Copyrightability and Scope of Protection for Works of Utilitarian Nature under Japanese Law

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I. Utilitarian Function as Determinant of Copyrightability and Scope of Copyright Protection in Japan

1. Introduction

This article analyzes how the Copyright Law of Japan is applied to "works of utilitarian nature"[1] to explain how Japanese courts determine both copyrightability and the scope of copyright protection for such works. The author argues in the first section that the "degree to which expression in a work is restricted by utilitarian function" is the parameter that defines the scope of copyright protection most efficiently, that is, in a manner that best balances the often conflicting policy choices underlying copyright protection, particularly from the viewpoint of industrial policy. Moreover, this proposition conforms to the orthodox understanding of the Copyright Law of Japan. The second section proceeds to consider how the judgments of Japanese courts on copyrightability or the scope of copyright protection for works of utilitarian nature have been influenced or even determined by this parameter. This section discusses the judicial application of the Copyright Law of Japan to works of utilitarian nature, to show how the "degree to which expression in a work is restricted by utilitarian function" serves, or could have served under the facts found by the courts in individual cases, as the primary determinant of the scope of copyright protection. This analysis shows that the "degree to which expression in a work is restricted by utilitarian function" is in fact the best predictor of how Japanese courts will rule on questions of copyrightability and scope of protection when dealing with alleged copyright infringement of works of utilitarian nature under the Copyright Law of Japan. The third section then concludes

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1 In this article, the phrase, "work of utilitarian nature," is a translation of the everyday Japanese word *jitsuyohin*, whose meaning is similar to the notion of a "useful work" in ordinary English terminology. The term *jitsuyohin* includes a tool, an ornamental article, an industrial design, an industrial description like a blue-print, and business forms, but does not include a traditional publication (in everyday Japanese terminology) like a book, map, or directory.

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with a summary of the lengthy analysis of the first two sections and offers a prospective view about the future trend of Japanese cases.

2. Scope of Copyright Protection Limited by Its Utilitarian Function

a) Author's Proposition and Definition of Utilitarian Function

The author offers the following proposition as both a normative and descriptive prescription for determining copyrightability and scope of protection for works of utilitarian nature under the Copyright Law of Japan:

1) Copyright protection never extends to any element of a work, through which the author's thoughts or feeling are expressed, and which are embodied in the expression (hereinafter simply referred to as an "element" of a work) substantially dominated by utilitarian function;
2) Copyright protection extends only to elements of a work which are not substantially dominated by utilitarian function; and
3) The stronger the expression in a work is restricted by utilitarian function, the narrower the scope of copyright protection for such work (and if virtually all elements of a work are substantially dominated by utilitarian function, such work is not copyrightable).

The key to understanding and demonstrating this proposition is the definition of "utilitarian function." In this article, the term "utilitarian function" means characteristics making a work suitable for an industrial purpose, including the efficient or accurate conveyance of information to a human being as well as any intrinsic function of a work beyond mere conveyance of information to a human being.

b) Examples of Utilitarian Function

In order to make the notion of "utilitarian function" more concrete and to suggest how it works to define the scope of copyright protection, it is helpful to consider some examples of works whose expression is, or is not, strongly restricted by utilitarian function.

c) Computer Programs Compared to Works of Literature in Degree of Utilitarian Function

Comparison of a computer program with a traditional work of literature brings out many of the ways in which utilitarian function can restrict expression in a work. Most people of standard education feel intuitively that the expression of a computer program (*e.g.*, a spreadsheet program) is significantly restricted by its purpose to perform certain functions, while the expression of a work of literature (*e.g.*, a poem) is not significantly restricted by functional goals. This rationale is explained more concretely by reference to some of the characteristics of high quality computer software set forth in the ISO/IEC (International Organization for Standardization and International Electrotechnical Committee) 9126 list of characteristics:

A) Functionality

1) Suitability

The principal purpose of a spreadsheet program is to show simultaneously many values, items, and the results of calculation (by substituting individual values into the parameters of a given formula). Therefore, the structure and literal code of a spreadsheet program may not be arbitrarily designed or described, and must be "suitable" to the above-referred purpose.

2) Accuracy

A spreadsheet program must pursue calculation "accurately" and the algorithm for managing such calculation must not have any flaws.

3) Interoperability and Compliance

A spreadsheet program is usually designed to operate on certain hardware (*e.g.*, a given model of central processor unit ("CPU")) and with certain software (*e.g.*, a given version of operating system ("OS")). A spreadsheet program must be "interoperable" with, that is, able to receive data from and transfer data to, the CPU and OS.

4) Security

A spreadsheet program may deal with data that are material trade secrets. If the program transmits such data through communication lines outside the computer on which the program is operated, the program must have a ciphering device data to prevent unauthorized persons from reading it.

B) Reliability

1) Maturity

In order for the user of a spreadsheet program to rely on the program, the program must undergo repeated testing to guarantee freedom from bugs.

2) Fault Tolerance and Recoverability

A spreadsheet program is often used for complicated calculations that are important in a business. If the computer on which the program is operating stops working (*e.g.*, due to an electric power failure) during the operation of the program, the data processed prior to the interruption ("fault") must be easily "recoverable." A spreadsheet program must have structure and code that performs such function.

C) Usability – Understandability, Learnability, and Operability

Because a spreadsheet program is used in everyday business, it must be structured and coded to satisfy such requirements.

D) Efficiency

1) (Good) Time Behavior

The user of a spreadsheet program wants the program to output its results without noticeable waiting time. Therefore, a spreadsheet program is structured and coded in accordance with an algorithm that satisfies this requirement.

2) (Good) Resource Behavior

Both vendor and user of a spreadsheet program desire the program to be structured and coded to minimize use of the limited storage media

("resource") of the program, and the limited memory "resource" required for the operation of the program.

E) Maintainability

1) Analyzability

A spreadsheet program must be structured and coded so that the program can be easily "analyzed."

2) Changeability and Stability

If the author of a spreadsheet program expects to modify it from time to time for the purpose of improvement or debugging, the program must be structured and coded so that its reliability is stable to changes.

3) Testability

A spreadsheet program must be "tested" to prove its reliability prior to its distribution to consumers. Testing of such a program cannot even begin until completion of all the coding. Moreover, if an error is found, the entire program must again be debugged. In order to avoid such inconvenience, and to make it easy to "test" and debug the program, a spreadsheet program must be structured so that it is comprised of several modules, each of which can be tested and debugged independently of the other modules.

F) Portability

1) Adaptability

It is desirable for the users of a spreadsheet program that the same spreadsheet program be operable in several operating environments. Therefore, both the vendor and the user desire a spreadsheet program structured and coded so that it is operable in (or "adaptable" to) several operating environments.

