

科学研究費助成事業 研究成果報告書

平成 30 年 6 月 12 日現在

機関番号：10101

研究種目：若手研究(B)

研究期間：2015～2017

課題番号：15K16970

研究課題名(和文) ユーザーから見た著作権等の技術的保護手段のありかた

研究課題名(英文) Copyright Users' Views on Technological Protection Measures

研究代表者

HAZUCHA B (Hazucha, Branislav)

北海道大学・法学研究科・准教授

研究者番号：30452808

交付決定額(研究期間全体)：(直接経費) 3,100,000円

研究成果の概要(和文)：本研究では、著作物の大規模な複製を防止する技術的保護手段(TPMs)とデジタル著作権管理システム(DRMs)の効率性を検証し、近時の判例法や学術文献を精査し、4つの重要な経済圏(日本・米国・ドイツ・中国)においてオンラインでのアンケート調査を行った。これによれば、TPMsとDRMsによる著作物の利用の制限について、各国の消費者の態度には類似点と相違点があった。この相違点は各国の経済的・文化的な違いから説明され得る。たとえば、著作物のオンライン市場が発展している国の消費者は、有体物の著作物に対する制限に比べて、インターネットからダウンロードした著作物に対する制限により敏感になるという傾向を示した。

研究成果の概要(英文)：This study examined the efficiency of technological protection measures (TPMs) and digital rights management systems (DRMs) employed in Japan and worldwide in order to prevent mass copying of copyrighted works. It scrutinised recent case law, policy documents and academic literature in this field. In addition, online surveys were conducted in 4 major economies (i.e. Japan, U.S., Germany and China). The collected data show several similarities, as well as differences between consumers' attitudes towards individual restrictions imposed by TPMs and DRMs on their use of copyrighted works. The differences could be explained by divergences between economic and cultural conditions in the studied countries. For instance, the respondents from countries with more developed online markets for copyrighted works tended to be more sensitive to restrictions affecting the uses of digital copies downloaded from the internet than to those applying to comparable uses of traditional tangible copies.

研究分野：社会科学

キーワード：著作権 TPMs DRMs アンケート調査

1. 研究開始当初の背景

(1) The unauthorized copying and sharing of copyrighted works by their users are conventionally considered by copyright holders and policy makers as main problems faced by contemporary copyright law. The perceived need to provide the copyright holders with an adequate and efficient legal protection has led to several key changes in international as well as national copyright laws in the last 30 years.

(2) One of those fundamental changes was the introduction of legal protection for technological protection measures (TPMs) and digital rights management systems (DRMs), which make certain activities conducted by copyright users technologically impossible (see, e.g., Efroni 2011). This has led to the massive use of various TPMs and DRMs by copyright holders at the present (see, e.g., Besek 2004, Gillespie 2007). Their use has brought an array of legal, economic and social controversies, such as restricting (i) the uses of copyrighted works by individuals, which are permitted by current copyright law (e.g., private copying, sampling, etc.); (ii) the uses of legally acquired downloaded copyrighted works on new versions of e-book readers, MP3 players or computers bought by individuals as substitutes for old ones; (iii) the second-hand resale of downloaded e-books, music tracks, movies, games or computer programs; and (iv) the uses of copyrighted works by various public institutions (e.g., public libraries, archives, museums, etc.), *inter alia*, due to the mutual incompatibility of employed TPMs or DRMs.

(3) Although the current academic literature has attempted to study these new trends and controversies in copyright law, it is limited in several regards. First, there is a lack of legal studies, which would rely on empirical studies and thus on solid and sound data. Most of them mainly rely on anecdotal evidence, if any.

(4) Second, a few available empirical studies mainly focus on studying markets with copyrighted works and not on behavioural aspects of activities conducted by subjects targeted by legal norms, such as their compliance with, or disregard of, legal norms (see, e.g., Liebowitz 2014).

