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Japan's Approach to Copyright Protection for Computer Software

Mark S. Lee

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Japan's Approach to Copyright Protection for Computer Software

MARK S. LEE*

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* Partner, Manatt, Phelps & Phillips, Los Angeles, California; J.D. University of Illinois, 1980.

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I. INTRODUCTION

Japan has made the most dynamic, successful adjustment to modern Western culture of any non-Western country, and has created an economic powerhouse that has surpassed virtually all the countries that it has emulated. It has accomplished this by combining Western legal and political institutions with traditional Japanese social and cultural norms. This Article examines Japan's treatment of one of the most modern Western legal concepts—copyright protection for computer software. This Article concludes with a commentary on how Japan's different cultural norms may have contributed to differences between Japan's approach to copyright law and that of other technologically advanced countries, especially the United States.

II. BACKGROUND OF JAPANESE LAW

For centuries, Japan was a feudal society with cultural and legal traditions totally unrelated to those of the West.¹ Emphasizing stability, loyalty to, and respect for, the feudal lord, harmony with one's co-workers, and the Confucian work ethic, traditional Japanese culture did not share the concepts of individual liberty, equality, and equal justice that are integral to the Western legal tradition. For centuries, Japan vigorously maintained its traditional culture by barring most foreigners from entering Japan.²

Commander Perry Matthew, a naval officer acting at the direction of the Secretary of State, Daniel Webster, forcibly

1. As used herein, "West" refers to Western Europe and the Americas, which largely share historical and cultural traditions.

2. See HUGH BORTON, *JAPAN'S MODERN CENTURY* 8-30 (1970); JOHN FAIRBANK ET AL., *EAST ASIA TRADITION AND TRANSFORMATION* 392-434, 484-512 (1973).

opened Japan's borders. In an historically important and startlingly successful transformation, the Japanese Government subsequently embarked on a comprehensive modernization program known as the "Meiji Restoration" in the late nineteenth century.³ The Restoration reformed Japan's legal systems along Occidental lines, and imported laws from Germany, France, and Belgium. Japan enacted its first Code of Civil Procedure in 1890,⁴ based on the model of the German *Zivilprozessordnung* of 1877.⁵ Furthermore, following World War II, U.S. law heavily influenced Japan, resulting in Japanese adoption of a U.S.-style constitution. In addition, Japan implemented many other laws under the "influence" of U.S. occupation forces.⁶

Despite more than a century of Western influence and a stable democracy, Japan remains a hierarchical society that avoids the use of legal processes as a means of resolving disputes. In Japan, non-lawyers provide much of the legal advice generally provided by lawyers in the United States. In addition, a variety of social forces, attitudes, and mechanisms discourage public disputes and promote resolution of private disputes in ways that respect Japanese cultural norms. Japanese society views litigious individuals and entities as disloyal because they disrupt social harmony and publicly embarrass opponents in an inappropriate manner. This is especially true if the defendant is a respected person or institution who rates higher on the Japanese hierarchy than the plaintiff.⁷ Thus, the results of litigation in Japan are uncertain. While law is important in Japan, tensions between hierarchical social values and formal equality often produce anomalous results where the identity of the litigants is just as important as the law.⁸

3. BORTON, *supra* note 2, at 79-126; FAIRBANK ET AL., *supra* note 2, at 513-57.

4. Japanese Code of Civil Procedure, Law No. 29 of 1890.

5. See FAIRBANK ET AL., *supra* note 2, at 525-26. Takao Sawaki, *Recognition and Enforcement of Foreign Judgments in Japan*, 23 INT'L LAW. 29 (1989).

6. See BORTON, *supra* note 2, at 459-91; J.A.A. STOCKWIN, JAPAN: DIVIDED POLITICS IN A GROWTH ECONOMY 35 (1975).

7. The complexities of Japanese social interaction are beyond the scope of this Article. For a detailed discussion of this issue, see CHIE NAKANE, JAPANESE SOCIETY (1970); BORTON, *supra* note 2, at 196-222, 514-40; FAIRBANK ET AL., *supra* note 2, at 808-61. For a discussion of the low statistical incidence of litigation in Japan, see Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 INT'L LAW. 443 (1991). For a discussion of the differing sources of assistance that would be considered legal in the United States, see Mark F. Johannessen & Hiroshi Goto, *Sources of Legal Advice in Japan*, 2 CAL. INT'L PRAC. (1990-91).