2) Installability

A spreadsheet program operable in a certain operating environment might not be operable in another operating environment (*e.g.*, CPU and OS). Therefore, it is desirable that a spreadsheet program be structured and coded so that modification of the program to "install" it in another operating environment can be completed easily.

3) Conformance

If the structure and code of a spreadsheet program does not "conform" to the standards required by the operating environment (*e.g.*, CPU and OS), the program cannot operate in such operating environment.

4) Replaceability

The user of a spreadsheet program requires that data or macros created under a given version of the program be understood by any subsequent version of the program. That is, the prior version of the program must be "replaceable" by the subsequent version of the program, and the subsequent version of the program must be able to "replace" the precedent version of the program.

As these examples from the ISO/IEC list of computer software characteristics show, both the vendor and the user of a spreadsheet program require the program to perform various industrial functions. It is this "utilitarian function" that limits the program's permissible range of structures and codes. Some parts of the elements (structure and code) of

the program are essential for the performance of its utilitarian function. As is discussed below, the elements of a computer program essential to perform its utilitarian function are not protected by copyright. Many elements of a spreadsheet program are, in fact, essential to its utilitarian function and therefore not protected by copyright.

d) Degree to Which Map Symbols Are Restricted by Utilitarian Function

Accurate and effective conveyance of information through symbolization also constitutes utilitarian function. Map symbols have mainly the characteristics of computer programs. On the other hand, some of the works of American pop artists like Keith Haring, which are not required to convey information accurately or efficiently, are not controlled by any utilitarian function, even though they often look similar to map symbols. Therefore, the scope of copyright protection for a Keith Haring figure is broader than for a map symbol, because Keith Haring's expression was not constrained by utilitarian function, whereas the development of map symbols is.

3. Supporting Grounds

a) Significance of "Utilitarian Function" from Viewpoint of Industrial Policy

It is hardly unusual for the expression of a work significantly restricted by utilitarian function to resemble a prior work. If mere similarity in appearance of a work of highly utilitarian nature (in the everyday terminological sense) to its predecessor constituted copyright infringement, industrial development through incremental improvement would be stifled. Any person must be freely permitted to utilize and improve upon utilitarian function unless protected under patent law, utility model law, or other statutes specifically aimed at protecting industrial property. Accordingly, if similarity of expression in a subsequent work to that of a prior work results from constraints by utilitarian function, such similarity should not be considered a factor in finding copyright infringement.

b) Consistency with Provisions of the Copyright Law of Japan

Japanese Copyright Law, Art. 2(1) (i), defines a "copyrighted work" as "a creative expression of thoughts or feeling which falls under the category of literature, science, art, or music." This provision connotes that only a subset of "expression" (namely, expression that is creative, expresses thought or feeling, and falls within one or more of the listed categories) can be a "copyrighted work." Copyright protection does not extend to anything that falls outside this subset of "expression." Since "idea" is not a subset of "expression," copyright protection does not extend to any idea. As a corollary, "expression merged with its under-

lying idea" (that is, "expression that admits of little variety without changing the idea expressed") is not protected by copyright in order to avoid virtually extending copyright protection to the underlying idea. Therefore, copyright protection for a copyrighted work does not extend to any element of the work merged with its underlying idea. Based on this doctrine, we can conclude as follows:

1) Among the ideas underlying the expression of a work of highly utilitarian nature (in everyday terminology) is its utilitarian function: "What functions are performed by the work?";
2) Copyright protection for a work must not extend to ideas and, accordingly, must not extend to any utilitarian function of a work, because utilitarian function is a subset of its underlying ideas;
3) If copyright protection extends to elements of a work substantially dominated by utilitarian function, others will be hindered in achieving the same utilitarian function, a result that is largely equivalent to copyright protection for utilitarian function;
4) Therefore, copyright protection must not extend to the elements of a work substantially dominated by utilitarian function; and
5) Copying the elements of a work does not constitute copyright infringement, if these elements of a work are substantially dominated by utilitarian function.

II. Analysis of Japanese Cases

The Japanese cases addressing the issues of copyrightability or the scope of copyright protection for works of utilitarian nature can be classified into several categories. This article's review of the cases shows that Japanese courts have avoided giving broad copyright protection to a work whose expression is strongly restricted by utilitarian function. Conversely, Japanese courts have generally shown little reluctance to afford copyright protection to a utilitarian work whose expression is not significantly restricted by utilitarian functions. For the purpose of testing their consistency with the proposition suggested by this article, these cases can be categorized as follows:

1) Cases, apparently consistent with the author's proposition, avoiding the recognition of broad copyright protection in works whose expression is significantly restricted by utilitarian function.

   a) Some of these cases denied copyrightability of a work whose expression was significantly restricted by utilitarian function;[2] and

2 *See* the cases discussed *infra* section II.1.(a).

   b) a number of others recognized copyrightability but suggested that comparison of the allegedly infringing work with the allegedly infringed work should be made carefully. All but one of these cases found no copyright infringement[3] and the one case that recognized infringement involved verbatim copying.[4]

2) Other cases, also consistent with the author's proposition, dealing with works of utilitarian nature whose expression is minimally restricted by utilitarian function. In these cases, the fact that such works were industrial products did not preclude the courts from recognizing copyrightability and even a broad copyright protection therefor.[5]
3) Cases apparently inconsistent with, or having few factors in support of, the author's proposition.
   a) Some of these cases considered works whose expression was strongly restricted by utilitarian function but offered little or no discussion concerning judicial caution in recognizing copyrightability or in determining the scope of copyright protection for such work;[6] and
   b) some cases denied copyrightability of works of utilitarian nature, basing their reasoning upon grounds other than the degree to which expression was restricted by utilitarian function.[7]

However, factors supporting the author's proposition are found in most of these cases.

1. Cases Avoiding Broad Copyright Protection for Works Whose Expression Was Strongly Restricted by Utilitarian Function

a) Cases Denying Copyrightability

aa) "Knitting Graph" case[8]

The plaintiff invented a matrix (the "Knitting Graph") showing for knitted products, in an easily understandable way, the number of stitches corresponding to a given length. The plaintiff charged that the defendant plagiarized the Knitting Graph. The court denied copyrightability of the Knitting Graph primarily on the ground that it lacked "creativity." The court also concluded that the idea underlying the Knitting Graph did not fall under any of the statutory categories (literature, science, or art). The court did not undertake a detailed analysis of how the Knitting Graph's utilitarian function affected its copyrightability. However,

3 *See* the cases discussed *infra* section II.1.(b).
4 *See* the case discussed *infra* section II.1.(c).
5 *See* the cases discussed *infra* section II.2.
6 *See* the cases discussed *infra* section II.3.
7 *See* the cases discussed *infra* section II.4.
8 *Yamazaki v. Doshisha,* Tokyo District Court, August 16, 1958.

because the Knitting Graph was nothing more than the embodiment of the functional idea of the plaintiff, the court's conclusion is reasonable.

bb) "Journalizing Table" case[9]

The appellee-plaintiff had been producing and distributing an instrument called the "Journalizing Table." The Journalizing Table showed the items on the debt side of an accounting ledger corresponding to items described on the credit side for frequently used business transactions; with the Journalizing Table the user could easily journalize items in performing double-entry bookkeeping. The appellant-defendant, studying the Journalizing Table, produced and distributed an instrument called "Quick Journalizing," which had the same function as the Journalizing Table.