(5) Third, a few studies, which examine the factors affecting the consumers' obeying of copyright law, are limited to primarily studying the behaviour of

undergraduate students and refrain from studying bigger groups of the consumers of copyrighted works (see, e.g., Chiang & Assane 2009, Waldfogel 2010).

(6) Finally, only a few empirical studies focused on problems related with legal protection and operation of TPMs and DRMs (see, e.g., Akester 2009, Hazucha, Liu & Watabe 2015). Nonetheless, they mainly studied a single jurisdiction and disregarded factors affecting cross-country and cross-cultural differences in obeying copyright law.

2. 研究の目的

(1) The purpose of this research project was therefore to empirically examine the efficiency of TPMs and DRMs habitually employed by major corporate copyright holders in Japan and worldwide in order to prevent mass copying of their copyrighted works. The study's aim was to scrutinize (i) the factors influencing the users' responses to, and compliance with, the currently adopted TPMs and DRMs; and (ii) the cross-country and cross-cultural differences in the effect of those factors between studied countries (i.e. Japan, US, Germany and China) in order to enquire into the causes of considerable differences between the studied countries.

(2) The studied countries have been carefully selected for their economic, social and cultural differences, specific approaches to copyright protection, and current situation with their implementation in practice. The reasons for selection of those countries were therefore as follows: (a) weak copyright enforcement, low level of copyright piracy, and mature market with copyrighted works in Japan; (b) the culture of individualism in the US, contrary to the communitarian culture in Japan; (c) the perception of Germans and Japanese as always obeying the law; and (d) the high level of copyright piracy in China, comparing to the other three studied countries.

3. 研究の方法

(1) The research combined qualitative and quantitative research methods to examine the factors (e.g., gender, age, education, income, consumption habits, etc.), which can influence behaviour of copyright users to obey or violate the current copyright protection of TPMs and DRMs. The research methods thus included as follows: (a) the examination of

recent legislations, policy papers and case law concerning the circumvention of TPMs and DRMs and problems brought by the use of TPMs and DRMs in the studied countries; (b) the online surveys examining factors affecting the copyright users' compliance with, or their circumvention of, TPMs and DRMs used with regard to various types of copyrighted works; and (c) the econometric analysis of collected data so that policy recommendation could be made for improving the current copyright laws.

4 . 研究成果

(1) In the last few decades, courts in many developed countries have dealt with cases of developing, marketing and distributing various devices designed for circumventing diverse TPMs and DRMs. In principle, the courts approach them from two different angles. On the one side, the courts tend not to consider activities of individuals, who develops a circumvention device for a personal non-infringing use of copyrighted works, e.g. for watching DVDs on noncompatible devices, as violating anticircumvention provisions in copyright law (see, e.g., *Norwegian DVD case*, Borgarting Appellate Court, 22 Dec. 2003). (2) On the other hand, the entities which develop, manufacture, market or otherwise distribute such circumvention devices for their use by third parties are not allowed to rely on same arguments (see, e.g., Hazucha, Liu & Watabe 2015, p. 136). The courts have a tendency to reject those arguments by stressing that such devices are mainly used by their users for acquiring infringing copies of copyrighted works and their providers cannot rely on arguing that some users can use them for non-infringing purposes. (3) At the same time, due to quite harsh conditions imposed on the use of copyrighted works by their users via the use of TPMs and DRMs by some copyright holders, it is possible to observe a new trend of relaxing the strictness of anticircumvention provisions in several countries. For instance, in the US, it has been done by identifying specific types of circumvention acts which are not considered to be violating copyright law (see, e.g., Samuelson 2016). In several European countries, there have been ongoing policy discussions on expressly stating that some copyright exceptions are mandatory and cannot be restricted by any contractual measure, including TPMs or

DRMs. A good example is the right to make a back-up copy of computer programs in the European copyright law (Art. 5(2) of Software Directive). The Belgian copyright law goes even further in this regard. The UK has also recently tried to regulate some copyright exceptions as mandatory.