8. See NAKANE, *supra* note 7, at 23-62; BORTON, *supra* note 2, at 206-08.

III. HISTORICAL DEVELOPMENT OF JAPANESE COPYRIGHT LAW

The first copyright legislation in Japan was enacted in 1869.⁹ Under the Publishing Ordinance of 1869, anyone who wished to publish a book was required to obtain a license from the government.¹⁰ Once the author obtained a license, he or she received government protection of the book and obtained a monopoly profit from the book for the author's life.¹¹ Japan amended this ordinance in 1875 to limit the monopoly right to thirty years.¹²

Japan issued a new publishing ordinance in 1887,¹³ adopting a registration system instead of the previous government license. A separate ordinance continued to regulate publishing activities.¹⁴

In 1899, Japan adopted its first modern copyright statute. Modelled after the German and Belgian statutes, the 1899 Copyright Act incorporated the principles of the Berne Convention, which Japan joined in 1899.¹⁵ The 1899 Act gave copyright protection to the author of a writing, speech, drawing, painting, sculpture, model, photograph, or other work of authorship.¹⁶ Under the 1899 Act, copyright of literary or scientific works encompassed the right of translation,¹⁷ and copyright of dramatic scripts and musical scores included the right of public performance.¹⁸

The 1899 Act was subsequently amended to include several other areas of authorship. It was amended in 1910 to add architecture,¹⁹ in 1920 to add instrumental and vocal performances,²⁰ in 1930 to include music,²¹ and in 1934 to include sound recordings

9. See TERUO DOI, *Japan, in INT'L COPYRIGHT L. & PRAC. JAP-5* (Melvin Nimmer & Paul Geller eds., 1992).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at JAP-5,-6.

14. *Id.*

15. UNESCO and WIPO, *Comp. 3 Copyright Laws and Treaties of the World*, Berne Copyright Union: Items A-1, A-2, B-2 (UNESCO, Paris and BNA, Washington, D.C. 1992).

16. See DOI, *supra* note 9, at JAP-6.

17. *Id.*

18. See DOI, *supra* note 9, at JAP-6.

19. See DOI, *supra* note 9, at JAP-6, -67 and -68.

20. *Id.*

21. *Id.*

of particular works.²² Finally, Japan ratified the Universal Copyright Convention in 1956.²³

The Copyright Act currently in force in Japan was enacted in 1970 and became effective on January 1, 1971, in tandem with a Copyright Act Enforcement Order and Regulation.²⁴ The Copyright Act has been amended repeatedly since 1970.

IV. SUBJECT MATTER OF THE PRESENT COPYRIGHT ACT

A. *Works of Authorship*

The Japanese Copyright Act is designed to protect authors' rights "with respect to their performances, phonograms and broadcasts and wire diffusions . . . having due regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture."²⁵ Article 2(1)(i) defines "work of authorship" as a "production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or mutual domain."²⁶ As examples, Article 10(1) lists nine types of "works of authorship" that are entitled to copyright protection, including:

- (1) novels, dramas, articles, lectures, and other literary works;
- (2) musical works;
- (3) choreographic and pantomime works;
- (4) paintings, engravings, sculptures, and other artistic works;
- (5) architectural works;
- (6) maps, plans, charts, models and other figurative, scientific works;
- (7) cinematographic works;
- (8) photographic works; and
- (9) computer program works.²⁷

22. DOI, *supra* note 9, at JAP-6.

23. ID at JAP-7. See UNESCO and WIPO, *supra* note 15, at items A-1, A-2.

24. See Japanese Statutes, Law No. 48 of 1970, as amended by Japanese Copyright Act Article 1-104; Cabinet Order No. 335 of 1970; Ministry of Education Ordinance No. 26 of 1970.

25. Japanese Copyright Act art. 1. All future references to "Articles" involve Articles of the Japanese Copyright Act unless otherwise indicated. All English translations are from UNESCO and WIPO, 2 *Copyright Laws and Treaties of the World*, *supra* note 15, unless otherwise indicated.

26. *Id.* art 2(1)(i).

27. *Id.* art. 10(1). Cf. 17 U.S.C. § 102 (1989), which lists eight examples of works covered by the U.S. Copyright Act. Although there is substantial overlap, Japan's Copyright Act specifies three types of works that are not identified in the U.S. Act,

B. Rights Protected

The Japanese Copyright Act gives authors of protected works more rights than are specified in the U.S. Copyright Act, including:

- (i) a reproduction right;
- (ii) a performance right;
- (iii) a broadcast right;
- (iv) a recitation right;
- (v) an exhibition right;
- (vi) a distribution and public showing right for cinematographic works;
- (vii) a rental right for copies of a work, except for cinematographic copies; and
- (viii) a translation right.²⁸

The Japanese Copyright Act also gives authors the exclusive right to create derivatives of the original work, including translations, musical arrangements, dramatizations, and other adaptations.²⁹

Under the Japanese Copyright Act, independent protection of compilations is possible if there is sufficient creativity in the selection or arrangement of the materials; protection of a compilation work does not prejudice the author's rights to the compilation's component parts.³⁰ This compilation protection has important implications in protecting computer databases. In 1985, an advisory committee to the Japanese Government recommended that computer databases be given compilation protection under the

namely, maps, plans, charts, photographic works, and computer program works. The U.S. Act, on the other hand, has separate specifications for dramatic works, which are included in the listing of literary works in the Japanese Act, as well as a separate listing for sound recordings, which are not included in the Japanese Act's exemplary list. 17 U.S.C. § 102(a) (1989).

