principle of faith and trust and that the latter means in order to cause tangible or intangible damage, such as a financial loss or loss of reputation, to a third party.

Shown below are some of the cases where the registration or use of domain names was judged to have been made in bad faith. These examples have come from judicial precedents and civil disputes handled by the Japan Intellectual Property Arbitration Center. These cases will be helpful when interpreting the profit-making and damage-causing purposes defined in the law.

- Cases of acquiring the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and selling products that take advantage of the reputation and the customer-attracting aspects of the firm.

- Cases of acquiring the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and using it to harm the reputation of the firm by displaying a message defaming or disparaging the firm on the Web site.
- Cases of using the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and opening a pornographic Web site.
- Cases of using the domain name which is identical with or similar to a trademark, for example, of a well-known firm for the purpose of transferring to another Web site.
- Cases of acquiring the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and continuing to hold it in order to make the firm difficult to set up a Web site.
- Cases of registering the domain name which is identical with or similar to a trademark, for example, of a well-known firm, and demanding a payment of unreasonable price (decided that they are for the purpose of reselling).

(2) Domain names the identical with, or similar to, another parties' trademarks, service marks, etc.

"Trademarks, Service marks, etc." means the name of a party, trademark, service mark or symbol related to a party's business or a mark indicating a specific product or service. In order to fall under this category, a mark has to have the function of identifying the object in question from others as well as the source identification function. Therefore, when an ordinary name for example, that does not have either or both of these functions, is used as a domain name, it is not fall into this category.

With respect to "similarity", the criteria presented by judicial precedents, etc. under Subparagraph 1, Paragraph 1, Article 2 and other clauses of the law will basically apply. For example, a Toyama District Court Judgment, December 6, 2000, says, "When compared, 'JACCS' and 'jaccs' are the identical, apart for capitalization. In addition, considering the fact that most domain names consist of lowercase letters, it should be considered that whether letters are in uppercase or lowercase does not matter." (This judgment was upheld by the High Court and was later finalized [Nagoya High Court, Kanazawa Branch judgment, Sept. 10, 2001. An appeal to this judgment was not accepted for hearing by the Second Petty Bench, Supreme Court, Feb. 8, 2002].) A Tokyo District Court judgment, April 24, 2001, says, "The names indicated at the Web site by the defendant are "J-PHONE" in English, "JPHONE" in Japanese, and "J-PHONE" in English ("J") and Japanese ("PHONE"), all written horizontally.

These are the identical with, or similar to, the aforesaid name "J-PHONE" in English on the Web site." This judgment was upheld by the High Court (Tokyo High Court judgment, Oct. 25, 2001).

Shown below are some of the cases where similarity was recognized in judicial precedents and civil disputes handled by the Japan Intellectual Property Arbitration Center (formerly, the Industrial Property Arbitration Center).

- "jaccs.co.jp" and JACCS (Nagoya High Court, Kanazawa Branch, judgment, September 10, 2001).
- "j-phone.co.jp" and J-PHONE (Tokyo High Court judgment, October 25, 2001).
- "sunkist.co.jp" and SUNKIST or Sunkist (Japanese Intellectual Property Arbitration Center award, June 1, 2001).
- "sonybank.co.jp" and SONY (Industrial Property Arbitration Center award, March 16, 2001).
- "itoyokado.co.jp" and Ito Yokado (Industrial Property Arbitration Center award, March 14, 2001).

(3) The act of acquiring or holding the rights to use a domain name or of using the domain name

The act of acquiring the right to use a domain name includes cases acquiring the right to use a domain name by applying to a domain name registration agency for its registration, cases acquiring the right to use a domain name by having it transferred by the third party in whose name the domain name is registered with a registration agency, and cases receiving a license for the domain name from the third party in whose name the domain name is registered with a registration agency.

The act of holding the rights to use a domain name means having the right to use a domain name in perpetuity, and the act of using a domain name means using a domain name for such purposes as setting up a Web site.

