2. Law of Property and Obligations

1. Copyright Amendment Act.

Promulgated on June 14, 1985. Ch. 62. Effective since Jan. 1, 1986.

Object of the amendment: Copyright Act (Ch. 48 of 1970). Hereinafter, the provisions of this Act are cited by only their numbers.

I. The Copyright Act

Japan's present Copyright Act, which was enacted from an old law in 1899 (Meiji 32) and was completely amended in 1970 (Showa 54), consists in the core of legislation concerning the protection of copyrights which is the same as copyright legislation in foreign countries.

Examples of "works of authorship" provided by this Act are as follows: novels, dramas, lectures, musical works, choreographic works, paintings, engravings, sculptures, cinematographic works, photographic works and others (Art. 10). The "author" ("a person who creates a work"; Art. 2) solely shall have "the right of reproduction, the right of performance of drama and music, and the right of cinematographic presentation and distribution (in the case of a movie) (Arts. 21, 22 and 26). Also, a copyright owner may grant a license to utilize his work to another person, and a person who has obtained a license may utilize the work within the scope of conditions set forth in the grant of the license. In case a copyright owner demands compensation for damage through infringement of the copyright, the Act gives a provision in which the loss of a copyright owner shall be estimated at the sum of the profit of the offender (Art. 114), and his economic interest is protected.

II. Background of the amendment

We introduced the amendment of the Copyright Act in the

column of the preceding number. The main contents of the amendment in the preceding number was the legal recognition of a copyright owner's lending right and the prohibition of the loan of the 'work' to another person without a copyright owner's approval.*

> * As the sales of phonograph records had been decreasing, mainly due to the appearance of rental phonograph record business (rent-a-record shops), this amendment was for the protection of the economic interests of phonograph record producers, songwriters, composers, singers and others.

Although the Copyright Act has been amended in sequence by this Amendment Act introduced herein, this amendment has clarified the protection of computer programs by the Copyright Act* and provisions corresponding to computer programs have been prepared.

> * Under the old Copyright Act before this amendment, some decisions by lower courts determined to protect computer programs for games or OS (operation systems) (Decision by the Tokyo District Court on Dec. 6, 1982; the Yokohama District Court on Mar. 30, 1983; the Osaka District Court on Jan. 26, 1984; the Tokyo District Court on Mar. 8, and June 10, 1985).

The background of this amendment is as follows: Recently, the development of computer technology has progressed rapidly, and the diffusion of general use computer and personal computer has been spectacular. Needless to say, a program makes a computer function effectively and manage all kinds of information at high speed. The programs (software) were treated as options to hardware, but nowadays they are recognized to have their own value independently of hardware. It requires a great deal of intellectual work and expense to develop the programs, but it is comparatively easy to copy them, so that an assertion of the necessity for rational protection of the rights of program producers arose in recent years. In Japan, it was discussed whether, as a measure of program protection, it should be by amendment of the

Copyright Act or by new legislation. However, it has become clear that this amendment protects programs by the Copyright Act the same as in other countries.*

* The following countries have amended their copyright laws to clarify the protection of programs: USA (1980), Hungary (1983), Australia and India (1984), W. Germany and France (1984).

III. Outline of the present amendment

1. Work of programs

As mentioned, the Copyright Act illustrates as 'work' a novel, a drama, a lecture, a musical work and so on (Art. 10 (1)). This amendment added a program as "work" (Art. 10 (1) (ix)). The Act defines program as 'expression as an assortment of indications to a computer in order to obtain a result by making the computer function.'

In the meantime, programming is usually done in the following process. First of all, using programming languages such as COBOL, FORTRAN and others and based on each promise which has been established in every language (the language's grammar), a program expresses an indication of what you want to request from a computer. This is called a source program. This source program is transferred to a machine language which a computer can read by the program called 'compiler' which is installed in every language (the transferred one is called an object program). By reading this object program, a computer can work.

The source program above mentioned comes under 'work' of Article 10 (1) (ix). However, an object program is also a 'reproduction' of a source program and it is provided that 'an author solely has the right to reproduce his work' (Art. 21), so the right of an author extends to an object program.

2. Reproduction right vested in the owner of a reproduction of the work of a program (Arts. 47.2 and 49)

(1) For the purpose of fair use of a work, the Copyright Act limits the copyright to a certain scope, and recognizes the free

use of a 'work'. Reproduction for private use and home use (Art. 30), quotation in accordance with fair custom (Art.32) and so on, are recognized with regard to general work, and also with the work of a program.

