

Interpretative Guidelines on Electronic Commerce
(Tentative Translation)

June 2004

Ministry of Economy, Trade and Industry (METI)

Introduction

Any laws and regulations stipulated herein are based on the technology that is available at the time of enactment and/or amendment thereof. For this reason, any new advances in technologies can bring about a change to the background facts of disputes which the governing laws and regulations had assumed. As a result, the flexible interpretation of laws and regulations may be required in response to such advances and also the creation of new laws and regulations may be needed for any matters which cannot be adequately addressed by such interpretations.

The emergence of the internet has resulted in the creation of new models of economical activities such as electronic commerce. However, since most of the existing laws, including the Civil Code, were established before the emergence of such new technologies, the interpretation of the application of the existing laws concerning electronic commerce are not necessarily clear. There is still no legal environment for electronic commerce in which the parties can participate in complete security. Normally, when there is any vagueness in the interpretation of existing laws, reasonable rules for interpretation may be naturally found through court precedents. However, the judicial system reforms necessary in order to meet the requirements of the new era have just began and for the time being, it is difficult to simply expect that court precedents will promptly accumulate because of such reforms.

These interpretative guidelines are intended to explain how the relevant laws and regulations including the Civil Code are applied and interpreted with respect to various types of legal problems in the field of electronic commerce and to promote facilitation of transactions by enhancing predictability for the parties involved. It goes without saying that it is the court which issues the final decision on how the existing laws are applied in each individual and specific case; however, we hope that these interpretative guidelines serve as a guide for the specific interpretation of laws and may also assist in the formation of new rules.

METI puts forward its specific interpretations of laws and regulations in these interpretative guidelines according to the proposal made by the Rules Establishment Subcommittee of the Information Economy Committee of the Industrial Structure Council, chaired by Professor Nobuhiro Nakayama of the University of Tokyo. In preparing the proposal, METI received advice on various issues concerning electronic commerce from consumer groups, trade associations, and observers from government agencies including the Cabinet Office, the Ministry of Justice, the Fair Trade Commission and the Agency for Cultural Affairs. We hope that these guidelines will function to facilitate the interpretation of laws and regulations concerned with electronic commerce into the future.

Furthermore, these interpretative guidelines should be amended flexibly in accordance with the transaction practices relating to electronic commerce, the technological trend relating thereto, and developments in international consensus on appropriate rules. Also, we intend to present practical interpretations of specific cases as well as basic concepts. For this purpose, we have sought opinions on specific cases from a wide range of business people and consumers who are actually engaged in electronic commerce. Some specific cases are given in these interpretative guidelines, but if there are any other appropriate examples in addition to such cases, please contact the address below:

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Interpretative Guidelines on Electronic Commerce

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Part 1: Online Transactions

This part discusses various problems arising from the nature of electronic commerce which is a new mode of business using online computer networks including the internet.

1. Problems concerning the Conclusion of Contracts

(1) Conclusion of Contracts (Arrival of Electronic Notice of Acceptance)

[Issue]

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

[Approach]

(I) E-mail

For e-mail, a notice of acceptance (“*shôdaku-tsûchi*”) arrives at the time when: (i) the e-mail has been recorded in the-mailbox of the designated mail server or in the-mailbox usually used by the intended recipient (offeror; “*môshikomi-sha*”); and (ii) the e-mail is legible.

(i) Notice of acceptance recorded in a mailbox of e-mail server of the intended recipient (offeror)

Cases where contract is concluded

- After the notice of acceptance was recorded in a mailbox, it became irretrievable due to a system failure or similar event.
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Cases where contract is not concluded

- The notice of acceptance had not been recorded in a mailbox due to the inoperativeness of the recipient’s (offeror's) mail server.
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(ii) Legibility of e-mail recorded

Contracts not concluded

- The notice of acceptance transmitted/received cannot be read e.g. a garbled e-mail.
- When the notice of acceptance is transmitted as an attached file, the recipient (offeror) cannot decode nor read it. (For example, if the notice is written using application software that the recipient (offeror) does not have.)
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(II) Internet browser windows

When using internet browser windows, a contract is completed when a notice of acceptance is displayed on the monitor screen of the offeror.

[Explanations]

1. Conclusion of contract ; arrival of notice of acceptance

In principle, a notice of acceptance given by electronic means (including e-mails) to a contract offer can reach the opposite party in an extremely short period of time. Therefore, Paragraphs 1 of Article 526 and Article 527 of the Civil Code do not apply where a notice of acceptance of a contract offer is given electronically between remote parties. Instead, the contract is concluded at the time the notice of acceptance reaches the opposite party (Article 4 of the Law Concerning Exceptions to the Civil Code Related to Electronic Consumer Contracts and Electronic Notices of Acceptance (hereinafter referred to as “the Electronic Contract Law”) and Paragraph 1 of Article 97 of the Civil Code).

A statement may say, for example, that “this e-mail is only to confirm the receipt of the contract offer and does not constitute an approval of such contract offer. We will send you an official notice of approval if the order is accepted after we check our stock”, which specifies that approval of the contract offer will be given separately. In this case, the e-mail only confirms the receipt of the contract offer which is not considered a notice of approval.

2. Meaning of “arrival”

The Civil Code does not expressly define the time of arrival. In general, “arrival” (“*tôtatsu*”) has been construed to mean the time when an expression of intention (“*ishi-hyôji*”) reaches the opposite party in an objective state which the opposite party can clearly identify. Specifically, this refers to the situation where it is possible for the other party to identify an expression of intent, or the expression of intent is communicated to the recipient (Judgment of the Supreme Court of Japan, 1st Petty Bench, April 20, 1961, 15-4 Saikôsaibansho Minji Hanreishû (“Minshû”) 774; Judgment of the Supreme Court of Japan, 3rd Petty Bench, December 17, 1968, 22-13 Minshû 2998).

When a notice of acceptance is given electronically, it is deemed to have arrived at the opposite party at the time the opposite party can access the electromagnetic record of the information pertaining to the notice. For example, when a notice is transmitted by e-mail, the information conveyed by the notice reaches the opposite party at the time it has been recorded

in the-mailbox of the-mail server used by the intended recipient (offeror) in a readable condition. More practically, this can be summarized as follows:

- (A) In cases where the information and telecommunications equipment used by the recipient for receiving notices is designated in its mail address or the like, or in cases where there is specific information equipment instead of designated information equipment, that is reasonably believed to be regularly used by the recipient 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 by the information and telecommunications equipment.
- (B) Except for the cases mentioned in (A), it is understood that a notice of acceptance is deemed to have reached the recipient not at the time when it has been recorded by the information and telecommunications equipment but rather at the time when the opposite party downloaded the information. (It is not necessary for the recipient to read its contents.)

If a notice of acceptance has not been recorded because the offeror's mail server was inoperative, the notice has not reached the offeror because he cannot access the notice.

On the other hand, if a notice of acceptance is lost for any reason after it was recorded, the notice did reach the recipient at the time it was recorded.

3. Meaning of “readable condition”

Where a transmitted notice of acceptance is illegible, the notice is deemed not to have reached the recipient. Whether a notice of acceptance is illegible is determined on a case by case basis according to a variety of factors not limited to bugged texts and characters. For example, a presenter (accepter) is at not fault where a recipient fails to utilize the proper character codes to view the text received. Whether a notice of acceptance is in a legible condition should be determined on the assumption that the offeror intended to communicate the acceptance in a legible form. Where a notice of acceptance is contained in a file created using a specific application software (such as the latest version of a word processing package) which the offeror does not possess, and thus cannot decode into a legible form, it does not seem reasonable to require the offeror to obtain the particular software in order to read the information therein. Instead, the acceptor has the responsibility to transmit the information in such a way that the offeror can decode it into a legible form. Therefore, when it is impossible for the offeror to decode and read a notice of acceptance, in principle, it should be deemed that the notice has not reached the offeror.

4. Internet browser windows

In the case of internet sales, orders may be placed and acceptances be made via the internet browser window. Specifically, requisite information including the product name, number of units, and name and address of the offeror is inputted according to the organizational format of the browser window. When this information is sent, the expression of intent to order is transmitted; after the notice of order is saved on the web server of the recipient, confirmation that the contract has been concluded with the offeror is automatically displayed in the browser window.

While notice of approval is transmitted via the browser window, the arrival of such expression of intention should be considered in the same manner as an expression of intent transmitted via e-mail is considered. Specifically, the time of arrival is when the expression of intention comes to the knowledge of the recipient (offeror) or when the expression of intent has been communicated to the recipient (offeror) in a legible form. More specifically, the time when a notice of acceptance appears on the monitor screen of the offeror, after the order data having been recorded on the web server and having reached the recipient. Furthermore, it would be sufficient that the notice of acceptance appeared on the recipient's (offeror's) screen; it is unimportant whether the recipient (offeror) actually acknowledged the acceptance. On the other hand, where a notice of acceptance is not displayed on the screen of the recipient (offeror) due to a transmission error or similar situation, such notice is generally deemed not to have arrived.

Incidentally, a statement may say, for example, "thank you for your order. We will send you an official notice of approval if the order is accepted after we check our stock", which specifies that approval of the contract offer will be given separately. In this case, the statement only confirms the receipt of the contract offer which is not considered a notice of approval.

Following the display of a notice of acceptance in the browser window, e-mails are sent in some cases to confirm the conclusion of a contract. Additionally, in these cases, contracts are deemed to be executed at the time that notice of acceptance is displayed, rather than at the time when the e-mail arrives. Where a notice of acceptance is not displayed on the monitor screen, if an e-mail is sent to confirm the conclusion of a contract, the contract is deemed to be executed at the time the e-mail arrives.

(2) Effectiveness of Website Terms of Use

[Issue]

Websites which provide various online transactions (such as internet trading, internet auction, intermediary services and/or information provision services on the internet) generally post a document which includes the terms and conditions for transactions such as “terms of use”, “terms and conditions” or “terms of service” etc. (hereinafter collectively referred to as the “Website Terms of Use”). Would such Website Terms of Use legally bind users?

[Approach]

With regard to websites which intend to engage in transactions of sales of goods or provision of services, the Website Terms of Use (a document which includes the terms and conditions for the transactions such as “terms of use” (“*riyô-kiyaku*”), “terms and conditions” (“*riyô-joken*”) or “service contract” (“*riyô-keiyaku*”) and the like. Hereinafter collectively referred to as the “Website Terms of Use” (“*Website riyô-kiyaku*”)) shall have binding force if the details thereof will be incorporated into the terms and conditions of the trade contract executed between such user and the website operator (“*site-un’ei-sha*”) concerned.

(Cases where the Website Terms of Use is deemed to be incorporated in the terms and conditions)

- The Website Terms of Use is always and clearly shown on the screen when engaged in online transactions and requires the user to agree to the Website Terms of Use by clicking the “Agree” button as a condition to effect the transactions.

(Cases where it is doubtful to deem that the Website Terms of Use has been incorporated into the terms and conditions)

- Although the Website Terms of Use is posted on the website where users can easily navigate (for example the link to the Website Terms of Use is distinctly placed on the screen of the application form for transactions), the users are not required in such website click the “Agree” button to the Website Terms of Use.

(Cases where the Website Terms of Use is not likely to have been incorporated into the terms and conditions)

- The Website Terms of Use is only posted on the website at a place where it is hard to notice and the users are not even required to click the “Agree” button to the Website Terms of Use for the use of such website.

If any change is made to the content of the Website Terms of Use, the revised Website Terms of Use will only be applicable to the transactions executed after such change and not to any transactions executed before such change. In order to claim the validity of any change made to the Website Terms of Use against a user who engaged in transactions before such change, the website operator should obtain the consent of such user to the revised Website Terms of

Use, after giving notification of the fact of the change to the Website Terms of Use and identifying the changes made in a clear and understandable manner.

Although the content of the Website Terms of Use is deemed to be incorporated into the terms and conditions of a contract between the user and the operator of the website, if in breach of Article 8 and Article 9 of the Consumer Contract Act or other compulsory provisions, the validity of the Website Terms of Use shall be denied to the extent thereof. Also, even if not in breach of the regulations, any illegitimate provisions of the Website Terms of Use which are beyond the reasonable expectations of the user may be deemed invalid, in light of judicial precedents concerning regulations on regular transaction agreements or the effects of the provisions of the Consumer Contract Act which invalidate any provisions which unilaterally diminish consumer protections.

Every website has its own title for the Website Terms of Use, such as “Terms and conditions” (“*riyô-joken*”), “Terms of use” (“*riyô-kiyaku*” or “*riyô-kisoku*”), “Informed consent” (“*go-dô-i-jôkô*”), “For the users” (“*go-riyô-ni-atatte*”) and the like, however, such titles have no effect on the validity of the Website Terms of Use, except in special circumstances.

[Explanations]

1. Identification of problems

Websites which provide various online transactions for consumers, such as internet trading, online financial services, internet auction, intermediary services and/or information provision services on the internet, often post a Website Terms of Use. The Website Terms of Use is posted on the website in various ways, such as by simply putting a link on the front page of the website, or by requesting the user to click the “Agree” button to the Website Terms of Use when applying for a particular transaction. It is unusual to execute a contract for an online consumer transaction simply through the website. Rather, it is typical that the seller (business entity) enters into transactions with consumers subject to the Website Terms of Use. For this reason, we must answer under what circumstances will the Website Terms of Use bind consumers.

2. Requirements for Website Terms of Use to be accepted as a contract between user and website operator

(i) Contractual relationships

The reason the Website Terms of Use is legally binding is because the Website Terms of Use is incorporated into the contract which has been executed between the user and the website operator. Therefore, in order for the Website Terms of Use to be legally

binding, there must be some kind of contractual relationship between the user and the website operator. The sales transaction (such as internet trading and the like) is the most typical type of transaction and it forms the foundation for the creation of the contractual relationship. However, various types of transactions which provide services such as information services through the internet or internet auctions may also be considered as having created a contractual relationship between the parties.

The binding force of the terms of use (end-user license terms and conditions) for downloading information assets such as software or music should be considered pursuant to the Website Terms of Use.

If there is no contractual relationship between the user and the website operator, the Website Terms of Use would have no binding force as a contract. Provided, however, that the details of the Website Terms of Use may be considered in some cases, upon determining the responsibility for unlawful acts and the extent thereof.

(ii) Users applying for transactions after agreeing to the Website Terms of Use.

The Website Terms of Use would only be contractually effective if the users entered into the transactions with the website operator with the intention to enter into the transactions pursuant to the Website Terms of Use. For this reason, users would not be bound by the Website Terms of Use if such users used the website without knowing about the Website Terms of Use.

In the past, cases regarding general conditions of contract such as in a transportation agreement (for example, Judgment of Osaka High Court, June 29, 1965, 16-6 Kakyûsaibansho Minji Saibanreishû (“Kaminshû”) 1154; Judgment of Kyoto District Court, November 25, 1955; 6-11 Kaminshû 2457 (concerning motor carrier transportation agreement)), the disclosure (e.g. representation) of the terms and conditions was a prerequisite to ruling that the terms and conditions had binding force. However, the court held that terms and conditions are deemed to be incorporated into a contract for transactions concerning the carriage of passengers or cargo transports if such terms and conditions are disclosed to the customers appropriately, so long as it is the established business practice when entering into transactions for such transportation agreements or other similar agreements. Therefore, under Japanese laws, the court may rule, in some cases that as long as the Website Terms of Use has been posted and was clearly disclosed to the users, such Website Terms of Use is deemed to be incorporated into the relevant online contract even though the users had not clicked the “Agree” button on the screen.

However, an internet transaction is still a new kind of transaction. Therefore, it is hard to assess at this point whether an established business practice exists regarding transactions executed pursuant to the Website Terms of Use posted on a website. Among the court cases (ex. Ticketmaster Corp v. Tickets.com Inc. (C.D.Ca., March 27, 2000), Specht v. Netscape Communications Corp. 150 F. Supp. 2d 585 (S.D.N.Y., July 5, 2001), aff'd. 306 F. 3d 17 (2d Cir., Oct. 2002)) in the United States, where internet technology is in its most advanced form, a case exists in which the court held that it cannot be assumed that a user who has initiated a transaction has agreed to the Website Terms of Use simply because the Website Terms of Use were posted on the website. Rather, the judge stated that a system would have to be in place (such as a system in which the user can enter into transactions only if such user clicks the "Agree" button to the Website Terms of Use) which can confirm the consent of the user to the Website Terms of Use, as a prerequisite to finding that the Website Terms of Use have been incorporated into the terms of contract.

For this reason, if a system, in which a transaction is commenced only after the user has consented to the Website Terms of Use by clicking the "Agree" button to the Website Terms of Use, is not established, the Website Terms of Use may not have binding force on the user. The Website Terms of Use may be deemed invalid, in principle, when the website has simply not provided an "Agree" button, and also when the user cannot make out the Website Terms of Use because the link to the Website Terms of Use is too small to identify and is difficult to locate by a user who has been notified of their existence.

Furthermore, if the contractual terms of a transaction which are described on the Website Terms of Use are considered common-sense in light of the established business practice, the consent of the user may be deemed to be present relatively easily. However, the consent of the user would have to be explicitly proven with respect to provisions (such as a provision on international arbitration or a provision that withholds the unilateral termination right of the seller (business entity; "*jigyô-sha*") in internet trading) which may impose disadvantages on the user and which the user normally expects not to be present (as described below, if the user is a consumer, such illegitimate provisions may be deemed invalid in some cases under the Consumer Contract Act).

(iii) Validity of long and complicated Website Terms of Use

Paragraph 1 of Article 3 of the Consumer Contract Act provides that a business entity must make efforts to ensure that its contracts with consumers are "clear and simple". This provision only prescribes the "duty to make efforts" and if the terms of the transaction or the conditions are complicated, the Website Terms of Use would likely

also become long and complicated. The validity of the Website Terms of Use incorporated into the transaction contract would not be denied immediately just because the contents of such Website Terms of Use are long and complicated. However, if the provisions which are unfavorable to the user are hidden because of the use of long and complicated sentences and the consumer cannot easily understand the contents, the validity of such unfavorable provisions which are “concealed by long and complicatedly phrased sentences” may be denied. In order to judge whether the Website Terms of Use is “clear and simple” for website users to understand, there would be a comprehensive consideration of the overall explanations of the Website Terms of Use provided to the users on the website, including the contents of the Website and the supplemental remarks concerning the conditions of transaction (e.g. explanations on flow of transactions, charts and/or illustrations).

3. Amendment to the Website Terms of Use

The following is a discussion on each type of Website Terms of Use stipulating the terms and conditions for single transactions such as internet trading and the terms and conditions for continuous transactions (such as online banking or internet auction) which are entered into between certain users (online member or subscriber).

(i) Amendment to the Website Terms of Use stipulating the terms for one shot transaction

As described above, the Website Terms of Use does not itself have the legal binding force, and only becomes effective when it is incorporated in the contract stipulating the terms and conditions for a transaction between the user and the website operator. Therefore, if the Website Terms of Use having a legal binding force (which means the Website Terms of Use which is incorporated in the contract) is changed, such amended Website Terms of Use would not be applicable retroactively to the transactions which are entered into before the changes are made and would only be applicable to the transactions entered into after the changes are posted on the website.

Also, if the users are not notified on the changes to the Website Terms of Use, it is likely that such users who have used such website in the past would apply for transactions based on the previous Website Terms of Use. For this reason, if the website operator does not notify the users on the changes of Website Terms of Use in an appropriate method (e.g. by setting an adequate period of notice on the changes in the front page of the website to notify the users and posting the change tracking so that the users can view the changes), question as to the binding force of the terms and conditions of the Website Terms of Use after the changes (especially if such changes are made to be much

more unfavorable to the users than they were before) may arise due to falsification of contract or in accordance with the principles of good faith, as for the users who were not aware of the changes to the Website Terms of Use.

(ii) Amendment to the Website Terms of Use stipulating the terms for continuous transaction

As described above, the Website Terms of Use may be deemed to have legal binding force if it is incorporated into a contract and if it stipulates the terms and conditions for the transaction between the user and the website operator. Once the contract is formed, the terms thereof may not be changed, in principle, unless upon mutual agreement of the parties. Therefore, the Website Terms of Use, stipulating the terms of a continuous transaction and which constitutes the terms and conditions between the parties, is not automatically legally binding on website users who have entered into the transactions based on the Website Terms of Use before the changes were made. In order to apply the amended Website Terms of Use to the existing website users, it is necessary for the business entity to notify the existing website users in an easily comprehensible manner of the amended part of the Website Terms of Use and to obtain the consent of such website users to the contents of the amended Website Terms of Use (or to enter into a transaction based on the amended Website Terms of Use). Also, where a continuous transaction contract is formed based on the current Website Terms of Use which do not reflect the changes, the existing website users who do not agree to the changes to the Website Terms of Use shall not be legally bound by the changes, and the business entity would be bound by the terms and conditions stipulated in the original Website Terms of Use which does not include any changes.

Unless otherwise specifically and clearly agreed by the website user that the terms and conditions stipulated in the amended Website Terms of Use would apply retroactively to the transactions which were previously entered into by and between the parties before the changes were made, the amended Website Terms of Use would only apply to the individual transactions executed after the changes became effective, even though the website user has agreed to the changes to the Website Terms of Use.

(iii) Verification of terms and conditions upon transaction if the Website Terms of Use is amended

If any dispute arises between the user concerning the applicable terms and conditions of the Website Terms of Use, it is highly possible that the website operator would be found to have a duty to verify the contents of the Website Terms of Use with the user at the time of the relevant transaction or the time of amendment. This is because the website

operator prepares the information including the Website Terms of Use on the website, maintains the server and is in the position to easily trace the changes made to the Website Terms of Use, and because in an electronic consumer contract, it is common that the electromagnetic record, which becomes evidence for the details of the Website Terms of Use, is not preserved for users, which is not ordinarily the case in a contract executed in written form. Especially, if the website operator desires to apply a certain provision of the Website Terms of Use, such website operator would be held fully responsible to verify that such provision existed at the time the parties agreed to enter into the transaction. Also, in the event the users claim, without showing any specific evidence, that the old Website Terms of Use had included such provisions that were favorable to the website operator, it is likely that claims by the users regarding the provisions would be admitted as the users have no paper-based contract of the transactions and it is additionally highly likely that such claim by the users be admitted as fact if the website operator, who should be able to easily produce the contents of the Website Terms of Use and a record of its changes, does not submit appropriate evidence against such fact. It is necessary to at least preserve a record of the changes in order for the website operator to verify the contents of the old Website Terms of Use. However, if the website users claim that the record of changes have been falsified, such record of changes may not have adequate probative force if there is no physical evidence to counter the possibility of falsification of the record of changes. In order to verify that the record of changes have not been falsified, the operator may utilize the “time stamp service” (service that provides proof that the electronic document had existed at a certain time and that there has been no alteration of such document) every time such operator makes changes to the Website Terms of Use.

4. Regulations of Consumer Contract Act etc.

Even if the Website Term of Use which is incorporated into the terms and conditions of a contract is legally binding, any provision in such Website Terms of Use that violates the compulsory provisions or that is contrary to public order and public morals would be held invalid. The following is a discussion on the Consumer Contract Act as the Act contains the most important compulsory provisions in relation to the Business-to-Consumer Electronic Commerce.

(i) Regulations on provisions limiting the liability of business entity

Article 8 of the Consumer Contract Act prescribes that any provision is invalid which fully discharges a business entity from its liabilities for default, unlawful act or compensatory damages such as liability to comply with the warranty against defects.

Correspondingly, a partial limitation of liability (e.g. setting an upper limit for compensatory damages) is not deemed outright as invalid under the Consumer Contract Act. However, the discharge and/or limitation of any partial liability which was caused by the intention and/or gross negligence of the business entity (of representative or employee) is prescribed as invalid under Article 8 of the Consumer Contract Act.

The validity of any limitation of liability on physical damages has been very narrowly interpreted¹ since the period before the Consumer Contract Act came into force. It is expected that Article 10 of the Consumer Contract Act, which prescribes that any provision which unilaterally detracts from the benefits of consumers shall be deemed invalid, will operate to strengthen the court to combat any restrictions on liability for bodily injuries. Therefore, it is clear that a business entity would not be fully discharged from the liabilities associated with bodily injuries or death and consequently any provision which partially limits the liability of such business entity could be found invalid.

(ii) Invalidation of excessive amount of damages against Consumers

Under Paragraph 1, Article 9 of the Consumer Contract Act, it is prescribed that if the termination charges “which exceed the average amount of damages incurred by such business entity following the termination of similar consumer contract” are levied upon the termination of a contract between consumers, the amount of such termination charges exceeding the average amount of such damages would be found invalid. Accordingly, this provision bans the business entity from gaining any benefits from imposing termination charges on customers. In relation to the termination of reservations at restaurants, Judgment of Tokyo District Court, March 25, 2002, 1152 Kinyû-shôji Hanrei 36, held that an agreement on termination charges, which exceeded the actual amount of food and beverages consumed, invalid and ruled that the amount of damages should be limited to 30% of the actual amount of food and beverages which would have been consumed. Also, the non-refund of any part of a tuition payment

¹ For example, Judgment of the Osaka District Court, May 9, 1989, 1308 Hanrei Jihô 28, allowed a limitation of liability for air transportation itself, however, the court did not allow a similar limitation on damages relating to bodily injuries or death on the ground that the maximum amount of liability (up to 600 Million Yen) stipulated in the Domestic Conditions of Carriage (“kokunai-ryokaku-unsô-yakkan”) was too low. As seen in the internationally acclaimed Warsaw Convention with respect to the limitation on liability for air transportation, even though in the air transportation industry, a limitation of liability is generally accepted, yet nevertheless any limitation on bodily injuries or death to passengers is strictly limited. Therefore, in Japan any limitation on bodily injuries or death should not be permitted.

made in advance in case of termination of enrollment at a private English school or for other classes or the non-refund of tuition by a private university when an enrollee declines admission before entering, the amount of such payments which exceed the average amount of damages would be found invalid under the Consumer Contract Act². Therefore, even though the provision of termination charges is prescribed in the Website Terms of Use, if such termination charges exceed the average amount of damages incurred by the website operator upon occurrence of termination, the amount in excess of such average amount will be found invalid.

Also, Paragraph 2, Article 9 of said Act prescribes a ceiling of 14.6% per annum as the default interest amount applicable to consumers.

(iii) Invalidation of other provisions which unilaterally damage the benefits of consumers

Article 10 of the Consumer Contract Act prescribes, dissimilarly to the Civil Code, that the Commercial Code and other laws which are automatically incorporated into contracts (unless specifically overridden in the contract), are more consumer friendly in that they will nullify any contractual clauses which limit the rights of consumers and which create additional obligations on the part of the consumer and which unilaterally detract from the benefits enjoyed by consumers. The following lists the possible types of clauses which could be found invalid:

- i) Clauses restricting the right of a consumer to terminate a contract, as stipulated by Article 570 of the Civil Code among other articles, to terminate contracts due to defects and non-performance of the business entity, or clauses expanding the rights of business entities to terminate contracts.
- ii) Arbitration clauses under which the right to appoint arbitrators belongs only to the business entities
- iii) Clauses which deem a the silence of a consumer to constitute an implicit expression of intention, such as a “negative option” where a consumer is deemed to consent unless he keeps silent for a certain period; such silence should not be deemed to constitute implicit expression of intention under general trade practices.
- iv) Clauses placing an additional burden of proof on consumers or eliminating the burden of proof for business entities

² After the Consumer Contract Act came into force, the courts have ruled that special clauses on nonrefundable tuition are invalid.

v) Clauses restricting the exercise period of legal rights of consumers

(iv) Regulations on general contractual conditions

If the Website Terms of Use is legally binding because it is incorporated into a contract, such Website Terms of Use shall fall under the general contractual conditions (“*yakkan*”) category such as in transportation agreements or insurance clauses. With respect to clauses of regular transaction agreements, the judicial precedents, in which the unreasonable clauses were held as invalid for being contrary to public policy (“*kôjo-ryôzoku*”), have had an impact on to what extent the contents of clauses can be restricted. Therefore, any unreasonable clauses within the Website Terms of Use could be similarly ruled invalid.

The essence of the jurisprudence on this point of law is similar to the purpose of the provision of Article 10 of the Consumer Contract Act “which prescribes, dissimilarly to the Civil Code, that the Commercial Code and other laws which are automatically incorporated into contracts (unless specifically overridden in the contract), are more consumer friendly in that they will nullify any contractual clauses which limit the rights of consumers and which create additional obligations on the part of the consumer and which unilaterally detract from the benefits enjoyed by consumers.”.

(3) Effects of Expression of Intention by a Spoofer on the Victim

[Issue]

When might the victim of “spoofing” (internet identity theft) have to bear any responsibility?

[Approach]

(I) Problems concerning settlements in internet trading

In Internet trading, spoofing (“*nari-sumash-kôï*”) poses the most significant problems at the settlement stage. In particular, when the consumer buys a product from one party and provides consideration to another, for example, through credits card or Internet banking settlements. Complex problems can arise due to the legal relationships existing between the multiple parties.

The main problems concern (i) whether a contract had actually been executed between the person whose identity was stolen and the seller (e.g. was a legal relationship created between them?) and (ii) whether a settlement agency (a credit card company or bank) can request the victim of identity theft to pay a fee or whether a remittance made according to the instructions of the spoofer is valid (i.e. what is the status of the legal relationship between the identity theft victim and the settlement agency).

(i) Was a sales contract formed between the identity theft victim and the seller?

(A) Cases where there is no prior agreement on how to identify users (one shot transaction)

When there exists no prior agreement on how to identify users, the expression of intention by a spoofer does not belong to the identity theft victim. Thus, no contract has been formed between the identity theft victim and the seller.

