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NOTES AND COMMENTS

The Protection of Computer Programs in Japan

I. INTRODUCTION

To catch up with the industrialized world, Japan promoted rapid growth in industry by using technology and know-how already existing in other countries. Believing regulation would retard acquisition of foreign technology, Japan avoided implementing any extensive regulatory scheme for protecting technology.¹ As a result, Japan has become an industrial giant. Because Japan will continue to be a net importer of technology in the foreseeable future, it is unlikely that Japan will adopt any new regulatory scheme for controlling all technology.

Computer programs present a unique problem for Japan. Despite the absence of regulations protecting technology, fierce competition, ease of duplication and expanding markets for software have made it difficult for Japan to acquire foreign computer programs. However, Japan is fast-becoming a net exporter of original computer programs. Thus, while Japanese companies still seek access to foreign programs, they should be equally interested in preventing the unauthorized use, sale and distribution of their own programs. Therefore, it is now in Japan's best interest to adopt and enforce a statutory form of regulation to obtain both protection of, and access to, computer software.²

Part II of this comment demonstrates how the nature of the computer software industry creates the need for a new form of software protection in Japan.³ Part III examines Japan's existing forms of legal

1. "Japan does not have a statute dealing with know-how per se, a serious deficiency for its protection in a Civil Law Country." Amemiya & Guttman, *Know-How*, in 4 *DOING BUSINESS IN JAPAN* § 1.02[4], at VI 1-5 (Z. Kitagawa ed. 1982) [hereinafter cited as *Know-How*]. In contrast, regulation of the actual influx of technology has been extensive. The influx of technology has been carefully regulated in an effort to avoid domination by foreign industries. Note, *Japan and the Introduction of Foreign Technology: A Blueprint for Less Developed Countries?*, 18 *STAN. J. INT'L L.* 171, 173 (1982).

2. Whether the economic advantages of a statutory solution will sufficiently outweigh the traditional Japanese reluctance to litigate is beyond the scope of this comment and, therefore, will only be mentioned briefly.

3. See *infra* text accompanying notes 6-14.

protection of software.⁴ Part IV analyzes proposed regulations that would protect domestic computer programs as well as provide access to foreign computer programs.⁵

II. THE NEED FOR ADEQUATE PROTECTION OF COMPUTER SOFTWARE

Three factors, endemic to the world-wide computer industry, have increased the need for adequate computer software protection. First, computer manufacturers are competing on the basis of their software capability. Companies have shifted investment allocation from hardware to software.⁶ As a result of this increased investment in software, its unauthorized use, sale and distribution represents a greater loss of investment return than ever before. Second, the sale of inexpensive computers, run by standardized software, has grown exponentially.⁷ This growth in market size should also exponentially increase the incentive to use, sell and distribute software without authorization. In addition, this explosive growth in the software market and concurrent increase in the unauthorized use, sale and distribution of software should cause a greater disparity between the potential and actual revenue that accrues to the software manufacturer—for every unauthorized sale, the manufacturer loses a potential customer. Third, because the significant cost of producing a computer program accrues while it is being written rather than while it is being reproduced, the potential for industrial espionage has increased. Most technologies require that the lion's share of investment be spent in retooling manufacturing facilities, buying materials and labor.⁸ Once a computer program is finished, it may be mass-produced for the cost of the tape on which it is copied. The resulting heavy initial

4. See *infra* text accompanying notes 15-67.

5. See *infra* text accompanying notes 68-85.

6. *Model Provisions on the Protection of Computer Software*, prepared by the International Bureau of the World Intellectual Property Organization, Geneva, 1978, reprinted in 11 LAW & COMPUTER TECH. 2 (1978) (retitled as LAW/TECH.) [hereinafter cited as *WIPO Proposal*].