(2) Regarding the question of the individual work of a program, Article 47.2 has been added and Paragraph 1 of this Article provides that "an owner of a reproduction of the work of a program can reproduce or transfer within the limited scope which is recognized as the necessity of his own use of the said work for his computer" (reproduction right vested in the owner of a reproduction of the work of a program).

The reason why this provision has been added is as follows: Due to the high-degree of development of computer programs in recent years, a great number of public users purchase programs in the market and use them instead of producing programs by themselves. In many such cases, public users of programs transfer the memory media of programs for various reasons (from magnetic tape to magnetic diskette or vice versa) and produce back-up copy in order to prepare for the loss or holding of the reproduction of the program, or improve the purchased program for their individual use. Then, Paragraph 1 of Article 47.2 provides that public users are able to reproduce or transfer these programs without the right owners' approval.

Therefore, even under Paragraph 1 of Article 47.2, it is not permitted for public users to make mass reproductions of programs for use by multiple computers through the purchase of one program.* The reproduction/translation right is granted only to the owner of the work of the program, not to a person who borrows the program.*

(3) Also, Paragraph 2 of Article 47.2 provides that an owner of reproductions of a program, after he loses the ownership of any of the reproductions (including reproductions under the reproduction right mentioned in (2)) except on grounds of loss of that reproduction, cannot keep the other reproductions. This provision has been added as it deviates from the purpose of the enactment of the reproduction/translation right as in the provi-

sion of Paragraph 1 of Article 47.2 to sell the original reproduction after making another reproduction from it.*

(4) It is regarded as a reproduction and an infringement on the right of reproduction of an author (Art. 21) for public users to distribute reproductions of a program work copied under a right of reproduction of the program*, or to keep the reproductions against the provision of Paragraph 2 of Article 47.2* (Art. 49).

> * For production/distribution companies of programs (software), a sales decrease because of illegal copies of their programs is a matter of life-and-death. Generally speaking, in such a business market, the following are called the "three evils" which should be purged: ① illegal sales of reproductions, ② rental-shops (software rental businesses), and ③ in-house copies (big scale enterprises use a large number of copies duplicated from a purchased software). Provisions introduced herein are counter measures against these "three evils" to a certain extent.

IV. Conclusion

Following the amendment of the Copyright Act introduced as above, it was amended by the Amending Act (Ch. 64 of 1986) as follows:

Article 12.2 has been added and provides that "databases which possess creativity through choice of information or through systematic composition are protected as works of authorship." Item 10.2 has also been added to Paragraph 1 of Article 2, and database is defined as "an assemblage of the information of reports, numbers, figures and so on, and a systematic composition in order to refer to this information by computer."

Therefore, the databases have come to be protected as "works of authorship" which have creativity in analysis/processing of information (systematic composition) based on a decision on control policy/choice standard of information to be accumulated, a decision on acceptance or refusal of concrete information based on it (choice of information), a decision on data-issue, con-

struction, and form in order to refer effectively to chosen information in computer, and a decision on systematic classification.

Databases have been interpreted as protected by the Copyright Act as "editorial works of authorship" in the provision of Article 12, and the protection of databases by the Copyright Act has now been clarified following the protection of computer programs.

It can be said that these amendments are counter measures for the extention of the field to be protected by the Copyright Act in accordance with the tendency of information to be a new media.

2. (1) The Act Concerning Transactions and Contracts in Deposits of Specified Commodities.

Promulgated on May 23, 1986. Ch. 62 of 1986. Effective since Dec. 22, 1986. (Hereinafter called 'this Act'.)

(2) The Ordinance Enforcing Transactions and Contracts in Deposits of Specified Commodities.

Promulgated on Jan. 11, 1986. Ordinance No. 340 of 1986. Effective since Dec. 22, 1986. (Hereinafter called 'this ordinance'.)

I. At the beginning

1. This Act was established in order to prevent the recurrence of damage to consumers from the so-called 'counterfeit spot business'. There is no established concept up to now in reference to the counterfeit spot business, but in general, this business includes the following:

(1) A sales contract of commodity is entered into between a trader as a seller and a customer as a buyer. Commodities are gold, silver and diamonds. In some cases, memberships in golf clubs and the like are the objects of this business.

(2) However, the sold commodity is not delivered to the buyer. (This is the reason for calling it a 'counterfeit spot business' as the object is not delivered to the buyer, although the sales contract is entered into.) At the time of the contract, it is

promised that the trader will deposit and invest the sold commodity for a stipulated term and return the commodity to the customer at the expiration of the contract (deposit contract). The balance of the object's price at the beginning of the contract and at the expiration of the contract is the profit of the customer. (At least, the trader claims it to be so.) However, in such contracts, the commodity is seldom delivered to the customer even if it is tentative.