3. Effects of Falling under the Category of "Unfair Competition"

Those whose business profit or reputation is harmed by unfair competition may demand that the use of the domain name be stopped (Article 3 of the Unfair Competition Prevention Law), damages (Articles 4 and 5 of the law), and action to recover reputation (Article 7 of the law). Those whose business profit is harmed by a party that has illegally acquired a domain name identical with, or similar to, their trademarks, service marks or the like, may demand damages to the amount equal to a licence fee they could receive normally if they had granted a license for the use of the domain name in advance. (Subparagraph 4, Paragraph 2, Article 5 of the law).

4. Handling in Accordance with Domain Name Dispute Resolution Policies

The Unfair Competition Prevention Law does not cater expressly for the possibility of transferring domain names. However, private organizations, such as JPNIC and ICANN, have formulated dispute resolution policies for both JP and generic domain names. In accordance with these policies, disputes are settled as described below.

(1) Handling of JP domain names

With respect to JP domain names, JPNIC's Regulations Concerning the Registration, etc. of Attribute Type (Organization Class Type) and Regional Type Domain Names (Article 40) and Regulations Concerning the Registration, etc. of General Purpose JP Domain Names (Article 37) (hereinafter collectively called the "Registration Regulations") provide that whenever there is a dispute between a registrant and a third party over a JP domain name registered in the name of the registrant, the registrant shall consent to the dispute settlement agency's action to be taken in accordance with the JP Domain Name Dispute Resolution Policy (hereinafter called the "JP-DRP). The JP-DRP provides that a third party that is an applicant may seek, as a remedy, the cancellation of the registration of the registrant's domain name or the transfer of the registration of the domain name to the applicant (Part i, Article 4 of the JP-DRP). The regulations provide that when an award is issued by a dispute settlement agency (the Japan Intellectual Property Arbitration Center only, at present) certified by JPNIC, the Japan Registry Service Corporation (hereinafter called the "JPRS") shall take steps for the transfer or cancellation of the registration of the domain name (Article 3 and Part k, Article 4 of the JP-DRP). However, the party dissatisfied with an award issued by the dispute settlement agency may file a suit with the appropriate court. (It is provided that jurisdiction by agreement shall belong to the Tokyo District Court or the court having jurisdiction over the address of the registrant.) If a suit is filed within 10 days of the notification of an award, the JPRS can

withhold the transfer or cancellation of the registration, which may be ordered by the award, and the transfer or cancellation of the registration is carried out if ordered by a judgment of the court (Part k, Article 4 of the JP-DRP).

Meanwhile, since the details of the rights to a domain name are prescribed under a contract with the JPRS, it is considered that the cancellation and transfer executed by the JPRS, in accordance with the Registration Regulations, do not constitute a tort. A judicial precedent also says, "The registration of a domain name is granted under a private contract (the contents of which are the Registration Regulations) between an Internet user and JPNIC (which was handling the registration of domain names in those days), a domain name registration agency. The registrant of a domain name uses the domain name as a right under the interpersonal contract with JPNIC, and the right the registrant has to the domain name is only a contractual right that can be asserted against the JPNIC"(Tokyo District Court judgment, Nov. 29, 2001).

(2) Handling of Generic Domain Names

With respect to generic domain names, arbitration is performed by certified dispute settlement agencies (such as the Arbitration Center of the World Intellectual Property Organization) in accordance with the Uniform Domain Name Dispute Resolution Policy (hereinafter called the "UDRP") adopted by ICANN.

Therefore, if a dispute occurs about a generic domain name, a party may seek to cancel or transfer by filing, an application with a dispute settlement agency certified by ICANN. However, the party dissatisfied with an award, issued in accordance with the UDRP, may file a suit with the appropriate court. (It is provided that jurisdiction by agreement shall belong to the court having jurisdiction over the address of the head office of a registrar certified by ICANN or the address of the registrant.) If a suit is filed within 10 days of the notification of an award, the execution of the result of the award, such as transfer or cancellation, is withheld (Part k, Article 4 of the UDRP).