7. *Id.*

8. A comparison of investments in hardware and software illustrates the difference in investment between software and other technologies. "[S]oftware businesses . . . require significantly less capital than hardware makers, which need considerable amounts of investment money to build manufacturing plants [A] software house needs only one-third as much investment capital as a hardware company to reach the same dollar level of sales." *Software: New Territory for Venture Capitalists: Competing for Micro Computer Software Companies*, BUS. WK., Oct. 19, 1981, at 103.

investment allocation during writing and nominal investment allocation during mass production provides significant incentive for competing manufacturers to allow another company to bear the cost of development and then steal the finished program. Theft of existing programs is not unusual, and Japan is a world center for such industrial espionage.⁹

Japan will continue to need a method of business that fosters access to foreign programs. Allowing computer software companies to rely on their own ability, rather than regulations, to protect themselves does not produce the advantages in foreign technology acquisition that have been realized in other Japanese industries. The ease with which computer programs may be copied and the expanding markets for computer programs have caused both foreign and domestic computer companies to be extremely hesitant to allow access to their software.¹⁰ If regulations imposed on Japan's computer program industry adequately protected against the unauthorized use, sale and distribution of software, foreign companies would be more willing to license their programs to Japanese companies.

Software protection is necessary to foster development of the computer software industry. While Japan will continue to be a net importer of technology for some years to come, some Japanese companies plan to become net exporters of software by 1991.¹¹ To foster this growth in domestic software development, Japanese companies must be assured that they will reap the rewards of their efforts to develop programs by assuring a profitable return on their investment. Thus, protection from the unauthorized use, sale and distribution of software is necessary to provide incentive for software manufacturers to develop computer programs. As a result, Japan's traditional objective of making the acquisition of foreign technologies

9. Ten thousand commercial spies now operate in Japan. Espionage is an actively sought skill. For example, the School of Industrial Protection opened in 1968 and organized to train industrial spies and counter-spies. Students are generally young executives selected by Japanese companies. I A. WISE, *TRADE SECRETS AND KNOW-HOW THROUGHOUT THE WORLD: JAPAN* § 1.05[7], at 1-80-81 (Aug. 1981). The pervasive espionage in the Japanese computer industry is exemplified by the recent F.B.I. "sting" operation against operatives of Mitsubishi Electric Corporation and Hitachi Ltd., who acquired confidential computer tapes from I.B.M. Now, *From the FBI: Japanscam*, TIME, July 5, 1982, at 44 [hereinafter cited as *Japanscam*].

10. Gregory, Thorp & Bartholemew, *Japan's "Third Revolution": A Far-Reaching Restructuring Rivaling the Meiji and Postwar Eras*, WORLD PRESS REV., Mar. 1982, at 23. See also *Attempting to Overcome the U.S. Lead in Software*, BUS. WK., Dec. 14, 1981, at 74 [hereinafter cited as *To Overcome the U.S. Lead*].

11. *To Overcome the U.S. Lead*, supra note 10, at 77.

as easy as possible is no longer its only objective for its computer software industry. Japan's new objective for its software industry is to assure adequate protection from foreign and domestic companies seeking Japanese software.¹²

To foster development of its domestic software industry, Japan's Ministry of International Trade and Industry (MITI) is providing funds for many small computer software companies.¹³ These small, independent software companies are a relatively new innovation in Japan. They are experiencing rapid growth which is largely due to the expansion of the home computer market.¹⁴ However, unlike large computer companies, these small companies cannot effectively rely on their own abilities to prevent the unauthorized use, sale and distribution of their software. Therefore, the only alternative for small companies is to rely on legal protection.

III. THE AVAILABILITY OF LEGAL PROTECTION

Presently, Japan has two bodies of law available to protect computer programs: copyright and trade secret. However, they are seldom used. In Japan, business and legal disputes are resolved through compromise and accommodation rather than through litigation.¹⁵ Filing a lawsuit is normally viewed as an inflexible and selfish act.¹⁶ Indeed, law in Japan developed largely to passify Westerners conducting business with Japan.¹⁷

A. Copyright Law

Copyright law developed to assure artists and writers that they would receive an economic reward for their efforts. Japan adopted Western copyright law long before computer programs

12. *A Registration and Certification Type of System to Protect Computer Programs*, MITI BULL., June 5, 1972, reprinted in 5 COMPUTER LAW SERVICES ARTICLES § 9-4, art. 3, at 2 (R. Bigelow ed. 1979) [hereinafter cited as *MITI Report*].