However, where the requirements prescribed by the Civil Code for an apparent representation (“*hyôken-dairi*”) are met: (a) a plausible appearance; (b) the counterparty acted without fault and in good faith; and (c) the identity theft victim is at fault, there are cases which have held that the expression of intention by a spoofer belongs to the principal as the requirements for apparent agency have been fulfilled (Articles 109, 110, and 112 of the Civil Code), and consequently a contract was formed.

Cases where identity theft victim was found a party to the contract

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Cases where identity theft victim is unlikely to be found a party to the contract

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(B) Cases where there exists a prior agreement about how to identify users (continuing transactions)

In the case of continuing transactions, a prior agreement is usually reached about how to identify users, such as through specific IDs or passwords. In this case, if the identification method agreed upon is properly effected, in principle a contract exists between the identity theft victim and the seller.

However, in cases where, although a user (identity theft victim) had agreed to the identification system provided by the vendor, the user was not aware of the degree of system security and where the security level is considerably lower than what the person would have reasonably expected, then the effects of the prior agreement could be limited. In addition, a prior agreement may be considered invalid if the user is a consumer and if the consumer exclusively bears the risks of being bound to the contract irrespective of whether the user acted without fault. In such cases, the rule in (A) will apply.

Cases where a prior agreement may be considered invalid

- Where the agreement stipulates that the effects of an expression of intention by a spoofer belong to the identity theft victim (consumer) irrespective of whether the identity theft victim (consumer) is actually at fault, so long as the other party (seller) properly verifies the personal identification information, (e.g.) ID or password.
- A prior agreement on a personal identification method was reached without any agreement on a concrete security system. Due to the sub par security system established by the seller, there existed a strong likelihood of leakage of information related to personal identification.
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Cases where a prior agreement may be considered valid

- Data is transmitted after being encoded by SSL and the comprehensiveness of the security system established by the seller is so complete that there exists very little likelihood of data leakage.
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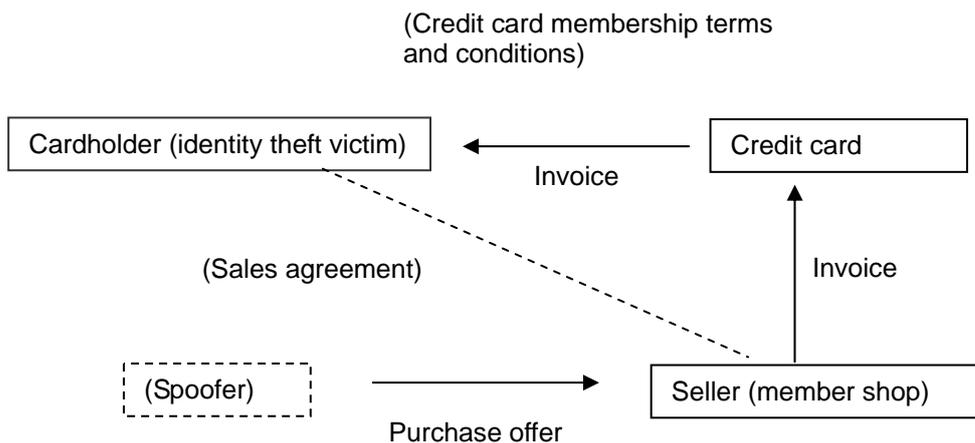
(ii) Do victims of identity theft have an obligation to pay settlement institutions?

(A) Credit card

When the payment method is a credit card, such as in internet trading, the transaction is conducted by inputting the credit card number, expiry date, and other details. When spoofing is committed in such cases, is the identity theft victim (card holder) obliged to pay the fraudulently charged amount?

According to existing credit card membership terms and conditions, an identity theft victim (card holder) is not obliged to pay the fraudulently charged amount or damages, except where the test for an apparent representation relationship has been fulfilled or where the identity theft victim (card holder) is at fault, for example, because of a violation of credit card membership terms and conditions.

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



(a) Cases where the identity theft victim is at fault

In these cases, the victim was obliged to pay the fraudulently charged amount or damages.

The credit card company or the insurance provided by the card membership agreement usually indemnify the victim. However, in cases where the victim was aware of the spoofing or was unaware due to gross negligence, or where the victim was deemed to be seriously at fault by allowing a relative to use the card, the victim will not be indemnified. Where the card is used by an unauthorized third party, the card company will investigate the case and may refrain from invoicing the victim.

Cases where the identity theft victim is responsible

- The relative or cohabitant of the cardholder used his card.
- A person, to whom the cardholder lent his card, used it.
- A cardholder disclosed his credit card information, such as the card number and expiration dates, to other persons, and subsequently such information was improperly used
- In addition to the credit card, the spoofer was aware of the appropriate ID, password, or similar verifying information that should have been kept secret from others.

(b) Cases where the identity theft victim is not at fault

In these cases, the victim is not obliged to pay the fraudulently charged amount or damages.

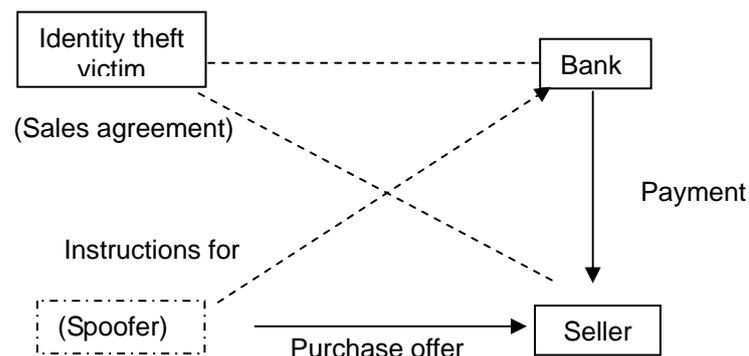
Cases where the identity theft victim is not responsible

- Although the credit card number and the expiry date were fraudulently used, the identity theft victim had properly managed and stored the credit card, credit card number, and other sensitive information.
- Information necessary for credit card transaction was leaked from a member shop and was improperly used.
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(B) Internet banking

Where a customer uses an internet banking system as a method of settlement, a spoofer, in addition to deceiving the seller in the internet trading transaction, steals the identity of the customer from the instruction of remittance to the bank.

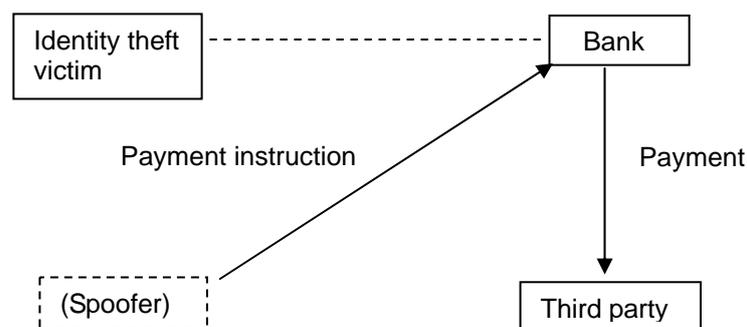
According to banking practices, if a customer agrees to a personal identification method which is incorporated as a general clause into a contract (banking clauses) and if the agreed identification method had been used at least one time previously, a remittance is valid so long as the personal identification method is properly performed even when effected by a spoofer. The validity of these clauses is judged by assessing the level of the security system of the bank. Based on existing technology, the following relationships will hold:



<p>Cases where a disclaimer in the banking clauses is considered valid</p> <ul style="list-style-type: none"> • Multiple passwords are used for personal identification, and data is transmitted after being encrypted using SSL. • •
<p>Cases where a disclaimer in the banking clauses is considered invalid</p> <ul style="list-style-type: none"> • • •

(II) Fund Transfer problems in Internet Banking

A problem occurs when a spoofer, falsely representing himself as another person, orders a fund transfer through internet banking. Is the fund transfer made from the account of the identity theft victim valid?



According to banking practice, if a prior agreement on a method of personal identification which is incorporated as a general clause into a contract (banking clauses) and if the agreed identification method is properly performed, a fund transfer made even according to the instructions of a spoofer are treated as valid. The validity of these clauses is judged by assessing the level of the security system of the bank. Based on existing technology, this problem is considered as follows:

<p>Cases where a disclaimer in the banking clauses is considered valid</p>
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<ul style="list-style-type: none"> • Multiple passwords are used for personal identification, and data is transmitted after being encrypted using SSL. • •
<p>Cases where a disclaimer in the banking clauses is considered invalid</p> <ul style="list-style-type: none"> • • •

[Explanations]

1. Problem identification

In electronic commerce, where parties carrying out a transaction never meet face-to-face, it is easy for an unauthorized person to make a transaction by wrongly using the name of another. Developments in electronic signatures, authentication methods, and other systems which specialize in verifying personal identification methods are expected to reduce the danger of spoofing. However, when an act of spoofing is committed, are there any cases where the identity theft victim, is legally responsible for the transaction executed by the spoofer?

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

2. Problems in internet trading

In internet trading, spoofing poses the greatest risk at the settlement stage.

In particular, when a consumer buys a product from a seller and pays the fee to another, as is common in credit card or internet banking settlements, complex problems can arise concerning the legal relationships between the multiple parties.

The problems concern (i) whether a contract is formed between the identity theft victim and a member shop (seller) (i.e. whether a sales agreement was executed between the victim and the seller); and (ii) the legal relationship between the victim and the settlement agency (credit card company or bank) (e.g. whether a settlement agency can request the victims to pay for the fraudulently charged amount or whether a fund transfer ordered by the spoofer is valid.

(1) Legal relationship between the victim of the identity theft 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 a third party do not belong to the principal. However, the Civil Code has provisions on apparent representation (Articles 109, 110, and 112). These provisions can attribute the effects of an expression of intention made by a third party, with no power of representation, to the principal if the following requirements are met: (i) the third party appears to legitimately have the power of representation; (ii) the counterparty acted without fault and in good faith; and (c) the identity theft victim is at fault. Requirements (ii) and (iii) ensure a balancing of the concerns of the counterparty and the victim by considering factors affecting both sides. The principle of apparent representation applies where the counterparty to a transaction believed that an unauthorized agent had the power of representation. Consequently, apparent representation does not directly apply to cases of simple spoofing. However, case law has held that Article 110 of the Civil Code should apply to cases where an agent (who, as determined by the court, had certain basic powers of representation) performed an unauthorized act as a principal and the counterparty believed in good faith that it was the act of the principal (Judgment of the Supreme Court of Japan, 2nd Petty Bench, December 19, 1969, 23-12; 2539 Minshû 2539).

In electronic commerce, it should be possible to attribute the effects of an expression of intention made by a spoofer to the identity theft victim, if, on application of the clauses for apparent representation, the spoofer was given certain basic powers of representation or the victim was at fault.

(B) Cases where there is a prior agreement

Parties who have a continuing legal relationship often conclude in advance a special agreement (basic agreement), which stipulates the requirements to have the effects of an expression of intention made by an unauthorized agent attributed to the principal, including the method of identifying the principal. As long as the identity of the principal is verified according to the prearranged method, for example, the provision of a password, the effects of an expression of intention made by the unauthorized agent will belong to the principal. If such basic agreements are always considered valid, the following problems will arise.

Under the principle of “Freedom of contract” (“*keiyaku-jiyû*”), contracts between parties at arm’s length, as in a Business-to-Business transaction, should be valid as concluded.

However, where a user is not aware of the sophistication of the verification system utilized by the seller, and where the actual sophistication of the security system is considerably lower than the user would reasonably expect, the validity of the prior agreement may be limited. For example, if a prior agreement is formed on the assumption that the level of the security system is reasonable, then it will be difficult for the seller to assert that the effects of a transaction made by an unauthorized person should be attributed to the principal by virtue of the prior agreement (thus demanding the conclusion of the transaction), if such system is proved insufficiently secure. A security system in this context means not only the narrow sense, such as the use of a firewall and the encryption of any transmitted data, but also the manner in which customer information is managed.

Where the user is an actual consumer, he may himself/herself be unable to fully evaluate how reasonable a security system is. Further, the security system is usually unilaterally specified by the seller; the consumer has no choice. In such cases, therefore, prior agreements which declare that the effects of a transaction made by an unauthorized person are always attributed to the principal, irrespective of whether the principal is at fault, may be judged invalid under Article 10 of the Consumer Contract Act or Article 90 of the Civil Code.

(2) Legal relationship between the identity theft victim and a settlement agency

(A) Credit card

The sales agreement between the identity theft victim (card holder) and the seller (member shop) is separate from the credit card agreement between the card holder and the credit card company. Therefore, the settlement between the card holder and the credit card company should be examined separately from the validity of the sales agreement.

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, the question arises whether the card holder is obliged to pay the fraudulently charged amount under the membership terms and conditions concluded between the card holder and the credit card company.

Under most of the existing credit card membership terms and conditions, the card holder is not obliged to pay a fraudulently charged amount except where an apparent representation relationship exists or where the card holder is considered to be at fault,

such as, where the card holder violated the credit card membership terms and conditions.

Summarized below are some common credit card membership terms and conditions.

A card holder has a duty to manage and keep his credit card and PIN number carefully. If he fails to fulfill his duty to be a good administrator or is otherwise at fault, he must indemnify the credit card company for the amount improperly charged. A card holder must also indemnify the credit card company for fraudulent charges on his credit card, if his card was improperly used after being carelessly lost or stolen. Even where the card holder is obliged to indemnify the credit card company, those payments are usually covered by the credit card company or by insurance included in the card membership agreement, except where the card holder was aware of the spoofing or whose ignorance was a result of gross negligence or who was seriously irresponsible, or where his card was not properly used by his family member or affiliate.

In conclusion, unless the card holder has failed to fulfill his duty to be a good administrator or is otherwise at fault, he is not obliged to indemnify the credit card company for any fraudulent charges. Conversely, where the card holder has failed his duty to be a good administrator or is otherwise at fault, he must indemnify the credit card company for any fraudulently charges. In practice, however, the card holder is not actually required to make any indemnity payments unless he is seriously culpable, for example, where he was aware of its fraudulent use or was only unaware of the fraud because of his gross negligence. In transactions where signatures are not required, 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 holder.

(B) Internet banking

Where a customer uses an internet banking system as a method of settlement, a spoofer, in addition to deceiving the seller in the internet trading transaction, steals the identity of the customer from the instruction of remittance to the bank..

According to current banking practice, if a prior agreement exists regarding how personal identity is verified and, if that personal identity authentication method is properly performed, the bank is not held responsible for a fund transfer made according to the instructions of a spoofer.

Judgment of the Supreme Court of Japan, 2nd Petty Bench, July 19, 1993, 1489 Hanrei Jihô 111, is the leading case regarding the validity of clauses in general contractual conditions (banking clauses) concerning fund transfers to an unauthorized person. This

judgment confirmed the legitimacy of these banking clauses, stating, “In cases where a person other than the account holder withdrew an amount from the account of the account holder using a bank-installed ATM, so long as the genuine cash card received from the bank by the depositor was used and the correct PIN number was entered, the bank is exempted from any responsibility by the disclaimer clause except where there exist any special circumstances such as the inadequate management of the PIN number by the bank.” It is noteworthy that this judgment refers not only to the disclaimer clause but also to the security of the remittance system adopted by the bank at the time when the accident occurred.

If a similar accident occurs in the future, the validity of the disclaimer in the banking clauses would be determined by evaluating whether the sophistication of the security system has caught up to the generally accepted standard at the time the subsequent accident occurs.

Assuming that current technology is employed, it is highly likely that any clause will be judged valid if multiple passwords are used in the personal identification method and if data is transmitted after being encrypted by SSL.

3. Problems in internet banking

If a third party, fraudulently using the account of another person, instructs the bank through internet banking to perform a fund transfer, is the fund transfer, fraudulently ordered from the account and executed by the bank, valid?

(1) Cases where no prior agreement exists

Article 478 of the Civil Code applies to any payment made to a person who has 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 payor did not know through no fault of his own that the payee was not the creditor. This applies to electronic fund transfers as well.

(2) Cases where a prior agreement exists

As mentioned in 2(2)(B) above, according to common banking practices, if a prior agreement regarding personal identification is incorporated into the general contractual conditions

(banking clauses), and if the identification method is properly performed, the bank is not held responsible for any fund transfer made according to the instructions of a spoofer. The validity of this banking clause has already been discussed.

(4) Responsibilities of Verification Authority against Spoofing

[Issue]

If an act of spoofing is attributable to the inadequate verification method employed by an electronic signature verification authority (“*Denshi-shomei-ninshô-kikan*”), what responsibility does the verification authority have to persons who suffer damage as a result of relying on the certificate of verification?

(Example) Based on a flawed personal identification method, an electronic signature verification authority issued a certificate of electronic verification to a third party who misrepresented himself as another person (principal). Although the innocent party to the transaction, who received the certificate from the spoofer, believed that the spoofer was indeed the principal, the transaction is not attributed to the principal causing the innocent party to suffer damage. What, if any, responsibility does the certification authority have to that innocent party?

[Approach]

(I) Cases of inadequate personal identification

(i) Principle: Tort liability

Where an electronic signature verification authority issues an electronic certificate without adequately verifying the identity of the person, if a counterparty receives and relies on the certificate but ultimately suffers damage because the spoofer’s transaction is not attributed to the principal (nominee of the electronic signature), the verification authority is tortiously liable to the innocent recipient of the certificate. In this case, the counterparty (recipient) must prove negligence of on the part of the verification authority (an inadequate identification method).

(Cases where identification of a nominee is sufficient)

- Where an identification of a nominee is made with ordinary due care, based on a laminated personal identification card issued by the governmental authorities bearing an official seal stamped at the border of the identifying photograph with the appropriate seal impression.

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(Cases where identification of a nominee is insufficient)

- Where an identification of a nominee is made with a personal identification card which appears obviously counterfeit.
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(ii) Exception: Contractual liability

Since there is usually no contractual relationship between the verification authority and the counterparty (recipient), the verification authority, in principle, bears no contractual liability.

However, in cases where a verification authority shows the terms applicable to the recipient (hereinafter referred to as the “Recipient Terms”) or the Certification Practice Standards (CPS) where a verification authority provides a certification, and the recipient consents to the Recipient Terms/CPS, a contractual relationship might be formed between them. The requirements of a contractual relationship between a verification authority and a recipient are similar to the requirements in a contractual relationship created according to a Website Terms of Use agreement (e.g.) accessibility to the provisions of the agreement terms (See [Issue] “(2) Effectiveness of Website Terms of Use”); there are many arguments for additional requirements. If a contractual relationship is formed, the verification authority must abide by the Recipient Terms/CPS. In such case, if the identification procedure of the verification authority does not follow the procedures specified in the Recipient Terms/CPS, it will be contractually liable for any failure. In this case, the verification authority bears the burden of proving that it is not at fault.

Cases where a contractual relationship is formed

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Cases where no contractual relationship is formed

- Where the recipient is not required, upon examining the effectiveness of the certificate, to agree to the terms of the CPS etc., which are simply presented to the recipient.
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(III) Validity of a disclaimer of a verification authority

Verification authorities do attempt to limit their liability to compensate innocent parties by inserting disclaimer clauses into Recipient Terms /CPSs. The validity of these clauses will be discussed.

(i) Where no contractual relationship exists between the recipient and the verification authority

The disclaimer clause does not bind any of the parties concerned.

(ii) Where a contractual relationship exists between the recipient and the verification authority

In principle, the disclaimer clause binds the parties concerned.

However, in consumer contracts, the disclaimer clause of a verification authority is invalid if it totally exempts or partly exempts the verification authority from any liability to compensate damages to an innocent party which resulted from the non-performance of an obligation or from a tort, or where the verification authority acted illegally or breached the contract deliberately or with gross negligence (Article 8 of the Consumer Contract Act). There are naturally other cases where the validity of a disclaimer clause can be called into question due to various factors.

Cases where the disclaimer is considered valid
<ul style="list-style-type: none">•••
Cases where the disclaimers is considered invalid
<ul style="list-style-type: none">•••

[Explanations]

1. Tort liability

Where an electronic signature verification authority issues an electronic certificate without adequately verifying the identity of the person, and another party receives and relies on the certificate but ultimately suffers damage because the spoofer’s transaction is not attributed to the principal (the electronic signature nominee), the certification authority is tortiously liable to the innocent certificate recipient.

Conversely, where the transaction is attributed to the principal, the certification authority is tortiously liable to the principal, who has suffered damage in principle.

In the case of tortious liability, the party suing for damages must prove negligence on the part of the certification authority.

2. Contractual liability

There is usually no contractual relationship between the certification authority and the recipient or the principal. Therefore, the certification authority bears no contractual liability in principle. However, some commentators argue that in cases where a verification authority shows the applicable terms to the recipient (hereinafter referred to as the “Recipient Terms”) or the Certification Practice Standards (CPS) when the verification authority provides the recipient with a certification, and the recipient consents to the Recipient Terms/CPS, a contractual relationship might be formed between them. If a contractual relationship is formed, the verification authority must abide by the Recipient Terms/CPS. In such case, if the identification procedure of the verification authority does not follow the procedure specified in the Recipient Terms/CPS, it will be contractually liable for any failure. In this case, the verification authority bears the burden of proving that it is not at fault.

3. Validity of the disclaimer

As damages in the electronic commerce business can be significant, some Recipient Terms/CPSs include disclaimers for the verification authorities (e.g. “The verification authority shall not compensate any recipient for damages resulting from reliance on the validity of an electronic certificate issued above the sum of ¥1,000,000”). On this point, one must first examine whether there is a contractual relationship (or a disclaimer agreement) between the recipient of an electronic certificate and the verification authority. Furthermore, even if there is such a relationship or agreement, the disclaimer of a verification authority is invalid if it totally exempts or partly exempts the verification authority from any liability to compensate damages to an innocent party which resulted from the non-performance of an obligation or from a tort, or where the authentication authority acted illegally or breached contract deliberately or with gross negligence (Article 8 of the Consumer Contract Act). There are naturally other cases where the validity of a disclaimer can be called into question due to various factors.

(5) Expression of Intention by a Minor

[Issue]

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

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

[Approach]

In an electronic transaction, if a minor intentionally enters a false date of birth at a company's age confirmation screen, and if, as a consequence, a company supposes that he is of age, the minor may be deprived of the right to rescind his expression of intention by Article 20 of the Civil Code.

Case where a minor might not be permitted to rescind

- A company actively confirms the age of anyone entering transactions and warns that parental consent is required for minors to conclude contracts.
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Case where a minor would be permitted to rescind

- The screen simply asks, "Are you of age?" and prompts the minors to click on "Yes".
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[Explanations]

1. Principle

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

In face-to-face transactions, it is fairly easy for a counterparty to assess whether an offeror is a minor by his appearance, e.g. by physical appearance, or by asking him to present an identity card. In electronic transactions, there exists a greater risk than in other types of transactions that minors can enter into contracts irrespective of their minor status. In consideration of the sanctity of contract, some argue that laws regarding the legal capacity of minors should apply more narrowly in electronic transactions. However, this is a common problem found in all types of remote transactions. Therefore, there is no reason to treat electronic transactions as exceptions.

2. Restriction on the right to rescind

Article 20 of the Civil Code provides that if a minor uses a fraudulent means to make a counterparty to a transaction believe that he is of age or has the consent of his guardian, he may not rescind his expression of intention. The use of a fraudulent means is not limited to cases where a minor actively misleads a counterparty to mistakenly acknowledge his capability. This includes cases where a person whose capacity is limited causes the counterparty to form a mistaken belief or to strengthen a mistaken belief by using speech or behavior that is usually considered deceptive (Judgment of the Supreme Court of Japan, 1st Petty Bench, February 13, 1969, 23-2 Minshû 291).

Therefore, in general, where a company engaged in electronic commerce has taken reasonable measures to confirm the age of its customers, for example, by providing an age confirmation screen, if a minor intentionally inputs a false age and thus causes the company to mistakenly believe that he is of age, he may be deprived of his right to rescind.

The fact that a minor responded that he is of age is just one factor in determining whether a fraudulent means was employed. Other factors normally considered are 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 that a minor will repudiate the contract on the grounds of incapability. Therefore, the company should adopt reasonable identification methods in light of the cost of establishing an identification system and the value of each transaction.

(6) Validity of Agreement on Court Jurisdiction

[Issue]

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

[Approach]

An agreement stipulating the court with jurisdiction has to be made in writing. An online agreement not in written form is considered invalid.

[Explanations]

An agreement stipulating the court with jurisdiction is invalid, unless it is in writing and concerns a lawsuit pertaining to a specific legal relationship (Paragraph 2 of Article 11 of the Code of Civil Procedure). Therefore, the court is not bound by any such agreement made in an online contract.

Therefore, even if a lawsuit is filed in the stipulated court, the court does not have jurisdiction unless it also has statutory jurisdiction or if jurisdiction has been created by the defendant's response to this lawsuit (See Article 12 of the Code of Civil Procedure). If the court has statutory jurisdiction, it can hear the case.

The following examples refer only to cases over which the Japanese courts had jurisdiction.

A bill proposing partial amendments to the Code of Civil Procedure and other relevant laws has been submitted to the current Diet; the new bill will permit the inclusion of a clause specifying the court with jurisdiction over an agreement completed electromagnetically as well as in writing.

Therefore, if an agreement stipulating the competent court is made in an online transaction after such bill comes into force, such agreement will be effective and the court stipulated in such agreement will have jurisdiction.

Therefore, an agreement specifying the court having jurisdiction after the enactment of the revised new law will be valid and consequently a court appointed by the agreement will have jurisdiction to hear the case.

(7) Validity of Arbitration Agreement

[Issue]

If an arbitration agreement in an online transaction is not completed in writing, is it valid?

[Approach]

An arbitration agreement in an online transaction is valid.

[Explanations]

Under the Arbitration Law enacted March 1, 2004, an arbitration agreement must be made in writing (Paragraph 2, Article 13 of the Arbitration Law³). However, it also stipulates that an arbitration agreement completed by electromagnetic record shall be deemed to have been completed in writing (Paragraph 4 of said Article⁴).

Therefore, contrary to the court jurisdiction agreement, an arbitration agreement completed in an online electromagnetic record (e.g. exchanging e-mails), where no written form exists, is considered a valid online transaction.

A consumer has the right to terminate the arbitration agreement incorporated into a consumer contract (“Consumer Arbitration Agreement”) as defined by the Consumer Contract Act (Supplementary provision of the Arbitration Law⁵).

³ Paragraph 2, Article 13 of the Arbitration Law: The arbitration agreement shall be in the form of a document signed by all the parties, letter or telegrams exchanged between the parties (including those sent by facsimile devices or other communication device for parties at a distance which provide the recipient with a written record of the transmitted content), or other written instrument.

⁴ Paragraph 4, Article 13 of the Arbitration Law: When an arbitration agreement is made by way of electromagnetic record (records produced by electronic, magnetic or any other means unrecognizable by natural sensory functions and used for data-processing by a computer)

⁵ Paragraph 2, Article 3 of Supplementary Provision of the Arbitration Law: Consumer may cancel a consumer arbitration. (*translation omitted*)

2. Problems Arising from the Development of New Types of Transactions

(1) Responsibilities of Cybermall Operator

[Issue]

Are there cases where a cybermall operator (“*cybermall un’ei-sha*”) has been found responsible for any damage suffered by a consumer through a transaction with a cyber shop?

(Example) A consumer discovers that the product he purchased from a cyber shop in a cybermall is defective. The shop operator has disappeared and the consumer cannot reach the shop. Can he demand damages from the operator of the cybermall?

[Approach]

(I) Principle: cybermall operator is not responsible

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

(II) Exception: cybermall operator can still be held responsible

Where (i) the appearance of the cybermall unavoidably misleads the consumer to believe that the business of the cyber shop is conducted by the cybermall operator himself (presence of an appearance); (ii) the cybermall operator is somewhat responsible for the aforementioned appearance (fault); and (iii) as the consumer executed the transaction, he had misidentified the operator of the cyber shop without gross negligence (no gross negligence); Article 23 of the Commercial Code might be *mutatis mutandis* applied to the cybermall operator.

Case 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 unified format order screen commonly used by every cyber shop at the cybermall.
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Case where the cybermall operator will not be held responsible

- At the website, the cybermall displays a message, in a form usually recognizable to potential customers, to the effect that each cyber shop is managed by its own operator independently and is not managed nor operated by the cybermall or any of its affiliates (unless otherwise expressly stated).
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[Explanations]

1. Problem identification

If a customer suffers any damage from a transaction with a cyber shop in a cybermall, he has recourse against the shop by virtue of the existing contractual responsibilities. Does the customer have any form of recourse against the operator of the cybermall? There is usually no direct contractual relationship between the operator of a cybermall and a customer. Therefore, the cybermall operator is not responsible for any damage arising from the customer's transactions with individual cyber shops. However, does the cybermall operator have any contractual responsibility where conditions leading to damages are caused by the cybermall-shop relationship; for example, the cybermall-shop relationship contributed to the consumer's mistaken belief that the cybermall operator was also the shop operator?

2. Application of Article 23 of the Commercial Code by analogy

A judicial precedent exists on point. The case involved a consumer who purchased an item from a tenant shop in a supermarket. The court ruled that since the supermarket fostered an appearance that the shop was operated by the supermarket, by concluding a tenancy agreement with the shop, the company operating the supermarket was as legally responsible as a person who permits another person to use his name, by the analogical application *mutatis mutandis* of Article 23 of the Commercial Code (Judgment of the Supreme Court of Japan, 1st Petty Bench, November 30, 1995, 49-9 Minshû 2972).

The requirements of Article 23 of the Commercial Code are as follows: (i) there must exist an appearance that makes potential customers believe that the nominee operates the business; (ii)

the nominee is at fault for allowing the perpetration of the aforementioned appearance by permitting another party to use his name, and (iii) the counterparty believed without gross negligence that the nominee is the operator of the business. In the above mentioned judgment, requirement (ii) was not met; however, the judgment held that any party which allows another to make the aforementioned appearance should be held responsible by virtue of applying *mutatis mutandis* Article 23 of the Commercial Code by analogical interpretation of Article 23 of the Commercial Code.

