

Revisions to Copyright Act and Unfair Competition Prevention Act

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Introduction

Collecting, analysing, combining and processing large amounts of information is critical to the development of the fast-growing information industry, as exemplified by the Internet of Things (IoT), Big Data analytics and artificial intelligence (AI), among other things. However, since information often includes copyrighted works, its use can constitute copyright infringement even where there is no or only minor harm to the copyright owner's interests. For example, AI requires drawing on a significant amount of data to provide answers to user questions, including pictures, novels, musical scores and other copyrighted works. If a machine has to identify a picture of a certain species, it must reproduce many pictures in order to do so. Further, while certain information may be useful, the owner's interests may not be properly protected under existing laws, such as the Copyright Act and the Unfair Competition Prevention Act (UCPA). For example, Big Data analytics analyses large amounts of data, requiring significant time and money. However, since the results of such analysis are broadly provided to third parties under contract, they might not be protected as trade secrets under the UCPA.

To resolve these problems and facilitate the proper use of information, the Act of Partial Revision of the Copyright Act (the Copyright Act Amendment) and the Act of Partial Revision of the Unfair Competition Prevention Act Etc (the UCPA Amendment) were enacted in May 2018. This article explains the primary changes introduced by the amendment acts.

Copyright Act revisions

Background

Unlike the US fair use doctrine, the Japanese Copyright Act includes an exclusive list of circumstances in which the use of copyrighted works is permitted without the owner's authorisation (the so-called 'rights restriction provisions'). To keep up with current needs, the Copyright Act has been repeatedly amended to add new rights restriction provisions to the exclusive list, in contrast with the courts' determination of certain types of permissible unlicensed use under the US fair use doctrine.

The Copyright Act Amendment's primary aim is to extend the scope of rights restriction provisions to balance the fair use of copyrighted works and the proper protection of copyright to correspond with the move towards digitisation and networking. The Copyright Act Amendment has revised the rights restriction provisions so that they flexibly apply to:

- certain actions that are usually considered not to harm copyright owners' interests (Articles 30-4 and 47-4); and
- certain actions that may cause only minor harm to copyrights owners (Article 47-5).

The Copyright Act Amendment was enacted on 18 May 2018 and promulgated on 25 May 2018. The

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revisions to the Copyright Act will take effect on 1 January 2019.

Intended use of copyrighted works without the enjoyment of the ideas or emotions expressed therein

Article 30-4 of the Copyright Act permits the free use of copyrighted works to the extent considered necessary where the intended use of such works is not the enjoyment of the ideas or emotions expressed therein. In such circumstances, the works' use would usually not impair the copyright owner's interests. Therefore, these circumstances have been added to the exclusive list of rights restriction provisions. In addition to the general framework for determining whether a certain unlicensed use is permitted, Article 30-4 states that the unlicensed use of copyrighted works is permitted where it is required to:

- test the development of technology for the use of copyrighted works or similar;
- analyse information; or
- process information using electronic computers without human recognition.

As a result, the following can be conducted without the copyright owner's authorisation under Article 30-4:

- reproducing works to prepare databases for machine learning to develop AI;
- using works in the background of a system without human recognition of the emotions expressed in the works; and
- reverse engineering.

Use of copyrighted works to ensure smooth or efficient use of the works in computers

Article 47-4 permits the use of copyrighted works without the copyright owner's authorisation to the extent considered necessary to ensure the smooth or efficient use of the copyrighted works in computers or maintain or restore their state of use. As with Article 30-4, Article 47-4 provides a list of circumstances in which the use of works would usually not impair the copyright owner's interests. Article 47-4 provides some specific applicable circumstances and the general framework for determining whether a certain unlicensed use is permitted. As a consequence, creating a cache for speeding up information processing through a network and the temporary copying of data to media from a portable audio player during its exchange to another party can be performed without the copyright owner's authorisation under Article 47-4.