13. *To Overcome the U.S. Lead*, *supra* note 10, at 75-76.

14. *Id.* at 77-78.

15. Stevens, *Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer*, 27 BUS. LAW. 1259, 1271-73 (1972).

16. *Id.* at 1272.

17. The eminent Japanese legal sociologist, Professor Takeyoshi Kawashima, stated that "law in Japan is like an heirloom sword. Western law was first conceived of in Japan as 'no more than an . . . ornament or prestige symbol' to make Japan respectable in Western eyes. It was taken out and shown to outsiders but never used or only rarely used in actual combat." *Id.* at 1271-72.

existed.¹⁸ While computer programs bear little resemblance to paintings, novels or poetry, copyright law may provide protection for computer programs because they qualify as literary works of a scientific nature.¹⁹ A copyright of a computer program instills both economic and moral rights in the holder.²⁰ The economic rights of copyright include the exclusive right to reproduce, exhibit or publish the program itself and/or its translation or adaptation.²¹ These economic rights may be assigned in whole or in part.²² The moral rights of copyright include the right to publicize the program and to prevent another party from changing or altering the program.²³

Certain drawbacks present in copyright law effectively limit its utility for protecting computer programs. To copyright a computer program it must be an original work²⁴ and it must qualify as a creative expression of thought.²⁵ While the MITI has stated that computer programs may be copyrighted as "literary works of a scientific nature,"²⁶ there has been no attempt to establish clear criteria for the required originality and creativity with respect to computer programs.

While the term of copyright protection is fifty years,²⁷ the marketable lifespan of a computer program is much less than fifty years.²⁸ Program designers cannot use a discarded program to aid

18. "The first modern copyright legislation is the old Copyright Law (*Chosakuku hō*) enacted in 1899." T. DOI, *THE INTELLECTUAL PROPERTY LAW OF JAPAN* 202 (1980). Japan adopted a new copyright law in 1970. See Copyright Law, Law No. 48 of 1970, reprinted in UNESCO, *2 COPYRIGHT LAWS AND TREATIES OF THE WORLD, JAPAN* (1982) (as amended to May 18, 1978) [hereinafter cited as *LAWS AND TREATIES*].

19. *MITI Report*, *supra* note 12, at 3.

20. Copyright Law of 1970 arts. 18-20 (moral rights) and arts. 21-28 (economic rights), reprinted in *2 LAWS AND TREATIES*, *supra* note 18.

21. *Id.* arts. 21-28.

22. *Id.* art. 61. *Cf. id.* art. 59 (moral rights are inalienable).

23. *Id.* arts. 18-20.

24. Under Japanese copyright law, an eligible work must be an *original* literary or artistic work of a Japanese national, or first published in Japan (which includes those works first published abroad, provided that they are subsequently published in Japan within thirty days). Copyright Law of 1970 art. 6(i)-(ii), reprinted in *2 LAWS AND TREATIES*, *supra* note 18.

25. *Id.* art. 2(1)(i). See *infra* note 76 and accompanying text.

26. *MITI Report*, *supra* note 12, at 3.

27. Copyright Law of 1970 arts. 51-53, reprinted in *2 LAWS AND TREATIES*, *supra* note 18.

28. *MITI Report*, *supra* note 12, at 3.

them in developing a newer or updated version.²⁹ This results in unnecessarily duplicated effort.³⁰

The copyright system provides a limited remedy for copyright infringement. While the holder of a copyright has a cause of action against anyone who steals or remanufactures the copyrighted program,³¹ distributors of illegal copies of the program cannot be sued unless the distributor is aware that the copies are products of a copyright infringement.³² Under present copyright law, the creator or assignee of a computer program may seek injunctive relief³³ and/or damages³⁴ against an "infringer." However, because use and distribution are not actionable offenses,³⁵ software companies are understandably reluctant to copyright newly-developed programs. Further, the software manufacturer has no cause of action to prevent the use of such copies.³⁶ Therefore, the available remedy under copyright law fails to adequately protect computer program manufacturers.