3. Possibility of cybermall operator being held responsible

In the case of a cybermall, if (i) an appearance exists by which potential customers unavoidably misunderstand that the cyber shop business is conducted by the cybermall operator; (ii) the cybermall operator is complicit in the presentation of the aforementioned appearance; and (iii) the consumer had misidentified the cyber shop operator without gross negligence when the customer conducted the transaction, then the cybermall operator could be held responsible through the analogical application of Article 23 of the Commercial Code.

Contrastingly, if the cybermall website displays a message, in a form usually recognizable to potential customers, stating “each shop is operated by an owner independently and, except as otherwise expressly stated, is not managed or operated by the cybermall operator or any of its affiliates” , then such a message would be considered a powerful ground for refusing to attribute any responsibility for a transaction to the cybermall operator.

Whether a cybermall operator is held responsible by analogy through the application of Article 23 of the Commercial Code would be judged on the appearance of the cybermall and the way the cybermall is operated and also in consideration of other factors such as the extent to which the cybermall operator was involved in the business of the cyber shop in question (for example, how sales proceeds are collected, the explicit or implicit permission to use a trade name and the like) to determine how blameworthy the cybermall operator is.

(2) Internet Auctions

In general, internet auctions represent a form of electronic commerce in which people submit bids for products offered on a website during a certain bidding time, where at the end of the bidding time the most valued bid wins.

Transactions in internet auctions may be categorized in forms such as “Business-to-Business,” “Business-to-Consumer,” and “Consumer-to-Consumer.” The form of the transaction is categorized as “Business-to-Business” if both the Exhibitor and the bidder are business entities. The “Consumer to Business” relationship may be formed theoretically but not practically. Also, in such case, the “Business entity” (*“jigyô-sha”*) means the Exhibitors or bidders and does not refer to the brokers who provide the internet auction system (“Auction Operator”).

The Auction Operators (*“auction jigyô-sha”*) participate in transactions in many different ways. In some cases, the Auction Operators may not be involved in the transactions at all, while in other cases, they may be substantially involved in transactions by advertising and endorsing a particular seller or by becoming the actual seller on behalf of the Exhibitors. The successful tender price may go up (or down in reverse auctions) depending on the bids submitted by potential purchasers.

In addition, it seems that some Auction Operators act as brokers of both internet auctions in which the transaction price fluctuates depending on the bids submitted by the potential purchasers and the fixed-price sales on the same website. There are also services ranging from sales of products limited to particular brand products to sales of products having no limitations.

As described above, the business models of e-commerce internet auctions come in many forms and accordingly the legal issues which may arise in connection therewith vary in each case.

(A) Responsibility of Auction Operator to users

[Issue]

Should an Auction Operator bear any liability to a user (including Exhibitors and bidders) who incurs losses in the course of internet auctions, such as non-payment or the non-delivery of goods?

In addition to the above mentioned, what liability does the Auction Operator have to the users?

[Approach]

(I) In principle, the Auction Operator bears no liability in any transactional problems between users, if the Auction Operator is not directly involved in transaction; where the Auction Operators simply provide the brokering sales system for individuals.

In exceptional circumstances, if the successful bidders, who have purchased the stolen items, experience claims demanding the return of such items by the original owner and this is attributable to the Auction Operator because it did not stop the bidding although such Auction Operator had been ordered to suspend the bidding by the police commissioner etc., the Auction Operator may be obligated to indemnify the successful bidders.

(II) If the Auction Operator is substantially involved in transactions between users beyond simple provision of the brokering system, the Auction Operator may be liable to that extent of his further involvement.

[Explanations]

1. Problem identification

As described above (see Part 1, 1(2)), there are various types of internet auctions and the degree of involvement by the Auction Operator in the transactions between the users differs for each type. In general terms, the more the Auction Operator is involved substantially in the transactions, the higher the possibility that the Auction Operator will be responsible for any problems arising from the transactions between the users. If so, specifically for what types of auctions could the Auction Operator be held responsible?

In addition, while the terms of use often provide that Auction Operators may not participate in sales transactions between auction participants, what effect would the limitation of liability prescribed in such rules have?

Other than the troubles arising in connection with the transactions between the users, the responsibility of Auction Operator for maintenance and/or management etc. of systems, for example, may become an issue.

2. Legal relationship between Auction Operators and users

The legal relationship between Auction Operators and users shall be subject to the relevant terms of use, in principle. In internet actions, such agreement is acknowledged by clicking the button “I Agree”, usually upon online registration as a user, after confirming the terms (See [Issue] of “1. (2) Effectiveness of Website Terms of Use” concerning the validity of the terms of use). Also, the system often prompts the users to click an “I Agree” button as to the terms of use upon each internet auction transaction.

If such agreement is concluded, the legal relationships between the users and Auction Operators are governed by such terms of use, in principle. The terms of use usually specify under which circumstances Auction Operators may be held responsible.

However, if the user is a consumer, the Consumer Contract Act applies. If the Consumer Contract Act is applicable, the provisions are invalid which fully (Subparagraph 1, Paragraph 1 of Article 8 of the Consumer Contract Act) or partially (Subparagraph 2 of said Paragraph; however, liabilities raised from the intentional acts or gross negligence of such Auction Operator, its agents, or employees are not discharged at any rate) discharge an Auction Operator from its liability for losses incurred by consumers based on the non-performance of such Auction Operator. For example, if the Auction Operator is substantially involved in the transactions between the users as described in (4) below, any provision which fully discharges such Auction Operator from its liability relating to the transactions may be invalid under Article 8 of the Consumer Contract Act. The liability of the Auction Operators is categorized below based only on the type of transaction where the provisions of the terms of use have been eliminated.

3. Liability of Auction Operators who simply provides the sales brokering system for individuals and is not directly involved in the individual transactions

As specified above, there are various forms of internet auctions. In general terms, the Exhibitors and the successful bidders (in some cases, including the other bidders) take full responsibility for the actual sales, in the internet auctions in which Auction Operators simply provide the sales brokering system for individuals and are not directly involved in the internet

actions. As a result, Auction Operators are normally regarded as having no liability in this regard. In other words, in internet auctions, regardless of “Business-to-Consumer”, “Business-to-Business” or “Consumer-to-Consumer” types, Auction Operators serve as a broker in the transactions by providing the system, however, such Auction Operators are not regarded as a party to the actual sales. In such case, the internet Auction Operators, in general, simply provide the site enabling internet auctions (including fixed-price transactions), and are not directly involved in the formation of any individual transactions. Therefore, Auction Operators are regarded, in principle, as having no liability in regard to transaction-related problems between users (in many cases, there is a provision in the terms of use that the Auction Operator will not be involved in the sales contracts between the auction users and therefore, the Auction Operator is not responsible).

Nevertheless, since an Auction Operators actively supports the infrastructure for the brokering of sales information, in certain cases its scope of the responsibility for the brokerage can be enlarged. In other words, since an auction business provides a venue for transactions, it may be deemed to have a certain obligation to act with due care, although there is no legal consensus on this point. For example, where information is provided by the police commissioner etc. to the effect that goods exhibited on the internet auction site are stolen, an Auction Operator that disregards this information may, based on a violation of the duty to act in good faith and with due care, have an obligation to indemnify the successful bidder who purchases the stolen goods which must be returned to the victim.

4. Liability of Auction Operators who is substantially involved in the transactions between individuals utilizing the auction system

As described above, in the type of auctions in which Auction Operators simply provide the sales brokering system for individuals and are not substantially involved in individual transactions, Auction Operators do not have any liability related to any specific transactions. However, in the actual internet auction business, Auction Operators may act beyond their capacity as system provider in some cases. The liability of internet Auction Operators in such cases needs to be reviewed separately and specifically in each case by evaluating its capacity and the extent of its involvement. The following is a discussion of some typical cases:

(i) Cases in which Auction Operators actively support the exhibition of a user and receive fees or bidding commissions

For example, if Auction Operator receive an offer by the user on the phone concerning the exhibition of brand products, which are afterwards shipped to the Auction Operator, and the Auction Operator carries out the exhibition on behalf of such user and receives

fees or bidding commissions in connection with the exhibition, the Auction Operator is regarded as an Exhibitor and not simply as a provider of the auction site. If the Auction Operator acts as exhibit agent on behalf of the actual Exhibitor while the Auction Operator is in a position where it can confirm whether the exhibitions are counterfeits, the Auction Operator may be held responsible to the purchaser for the occurrence of troubles, irrespective of the provisions of the terms of use. In such cases, if the products provided for auction exhibition fall under “used goods” defined under the Antique Dealings Law, the Auction Operator may be subject to the regulations of said Law (For more information, see [Issue] of “(H) Internet auctions and the Antique Dealings Law”).

(ii) Cases in which an Auction Operator in some manner endorses a particular seller

If an Auction Operator endorses a particular seller or promotes the sales of a particular seller, or endorses the exhibition of particular goods, the Auction Operator may be held liable in regard to transaction-related problems between users, depending on the form of such endorsement and/or promotion. For example, if an Auction Operator not only posts an advertisement on its website after having collected a certain fee from a particular seller, and also further introduces such seller by displaying its featured pages, where the Auction Operator post interviews etc., and features the particular products of the exhibitions of such seller as a “best buy” or “price buster – recommended products”, it cannot be denied that the Auction Operator will be held responsible for some problems associated with sales.

(iii) Cases in which an Auction Operator itself is a seller

In internet auctions held for special events, the name of an Auction Operator may be indicated as the seller of products provided for sale by an individual who wishes to sell his product indirectly through the Auction Operator. However, any monies received in connection with the sale of the product received by the Auction Operator must be promptly transferred to the individual who had his goods sold. In such case, the Auction Operator takes on the responsibilities of the seller, in principle.

5. Liability of Auction Operator in issues other than problems between users, such as the maintenance and/or management of the system

Most internet auction sites collect commissions. Regardless of whether such commissions are charged, it can be interpreted that a legal relationship is created between Auction Operators and users (Exhibitors and/or successful bidders etc.) concerning the utilization of the internet auction system provided by the Auction

Operators. This is because in internet auctions, users cannot exhibit goods or participate in biddings unless the users utilize the systems provided by the Auction Operators. Therefore, it is interpreted that the Auction Operators are held responsible to maintain and/or manage the functions of the internet auction system which serves as the infrastructure for the exchange of information between individuals.

(B) Legal relationships between auction users (exhibitors and successful bidders)

[Issue]

What is the legal relationship between auction users (exhibitors and successful bidders)? If the goods delivered differ from those specified in the exhibit information of an internet auction, does the successful bidder have the right to nullify the contract or change the terms thereof?

[Approach]

(I) Cases in which a sales contract has no legal effect

If there is material discrepancy in the intentions of the seller and the buyer “to sell” or “to buy”, such parties may claim for the invalidation of the contract, unless there has been gross negligence resulting in the discrepancy which is attributable to the party who wishes to invalidate the contract. Also, the contract may be rescinded (“*torikeshi*”) if the parties committed fraud or were compelled to execute the contract. Furthermore, the contract may be terminated (“*kaijo*”) in the event of default or if any latent defects are found in the products.

(II) Cases in which the buyer may request the goods received be exchanged for other goods

If there are any defects in the delivered goods which are traded in the market, the buyer may demand the exchange of such goods for defect-free products.

(III) Cases in which the buyer may claim from the seller monetary compensation

If the subject item of the transaction is in any way defective or if some obligations have not been performed as required by contract, the buyer may claim a reasonable amount of damages.

[Explanations]

1. Problem identification

When a successful bid for goods is accepted in an internet auction, a sales contract is concluded between the exhibitor and the successful bidder at the time a bid is successful.

Specifically, under the sales contract, the seller (exhibitor) and the buyer (successful bidder) bear their own respective obligations (principally, the seller shall deliver the goods as specified in the exhibit terms and conditions and the buyer shall pay the bid amount subject to the bidding terms and conditions). In general, both the exhibitor and the successful bidder have actual intentions to engage in the transaction based on the terms and conditions at the time the bid was successful. Assuming that a contract is not deemed to have been entered into at the time a bid is successful, the parties are not necessarily bound by the terms and conditions thereunder because the details of the terms and conditions of such contract are decided by the negotiations between the parties after the time of bidding.

However, the legal relationship between the parties in the transactions using the internet auction is no different from that of the existing transactions and therefore, the principles of a general sales contract are applied to such transactions. In other words, if the actual intentions of the parties are found to be different from the sales contract formed, a party may claim that such contract be nullified; that the goods be exchanged with other goods; and that the party be compensated by the other party. The following paragraphs will explain when a party may submit the aforementioned claims in line with the principles of a general sales contract.

2. Cases where a sales contract may be nullified

A sales contract arising from an internet auction bid may be nullified when a party claims that the contract was invalid, when the parties claim to rescind the contract although the contract was validly executed and when the parties claim to terminate the contract although the contract was validly executed. If such contract is deemed to never have been formed, the buyer may claim for the return of the amount already paid and the seller may claim for the return of the products delivered.

See below for detailed explanations.

(i) Cases where a sales contract may have no legal effect

In principle, a contract is deemed to have been formed when the intentions of the seller and buyer “to sell” or “to buy” are presented and accepted each of the respective parties. If the intentions presented to the other parties differ in material respects to the actual intentions of such parties (“fundamental mistake”), such parties may claim, in principle, that the contract was never actually formed (Article 95 of the Civil Code). In general, material discrepancy means that the discrepancy (mistake) concerns the expression of intention and in which case it can be clearly deduced that in accord with the judgment of a normal person the party made no such intention (to sell or to buy) by virtue of the

existence of the discrepancy. What constitutes a material discrepancy differs in each case. For example, if there is discrepancy in the year when the product was made, and if it is especially important for the buyer that the product has been made in that particular year, and where the buyer would not have participated in the bidding if it had known that the product was not made in that year, then the buyer may claim that a discrepancy exists in a material aspect. In the example, the year in which the product was made need not have any particular significance as shown above in the other cases.

However, if an intention is erroneously communicated due to the gross negligence of the communicating party, such party may not claim for the invalidation of the contract on the basis of their mistake. What constitutes gross negligence differs in each case, but in general, a party is deemed to be grossly negligent if such party operates significantly without the commonly expected due care depending on the status of such party, types of acts and/or purposes etc.

(ii) Cases in which a sales contract may be rescind

As described above, a sales contract under which a seller is responsible to deliver the subject product and a buyer is responsible to pay the charged amount is formed when the intentions of the parties “to sell” or to “buy” match each other (and no discrepancy is found in material aspects). However, even if no discrepancy is found in such intentions, a contract may be rescinded if such intentions are made due to compulsion or fraudulently. In the first case, if a party is compelled to agree to a contract in order to avoid the disclosure of his personal information on the internet, and in the latter case, if a seller intentionally posts false information about the product in order to deceive a buyer. Also, if a minor is a party to a sales transaction, such transaction may be rescinded unless the minor obtains the consent of his guardian (e.g. parents). However, for example, if a minor buys stationery with the money given to him by his guardian for that purpose, the minor may use the money for the purpose the guardian intended. Also, in some cases, a minor may dispose of its assets at its own discretion (such as an allowance) without the consent of his legal representatives. In such case, a sales transaction may not be rescinded even though the minor does not have the express consent of his guardians.

(iii) Cases where a sales contract may be terminated

In some cases, a seller or buyer may terminate and nullify a contract notwithstanding that the contract does not fulfill either requirements (i) nor (ii) above. For example, a buyer may terminate a contract: if a seller defaults; if a buyer does not perform its obligation; if any latent defects (“*kashi*”) are found in used goods purchased; according

to a provision prescribed in the terms and conditions of contract (e.g. exhibition terms and condition) permitting termination in certain circumstances; or, if both parties agree to the termination. If the contract is terminated, each party is responsible to return the other party to its pre-contract state; the party who received goods must return them and the who received payment for the goods must repay the paid amount.

(A) Cases where a seller defaults

If a seller and a buyer have concluded a sales agreement for certain goods, and if the goods delivered to the buyer differ from those specified in the sales agreement, the buyer may claim for the delivery of goods as specified in the sales agreement. Under the sales contract, the seller bears an obligation to deliver the goods as specified in the sales agreement. In general, if the goods delivered to a buyer differ from those specified in the description of the goods in the sales agreement, the buyer may claim for the termination of the contract due to the default of the seller to perform its obligation to deliver the goods as specified in the description. As described above, if a seller or a buyer fails to perform its obligations under a sales contract, the other party may terminate such contract.

(B) Cases where latent defects are found in a specific good purchased

As described in (A) above, if a good offered for exhibition is an unspecified good and replacements for such good are easily available in the market, a seller is liable to deliver defect-free goods complying with the description and a buyer may claim for the delivery of defect-free goods. On the other hand, if the seller decides to handle the goods after having specified certain characteristic of such goods (namely “specific goods”), regardless of whether replacements of such goods are available in the market, the seller is deemed as having performed its obligation to deliver goods even though the seller delivers a defected good as it is. The seller bears no further obligations to procure and deliver a replacement for such good. For example, if a seller is an individual and if a buyer can easily acknowledge that the seller is vending only the item on display by exhibiting the unused good with a corresponding description such as “unopened and as-is good received as a Christmas gift”, the seller bears no obligation to procure and deliver a replacement for such good because the deal is based on the characteristic of such good, although it is physically possible to procure its replacement in the market. In such case, the buyer may claim for the termination of a contract (or for compensation) if the buyer cannot perform the purpose of the sales contract due to a defect in the subject item, for example,

where, the buyer was not aware of such defect upon conclusion of the sales contract (hereinafter referred to as “liability for defects” under Article 570 of the Civil Code. A judicial precedent has held that liability exists for defects in sales contracts for unspecific goods if any defect is found after the receipt of such goods (Judgment of the Supreme Court of Japan, December 15, 1961).

- (C) Cases where a provision prescribed in the terms and conditions of contract (e.g. exhibition information) exist which stipulates that a contract may be terminated under certain circumstances

Some sales contracts stipulate the terms and conditions for the termination of contract in advance; while others may stipulate that a product is “returnable if you are not completely satisfied” or returnable under other circumstances. In such case, the parties may terminate the contract as long as such party satisfies the terms for termination of contract.

- (D) Cases where the parties agree to the termination

Furthermore, if the parties agree to the termination ex post facto, the contract may be terminated.

3. Cases where the goods may be exchanged for other goods

If the deal does not concern specific goods, and if the goods can be replaced with other goods available in the market, the seller is responsible to deliver the product free of defect in accordance with the description thereof and the buyer may demand to exchange a defective product with a non-defective product as described in the exhibit information (description). If the delivered product does not match the description in the agreement, the buyer may demand that the seller exchange such product for a product which satisfies the description specified in the agreement.

4. Cases where the goods may be repaired

If the goods on exhibition are unspecific and can be replaced with other goods available in the market, the seller bears the responsibility to deliver goods free of defect in accordance with the description and the buyer may demand that the seller deliver the goods which both comply with the description and are free of defect. If the delivered product does not match the trade description, the buyer may demand that the seller exchange such goods for goods which match the

trade description and may at the same time demand that the goods received from the seller be repaired (“claim for full performance”).

5. Cases where damages may be compensated

If the goods on exhibit are special and cannot easily be easily replaced by other goods in the market, the seller is deemed to have fulfilled its delivery duty even if the seller delivers such “as-is” defective products. In such case, the buyer may claim compensation (liability for defect goods, Article 570 of the Civil Code) although it may not terminate the contract. A judicial precedent ruled that a liability for defects exists in a sales contract for unspecific goods if any defects are found after the receipt of such goods (Judgment of the Supreme Court of Japan, December 15, 1961).

Also, regardless of whether the goods are specific and/or unspecific, if a party suffers damages because of the nonperformance of the counterparty of its duties (delivery duty, payment duty, etc.), such suffering party may claim a significant amount of compensation.

(C) Conclusion of sales contracts in internet auctions

[Issue]

When are sales contracts concluded in internet auctions?

[Approach]

The timing for the conclusion of contracts in the course of internet auctions is determined on a case by case basis because there are various types or forms of internet auctions. Such timing for the conclusion of a contract is determined based on the intention of the parties as reasonably interpreted after taking into account the nature of each transaction.

Cases where a contract is deemed to have been concluded at the time of the acceptance of the successful bid

- The exhibitor provides a good for exhibition based on the premise that such good will be sold, irrespective of the bidders, based on the terms and conditions of sales stipulated in the description, while the successful bidder is participating in the bid on the premise that it would purchase the good at the successful tender price in accordance with such exhibition terms and conditions. In other words, the exhibitor and the successful bidder are engaged in internet auction based on the premise that such exhibitor and the successful bidder will be bound by the conditions of transactions at the time of the acceptance of the successful bid.

Cases in which a contract is not deemed to have been concluded at the time of the acceptance of the successful bid

- The exhibitor and the successful bidder acknowledge that the description of goods by the exhibitor in the internet auction site is simply an advertisement or publicity and the parties engage in the internet auction based on the premise that the parties will not be bound by the conditions of transactions (successful tender price, description of good, etc.) at the time of the acceptance of the successful bid and that the conditions of transactions may be negotiated freely by the parties after the internet auction is closed.

[Explanations]

1. Problem identification

When a successful bid for goods is accepted in an internet auction, a sales contract is concluded between the exhibitor and the successful bidder at the time the bid is successful. The legal relationship between the auction users is governed by the sales contract. In other words, under the sales contract, the seller (exhibitor) and the buyer (successful bidder) bear their own respective obligations (principally, the seller shall deliver the goods as specified in the exhibit terms and conditions and the buyer shall pay the amount bid subject to the bidding terms and conditions).

On the other hand, the terms of use in the auction sites are stipulated in various forms depending on each business model (e.g., “a successful bid does not constitute the conclusion

of a sales contract but only entitles the successful bidder to a priority right for negotiation”, “the parties are obliged to execute a sales contract concurrently upon a successful bid” or “the parties are responsible to execute the contract in accordance with good faith principles”). In the meantime, as a preventive measure against troubles, it is desirable to clearly specify the details of contract regarding the shipping charges or other terms in the exhibition information, even though this is not often done.

Therefore, at which stage of the transaction is a contract considered to have been concluded by the parties? If a contract is deemed to have been concluded at the time of the acceptance of the successful bid, the exhibitor becomes obliged to deliver the goods as stipulated in the exhibition information and the successful bidder becomes obliged to pay the tender price. In the meantime, if the auction system only acts as an information intermediary simply posting information on sales and purchases (for example, “Buy & Sell Bulletin Board”), a contract is not formed at the time of the acceptance of the successful bid. However, a contract may be formed without being bound by the terms and conditions which are prescribed upon the successful bid depending on the negotiations between the parties after the acceptance of the successful bid. In other words, the issue related to the timing for the conclusion of a contract relates closely to what rights or obligations arise between the parties under the sales contract or to which expression of intention should the parties refer to when considered with the invalidation due to mistake. Should the parties be bound by the terms and conditions at the time of the acceptance of the successful bid?

Also, if a provision concerning the timing for conclusion of a contract is prescribed in the terms of use, should the parties be bound by such provision concerning the conclusion of a contract?

2. Timing of conclusion of contract in internet auction

A sales contract is concluded when the intentions of the buyer (to apply for a contract) and the seller (to accept such application) accord with each other. The timing of such accordance is determined by a reasonable interpretation of the actual intentions of the parties. There are various forms of internet auctions and it would be difficult to determine whether a contract is formed. However, in general, if it is likely that the parties intended to participate in the transaction based on the premise that they would be bound by the terms and conditions prescribed at the end of the bidding time (at the end of auction), then it can reasonably follow that a sales contract has been formed between the successful bidder who satisfied the bidding terms and conditions which were presented by the exhibitor at the end of bidding time.

In some cases, the Auction Operators particularly prescribe a provision in the terms of use which designates the time at which a sales contract comes into effect. For example, in some

cases, it is stated that a sales contract will only come into effect after negotiations have been held between the exhibitor and the successful bidder following the end of the auction. In such case, the terms of use usually do not specify at what stage, after the successful bid, the contract comes into effect. In general, such description in the terms of use may not fix the timing of the conclusion of contract; rather the time the contract is executed can only be determined by identifying the offer made and its acceptance which form the basis of the sales contract. Therefore, although the terms of use may prescribe that the contract comes into effect at the time the auction ends, it does not necessarily mean that such terms of use has binding force. Notwithstanding the above, the specification of timing in the formation of a contract in the terms of use generally has an impact on the intentions of the users. Therefore, it should be taken into consideration when interpreting the intentions of the parties. As a result, if it is determined that the user had no intention to execute a contract at the time the auction ended, it would be held that the contract had not come into effect at the closing of the auction.

(D) Effectiveness of special clause “No Claim, No Return” policy

[Issue]

In some cases, in internet auctions or other individual transaction, a seller stipulates a “No Claim, No Return” policy regarding the exhibition items. A buyer may bid and/or make a successful bid for the items after having agreed to that policy. In such case, could the successful bidder or the buyer complain about or return the purchased item?

[Approach]

Posting a special “No Claim, No Return” clause does not always mean that it has legal effect. The validity of the clause will be judged in light of good faith principles.

Cases where a special “No Claim, No Return” clause may be valid

- If there is a posting which says “this junk item is sold on a NO CLAIM, NO RETURN basis”, the exhibitor may be discharged from any responsibility even if such item is inoperative.

Cases where a special “No Claim, No Return” clause may be invalid

- If the exhibitor had known of any dent or stain affecting the product but had not mentioned such to the bidders, such special clause is not valid and the exhibitor may not be discharged from liability for defect.
- If a “No Claim, No Return” clause is posted and the bidder for whatever reason misunderstands material matters relating to the transaction because of a deficiency in the description of the goods or items, such clause may be ruled inoperative due to the material misunderstanding.

[Explanations]

“No Claim, No Return” is language an exhibitor may use (such as “all sales final - ‘no refunds or returns’”) in the description of a product on exhibition in internet auctions. The issue is whether the bidder and/or successful bidder, after agreeing to such policy, may not request a refund or return (termination, returns etc.) the product. Especially, if the goods delivered differ from their description or if while no discrepancy existed between the description of the product and the product actually delivered, but where the buyer would not have participated in the bid had it known of circumstances which were not specified in the description, can the buyer still claim against the seller for the invalidation or termination of the contract?

In general, if a seller posts the language “No Claim, No Return” regarding any goods on exhibition, it is interpreted that the seller has expressed its intention that only those bidders who agree that “the seller accepts no claims or returns concerning the product” should be able to participate in the bid. This is considered a special clause which discharges the seller from

any liability for defect (Article 572 of the Civil Code). The discharge from liability for defect means that the seller (exhibitor) should have no liability for any latent defects in the tendered product. Descriptions such as “this junk item is sold on a ‘No Claim, No Return’ basis”, or “we offer this used and antiquated product on a no claim no return basis” are some typical examples we can find on websites. In some cases, “No Claim, No Return” is itself simply indicated. In principle, it is valid to prescribe such special clause.

However, a special clause between users cannot serve as a justification for any act that is against the principle of good faith and therefore, a seller shall not be discharged from liabilities if the exhibitor itself is aware that all or part of the items on exhibition belong to others or that the quantity of products are insufficient, that the item on exhibition has any defects (e.g. any dents or stains which are not stated in the description of such product), and where the seller still engages in the transaction without notifying the bidders and/or successful bidders thereof. In such event, the termination of a contract or compensation for damages may be claimed on the grounds of liability for defect or error etc. (or fraud, as the case may be), even though the “No Claim, No Return” clause had been indicated.

(E) Internet auctions and the Specified Commercial Transactions Law

[Issue]

Where persons sell goods through internet auction sites, do Article 11 (Display of required items in advertisements) and Article 12 (Prohibition of misleading advertisements) of the Specified Commercial Transactions Law apply?

[Approach]

Business entities who sell “specified products” as defined in the Law Concerning Specified Commercial Transactions (hereinafter referred to as the “Specified Commercial Transactions Law”) are subject to obligations to display certain items in advertisements (Article 11) and to the prohibition of misleading advertisements (Article 12). In internet auction sales, these provisions apply to businesses, whether legal entities or individuals, engaged in transactions which are to be repeated and are continuous with a view to profit.

[Explanations]

Online transactions which accept an offer via the internet, including auctions, fall in the “correspondence sales” (“*tsûshin-hamba*”) category defined in the provisions of the Specified Commercial Transactions Law. Therefore, business entities who sell “specified products” (Paragraph 4, Article 2 of the Specified Commercial Transactions Law and Schedule 1 of the Ordinance for Enforcement of the Specified Commercial Transactions Law) through internet auctions are subject to the obligations to display certain items in advertisements (Article 11) and to the prohibition of misleading advertisements (Article 12) as stipulated in the Specified Commercial Transactions Law. Furthermore, in the event of a violation, violators are subject to administrative dispositions and penalties⁶. Moreover, these provisions apply to any businesses, whether legal entities or persons, engaged in transactions which are to be repeated and are continuous with a view to profit.

In this case, whether the business is “repeated and continuous” is determined in consideration not only of internet auctions but also of transactions conducted in actual physical venues. For example, when an individual engaged in business uses internet auctions to exhibit goods one

⁶ Paragraph 1, Article 11 of the Specified Commercial Transactions Law requests the prices of a product to be displayed; however, in the case of Internet Auctions, the nature of the auction process means that the prices have not yet been determined. In this regard, the law requests that the price determination mechanism be constituted by clear rules, according to which the price is determined and which is clearly displayed.

single time and the business also sells those products at an actual physical venue, these transactions are considered to be subject to the Specified Commercial Transactions Law. Dissimilarly, where an individual makes an exhibition to dispose of goods collected for the purposes of a personal hobby, despite their large quantities, these transactions may not be considered as conducted by a business entity.

Whether a business has a “view to profit” (*eiri-mokuteki*) can be determined objectively. For example, when one hundred pieces of the same item are exhibited in one month, such offering is generally regarded as solid proof of transactions by a business⁷.