28. See Japanese Copyright Act arts. 21-27. Cf. 17 U.S.C. § 106 (1989), which lists four rights protected under the U.S. Copyright Act: rights to (1) reproduction, (2) distribution, (3) derivative work right as to all copyrights, and (4) public performance and public display rights for certain types of works. In general, the Japanese Act contains a greater specification of rights.

29. Japanese Copyright Act arts. 11, 28.

30. *Id.* arts. 12(1)-(2).

Copyright Act.³¹ The 1986 amendments followed this recommendation.³²

The Copyright Act also protects the author's moral rights and other so-called "neighboring" rights.³³

C. Limitations on Rights

There is no general "fair use" exception to the exclusive rights granted by the Japanese Copyright Act.³⁴ Instead, the Act identifies a number of specific limitations and compulsory licenses. Specified limitations include:

1. reproduction for private use, unless the reproduction is made by an automatic reproduction machine placed for public use;
2. reproduction of library materials for certain non-profit activities;
3. limited quotations;
4. limited reproductions or broadcasts in schools, school text books, or school education programs;
5. reporting of current events;
6. reproduction for judicial proceedings; and
7. other matters.³⁵

These provisions do not affect the author's moral rights in the works being copied.³⁶ In addition, copying is allowed for certain other uses by compulsory licenses.³⁷

31. See Report Submitted to the Copyright Council on September 25, 1985 by Committee No. 7 (databases and new media) of the Copyright Council, Cultural Affairs Agency; Art. 12 *bis*.

32. *Id.*

33. Japanese Copyright Act arts. 89-111. "Neighboring rights" are rights given to performers, record producers, broadcasting organizations and others. They include performers' exclusive right to make recordings of their performances and offer them to the public (arts. 91, 95 *bis*), record producers' exclusive right to reproduce their phonograms (art. 96), broadcasting organizations' exclusive right to record their broadcasts (art. 98).

34. Cf. 17 U.S.C. § 107 (granting a general right to make limited use ("fair use") of copyrighted works without infringing them. The propriety of that use is evaluated by factors such as the purpose and character of the use, nature of the copyrighted work and the amount used).

35. Japanese Copyright Act arts. 30-49. "Other matters" refers to the narrow exceptions created for certain types of uses, such as a broadcast station's right to make ephemeral recordings of works they have a right to broadcast (art. 44) or advertising for exhibition of artistic works (art. 47).

36. *Id.* art. 50.

37. See discussion *infra* part VI.G.

V. REQUISITES FOR CREATION OF COPYRIGHT PROTECTION IN JAPAN

A. Automatic Copyright Protection

There are no formal requisites for creation of copyright protection under the Japanese Copyright Act. Authors automatically enjoy both copyright protection and moral rights protection. Article 17(2) provides that "the enjoyment of moral rights and copyright, shall not be subject to any formality."³⁸ This is consistent with Japan's membership in the Berne Union.³⁹ Yet, registration is still possible and, in some circumstances, desirable in helping to prove copyright infringement.

Fixation in a tangible medium is generally not required for authorship works to be protected under the Copyright Act. By implication, however, fixation is required for certain types of works, such as paintings and drawings, which do not exist until they are fixed. The Copyright Act expressly requires fixation for cinematographic works.⁴⁰

B. Registration Systems

Although registration systems are not necessary for creation of copyright protection, the Japanese Government operates four different copyright registers. The Director General of Japan's Cultural Affairs Agency administers the Copyright Register, the Publication Right Register, and the Neighboring Rights Register.⁴¹ A government agency created in December 1986, called the "Software Informations Center," administers the Computer Program Register. Registration of those works can be important to prevent disputes with third parties.⁴²

The most important registration is the registration of copyright transactions. Unless the transaction is registered, transfer of a copyright other than by inheritance or other form of legal succession, any restriction on the disposition of the copyright, use of the copyright as security, transfer of a secured party's rights, and other

38. Japanese Copyright Act art. 17(2).

39. UNESCO and WIPO, *supra* note 15.

40. Japanese Copyright Act art. 2(3).

41. *Id.* arts. 71(1), 78 *bis*, 88; DOI, *supra* note 9, at JAP-30, -36, -38.

42. Japanese Copyright Act arts. 75-78.

related rights cannot be asserted to bar claims of third parties.⁴³ The Act also allows registration of works published anonymously or pseudonymously.⁴⁴

Registration in the Publication Rights Register is important to protect the "right of publication," a unique feature of Japanese copyright law. Under this system, authors have the option of granting either an exclusive or nonexclusive license to publish their work under Article 21, or of granting the publisher a "right of publication" under Article 79(1).⁴⁵ If only a license is granted, the author retains the right to reproduce his or her work elsewhere, even if the license is "exclusive." If a "right of publication" is also granted, however, the author does not retain that right.⁴⁶

No formality is required to establish the "right of publication" between the author and publisher; nonetheless, registration is necessary for the right to be effective against third parties.⁴⁷ Registration is also necessary for the creation and transfer of security interests in the right of publication as to third parties.⁴⁸

Registration of a computer program with the Computer Program Register raises a presumption that the author created the program on the date recorded on the register. Such registration must take place within six months after the creation of the program.⁴⁹ This registration law became effective on April 1, 1987. Computer programs created before that date are exempt from the registration requirement in some circumstances.⁵⁰

C. Notice on Copyrighted Works

Under Japanese law, notice is not required for copyrighted work. Notice, however, can avoid certain exemptions to copyright holders' exclusive rights that could otherwise apply.⁵¹

43. *Id.* art. 77.