The plaintiff asserted that Quick Journalizing infringed his copyright in the Journalizing Table. Although the district court recognized its copyrightability, the high court denied it on the ground that its features and their arrangement were simply commonplace expressions used in accounting. Since uniform or standardized expression is often necessary for the performance of utilitarian function, we can draw at least a mild inference from this case that the scope of copyright protection for a work whose expression is restricted by utilitarian function is thin.

cc) "B/L Form" case[10]

The defendant commissioned the plaintiff to prepare a draft of a blank form of a bill of lading to be used by the defendant. Then, upon the defendant's order, the plaintiff printed and sold to the defendant copies of the form bill of lading prepared in accordance with the draft form prepared by the plaintiff (the "B/L form"). Thereafter, the defendant hired a third party to print the same B/L form for the defendant's use. The plaintiff sought compensation in damages, claiming that the defendant's conduct infringed the plaintiff's copyright. The court denied copyrightability of the B/L form, reasoning that the B/L form had the utilitarian function of showing the legal conditions and consequences to be agreed upon by the parties to a contract, and that no thought original to the plaintiff was expressed.

dd) "Eternal Calendar" case[11]

The plaintiff invented an eternal calendar and registered it as a utility model with the Patent Office of Japan under the Utility Model Law. The defendant manufactured and sold a similar calendar. The plaintiff sought damages for copyright infringement and an injunction for infringement of its utility model right. Though granting an injunction

9 *Hirose v. Shibata,* Osaka High Court, March 29, 1963, 14 Kaminshu 509.
10 *Kotani v. Japan Line,* Tokyo District Court, August 31, 1965, 16 Kaminshu 1377.
11 *Ueda v. Nisshin,* Osaka District Court, January 26, 1984, 16 Mutaishu 13.

based on infringement of the plaintiff's utility model right, the court rejected copyrightability of the plaintiff's calendar on the ground that (1) ideas are not protected by copyright; (2) almost all elements of the plaintiff's calendar were nothing more than the embodiment of the plaintiff's utility model or an unprotected idea, and therefore were not copyrightable; and (3) the elements of the plaintiff's calendar that were not an embodiment of the plaintiff's utility model or an unprotected idea were nothing more than commonplace expression.

ee) "Morisawa v. N.I.C."[12]

The plaintiff designed a set of typefaces ("Morisawa's Typeface"). Morisawa's Typeface was designed for use in a photo-typesetting machine. The defendant designed its set of typefaces for the purpose of installing it in the defendant's computerized photo-typesetting system, and began distributing it. The plaintiff sought an injunction and damages, claiming that 2,411 characters of the defendant's typeface had been copied from the corresponding characters in Morisawa's Typeface. The plaintiff argued that the defendant's conduct constituted copyright infringement or, in the alternative, a tort. The court did not accept the plaintiff's claims, denying not only copyrightability of Morisawa's Typeface, but also concluding that the defendant's conduct did not constitute a tort.

The court pointed out the utilitarian function performed by Morisawa's Typeface and denied copyrightability on the ground that there was no element of creative (noncommonplace) expression that was not also substantially dominated by utilitarian function to convey information intrinsic to a character. The court further explained its conclusion that the defendant's typeface in no event infringed the copyright on Morisawa's Typeface nor did its production and use constitute a tort:

> It is true that, on first impression, the defendant's typeface resembles Morisawa's Typeface. However, we recognize that:
> [i)] Morisawa's Typeface and the defendant's typeface are both intended to function as a utilitarian typeface installed in a phototypesetting machine for the purpose of practical printing;
> [ii)] This kind of utilitarian typeface can be seen as the product of 10 % improvement, based on 90 % inheritance from predecessors;
> [iii)] The design of this kind of utilitarian typeface is usually made within the limited scope of variety of expression according to the uniform or standardized appearance of characters of the existing printing types, etc.;
> [iv)] Variety in the design of such utilitarian typeface inevitably is constrained to a very limited scope (such as the angle at the beginning and end of the vertical or horizontal strokes, the thickness of the vertical or horizontal strokes, or the balance of length or thickness between the vertical and horizontal strokes);

12 Osaka District Court, March 8, 1989, 21 Mutaishu 93.

> [v)] Morisawa's Typeface was designed within such restrictions and was not free of any of them; and
> [vi)] The defendant's typeface, which is a utilitarian typeface installed in the defendant's system, was also designed within such restrictions.
> In light of these facts found by the court, we must not hastily conclude that the defendant's typeface was produced by copying Morisawa's Typeface based upon the impression that they resemble each other....
> It was not proved that the defendant's typeface was a verbatim copy of Morisawa's Typeface....
> A truly creative typeface can be protected against verbatim or similar copying by others without permission of the author under tort law, even if such typeface is not copyrightable....
> [I]t is not clear which element of Morisawa's Typeface is creative. Moreover, resemblance between the defendant's typeface and Morisawa's Typeface is to some extent inevitable because expressive variety in both designs was constrained within a predetermined scope.... Moreover, we have found some differences in the appearance of the defendant's typeface and Morisawa's Typeface. In light of these facts, though we cannot deny the resemblance between them, we cannot conclude that the defendant's typeface was a wholesale appropriation of Morisawa's Typeface.

The court thus recognized the utilitarian functions performed by both Morisawa's Typeface and the defendant's typeface. It also indicated the need to avoid a hasty conclusion that the defendant's typeface infringed the rights of Morisawa's Typeface based upon the impression that they resembled each other, because resemblance between the two was inevitable due to the strong restriction of expression by utilitarian function.[13]

ff) "Disk Management Program" case[14]

The petitioner had been distributing an application program called "EO System," whose function was to manage the installation of application programs onto the hard disk of a personal computer. The petitioner asserted a separate copyright in a part of EO System called "IBF File." The respondent, City Soft, created a program that performed a function similar to that of EO System, and transferred the rights to reproduce it to the respondent, Met's. Met's, in turn, commenced distribution of the respondent's program. The petitioner sought a preliminary injunction, claiming that the part of the respondent's program called "HCA File" infringed the petitioner's copyright in IBF File because HCA File was created by copying IBF File. The court dismissed the claim. It held that copyright protection does not extend to the structure of IBF File because it is constrained to comply with the instructions of another part of EO System. The court also denied the copyrightability of the literal code of IBF File because its expressive features are predetermined by other parts of EO System or by certain functions to be performed, and there is no or little room for an alternative.