Internet auctions are a system which enables individuals, who in the past had only been consumers, to become sellers; however, when an individual is deemed a “business entity”, such individuals may be subject to the Specified Commercial Transactions Law.

⁷ The definition of a “business entity” differs under each law. For example, the meaning of “business entity” under Paragraph 2, Article 2 of the Electronic Contract Law and “as a business” under Subparagraph 1, Paragraph 1, Article 2 of the Trademark Law covers instances where the same act is conducted on a repeated and ongoing basis absent any requirement of a profit objective.

(F) Internet Auctions and the Premiums and Representations Act

[Issue]

Does Article 4 (Prohibition against misleading representations) of the Premiums and Representations Act apply to the sale of goods provided by individuals through internet auctions?

[Approach]

When business entities participate in internet auctions and sell goods to consumers, Article 4 of the Premiums and Representations Act is applied.

[Explanations]

There are cases where business entities participate in internet auctions and sell goods to consumers. Such cases constitute a Business-to-Consumer transaction using the internet, so Article 4 of the Act against Unjustifiable Premiums and Misleading Representations (hereinafter referred to as the “Premiums and Representations Act”) applies, and the misleading representations described in each subparagraph of the same article are prohibited⁸.

(Reference)

When a business offered wristwatches for sale to general consumers on an internet auction site on at least 52 occasions between March and August 2002, the Fair Trade Commission deemed these representations to be in violation of the provisions of Subparagraph 1, Article 4

⁸ The definition of a “business entity” (“*jigyô-sya*”) differs for each law. The meaning of “business entity” under the Premiums and Representations Act is the same as “person engaged in a commercial business, industrial business, financial business, or other business” stipulated in Article 2 of the Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the “Antimonopoly Act”). Not only legal entity but also individuals may be regarded as businesses. The term “business entity” under the Specified Commercial Transactions Law applies to cases in which a person is engaged in sales on a repeated and ongoing basis with a view to profit, whereas the meaning of “business” under Paragraph 2, Article 2 of the Electronic Contract Law and “as a business” (“*gyô-to-shite*”) under Subparagraph 1, Paragraph 1, Article 2 of the Trademark Law covers instances where the same act is conducted on a repeated and ongoing basis absent any requirement of a profit objective.

(Misrepresentation of the quality of products) under the Premiums and Representations Act, and issued a warning to the business involved.

(G) Internet Auctions and the Electronic Contract Law

[Issue]

Does Article 3 of the Electronic Contract Law (Exception for contract invalidity due to mistake in expression of intention) apply to sales contracts concluded between exhibitors and successful bidders in internet auctions?

[Approach]

Article 3 of the Electronic Contract Law is considered in principle not to apply to Consumer to Consumer auctions.

[Explanations]

When a consumer makes an offer to a business entity through a website in accordance with the procedures displayed on the website by the business entity, Proviso to Article 95 of the Civil Code will not apply to the offer and the consumer can invalidate an unintended application for contract or an expression of intent which differs from his true intent, if the customer makes an offer unintentionally or makes an offer which is different from his actual intention; except for cases where the business entity has taken steps to secure the confirmation of the consumer of his actual intention and its contents, or where the consumer himself indicates that it is not necessary to have an opportunity to confirm the intent to apply or the contents of the application (Article 3 of Electronic Contract Law).

The aforementioned law applies to Electronic Consumer Contracts which are concluded between consumer and business entities, so-called “Business to Consumer” transactions. This law addresses the gap between consumers and business entities in the context of electronic commercial transactions.

Currently, the parties to a transaction (exhibitors and bidders) are on even grounds in most of the Consumer to Consumer auctions. Therefore, the aforementioned laws would not apply to the sales contracts between the exhibitors and bidders.

(H) Internet auctions and the Antique Dealings Law

[Issue]

Must business entities engaging in internet auctions obtain licenses as used goods merchants (“*kobutsu-shō*”) or used goods market operators (“*kobutsu-shijō-shū*”) to comply with relevant laws?

[Approach]

Internet Auction Operator need not obtain a license as a used goods merchant or used goods market manager, unless they engage in internet auctions in the sale or exchange of used goods on their own or under consignment or if they manage a market for the sale or exchange of used goods between businesses.

[Explanations]

1. Whether a license is required for a used goods merchant or used goods market operator

Under the Antique Dealings Law, a license must be obtained (1) where a person is engaged in the sale or exchange of used goods, or the sale or exchange of used goods under consignment, (except those who simply sell used goods or repurchase goods sold from the buyers) (Subparagraph 1, Paragraph 2, Article 2) and (2) where a person is engaged in the business of operating markets for used goods (defined as markets for purchases and exchanges by used goods merchants; Subparagraph 2 of the same paragraph). In case (1) the license is obtained from the prefectural Public Safety Commission in charge of the business premises of the used goods merchant. In case (2) the license is obtained from the Public Safety Commission in charge of the location of the used goods market operated by the used goods market operator (Paragraph 3 and Paragraph 4 of Article 2, Article 3).

Unless Auction Operators sell or exchange used goods by themselves or have consigned them to somebody else, or unless they operate a market for the sale or exchange of goods between used goods merchants, it is deemed not necessary to obtain a license as a used goods merchant or used goods market operator under the foregoing laws. In other words, Auction Operators who are not parties to internet auctions are neither “used goods merchants” nor “used goods market operators”.

However, persons who participate in internet auctions to engage in the sale of used goods must duly obtain a license as a used goods merchant.

2. Summary of the Amended Antique Dealings Law

The Law for the Partial Amendment of the Antique Dealings Law, which was legislated to prevent the sale of stolen goods in internet auctions (2002 Law No. 115), was enacted on September 1, 2003. This law defined those who engage in auction brokerage businesses (specifically designated as those who uses electronic information processing systems specified by relevant ordinances) of used goods as “used goods auction brokers” (excluding used goods market operators) (“*kobutsu-seri-assen-gyô*”) and applies certain regulations (Subparagraph 3, Paragraph 2, Article 2). Internet auctions are designated as used goods auction brokers (Article 3, Amended Enforcement Ordinance of the Antique Dealings Law)⁹.

The Amended Antique Dealings Law could be summarized as follows:

- (1) Persons engaged in a business of used goods auction broker shall submit a written notice thereof to the public safety commission (Article 10-2, Paragraph 1).
- (2) A used goods auction broker shall promptly notify the police when suspicions arise that goods offered on the internet auction site are stolen (Article 21-3).
- (3) When a used goods auction broker attempts to obtain applications for assistance from persons attempting to sell used goods, said operators shall endeavor to take measures to confirm the honesty of the solicited persons, and when assisting persons attempting to sell used goods, shall endeavor to prepare and keep records thereof (Article 21-2, 21-4).
- (4) A used goods auction broker can obtain certification from the public safety commission attesting that the methods of conducting business conform to the standards designated by the National Public Safety Commission on the rapid discovery and prevention of the sale of stolen goods. A used goods auction broker, who has obtained certification from the public safety commission, can display such certification. Except where the certification has been duly obtained, no one shall display such certification or put forth any misleading similar display (Paragraphs 1-3 of Article 21-5).

⁹ The “auction method” (“*seri-no-hôhô*”) stipulated under Subparagraph 3, Paragraph 2, Article 2 of the Amended Antique Dealings Law is defined as the method by which an electronic information processing system consists of computer and telecommunication wires; where the computers of the exhibitor, the bidders and the auction operator are connected to each other; where the communication including goods information provided by the exhibitor and price information provided by the bidders are electronically and automatically transmitted and disclosed to common users (Article 3, Enforcement Ordinance, Amended Antique Dealings Law).

- (5) A used goods auction broker located in a foreign country (limited to cases where the persons to whom assistance is provided are located in Japan) shall be treated in the same way as operators engaged in a used goods auction broker under (4) (Article 21-6).
- (6) A used goods auction broker provides assistance to a person offering goods, which are reasonably suspected as being stolen property, the Superintendent-General of the Tokyo Metropolitan Police Department, the chief of the Prefectural police headquarters, or the chief of a police station can order a used goods auction broker to stop the auction involving the applicable used goods (Article 21-7).
- (7) The chief of the prefectural police headquarters or the like can request necessary reports in regard to stolen goods from a used goods auction broker when deemed necessary (Paragraph 3, Article 22).

(3) Prize Offers on the Internet

[Issue]

Are prizes offered to consumers on internet websites subject to the provisions of the Premiums and Representations Act, which regulate premiums provided in connection with transactions?

[Approach]

I. Prize offers on the internet

Prize offers made on a commercial transaction site do not constitute the provision of an economic benefit associated with a transaction, subject to the Premiums and Representations Act (therefore, they are called as “*open kenshō*”, prize offer open to public); even though the prize offer is located on the commercial websites (e.g. offeror assumes that the users found the offer on the commercial transaction websites; the prize offers were announced on the websites; offeror accepted applications from users on the website).consumers are free to move from one website to another

Nevertheless, if a person cannot apply for a prize offer unless he purchases a product or service on the commercial transaction site, or if a purchase increase the odds of winning a prize, such prize offers are deemed to be associated with a transaction and therefore it will be subject to the Premiums and Representations Act.

II. Prize offers from internet service providers and the like

Prize offers made on the websites of businesses that provide services to connect to the internet, such as internet service providers, telephone companies, and the like, are not regarded as associated with transactions, provided that the persons eligible to apply for the offer are not limited to the present users of the connectivity service provided by the same entity. Thus, such offers as *open kenshōs* are not subject to the Premiums and Representations Act.

[Explanations]

1. Problem identification

In connection with the rapid increase in electronic transactions made at commercial transaction sites on internet websites, prize offers are widely used to consumers on internet websites. It is often difficult to determine whether such offers are subject to the provisions of

the Premiums and Representations Act which regulates premiums provided in connection with transactions. For that reason, the Fair Trade Commission has expressed their opinion on how prize offers made on the internet should be treated.

(<http://www.jftc.go.jp/pressrelease/01.april/010426.pdf>)

The contents are as follows:

2. Summary of regulations on prize offers

The Premiums and Representations Act regulates premiums (Article 3), defining a premium as either (1) a means of attracting customers; (2) a prize provided in association with a transaction; or (3) an economic benefit (Paragraph 1, Article 2). Furthermore, a “contest” is defined as the system by which a beneficiary of the premium is selected and/or the premium amount is determined (1) through use of a lottery or other random selection; or (2) through judging the superiority or correctness of certain acts (Restrictions Concerning the Provision of Premiums by means of Prize Offers; Notice of the Fair Trade Commission, No. 3, March 1, 1977).

Accordingly, premium offers, which provide an economic benefit according to the result of a lottery or otherwise, associated with a transaction as a means of soliciting customers, are subject to the provisions of the Premiums and Representations Act. As used herein, “associated with a transaction” means that a premium is provided in connection with a transaction; e.g. where only a purchaser of certain goods can obtain premiums; where a premium is provided to the answerer of a quiz posted on the label of certain goods; and where a premium is provided to those who entered the offeror’s store.

Under the Premiums and Representations Act, the maximum value of a premium provided by means of a prize offer shall not exceed twenty times the price of the transaction involving the prize offer (however, when the applicable amount exceeds ¥100,000 yen, the limit shall be ¥100,000 yen). In addition, the total value of premiums provided by means of prize offers shall not exceed two percent (2%) of the planned total value of the transactions involving such prize offers (Restrictions Concerning the Provision of Premiums by Means of Prize Offers; same notice as above).

Where an offer is made to provide an economic benefit through the selection of a specified person by means of a lottery, or to otherwise solicit general consumers in an advertisement, and where such offer is not associated with a transaction (meaning that such prize offers or prizes do not constitute a premium governed by the Premiums and Representations Act), such prize offers as “*open kenshōs*” are subject to the provisions of the Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the

“Antimonopoly Act”). In this case, the maximum value of the economic benefit is ¥10 million yen. There is no regulation on the total value of the prize (Regulation of Unfair Transaction Methods When Providing Economic Benefits by Means Of Drawing or the Like in Advertisements; Circular Notice of the Bureau Chief of the Fair Trade Commission, No. 5, July 2, 1971).

3. “*Open kenshō*” in the internet

Internet websites are exceptional because they are open to all and can be used as a means to notify about and to handle applications for so-called “*open kenshō*.” Such websites are already extremely widespread. Moreover, consumers can freely move between pages on a website. As a result, even where a prize is offered on one webpage of a commercial transaction website or even where the webpage offering the prize cannot be viewed unless the commercial transaction site itself is visited, any and all attempts by persons to respond to the prize offers are not directly tied to the purchase of a product or service.

Accordingly, with respect to prize offers made on websites, even if the applicable website is constructed as specified above, this does not constitute the provision of an economic benefit associated with a transaction. Therefore, such prizes as *open kenshōs* are not subject to the Premiums and Representations Act. However, if a person cannot apply for a prize offer unless he purchases a product or service on a commercial transaction website, or if the purchase of a product or service facilitates or increases the likelihood of obtaining the prize (for example, where hints or correct answers to a quiz concerning a prize offer can only be obtained by purchasing a product or service), the offers are regarded as associated with a transaction and therefore subject to the provisions of the Premiums and Representations Act.

4. “*Open kenshō*” by internet service providers

As long as persons other than those contracting with the company operating a website are able to visit the appropriate website to apply for prize offers, any prize offers made on the internet by internet service providers, telephone companies, or similar companies offering connectivity services required to gain internet access are not regarded as associated with transactions, provided that the actual eligibility for such offers is not restricted to current users of the connectivity service offered by the same entity. Thus, any offer complying with the foregoing is not subject to the Premiums and Representations Act (instead they are regarded as an “*open kenshō*”).

3. Consumer Protection

(1) Mistake caused by Consumer's Erroneous Operation

[Issue]

In Business-to-Consumer electronic transactions, if the company has not taken measures to reconfirm the consumer's offer, such as by reconfirmation of the details of an offer, any contract executed by the consumer's erroneous operation is invalid in principle (Article 3 of the Electronic Contract Law). Conversely, if the company has taken reconfirmation measures and there exists gross negligence on the part of the consumer, the company can assert the valid formation of a contract. What specifically are these reconfirmation measures?

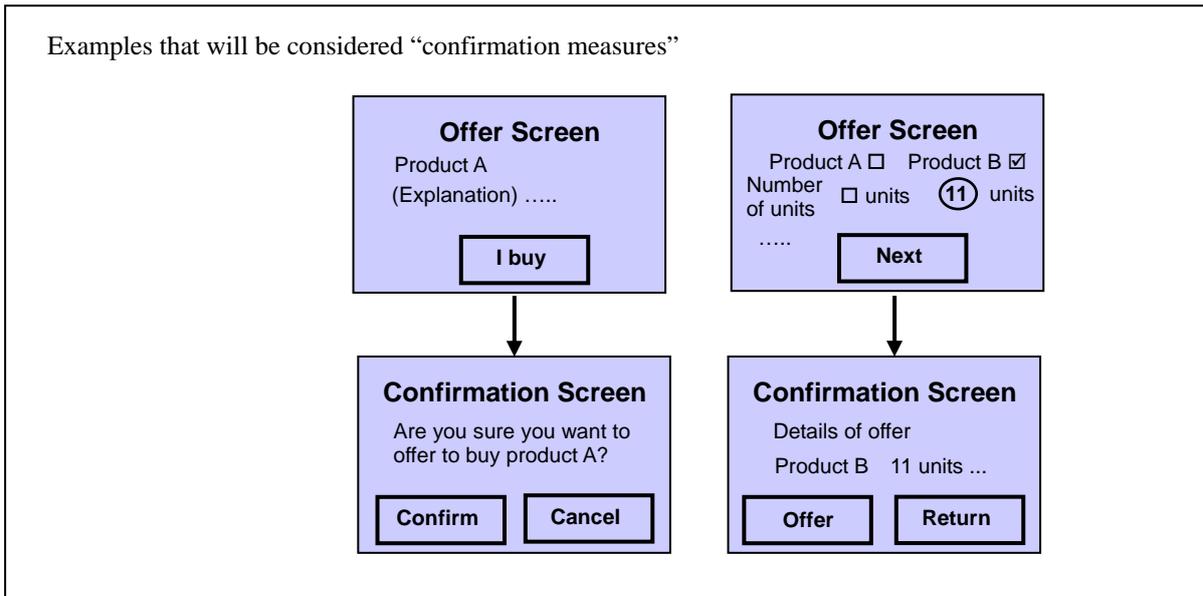
[Approach]

(I) Remedy for consumer's erroneous operation

In Business-to-Consumer electronic transactions, an expression of intention by a consumer caused by the erroneous operation of the computer by the consumer, which corresponds to a mistake of an essential element (“*yôso-no-sakugo*”), is invalid, except where (i) the business entity has taken measures to confirm the consumer's intention, e.g. by presenting an opportunity for consumers to confirm the content of offers before the consumer makes his final offer; or (ii) the consumer has expressly abandoned any 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 business entity can assert the formation of a contract (Proviso of Article 95 of the Civil Code).

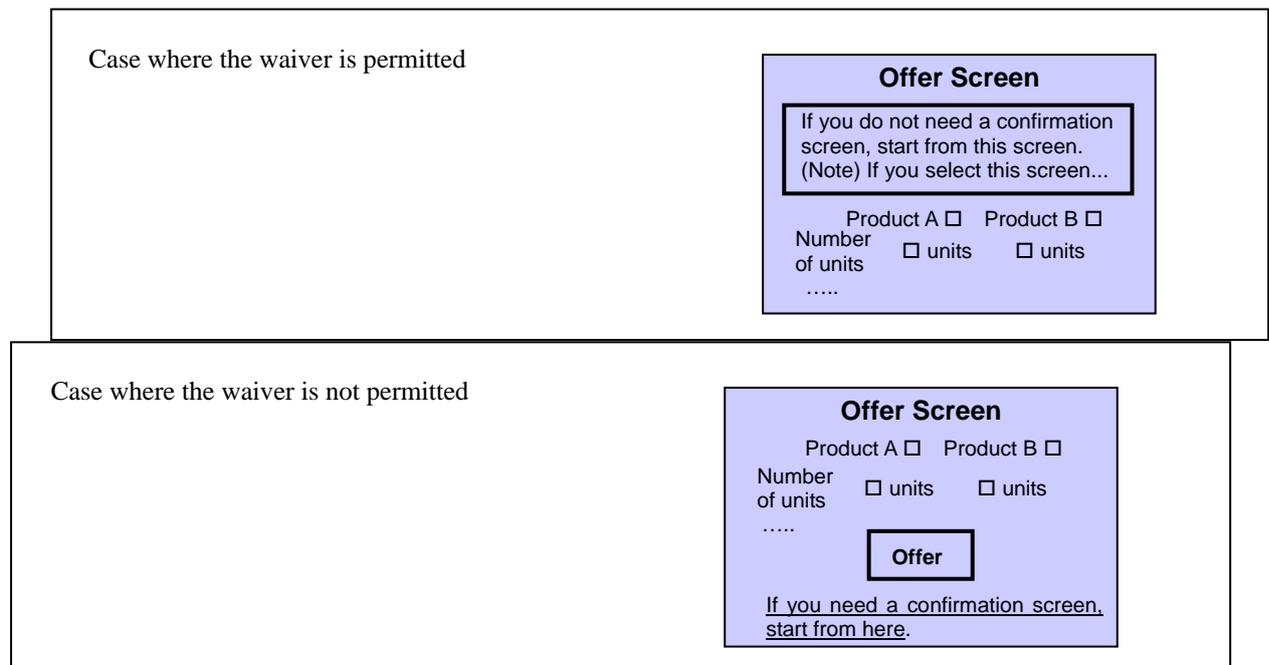
(II) Confirmation measures to be taken by the business entity

Confirmation measures must constitute a substantial query which confirms that the consumer had an actual intention to offer and that the consumer intended to offer what he inputted into the computer. For example, the business entity needs to construct a webpage on which (i) the consumer can clearly understand that he makes an offer by clicking a certain transmission button; or (ii) the concrete contents of his offer are plainly displayed to the consumer and on which the consumer is given an opportunity to revise an offer prior to making the final offer.



(III) Consumer’s waiver of an opportunity to confirm

If the consumer waives any opportunity to confirm an offer, such waiver must be explicitly expressed. Whether said waiver language is properly formulated will be assessed according to strict criteria. For example, any waiver will not be admitted if the consumer were forced to provide it by the business entity or if the business entity intentionally induced the consumer to do so.



[Explanations]

1. Special measures concerning invalidity due to mistake

Where a consumer can enter into a contract with a business entity by following the procedure displayed on its website, if he makes an unintentional offer (for example, where he mistakenly sends an offer although he has no actual intention to make an offer) or if he makes an offer in which the contents do not correspond to his actual intentions (for example, where he acted without revising his first offer where the first offer does not correspond with his actual intention, and where he intended to make a change), then he can assert the invalidity of the offer which was not intended or which is different from his actual intention. The proviso to Article 95 of the Civil Code is not applicable except where the business entity has taken measures to give the consumer an opportunity to confirm his intention to make the offer and to confirm the contents of the offer, or where the consumer voluntarily waives such opportunity (Article 3 of the Electronic Contract Law).

An example of an unintentional offer is where a consumer mistakenly presses a button executing a contract instead of pressing the cancellation button. An example of the contents of an offer being different from what is intended is where the consumer presses the offer button after mistakenly entering 11 units instead of 1 unit.

2. “Request for confirmation”(“*kakunin-wo-motomeru-sochi*”) in Article 3 of the Electronic Contract Law

If the business entity has taken measures to ask the consumer to confirm his intention to make an offer and the contents of the offer are on the screen, then the main part of Article 3 of the Electronic Contract Law does not apply. In such cases, under the proviso of Article 95 of the Civil Code, the business entity can assert gross negligence on the part of the consumer in submitting an unintentional offer or in making an offer containing inaccurate contents (proviso to Article 3 of the Electronic Contract Law).

The confirmation measures must include substantially asking the consumer to confirm whether he wishes to make the stated offer and whether he wishes to make the stated offer for the products/services inputted.

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

- On which the consumer can clearly recognize that by clicking on a certain button, he is expressing his intention to make an offer; and

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

3. “Explicit waiver” in Article 3 of the Electronic Contract Law

When the consumer expressly waives the need for the confirmation measures mentioned above, the main part of Article 3 of the Electronic Contract Law does not apply. For that reason, under the Proviso to Article 95 of the Civil Code, the business entity can assert that there has been gross negligence on the part of the consumer in making an unintentional offer or making an offer for mistaken contents (proviso to Article 3 of the Electronic Contract Law).

An “Explicit waiver” (“*ishi-no-hyômei*”) is the act of the consumer which positively communicates to the business entity that, by his own decision he does not need to be given any confirmation measures. Whether this explicit waiver has been made will be carefully scrutinized. This explicit waiver will be invalid if the business entity forces the consumer or intentionally induces him to consent to the waiver. Other examples of this explicit waiver include cases where the business entity displays the message: “The consumer is deemed to have consented to waive confirmation measures” or in which the consumer cannot buy a product unless he clicks the button: “I expressly waive confirmation measures”. In short, an intention to abandon the need for confirmation measures must be expressed clearly and be based on the voluntary decision of the individual consumer.

With respect to the explicit waiver, the business entity bears the burden of proof.

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

[Issue]

In internet trading, what specifically is an “inducement 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]

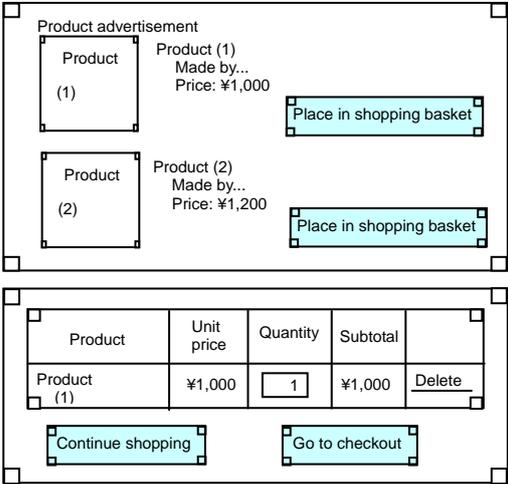
In internet trading, a business entity is subject to administrative penalties where (I) there are no measures which enable customers to understand easily that an application will result in the formation of a fare-paying contract, or (II) there are no customer-friendly measures which enable consumers to confirm and/or to revise the content of his offer easily.

(I) Display indicates an offer for a contract for value

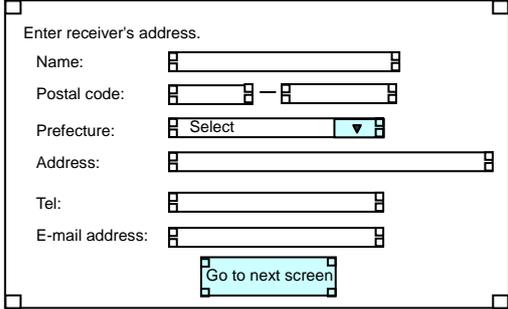
Cases in compliance

[Screen example 1]

- Step 1: Select product



- Step 2: Enter personal information



- Step 3: Display final confirmation screen

Order conbusiness

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

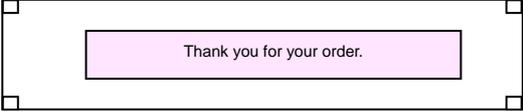
... card xxxx-xxx
Expiry date: 06/2002

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 possibly not in compliance

[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) Opportunities for confirmation and correction

Cases not in compliance

[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 possibly not in compliance

[Screen example 5]

<Screen 1>

Product name ●●●	Image <div style="border: 1px solid black; width: 40px; height: 40px; margin: 0 auto;"></div>	Product description	¥ 5,340
			<input type="button" value="Next"/>

<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

Where a business entity induces customers to apply for sales contracts or service contracts against the will of the customers, and where such inducement is considered likely to harm the fairness of trading and the interests of customers, the Minister of Economy, Trade and Industry (METI) may instruct the business entity to take necessary measures (Article 14 of the Specified Commercial Transactions Law).

In internet trading, an “inducement to have a customer request a contract contrary to the will of the customer specifically refers to (i) cases where there are no measures which enable the customer to understand easily that the application results in the formation of a fare-paying contract (Subparagraph 1, Paragraph 1 of the Regulations for the Enforcement of the Specified Commercial Transactions Law) and (ii) cases where there are no customer-friendly measures which enable consumers to confirm and/or to revise the content of his offer easily (Subparagraph 2, Paragraph 1 of the Regulations).

2. Guidelines concerning “Inducement to Have the Customer Enter into a Contract Contrary to the Customer’s True Intent”

The METI has stipulated guidelines concerning “Inducement to Have the Customer Enter into a Contract Contrary to the Customer’s True Intent”. The guidelines include the following interpretative standards:

(1) Indication of offer (Subparagraph 1)

(i) Cases not considered subject to Subparagraph 1:

(A) Cases where a screen entitled “Order Confirmation” (final confirmation screen) is always displayed at the final stage of an offer and where the offer 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 overtly that this action is the final step in making an offer:

(a) The text on the final offer button reads: “I want to order (buy or apply for) the above product”.

- (b) A message near the final offer button reads: “Do you want to order (buy or apply for)...?” near the final offer button. In addition, the text on the final offer button reads “Yes”.

(ii) The following cases are likely to fall under Subparagraph 1:

(A) Cases where the text of the final offer button only reads “Send”, instead of “Order (or “Buy” or “Apply for)””; and where no further text on the offer button is displayed.

(B) Cases where text misleads the customer to believe the transaction is “free of charge”, such as where the word “Present” is located near the final offer button.

(2) Opportunities for confirmation and correction (Subparagraph 2)

(i) Cases which meet both of the following requirements I and II are generally considered not to be subject to Subparagraph 2:

I. Where either of the following measures is taken at the final application stage to enable customers to easily confirm the contents of their offers:

(a) At the final offer stage, the offer contents are displayed on the screen.

(b) Where although the offer contents are not displayed, a button with the text “Confirm the contents of the order” is displayed and customers can confirm the offer contents by clicking such button; otherwise, a button with the text “For confirmation, please return to the previous page by clicking the ‘back button’ of the browser”.

II. Where the customer can easily revise the offer content after the confirmation procedure described in I., such as:

(a) At the final application stage, buttons, such as “Change” and “Cancel”, are provided which enable customers to make corrections by clicking on those buttons.

(b) Where a statement exists such as “For corrections, please return to the previous page by clicking on the ‘back button’ of the browser”.

(ii) Each of the following case is subject to Subparagraph 2:

- (A) At the final offer stage, the offer contents are not displayed on the screen and where no button, such as “Confirm the contents of the order”, or other means are provided to allow the consumer to confirm the order contents and where no explanation is given to the effect that the customer can return to the previous page by clicking the ‘back’ button of the browser.
- (B) At the final offer stage, no button, such as a “Change” button, or other means are provided to make corrections and the screen presents no explanation to the effect that customers can return to the previous page by clicking the ‘back’ button of the browser.
- (C) Where the final offer stage induces the customer to make a final offer without confirming the contents of the offer due to the confusing structure of the system (unless otherwise amended by the consumer with complete attention): e.g., the configuration of the final offer stage webpage makes it nearly impossible to determine for how many units the user is making an offer

Reference Note:

Public guidelines exist concerning what webpage layouts pertain to the respective cases mentioned immediately above (Guidelines on “Actions to Have the Customer Request a Contract Contrary to the Wishes of the Customer” in internet trading).

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

(3) Regularization on Representations in Web Advertising

(A) Regulation under the Premiums and Representations Act

[Issue]

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 of services and the transaction conditions displayed by business entities on their websites are regulated by the Premiums and Representations Act.