44. *Id.* arts. 75(1)-(2), 77, 78(2).

45. *See id.* arts. 21, 79(1).

46. *See id.* arts. 21, 63, 79(1); *see also* DOI, *supra* note 9, at JAP-29.

47. Japanese Copyright Act art. 88(1).

48. *Id.*

49. *Id.* art. 76.

50. *See* LAW CONCERNING EXCEPTION PROVISIONS FOR THE REGISTRATION OF PROGRAM WORKS, Law No. 65 of 1986, in Japan: In Item 3C, 2 *Copyright Laws and Treaties of the World*, *supra* note 15; Order to Enforce the Program Registration Act, Cabinet Order No. 287 of 1986; Regulation to Enforce The Program Registration Act, Ministry of Education Ordinance No. 35 (1986).

51. For a more detailed discussion of those exemptions, *see infra* part VI.G.

D. Copyrights in Foreign Works

The Japanese Act only protects works of Japanese nationals and works "first published" in Japan, unless an international treaty obligates Japan to protect otherwise ineligible works.⁵² "First published" works include works published within thirty days of initial publication elsewhere. Nevertheless, Japan has entered into one bilateral treaty and several multilateral conventions that protect U.S. works.

Japan signed a Copyright Convention with the United States in 1905.⁵³ This Convention is the only bilateral copyright treaty Japan has concluded. Article 1 of the Treaty contains a reciprocity provision,⁵⁴ and Article 2 provides U.S. nationals free translation of their works.⁵⁵

Interestingly, the Treaty did not contain a provision to terminate the copyright protection of U.S. authors in Japan upon expiration of the copyright term in the United States.⁵⁶ The Treaty was abolished in 1952, the day before the effective date of the Treaty of Peace between Japan and the United States.⁵⁷ In 1953, however, Japan and the United States made a provisional arrangement that provided copyright protection reciprocity between nationals of the two countries.⁵⁸

Since 1899, Japan has acceded to various Acts of the Berne Convention. It ratified the Universal Copyright Convention⁵⁹ in 1966, and the Convention Establishing the World Intellectual Property Organization⁶⁰ in 1975. Japan amended its Copyright Act in 1989 to implement the Convention by extending neighboring rights to specific classes of foreign performances, sound recordings, and broadcasts.⁶¹

Upon Japan's ratification of the Universal Copyright Convention in 1956, the Convention governed the copyright relationship

52. Japanese Copyright Act arts. 5-6.

53. DOI, *supra* note 9, at JAP-40.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* DOI, *supra* note 9, at JAP-40 to 41.

59. UNESCO and WIPO, *supra* note 15.

60. *Id.*

61. *See* UNESCO and WIPO, *supra* note 15, at Japan: Items 7A, 7B, 7C; DOI, *supra* note 9, at JAP-40.

between Japan and the United States. The Berne Convention has governed this relationship since March 1, 1989.⁶²

VI. OWNERSHIP AND TRANSFER

A. *Initial Ownership*

The initial copyright ownership and related rights in a work belong exclusively to the work's author.⁶³

B. *Joint Ownership*

Joint authors may copyright particular works. Joint ownership is "a work created by two or more persons in which the contribution of each person cannot be separately exploited."⁶⁴

The Copyright Act contains special rules for exercising copyrights in joint works. Under these rules, one author may not exercise or assign a copyright without the consent of all joint owners.⁶⁵ Each joint owner cannot refuse consent, however, without a justifiable reason.⁶⁶ Authors of a joint work may select a representative to exercise their moral rights. Limitations on the right to represent another in exercising moral rights, which generally prevent an author from selecting a third party representative, do not apply to works created jointly by authors.⁶⁷

C. *"Work for Hire" Doctrine*

Japanese law recognizes the "work for hire" doctrine which applies when, in the performance of his or her employment duties and at the initiative of the employer, a legal entity's employee creates a copyright work. When this work is published under the name of the employer, the legal entity/employer is regarded as the work's author unless otherwise provided by the employment contract or work regulations in force at the time of the creation. This rule applies to unpublished computer programs.⁶⁸

62. *Id.*

63. Japanese Copyright Act arts. 1, 14-16.

64. *Id.* art. 2(1)(xii).

65. *Id.* art. 65(1)-(3).

66. *Id.*

67. *Id.* art. 65(1)-(4).

68. *Id.* art. 15.