13 *Cf. Morisawa v. Watanabe,* Tokyo High Court, December 24, 1993, 1505 Hanrei Jiho 136. The facts discussed in this case are very similar to those of *Morisawa v. N.I.C.,* provided that the allegedly infringed Morisawa's typeface in this case was a different set of typefaces from the typefaces in *Morisawa v. N.I.C.* and that Morisawa sought only application of the Unfair Competition Law. The court held that Morisawa's typeface in this case is remarkably different from precedent typefaces; that Watanabe's typeface is substantially identical to Morisawa's typeface in this case; and that, therefore, Watanabe's typeface infringed Morisawa's rights to its typeface under Unfair Competition Law. Although this case discussed the Unfair Competition Law in comparison with the Copyright Law and Tort Law discussed in *Morisawa v. N.I.C.,* the policy underlying both cases was identical.

14 *ICM v. Met's,* Tokyo District Court, February 27, 1991, 23 Chizaishu 138, *aff'd*, Tokyo High Court, March 31, 1992, 24 Chizaishu 218. *See* KARJALA, "Programs and Data Files under Japanese Law," [1993] 8 EIPR 267, which is a comprehensive study of the High Court opinion in this case.

gg) "Shinobu Building" case[15]

The petitioner, who was commissioned by the respondent Kobata to design a house, drew a construction blueprint. Kobata commissioned the respondent Noma to draw another construction blueprint. Noma then began to construct a house based on the respondent's blueprint under the direction of Kobata. The petitioner sought to enjoin construction, claiming that the construction of the house was a reproduction of the architectural work shown in the petitioner's blueprint. The court denied the copyrightability of the petitioner's architectural work, holding that an architectural work whose appearance does not express an author's cultural or spiritual thoughts, separated from its utility or functionality, is not copyrightable.

b) Cases Recognizing Copyrightability but Denying Copyright Infringement

aa) "Tanaka Construction Blueprint" case[16]

The plaintiff drew a construction blueprint for a cold-storage warehouse. The defendant also designed a construction blueprint for a cold-storage warehouse. The plaintiff sought damages, claiming that the defendant's blueprint was copied from its blueprint. The court dismissed the plaintiff's claim, holding that the defendant's blueprint was not copied from the plaintiff's blueprint within the meaning of the Copyright Law of Japan, although the court recognized the copyrightability of the plaintiff's blueprint. The court pointed out that since a construc-

15 *Shinobu v. Kobata,* Fukushima District Court, April 9, 1991, 23 Chizaishu 228. *See* 26 IIC 135 (1995).

16 *Tanaka Sekkei v. Himi Suisan Kakogyo Kyodo Kumiai,* Osaka District Court, February 23, 1979, 387 Hanrei Times 145.

tion blueprint is a work of an extremely technical and functional nature, the scope for variety in its expression is not broad; and one is compelled to employ expression similar to that of the predecessor if one employs a construction technique similar to that of the predecessor to construct a building of the same kind as the predecessor. Further, the court recognized the need for caution in concluding that a construction blueprint infringes a predecessor's copyrighted blueprint based solely on resemblance of the two works, because expression in a construction blueprint is strongly restricted by utilitarian function.

bb) "Educational Toy" case[17]

The appellant-plaintiff manufactured and sold an educational toy designed by its employee called "Penta-kun," comprised of 34 pentagonal blocks that could be connected to one another at the tops or bottoms of the blocks to form pentagonal pillars, and in making these connections any block could be rotated with respect to any other through each of its five sidefaces on which *hiragana* characters were painted. By rotating the blocks and stacking them, children could spell out Japanese words. The appellant also acquired two utility model rights for Penta-kun. The appellee-defendant began to produce and distribute a similar educational toy comprised of hexagonal blocks called "Mebaekko." The appellant sought an injunction and damages, claiming that Mebaekko infringed its copyright, utility model rights, and rights under the Unfair Competition Law of Japan, based on the similar appearance of Mebaekko to Penta-kun. The district court dismissed the appellant's claim, holding that (1) Mebaekko did not infringe the copyright of Penta-kun, even though Penta-Kun was copyrightable; (2) Mebaekko did not infringe the utility model rights of Penta-kun; and (3) the distribution of Mebaekko by the appellee did not constitute an infringement of the rights of the appellant under the Unfair Competition Law of Japan.[18] The high court dismissed the appellant's appeal, affirming the judgment of the district court.

The court was explicit in refusing to extend copyright protection to utilitarian function, or to elements of a work substantially dominated by utilitarian function:

> Penta-kun is [an educational toy] comprised of pentagonal blocks, each of which has a so-called "snap" mechanism at both the top and bottom ends, so that blocks can be arbitrarily connected, disconnected, or revolved. [This mechanism of Penta-kun was] designed so that [the user of Penta-kun] can compose a word by combining characters, a maze by combining pictures, and a completed picture by combining [parts of] pictures. However, these are nothing more than the functions performed by the figures and structures of Penta-kun. They are the embodiment of technological ideas, but are not considered "expression" referred to in Japanese copyright law Art. 2(1) (i).

17 *Book Loan v. Agatsuma*, Tokyo High Court, December 25, 1989, 21 Mutaishu 1066.

18 Because the surface pictures of Mebaekko were entirely different from those of Penta-kun, and the trade name of Mebaekko was prominently printed on the package, the court found no possibility of consumer confusion. Therefore, the appellant's claim under the Unfair Competition Law of Japan was rejected.