Examples of misrepresentations

- Representing that computer anti-virus software has a “100% detection rate and can detect any virus,” despite the fact that it cannot possibly detect all viruses.
- When the date, on which the information is updated, is not disclosed, such as when a product is deceptively presented to consumers as a “new product”, despite the fact that it is no longer a new product.
- Websites which state that “a free 30 minutes” is available without making it clear that the free 30 minutes can only be used once site is used for 60 minutes or more misrepresenting to consumers that the site can be used unconditionally free of charge.
- Misrepresenting that Company Y internet service provider is “always less expensive than Company Z,” even though the speed of Company Y’s service is slower than that of the service offered by Company Z, misleading consumers to believe that Company Y more cheaply offers the same service as Company A.

[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 the Premiums and Representations Act, and regulated by the law include advertisements of equipment used for information processing, including the internet. That is, representations displayed by business entities at their websites of the contents of products or services and their transaction conditions are also regulated by the Premiums and Representations Act.

(1) Representations for product and service transactions conducted directly through the internet

(A) Representations concerning products and services in the internet transaction

(i) Problems under the Premiums and Representations Act

Business-to-Consumer e-commerce can by its nature lead consumers to a mistaken understanding when making product or service choices or when placing orders. Therefore, potential exists that consumers can suffer much harm in e-commerce transactions. Accordingly, there is a greater need for businesses to appropriately disclose information to consumers concerning product or service content or the terms of sale, than in transactions that taking place in person.

(ii) Cases where the Premiums and Representation Act applies

- Using expressions such as “Lose 5-6kg comfortably! Fast dieters can normally lose up to 3 or 4 kilograms in one week. Eat as much as you like! Original preparation formulated by our specialists based on medical studies uses natural ingredients that are good for dieting,” to emphasize efficacy and results without any adequate scientific basis and presenting the information in a manner that makes it appear academically authorized.
- Where strict conditions for product returns exist and where in fact almost no products can be returned, a business: does not clearly display the relevant conditions for product returns; states that “customers may return the product at any time even if it is not defective”; represents that users can unconditionally return the product.

(iii) Points of concern

- Business entity should not make disclosures concerning product efficacy without adequate bases when advocating the virtues of a product or service which may cause general consumers to form a mistaken understanding.
- Business entity should accurately and clearly disclose the specific details of their terms of sale such as the selling price, shipping charges, and the product returns policy, etc.

(B) Disclosure manner

(i) Problems under the Premiums and Representations Act

When information that concerns a product or service contents or terms of sale is available through a link, for example, when by clicking on text, you can receive more information about the product (collectively referred to below as “hyperlink text”), yet is not clearly disclosed, consumers may overlook the hyperlink text. The result is that the consumer may

not be exposed to information which may be material to his product decision. In addition, because a company can easily change the disclosure contents on its webpage, if the date is not disclosed on which the information was last updated, it will be difficult for consumers to know when the company first made the disclosed information available.

(ii) Cases where the Premiums and Representation Act applies

- When a business claims “no shipping charges” apply, whereas information disclosed in a link about the product delivery conditions state that “products will only be shipped free of charge to delivery locations within the Tokyo metropolitan area” – for example, when the hyperlink text is shown in unusually small text – consumers may overlook the relevant hyperlink text. By not clicking on the relevant hyperlink text, they will be exposed to the information concerning the relevant delivery conditions. As a result, consumers will come to the erroneous conclusion that products will be delivered unconditionally and free of charge.
- When the date, on which the information was updated, is not disclosed, for example, when a website asserts that a product is “new” with expressions such as “New Product” or “Latest Model,” consumers will wrongly believe that the product or service is the latest version.

(iii) Points of concern

(When hyperlinks are used)

- In order to ensure that consumers know to which information a link leads, businesses should describe the link contents with expressions which clearly communicate the relevant subject matter.
- To prevent consumers from overlooking links, businesses should consider functions such as text size and color to appropriately highlight them.
- The relevant text and links should be placed near related information in a way that ensures consumers will not overlook them.

(Time/Date when the information is updated)

- On each occasion a business entity changes information disclosed on a respective webpage, it should accurately and clearly disclose the date of the most recent change.

(2) Disclosures for internet information service transactions

(i) Problems under the Premiums and Representations Act

Because internet information provider services complete their transactions using the internet, such businesses must appropriately provide consumers with information such as whether they provide their information free of charge, the transaction terms and conditions such as a payment for long-term contracts, and information related to the download procedures used to purchase their products.

(ii) Cases where the Premiums and Representation Act applies

- Information provider sites which merely display “30 Minutes No Charge” without clearly disclosing that the free 30 minutes are conditional upon the consumer using the site for an hour or longer.
- Graphic image provider sites where an advertisement leads the consumer to believe that he is entering a one-month contract, e.g. “First step is the first month”, even though the consumer is entering an ongoing contract which includes the charging of a monthly fee in the month after the first free one.
- On websites selling downloadable website creation software, presenting statements such as “Easy to download,” without clearly showing that a specified version type of OS is required, despite the fact that the program will not function on a computer without the appropriate OS version installed.

(iii) Points of concern

- When an internet information provider service charges service fees, the business should accurately and clearly disclose that a fee will be charged.
- In situations involving long-term agreements such as those that charge monthly user fees, businesses should accurately and clearly disclose that, and how, the fee will be charged.
- Businesses should accurately and clearly disclose information concerning the type of OS, type of CPU, memory requirements, necessary hard disk capacity, and other operating environment conditions essential to utilizing their software.

(3) Internet connection service transactions

(i) Problems under the Premiums and Representations

For internet connection services such as DSL and TS1 which enable consumers to utilize broadband telecommunications, the most important factors in selecting a service include

transmission speed, the start date for the provision of services and the service charges, etc., thus businesses must properly provide this type of information to consumers.

(ii) Cases where the Premiums and Representation Act applies

(Internet service providers that enable consumers to use broadband telecommunications)

- It is misleading to represent services by simply stating “8Mbps maximum transmission speed” without disclosing that the maximum transmission speed is not guaranteed and without clear indication that transmission speeds will be slower depending on transmission facility conditions or interference from other circuits. Such misrepresentation may lead consumers to believe that they will always receive broadband service at the maximum transmission speed.
- It is misleading to represent that “You will be able to start using the internet from home in less than 10 days” despite the fact that the provision of services almost never begins within 10 days from the application for service because of delays in line connections, etc.
- It is misleading to represent that a company’s service is “Always less expensive than Company A” without indicating that their applicable service transmission speed is slower than that provided by Company A. Consumers could be misled to believe that the company is providing a similar service to Company A but at a lower price.

(iii) Points of concern

- Businesses should accurately and clearly disclose the fact that their broadband telecommunications speeds may be affected by the quality of the telecommunication facilities or by the interference of other circuits.
- When companies may be unable to begin providing services by the date indicated because of delays for whatever reason, they should accurately and clearly disclose this fact.
- When disclosing service charge comparisons, businesses should make their comparisons against services which are legitimately equivalent in transmission quality according to commonly comparative factors and which are available at the same time.

2. Announcement of guidelines

In an effort to promote the sound development of Business-to-Consumer e-commerce and consumer transactions, the Fair Trade Commission summarized the relevant issues under the Premiums and Representations Act with respect to representations in Business-to-Consumer e-Commerce, issuing a document entitled “Problems and Points of Concern under the

Premiums and Representations Act Concerning Representations in Business-to-Consumer E-Commerce,” setting forth points of concern regarding representations by businesses.

(<http://www.jftc.go.jp/pressrelease/02.june/02060501.pdf>)

(B) Regulations under the Specified Commercial Transactions Law

[Issue]

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, a business entity which sells products specified by the law over the internet must (I) present certain matters (Article 11); and (II) is prohibited from using misleading advertisement (Article 12).

(I) Duty of representation

Matters that must be represented

- 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., if returnable, and the conditions to returning it.
- Name, address, and telephone number of the vendor (and the name of the representative or business manager if the vendor is a corporation).
- Date of expiry of the effective period of an offer, if any.
- 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 vendor's responsibility for any latent 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 notify the vendor of their wishes. When the vendor sends unsolicited e-mail advertisements, in other words absent a consumer request or without obtaining their consent therefor, the vendor shall, following the term “[Business]” at the head of the subject space and in the e-mail text, indicate his name and the e-mail address at which consumers may contact the vendor to request removal from the e-mail list.
- When the vendor sends advertisements by e-mail without being requested by consumers or without obtaining their consent, the vendor must write “Unapproved Advertisement*” (“*mi-shōnin-kōkoku*”) at the head of the subject space and in the text of the e-mail.

(II) Prohibition of misleading advertisements

Matters prohibiting exaggerated advertisement

- 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 vendors and service providers; in the business conducted by vendors and service providers (Examples: Endorsements such as “Certified by XX Ministry” or “Recommended by XX Prefecture” for products, business entities, and others).
- Country of origin, place of production, and manufacturer
- Matters shown in (I) above

[Explanations]

1. Regulations on advertisement under the Specified Commercial Transactions Law

Transactions concluded through online applications over the internet fall under the category of correspondence sales as defined in the Specified Commercial Transactions Law. Therefore, business entities 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) must advertise in compliance with the advertising regulations under the Specified Commercial Transactions Law (Articles 11 and 12). If they violate the regulations, they will be subject to administrative or other penalties.

2. Duty of representation

When vendors 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 product price or service, etc.
- Time of delivery of the product, service, etc.
- Return of the product, service, etc., if returnable, and the conditions to returning it.

- Name, address, and telephone number of the vendor (and the name of the representative or business manager if the vendor is a corporation).
- Date of expiry of the effective period of an offer, if any.
- 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 vendor's responsibility for any latent 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 made by e-mail¹⁰.
- If advertising is by e-mail, the method by which consumers, who do not want e-mails, can notify the vendor of their wishes. When the vendor sends unsolicited advertisements by e-mail, in other words absent a consumer request and without obtaining their consent therefore, the vendor shall, following the term “Business entity” at the head of the subject space and in the e-mail text, indicate the name and e-mail address of the vendor at which consumers may contact the vendor to request removal from the e-mail list.) (Furthermore, if a consumer notifies a business that consumer no longer desires to receive e-mail advertisements, the vendor is prohibited from sending subsequent e-mail advertisements to the consumer (Article 12-2 of the Specified Commercial Transactions Law).
- When the vendor sends advertisements by e-mail without being requested by consumers or without obtaining their consent, the vendor must write “Unapproved Advertisement *” (Note) at the head of the subject space and in the text of the e-mail.

¹⁰ When a person (limited to for-profit entities or individuals engaged in business) sends e-mails to advertise or promote himself or a business (hereinafter referred to as “Specified e-mail”) to persons other than those specific persons who have granted their consent to the sender to receive said e-mails, the sender shall, at the head of the subject space and in the e-mail text, indicate that the e-mail is a Specified e-mail by indicating “Unapproved Advertisement *” along with his name, address, telephone number, the e-mail address used to send the e-mail, the e-mail address used to receive e-mails requesting removal from the e-mail list, and the like (Article 3 of the Law on Regulations of Transmission of Specified Electronic Mail).

In advertising on personal computer screens, etc., such as at home pages on the web, it is desirable that all of the above matters be displayed for confirmation without necessitating any screen scrolling or switching to other screens. In particular, the vendor's name, address, and telephone number (and the name of the representative or business manager if the vendor is a corporation) should be displayed in such a way that consumers can easily be recognized when an advertisement is initially displayed on the screen. If vendors cannot be displayed in this manner for unavoidable reasons, measures should be taken in advance to enable the consumers to effortlessly move from the beginning of the advertisement to the part where these matters are explicitly shown or require the consumer to go through the screen, which shows these matters, in order to reach the screen on which one can enter a purchase contract.

3. Prohibition of misleading advertisements

When advertising, vendors must not present the following matters in a manner which is substantially different from what they are in actuality or in a manner which will cause a consumer to believe that the subject of the advertisement is better or more 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 Vendors and service providers; in the business conducted by Vendors and service providers. For example, endorsements such as “Certified by XX Ministry” or “Recommended by XX Prefecture” for products, business entities, and others.
- Country of origin, place of production, and manufacturer
- Matters shown in 2 above

Part 2: Information Property Trading

1. License Agreement

Trading of information property, such as programs and digital content, is often done under ordinary sales agreements and also under license agreements which are concluded between the information property vendor (hereinafter referred to as the “Vendor/Vendors”) and the user for the use of the property in question. Part 2t discusses the legal issues in 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 also agrees thereto. These interpretative guidelines only cover contracts for value which are commonly used in 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 (i.e., in a 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 content such as music, movies, and computer graphics). In the case of custom-made information property, the particular license agreement between the parties will determine its contents, conditions, and other details. Therefore, this part only discusses information property distributed in the market as ready-made products.

(1) Return of the Product by the User After the Conclusion of the Contract

(A) Cases where information property is provided via media

[Issue]

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

[Approach]

<I> **Where contracts between stores and users are deemed to be a Primary Agreement**

(i) **Principle**

When contracts between stores and users are deemed to be a agreement for the delivery of tangible materials such as media or manuals (“Primary Agreement”(“*teikyô-keiyaku*”)); and an agreement for setting an option to conclude a license agreement with the user, it is reasonable to consider that a user who does not consent to the contents of the license agreement can return the product and demand a refund. The basis of this consumer right is that there exists a tacit agreement in the contract between the store and the user 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 employed: a shrink-wrap contract and a click-on contract. These two types of contracts will be discussed below.

(A) **Shrink-wrap contract**

If the user is aware of the contents of a license agreement before breaking the seal of the media (such as the film wrap or seal) and he proceeds to break the seal with intent to conclude a license agreement, the license agreement is formed (“shrink-wrap contract”) (Paragraph 2, Article 526 of the Civil Code). In such case, the user cannot return the product on the ground that he did not consent to the agreement.

Therefore, where the film wrap, seal, etc., is broken, the store need not accept the return of the product, so long as the store verifies the adequacy of the information on the film wrap, seal, etc. and confirms that the information is plainly recognizable.

Where a product is considered non-returnable after the seal is broken (i.e. where the license agreement is considered to be concluded)

- Where the license agreement can be viewed through the film wrap, seal, etc. in a manner plainly recognizable before the user breaks it, that user is requested to check the license agreement form. If he breaks said film wrap, seal, etc. through which the license agreement can be viewed, then the license agreement is formed.
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-

A product is considered returnable even after the user has broken the seal, where he does not consent to the license agreement (the license agreement is 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 where to find the contents of the license agreement and it is not easy to find that information.
-

(B) Click-on contract

If the user is aware of the contents of the license agreement before clicking the button “I Agree (to the license agreement)”, where he clicks the button with intent to conclude a license agreement, the license agreement is formed (“click-on contract”) (Paragraph 2, Article 526 of the Civil Code). Therefore, he cannot return the product on the ground that he did not consent to the agreement.

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

Where the product is considered non-returnable after the Agreement Button has been pressed (i.e. where the license agreement is considered concluded)

- The user pressed the Agreement Button after scrolling through the entire license agreement form.
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-

Where a product is considered returnable even after the user presses the Agreement Button, so long as he did not consent to the license agreement (the license agreement not formed)

- The screen configuration seeking consent to the license agreement or the Agreement Button is not sufficiently dissimilar from other screen configurations or other buttons. Furthermore, no screen is provided for the user to confirm his consent to the license agreement.
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Where a Vendor can confirm the valid formation of a license agreement

- 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

(A) Where the contents of a license agreement are only clearly shown when the purchase of the product at the store

Where the user was aware of the contents of a license agreement and paid consideration, he cannot at a later time return the product and demand a refund.

Where the user cannot return the product and demand a refund on the ground that he has already agreed to the license agreement

- The contents of the agreement are printed on the outside of the product package in a type size large enough for the user to recognize.
- The store ensured that the user agreed to the license agreement at the time of purchase.
-

(B) Where it is clearly stated that the product is non-returnable even if the user does not agree to the license agreement

Even in cases where it is clearly indicated that the product is non-returnable notwithstanding the user's consent to the agreement, a user who does not agree to the license agreement may be able to return the product to the store, except where he offered the payment (and such payment is accepted) after having specifically agreed to the non-returnable clause

Where a user cannot return products even if he has not agreed to the license agreement

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

Where a user can return the product, if he does not agree to the license agreement

- Where there was no indication at the time of payment that the product is non-returnable, which fact could only have become known after opening the package.
-
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(II) Where the agreement between the store and the user is considered a sales agreement for a reproduction of information property

Where an agreement between a store and a user is a sales agreement for a reproduction of information property, no license agreement exists between them. The user can freely use the information property, so long as he does not violate the Copyright Law. Even if a license agreement is presented after the product is purchased, the user is not bound by it. Therefore, no issue exists concerning the return of goods after the conclusion of the license agreement because no license agreement is necessary.

Where information property is considered freely usable regardless of the lack of a license agreement

- The user did not recognize nor intend to conclude a license agreement, no mention was made on the product package of a license agreement, and the store did not tell the user that there should be a license agreement.
-
-

[Explanations]

1. Problem identification

When information property, such as CD-ROMs or other media, is sold through stores, it is a trade practice that the licensor unilaterally determines the licensing conditions. No explicit agreement has been made about the licensing conditions at the time of the delivery of the media. Rather, 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 displayed on the screen. In these cases, it is not necessarily clear at which stage the licensing agreement is formed and whether a user who has not agreed to the licensing agreement can return the product and demand a refund.

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

2. Nature of the agreement between the store and the user

When the user takes possession of information property by paying consideration to the store, the intention of the parties is reasonably interpreted to conclude either (i) a sales agreement for a reproduction of the information property; or (ii) an agreement by which the store assigns to the user the opportunity to consenting to the license agreement and by which the store delivers tangible objects such as the medium and manuals to the user (“Primary Agreement”). How the parties actually intended to conclude the agreement, either by method (i) or (ii), will be determined according to various factors including general knowledge on transactions in information property (for example, was the buyer aware that the packaged software he purchased could not legally be used absent his consent to the license agreement?). However, the intention of the parties will likely be interpreted as concluding the Primary Agreement (ii), if the necessity to conclude a license agreement is clearly stated on the outside of the medium package in a form easily identifiable to the user or if the store has verbally explained the need to conclude the license agreement.

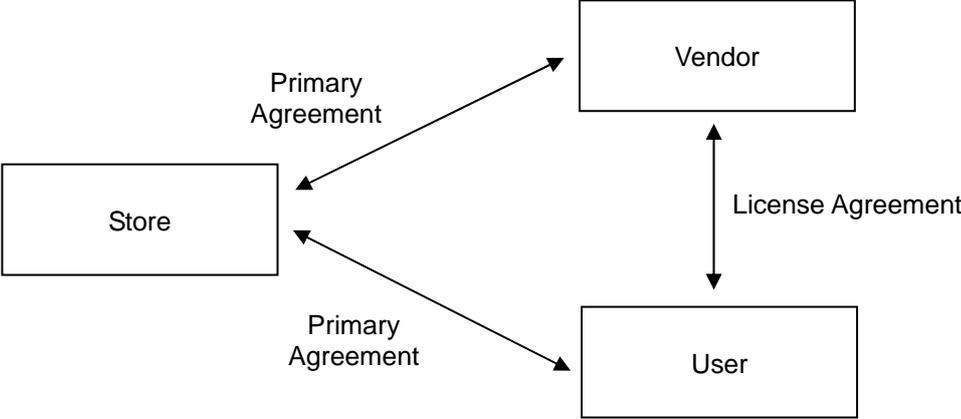
On the other hand, in the case of (i), i.e. when their intent is interpreted as concluding a sales agreement for a reproduction of information property, the user should not be bound by an agreement of which he is not aware. Therefore, the user can use the information property freely, so long as he does not violate the Copyright Law. More specifically, the user can reproduce the information property solely for personal use, except where he must circumvent any technical protective barriers in order to make reproductions (Paragraph 1, Article 30 of the Copyright Law), and he 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 ground that the user does not consent to the license agreement.

Where no agreement is reached on any necessity to conclude a license agreement, if a license agreement is clearly presented after the purchase of a product (where the license agreement is enclosed in the outer case of the product package), such license agreement will usually have no legal effect.

Next, under Primary Agreement (ii), the store assigns to the user the right to use the information property after he consents to the license agreement. In other words, the store assigns to the user an option to conclude a license agreement and delivers the tangible objects such as the medium and manuals to the user. The Primary Agreement provides for both the assignment of the right and the delivery of the objects.

In this case, the user has concluded two different agreements. First, the user agrees to the Primary Agreement with the store. Second, the user consents to the license agreement with

the Vendor for the use of the information property. Consenting to the license agreement allows the user to employ the information property (see figure below).



3. Requirements and timing of the conclusion of license agreement

As described in 2 (ii), where the agreement between the store and the user is a Primary Agreement, the contents of a license agreement may be clearly presented (A) before the conclusion of the Primary Agreement (e.g. before payment is offered and accepted); or (B) after the conclusion of the Primary Agreement (i.e. after payment is offered and accepted). When exactly is the license agreement formed in each of these cases?

When information property is provided in media form, the license agreement between the Vendor and the user is a contract between remote parties. This means principally that it is necessary for a user to express his intention to accept an offer in order for the license agreement to be formed. However, if the offeror indicates or it is the common trade practice that an acceptance notice is not needed, then the agreement is formed when the conduct of the user explicitly communicates his expresses (“*ishi-jitsugen-kô*”) (Paragraph 2, Article 526 of the Civil Code). This is theoretically because the offeror’s prior expression or common trade practice functions to allow the conduct of the user itself to constitute an intention to execute the contract rather than requiring an actual expression of intention; based on such theoretical principle, license agreements should be considered as well

First, in the case of (A), where a user purchases a product under the Primary Agreement with knowledge of the license agreement’s content , the intention of the user to conclude the contract has been displayed by his conduct. Therefore, the license agreement is formed at the time the Primary Agreement is concluded. An example is where the contents of the agreement are printed on the outside of the product package in a type size large enough for the

user to easily notice and where the store made sure that the user agreed to the license agreement at the time of the product purchase.

Second, in the case of (B), since the contents of the license agreement are not clearly presented at the time the Primary Agreement is concluded, the license agreement is formed at a later time. In the case of the shrink-wrap and click-on contracts, which are now widely used in the industry, the formation of a license agreement depends on whether the conduct of the user constituted an intention to conclude the contract.

In the case of a shrink-wrap contract, the question is whether the act of breaking the film wrap, seal, etc. could be considered as conduct of the user which reflects his intention to conclude the contract. A license agreement is formed where the user breaks the film wrap, seal, etc. with knowledge of the contents of the license agreement and if he intends to conclude the license agreement before breaking it. For example, a statement which requires consent to a license agreement and which asserts that the effect of breaking the film wrap, seal, etc. equates to giving consent to the license agreement, and where the license agreement is printed on the film wrap, seal, etc. in a form that the user can easily identify before breaking the covering, it will often be interpreted that the act of breaking the covering is deemed to be conduct of a user which indicates his intention to conclude the license agreement and that by virtue of his conduct the license agreement has been completed. On the other hand, if the license agreement is not mentioned on the film wrap, seal, etc. of the media or if there is no mention on the film wrap, seal, etc. of the media concerning the location of the license agreement contents and it is also not easy to find them, then the license agreement is not formed, even if the user has broken the film wrap, seal, etc.

Second, in the case of click-on contracts, the question is whether the act of clicking the “I Agree (to the license agreement)” button (hereinafter called the “Agree Button”) displayed on the screen is deemed analogous to conduct displaying the intention of the user to execute the contract. If the user knows the contents of the license agreement before clicking the Agree 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 easily identify the contents of the license agreement before clicking the Agree Button (in other words the screen configuration is such that the user cannot click the Agree Button unless he has scrolled through the entire contents of the license agreement), then it will often be considered that the license agreement has been formed. However, if the screen configuration seeking consent to the license agreement or the Agree Button are 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 license agreement could not have been concluded.

4. Termination of the Primary Agreement where there is no consent to the license agreement

In 3(B) above, where the contents of a license agreement are presented at a time later than the conclusion of the Primary Agreement (e.g., after payment is offered and accepted), the question is whether a user, who does not agree to the licensing agreement, can return the product and demand a refund for the purchase price.

The license agreement and the Primary Agreement are essentially mutually independent contracts. However, since the primary objective of the Primary Agreement is to enable the user to employ information property, the agreement is very closely linked to the license agreement. Furthermore, the value of agreeing to the Primary Agreement is considered to be the right to use the information property. Therefore, a user who does not agree to the license agreement can return the product and demand a refund of the purchase price. Under existing law, a user has the right to return products by way of tacit agreement, where the user does not agree to the license agreement.

Unless otherwise agreed (for example, by clearly indicating on the outside of the product package a reasonable period during which goods may be returned), the right to return goods can either be exercised for a period of 10 years (Paragraph 1, Article 167 of the Civil Code) or for five years (Article 522 of the Commercial Code).

Unless otherwise explicitly agreed upon, parties to the Primary Agreement tacitly agreed on the right of termination. Such agreement by the parties of the right to terminate should still exist, even if it is stated on the outside of the product package that the product is non-returnable after opening.

If a license agreement has been concluded previously, a user cannot return the product on the ground that he does not agree to the license agreement. The question is how the store determines whether a license agreement has been formed.

First, in the case of shrink-wrap contracts, the film wrap, seal, etc. may be (i) broken; or (ii) unbroken. In the latter case, the license agreement is not formed and the store cannot refuse a return on the basis of consent given to the license agreement. In the former case, the question is whether the statements on the film wrap, seal, etc. were sufficient. If the license agreement is present on the film wrap, seal, etc., in a manner the user can easily identify, then that license agreement is duly concluded and the store need not accept the item's return.

Second, in the case of click-on contracts, it is usually difficult for the store to ascertain whether the button was actually clicked. However, in some cases the store can verify the formation of a license agreement by contacting the Vendor (for example, where a user registration card has reached the Vendor or where a license agreement has been concluded online or by telephone which 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.

Furthermore, there is another problem regarding whether the store can return the product to the wholesaler or the Vendor, when the store has accepted a product returned by a user who had not agreed to the license agreement. Where it is clearly indicated that a prerequisite to use of a product is consent to the license agreement and where there is no indication that the product is non-returnable, the purchaser of the product may terminate the provisional license agreement, if he does not wish to consent to the license agreement, and return the product to the retailer, where such retailer can further terminate its Primary Agreement with the Vendor and return said product to the Vendor(see section 5 below). Therefore, a Vendor and wholesale agent should accept the store's return of products which were returned by users. This conclusion is supported theoretically by explicit or implicit agreement between the parties which assume returns of the products from store to wholesale agent; and from wholesale agent to Vendor.

Vendors and wholesale agents have to accept the return of products when the user does not agree to the license agreement and requests the store to return the product; however, because Vendors and wholesales agent are not in direct contact with the user, they will not be able to discover whether in actuality the store is returning the product as a result of the user not agreeing to the license agreement. In order to resolve common problems promptly and amicably, it may be wise to request the user at the time of formation of the Primary Agreement that if the user should terminate the Primary Agreement, he should submit a document stating the reason therefore (Paragraph 3, Article 30-4 of the Installment Sales Law expressly provides for this.)

5. Where there is explicit indication that the product is non-returnable

The Primary 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 where it is clearly stated at the time the Primary Agreement is concluded (that is, at the time the product is purchased at the store) that he cannot return the product even if he does not agree to the license agreement?

It is not reasonable that the product cannot be returned simply because the package states that the product is non-returnable. Instead, the user cannot return a product only when he specifically agreed to the non-returnable clause; e.g., he purchased the product after agreeing to the non-returnable clause which the store explained to him verbally and explicitly or indicated such clause which was plainly visible outside of the product package.

A user, who has individually agreed not to return a product, has no other option but to conclude the license agreement whose contents are to be displayed after the purchase of the products. As always, the validity of contractual clauses falling under category “(3) Unreasonable Contractual Clauses” may be negated. In such cases, the user will not be bound by such clauses.

(B) Where information property is provided online

[Issue]

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) Where the contents of a license agreement are presented at the time of an online contract

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

Cases where the consumer agreed to the license agreement and cannot demand a refund

- Where the contents of a license agreement are clearly presented on the screen, where the Agreement Button and the Purchase Button are conspicuous and are arranged differently from other buttons used for downloading, and where the consumer clicked the Purchase Button after clicking the Agreement Button.
- Where the screen is configured in such a way that the contractual text is too long to be displayed on a single screen, the Agreement Button cannot be clicked unless the consumer scrolls through the entire text, and the consumer has clicked the Purchase Button after clicking the Agreement Button.
-

Cases where the consumer did not agree to the license agreement and can demand a refund

- Where the online screen is configured in such a way that consumers move from an online contract screen to a license agreement screen using a link, where the link is hard to find, and where the agreement of the consumer to the license agreement is not required in order to click the Purchase Button.
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In Business-to-Consumer contracts any expression of intention mistakenly made by the consumer shall render the contract invalid, except where business entities have taken measures to confirm the consumer's intention to form a contract and where the consumer has voluntarily waived such confirmation measure (Article 3 of the Electronic Contract Law and Article 95 of the Civil Code).

(II) Where the necessity to conclude a license agreement is not clearly shown at the time of online contract

Since no license agreement had been concluded, problems should not occur regarding the return of the product on the ground that the user would not consent to the license agreement. Therefore, 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 he has clicked the Purchase Button (and has paid consideration), the consumer is not bound by it.

Cases where the consumer is not bound to the license agreement

- The presence of a license agreement is not indicated on the online contract screen. Instead, a readme.txt file, which extracts when a downloaded file is decompressed, contains the contents of the license agreement.
-
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There can be cases where the contents of the license agreement can only be seen after downloading and at no time before the Purchase Button is clicked, although the necessity to conclude a license agreement is shown on the online contract screen. As it is quite easy for a business entity to display the contents of a license agreement on the screen, this type of trade system seems unusual. In any event, the user can legitimately demand a refund if he does not agree to the license agreement.