(3) The customer actually pays the trader for the commodity at the time of the contract. But, at that time, the customer receives "an offer of 'profit' in compensation for the deposit" from the trader in the form of discount from the sales charge in compensation for the deposit during the contract term. In return for this, the trader issues only a "deposit certificate" to the customer with the description of the contents of the contract. The customer cannot ask for the return of the commodity before the expiration of the term. Cancellation of the contract is exceptionally recognized, but the customer is charged a penalty fee in case of cancellation. (In the undermentioned Toyota Shoji case, 30% of the refund from this company was deducted as a penalty.)

2. First of all, concerning the actual contract of the "counterfeit spot business", several issues (samplings of a great number of consumers' consultations) are raised as follows:

(1) The trader strongly emphasizes only the safety and profitability of the transaction without sound notice of the contents of the contract.

(2) At the time of the canvassing, the trader advocates obstinately for a long time or assumes a threatening attitude.

(3) To many old people who are the subjects of canvassing, the trader tries to force the contract before they make a thoughtful decision.

3. Moreover, the contents of the contract are also questionable as follows:

The trader makes the customer enter into the contract, emphasizing both that there will be a definite price increase in the commodity in question leading to a profitable investment and

that the transaction is "safe".

Customers, especially elderly people, riding on the wave of the recent financial boom, enter into these kinds of contracts to make sure their money is securely invested.

However, what finally secures the customer's right to demand restitution of the commodity in question is the "deposit" of the trader. If the trader does not hold commodities in hand corresponding to each contract (actually most of the cases are such), and if the trader has no assets corresponding to them, the commodity cannot be restituted to the customer in the case of the trader's business depression and there exists the danger of a loss in the part of the payment made at the conclusion of the contract.*

* In such a contract, it may be possible for a customer to assert the dissolution of the contract based on public order and morals (Civil Code, Art. 90) or mistake (Civil Code, Art. 95), and to assert the cancellation of the contract by fraud and duress (Civil Code, Art. 96). On the other hand, it may be possible for the trader to be charged with the crime of fraud (Criminal Code, Art. 246) or the crime of blackmailing (Criminal Code, Art. 249). But the most important thing is to prevent the appearance of the victims of such immoral business before it happens.

II. Toyota Shoji K.K. case

Such numerous enterprises of the counterfeit spot business exist and such issues of the immoral business have been pointed out publicly. "Toyota Shoji K.K." typified such enterprises.

The transaction that was conducted by Toyota Shoji was that it first sold gold bullion to customers door to door, and then canvassed the customers to deposit that gold bullion at a yearly 10% of the price for a one-year contract, a yearly 15% for 5 years as the value of the lease. If a customer deposited the bullion the company issued a security called a "Pure Gold Family Contract Bond" instead of delivering the gold bullion to the customer. The

company could not make enough profit to give the promised profit to the customers, due to having set the standard of the profit level too high and also to various company expenses. The company had to run about and get new customers, continuing a precarious day to day management. Finally it was adjudged bankrupt on July 1, 1985. At present, the bankruptcy proceeding is progressing.

According to the investigation report submitted from the trustee in bankruptcy to the Osaka District Court, as of September 10, 1985, the number of creditors proven in bankruptcy amounted in total to 29,207 persons, and the total amount of the claims is a little more than 130.3 billion yen, of which 106 billion yen, or 96.6% of the whole, are the credits of the purchasers of the "Pure Gold Family Contract Bond", and approximately 60% of them are over 60 years old.

Also, this report says that Toyota Shoji had received 202 billion yen from its customers and refunded 55 billion yen to them, but 86 billion yen of 147 billion yen balance, or approximately 60% of the balance, had already been paid for expenses such as compensation to its employees and office rent. Therefore, in spite of the trustee's strenuous efforts, the assets of the bankrupt's estate are extremely meager. Its financial standing was "a matter of course that there was nothing much left as Toyota Shoji was nothing but an organization which swindled its customers out of money by fraudulent business and the people concerned were busy dividing the collected money." Under such a situation, even a long time before the bankruptcy, it was impossible for Toyota Shoji to return that gold bullion to its customers if they required, and the continuation of the business under such a situation caused them to extend the damages even more.*

Other companies besides Toyota Shoji, such as "Nihon Sogo Lease" and "Tokyo Shinkin" tried the same business as the "Pure Gold Paper Transaction", and "Kajima Shoji" had a similar business with golf club memberships. The financial standings of these companies were nearly the same as Toyota Shoji and all of them became bankrupt.