(4) The scholarly literature is divided on these issues. Many scholars advocate for understanding copyright exceptions as the consumers' rights (see, e.g., Chapdelaine 2017). However, there are also scholars who stress on the point that the exclusive right of copyright holders should be broadly construed so that the protection of their legitimate interest can be more adequate and appropriate in the digital environment. Therefore, they oppose any interpretation of copyright exceptions as rights. They point out that the exceptions can be used only as defences, but not as basis for claiming anything against copyright holders. The main stream, however, supports the idea of designing flexible copyright exceptions which can take into account the legitimate interests of both affected parties, i.e. copyright holders, as well as consumers of copyrighted works (see, e.g., Geiger, Gervais & Senftleben 2014).

(5) The results of online surveys conducted in the four studied countries during this research project suggest that the consumers distinguish between individual uses of copyrighted works. Some uses are considered by them as very important for them and with regard to the others they do not perceive any problem, if such uses are restricted by TPMs and DRMs. Accordingly, while the copyright holders can quite efficiently restrict some types of the uses of their copyright works by TPMs and DRMs, they fail to do so, when the users consider such restriction as too burdensome for the users.

(6) The study also showed several significant differences between studied countries which can be linked to their economic, social and cultural differences. For instance, the respondents from countries with developed online markets perceived the restrictions on uses, which are characteristics for such markets, as more important than respondents from countries, where traditional ways of distributing copies of copyrighted works still prevail.

(7) Similarly, the ways of responding to online questionnaires suggest cultural differences between individual countries.

For instance, the US respondent tended to accept contractual restrictions on using copyrighted works more than respondents from the other countries, especially Germany, where the respondents inclined to express more strongly their views with regard to objecting or accepting individual restriction measures.

(8) A further feature in this regard was high acceptance of restrictive measures by Chinese respondents. This might be explained by the fact that they did not care, because they had no interest in such uses or they know that there is sufficient availability of other ways for accessing copyrighted works without obtaining any permission from the concerned copyright holders in China. This could be observed amongst respondents with lower income, contrary to those with higher income. It can suggest that the problem with mass copyright piracy in many developed and transition countries can be solved by improving living standards in those countries.

(9) Another problem studied by this research project dealt with the issue of digital exhaustion. In this regard, we can observe a significant divide between the US and the EU copyright laws. In the US, the courts reject any possibility of digital exhaustion regarding the transfer of copies via digital networks (see, e.g., *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (SDNY 2013)). In the EU, the Court of Justice came to the conclusion that digital exhaustion is applicable even to the transfers of copies via digital networks in the case of computer programs (see *UsedSoft GmbH v Oracle International Corp.*, C-128/11). This has led to heated discussion whether digital exhaustion also applies to other types of copyrighted works. National courts in several member states of the European Union have come to different conclusions in this regard (see, e.g., Savic 2015). Although the Court of Justice of the European Union has hinted in one of its subsequent decisions that digital exhaustion might also be applicable to other types of copyrighted works (see *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*, C-174/15), this issue is still far from settled down.

(10) The current academic scholarship considerably diverges on the issue of digital exhaustion. It varies from those who question even the role of exhaustion in modern copyright law (see, e.g., Robinson 2004), to those who advocate for broad and

flexible digital exhaustion (see, e.g., Perzanowski & Schultz 2010). Somewhere in between are those who put forward that exhaustion should be applicable only to tangible copies of copyrighted works and has no role in the digital environment (Stamatoudi & Torremans 2014).

(11) The results of online surveys conducted in the four studied countries as a part of this research project suggest that the general public does not consider the issue of digital exhaustion as crucial issue. However, the considerable differences were observed between countries with more developed online markets (e.g., the U.S.) and the others. This can suggest that with the further development of online distribution of copyrighted works we can expect that more consumers might start to consider the issue of digital exhaustion as important for them. At the same time, the lack of digital exhaustion might also be one of reasons why the development of online markets has been hampered in some countries.