D. *Transfers of Copyright Interests*

An author's ownership interest in a copyright is assignable in whole or in part.⁶⁹ Japanese case law interprets transfer provisions liberally to permit assignment of each separate right granted by the Copyright Act, and to permit assignment that is limited in time or space.⁷⁰ Therefore, occasionally there is no clear distinction between an assignment and a license.

An author's copyright interest can also be transferred by death. The succession provisions in Japan's Civil Code govern these matters.⁷¹ The Copyright Act contains an exception to these rules that applies when there is no legal heir to the copyright holder. When no heir exists, or when a legal entity acting as a copyright holder is dissolved, the copyright falls into the National Treasury.⁷²

E. *Requisites for Transfer*

No formal requisites exist for transfers of copyright interests. Any transfer, however, must be registered in order to be effective against third parties, unless the transfer is by inheritance or another form of general succession.⁷³ To protect authors, the Japanese Copyright Act contains a statutory presumption that an assignment agreement does not transfer the right to create derivative works unless the assignment agreement specifically mentions such an assignment.⁷⁴

F. *Partial Transfers*

Japanese law recognizes a variety of circumstances in which authors may make limited transfers of copyright interests by license or hypothecation.⁷⁵ A licensee may use the work in the manner set forth in the license agreement, but may not assign its

69. *Id.* art. 61(1).

70. See Judgment of Tokyo District Court (International Music Publishers Co. v. Domei Suzuki et al.), May 13, 1968, 19 Minshū 257, Chosakuken Hanreishu 363, *aff'd.*, Judgment of the Supreme Court, Sept. 7, 1978, 32 Minshū 1145.

71. See MINPŌ [CIVIL CODE] arts. 951-59 (Japan).

72. See Japanese Copyright Act art. 62(1).

73. See discussion *supra* part V.B.

74. See Japanese Copyright Act arts. 28, 62(1).

75. *Id.* arts. 63, 66.

rights without the consent of the copyright owner.⁷⁶ A copyright may be hypothecated as security, but a copyright owner can, nevertheless, exercise the copyright, unless otherwise provided in the security agreement. The secured party has the right to collect a copyright owner's royalties or other consideration from third parties' use of authorship work.⁷⁷

An author can grant an exclusive or nonexclusive license to publish a work. As described above, however, the licensee will not enjoy the same exclusive right to publish against third parties as the copyright owner unless the licensee is also granted the "right of publication."⁷⁸

G. Compulsory and Legal Licenses

Japanese copyright law provides for a variety of automatic licenses, with statutory royalties paid for the mandated uses. Such licenses include the following:

1. Published works may be reproduced in text books and/or broadcast in school education programs.⁷⁹
2. A license must be given when a public work is reproduced for the preparation of questions in an examination or test conducted for profit.⁸⁰
3. A license must be given to broadcast a published work or make phonograph records.⁸¹
4. A license must be given for a published work when the copyright owner cannot be located; again with a reasonable royalty payment fixed by the government. Registration of the work will avoid this problem.⁸²
5. Japanese publishers may obtain a compulsory license to translate under the Universal Copyright Convention.⁸³

76. *Id.* art. 63(3).

77. *Id.* art. 66(1)-(2).

78. *Id.* art. 21; see discussion *supra* part V.B.

79. Japanese Copyright Act, arts. 33-34.

80. *Id.* art. 36.

81. *Id.* arts. 38, 68.

82. *Id.* art. 67(a). Again, a reasonable royalty payment is fixed for these situations.

Id. art. 68. Registration of the work will avoid this problem. *Id.* art. 67(a).

83. *Id.* art. 5.

VII. DURATION OF COPYRIGHT PROTECTION

A. Japanese Works

Generally, a copyright lasts for fifty years after the author's death.⁸⁴ For joint works, the fifty-year term does not begin to run until the death of the last surviving author.⁸⁵ There are, however, exceptions to this general rule. An anonymous or pseudonymous work generally has a copyright of fifty years after publication. If the author is presumed to have been dead for more than fifty years, the copyright life is for fifty years after the presumed death. These presumptions no longer apply once the author's real name becomes known.⁸⁶

A copyright created by a legal entity lasts for fifty years after publication or for fifty years after creation if the work is not published.⁸⁷ Cinematographic, photographic, and periodical works all generally have copyrights of a fifty-year duration, subject to special calculation provisions.⁸⁸

B. Foreign Works

Foreign works generally are protected by the Berne Convention⁸⁹ or the Universal Copyright Convention.⁹⁰ These conventions generally accord foreign works the same protections granted to Japanese works. The foreign work is protected in Japan only as long as it is protected in its country of origin.⁹¹

VIII. REMEDIES FOR COPYRIGHT INFRINGEMENT

There are several formal and informal mechanisms to resolve copyright disputes in Japan. First, Japan's Copyright Act includes informal mediation procedures under the auspices of the Director General of the Cultural Affairs Agency, the government agency re-

84. *Id.* art. 51(1)-(2).

85. *Id.*

86. *Id.* art. 52.

