Companies As Owners and Users of Works Protected by Copyright and Related Rights

Special Reference to Software Companies

Takeshi Hishinuma

Associate Legal Officer, Copyright E-Commerce, Management and Technology Division

1
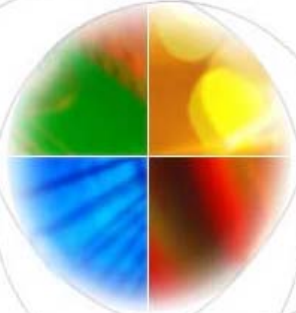
Basic Structure

I. Copyright Protection in General

- Introduction
- International treaties
- Subject matter of protection
- Basic rights protected
- Non-formality principle
- Authorship/ownership
- Scope of protection
- Limitations/exceptions
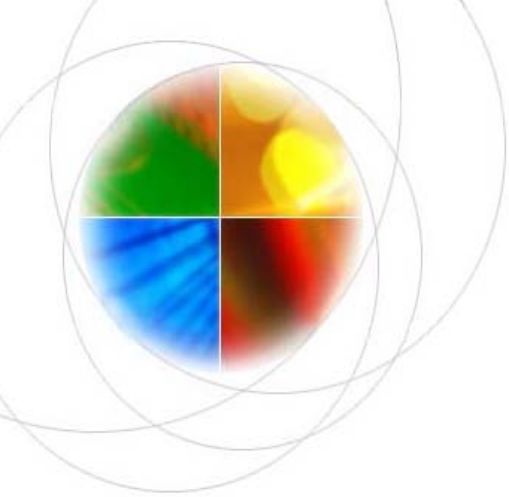- Enforcement

Basic Structure *(continued)*

II. Special Consideration for Software

- Computer programs protected by copyright law
- Limitations/exceptions
- Registration
- Patent and copyright protection as complementary legal regimes
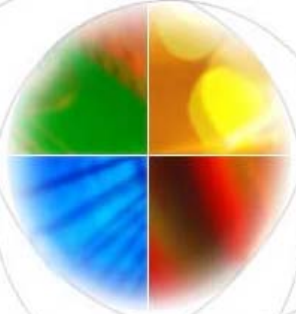
III. New Issues

- Open source software (OSS)
- Technological protection measures (TPMs)
- Responsibility of software developers

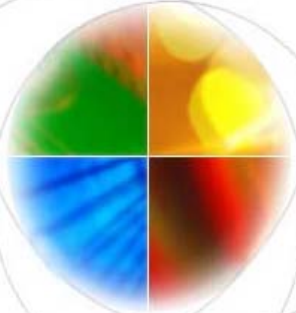# *I. Copyright Protection in General*

Introduction

- Basic idea of copyright protection

- Purpose of copyright protection

- Dynamic history of copyright protection

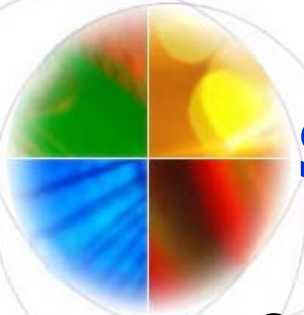- Balance between adequate protection and the public interest

International Treaties

- The Berne Convention (1886)

- "Guided development" (1970s and 1980s)

- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, 1994)

- WIPO Copyright Treaty (WCT, 1996)

Subject Matter of Protection

- Original works; not ideas, procedures nor methods of operations
  - Computer programs (source and object codes)
  - Non-original databases
- Independent of the quality or the value attaching to the work
- Non-exhaustive list in national copyright laws:
  - Literary works (such as Books and pamphlets)
  - Artistic works
  - Maps and technical drawings
  - Photographic works
  - Motion pictures
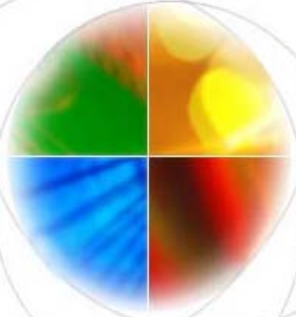 - Computer programs (either as literary work or independently)

Basic Rights Protected by Copyright

- Right of reproduction
- Right of distribution
- Right of rental
- Right of importation
- Performing rights
- Recording rights
- Motion picture rights
- Broadcasting rights
- Translation and adaptation rights
- Moral rights

Non-formality Principle

- A work is protected by copyright as soon as it created

- Some national laws allow for registration of works for the purposes of:
  - *prima facie* evidence in a court
  - claiming statutory damages or attorney's fees
  - identifying and distinguishing versions of works
  - claiming rights against third parties based on transfer

Authorship/ownership

- The author who has created the work is generally the owner of the copyright

- Copyright is transferable to third parties in many countries; in other countries copyright is not legally transferable, but the owner of copyright can license all or some of the rights

- Moral rights remain with the author even after the transfer of economic rights

Scope of Protection

- Life of the author plus not less than fifty years after the author's death

- A tendency towards longer term of protection under national laws

- Not less than 50 years from publication if term not measured from life of author

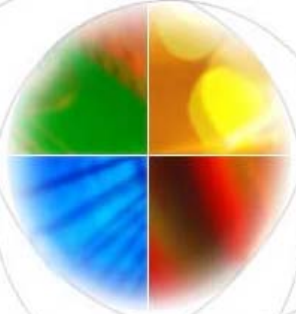- Geographical limitation (territoriality)

Limitations/Exceptions

- Quotation

- Three-step test:
  - Only certain special cases
  - No conflict with normal exploitation of the works
  - No unreasonable prejudice to the legitimate interests of the owners of rights