<引用文献>

Akester, Patricia, "Technological Accommodation of Conflicts between Freedom of Expression and DRM: The First Empirical Assessment", 2009

Besek, June M., "Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts", Colum. J.L. & Arts, Vol. 27, 2004, pp. 385-519

Chapdelaine, Pascale, Oxford University Press, "Copyright User Rights: Contracts and the Erosion of Property", 2017

Chiang, Eric P., and Djeto Assane, "Estimating the Willingness to Pay for Digital Music", Contemporary Econ. Pol'y, Vol. 27, 2009, pp. 512-522

Efroni, Zohar, Oxford University Press, "Access-Right: The Future of Digital Copyright Law", 2011

Geiger, Christophe, Daniel J. Gervais and Martin Senftleben, "The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law", Am. U. Int'l L. Rev., Vol. 29, 2014, pp. 581-626

Gillespie, Tarleton, MIT Press, "Wired Shut: Copyright and the Shape of Digital Culture", 2007

Hazucha, Branislav, Hsiao-Chien Liu and Toshihide Watabe, "Private Ordering and Consumers' Rights in Copyright Law: A View of Japanese

Consumers”, in Graeme Dinwoodie (ed.), Edward Elgar Publishing, “Intellectual Property and General Legal Principles: Is IP a Lex Specialis?”, 2015, pp. 119-55

Liebowitz, Stan J., “How Much of the Decline in Sound Recording Sales is Due to File-Sharing?”, *J. Cul. Econ.*, Vol. 40, 2016, pp. 13-28

Perzanowski, Aaron, and Jason Schultz, “Digital Exhaustion”, *UCLA L. Rev.*, Vol. 58, 2010, pp. 889-946

Robinson, Glen O., “Personal Property Servitudes”, *U. Chi. L. Rev.*, Vol. 71, 2004, pp. 1449-1523

Samuelson, Pamela, “New Exemptions to Anti-Circumvention Rules”, *Communications to the ACM*, Vol. 59, 2016, pp. 24-26

Savic, Masa, “The Legality of Resale of Digital Content after *UsedSoft* in Subsequent German and CJEU Case Law”, *EIPR*, Vol. 37, 2015, pp. 414-429

Stamatoudi, Irini, and Paul Torremans, “The Information Society Directive”, in Irini Stamatoudi and Paul Torremans (eds.), Edward Elgar, “EU Copyright Law: A Commentary”, 2014, pp. 395-527

Waldfoegel, Joel, “Music File Sharing and Sales Displacement in the iTunes Era”, *Info. Econ. & Pol’y*, Vol. 22, 2010, pp. 306-314.

5 . 主な発表論文等

〔雑誌論文〕(計1件)

Branislav Hazucha, “Private Copying and Harm to Authors: Compensation versus Remuneration”, *Law Quarterly Review*, peer review, Vol. 133, 2017, pp. 269-95

〔学会発表〕(計3件)

Branislav Hazucha, “Copyright Exhaustion in the Digital Age: An Empirical Study”, Hokkaido University Intellectual Property Law Workshop, Sapporo, 2018

Branislav Hazucha, “Copyright Exhaustion in the Digital Age: An Empirical Study in China and Japan”, 5th Asia Pacific IP Forum, Kanazawa, 2017

Branislav Hazucha, “Copyright, Creative Industries and Cultural Diversity”, 34th Annual ATRIP Congress, Cape Town, 2015

〔図書〕(計2件)

Zuzana Adamova & Branislav Hazucha, C. H. Beck, “Autorsky zakon:

Komentar”, 2018, 1160 p.

Branislav Hazucha, “Intellectual Property, Private Ordering and Legal Certainty”, in Mark Fenwick and Stefan Wrba (eds.), Springer, “Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives”, 2016, pp. 33-60

6 . 研究組織

(1)研究代表者

ハズハ・ブラニスラブ (Hazucha, Branislav)

北海道大学・大学院法学研究科・准教授

研究者番号：30452808