87. *Id.* art. 53(1).

88. *Id.* arts. 54-56.

89. UNESCO and WIPO, *supra* note 15.

90. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, revised July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868.

91. See UNESCO and WIPO, *supra* note 15, UNIVERSAL COPYRIGHT CONVENTION: Item A-1; BERNE COPYRIGHT UNION: Item A-1.

sponsible for supervising copyrights.⁹² Both parties must agree to this non-binding proceeding.⁹³ Second, parties may attempt to resolve their disputes informally in a different mediation forum, namely, the summary court established under Japan's Civil Mediation Act.⁹⁴

Third, parties may commence civil actions in court. Special intellectual property courts have been established in Tokyo and Osaka to handle such actions.⁹⁵ Remedies include injunctive relief, damages, compensation for unjust enrichment, and what amounts to a declaratory relief-type action to confirm that another party has no right to injunctive relief on a copyright.⁹⁶ *Ex parte* seizure remedies are not available in civil actions, however, as they are in the United States.⁹⁷ Furthermore, because Japan has a "civil law" heritage, it employs virtually no U.S.-style discovery in its domestic litigation.⁹⁸

Fourth, although Japan does not have equitable asset freeze procedures as used in U.S. courts,⁹⁹ Japan allows a party to obtain a temporary attachment of the respondent party's assets to preserve them in the event of an eventual money judgment. The attachment may also apply to the copyright itself to prevent its transfer during the pendency of the action.¹⁰⁰

Finally, Japan's Copyright Act contemplates criminal penalties for those who wilfully infringe upon another's copyrights. These penalties include imprisonment for up to three years and a fine of up to one million yen (i.e., slightly less than \$10,000).¹⁰¹ Infring-

92. Japanese Copyright Act arts. 105, 111.

93. *Id.* art. 109(1).

94. See MINPŌ (Civil Code), Law No. 222 of 1947.

95. DOI, *supra*, note 9, at JAP-62, 63; Japanese Copyright Act arts. 112, 118.

96. DOI, *supra*, note 9, at JAP-62, 63; Japanese Copyright Act arts. 112, 118.

97. *Cf.* 17 U.S.C. §§ 502-03 (1988) (setting forth impoundment procedures and remedies); see also 15 U.S.C. § 1116 (1988) (setting forth seizure remedies applicable to trademarked goods).

98. For a discussion of the discovery available in domestic and foreign litigation involving Japan, see Mark S. Lee, *Conducting Discovery in Japan*, 6 INT'L LITIG. Q. 57 (1990).

99. See *Reebok Int'l v. Marnatech*, 23 U.S.P.Q. 2d 1377 (9th Cir. 1992); Mark S. Lee, *Prejudgment Asset Freezes Against Software Pirates*, 9 COMPUTER LAW. 22 (1992).

100. See Japanese Code of Civil Procedure Law, No. 29, 1890; DOI, *supra* note 9, at JAP-63.

101. See Japanese Copyright Act arts. 119, 122.

ers may only be prosecuted if the injured party complains of infringement.¹⁰²

IX. COPYRIGHT PROTECTION FOR COMPUTER SOFTWARE

A. Historical Development

Throughout the 1970s, the Japanese Government and computer industry debated the amount and type of intellectual property protection appropriate for computer software. Government-appointed committees concluded that computer programs should qualify for some type of protection other than copyright.¹⁰³ In December 1983, a special council appointed by Japan's Ministry of International Trade and Industry ("MITI") cited shortcomings in the existing Copyright Act and proposed a *sui generis* type of intellectual property protection for software.¹⁰⁴

While this debate progressed, Japanese courts found implicit computer protection for software programs in the Copyright Act. These cases generally held that computer software was a "work" within the meaning of the Act, and that the definition of "reproduction" under Article 2(1)(xv) of the Act was broad enough to cover reproductions of computer source code.¹⁰⁵ Courts considered object code and actual copies of the software as "copies" for copyright purposes.¹⁰⁶ One court also held that software used in a video game was a "cinematographic work" for copyright purposes.¹⁰⁷

These court decisions accelerated the governmental and scholarly debate concerning software. The uncertainty inherent in case-by-case development of copyright protection for software encouraged the Japanese Diet to implement amendments to the

102. *Id.* art. 123(1).

103. See Raymond August, *Computer Program Protection: A World-View of Developments*, 1 COMPUTER L. & PRAC. 117, 123 (1985).

104. J.A. KUESTERMONS & I.M. AUCKENS, INTERNATIONAL COMPUTER LAW § 7.25[B], at 7-64 (1993).

105. See Judgment of Dec. 6, 1982, Tokyo District Court (Taito Co. v. I.N.G. Enters.), 1060 HANJI 18; Judgment of Mar. 30, 1983, District Court (Taito Co. v. Makoto Denshikogyo Co.), 1081 HANJI 125; Judgment of Jan. 26, 1984, Yokohama District Court (Konami Kogyo Co. v. Daiwa Co.), 1106 HANJI 134.