[Explanations]

1. Problem Identification

In online delivery of information property, intangible information property is downloaded instead of the media, on which a reproduction of the information property resides, being physically delivered. For example, information property is directly downloaded from a Vendor's server to a user's hard disk, etc. When information property is provided intangibly, 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 nature of contracts regulating online transactions in information property.

2. Where the necessity to conclude a license agreement is not shown in advance

Where the necessity to conclude a license agreement is not clearly shown on an online contract screen, the user in principle does conclude a contract to acquire ownership of a copy of information property by downloading it. This is exactly the same case as the sale of media information property described in (A) above “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. Problems should not occur regarding the return of the product on the ground that the user does not consent to the license agreement. Even if a license agreement is presented after the consumer has clicked the button to purchase the information property (hereinafter called the “Purchase Button”), i.e. after the purchase of the product, the consumer is not bound to it.

3. Where the necessity to conclude a license agreement is shown in advance

Where the necessity to conclude a license agreement is clearly shown on an online contract screen, the user in principle has concluded a contract which enables the user to employ, and benefit from, within a certain scope, the information property provided (transmitted) to the user; in other words, 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 product is purchased; or (B) may not be clearly presented before the product is purchased. When is the license agreement formed in each of these cases?

First, in case (A), if the contents of a license agreement are clearly presented on the contract screen before the conclusion of the transaction, 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 at which the information, to which the consumer has given his assent by clicking the Purchase Button, is recorded on the counterparty's server (Article 4 of the Electronic Contract Law). In Business-to-Consumer contracts any expression of intention mistakenly made by the consumer is invalid, except where business entities have taken measures to confirm the consumer's intention to form a contract and where the consumer voluntarily waived such confirmation measure (Article 3 of the Electronic Contract Law and Article 95 of the Civil Code).

For example, where the contents of a license agreement are clearly presented on the online screen, (e.g.) the Agreement Button and the Purchase Button are plainly visible and are arranged distinctively from other buttons used for downloading; the screen is configured in such a way that if the contractual text is too long to be displayed on a single screen, the Agreement Button cannot be clicked unless consumers scroll through the entire text. Under such circumstances, if the consumer clicks the Purchase Button after clicking the Agreement Button, the license agreement is formed, and the consumer can demand no refund.

On the other hand, if the display screen is configured, e.g., in a manner where consumers have to move from the online contract screen to the license agreement screen using a difficult to locate link; the assent of the consumer to the license agreement is not required for clicking the Purchase Button. Under such circumstances, the license agreement is not formed even if the consumer clicks the Purchase Button. Therefore, the consumer may demand a refund in this instance.

Next, in case (B), the whole contract, including the license agreement, is formed at the time at which the user clicks the Agreement Button having knowledge of the contents of the license agreement and with the intention to conclude the contract. For example, where a readme.txt file is extracted following the decompression of a downloaded file and where it contains the contents of a license agreement, then if the user does not agree to the contents of the license agreement, the agreement is not formed and the user may return the product and demand a refund.

However, it should be quite easy for a 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 clearly presenting the full text of a license agreement. Therefore, in some cases, if the contents of the license agreement were not clearly presented in advance, when the user concludes the contract for acquiring the ownership of the reproduction of information property by downloading it, no license agreement will restrict the use of the information property similarly to the description in 2 above.

(2) Effects of Not Representing Important Matters

[Issue]

When the user purchases the information property, what information must the Vendor or the store provide? What happens if they do not provide such information?

(Example) At a store, a consumer purchased a program and took possession of it. However, since the store did not provide the consumer with any information about the operating system required to run the program, the consumer was unable to use it. In this case, can the consumer return the product and demand a refund?

[Approach]

(I) 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 can return the product and demand a refund (Paragraph 2, Article 1 of the Civil Code).

(II) Specific contents of important matters

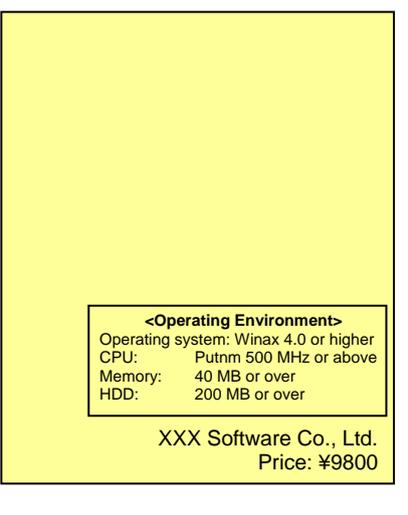
At present, the following could fall under the category of important matters:

Matters that could fall under the category of important matters

- (1) Types and versions of the operating system and platform software. Listing the type and version of either the operating system or the platform software is satisfactory, where such information 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 the applicable information, such as that mentioned above, the important matters will usually be written on the outside of the product package, in the case of a medium-type transaction, and be displayed on the contract screen, in the case of an online transaction.

<p>Where important matters have been sufficiently 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 near the price on the outside of the product package (see example at right).••	 <p data-bbox="1075 815 1369 922"><Operating Environment> Operating system: Winax 4.0 or higher CPU: Putnm 500 MHz or above Memory: 40 MB or over HDD: 200 MB or over</p> <p data-bbox="1142 936 1369 987">XXX Software Co., Ltd. Price: ¥9800</p>
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[Explanations]

1. Problem identification

Information property is more highly dependent on an operating environment than other types of property. If employed in the wrong environment, information property may not function at all. It is possible that a user may purchase packaged software from a store but cannot actually use it because he was not been provided with information about the required operating environment. The question in this case is whether the user can terminate the Primary Agreement and return the packaged software to the store.

Based on the principle of good faith and mutual 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 terminate 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 conclusion of a contract

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 good faith and mutual trust (Paragraph 2, Article 1 of the Civil Code) to provide the other party with information on the important matters material to the conclusion of the contract (“*jûyô-jôkô*”)(hereinafter called “Important Matters”) during the process of conclusion.

In the case of information property, the user cannot use the product purchased 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 for the information property, which constitutes a supplementary duty at the time of providing the information property, can sometimes be material information (Important Matters) for determining whether the information property can actually be used. Based on the principle of good faith and mutual trust, the minimum operating environment required to employ the information property must be communicated at the time the Primary Agreement is being concluded.

3. Effects of violation of the duty to provide information

There are judicial precedents that affirm such duty based on the principle of good faith and mutual trust. These judicial precedents have found parties either (i) liable for damages; or (ii) having a right to terminate the contract.

Judicial precedents finding liability for damages mostly concern cases where transactions were made in financial products or a long time has passed between the conclusion of the contract and the plaintiff’s claim for damages.

Judicial precedents in (ii) above are cases which ruled that a party had the right to terminate a contract, all concerning real estate transaction. These judicial precedents holds that a supplementary duty exists associated with the conclusion of a sales contract; which obligates the potential Vendor to inform the potential buyer of Important Matters, such as information about the surrounding environment, and as this is important information in deciding whether to conclude the sales contract, the buyer may terminate the sales contract where the Vendor has failed to perform his duty.

In many cases where a buyer cannot use information property because no information about its operating environment was provided at the time the contract was concluded, the buyer may terminate the contract and demand a refund of the purchase price.

4. Contents of the duty to provide information

Where the user who purchased the right to employ information property cannot use it because the required operating environment was not clearly indicated, the user might be allowed to terminate the Primary Agreement or even the license agreement.

Summarizing the actual cases, the following would constitute essential matters that need to be clearly shown as regards 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 is satisfactory, where such information 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 the relevant information, as mentioned above, it will usually be written on the outside of the product package in the case of medium-type transactions and be displayed on the contract screen in the case of online-delivery transactions. For example, if important matters are clearly shown, in an enclosure entitled “Operation Environment” (“*dōsa-kankyō*”)etc., at a position the user can easily perceive, such as a position near the price on the outside of the product package, then the information has been duly provided. Alternatively, the store can always receive information from the Vendor and provide that information to the user at the time the user offers to purchase the right to use the information property.

(3) Unreasonable Clauses

[Issue]

What clauses of a license agreement may be interpreted as being unreasonable and therefore invalid?

[Approach]

The contractual clauses shown below could be interpreted as invalid. Users are not bound by invalid clauses.

(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 invalid.

Examples of clauses that could be unreasonable

- Clauses setting extremely advantageous conditions on which the Vendor can terminate the contract.
- Clauses by which the Vendor can only be required to pay a minuscule amount in damages
-

(II) Contractual clauses violating the Consumer Contract Act

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

- Clauses shielding the Vendor from any liability.
- Clauses protecting the Vendor from liability for intentional acts or acts of gross negligence.
- Clauses making the purchaser liable for damage or penalty amounts at levels unreasonably higher than the amount demanded of the Vendor in similar situations.
- Clauses unfairly restricting the rights or expanding the duties of consumers.

Examples of clauses that could be unreasonable:

- Excluding the Vendor from any liability for bugs
- Charging a customer for any repair of bugs
- Setting an extremely short warranty period
-

(III) Contractual clauses restricting competition

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

Examples of clauses that could be unreasonable if they were to impede fair competition in the market:

- Restricting research or experimentation
- Prohibiting the use of specific products or competing products
- Prohibiting reverse engineering
-

(IV) Contractual clauses restricting the user from making such use of information as permitted by the Copyright Law

Articles 30 to 49 of the Copyright Law partly restrict copyright, that is, permit users to make free use of the information property in a specified way. A view exists that since these clauses are basically discretionary clauses, the rights of users can be contractually restricted. On the other hand, another view exists that clauses of license agreements are invalid which too narrowly restrict how users make use of the information property.

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

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

The following clauses of a license agreement could be invalid:

1. Contractual clauses contrary to the 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 invalid if its effects are deemed to be excessively unreasonable from a social point of view. For example, there exists judicial precedent in which a clause was judged invalid as contrary to public policy because it limited the amount of damages awarded for aviation accidents to 1 million yen (Judgment of Osaka District Court, June 12, 1967, 18-5 to 6 Kaminshû 641). The same principle could apply to the unreasonable contents of license agreements.

For example, clauses could be judged invalid in accordance with the above principle, which set extremely advantageous conditions by which the Vendor can terminate the contract and by which the Vendor can only be required to pay a minuscule amount in damages.

2. Contractual clauses that violate the consumer contract act

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

- Clauses shielding the Vendor from any liability. Clauses protecting the Vendor from liability for intentional acts or acts of gross negligence.
- Clauses making the purchaser liable for damage or penalty amounts at levels unreasonably higher than the amount demanded of the Vendor in similar situations.
- Clauses unfairly restricting the rights or expanding the duties of consumers.

For example, in accordance with the above, clauses excluding the Vendor from all liability for bugs or clauses which set an extremely short warranty period could be interpreted as invalid.

3. Contractual clauses restricting competition

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

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

In regard to provisions prohibiting reverse-engineering, the Fair Trade Commission issued a document entitled “Views on Software Licensing Agreements, etc. under the Antimonopoly Act – An Interim Report of the Study Group on Software and the Competition Policy.” Specifically, provisions prohibiting reverse-engineering are considered invalid due to their deleterious effect on competition in the market under the following circumstances: (1) where it is necessary to obtain interface information concerning the applicable software in order to develop hardware or software which is compatible with the platform software such as operating systems; (2) the licensor has not provided the interface information; and (3) the performance of reverse-engineering by the licensee is an essential and unavoidable measure in order to develop software and hardware for the applicable software.

(<http://www.jftc.go.jp/pressrelease/02.march/020320.pdf>)

4. Contractual clauses restricting the user from making use of information property whose rights are restricted by the Copyright Law

When information property is protected by the Copyright Law, the scope of the copyright can be partly restricted by the law (Articles 30 to 49 of the Copyright Law). The Copyright Law allows users to make free use of particular parts of the information property. A view exists that since these clauses are basically discretionary clauses, the user’s right can be contractually restricted. On the other hand, another view exists that clauses of license agreements are invalid which too narrowly restrict how users make use of the information property. According to this view, clauses which completely forbid copying for personal use and the making of backup copies could be interpreted as invalid.

(4) Duties of the User upon Contract Expiry

[Issue]

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

(Example) After terminating the license agreement, can the user legally retain the information property?

[Approach]

(I) Duty of user on termination of the license agreement (restoration; “*genjô-kaifuku*”)

After the license agreement is terminated, the user has a duty to stop using the information property. To ensure that this duty is performed, the Vendor may demand that the user erase the information property.

(II) Duty of user where no license agreement was formed (duty to avoid unjust enrichment; “*futô-ritoku-henkan-gimu*”)

Because the user has a duty to avoid becoming unjustly enriched, where no license agreement is formed, the user may not use the information property. To ensure that this duty is performed, the Vendor may demand that the user erase the information property.

(III) Duty of User upon the expiry of the term of the license agreement

When the license agreement expires, the user must fulfill his duty as specified in the license agreement. Therefore, even though the user cannot continue to use the information property after the expiry of the license agreement, he is only obliged to erase it where the license agreement requires.

[Explanations]

This problem will be confronted in three scenarios: (1) early termination of the license agreement; (2) non-formation of the license agreement; and (3) expiry of the term of the agreement.

1. Duty of the user after termination of the license agreement

(1) Problem identification

When a contract is terminated, each party has a duty to restore the counterparty to their respective state which existed before the contract was formed (hereinafter called the “Restoration Duty”) under Article 545 of the Civil Code. The Restoration Duty is essentially a duty to avoid any one party becoming unjustly enriched at the expense of the counterparty. However, the scope of the Restoration Duty is larger than that of unjust enrichment. In principle, Restoration Duty specifically means the return of any tangible object already delivered by a Vendor who has terminated the contract. 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 presented in its place.

Therefore, when a license agreement for information property is terminated, the user not only has to stop using the information property but also has to return any copy of the information property made. However, since information property as an intangible object is impossible to return (to transfer the possession of), a question arises about what the Restoration Duty in Article 545 of the Civil Code means for information property.

(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 after the license agreement is terminated, there exists the possibility that he might continue to use it even though he has no right to do so.

From the perspective of the Vendor, he wishes to take the information property out of the control of the user, so that the user cannot further employ or otherwise benefit from the information property.

Therefore, according to the Restoration Duty prescribed in Article 545 of the Civil Code, a user has to stop using the information property at the time the license agreement is terminated. In order to ensure the performance of this duty, the Vendor may demand that the user completely erase (delete) the information property.

In the Copyright Law, Paragraph 2, Article 47-2 provides: “The owner of a copy of a program shall not retain other copies of the program after ceasing to possess ownership rights to the copy”. The reason that this provision does not allow the owner to retain copies of the program is that if, after transferring any of the copies, the owner is permitted to use the remaining copies, he can easily use the program any number of times, thus unduly harming the interests of the copyright holder. Therefore, requiring the erasure of a copy of information property is consistent with the spirit of the Copyright Law.

2. Duty of user where no license agreement formed

(1) Problem identification

Where certain information property has been provided (transmitted) to a user in conclusion of a contract, if no license agreement is formed or has become invalid, the user has to both stop using the information property and to return any copy of the information property. These acts are necessitated by Article 703 of the Civil Code which places a duty on the user to avoid becoming unjustly enriched and under which the retention of any copies of information property constitutes a benefit.

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

(2) Duty to return unjust enrichment

When a user makes a copy of information property, the Vendor suffers no loss because the cost of the copy is borne by the user.

However, if the user retains a copy of the information property, he might continue to use it despite possessing no right to do so, even if no contract was formed. Such act is highly likely to cause damage to the Vendor. In addition, it is difficult to quantitatively estimate the extent of the damage.

From the perspective of the Vendor, he wishes to take the information property out of the control of the user, so that the user cannot further employ or otherwise benefit from the information property.

Therefore, according to 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 where its clauses do not directly apply), the user may not employ the information property if a license agreement has not been formed and, in order to ensure that the user will not employ it, the Vendor may demand that the user completely erase (delete) the information property.

3. Duty of user at the expiry of the term of the license agreement

The duty of the user at the expiry of the term of the license agreement can be expressly defined as “contractual obligations”. The duty of the user for contractual obligations is exclusively confined to such stipulated obligations. Therefore, although the user cannot continue to use the information property after the expiry of the license agreement, he is only obliged to erase it where the license agreement requires.

(5) Validity of Security Measures in Preparation for Contract Termination

[Issue]

Will the Vendor have to assume any responsibility where he takes technical protections to forcibly prevent the user from illegally using the information property after the end of the license agreement?

(Example) A program suddenly stops functioning as a result of technical protections 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

A technical protections which restricts the use of information property could be interpreted as a means of compulsory execution other than by a court and thus constitute a tort (i.e. a violation of the principle prohibiting self-enforcement).

(II) Exception

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

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

Examples which meet the requirement

- The taking of such technical protections is clearly described in the license agreement, and the user has agreed to the agreement.
-
-

(ii) Such technical protections are limited to preventing the continued use of the information property.

Examples which meet the requirement

- Sanctions that stop the operation of the information property after warning.
-
-

Examples which do not meet the requirement

- Sanctions that destroy the files created using the information property.
- Sanctions that interfere with the operation of the computer system.
-

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

Examples which do not meeting this requirement

- Methods are installed during a later maintenance operation.
- Methods are installed by transmitting information to the relevant information property via network like internet.
-

[Explanations]

1. Problem identification

After the expiry of a license agreement for information property, a user could continue to use the information property without paying any consideration therefore. To prevent such occurrence, the Vendor may apply a technical means to the information property which functions to forcibly terminate its use, such as making access to the information property impossible or deleting the information property.

Paragraph 1, Article 414 of the Civil Code provides that if a debtor does not voluntarily perform his obligation, the creditor may apply for compulsory enforcement to the court. Conversely, this means that the creditor is not allowed to directly enforce the debtor to perform his obligation (“the prohibition on self-enforcement”; “*jiriki-kyûsai-kinshi-gensoku*”). In principle, the creditor is prohibited from enforcing his right (claim) to any person (by private enforcement). Although it is not expressly stipulated in the Civil Code, most of the academic theories and judicial precedents agree that the enforcement contrary to this principle constitutes a tort.

Therefore, when a Vendor uses a technical means to forcibly obstruct the use of information property at the end of the license agreement, a question arises about whether this act violates the principle prohibiting self-enforcement.

2. Standards for judgment

(1) Presence of a prior agreement

When the Vendor has obtained the prior consent of the user that the information property will be unavailable for use at the expiry of the license agreement, the principle prohibiting self-enforcement will not apply.

However, generally, in a case of title retention (“*shoyûken-ryuho*”), contract clauses usually include such clause as the debtor shall bear a self-enforcement by the creditor, by virtue of recovery clause (“*torimodosi-yakkan*”). However, common theories did not justify such self-enforcement only based on the prior agreement as mentioned above. A judicial precedent (Judgment of Fukushima District Court, February 24, 1972, 278 Hanreitaimusu 201) concerns a case in which an act of repossession was performed by virtue of a recovery clause. The judgment says that, in consideration of the principle prohibiting self-enforcement, the clause could be interpreted as invalid under Article 90 of the Civil Code.

Therefore, the validity of a prior agreement, which allows the presence of a technical means to restrict use to information property, could raise questions in light of the principle prohibiting self-enforcement.

(2) Technical sanctions limited to the prevention of continued use (ensuring the termination of contract)

In a license agreement, it could be agreed in advance that a technical means could employ measures which go beyond merely preventing the future use of information property. However, if the Vendor pressures the user to perform his obligations including payment of the license fee, by way of threatening the use of the software other than the information property which was licensed to the user: such as erasing other information on the hard disks such as files, etc. created and stored using the information property on the hard disk; or interfering with the operations of the computer system. These sanctions would be invalid due to its excessive restriction to the users, considering the difference of the bargaining power of the parties when they entered into such agreement.

(3) Technical sanctions taken in advance

A prior agreement may permit the application of technical protections after the agreement is in force, not in advance, for example, through the modification of the computer system of a user during a maintenance operation which allows the Vendor to prevent the user from employing the information property. This modification could be performed after a certain period or by sending specific signals which prevent the information property from functioning on a network such as the Internet. Such practice may often be arbitrarily used by the Vendor. Therefore, despite the existence of a prior agreement, this practice could be found as an abuse of rights.

3. Summary

In summary, it is highly likely that a technical sanction will be found legal, and not a means of self-enforcement, if (i) the user has agreed in advance that the Vendor may implement the extraordinary technical means; (ii) the technical means is limited to the prevention of the continued use of the information property (ensuring the end of the contract); and (iii) the technical means has been taken in advance.

(6) Liability of Vendors on Programs

[Issue]

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 the license agreement. If the user has discovered a bug which constitutes a product defect after the expiry of that period, can he question the responsibility of the Vendor?

[Approach]

(I) For which bugs (which is considered to be defects) is the Vendor responsible?

(i) Where a program does not have normally expected function nor quality (judged by the reasonable standard based on the trade practice); and (ii) where any malfunction occurs when the program is used under the usually predictable circumstances or along with the usually predictable way of use, then the bug in the program is deemed to be a defect, and the user can hold the Vendor responsible therefor.

(i) Where a program does not have the normally expected functions or quality judged by the reasonable standard of trade practice

Examples that do not have the usual functions or quality

- A program does not operate at all.
-
-

Examples that have the usual functions or quality

- Although the user tried to combine ruled lines, shading, rotation, and double sized font using the word-processing software, the intended result was not obtained.
-
-

(ii) Where a malfunction occurs when a program is used under the normally predictable circumstances or along with the usually predictable way of use

Examples not falling into this category

- A malfunction occurred when a program was used in an operating environment which did not satisfy the operating environment requirements shown on the outside of the product package.
- A malfunction occurred as a result of a modification the user made to the program code.
- A malfunction occurred only in certain user environments

(II) When a bug is deemed to be a product defect, what responsibility does the Vendor have to the user?

A user may demand for damages, for repair or replacement of product against the Vendor, or terminate the contract. However, when considering the nature of software programs, the user may not claim for damages declining the Vendor's offer to repair the software by virtue of principles of good faith, when the Vendor promptly offered to repair or replacement of the software and such repair or replacement is easy to be conducted when the user accept it.

(III) How long can the Vendor would be responsible for bugs deemed to be product defects?

Where a license agreement contains a special clause which stipulates a shorter warranty period for bugs deemed to be product defects, a question arises about whether the license is valid.

(i) Where the user is a consumer

Article 10 of the Consumer Contract Act declares that any clause extremely disadvantageous to the consumer is invalid. For example, clauses which provide an extremely short warranty period for bugs deemed to be product defects could be considered invalid.

Cases where a clause could be judged invalid due to violating the Consumer Contract Act

- Clauses which set an extremely short warranty period for a program
-
-

The Civil Code and other laws apply where clauses are judged invalid or where there is no special clause. Therefore, the user can demand for damages either of the following period; (A) for one year from the discovery of the defects by virtue of warranty obligation; and (B) for five years by virtue of non-performance of the obligation. With respect to defect warranty liability (“*kashi-tampo-sekinin*”) (Article 570 [Sales Contract; “*baibai*”] and 634 [Work Contract; “*ukeoi*”] of the Civil Code), obligation period is stipulated as (i) one year from the discovery of the defects (Sales Contract, Article 566 of the Civil Code) and (ii) one year from the delivery (Work Contract, Article 637 of the Civil Code). With respect to non-performance of the main obligation (“*saimu-furikō*”) (Article 415 of the Civil Code), ten years from the timing of non-performance (Paragraph 1, Article 167 of the Civil Code); rather, five years from the timing of non-performance because the Commercial Code will apply to Vendors which is usually are business entities (Article 522 of the Commercial Code).

(ii) Where the user is not a consumer

The Consumer Contract Act does not apply where the user is not a consumer. If there is a particular clause in the agreement, it applies. If there is no particular clause, under the Civil Code and other laws, the user demand for damages against the Vendor for either of the following obligation period; (A) by virtue of warranty obligation, obligation period shall be six months or one year from the delivery; (B) by virtue of non-performance of main obligation, five years from the timing of non-performance of main obligation. More specifically, with respect to the warranty obligation, basically one year from the discovery of the defects (Sales Contract, Article 566 of the Civil Code) or one year from the delivery (Work Contract, Article 637 of the Civil Code); rather, six months from the delivery because the Commercial Code will apply to Vendors which is usually are business entities (Article 526 of the Commercial Code).

Where a special clause could be judged invalid as being contrary to public policy, etc. <ul style="list-style-type: none">•••

[Explanations]

1. Problem identification

Programs are kind of information property which can have unintentional consequences, for example, where a programming error (hereinafter referred to as a “Bug”) interferes with the

normal operation of the computer. Bugs will prevent the user from using the program thoroughly.

Either of the following clauses could apply to this problem¹¹:

- (A) Defect warranty liability: should be filed to the court within one (1) year from the discovery of a defect under Article 570 of the Civil Code (Sales Contract) or within (1) year of delivery under Article 634 of the Civil Code (Work Contract))
- (B) Non-performance of the main obligation: should be demanded for within 10 years from the timing of non-performance under Article 415 of the Civil Code (Damages and Specific Performance); Article 541 of the Civil Code (termination of contract due to the delays in performance of the user's main obligation); Article 543 of the Civil Code (termination due to impossibility of performance) .

In order to apply these clauses, the following questions need to be answered: (i) (a) In what cases can the Vendor be held responsible for program Bugs? (b) How long can the Vendor be held responsible? (ii) Where a license agreement contains particular clause exempting the Vendor from certain responsibilities, is such special clause valid?

2. Defects on programs

(1) How to determine whether a program is defective

Where a program, as object of a contract, does not have the usually expected functions or quality judged by the standard based on trade practice, it will be considered that the program has a defect.

In particular, the following are the examples of cases in which the program may not be considered a defect.

First of all, how a program function depends on the environment in which it is used. It is usually clearly indicated which operating environment a program requires. Where a

¹¹ The liability under the Product Liability Law covers that of “products (“*seizō-butsumo*”)), namely “the movable and tangible properties which have been produced or processed”, and does not cover programs, in principle. However, in case of the purchase of product (movable and tangible property) such as personal computer, if a defect is found in a program recorded in the CD-ROMs and it constitutes a defect of a whole product, the manufacturer of such product (movable and tangible property) may be responsible for the product liability.

program is used outside of the stipulated operating environment and any difficulties arise in the proper functioning of the program, such malfunctioning shall not constitute defects.

Secondly, the user should reasonably be able to understand how a program can be properly be used by referring to its manual, company website, etc. Therefore, a Vendor is not responsible for any problem arising through the unusual way of use of the program, which was not normally predicted by the Vendor (for example, where a problem occurs after the user modified the program code).

Furthermore, a Bug in a program would be necessarily considered as a defect; minor Bugs which do not interfere with the normal use by the user shall not constitute defect. In addition, despite the Bug's presence, if the program can be repaired and used smoothly with the user's "patch", such Bugs might not be deemed to constitute defects. Among the court's precedent (e.g., Judgment of Tokyo District Court, February 18, 1997, 964 Hanreitaimusu 172) states that because every program is likely to have some Bugs, a program should not be considered as having defect because of the Bug if the Vendor repair the Bugs promptly after becoming aware thereof or if they quickly take reasonable, alternative steps after consulting with users.

(2) The responsibility of the Vendor

(i) Will Civil Code apply?

If a defective program is delivered to a user in exchange for payment, the Vendor is responsible for the defect. Under the Civil Code, the Vendor will be either claimed for (A) defect warranty liability (Article 570 [Sales Contract] or Article 634 [Work Contract] of the Civil Code); or (B) non-performance of the main obligation (Article 415 of the Civil Code).

(A) Defect warranty liability

The user could either (a) terminate the contract, (b) demand for damages or (c) demand for repair of defect.

However, the termination option under (a) above is only available in "cases where the purpose of the transaction cannot be achieved" (Article 566 [Sales Contract] and Article 635 [Work Contract], both of which refer to Article 570 of the Civil Code). Should the Vendor fix the program so that it performs its intended functions, the purpose of the transaction will have been achieved. Therefore, if as demanded by the user, the program is fixed or a functioning

replacement is provided, the user cannot terminate the contract as such scenario constitutes a “case where the purpose of the transaction is achieved”.

As for (b), considering the nature of the program that can easily be repaired, the user should not demand damages after rejecting the offer of the Vendor to promptly repair the program or the provision of a replacement under the principle of good face and trust, as is usually preferable to the Vendor.

(B) Non-performance of the main obligation

A Vendor commits a contractual default where he supplies a defective product which cannot perform its stated functions. In response, the user can either (a) terminate the contract; (b) demand damages; or (c) demand fulfillment of obligation.

(a) Termination of the contract

Article 541 and 543 of the Civil Code stipulate that, where a party to a contract may terminate a contract if the party has already demanded the obligor to perform its obligation within a specified reasonable period of time, and yet the obligor did not perform its obligation, or where it is impossible for the obligor to perform its obligation. Specifically, if a user demands the Vendor fulfill its obligations within a specified (reasonable) time period, which is reasonable, and if the Vendor fixes the program’s defect or provides a functioning replacement within the specified period, then the user may not terminate the contract.

(b) Damages

Under the Article 415 of the Civil Code, if a Vendor cannot perform in accordance with a substance of the obligation, then the user 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 fulfilling his obligations. However, considering the nature of the program which may be easily repaired, the user may not demand for damages under and in accordance with the principle of good face, as mentioned above, without accepting the Vendor’s offer to fix or replacement, which is easily realized and is less onerous for the Vendor.

(c) Fulfillment of obligation (“*kanzen-rikô*”)

It is possible for a consumer, who purchased a defective product, to demand its repair or replacement under Article 415 of the Civil Code.

3. Period of the Vendor's defect warranty liability and other liability

Unless there is any particular agreement in the license agreement, the period of the obligation shall be as follows:

The period of the defect warranty liability is limited to the following periods: one (1) year after the user becomes aware of the defect (Articles 570 and 566 of the Civil Code [Sales Contract]) or one (1) year after delivery (Article 637 of the Civil Code [Work Contract]); provided that if the user is a business entity, Article 526 of the Commercial Code applies and the period is six (6) months after delivery.