Minor use of copyrighted works in information processing by computers and provision of results thereof

Article 47-5 permits the unlicensed use of copyrighted works where the use is minor and forms part of information processing by computers and the provision of the results thereof. Article 47-5 provides circumstances in which the use of works could cause only minor harm to the copyright owner's interests. Unlike Articles 30-4 and 47-4, Article 47-5 identifies only specific applicable circumstances where a person searches for or analyses information and provides the results thereof, although the government can add certain circumstances to this category by a cabinet order to meet future needs. Notably, under Article 47-5, the extent of the use must be minor. For example, locating a certain book using specific keywords and displaying a part thereof with the keywords can be done without the copyright owner's authorisation.

UCPA revisions

Background

The UCPA protects trade secrets, among other things. It defines and prevents 'unfair competition', which includes:

- improper acquisition of trade secrets;
- the improper disclosure and the misappropriation of trade secrets; and
- interference with the effectiveness of technological restrictions.

The UCPA Amendment establishes civil remedies for the improper acquisition, disclosure and use of 'data for limited provision' (defined below) that constitutes an act of unfair competition and also extends the scope of unfair competition to include interference with the effectiveness of

technological restrictions. The UCPA Amendment was enacted on 23 May 2018 and promulgated on 30 May 2018.

Unfair acquisition, disclosure and use of data for limited provision

Certain types of information are valuable for business and society, but do not constitute trade secrets or copyrighted works. Therefore, owners of such information may hesitate to share and use it because it is not protected under the Copyright Act or the UCPA and will quickly lose its value once disclosed to the public. Given that sharing and using data is critical for information technology development, the UCPA Amendment provides protection for information that is valuable, but does not qualify as a trade secret or 'data for limited provision' in order to facilitate its use. Under the UCPA, the improper acquisition, disclosure and use of data for limited provision constitutes a new act of unfair competition. 'Data for limited provision' refers to technical or business information that is controlled (eg, by requiring identification or a password) and stored in large volumes by electronic or magnetic means to be provided to a specific person on a regular basis. It does not cover data which constitutes a trade secret or is provided to non-specified persons free of charge. Big Data is expected to fall within the scope of data for limited provision. However, unlike with trade secrets, transferring information created by the use of data for limited provision does not constitute an act of unfair competition.

Remedies for the improper acquisition, disclosure and the use of data for limited provision are limited to civil remedies, including injunctions and damages. Unlike other acts of unfair competition under the UCPA, criminal penalties are not applicable to the improper acquisition, disclosure and the use of data for limited provision.

The guidelines regarding the interpretation of the revised UCPA, including requirements for the subject of protection, will be made public before the enforcement of the revised act. Although a government-organised working group is considering the guidelines, its discussions have not been disclosed.

The revisions to the UCPA will take effect on 1 July 2019.

Interference with effectiveness of technological restrictions

Currently, technological restrictions include copy control and access control technology, and the provision of machines or programs that interfere with technological restrictions constitutes an act of unfair competition.

The UCPA Amendment protects information recorded by electronic or magnetic means in addition to viewing images, hearing sounds or running programs. Further, the UCPA Amendment clarifies that activation is a technological restriction protected under the UCPA. Moreover, the UCPA Amendment provides that the provision of serial codes and services that interfere with the effectiveness of technological restrictions constitutes an act of unfair competition. As a result, providing services that modify a gaming device so that the device can use pirated software avoiding technological restrictions constitutes an act of unfair competition.

Both civil remedies and criminal penalties apply to the new restriction on interfering with the effectiveness of technological restrictions explained above.

The revisions to the UCPA will take effect on 29 November 2018.

For further information on this topic please contact [Hitomi Iwase](mailto:h_iwase@jurists.co.jp) or [Takuhiko Fukazu](mailto:t_fukazu@jurists.co.jp) at Nishimura & Asahi by telephone (+81 3 6250 6200), or email (h_iwase@jurists.co.jp or t_fukazu@jurists.co.jp). The Nishimura & Asahi website can be accessed at www.jurists.co.jp.

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