Japan's present copyright system also fails to inform the public of what programs already exist. Copyright provides no system for disseminating information about programs or their outlines to the public,³⁷ nor does it provide any index or catalogue system of existing programs.³⁸ Thus, given the thousands of existing programs marketed in Japan today,³⁹ developers run a substantial risk of creating programs that have already been developed.⁴⁰

B. Trade Secret and Know-How Protection

Though no case law exists, license agreements are generally used as a guideline for software protection. In Japan, these license

29. Copyright Law of 1970 arts. 27-28, *reprinted in 2 LAWS AND TREATIES, supra* note 18.

30. *MITI Report, supra* note 12, at 2.

31. *Id.* See also *Japanscam, supra* note 9, at 44 (Japanese businessmen were arrested while attempting to procure a competitor's software).

32. Copyright Law of 1970 art. 113, *reprinted in 2 LAWS AND TREATIES, supra* note 18.

33. *Id.* art. 112.

34. *Id.* art. 114.

35. *Id.* art. 113.

36. *MITI Report, supra* note 12, at 3.

37. *Id.* at 2.

38. *Id.* at 3.

39. *To Overcome the U.S. Lead, supra* note 10, at 77-78.

40. *MITI Report, supra* note 12, at 2.

agreements constitute trade secret and know-how protection, though they bear little resemblance to United States trade secret protection.⁴¹

Trade secret and know-how law differs from copyright law in several respects. Trade secret and know-how law does not require that a computer program be creative.⁴² Furthermore, trade secret and know-how law protects documentation describing the program as well as the program itself.⁴³ In addition, trade secrets and know-how may be given to others by formal agreement only, otherwise, the proprietary interest in the secret will be lost.⁴⁴ These agreements can be made with licensees, distributors, engineering companies or employees.⁴⁵

Trade secret and know-how protection is severely limited. A trade secret agreement can only be breached by a party that agreed to keep the secret.⁴⁶ Third parties who acquire the secret have the full right to use it.⁴⁷ Moreover, any civil proceeding brought to protect

41. Trade secret protection in the United States has been based on various aggregates of property law, unjust enrichment and contract law, although no uniform basis for trade secret protection is followed by all states. For example, New Jersey defines a trade secret as:

[T]he whole or any portion or phase of any scientific or technical information, design, process, procedure, formula or improvements which is secret and of value. A trade secret shall be presumed secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 184 (2d ed. 1982). Japanese and American trade secret law differs in that American trade secret law imposes liability irrespective of a contractual or confidential relationship: "[o]ne who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if: (a) he discovered the [trade] secret by improper means; or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him" RESTATEMENT OF TORTS § 757 (1939); see generally KINTNER, *supra* note 41, at 209-20 (a discussion of how the concepts of contract, property and unjust enrichment have been relied upon in American cases).

42. *Know-How*, *supra* note 1, § 5.03[1], at VI 5-4.

43. *Id.* § 5.01, at VI 5-2.

44. *Id.* § 5.04, at VI 5-5.

45. *Id.*

46. *Id.* § 5.06, at VI 5-9.