Conversely, the court recognized that elements of a work not substantially dominated by utilitarian function, which also are not commonplace expressions, are copyrightable. The court concluded that Mebaekko did not infringe the copyrights of Penta-kun, because the copyrightable elements of Penta-kun were not copied by Mebaekko.

cc) "CA-9 Program" case[19]

The claimant-petitioner created several computer programs, which were to be used to manage a measurement apparatus. The respondent had been distributing an apparatus in which the claimant's programs were installed, together with another program ("CA-9 Program") whose function was the same as one of the claimant's programs ("CA-7II Program"). The claimant sought a preliminary injunction, claiming that the respondent's conduct constituted copyright infringement of its programs. The district court dismissed all claims. On appeal, the high court confirmed that computer programs perform a utilitarian function and that the expression in computer programs often necessarily resembles that of another. Based on this theory, the court concluded that the CA-9 Program did not infringe the copyright of the CA-7II Program because the CA-9 Program did not copy any of the literal code of the CA-7II Program that could be arbitrarily described.

dd) "Calligraphy" case ("Tsukamoto v. Yokoyama")[20]

The plaintiff, a calligrapher, published his calligraphy in a book entitled "Dynamic Calligraphy." The defendant (a1) displayed a signboard ("Signboard A") on his osteopathy clinic, which he had the defendant (a2) draw. The defendant (b1) displayed a signboard ("Signboard B") at her bar, which she had the defendant (b2) draw. The defendant (b2) admitted that he had drawn Signboard B using the calligraphy shown in "Dynamic Calligraphy" as a model but asserted that he did not make a "verbatim" copy of it. The plaintiff sought damages against the defendants (a1, a2, b1 and b2), claiming that the calligraphy on Signboards A and B infringed the copyright of the calligraphy in "Dynamic Calligraphy." While recognizing the copyrightability of the calligraphy in "Dynamic Calligraphy," the court concluded that the calligraphy on

19 *System Science v. Toyo Sokki*, Tokyo High Court, June 20, 1989, 1322 Hanrei Jiho 138.

20 Tokyo District Court, November 10, 1989, 1330 Hanrei Jiho 118.

Signboards A and B did not infringe the plaintiff's copyright because the basic shape of a character, per se, is not copyrightable and nobody can claim a monopoly over such a basic shape; and there are some differences between the calligraphy in "Dynamic Calligraphy" and that on Signboards A and B.

c) One Case Recognizing Copyrightability and Finding Copyright Infringement – "Blueprint (Machine)" Case[21]

The plaintiff had its employee draw a blueprint for a machine. The defendant made a blueprint for a similar machine based on the plaintiff's blueprint and manufactured a machine. The plaintiff sought an injunction and damages, claiming that both the creation of the defendant's blueprint and the manufacturing of the defendant's machine constituted infringements of the copyright of the plaintiff's blueprint. The court admitted the copyrightability of the plaintiff's blueprint after carefully explaining that an idea was not protected under the Copyright Law of Japan, pointing out that the plaintiff's blueprint was a work in which not all of its elements were substantially dominated by utilitarian function. Further, the court recognized that the scope of copyright protection for a blueprint of a machine is inevitably thin because copyright does not protect any utilitarian function; it concluded, however, that the defendant's blueprint fell within even this thin scope of copyright protection because it was a "verbatim" or "near-verbatim" copy of the latter. If copyright protection in the plaintiff's blueprint prohibited not only the exact reproduction of the document but also the production of the machine portrayed therein, it would lead substantially to copyright protection of the functions (utilitarian function) performed by such machine. However, such utilitarian function is not the subject of copyright protection. The court therefore concluded that the production of the defendant's machine did not infringe the copyright in the plaintiff's blueprint.

2. Cases Involving Utilitarian Works or Mass-Produced Works in Which Expression Is Minimally Restricted by Utilitarian Function

There are several cases which found no difficulty in recognizing copyrightability of utilitarian works or works made for mass distribution. In these cases, it is clear that the expression in these works is minimally restricted by utilitarian function. For example, in *Statuette*[22] copyrightability was recognized for a mass-produced statuette, confirming that the

21 *Kawazoe Kikai Seisakusho v. Daisho Seiki,* Osaka District Court, April 30, 1992, 24 Chizaishu 292.

22 *Ihara Kobo v. Hasami Togei,* Sasebo Branch of Nagasaki District Court, February 7, 1973, 5 Mutaishu 18.

commercial purpose of such statuette is irrelevant to its copyrightability. Also, in *Buddhist Altar*[23] it was held that mass-produced sculptures for a Buddhist altar are copyrightable. In *T-Shirt*[24] it was emphasized that a pattern printed on a T-shirt is not a utilitarian work in concluding that it is copyrightable. *Pac Man*[25] decided that a series of visual outputs of a video game is copyrightable. *Portrait*[26] easily found that a commercial photograph is copyrightable. *Mural Art*[27] decided that mural art, in which expression can be restricted by its utilitarian function to some extent, is copyrightable because the mural at issue remarkably expressed the sentiments of its author. Only one case denied the copyrightability of an ornamental work for mass-distribution (*Coin*[28]). However, its ground was that the design of such work was commonplace and a near-verbatim copy of classic gold coins. In sum, these cases do not conflict with the author's proposition.

3. Cases Finding Both Copyrightability and Infringement by Verbatim or Near-Verbatim Copying of Works in Which Expression Was Strongly Restricted by Utilitarian Function

a) "Kitamura Construction Blueprint" Case[29]

The defendant, A.B.S., commissioned the plaintiff to design a building and the plaintiff drew the construction blueprint therefor. Thereafter, the defendant cancelled the plaintiff's commission and had the co-defendant, Komata-gumi, draw another construction blueprint for the building. The defendants, A.B.S. and Komata-gumi, filed the defendant's blueprint, omitting the plaintiff's name, with the administrative office in charge of construction for confirmation that the proposed construction conformed to applicable construction regulations. The plaintiff sought damages, claiming that the defendant's filing of the defendant's blueprint without indication of the plaintiff's name infringed the plaintiff's moral rights, because the defendant's blueprint was a reproduction of the plaintiff's blueprint. The court ordered the defendant to pay compensation, holding that the defendant's blueprint was a copy of the plaintiff's blueprint under the Copyright Law of Japan.

23 *Onishi v. Kanekura Bukkodo,* Himeji Branch of Kobe District Court, July 9, 1979, 11 Mutaishu 371.

24 *Weiss Mfg. v. Universal Hanbai,* Tokyo District Court, April 20, 1981, 13 Mutaishu 432.

25 *Namco v. Suishin Kogyo,* Tokyo District Court, September 28, 1984, 16 Mutaishu 676.

26 *Sugiyama v. Maruberu,* Tokyo District Court, July 10, 1987, 1248 Hanrei Jiho 120.

27 *Shiraishi v. Tatebayashi City,* Hachioji Branch of Tokyo District Court, September 18, 1987, 19 Mutaishu 334.

28 *Onoe v. Juko,* Osaka District Court, December 21, 1970, 2 Mutaishu 654.

29 *Kitamura v. A.B.S.,* Tokyo District Court, January 28, 1977, 9 Mutaishu 29.