The liability period of the non-performance of main obligation is limited to ten (10) years from the date the program is delivered (Paragraph 1, Article 167 of the Civil Code). However, where the Vendor is a business entity, any liability for default ends following the passage of five (5) years from the date the program is delivered under Article 522 of the Commercial Code. The claim for damages following the termination of contract (due to non-performance of claim for restoration to original state following the termination of contract) ceases following ten (10) years (in principle) or five (5) years (in cases of commercial transaction) from the date of termination.

These periods may be subjected to revision in consideration of the usual short life spans of software programs.

4. Disclaimer clause of defect warranty liability or non-performance of the main obligation

(1) Where the user is a consumer

Some license agreements have disclaimer clauses concerning defect warranty liability or main obligation of the contract. However, in consumer contracts, the following special clauses are likely to be declared invalid as violations of Subparagraphs 1, 2, or 5, Paragraph 1, Article 8 r Article 10 of the Consumer Contract Act:

- Clauses which shield the Vendor from any and all liability to indemnify the consumer for damages resulting from the Vendor's non-performance of obligation

- Clauses which partially shield the Vendor from liability to indemnify the consumer for damages resulting from the intentional, or grossly negligent, non-performance of main obligation.
- Clauses which shield the Vendor from any and all liability to indemnify the consumer for damages caused by a product defect; provided, however, that these clauses would be valid if it is stipulated in such contract that the Vendor should be responsible, when a latent defect is found in the subject item under such contract, to provide replacement or repair such defect (Subparagraph 1, Paragraph 2, Article 8 of said Act) or if a Vendor's affiliate bearing a certain relation to such Vendor is held responsible (Subparagraph 2, Paragraph 2, Article 8 of said Act).
- Clauses which restrict the rights of consumers or excessively disadvantageous to consumers

For example, clauses which shield the Vendor from any liability related to the Bugs; clauses which stipulate that Bugs will only be repaired on a chargeable basis. These clauses could be ruled invalid under Article 8 of the Consumer Contract Act. In a similar context, where the nature of a program necessitate a certain warranty period, and where a clause sets an unreasonably short, the clause could be judged invalid under Article 10 of the Consumer Contract Act.

(2) Where the user is not a consumer

When the user is not a consumer, the Consumer Contract Act naturally does not apply. For that reason, any special clause will be applicable in principle.

(7) Relationship between User and Assignee of Intellectual Property

[Issue]

A user (licensee) is only allowed to employ information property through a contract entered into 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 to employ the information property against the assignee?

(Examples)

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

[Approach]

(I) Where intellectual property rights of information property are assigned to a third party.

(i) Where the position of licensor (Vendor) of information property is transferred

A present licensor may assign its position as a licensor to a third party by entering into an agreement. In such case, the user (licensee) may continue to employ the information property.

(ii) Where only the intellectual property rights are assigned

(a) Copyright

Simply using information property does not necessarily constitute a infringement of copyrighted work. Therefore, the user (licensee) may continue to employ the information property, so long as he does not violate the copyright of the assignee.

(b) Patent

After a patent right has been assigned, the user may not continue to use the information property because such use constitutes a violation of the patent rights of the assignee; except where the user registered its non-exclusive license of the patent right. However, because the user is a consumer, as the use of information property for private purposes usually does not constitute a violation of patent rights, he may continue to use the information property.

(II) Where the Vendor (licensor) has gone bankrupt

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

However, the trustee does not usually find it beneficial to terminate license agreements for information property in cases of generic packaged software, where the users had already paid total amount of the license fee and do not have to pay license fees continuously.

[Explanations]

1. Problem identification

A licensee (user) is only allowed to use information property by virtue of a contract with the licensor (Vendor). Therefore, it is questionable whether a user will be able to effectively assert a right to use the information property against a third party to whom the Vendor (licensor) has assigned the intellectual property rights of the information property. If the Vendor should (licensor) go bankrupt, the trustee in bankruptcy may have the power in certain circumstances to unilaterally terminate the bankrupt's contracts (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). If the trustee terminates a license agreement, there is a risk that the user (licensee) may be immediately unable to use the information property.

2. Where intellectual property is assigned to a third party.

Where the Vendor (licensor) assigns intellectual property rights of information property, the Vendor either (1) assigns the position as licensor of the information property; or (2) assigns only the intellectual property rights.

(1) Where the whole position as licensor of information property has been assigned

Replacing a party to a contract is composed of the assignment of claims and the acceptance of obligations. Therefore, the replacement requires not only an agreement between the assignor and the assignee but also the consent of the counterparty to the contract.

However, where the ownership of land is assigned, and where the new owner assumes the role of lessor of the land under a pre-existing lease agreement, it is held that, except where special circumstances prevail, the new owner may assume the rights and duties of the former owner by way of agreement between the former owner and the new owner, without obtaining the consent of the lessee. This is possible in part due to the assumption of the lessor's duty by the new lessor, since the manner in which the duty is fulfilled would not be substantially different, and partly because it is advantageous for the lessee to allow the new owner of the land to assume the lessor's duties (Judgment of the Supreme Court of Japan, 2nd Petty Bench, April 23, 1971; 25-3 Minshû 388).

This judgment could be interpreted to mean that the whole 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 manner in which the obligation of the Vendor (licensor), which is to allow the user (licensee) to use the information property, would not in some cases differ regardless of 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 obligations attached thereto. In such a case, the user (licensee) may effectively assert the right to continue to employ the information property.

Where a license fee is payable annually, the new licensor may receive license fees for the next year on if either (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 that he consents to the assignment of the right to receive license fees (Paragraph 1, Article 467 of the Civil Code).

(2) Where only intellectual property rights are assigned.

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

(i) Copyright

The simple use of information property protected by a copyright does not constitute an infringement of a copyrighted work protected by the Copyright Law. Therefore, 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 for non-personal use, and the modification of information property (alteration or adaptation), are highly likely to constitute violations of the copyright.

A licensee cannot assert any perfected right to copyrighted works against a third party because the Copyright Law has no system by which a licensee can perfect a right.

(ii) Patent right

The unauthorized use of information property protected by a patent right constitutes a use of the patent right (Subparagraph 1, Paragraph 3, Article 2 of the Patent Law) and thus constitutes a violation of the assignee's patent rights. In such case, the user (licensee) may not continue to use the information property. However, if the employment is not considered as a use "for business purposes"(for example, for personal or family purposes), such use would not constitute a violation of the patent right. For that reason, the user (licensee) may continue to use the information property (Article 68 of the Patent Law).

When the non-exclusive license of a patent right has been registered, it can be effectively asserted against a third party (Paragraph 1, Article 99 of the Patent Law). Therefore, even if the user (licensee) employs the information property for business purposes, the user (licensee) may continue to employ the information property, so long as he registers any non-exclusive licenses of patent rights to the information property.

In both cases of (i) and (ii), the user (licensee) may demand damages from the Vendor (licensor), where the user is unable to continue to use the information property as a result of the assignment of the intellectual property right to a third party.

3. Where the Vendor (licensor) has gone bankrupt

Where both parties to a bilateral contract have not yet fulfilled their obligations, bankruptcy laws allow the trustee to choose between terminating the contract and demanding its specific performance (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 to use the information property, unless the user (licensee) concludes a new license agreement with the trustee or with the third party (assignee) to whom the trustee has assigned the right.

The trustee only can terminate those bilateral contracts under which both parties have yet to fulfill their respective obligations. Therefore, license agreements for information property (for example, generic packaged software), which require no further payment aside from the initial purchase, do not fall under this category.

2. Intellectual Property

(1) Use of Peer-to-Peer (“P-to-P”) File Exchange Software and the Provision of Peer-to-Peer File Exchange Services

[Issue]

Are uploading music and other files to the internet or through downloading such files from the internet using Peer-to-Peer file exchange software constitutes violation of the Copyright Law?

[Approach]

(I) Function of Peer-to-Peer file exchange software

Peer-to-Peer 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 by users

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 (copyrighted products) transmittable (collectively referred to as “*kôshû-sôshin-ka-ken*”).

(ii) Downloading by users

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.

(II) Providers of Peer-to-Peer file exchange services

The potential for infringement of copyright or related rights is deemed to exist, where the Peer-to-Peer file exchange service (i) runs on a central server; and (ii) supports the exchange of a vast majority of files which violate copyrights; and where the provider (iii) is deemed to exercise a high degree of management and control over the exchange; and (iv) is deemed to be making the service available in an attempt to obtain some future benefit.

[Explanations]

1. Problem identification

In recent years, software that supports the exchange of music and other files between users over the internet (hereinafter referred to as “P-to-P File Exchange Software”), such as Napster and Gnutella, has appeared. This type of program poses a risk to the holders of copyrights and neighboring rights.

Peer-to-Peer file exchange mechanisms fall into two major categories: (1) cases where the exchange of files between users is conducted through a central server; and (2) cases where the exchange of files is conducted without using a central server.

- (1) Where a central server is used, users exchange files by downloading the P-to-P File Exchange Software which is exclusively used to provide that service. After the software is installed on their personal computers, users can exchange files with other users by accessing the central server and obtaining the file information.
- (2) Where a central server is not used, users first obtain the P-to-P File Exchange Software. After installing the software on their personal computers, they can exchange files with other users by directly accessing the files on other users’ computers.

(1) User of P-to-P File Exchange Software

P-to-P File Exchange Software has two functions: (i) enabling transmission of files to the internet (uploading); and (ii) copying files (including the recording of sound and images) from the internet to media possessed by the user (downloading).

Whether the use of P-to-P File Exchange Software constitutes infringement of copyrights should be discussed.

(2) Providers of P-to-P File Exchange services

Does the provision of services, that support the exchange of files, such as the exchange of music between users via the internet through the use of a central server or the like (hereinafter referred to as “P-to-P file Exchange Services”), infringe upon copyrights?

2. Users of P-to-P File Exchange Software

(1) Uploading

The right to reproduce copyrighted works is held solely by the owner of the copyrights and the related rights (Article 21; Paragraph 1, Article 91; Article 96; Article 98; Article 100-2 of

the Copyright Law), but the rights of owners to prevent reproduction, “reproduction rights” (“*fukusei-ken*”), of copyrighted works does not cover solely private use (Paragraph 1, Article 30 of the Copyright Law).

Users usually produce files to upload for the use of Peer-to-Peer file exchange, for example, reproducing music CD (copyrighted work) into the form of an MP3 file. However, when the user makes a reproduction with the intent to distribute it to the public, this does not constitute private use and it is not regarded as an exception of private reproduction (“*shiteki-shiyô-no-tame-no-fukusei*”)(Paragraph 1, Article 30 of the Copyright Law). Moreover, even where the user originally makes the reproduction for private use, if the relevant file is uploaded, the reproduction is deemed to have been made under Subparagraph 1, Paragraph 1, Article 49 or Subparagraph 1, Paragraph 4, Article 102 of the Copyright Law.

Furthermore, making files transmissible over the internet (uploading) constitutes the act of “making (copyright products) transmittable” defined in Subparagraph 9-5, Paragraph 1, Article 2 of the law. The right of making (copyrighted products) transmittable (“*kôshû-sôshin-ka-ken*”) is solely possessed by the copyright holder and the neighboring rights holder (Articles 23, 92-2, 96-2, Article 99-2, Article 100-4 of the law).

Therefore, any person who makes, intentionally or negligently, music or other files transmittable to the internet using P-to-P File Exchange Software without obtaining the consent of the title holder, violates reproduction rights (Article 21; Paragraph 1, Article 91; Article 96, Article 98, Article 100-2 of the law), the right of transmission to the public or the right of making (copyrighted products) transmittable (“*kôshû-sôshin-ka-ken*”)(Articles 23, 92-2, 96-2, Article 99-2, Article 100-4 of the law) and will be liable for damages (Article 709 of the Civil Code). In addition, if there is, or if there is likely to be, a violation of rights, whether intentional or negligent, the rights holder may demand that acts which violate, or could lead to a violation, be ceased (Article 112 of the Copyright Law). Furthermore, any violator is liable at maximum for either a 3 year prison term or a fine of up to 3 million yen (Article 119 of the Copyright Law).

(2) 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 P-to-P 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

within a similar sphere. Such acts are not considered to violate any copyright or neighboring right (Paragraph 1, Article 30 and Paragraph 1, Article 102 of the Copyright Law).

If a person uses said copies for purposes other than personal use, such act will violate the right to reproduce (Articles 21; Paragraph 1, Article 91; Article 96, 98, and 100-2 of the Copyright Law) (Subparagraph 1, Paragraph 1, Article 49 and Subparagraph 1, Paragraph 4, Article 102 of the Copyright Law). The violator could be liable for damages (Article 709 of the Civil Code), he could be subject to the demands of the rights holder to cease reproduction (Article 112 of the Copyright Law), and he could be held criminally responsible (Article 119 of the law).

Where a user places a downloaded file on his own computer from which the file can be transmitted to the public and makes the downloaded file transmittable to the internet (in other words, both the downloading and uploading occurred at the same time), such act of downloading does not constitute an act of private reproduction and is deemed to infringe upon Reproduction Rights.

3. Providers of P-to-P file exchange services

There is a precedent from the court of first instance regarding P-to-P file exchange services using a central server. In this case, managers of copyrights and title holder of the neighboring right filed a lawsuit requesting an injunction against the provision of P-to-P file exchange services. The court held that considering (1) the content and nature of the acts committed by the provider of P-to-P file exchange services; (2) the degree of management and control the provider had over transmissions by users; and (3) the benefits accruing to the provider of P-to-P file exchange services as a result of the provision of such services, the provider of the P-to-P file exchange services is considered to engaging in acts of automatically transmitting to the public, or at least enabling such transmissions of, copyrighted works. Thereby, the provider had infringed upon the rights of owners of copyrights and related rights by transmitting protected works to the public or by enabling such transmissions to happen (Interim Judgment of Tokyo District Court, January 29, 2003; the service, which was the subject of the dispute, ceased operations on April 16, 2002).

Accordingly, based on the foregoing, providers of P-to-P file exchange services may be found liable for infringement of copyrights or neighboring rights when all of the following conditions are met:

- (1) The P-to-P file exchange service is constructed in such a manner that the illegal exchange of copyrighted works, which constitute the vast majority of the files exchanged by the

service, widely available in the commercial market, could have been anticipated by the provider.

- (2) The provider of P-to-P file exchange services has a significant degree of management and control over the facilitation of transmissions conducted by users.
- (3) The provider of P-to-P file exchange services is deemed to be making services available for the purpose of obtaining a future benefit.

(2) Illegal Acquisition of Domain Names

[Issue]

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 “unfair competition (*“fusei-kyōsō”*)” as an act of (i) acquiring or holding the right to use a domain name or using a 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)(*“tori-mokuteki”*) or causing damage to a party (damage-causing purpose)(*“kagai-mokuteki”*).

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

(II) Cases falling under the category of unfair competition

Shown below in (i) are some of the cases which ruled that the acquisition or use of a domain name was made in bad faith and in (ii) are cases decided by courts and by alternative dispute resolution panels which held that the domain names at issue were identical with, or similar to, other parties' trademarks, service marks, etc.. All of these cases are highly likely to violate the Unfair Competition Prevention Law.

(i) Cases where it was ruled that the acquisition or use of a domain name was made for illegal purposes, etc.

- Where the domain name acquired was identical or similar to a trademark, for example, of a well-known business entity, and where products were sold taking advantage of the reputation and the brand recognition of the well-known business entity.
- Where the domain name acquired was identical or similar to a trademark, for example, of a well-known business entity, and using the domain to harm the reputation of the business entity by displaying a message defaming or disparaging the business entity on the website.
- Where a domain name was used which was identical or similar to a trademark, for example, of a well-known business entity, and opening a pornographic website.
- Where a domain name was used which was identical or similar to a trademark, for example, of a well-known business entity for the purpose of assigning the user to another website.
- Where a domain name was used which was identical or similar to a trademark, for example, of a well-known business entity, in order to make it difficult for such business entity to set up a website.
- Where the domain name registered is identical or similar to a trademark, for example, of a well-known business entity, and demanding the payment of unreasonable price for the domain name (ruled that the domain name was purchased for the purpose of reselling).
-
-

(ii) Where domain names were ruled identical or similar to another party's trademarks, 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
- “goo.co.jp” and goo
-

(III) Effects of the Unfair Competition Prevention Law

Those who experience lost profits or reputation damage due to unfair competition may demand (i) injunction of the use of the domain name (Article 3 of the Unfair Competition Prevention Law); (ii) damages (Articles 4 and 5 of the law); and (iii) an action to restore the business entity's reputation (Article 7 of the law).

(IV) Dispute settlement guidelines

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

(i) JP Domain Names

When a dispute concerns a JP Domain Name, it is possible to seek a settlement through a dispute settlement institution authorized 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 deletion of the registered domain name or its assignment to the applicant. The award given by the agency is not final, since the party dissatisfied with the award can file a subsequent suit through an appropriate court.

(ii) Other domain names

When a dispute concerns other domain names, 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 assignment to the applicant. The decision given by the agency is not final, since the party dissatisfied with the award can file a subsequent suit through the appropriate court.

[Explanations]

1. Regulation of illegal acquisitions 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 business entities 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 worldwide in which a person has registered domain names composed of a string of characters, numerals, etc. that were identical or similar to the name of a well-known company, trademark, or service mark and the like. The registered holder then offered to sell the domain name to

the company at an exorbitantly high price or instead attempted to disparage the reputation of the company through the website.

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 defines “unfair competition” as an act of (i) acquiring or holding the right to use a domain name or using a 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 a party (damage-causing purpose).

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 referred to as “JP Domain Names”) but also to domain names that end with the country codes of other countries such as those ending with “.uk”, “.ca”, “.de” or do not end with a country code at all (such as those ending with “.com”, “.net”, “.org”, or “.info”) (hereinafter referred to as “Generic Domain Names”).

2. What Acts constitute “Unfair Competition”?

(1) For 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. The former means in order to make a profit for oneself or for a third party in a manner contrary to public policy or to the principle of good face and trust. The latter means in order to cause tangible or intangible damage to a third party such as financial loss or reputation damage.

Shown below are some of the cases where it was ruled that the registration or use of a domain name was in bad faith. These examples are drawn from judicial precedents and actual civil disputes adjudicated by the Japan Intellectual Property Arbitration Center (hereinafter referred to as “JIPAC”). These cases are helpful when interpreting the profit-making and damage-causing purposes defined in the law.

- Where the domain name acquired was identical or similar to a trademark, for example, of a well-known business entity, and where products were sold taking advantage of the reputation and the brand recognition of the well-known business entity.
- Where the domain name acquired was identical or similar to a trademark, for example, of a well-known business entity, and using the domain to harm the reputation of the business entity by displaying a message defaming or disparaging the business entity on the website.
- Where a domain name was used which was identical or similar to a trademark, for example, of a well-known business entity, and opening a pornographic website.
- Where a domain name was used which was identical or similar to a trademark, for example, of a well-known business entity for the purpose of assigning the user to another website.
- Where a domain name was used which was identical or similar to a trademark, for example, of a well-known business entity, in order to make it difficult for the business entity to set up a website.
- Where the domain name registered is identical or similar to a trademark, for example, of a well-known business entity, and demanding the payment of unreasonable price for the domain name (ruled that the domain name was purchased for the purpose of reselling).

(2) Domain names identical or similar to another party's trademarks, service marks and the like

“Trademarks, Service marks and the like” 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 come within this category, a mark has to perform both a distinguishing function vis-a-vis other marks as well as an identification function. Therefore, for example, when an ordinary name, which does not have either or both of these functions, is used as a domain name, it does not come within 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 apply. For example, a Toyama District Court Judgment dated December 6, 2000 ruled that “When compared, apart for the capitalization, ‘JACCS’ and ‘jaccs’ are identical. In addition, taking into account the fact that most domain names consist of lowercase letters, the capitalization of the letters is immaterial.” (This judgment was upheld by the High Court and was later affirmed [Nagoya High Court, Kanazawa Branch judgment, Sept. 10, 2001. An appeal to this judgment was

rejected by the Second Petty Bench, Supreme Court, February 8, 2002].) A Tokyo District Court judgment dated April 24, 2001 concluded that “The defendant’s website contains the names “J-PHONE” in English, “JPHONE” in Japanese, “J-PHONE“ in combination of English (“J”) and “PHONE“ in Japanese, all written horizontally. These are substantively identical or similar to the aforesaid English name “J-PHONE” on the website.” This judgment was upheld by the High Court (Tokyo High Court judgment, Oct. 25, 2001).

Shown below are some of the rulings delivered by the Japan Intellectual Property Arbitration Center (formerly, the Industrial Property Arbitration Center) in court and alternative dispute resolution panel where “similarity” was found to exist.

- “jaccs.co.jp” and JACCS (Judgment of Kanazawa Branch of Nagoya High Court, September 10, 2001).
- “j-phone.co.jp” and J-PHONE (Judgment of Tokyo High Court, October 25, 2001).
- “sunkist.co.jp” and SUNKIST or Sunkist (Award of JIPAC, June 1, 2001).
- “sonybank.co.jp” and SONY (Award of Industrial Property Arbitration Center [presently JIPAC], March 16, 2001).
- “itoyokado.co.jp” and Ito Yokado (Award of Industrial Property Arbitration Center [currently JIPAC], March 14, 2001).
- “goo.co.jp” and goo (Judgment of Tokyo High Court, October 17, 2002)

(3) Acquiring/Keeping of the right to use a domain name or act of using a domain name

Acquiring the right to use a domain name includes cases where (i) an applicant acquires the right to use a domain name by applying to a domain name registration agency for its registration; (ii) an entity acquires the right to use a domain name through its assignment from a third party in whose name the domain name was originally registered with a registration agency; and (iii) an entity receives a license for the domain name from the third party in whose name the domain name is registered with a registration agency.

Keeping the rights to use a domain name is equivalent to having the right to use a domain name continuously. Using a domain name means using a domain name for purposes such as setting up a website.

3. Effects of falling into the category of “Unfair Competition”

Business entity who suffer loss of revenue or reputation damage through acts of unfair competition may demand that the use of a domain name be stopped (Article 3 of the Unfair Competition Prevention Law), damages (Articles 4 and 5 of the law), and measures be taken to restore reputation (Article 7 of the Unfair Competition Prevention Law). Business entity who suffer loss of revenue because a party has illegally acquired a domain name identical or similar to their trademarks, service marks or the like, may demand damages equivalent to the price of a license fee which they could have received had they granted a license for the use of the domain name in advance (Subparagraph 4, Paragraph 2, Article 5 of the Unfair Competition Prevention Law).

4. Domain name dispute resolution policies

The Unfair Competition Prevention Law does not contain any explicit provisions with respect to the assignment of domain names. Even if a claim for the assignment of a domain name is made based on the right to order an injunction against the use of the domain name in a litigation proceeding, it would be difficult to obtain a judgment for the assignment of such domain name. 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) 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 referred to as 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 authority to resolve the dispute in accordance with the JP Domain Name Dispute Resolution Policy (hereinafter referred to as the “JP-DRP). The JP-DRP provides that a third party applicant may seek, as a remedy, the cancellation of the registrant's domain name registration or the assignment of the domain name registration 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 (presently, JIPAC is the only one) certified by JPNIC, the Japan Registry

Service Corporation (hereinafter referred to as the “JPRS”) shall take steps for the assignor cancellation of the domain name registration (Article 3 and Part k, Article 4 of the JP-DRP). However, any 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 residency area of the registrant. If a suit is filed within 10 days of the notification of an award, the JPRS can withhold the assignor cancellation of the registration, which it may have ordered in the award. Where a court becomes involved, the JPRS will ultimately carry out the instructions of the court as regards the domain name (Part k, Article 4 of the JP-DRP).

As the details of any rights to a domain name are prescribed in the contract between the registrant and JPRS, a cancellation or assignment executed by JPRS, in accordance with the Registration Regulations, does not constitute a tort. A judicial precedent also states, “The registration of a domain name is granted by private contract (the contents of which are the Registration Regulations) between an internet user and JPNIC (which handled the registration of domain names in the past), a domain name registration agency. The registrant of a domain name uses the domain name by virtue of the contract with JPNIC, and any right the registrant has to the domain name is a contractual one to be asserted against the JPNIC”(Judgment of Tokyo District Court, November. 29, 2001).

(2) 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 assign its registration by filing an application with a dispute settlement agency certified by ICANN. However, any 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 either 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 enforcement of the judgment, such as an assignor cancellation, will be withheld (Part k, Article 4 of the UDRP).

(3) Presentation of Product Information on the Internet and Trademark Infringement

[Issue]

Does the presentation of brand-name goods in internet auctions or offers to sell brand-name goods on internet message boards infringe upon trademark rights?

[Approach]

(i) Where these acts are conducted “as a business” (“*gyô-to-shite*”); and (ii) the goods sold “are not genuine products“, liability for trademark infringement potentially exists.

(i) Whether these acts are conducted “as a business”

Where these acts are not conducted “as a business” as defined by the Trademark Law, there is no infringement of trademarks. If an individual or entity, for example, conducts transactions on a repeated and ongoing basis, or when the same goods are sold at one time in large quantities, such individual or entity will be operating “as a business.”

(ii) Whether these are “genuine products”

Trademark rights are deemed legally exhausted after the initial sale. Therefore, if the goods being resold are the genuine products, the resale of such goods does not infringe any trademark right.

[Explanations]

1. Problem identification

The growth of the internet has led to the sale of brand-name goods (meaning, in this section, goods that are subject to registered trademark rights) in internet auctions and on internet message boards. In addition to the sale of goods owned by persons, businesses are selling products which they acquired in large quantities. Replica goods are also being sold in combination with genuine products.

Are people infringing the rights of trademark owners, who exhibit brand-name goods in internet auctions or who offer to sell brand-name goods on internet message boards (hereinafter referred to as “Exhibitors”)?

2. Liability of Exhibitors

“Trademarks” as used herein refers to “characters, figures, symbols or three-dimensional forms, or combinations thereof, or combinations of the foregoing with colors, which are used by parties who attach such marks to products that such parties produce, demonstrate, or assignment as a business” (Subparagraph 1, Paragraph 1, Article 2 of Trademark Law). The owner of a trademark right has the exclusive right to use the trademark for the purpose of attaching to products or product packaging (Article 25 of the Trademark Law).

Furthermore, advertisements on the internet constitute the use of trademarks (Subparagraph 8, Paragraph 3, Article 2 of the Trademark Law), and acts including the exhibition of goods in internet auctions and offers to sell on the internet are deemed subject to the same provision.

(1) “As a business”

As specified above, the definition of trademark use requires that the trademarks be used in the course of acting “as a business.” Thus, the exhibition of brand-name goods in internet auctions and offers to sell brand-name goods on internet message boards, when there is no assignment of such goods “as a business,” do not constitute use of trademarks and are deemed not to infringe trademark rights.

By way of example, a person would be regarded as acting “as a business” in the following two cases (a) and (b). Moreover, this would apply to acts whether conducted by a person or an entity¹².

(a) Cases involving repeated and ongoing transactions

In practice, when transactions are conducted on a repeated and ongoing basis, such conduct is deemed acting “as a business.” Moreover, when an Exhibitor intends to conduct transactions on a repeated and ongoing basis, that is also deemed to acting “as a business.”

A person does not act “as a business” where he uses a single internet auction website to exhibit the same brand-name goods multiple times using the same ID.

¹² Please keep in mind that the definition of “business” differs from law to law.

For example, the meaning of “business” in Paragraph 2, Article 2 of the Electronic Contract Law covers instances where the same action is conducted on a repeated and ongoing basis without the need for a profit objective, whereas a “business” under the Specified Commercial Transactions Law applies to sales conducted on a repeated and ongoing basis with a view to profit.

Rather, a person is deemed to be acting “as a business“, if on multiple websites he exhibits the same brand-name goods and offers to sell such goods overall on a repeated and ongoing basis.

Where no bids are made for the exhibited items, even where the same goods may be exhibited several times on internet auction websites or internet message boards, such instances will not constitute repeated and ongoing transactions.

(b) Conducting single transactions involving large quantities of the same goods

It is now possible and common to exhibit and offer for sale the same goods at the same time on internet auction websites and internet message boards. A person will be deemed to be acting “as a business” where he conducts single transactions involving large quantities of the same goods.

(2) Genuine Products

The term “Genuine products” as used herein refers to goods put into distribution by the owner of the trademark. With respect to goods that are in lawful distribution, such as those procured through normal channels, the trademark rights are deemed exhausted at the time the goods are initially sold to a consumer. Any subsequent resale of such goods does not constitute an infringement of trademark rights. Furthermore, when acquired from a foreign country (such as in the case of parallel imports), the trademark rights are also deemed exhausted when the owner puts the goods into distribution in a foreign country. If the same person owns the trademark rights in both Japan and the relevant foreign country, or if the goods are manufactured in a foreign country by the respective owner of the rights, where the trademarked goods are assigned by proper means, the trademark rights are exhausted upon the initial sale of the goods in Japan, meaning following sales in Japan will generally not be deemed an infringement of trademark rights (Judgment of Osaka District Court, February 27, 1970, 625 Hanrei Jihô 75)

Accordingly, the resale of goods, which were acquired by proper means, does not raise any issue under the Trademark Law. Specifically, such goods are similar to the ones which a retailer acquires from a wholesaler, where the retailer independently determines the retail price without ever requiring a license from the trademark owner. Offering goods for sale on an internet auction website or an internet message board is regarded as the equivalent of an advertisement flyer of a retailer under the Trademark Law.

Nevertheless, when goods are produced at a legal factory but are not put into distribution by decision of the trademark owner, if, for example, the goods are stolen, such goods will not be treated as genuine products.