47. This aspect of Japan's limited trade protection was demonstrated in a case brought by a German firm (Deutsche Werft Aktiengesellschaft) against a Japanese company (Waukesha Chūetsu Yūgen Kaisha) which was formed as a joint venture between the American licensee of the German firm (Waukesha Bearings Co.) and a Japanese firm (Chūetsu). Waukesha Bearings Co. was licensed to manufacture and sell oil lubricated propeller shaft tube sealings using German know-how. Without authorization, Waukesha established the joint venture with Chūetsu which began using the German know-how. The German company sued for a preliminary injunction against Waukesha Chūetsu. The injunction was denied because Waukesha Chūetsu was considered a separate legal entity from Waukesha and not a party to the agreement. *Deutsche Werft Aktiengesellschaft v. Waukesha Chūetsu Yūgen Kaisha*, Sept. 5, 1966, High Ct., Tokyo, Japan, 17 Kakyū minshū 769, summarized in *Know-How*, *supra* note 1, § 5.06, at VI 5-9-10. This is the only case which mentions the legal status of know-how agreements between companies. T. DOI, THE INTELLECTUAL PROPERTY LAW OF JAPAN 88 (1980).

trade secrets and know-how will be open to the public.⁴⁸ Therefore, bringing an action for breach of a trade secret agreement will destroy the secret nature of the know-how.⁴⁹

Remedies which may be sought for breach of a trade secret or know-how agreement include damages, specific performance and rescission.⁵⁰ Damages are normally limited to remuneration for the natural and proximate consequences of the breach as well as any damages which were reasonably foreseeable.⁵¹

The most effective remedy for protecting computer programs, specific performance of a non-disclosure clause, is seldom used.⁵² Specific performance would prevent the unauthorized use,

48. "[T]he court procedures are in principle open to the public and the owner will not want to disclose his know-how to the public. However, in order to win his case he must disclose it." Lee & Kubota, *Remedies for Breach of License Agreements*, in PATENT AND KNOW-HOW LICENSING IN JAPAN AND THE UNITED STATES 265 (T. Doi & W. Shattuck eds. 1977).

49. The know-how may be kept secret if only a temporary injunction is sought. However, because the method of proof is limited in this procedure, it is unlikely that a court will grant a temporary injunction in matters concerning complicated techniques which must be explained to the judge before he or she can understand the case. *Id.* at 265 n.218.

50. All three remedies may be sought simultaneously throughout a given case. Injunctive relief may be achieved through an action for performance of the agreement. The Civil Code provisions governing these remedies are articles 412-422 and 540-548. WISE, *supra* note 9, § 1.06[4], at 1-95 n.8.

51. No case exists in which damages were sought for breach of a trade secret or know-how agreement. The closest analogy may be found in *American Cyanamid Co. v. Nissan Kagakukōgyō K.K.*, Sept. 7, 1970, Dist. Ct., Toyama, Japan 2 Mutaizaisan reishū 414, which involved an attempted patent infringement action that was finally argued on a theory of unjust enrichment because the statute of limitation precluded any action for violation of the patent. The American company (American Cyanamid) had discovered that the Japanese company (Nissan Kagakukōgyō K.K.) was using its patented process. The district court in Japan found that Nissan had been unjustly enriched. American Cyanamid was awarded four percent of the net sales price of the product for the applicable period of enrichment. In contrast, under a typical licensing agreement for their patents in the United States during the same period, American Cyanamid reaped five percent of the net sales price. The court's rationale for awarding only four percent was that there were only two years left on the patent when Nissan began infringement. *Id.*, discussed in DOI, *supra* note 47, at 49-50; WISE, *supra* note 9, § 1.05[8], at 1-81-82. See also WISE, *supra* note 9, § 1.06[4][a], at 1-95-96 (article 416 of the Civil Code).

52. Article 414(1) of the Civil Code allows specific performance where applicable. This remedy is extended to obligations to forbear from specified activities, such as divulging the inner workings of a computer program. WISE, *supra* note 9, § 1.06[4], at 1-96.

sale or distribution of a program, but there are no cases involving the specific performance of an industrial trade secret agreement.⁵³ This probably is a result of the Japanese people's traditional reluctance to sue.⁵⁴ Furthermore, there is no contempt procedure available to enforce compliance with a specific performance decree.⁵⁵ The plaintiff is confined to seeking non-compliance damages.⁵⁶ However, because they are speculative in nature, these damages are unlikely to compensate for loss of a trade secret. In addition, the most desirable defendants, the buyer, distributor and manufacturer of the stolen program, often cannot be sued. This is true for all trade secret remedies.⁵⁷ Therefore, the lack of case law may further demonstrate the inadequacy of license agreement protection.