The court did not discuss the utilitarian function performed by a construction blueprint, or how expression in a construction blueprint is restricted by such utilitarian function. However, the court did find that the defendant's blueprint was a near-verbatim copy of the plaintiff's blueprint. According to the author's proposition, the determination of copyright infringement involving a work, such as a construction blueprint, must be made carefully so as not to protect functional elements not shielded by the thin scope of protection. However, if the subsequent work is a "verbatim" or "near-verbatim" copy of the precedent work, it may be inferred that elements of the work that are not substantially dominated by utilitarian function have been copied. In this sense, in the *Kitamura Construction Blueprint* case, where infringement was found based on "near-verbatim" copying, it does not conflict with the author's proposition.[30]

b) "Calligraphy" Case ("Tsukamoto v. Tokai Zaidan")[31]

The defendant produced and published brochures, in which several calligraphy characters taken from the plaintiff's book, "Dynamic Calligraphy," were reproduced.[32] The plaintiff sought compensatory damages based on copyright infringement. Notwithstanding that calligraphic expression is restricted by utilitarian function, the court in this case showed no hesitation in finding the calligraphy copyrightable or in finding that the copyright was infringed based on the defendant's verbatim or near-verbatim copying of the plaintiff's calligraphy.

30 Two other cases (*Kobe v. Kosaki,* Tokyo District Court, June 20, 1979, 11 Mutaishu 322; and *Hasegawa v. Niten'mon,* Tokyo District Court, April 26, 1985, 566 Hanrei Times 267) also held that a construction blueprint which is a "verbatim" or "near-verbatim" copy of another construction blueprint infringes the copyright of the latter. In three other cases (*Taito v. I.N.G. Enterprises,* Tokyo District Court, December 6, 1982, 14 Mutaishu 796; *Taito v. Makoto Denshi,* Yokohama District Court, March 30, 1983, 1081 Hanrei Jiho 125; and *Konami v. Daiwa,* Osaka District Court, January 26, 1984, 16 Mutaishu 26) it was held that a video game program which is a verbatim or near-verbatim copy of another video game program, in which expression is restricted by utilitarian function to some extent, infringes the copyright of the latter.

31 Tokyo District Court, October 30, 1985, 17 Mutaishu 520. The plaintiff and the "Dynamic Calligraphy" involved in this case are the same as in the *Calligraphy* case *(Tsukamoto v. Yokoyama), supra* note 20.

32 The defendant published three different brochures, namely, "Tokyo," "Tokyo II," and "Nagoya." The defendant conceded that they reproduced the calligraphy in "Dynamic Calligraphy" in "Tokyo" and "Tokyo II," but contended that it did not reproduce it in "Nagoya."

c) "Microsoft v. Shuwa"[33]

The plaintiff created an assembly-language BASIC interpreter program for an 8-bit personal computer (NEC PC-8001). The object code derived from the plaintiff's source program was stored in ROM and distributed as a standard feature of the NEC PC-8001 computer. The defendant admittedly reverse-translated the plaintiff's object program (described in binary code) back into hexadecimal code. The defendant then disassembled the hexadecimal code into a version of source code, to which he added labels and comments, and published it in a book. The plaintiff sought an injunction against publication, asserting copyright infringement. The court held for the plaintiff.

The court easily recognized the copyrightability of the plaintiff's source program. The defendant's contention that the plaintiff's source program is not copyrightable because it is a so-called operating system, different from application programs, intended only for the efficient and speedy handling of data, was considered by the court as groundless. The court, in contrast with the author's proposition, appears not to have considered that the scope of copyright protection may vary depending on the degree to which expression is limited by utilitarian function. In this respect the court was too hasty, although the copyrightability of the plaintiff's source program would not be denied under the author's proposition, either.

The court found that the defendant's hexadecimal code, which is a direct translation of the plaintiff's object program, infringed the copyright of the plaintiff's source program. The plaintiff's object program was derived by mechanical assembly of the plaintiff's source program. The defendant's hexadecimal code was, in turn, a near-verbatim translation of the plaintiff's object program, because it was derived by mechanically transforming the plaintiff's object code from binary into hexadecimal code. Therefore, it is not surprising that the court so easily determined that the defendant's hexadecimal code falls within the scope of "copy" of the plaintiff's source program.

The court employed questionable reasoning that the defendant's source code playing the same function as that of the plaintiff's source program infringes the copyright of the latter even if there is difference in the literal code between them. Given that the defendant's hexadecimal code was mechanically derived from the plaintiff's source program and that the operative parts (commands and data) of the defendant's source code were mechanically derived from the defendant's hexadecimal code, it appears that these parts of the defendant's source code can be deemed a "near-verbatim" copy of the plaintiff's source program. However, a

33 Tokyo District Court, January 30, 1987, 19 Mutaishu 1.

glib analysis of *Microsoft v. Shuwa* might attribute the court's failure to adopt a cautious approach to the copyrightability and scope-of-protection questions to the determination that the allegedly infringing work included a verbatim or near-verbatim copy of the allegedly infringed work. This would allow placing it in the same category as the cases discussed earlier in this section II.3 as not creating an essential conflict with the author's proposition.[34] However, the finding of near-verbatim copying by the court was not based upon a careful analysis.

4. Cases Denying Copyrightability of Works of Utilitarian Nature, Not Based on Degree to Which Expression in Work Is Restricted by Utilitarian Function

a) "Yagi's Typeface" Case[35]

The appellant-plaintiff created a series of decorative character designs ("Yagi's Typeface"). The appellee-defendant, Kuwayama, authored books (showing numbers of examples of decorative typefaces), in which Yagi's Typeface was reproduced as examples. The co-appellee-defendant, Kashiwa Shobo, published the appellee's books. The plaintiff sought an injunction and damages, claiming copyright infringement. The district court dismissed the appellant's claims, holding that Yagi's Typeface was not copyrightable. The high court dismissed the appeal on the same ground.

aa) Court's standard for determining copyrightability

The court denied copyrightability of Yagi's Typeface, reasoning that it does not fall within the category of "literature, science, or music," and would be deemed, by an objective observer, to be a work intended to be mass-produced but not a subject of artistic appreciation; consequently, it did not fall within the category of "art," either. This reasoning is not fully persuasive. It is difficult to conceive of a work that can be objectively deemed a subject of artistic appreciation, because "appreciation" is intrinsically a subjective activity of a human being. Moreover, mass-produced versions of both a statuette as well as decoration for a Buddhist altar have been recognized as copyrighted works.[36] Whether such statuette or decoration for a Buddhist altar can be a subject of artistic appreciation will vary with the individual observer. Accordingly, whether a work can be objectively considered a subject of artistic appreciation or whether a work is mass-produced cannot be determinative of copyrightability. Since other works of highly utilitarian nature,

34 *See* the *Kitamura Construction Blueprint* case, *supra* note 29, and the cases that follow.