* As of July 1987, the assets withdrawn by the trustee were a little more than 11.3 billion yen in total, and the total amount of approximately 9.3 billion yen after various expenses were deducted would be refunded to the victims as temporary refunds. However, the sum refunded to the victims is only 8% of the average damage for each case.

III. Outline of regulation

Keeping in mind the examples of Toyota Shoji and others, this Act defines a certain type of contract as the "deposit dealing contract" (ref. IV), and also matters within this definition are provided in the regulation as mentioned in V et seq., especially what the obligations are of the trader. Full-scale prohibition of counterfeit spot business and the introduction of a system of licensed traders are not provided.

IV. Transactions regulated by this Act

As in the following "deposit dealing contract" (defined as in Paragraph 1 of Article 2 of this Act), the regulation occurs as mentioned below in V et seq.

1. Forms of contract

Deposit dealing contract within the meaning of Article 2 (1) is in the following (1) – (4):

(1) A contract in which the trader* promises to be deposited with a specified commodity designated by the cabinet ordinance** for a certain period exceeding the limit of 3 months fixed by the ordinance of the Ministry of International Trade and Industry and promises to furnish some financial benefit in compensation for the deposit and the customer*** promises to deposit the specified commodity to the trader.

* Exactly referred to as a "deposit dealing trader" (Art. 2 (2) of this Act).

** Article 1 (1) of this ordinance provides the following ① and ② as "specified commodities": ① jewelry, pearls, precious metals, and ornaments or accessories of personal

effects consisting of such items, and ② bonsai or potted dwarf trees, potted plants and flowers, and other plants for appreciation.

*** Exactly referred to as a "depositor" (Art. 2 (4) of this Act).

(2) A contract in which the trader refunds money or some other substitute to the customer instead of the deposited specified commodity at the time when the trader returns the said commodity, but the other points are same as in (1).

(3) A contract in which the trader purchases the said commodity from the customer at the payment of a certain price or a price defined by a certain method, but the other points are same as in (1).

(4) The contract analogous to (1) – (3) in which the object of the transaction is not a specified commodity but the rights for the use of a facility set forth in the ordinance.*

* Golf club memberships, sports and recreation club memberships, etc. are provided as the rights for the use of a facility in Article 1 (2) of this ordinance.

2. Parties of deposit dealing contract

(1) The provisions of this Act do not apply to a contract which the depositor (customer) enters into for his trade or as his trade (Art. 11 of this Act). Therefore, the customers protected by this Act are limited to non-trade people.

(2) "Deposit dealing trader" (trader) within the meaning of this Act is defined as a person who accepts a deposit as a "business" (Art. 2 (2) of this Act). Consequently, general consumers who conclude a deposit contract with each other just one time are not regulated by this Act.

V. Regulation prior to and at the time of the conclusion of the contract

1. Obligations to deliver the documents

(1) The deposit dealing trader must deliver documents mentioning the following items, that is to say, (a) the contents and implementation of the deposit dealing contract, and (b) the oper-

ation and financial standing of the trader in a deposit dealing contract, to the customers by the date of conclusion of the contract (Art. 3 (1) of this Act).

A deposit dealing trader who does not deliver such documents is subject to a fine of not more than 500 thousand yen (Art. 15 of this Act), and also, in the event of the recognition of possibilities of continuous violations, suspension of business operations may be ordered by the competent Minister (such as the Minister of M.I.T.I.) (Art. 12 of this Act).

In the document of (a), items concerning the contents and implementation of the contract must be mentioned as well as the following items (Art. 3 (1) of M.I.T.I. Ordinance): ① the name of the trader, ② the description of a commodity and its price, ③ the period of deposit, ④ the contents, price and method of return to customer at the time of expiration, ⑤ the contents of the financial benefit offered to the customer, the offer period and method, and (in the case of the purchase by the trader without the return of the commodity to the customer) the purchase price, ⑥ the contents, period and method of handling charge for collection, ⑦ the method and result in the case of cancellation by the customer, ⑧ in the case of a cancellation attempted mainly by the customer, the contents of damages to be paid by the party who intends to cancel if agreed prior to contract, ⑨ whether or not there is between a bank and the trader a contract as a security for the benefit of the customer, and in the event of such contract, its contents, and ⑩ a reference for the trader from the customer.

In the document of (b), items concerning the operation and financial standing of the trader must be mentioned as well as the following items (Art. 3 (2) of M.I.T.I. Ordinance): ① the opening date of the business, ② the main contents of the business, and ③ the summary of assets, profits and losses (balance sheet, statement of profit and loss).