C. Legal Recourse Available to Foreign Companies

Since computers were first introduced, Japan has needed, and will continue to need, access to foreign software. Both foreign and Japanese companies need adequate protection from the unauthorized use, sale and distribution of software. Such legal protection of software would make foreign companies less hesitant to allow access to

53. The case most similar to one invoking specific performance of a trade secret and know-how agreement is *Yūgen Kaisha Forseco Japan, Ltd. v. Okuno*, Oct. 23, 1970. Dist. Ct., Nara, Japan. 624 Hanrei Jihō 78, 3 Kokusaitorihiki Hanreishū 550, *discussed in Doi, supra* note 47, at 91-92. In this case the court granted a provisional injunction against former employees. The employees (Okuno and Daimatsu) had signed an agreement with Yūgen Kaisha Forseco, Ltd., a company in the chemical and metalworks industry. The agreement prohibited disclosure of trade secrets and know-how gleaned from employment as well as competition with Forseco for two years after leaving the company. Shortly after leaving Forseco, Okuno and Daimatsu became directors of a newly-formed company (Apollo Chemical Corp.) which competed directly with Forseco. The provisional injunction was granted because the scope of the industry dealt with in the agreement (chemical and metalworks) was narrow, the non-competition limit was only two years and Okuno and Daimatsu had been compensated through salary for keeping the trade secrets while working at Forseco. Whether specific performance of trade secret and know-how agreements between companies will be treated in the same manner remains an open question.

54. Stevens, *supra* note 15, at 1272.

55. WISE, *supra* note 9, § 1.06[4], at 1-96-97.

56. This separate form of damages for non-compliance with a court order of specific performance is similar to the *astreinte* in French law. It is a pecuniary action designed to induce compliance with the order of specific performance. *Id.* § 1.06[4], at 1-96-97.

57. The lack of remedy against a third party in breach of a trade secret and know-how agreement was unequivocally demonstrated in *Deutsche Werft Aktiengesellschaft v. Waukesha Chūetsu Yūgen Kaisha*, Sept. 5, 1966, High Ct., Tokyo, Japan, 17 Kakyū minshū 769, *summarized in Know-How, supra* note 1, § 5.06, at VI 5-9-10. See *supra* note 47 for a discussion of this case.

their programs. However, the question of whether existing law provides sufficient protection for foreign software is open to serious debate.

Japanese copyright law is available to foreign companies if the program is either published first in Japan or introduced in Japan within thirty days of initial publication elsewhere.⁵⁸ However, as with Japanese programs, the qualifications of originality and creativity are still problematic.⁵⁹ Alternatively, an existing copyright from a member of either the Universal Copyright Convention⁶⁰ or the Berne Convention⁶¹ is given an automatic copyright. Under the rules of these conventions, the vague questions of originality and creativity under the Japanese standards for qualification are avoided.

Japanese trade secret law protects a foreign company's software only if an agreement exists⁶² or is being negotiated with a Japanese company.⁶³ As with Japanese firms, trade secret law allows no remedy against a third party.⁶⁴ Thus, foreign companies which produce programs solely for their domestic market cannot prevent a Japanese firm from using and marketing copies of their programs.⁶⁵

58. Doi, *supra* note 47, at 205.

59. *See id.* at 204.