35 *Yagi v. Kuwayama,* Tokyo High Court, April 26, 1983, 15 Mutaishu 340. The case was settled before the Court on April 1, 1985 (Supreme Court, 1982 (o) No. 799).

36 *See supra* section II.2.

such as a computer program or a blueprint, are in fact copyrightable, it is anomalous to deny copyright protection to works of art if they are mass-produced and unless they meet the vague condition of being a "subject of artistic appreciation."

bb) Restriction of expression by utilitarian function

The court referred to the utilitarian function of Yagi's Typeface as a ground for concluding that it was not considered a subject of artistic appreciation:

> Characters ... can only be expressed by means of figures that may take on various appearances.... Therefore, the appearances used to express characters, etc., are inseparable from the characters.... Accordingly, affording copyright, which is an exclusive right, to the appearance of characters ... would preclude the use of such appearance of characters ... by others for the long term provided by the Copyright Law....
> [Yagi's Typeface] is, doubtlessly, a set of typefaces "intended as a set of designed characters, etc., that functions as a tool to express a sentence by means of printing, typewriting, or other similar method." Though decoratively designed, each alphabet, numeral, or symbol of Yagi's Typeface is, intrinsically, expected to have the utilitarian function of conveying information through their combination. Accordingly, although having aesthetic expression, they are still subject to the intrinsic restriction that they should not lose their basic alphabetical, numerical, or symbolic form, for which every person has a common understanding. In this context, we cannot deem Yagi's Typeface as an aesthetic creation capable of being considered a work that can be the subject of aesthetic appreciation, like a painting or a sculpture.

This quotation clearly shows the court's reluctance to afford copyright protection to a work having utilitarian function.

b) "Wood-Grain Pattern" Case[37]

The appellant-plaintiff produced and sold paper on which a wood-grain pattern was printed. The master pattern used for the endless printing of the appellant's product was created by an employee of the appellant. The appellee-defendant sold a printed paper product whose pattern was made by photocopying a reproduction of the master pattern. The appellant sought an injunction and damages, claiming copyright infringement of its master pattern, as well as tort liability. The district court dismissed the appellant's claim. On appeal, the high court allowed the damages claim based on tort law, but copyrightability of the master pattern was denied.

37 *Dai Nippon Insatsu v. Takebayashi Shoji,* Tokyo High Court, December 17, 1991, 23 Chizaishu 808, and 25 IIC 805–812 (1994).

The court stated that a work of applied art is not copyrightable unless it can be considered equivalent to "pure art:"

> The master pattern ... is considered a creative expression of thoughts or feeling. However, the master pattern was designed for the purpose of being used as a master to print mass-produced paper products, which in turn would be pasted on the surface of a piece of furniture. Due to the restrictions imposed by its utilitarian nature, the master pattern was intentionally designed so that the products which were printed by using the master pattern would show an endless wood-grain pattern. The master pattern is in monochrome so that products printed by utilizing the master pattern can take on various colors. Considering these facts, since the master pattern is a mass-produced industrial article for a utilitarian purpose, it does not constitute so-called "pure art" (*i. e.,* art created with the primary purpose of expressing beauty as a subject of artistic appreciation).... Therefore, the master pattern does not fall under the category of literature, science, art, or music. Accordingly, the master pattern is not copyrightable....

The court, surely, referred to the restriction of expression of the master pattern by utilitarian function, as part of its reasoning in denying copyrightability. The author considers that the court could have judged copyrightability of the master pattern by deciding whether it had any copyrightable element by analyzing what elements were substantially dominated by utilitarian function and what elements were not, without questioning whether the master pattern was considered equivalent to pure art or not. Such analysis would have made the court's opinion more persuasive.

c) "Obi" Case[38]

The plaintiff designed a pattern applying Japanese ethnic and traditional design for embroidery on an *obi* (a sash worn with the Japanese kimono) and sold *obi* products manifesting such pattern. The defendant designed a pattern similar to the plaintiff's pattern and sold *obi* products with such pattern. The plaintiff sought injunction and damages, claiming copyright infringement as well as infringement of rights under the Unfair Competition Law of Japan and tort law. The court denied copyrightability of the plaintiff's pattern, as well as the plaintiff's rights under the Unfair Competition Law of Japan,[39] but recognized that the defendant's conduct constituted a tort. The court granted an injunction against the defendant, but dismissed the plaintiff's damages claim because the plaintiff failed to prove actual economic damages.

38 *Komori Orimono v. Sakurai,* Kyoto District Court, June 15, 1989, 1327 Hanrei Jiho 123.

39 The Unfair Competition Law of Japan at the time of this case did not protect the appearance of a commercial product that was not "widely known." The court found that the plaintiff's pattern was not "widely known." *Cf. Tatsumura v. Tatsumura* (Kyoto District Court, February 18, 1993, 829 Hanrei Times 220) dealt with an issue similar to that of the *Obi* case but held that the defendant's *obi* pattern infringed the plaintiff's rights in its *obi* pattern under the Unfair Competition Law of Japan because the plaintiff's pattern was "widely known." In this case, neither copyright infringement nor tort was discussed before the court.

The court answered the plaintiff's contention that its pattern was protectable under tort law or the Copyright Law of Japan because it is "unique." However, the court refused to afford legal protection (whether under the Copyright Law or under tort law) to an ethnic and traditional pattern which was not novel or unobvious. Further, the court denied copyrightability for the plaintiff's pattern on the ground that it could not be considered a subject of artistic appreciation. This ground for denying copyrightability is not persuasive, because no "objective" answer exists to the highly "subjective" question of whether a work can be a subject of artistic appreciation. The only possible justification for the court's conclusion would be the policy consideration that one should avoid copyright protection for an ethnic and traditional pattern.[40]

III. Conclusion

1. Overview of Japanese Cases

The Japanese cases addressing the issues of copyrightability or the scope of copyright protection for works of utilitarian nature can be classified into several categories. This article's review of the cases shows that Japanese courts have avoided giving broad copyright protection to a work whose expression is strongly restricted by utilitarian function. Conversely, Japanese courts have shown little reluctance to afford copyright protection to a work of utilitarian nature whose expression is not significantly restricted by utilitarian function, with only two exceptions in *Obi* and *Hasuike v. Hashizume*.

In the cases discussed in *supra* section II.2. (other than the *Coin* case) there was no hesitation in recognizing copyrightability without addressing the scope-of-copyright-protection issue.[41] In all of these cases, the restriction of expression by utilitarian function was weak. Under the author's proposition, the mere fact that a work is an industrial product is not a basis for denying copyrightability or for affording broad copyright protection to a work whose expression is not significantly restricted by utilitarian function. Therefore, these cases are also consistent with the author's proposition.