106. *Id.*

107. Judgment of Sept. 28, 1984, Tokyo District Court (Namuko Co. v. Suishin Kogyo Co.), 1129 HANJI 120.

Copyright Act to articulate the nature and extent of computer software protection.¹⁰⁸

B. The 1985 Amendments to the Copyright Act

The 1985 Amendments to the Act, which became effective on January 1, 1986, clarified the copyright protection to be given to computer software. First, the 1985 Amendments added the word "program" as a definitional term. The Act now states that "program" means "an expression of combined instructions given to a computer so as to make it function and obtain a certain result."¹⁰⁹ Second, the Copyright Act added "program works" to its list of authorship works.¹¹⁰

Third, the Act specified three limitations on the protection provided to software:

The protection granted by this Law to [program] works . . . shall not extend to any programming language, rule or algorithm used for making such works. In this case, the following terms shall have the meaning hereby assigned to them respectively:

- (i) "programming language" means letters and other symbols as well as their systems for use as means of expressing a program;
- (ii) "rule" means a special rule on how to use in a given program a programming language mentioned in the proceeding item;
- (iii) "algorithm" means methods of combining, in a program, instructions given to a computer.¹¹¹

Fourth, the Act added a specific "work for hire" provision¹¹² that applies to computer software as follows:

108. Act. No. 62 of June 14, 1985. A translated version of the amendment is published in 21 COPYRIGHT 294 (1985).

109. See Japanese Copyright Act art. 2(1), 2(1)(xbis); cf. the definition of "program" in the U.S. Copyright Act: "[A] 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101(5) (1994).

110. Japanese Copyright Act art. 10(1). There is no similar addition of computer programs in the U.S. listing of copyright subject matter. See 17 U.S.C. § 102 (1988).

111. Japanese Copyright Act art. 10(3). There are no similar statutory restrictions on protection of computer software in the U.S. Copyright Act. The United States has relied on case law or U.S. Copyright Office policy to guide its applications of copyright to those unique elements of software.

112. See discussion *supra* part VI.C.

The authorship of a program work which, on the initiative of a legal person, etc. is made by its employee in the course of his duties, shall be attributed to that legal person, etc. unless otherwise stipulated in a contract, work regulation or the like and in force at the time of making of the work.¹¹³

Fifth, the 1985 Amendments added an exception to the Act's provisions allowing an author to preserve the integrity of his or her work by prohibiting modifications to it. This exception allows "modification which is necessary for enabling to use in a particular computer program which is otherwise unusable in that computer, or to make more effective the use of the program work in a computer."¹¹⁴

Sixth, the Copyright Act now allows the owner of a program work to make copies or adaptations as needed for the owner to exploit the work in a computer by himself:

(1) The owner of a copy of a program work may make copies or adaptations (including the making of copies of a derivative work created by means of adaptation) of that work if and to the extent deemed necessary for the purpose of exploiting that work and the computer by himself

(2) If the owner of a copy mentioned in the preceding paragraph has ceased to have the ownership of any of the copies mentioned in that paragraph (including copies made in accordance with the provisions of that paragraph) for reasons other than those of destruction, he may not thereafter preserve other copies in the absence of any declaration of the intention of the copyright owner to the contrary.¹¹⁵

Seventh, the 1985 Amendments created a new registration system for computer programs.¹¹⁶ Eighth, the 1985 Amendments created copyright liability for persons who knowingly use pirated programs on their computers:

An act of using in a computer, in the conduct of business, copies made by an act infringing a copyright of a program work . . . shall be considered to constitute an infringement on that copyright, so long as a person using such copies is aware of such

113. *Id.* art. 15(2).

114. *Id.* art. 20(2)(iii).

115. *Id.* art. 47 *bis*.

116. *Id.* art. 76 *bis*; see discussion *supra* part V.B.

infringement at the time he has acquired title to use these copies.¹¹⁷

Japanese authorities have used this Amendment to prosecute infringers criminally.¹¹⁸

B. Case Law Construing the 1985 Amendments

Few cases discuss the 1985 Amendments to the Japanese Copyright Act. Yet, although much remains undecided, the courts have discussed some aspects of the Amendments.

1. Literal Infringement

Several cases have held that literal-code copying infringes the copyright in a program.¹¹⁹ These rulings are consistent with the language of the Act.

2. Non-literal Infringement

In contrast to the extensive judicial debate concerning the nature and scope of non-literal copyright infringement of computer software in the United States,¹²⁰ no Japanese case has discussed the issue. Thus, the extent to which a party might be liable for "look and feel" or other forms of non-literal infringement is uncertain.

3. Creativity Standard

Japanese courts have not set an especially high "creativity" standard for program works to qualify for copyright protection. Thus, Japan has apparently taken an approach analogous to that of the United States, rather than the more stringent creativity

117. *Id.* art. 113(2). Note that no such "use" liability is contained in the U.S. Copyright Act. See 17 U.S.C. § 106 (1988).