In light of the above, when a person is acting “as a business“ and the goods “are not genuine products,“ the act of exhibiting such goods on an internet auction site or offering the goods for sale on an internet message board constitutes an infringement of trademark rights; any person engaging in such action is deemed liable to indemnify the damaged parties (Article 709 of Civil Code). Moreover, there are cases in which such person may be subject to a claim for an injunction from the owner of the rights (Article 36 of Trademark Law) or to criminal sanction (Article 78 of Trademark law).

In addition, where a person who exhibits, or offers for sale, replica goods, which are not genuine products, and even where the person has clearly specified the replica goods as replications, such act will constitute an infringement of trademark rights because the person is selling goods to which a trademark is attached without having received a license from the owner of the trademark right (Article 25 of Trademark law).

Where a Vendor sells replica goods in a manner which presents the replications as genuine products, and where the Vendor is aware that they are replications, such Vendor may be subject to a criminal sanction under the Criminal Law for the commission of fraud (Article 246 of Criminal Law).

(4) Providing IDs and Passwords on the Internet

[Issue]

What regulations apply with respect to exhibiting IDs and passwords in internet auctions, and disclosing this information on internet message boards, for the purpose of gaining access to and copying (installing) digital content and programs?

[Approach]

(I) Contractual regulations

Where a contract has been concluded between a provider and a user that prohibits communication of IDs and passwords to third parties, users who sell or disclose IDs or passwords on the internet bear contractual liability (liability for the non-performance of contractual obligations).

(II) Regulations based on the Unauthorized Computer Access Law

Where IDs and passwords are provided for the purpose of using computers via the internet, it is prohibited by the Unauthorized Computer Access Law to leak IDs or passwords with the information that which computer could be used by such IDs and passwords without the permission of the authorized user of such IDs and passwords¹³ nor the permission of the issuer of such IDs and passwords.

(III) Regulations based on the intellectual property laws

The sale or disclosure of IDs and passwords on the internet is deemed not to constitute unfair competition or a violation of the Copyright Law with respect to technical sanctions.

¹³ “Authorized user” as used herein refers to a user who has obtained permission to use other computers from the person who is authorized to grant applicable IDs and passwords for use of said computers.

[Explanations]

1. Problem identification

Businesses impose technical sanctions (known as “access controls”) on the viewing, listening, and usage of digital contents and programs (hereinafter referred to as “Content”), as well as technical sanctions on copying (e.g., installation; known as “copy controls”), and by providing content only to users who pay a fee and who are given access based on user IDs, passwords, product IDs, serial numbers, and the like (hereinafter referred to as “IDs/Passwords”) by which technical sanctions can be removed (in some cases, the users establish specific IDs/Passwords). Users can then use their IDs/Passwords to view, listen, use, or copy (hereinafter referred to as “Accessing and Copying”) the Content.

With the growth of the internet, IDs/Passwords are being sold and disclosed by means of internet auctions and internet message boards which allow access to and the copying of Content. Moreover, methods to avoid technical sanctions for the purpose of Accessing and Copying Content (know-how), in the form of documented information such as manuals (hereinafter referred to as “Circumvention Manuals”) are also being sold and disclosed. As a result, businesses, which provide access to and the copying of Content for the payment of a fee, are experiencing revenue losses.

What types of legal regulations exist with respect to the sale and disclosure on the internet of IDs/Passwords and Circumvention Manuals?

This section discusses IDs/Passwords for Accessing and Copying Content, which is being provided in the market for commercial purposes, but does not concern security numbers for banking cash cards, passwords for the control of corporate trade secrets, or the like.

2. Contractual regulations

In some cases, contracts may be concluded between providers and users specifying that IDs/Passwords may not be provided to third parties upon provision of the IDs/Passwords. In such cases, users who sell or disclose such IDs/Passwords on the internet bear contractual liability (liability for the non-performance of the main obligations; Article 415 of Civil Code).

3. Regulations under the Unauthorized Computer Access Law

Where a person can connect via a network such as the internet to a computer that can be used by entering distinct codes such as IDs/Passwords, and where such use is made possible by entering the distinct codes of another person without authorization, such acts are prohibited as acts of unauthorized access and punishable by law (Articles 3 and 8 of the Unauthorized

Computer Access Law). Specifically, the act of entering the distinct code of another person without authorization and any action which can be classified as an “attack on a security loophole” constitute such an action. As used herein, in order to be a distinct codes two requirements must be satisfied. A distinct code must allow access to: (1) information which allows specified usage that differs for each individual user; and (2) information that cannot be used by anyone other than such other person. As used herein, “specified usage“ means use via an electronic telecommunications line such as the internet, whereby no limits exists on usage and where Accessing and Copying Content can be performed.

The acts of providing the distinct codes of another person without authorization and disclosing which computers can be used with such IDs/Passwords to a third party are prohibited as acts that promote unauthorized access (Articles 4 and 9 of the Unauthorized Computer Access Law). Moreover, the provisions of this information is prohibited by any and every means both online and offline. It does not matter whether such acts result in financial gain.

Accordingly, for IDs/Passwords whose purpose is to provide access to other computers by means such as the internet, the Unauthorized Computer Access Law bars the sale or disclosure of such IDs/Passwords via the internet as well as the disclosure of computers accessible with such IDs/Passwords, if the provision occurs without either the permission of the authorized user of such IDs/Passwords or the individual granting such authorization.

4. Regulations under the intellectual property laws

(1) Unfair Competition Law

(i) Unfair competition against technical protections

Under the Unfair Competition Law, where measures are taken for business reasons to restrict access to and the copying of Content by electronic means (technical protections (Paragraph 5, Article 2 of the Unfair Competition Act)), the act of assigning devices or programs (including, in the case of programs, providing them via electronic telecommunications lines), whose sole function is to enable unauthorized access or copying by means of circumventing the effects of such technical protections, constitutes unfair competition (Subparagraphs 10 and 11, Paragraph 1, Article 2 of the Unfair Competition Act). Moreover, where any business, which makes Content available and which is protected by technical protections, is being harmed by assigning programs or devices which invalidate their technical protections, so that the business loses revenue or is at risk of losing revenue, such business can apply for an

injunction or for indemnification from the persons distributing the assigning programs or circumvention devices (Articles 3 and 4 of the Unfair Competition Act).

Nevertheless, properly inputting such IDs/passwords into a computer in order to obtain a certain result conceived in advance does not constitute improper use of the computer. Therefore, as a rule, proper use of IDs/Passwords does not constitute an act circumventing the effects of technical protections.

Items that are the focus of unfair competition include “devices” and “programs” designed for a special purpose. As used herein, “programs” mean combination of structured orders, by which one can obtain certain results” (Paragraph 6, Article 2 of the Unfair Competition Law). IDs/Passwords are simply strings of letters, numbers, or symbols, and constitute neither programs nor devices.

Similarly, Circumvention Manuals constitute neither programs nor devices.

Therefore, the act of assigning IDs/Passwords or Circumvention Manuals is not deemed to constitute unfair competition with respect to technical protections.

(ii) Unfair competition related to trade secrets

Under the Unfair Competition Prevention Law, trade secrets: (1) are managed as secrets (confidentiality); (2) constitute valuable technical or business information for business activities (value); and (3) are not in the public domain (non-public) (Paragraph 4, Article 2 of the Unfair Competition Law). Acts involving the improper acquisition, use, or disclosure of trade secrets constitute unfair competition (Subparagraphs 4 to 9, Paragraph 1, Article 2 of the Unfair Competition Law). If businesses incur financial loss or are put at risk of incurring losses as a result of such unfair acts related to trade secrets, such businesses may claim an injunction against or indemnification for such unfair acts (Articles 3 and 4 of the Unfair Competition Law).

(A) IDs/Passwords

Trade secrets are determined by whether the item of information satisfies the relevant legal requirements. For example, where a business, who employs IDs/Passwords as a technical protection to the access of Content, grants the same IDs/Passwords to multiple users without imposing any condition that such IDs/Passwords shall not be provided to third parties, users are unlikely to be aware of (1) any confidentiality requirement and (3) the non-public nature of the information, rendering it difficult to regard such IDs/Passwords as trade secrets.

If such persons grant different IDs/Passwords to each person on the condition that such IDs/Passwords shall not be provided to third parties, the requirements of (1) confidentiality and (3) non-public nature may be satisfied. In addition, as the IDs/Passwords have value as regards their role in the business, the IDs/Passwords would consequently be regarded as trade secrets.

(B) **Circumvention Manuals**

Methods of circumventing technical protections, in order to access or copy Content that satisfies the criteria of (1) confidentiality, (2) value, and (3) non-public nature, may be regarded as trade secrets. If they are so regarded, whether this status constitutes unfair competition depends on how the trade secrets were acquired; if they were acquired by means of theft, fraud, coercion, or other improper means (hereinafter referred to as an “act of unfair acquisition”), or if such information is acquired from a third party where the person who acquired the manual was aware of the existence of an act of unfair acquisition (or is unaware due to gross negligence), each act of acquiring, using, or disclosing such information constitutes unfair competition (Subparagraphs 4 and 5, Paragraph 1, Article 2 of the Unfair Competition Law). If a person becomes aware of the existence of an act of unfair acquisition after acquiring the applicable information (or if he was unaware due to gross negligence), the acts of using or disclosing such information each constitute unfair competition (Subparagraph 6, Paragraph 1, Article 2 of the Unfair Competition Law). Whether there has been a violation of the management of confidentiality is regarded as one of the standards used to determine improper means hereunder. Moreover, the act of acquiring information by reverse engineering is not regarded as an act involving improper means.

(2) **Copyright Law**

Under Copyright Law, the public assignment of devices, including programs for public transmissions, or programs whose primary function is to circumvent technical protections, including programs or which enable transmissions, is prohibited, and criminal penalties may be imposed on persons engaging in such acts (up to one year in prison or fines of up to one million yen) (Article 120-2, Copyright Law).

As used herein, “technical protections” refers to measures based on electronic methods for blocking or obstructing acts which violate copyright (Subparagraph 20, Paragraph 1, Article 2 of Copyright Law), and which in any case are a means of blocking or obstructing acts for the unauthorized use of copyrighted works (reproduction, public transmission, or enabling transmission). Access controls such as restrictions on the use of programs or control of the viewing of and listening to digital Content, fall beyond the scope of this definition.

Moreover, the “circumvention of technical protections” means, based on the removal or alteration of codes used for technical protections, facilitating acts and/or removing any obstacles to acts which the technical protections were designed to prevent (Subparagraph 2, Paragraph 1, Article 30 of Copyright Law).

Nevertheless, properly inputting such IDs/Passwords into a computer in order to obtain a certain result conceived in advance does not constitute improper use of the computer. Therefore, as a rule, proper use of IDs/Passwords does not constitute an act circumventing the effects of technical protections.

The focus herein is devices and programs, specifically special purpose items. “Programs” refer to “expression of combinations of instructions, by which one can operate a computer to obtain certain results” (Subparagraph 10-2, Paragraph 1, Article 2 of Copyright Law). IDs/Passwords are simply strings of letters, numbers, or symbols, and constitute neither programs nor devices.

Moreover, Circumvention Manuals constitute neither programs nor devices.

Therefore, the act of assigning IDs/Passwords or Circumvention Manuals to the public is not deemed to violate Copyright Law.

Do acts of reproduction by users based on the input of IDs/Passwords obtained from third parties and acts of reproduction by users using methods specified in Circumvention Manuals constitute violations of copyright?

Under the Copyright Law, reproduction enabled by the circumvention of technical protections without the permission of the owners of rights, and conducted with knowledge of both facts, does not constitute private reproduction but rather constitutes a violation of reproduction rights (Subparagraph 2, Paragraph 1, Article 30 of Copyright Law).

However, even if content is reproduced using IDs/Passwords obtained from another person, properly inputting such IDs/Passwords into the computer to obtain a certain result conceived in advance does not constitute improper use. This is deemed not to constitute a circumvention of technical protections. Therefore, when such reproduction is for personal use, the reproduction will not constitute a violation of reproduction rights.

Nevertheless, where the reproduction of content through the use of methods set forth in a Circumvention Manual is deemed to involve the removal or alteration of codes used in technical protections, such acts constitute a violation of reproduction rights.

(5) Treatment of Data and Information Extracted from Databases

[Issue]

Do legal restrictions apply to the extraction of information and data from databases provided online via the internet or from packaged CD-ROMs, and to the provision of such information and data to third parties?

[Approach]

(I) Where each element of data extracted from a database is a copyrighted work

Copyrights extend to such data. The use of such data without permission from the owner of the right violates copyright.

(II) Where each element of data extracted from a database is not a copyrighted work

Generally, this data can be freely used. However, in cases i) and ii) below, where large amounts of relatively organized data are extracted, legal restrictions may apply.

(i) Where the creativity of an original database is reproduced through the use of a body of data, which had been extracted from the original database with creativity.

The use of the data without permission of the owner of the right violates copyright.

(ii) Where data extracted from a database interfere with business related to the original database, although the database is not deemed to have creativity.

Acts such as the sale of such body of data, interfering with business related to the original database, constitute illegal acts giving rise to liability for indemnification.

[Explanations]

1. Problem identification

Databases refer to collections of data in which (1) data is or can be saved as part of a systematic scheme embodying a structure involving hierarchies or links; (2) it is possible to identify and extract only specifically required items from the whole of the database; (3) enables searches for such required items from an information terminal device possessing the appropriate functions. Such databases are provided online via the internet, packaged on CD-ROMs and the like, and are characterized by a system of information and data that enables the information and data to be easily searched from the appropriate terminal.

Along with the development of digital means of data capture, storage, and transmission, there has also been a dramatic increase in the flow of information, making it increasingly important to efficiently and accurately extract the requisite information from vast amounts of information. As a result, there is an increased need for databases which enable searches by computer.

Moreover, the spread of the internet and personal computers has been accompanied by an increase in the transmission of information from individual users. In certain cases, information and data extracted from databases is provided as is or with further processing to third parties (such as the distribution of printed materials uploaded to the internet). Do legal restrictions apply to the use of information and data extracted from databases such as the provision of such information and data to third parties?

2. Where each item of data extracted from a database is a copyrighted work

Where information and data extracted from a database are deemed subject to copyright, each item of information or data is protected as a copyrighted work. For example, where information or data extracted from a database is a newspaper or magazine article, a map, an image, or the like, such items often constitute copyrighted works.

In this case, the act of using (reproduction (Article 21 of Copyright Law), assigning (Article 26-2), publicly transmitting, or enabling transmission (such as by uploading to the internet) (Articles 23, 92-2, 96-2, 99-2, 100-4 of Copyright Law) of each item of data without permission of the owner of the rights infringes upon such copyrights and may give rise to liability for indemnification (Article 709 of Civil Code), a claim for injunction (Article 112 of Copyright Law), or criminal liability (Article 119 of the Copyright Law).

However, where the purpose of reproduction is personal use, these acts do not infringe upon copyrights (Paragraph 1, Article 30 of Copyright Law).

3. Where each item of data extracted from a database is not a copyrighted work

Where each item of information and data extracted from a database is simply a fact, such as a train schedule, the names and elevations of mountains, or stock information, such items are generally deemed not to constitute copyrighted works. Therefore, such information is generally in the public domain.

However, where large amounts of relatively organized data are extracted, legal restrictions may apply where (1) a body of data extracted from a database with creativity reproduces the creativity of the original database, and (2) a body of data extracted from a database infringes

upon business activities related to the original database, despite the fact that the original database is not deemed to have creativity.

- (1) Where the creativity of an original database is reproduced through the use of a body of data, which had been extracted from the original database with creativity.

Under Copyright Law, where databases are comprised of bodies of information such as text, figures, or diagrams which are systematically organized to enable searches by an electronic computer and which constitute original works because of the selected data and systematic structure, such databases shall be protected as copyrighted works (Subparagraph 10-3, Paragraph 1, Article 2 and Article 12-2).

Specifically, databases deemed to be protected as copyrighted works are those that exhibit creativity such as a unique method of data selection or a specialized format for each item of information, search systems, setting of keywords, and hierarchy of the database which enables information to be found efficiently because of its systematic structure. By way of example, in one judicial precedent where a database was protected as a copyrighted work, the court acknowledged the creativity of the NTT Town-Page database with respect to the classification of telephone numbers by the employment field of the respective owners (Judgment of Tokyo District Court, March 17, 2000, 1714 Hanrei Jihô 128).

When a body of relatively organized information and data (hereinafter referred to as a “Body of Data”) is extracted from a database having creativity, and the selection or systematic structure of such information is deemed to have creativity that did not arise as a result of additional processing by the person who extracted the information (when information and data extracted from a database with creativity are reproduced in a form which is relatively organized and does not detract from their value as a copyrighted work), the copyrights to the original database are deemed to extend to that Body of Data. Therefore, the act of using (such as reproduction (Article 21 of the Copyright Law), assigning (Article 26-2 of the Copyright Law), publicly transmitting or enabling the public transmission of (such by uploading to the internet) [Article 23 of the Copyright Law]), the Body of Data without the permission of the owner of the rights infringes upon copyrights and may give rise to liability for indemnification (Article 709 of Civil Code), a claim for injunction (Article 112 of Copyright Law), or criminal liability (Article 119 of the Copyright Law).

However, when reproductions are for personal use, such acts do not infringe upon copyrights (Paragraph 1, Article 30 of Copyright Law).

- (2) Where extracting a Body of Data from a database infringes upon business activities related to the original database despite the fact that the original database is not deemed to be an original work

Databases not deemed to be original works are not protected by copyright. In a judicial precedent concerning a database comprised of certain information on existing four-wheel automobiles in Japan for purposes of automobile servicing, the selection criteria were common, and this feature was not regarded as having creativity. Moreover, information was simply placed in order from the oldest to the newest, and was not further classified. Since other businesses independently adopted the same structure, the systematical structure of the database was also not regarded as original (Interim Decision of Tokyo District Court, May 25, 2001; 1744 Hanrei Jihô 132).

This decision held that (1) the database was created by a person who expended labor and money to collect and organize the information; and (2) such person engaged in business activities to compile and sell the database; and (3) the acts of reproducing the data of the database and compiling a new database to sell in a geographic area that competes with the sales geography of such person were deemed to constitute illegal acts using conspicuously unfair means that infringed upon the business interests of another person in the trading society subject to legal protection under the principle of fairness and free competition.

Accordingly, regarding the creation of a Body of Data from a database that is not original, where (i) the original database has economic value such as being created through a considerable investment of capital; and (ii) it is used for business activities; and (iii) an act such as the sale of such Body of Data infringes upon the business activities related to the original database, such act may be deemed to be illegal, giving rise to liability for indemnification (Article 709 of Civil Code).

However, this case held that an injunction was not approved which would have barred acts such as the reproduction of a Body of Data (Judgment of Tokyo District Court, March 28, 2002, 1104 Hanreitaimus).

4. Where, with respect to the provision of a database, a contract is concluded between the provider and the users regarding the conditions for information and data use

With respect to the provision of a database, a contract may be concluded between the provider and the users regarding the conditions for use of information and data in the database.

When a contract is concluded, users must generally use the database itself and the information and data included in such database in accordance with the applicable conditions of use, and the provider of the database is deemed able to assert contractual liability (liability for

non-performance of the main obligation, Article 415 of Civil Code) with respect to acts of use by the user outside the contract.

However, some opinions have highlighted the need to further scrutinize the validity of such contracts especially the contractual provisions which restrict the acts of users.

(6) Legal Responsibilities in E-Learning

[Issue]

What legal responsibilities do the schools or service Vendors have in regard to copyrights or protection of personal information when providing school lessons and/or staff trainings through remote education by using network or when the remote education service Vendors provide lessons and/or trainings to schools or companies for value?

[Approach]

(I) Responsibility for copyrights

When using the copyrighted work of a third party in e-learning, permission from the copyright owner must be obtained in principle.

However, the use of any copyrighted work in the course of lessons by schools or other nonprofit-oriented educational institutions which satisfy certain requirement, such copyrighted work may be transmitted to the students located in remote districts for studying purpose by using the Internet or other network, without permission from the copyright owner. In order for such public transmission without permission to be approved, the transmitter needs to confirm that the copyrighted work is already made public, that the image of the actual lessons (main site) is aired live at the same time at a place other than that where such lessons are given (secondary site) for students who take lessons and that the transmission is limited to those taking classes at such educational institutions.

By satisfying certain requirements, the copyrighted work of exam questions for examination using the network may be transmitted publicly without permission from the copyright owner. In order for such public transmission without permission to be approved, the transmitter needs to confirm that the copyrighted work is already made public and that it is disclosed to an extent necessary for the exam, and may become liable to compensate the copyright owner if it is used for profit-oriented purpose.

As described above, the permission of the copyright owner must be obtained, in principle, in order to use the copyrighted work of such third party relating to e-learning, however, such permission is not required under certain circumstances permitted by law. In such case, however, the above requirements prescribed by law need to be satisfied (public transmission of simultaneous reporting of lessons and exam questions are considered mainly for e-learning. Exceptional provisions concerning the public transmissions of educational materials used in

the simultaneous reporting of classes and of exam questions were adopted by the 2003 Amendment to the Copyright Law. However, any e-learning business for profit requires an attention that the application of such amended law is limited. In other words, any public transmission of educational materials used in the simultaneous reporting of lessons is not permitted if it is used for profit purpose and requires the permission of the copyright owner as it is in the first place. Also, although the public transmission of exam questions is found legal under the amended law, the transmitter bears the liability to pay compensation to the copyright owner.

Where a public transmission of educational materials without obtaining the permission is legal

- Materials (copyrighted work of a third party) are distributed in the school class room (main site) and are transmitted to provide such materials to the students who are taking such class through the simultaneous reporting of such class at secondary site located at remote place.

Where a public transmission of educational materials without obtaining the permission is illegal

- A head teacher in school makes a PDF file of the books (copyrighted work of a third party) for summer assignment and uploads on the web server for the access by the students in that class.
- Materials (copyrighted work of a third party) which are distributed at staff training session are uploaded on the web server for the access by the staffs who are attending such session through the simultaneous reporting of such session at remote place (which will be deemed illegal although the permission for copy and/or distribution of the materials is obtained).
- Materials (copyrighted work of a third party) distributed in a school class room are transmitted for later access by any students who could not attend the class (which will be deemed illegal although the permission for copy and/or distribution of the materials is obtained).

Where a public transmission of exam questions without obtaining the permission is legal

- E-learning Vendor posts the copyrighted work of exam questions already made public on its website and transmits to the test-taker who enters its ID and/or password.

Where a public transmission of exam questions without obtaining the permission is illegal

E-learning Vendor posts the copyrighted work of exam questions already made public on its website and transmits to the test-taker who enters its ID and/or password.

(II) Responsibility for personal information

If the information of performance records are kept in e-learning in a way which can identify the personnel data of such information (and not in statistical data), the school or e-learning Vendor which has leaked such information may be subject to contractual liability and/or liability for unlawful act. Also, any school and e-learning Vendor which keeps a certain amount of personal information on its data base will be subject to the obligations stipulated in the Law Protecting Personal Information.

[Explanations]

1. Use of copyrighted work of a third party in e-learning

(i) Utilization of internet in education

The copyrighted works of third parties have been used as materials in many educational scenes. The text of novels and/or newspaper articles or images of pictures and/or paintings have traditionally been used as materials. In remote education utilizing networks (i.e. e-learning), the range for use of copyrighted works of a third party has further extended by the addition of programmer, narration and even music media, as a result of digitalization of the materials and/or the multimedia content of such materials.

It is a fundamental rule to obtain the license or permission of the copyright owner for the use of copyrighted work of a third party. However, there are several exceptions under the Copyright Law in light of the significance of the use of copyrighted work of a third party in education. A 2003 amendment to the Copyright Law focused on the increase in usage of the internet in education and has expanded the range of exceptions. (Note 1)

(ii) Public transmission of materials during simultaneous teaching of a class

The public transmission (including making transmittable in the case of interactive transmission; the same shall apply hereinafter) during the simultaneous teaching of a class without permission is permitted under Paragraph (2), Article 35 of the Copyright Law, which was newly created by the 2003 amendment, subject to the following conditions: (Note 2)

- that the transmitter is nonprofit-oriented educational institution;
- that the transmission is made only to those attending the classes at such educational institution;
- that the transmission is made to the individuals at secondary site who are simultaneously participating in the ongoing classes at the main site;
- that the transmission is made for the delivery of materials which are distributed at the main site;
- that it is a transmission of copyrighted work which has already been made public; and
- that the transmission does not unreasonably prejudice the interests of the copyright owner in light of the nature and the purpose of the work as well as the form of the transmission.

In the first place, only the nonprofit-oriented educational institutions, such as schools or community centers are the subject entities, while the private profit-oriented e-learning Vendors are not. E-learning Vendors need to obtain permission for public transmissions in class instructions from the copyright owner. The permission for the distribution of materials in the actual classroom does not apply to the public transmission thereof.

Also, exceptions are applicable only to simultaneous teaching. In addition, the permission of the copyright owner is required if such lecture is to be kept on the web server for later access.

(iii) Public transmission of exam questions

The public transmission of exam questions without permission is permitted under Article 36 of the Copyright Law following the 2003 amendment, subject to the following conditions: (Note 3)

- to pay compensation to the copyright owner if it is used for profit purposes;
- to ensure that the use is within the extent necessary for the purpose of exam;
- to ensure that the copyrighted work is already made public; and
- that the transmission does not unreasonably prejudice the interests of the copyright owner in light of the nature and the purpose of work as well as the form of the transmission.

The private e-learning Vendors having profit-oriented purposes may use public transmissions without permission if they are used to communicate exam questions. As a result, however, such Vendors will be responsible to pay compensation. Also, a trial exam which collects an examination fee is a typical example of profit-making for which the Vendor will be responsible to pay compensation.

2. Protection of personal information in e-learning

(i) Duties under the Civil Code

Many schools, prep-schools, or e-learning services Vendors normally keep the performance records, learning records, questionnaires or other personal information of students. If such personal information is leaked, such schools, prep-schools, or e-learning services Vendors may be subject to contractual liability (Article 415 of the Civil Code) and/or liability for unlawful act (Article 709 of the Civil Code).

(ii) Duties under the law protecting personal information (Note 4)

Any private school, prep-school or e-learning service Vendor which utilizes more than 5,000 pieces of personal information on its data base is subject to and assumes the duties under the provisions of the Law Protecting Personal Information as an entity which handles personal information. The following lists some of the key obligations (extracted): (Note 5) (Note 6) (Note 7)

- clarification of purpose of usage;
- purpose of use: to identify the purpose of use to the greatest extent possible (Article 15);
- no handling of information beyond the extent necessary for the accomplishment of

the purpose of usage (Article 16);

- appropriate acquisition of information and the notification of purpose of usage upon acquisition;
- no fraudulent acquisition of information or other illegal collection methods (Article 17);
- to notify or announce the purpose of usage upon acquisition of information (Article 18);
- to ensure that the principal can become aware of the purpose of usage of information (Article 24);
- to ensure the accuracy of the data and its content;
- to make efforts to keep the information accurate and up-to-date (Article 19);
- to take safety control measures, to supervise employees and/or outsourcing entities;
- to take necessary and appropriate measures for safety control (Article 20);
- to supervise the employees and/or outsourcing entities to the extent necessary and appropriate (Article 21 and 22);
- restrictions on third-party provision;
- no provision of information to a third party without the consent of the principal (Article 23);
- request of the principal for disclosure, amendment, cease of use of information etc.;
- to disclose the information data in record at the request of the principal (Article 25);
- to amend and/or discontinue the use of information at the request of the principal (Article 26 and 27);
- settlement of complaints;
- to make efforts to settle complaints in an appropriate and prompt manner (Article 31).

(Note 1) The enforcement date of the 2003 amendment law is January 1, 2003.

(Note 2)“(2) In the case of the exploitation of a work already made public, by offering or making public the original or copies of such work in the course of lessons in educational institutions mentioned in the preceding paragraph to those who take lessons directly, or in the case of the exploitation of such work by publicly performing, presenting or reciting it in accordance with the provision of Paragraph (1), Article 38 in the course of such lessons, it shall be permissible to make the public transmission (including making transmittable in the case of interactive transmission)

of such work intended for reception by those who take lessons simultaneously at a location different from the place where such lessons are given; provided, however, that such transmission does not unreasonably prejudice the interests of the copyright owner in the light of the nature and the purpose of the work as well as the form of the transmission.

(Note 3)“(1) It shall be permissible to reproduce or to make a public transmission (excluding the broadcasting or wire diffusion, and including making transmittable in the case of interactive transmission; the same shall apply in next paragraph) of, a work already made public as questions for an entrance examination or other examinations of knowledge or skill, or such examination for a license, to the extent deemed necessary for such purpose; provided, however, that such transmission does not unreasonably prejudice the interests of the copyright owner in light of the nature and the purpose of the work as well as the form of the transmission.”

(Note 4) The enforcement date of the provisions for such duties is April 1, 2005.

(Note 5) Only private schools are subject to the Law Protecting Personal Information. National schools, universities which are transformed into independent administrative entities and prefectural junior high schools and/or city high schools are subject to the Law On Protection of Personal Information Held by Administrative Agencies, Law Protecting Personal Information for Independent Administrative Agencies etc., and the local ordinances protecting personal information, respectively.

(Note 6) In the event of breach of any provisions of duties, the competent minister may give advice whenever necessary to protect the rights or interests of an individual and if the breaching party does not subscribe to such advice or if in urgent need, the competent minister may issue an order (Article 34). Penalties may be imposed on the breaching party if such party does not obey the order (Article 56).

(Note 7) Please refer to “Guidelines concerning the Protection of Personal Data in Electronic Commerce in the Private Sector (Ver. 2.0 alpha version)” prepared by Electronic Commerce Promotion Council of Japan (ECOM) for further details on the treatment of personal information. (http://www.ecom.or.jp/privacy_gl/ECOMGuideline2.pdf)