(2) A business suspension order within the meaning of this Act is as in the following ① and ② (Art. 7 (1) of this Act):

① to order the suspension of the following operations for a

period of not exceeding one year; (a) canvassing, (b) making canvassers canvass, and (c) implementing the entire operation or part of it; and ② to order the trader to take necessary measures in order to protect the customers' profits besides ①.

The trader in violation of a business suspension order shall be subject to a penal servitude not exceeding 2 years or a fine not more than one million yen (Art. 14 (ii) of this Act).

2. Regulation of canvassing — the trader's obligation of notification

(1) At the time of canvassing, (a) the trader or its canvassers shall not intentionally refrain from telling the truth nor offer a misrepresentation as to the items prescribed by the cabinet ordinance (Art. 4 (1) of this Act), and (b) the trader or its canvassers shall not canvass with threatening language or attitudes (Art. 5 (i) of this Act).

In the event of violation of the prohibition of (a), a penal servitude not exceeding two years or a fine not more than one million yen shall be imposed (Art. 14 (i) of this Act). In case of the recognition of possibilities of continuous violations, suspension of business operations may be ordered.

As to a violation of the prohibition of (b), in a case conforming to the crime of blackmail in the Criminal Code, Article 249, the offender will be punished rightfully by this Code. And also, whether or not it conforms to the crime of the said Article, in the case of the recognition of possibilities of continuous violations, the suspension of business operations may be ordered.

(2) "Items prescribed by the cabinet ordinance" of (a) noted above is defined within the meaning of the following items in general (Art. 3 (1) of this ordinance): ① the price of the commodity and its fluctuation, ② in case of the stipulation in which the return of a substitute for the deposited commodity at the time of expiration is provided, the price of the substitute and its fluctuation, ③ in case of delivery of the goods as a financial benefit, the price of the goods and its fluctuation, ④ the description of the specified commodities in the trader's possession, and ⑤ the contents and the state of the facility concerning the usage of the

facility.

VI. The customer's right of cancellation

This Act gives to the customer the right to cancel the deposit dealing contract unilaterally (Arts. 8 and 9; this is generally called the 'cooling-off system'). Effects of the cancellation are different in the case of (a) not exceeding fourteen days counting from the day of receipt of the above-mentioned documents by the customer, and in the case of (b) exceeding fourteen days.

In case of (a), the trader shall not claim any payment of damages or penalty by reason of cancellation of the contract, and the trader shall bear every expense in order to return the commodity in question (Art. 8).

In case of (b), damages or penalty may be stipulated in the contract; however, the trader shall not claim from the customer any payment exceeding ten percent of the price at the time of the conclusion of the deposit dealing contract for the said commodity in question (Art. 9).

Special agreements against the aforesaid provisions in Article 8 and Article 9, or disadvantages for the customer (such as a special agreement "the term for cancellation not accompanied with indemnity as prescribed by Article 8 shall be a period of not exceeding ten days" or "in the event of cancellation in Article 9, penalty shall not be more than fifteen percent of the commodity price in question") are invalid.

And these cancellation rights must be written in the aforesaid documents. Cancellation on the customer's side must be presented in a written notice in order to avoid a dispute after the cancellation.

VII. Comment

As mentioned above, this Act tries to prevent the recurrence of victims of counterfeit spot contracts by imposing some contractual obligations (including obligations to be discharged for conclusion of the contract) on the trader at the time of deposit dealing contract which must satisfy specific requirements of this Act.

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3. Law of Civil Procedure and Bankruptcy

Reform project of the system of provisional remedies: Draft Outline on the System of Provisional Attachment and Provisional Disposition.

The reform of the system of provisional attachment (kari-sashiosae) and provisional disposition (kari-shobun) — putting both of them together, we call the system "provisional remedies (hozen-shobun)" — had been discussed within the Civil Procedure Law Division of the Legislative Council, an advisory body to the Minister of Justice, since Oct. 1983. The basic study on all the matters for revision came to an end within the Division, and on Dec. 23, 1986, the "Draft Outline on the System of Provisional Attachment and Provisional Disposition" was published. At the same time, 'Comments on the "Draft Outline on the System of Provisional Attachment and Provisional Disposition"' was also published as material for understanding the aim and contents of the "Draft Outline".

The "Draft Outline" is definitely not a final bill concerning the reform of the system of provisional remedies. It only shows the development of the study within the Division and a tentative plan for revision. It was published in order to again inquire for the opinions of concerned circles. Taking those opinions into consideration, the Division is continuing the work on revision. By taking such a step it is expected to achieve an excellent revision of provisional remedies.

The deadline for presenting opinions to the "Draft Outline" is