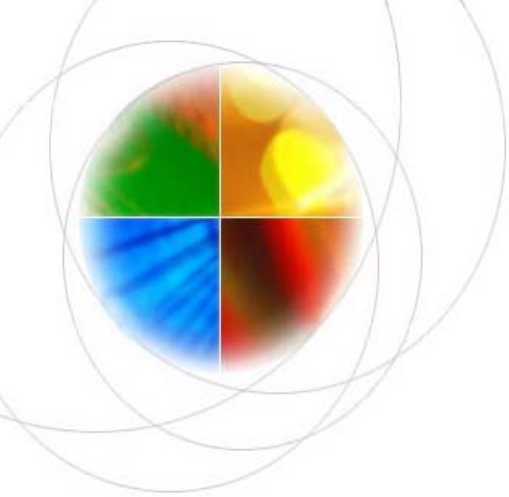- Temporary recording for broadcasting

Enforcement

- General obligations
  - Effective enforcement
  - Fair and equitable procedures
  - Technological protection measures and rights management information

- Civil remedies

- Provisional measures, including preliminary injunctions

- Border measures

- Criminal sanctions

II. Special Considerations for Software

Computer Programs Protected by Copyright Law

- United States (1980)

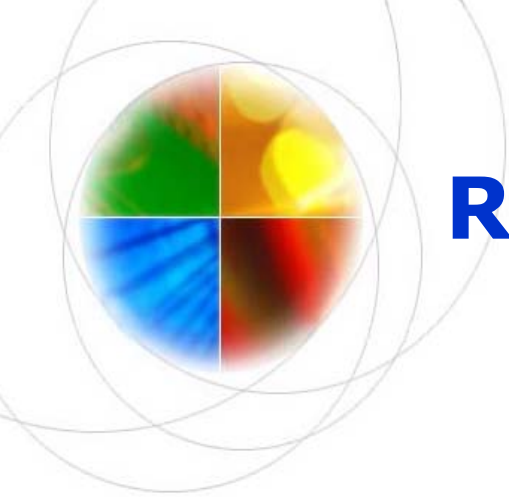- Europe and Japan (1991)

- TRIPS (1994)

- WCT (1996)

Limitations/Exceptions

- Free copying for private purposes

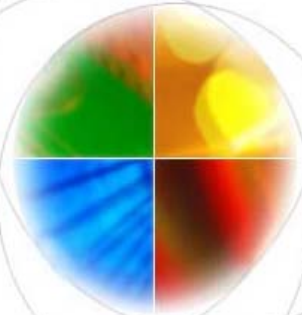- Back-up copies for archival purposes

- Decompilation

Registration

- Non-formality principle

- Some national laws provide specific voluntary registration systems for computer programs

Patent and Copyright Protection as Complementary Legal Regimes

- Patents protect inventive ideas; copyright protects original expression

- Patents can be invoked even against independent inventors of the same idea; copyright cannot prevent independent creators from recreating the same or similar work

- Patent is accorded after an application and examination process; copyright protection requires no formality
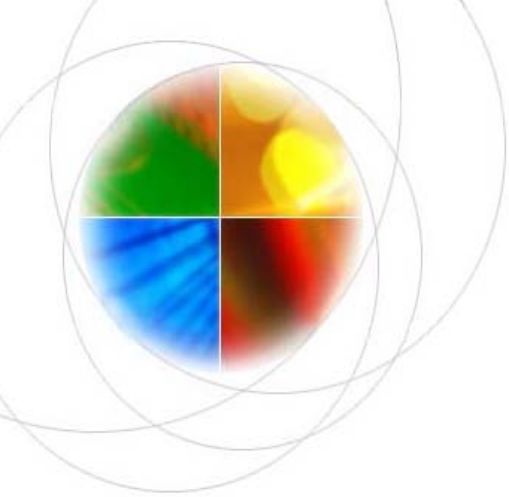
18

Patent and Copyright Protection as Complementary Legal Regimes *(continued)*

- Patent application process involves disclosure; copyright protection requires no disclosure

- Patent may be subject to compulsory license in some countries; copyright is subject to limitations/exceptions

III. New Issues

Open Source Software (OSS)

- Proprietary software and OSS

- Purposes of OSS

- OSS is based on copyright protection

Technological Protection Measures

- Legal framework
  - WCT (1996)
  - EU Directives (98/84/EC, 2001/29/EC)
  - National laws
    - U.S. DMCA (1998)
    - Japan: Unfair Competition Prevention Law and Copyright Law (1999 Amendments)
  - Free trade agreements (FTAs)

- Access control and copy control
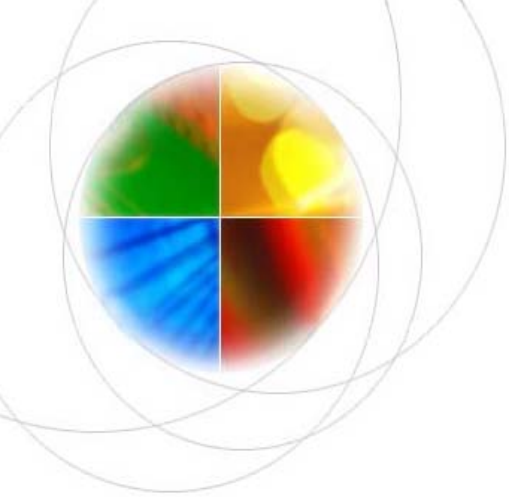

- Limitation/exceptions

Responsibility of Software Developers

- Civil liability to the copyright owner as a contributor to copyright infringement

- Criminal liability
  - *Elcomsoft* case (2001~2)

  - *Winny* case *(2004)*

The End

Thank you!