40 Another case (*Hasuike v. Hashizume,* Kobe District Court, April 27, 1979, 392 Hanrei Times 158) also denied copyrightability of an ethnic design, but did not give the ground.

41 *See supra* section II.2.

The cases discussed in *supra* section II.3 appear inconsistent with the author's proposition. However, in all of these cases, the allegedly infringing works were verbatim or near-verbatim copies of the allegedly infringed works. Even if no element of a work substantially dominated by utilitarian function is protected by copyright, verbatim or near-verbatim copying will infringe if the work contains any elements not substantially dominated by utilitarian function, because verbatim or near-verbatim copying will include these protected elements. Application of the author's proposition would therefore also result in a finding of copyright infringement in these cases. Their conclusions are therefore not necessarily inconsistent with the author's proposition.

Some cases, on grounds other than restriction of expression by utilitarian function, have denied copyrightability for works of utilitarian nature. At first it seems difficult to find any factor supporting the author's proposition in these cases. However, in (i) *Yagi's Typeface*[42] the utilitarian function performed by the appearance of typeface was given as one of the reasons for concluding that typeface is not copyrightable; and in (ii) *Wood-Grain Pattern*[43] the strong restriction on the expression of the plaintiff's pattern by utilitarian function was given as one of the reasons for concluding that the plaintiff's pattern was not copyrightable. These cases are therefore consistent with the author's proposition to the extent that the opinions show judicial reluctance to affording broad copyright protection to expression performing a utilitarian function.

In contrast, the *Obi* case[44] and *Hasuike v. Hashizume*[45] denied copyright protection to expression not significantly restricted by utilitarian function. In these two cases, factors supporting the author's proposition are not predominant. However, some justification of the courts' holdings may be possible by appeal to policy considerations favoring the avoidance of monopoly in ethnic and traditional patterns.

2. Significance of "Degree to Which Expression in Work Is Restricted by Utilitarian Function"

As the analysis in this article shows, Japanese courts have almost always been reluctant to afford broad copyright protection to a work of highly utilitarian nature.[46] This article contends that the "degree to which expression in a work is restricted by utilitarian function" is the parameter that broadens or narrows the scope of copyright protection. Application of this parameter persuasively explains the fluctuation of the scope of copyright protection based on the nature of a work:

1) "Utilitarian function" is a subset of "idea";
2) Copyright protection does not extend to "utilitarian function" because copyright does not protect any idea;
3) If copyright protection for a work extends to its elements that are substantially dominated by utilitarian function, such function is virtually protected by copyright, a result that is inconsistent with 2) above;
4) Therefore, copyright protection for a work must not extend to any of its elements that are substantially dominated by utilitarian function;
5) A work of less utilitarian nature (according to common terminology) has fewer elements that are substantially dominated by utilitarian function; on the other hand, a work of highly utilitarian nature (according to common terminology) has many elements that are substantially dominated by utilitarian function;
6) Accordingly, the scope of copyright protection for a work of less utilitarian nature (according to common terminology) is broad, while the scope of protection for a work of highly utilitarian nature (according to common terminology) is narrow.

In this way, the parameter "degree to which expression in a work is restricted by utilitarian function" usefully and comprehensively explains the results of most of the Japanese cases and the underlying reasoning of the Japanese courts' varying the scope of copyright protection depending on the nature of copyrighted works. Works in which expression is strongly restricted by utilitarian function have very few elements that are not substantially dominated by such function. For these works, only verbatim or near-verbatim copying constitutes copyright infringement. This result comports with recent judgments holding that only verbatim or near-verbatim copying infringes in the case of works of highly utilitarian nature.

In *Yagi's Typeface*[47] and *Wood-Grain Pattern*[48] the courts saw the commercial purpose in designing a work as an obstacle to copyrightability. In determining copyrightability of applied art works of utilitarian nature, these courts asked whether the work was "equivalent to a work of pure art (or a work considered as a subject of artistic appreciation)." This standard lacks objectivity because the determination of what should be called "pure art" (or a "subject of artistic appreciation") is highly dependent upon personal and subjective values. Moreover, opinions stating that the commercial nature of a work is an obstacle to copy-

42 *Supra* note 35.
43 *Supra* note 37.
44 *Supra* note 38.
45 *Supra* note 40.
46 *E.g.,* the majority of the cases discussed in *supra* sections II.1 and 4.
47 *Supra* note 35.
48 *Supra* note 37.

right protection co-exist with cases ignoring the commercial nature of a work in determining both copyrightability and the scope of protection. Commercial nature, in itself, thus cannot be a determinative factor, any more than the nature of the work as one of "pure art." Still, some Japanese scholars consider that "whether a work falls within the category of 'pure art' decides copyrightability of such a work."[49] However, their contention does not help us in predicting future decisions of Japanese courts because they fail to appreciate the value of the modern decisions" suggesting the usefulness of the factor of "degree to which expression in a work is restricted by utilitarian function" discussed in *supra* section II.

In contrast, many courts have clearly addressed the question, "What elements of a work are restricted or dominated by what utilitarian function?" Therefore, the "degree to which expression in a work is restricted by utilitarian function" is a parameter that can be objectively applied to determine the scope of copyright protection for a work of utilitarian nature. Moreover, this parameter makes sense in light of industrial policy, conforms to the generally accepted understanding of the Copyright Law of Japan, and is consistent with most Japanese cases to date (and, therefore, contributes to legal certainty). In sum, the parameter proposed by the author is both descriptively and normatively superior to other parameters, such as "commercial purpose" or "nature of pure art," for analyzing copyrightability and scope-of-protection issues. Explicit use of the "degree to which expression in a work is restricted by utilitarian function" as a parameter to decide copyrightability or the scope of copyright protection for a work permits prediction of future Japanese court decisions with greater certainty. Even a foreign business, which is not likely to be familiar with Japanese judicial practices, can better plan strategy and tactics in anticipation of litigation in Japan, whether as a plaintiff or defendant, by considering the "degree to which expression in a work is restricted by utilitarian function" as the important determinant of copyrightability and the scope of copyright protection for a work of utilitarian nature.

49 *E.g.*, MONYA, "Design Law and its related Laws – in particular, copyright Law," 12 Annual of Industrial Property Law 118, 132 (1989), who does not expressly state the ground for his opinion; IKOMA, "Study on the Copyrightability of Applied Arts" ("Ouyoubijutsu no chosakubutsu-sei ni kansuru kenkyu"), 1993 Handa-Kanreki 598, who somehow places value on the subjective decision of a judge over whether a work is a "pure art" or not; and KIMURA, "Legal Protection of Applied Art" ("Ouyoubijutsu no Hogo"), 1993 Handa-Kanreki 580, who tells the history of the enactment of the Japanese Copyright Law but does not tell much about his opinion.