118. Judgment of Mar. 23, 1988, Osaka District Court (State v. MMC), 1284 HANJI 156 (sentencing the defendant to one year and six months hard labor, under Article 119(i) of the Copyright Act, for making eight illegal copies of IBM's PC programs and their associated manuals).

119. See, e.g., Judgment of Mar. 31, 1989, Tokyo District Court (System Science Corp. v. Japan Technato, Co.), 130 HANJI, *aff'd in part, rev'd in part*, Judgment of Tokyo High Court, June 20, 1989.

120. See, e.g., *Computer Assoc. v. Atari*, 982 F.2d 693 (1st Cir. 1992); *Lotus Dev. Corp. v. Borland Int'l Inc.*, 831 F. Supp. 223 (D. Mass. 1993).

standards enacted in many European countries, including Germany.¹²¹

4. Algorithms

Japan's courts have confirmed that copyright protection in a program work does not extend to the "algorithms" used in making the programs.¹²² The Tokyo High Court indicated that the algorithm exception means that there is no copyright protection for the basic structural design revealed by examination of the program.¹²³

5. "Rules"

One of the more opaque portions of the Article 10(3)s exceptions to program protection is its prohibition on protection for "rules." No Japanese case has construed this provision. It has been interpreted by Japanese Government officials, however, as eliminating protection for interface information and methods.¹²⁴ A representative of the Cultural Affairs Agency, the government copyright agency, stated:

In making a program, in addition to the conventions applicable to the program language, it is sometimes necessary to follow specific conventions for the purpose of using the program in connection with a different program in the same computer or with a program in another computer through the medium of communication circuits. All these conventions are included within the term "rules."¹²⁵

At least one Japanese commentator has questioned the accuracy of this characterization.¹²⁶ Commentators argue that "rules" could still be protected if they implement a protectible part of the program. This argument has itself been criticized for confusing the expression in the code with the function of the code.¹²⁷

121. See Dennis S. Karjala, *Copyright Protection of Computer Software in the United States and Japan: Part II*, in 7 EIPR 231 (1991).

122. *Science Sys. v. Japan Technato*, *supra* note 119.

123. *Id.*

124. K. Bandou, *The Copyright Law Amendments—Clarifying the Protections of Computer Programs*, 334 MBL 18, 20 (1985), *quoted in* Karjala, *supra* note 121, at 234.

125. *Id.*

126. *Id.*

127. *Id.*

6. Reverse Engineering

The propriety of reverse engineering of software remains unclear. The Japanese Copyright Act contains neither general “fair use” provisions¹²⁸ nor specific “fair use” provisions that apply to research, study, or most commercial uses. The “fair use” statute applicable to programs allows copying or modification (and thus, by implication, reverse engineering) only for personal use. One case implies that reverse engineering may constitute copyright infringement, although this case may be limited to its facts.¹²⁹ An advisory committee to Japan’s Cultural Affairs Agency is presently considering broad legislation of reverse engineering, which may result in legislation on this issue.

7. User Interfaces

The extent to which user interfaces can be protected is also unclear, as no case has discussed the issue. Many user interfaces, however, can stand independently as audio, visual, or compilation works, and may be protected on this basis.

8. Compatibility

Also unknown is whether the copying of program language to establish compatibility is allowed. The limitation on program languages in Article 10(3) implies that the Act might allow the copying necessary for compatibility because the alternative effect of the copyright would be to protect the language in which the

128. See discussion *supra* part IV.C.

129. See Judgment of Jan. 30, 1987 (Microsoft Corp. v. Shu Sys. Trading, Inc.) Chisai [Dist. Ct.], 1219 HANJI 48 (holding that defendant’s acts of decompiling plaintiff’s program and source code, adding labels and explanatory comments, and publishing the end product in a book in hexadecimal code form constituted copyright infringement). United States law on reverse engineering is also unclear, although a judicial trend may be emerging that would allow reverse engineering if it is done for “fair use” purposes under the U.S. Copyright Act. See *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *Sega Enter. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

program was written.¹³⁰ Thus far, no cases have been reported on the issue.

VII. CONCLUSION

Reflecting its aversion to controversy and its European civil law influences, Japan's Copyright Act relies more on codification and less on judicial construction to articulate the nature and extent of its copyright protection for computer software than its European counterparts. The result is a more detailed listing of protections and exceptions from protections than are present in U.S. law. Yet, there are fewer answers to questions surrounding applications. Nevertheless, on many issues, Japan has arrived at a scope of protection for computer software surprisingly similar to that presently accorded in the United States.

130. Karjala, *supra* note 123, at 233. See Japanese Copyright Act art. 10(3). Cf. U.S. copyright law, which is developing a trend to allow copying achieved through "legitimate means," e.g., reverse engineering to achieve compatibility between different programs. See *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *Sega Enter. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992). But cf. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 831 F. Supp. 223 (D. Mass. 1993), which rejected compatibility arguments and found nonliteral infringement by Borland of Lotus' "1-2-3" spreadsheet program.