60. Both Japan and the United States are signatories to the Universal Copyright Convention. *See generally* Matsui, *Copyright*, in 4 DOING BUSINESS IN JAPAN § 8.02[2][c], at VI-8-4-5 (Z. Kitagawa ed. 1982); *Revised Universal Copyright Convention, Hearings before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. 2 (1972). The only requirement is that the work be first published in a member country or published by a national of a member country. There is some question concerning whether a computer program satisfies the requirement of "publication." Matsui, *supra* note 60, at VI-8-6, suggests a work must be published in "print or other visual forms" to be subject to the Universal Copyright Convention. The Universal Copyright Convention as revised in Paris on July 24, 1971, defines publication as "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." UNESCO, Records of the Conference of Revision of the Universal Copyright Convention art. VI, at 33 (1973). For a list of member countries, see Abelman & Berkovitz, *International Copyright Law*, 22 N.Y.L. SCH. L. REV. 619, 647-51 (1977).

61. For a list of member countries, see Abelman & Berkovitz, *supra* note 60, at 647-51.

62. *Know-How*, *supra* note 1, § 5.06, at V-15-9.

63. The Roman law doctrine of *culpa in contrahendo* is likely to be incorporated into Japanese law. This doctrine invokes a confidential status to the relationship between negotiating parties. Disclosure of the other party's secret know-how to another would be a breach of this confidential relationship. *See* WISE, *supra* note 9, § 1.06[5][b], at 1-99.

64. Doi, *supra* note 47, at 88.

65. Absent a Japanese or American copyright, a third party is as immune from a foreign plaintiff using Japanese law as is an indigenous plaintiff under trade secret and know-how protection. The lack of recourse against a third party is demonstrated in the *Deutsche Werft* case. *See supra* note 47 for a discussion of this case. In this case, a German firm, under Japanese law, only had a cause of action against the American licensee. This underscores the impotence of legal remedies where no direct licensor-licensee link between the infringer and the party seeking redress exists.

As long as a foreign company has a legal right to protect its program under Japanese law, Japanese courts are available.⁶⁶ Generally, cases involving the protection of industrial secrets have been brought by foreign companies.⁶⁷ To date, no foreign company has sought redress for the unauthorized sale or distribution of its program. However, cases involving other types of industrial secrets suggest that foreign companies are free to bring an action to protect their programs. The limited relief available to Japanese firms would equally limit relief to a foreign plaintiff.

IV. LEGAL SYSTEMS PROVIDING BOTH PROTECTION AND ACCESS

A. *The Japanese Proposal*

Japan's Ministry of International Trade and Industry (MITI) has determined that laws concerning software protection and access should provide incentive for the creation of and investment in new software.⁶⁸ The MITI has also determined that new legislation should make programs known to the public so that software developers will not needlessly recreate existing programs.⁶⁹

To prevent the "unauthorized duplication, use, transfer of possession, lease, or use in the preparation of another program,"⁷⁰ the owner must have a right to injunctive relief and damages for such activity. This would expand legal protection beyond both trade secret law, which only allows legal action against a licensee,⁷¹ and copyright

66. For example, the Treaty of Friendship between the United States and Japan ensures that American citizens have access to Japan's courts. Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, United States-Japan, art. II, 4 U.S.T. 2063, 2067, T.I.A.S. No. 2863. Regardless of whether a specific treaty exists, the common practice in Japan is to allow suit to be brought by any foreign body. WISE, *supra* note 9, § 1.05[12], at 1-86.

67. See *supra* notes 47, 60 and accompanying text. Yūgen Kaisha Forsecoco Japan, Ltd. v. Okuno, Oct. 23, 1970, Dist. Ct., Nara, Japan, 624 Hanrie Jihō 78, 3 Kokusaitorihiki Hanreishū 550, discussed in Doi, *supra* note 47, at 91-92, is the sole exception to this proposition. Yūgen Kaisha Forsecoco Japan, Ltd. was formed as a joint venture between Forsecoco International, Ltd. of Great Britain and Ito-chu, Ltd., as well as other companies. Doi, *supra* note 47, at 91.

68. MITI Report, *supra* note 12, at 2.

69. *Id.*

70. *Id.* at 6.

71. See *supra* note 57.

law, which precludes action against users and unknowing distributors of protected programs.⁷²

The MITI has recommended that computer programs be registered with some government agency.⁷³ To provide an overview of existing programs, this agency would require the registrant to publish the title and summary of the outline.⁷⁴ Such an overview would prevent programmers from recreating already existing programs.⁷⁵ Rather, programmers could review registered programs and develop more powerful software.

The MITI has suggested that laws specifically designed to protect software should have no minimum creativity or originality requirements⁷⁶ which would allow only certain programs to be protected and known to the public. Such requirements would diminish the effectiveness of a law designed to stimulate software development by avoiding duplicated effort and rewarding creators and investors.⁷⁷

B. *The World Intellectual Property Organization Proposal.*

Since the MITI proposal was issued, the World Intellectual Property Organization (WIPO) has developed its own proposal for legal protection of software.⁷⁸ The WIPO proposal, which endorses a copyright form of protection specially adapted to the needs of software,⁷⁹ is designed to protect the manner in which the program is

72. *MITI Report*, *supra* note 12, at 3.

73. *Id.* at 5-6.

74. *Id.*

75. Although the proposed registration/publication system would not alleviate the risk of duplication of programs developed simultaneously by unknowing rival creators, the risk of unknowing duplication of an existing program would be reduced.

76. "All the computer programs prepared by creators should be protected." *MITI Report*, *supra* note 12, at 5. Under present Japanese copyright law the work must contain some minimum level of creative expression of the author's thoughts. For example, a form designed for use as a bill of lading, failing to contain any expression of the author's thoughts, could not be copyrighted. *Kotani v. Japan Lines K.K.*, Aug. 31, 1965, Dist. Ct., Tokyo, Japan, 16 *Kakyū minshū* 1377, *quoted in Doi*, *supra* note 47, at 203-04. Some computer programs can be seen as elaborate forms on which data is placed, so it is questionable whether all computer programs can presently be copyrighted.

77. *WIPO Proposal*, *supra* note 6, at 5.

78. *Id.* at 11-24.

79. "However, . . . the model provisions are essentially based on a *copyright law approach*; the rights granted are consequently less extensive than those of a patentee: they do not protect the concepts underlying computer software and cannot prevent a person from independently creating the same computer software and using it." *Id.* at 7 (emphasis in original).

expressed rather than the concept underlying the program.⁸⁰

Both the WIPO and the MITI proposals enumerate the same major objectives: the creator's efforts and the investor's assets should be protected and publication of programs should be encouraged.⁸¹ Proprietary protection against the unauthorized use, duplication or distribution is recommended by both proposals.⁸²

While the MITI proposal suggests mandatory publication of software, the WIPO proposal suggests that such publication be optional.⁸³ However, both recommendations serve the objective of informing the public about existing programs to avoid duplication.⁸⁴ The WIPO proposal also suggests that the lifespan of protection be reduced.⁸⁵

V. CONCLUSION

The need for adequate legal protection of software is increasing due to the changing nature of the world-wide computer industry. Furthermore, significant changes, unique to the Japanese computer industry, compel additional protection. Given Japan's expectation of becoming a net exporter of new programs, and the vast expansion of computer software markets, both large and small software producers need protection for their programs.

Copyright and trade secret laws of Japan do not provide effective protection for software. New legislation must be enacted to protect creators and investors of software and to avoid duplicated effort. Japan's traditional reluctance to litigate may give way to practical necessity when small Japanese software companies are confronted with the methods of market control and program acquisition that major foreign and domestic corporations are capable of rendering.

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80. *Id.*

81. *Id.* at 6; *MITI Report*, *supra* note 12, at 5.

82. *WIPO Proposal*, *supra* note 6, at 6; *MITI Report*, *supra* note 12, at 5.

83. *WIPO Proposal*, *supra* note 6, at 9; *MITI Report*, *supra* note 12, at 5.

84. *WIPO Proposal*, *supra* note 6, at 9; *MITI Report*, *supra* note 12, at 5.

85. The maximum duration is twenty-five years from the date of creation. If the program is used or sold, the duration is limited to twenty years from that date. *WIPO Proposal*, *supra* note 6, at 21.

