

Recent Developments in Computer Law in Japan

Masao Yanaga

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To cope with information technology, e-commerce and the Internet, some regulations have been introduced in Japan. This article focuses on two developments in computer law in 2001: the former regulates some types of consumer transaction in an information society, and the latter covers the ISPs’ (information service providers’) liability.

I. “WRITING” REQUIREMENTS AND CONSUMER PROTECTION

As mentioned in the last issue of this journal, the law amending certain statutes requiring the delivery of a “writing” (Law No. 126/2000) removed some writing requirements in fifty statutes. For this time, the focus is placed on the Act Regarding Specified Transactions and the Installment Act.

1. *Act Regarding Specified Transactions*

The Act Regarding Specified Transactions (*Tokutei shōtorihiki ni kansuru hōritsu*)¹ regulates door-to-door selling, distance selling and specified continuous service provision transactions, etc. The purpose of this act is to make such transactions fair, in order to protect purchasers’ interests and therefore to prevent the damages that the purchasers might suffer from such transactions.

The term “distance selling” as used in this act means sales of designated goods or rights or provision of a designated service by a seller or service provider as a business (excluding telephone canvass sales) in cases where the offer of the contract has been sent by post or other methods provided in an ordinance of the Ministry of Economy,

1 Law No. 57/1976, originally enacted as “*Hōmon hanbai-tō ni kansuru hōritsu*”; title and content has been amended by Law No. 120/2000. Latest amendment by Law No. 126/2000.

Trade and Industry (METI, *Keizai Sangyôshô*), Art. 2 para. 1 no. 2. The other methods are by telephone or facsimile facilities and other telecommunication or data processing devices, telegrams, or fund transfers to deposit or saving accounts (*Tokutei shôtôrihiki ni kansuru hôritsu shikô kisoku* [Enforcement Regulation of the Act Regarding Specified Transactions]² Art. 2 nos. 2-4).

The designated goods (*Tokutei shôtôrihiki ni kansuru hôritsu shikôrei* [Enforcement Ordinance of the Act Regarding Specified Transactions]³ Art. 3 para. 1) cover media on which sound, image, or programs have been recorded magnetically or optically (Enforcement Ordinance, Annex 1, no. 49). The designated services (Enforcement Ordinance Art. 3 para. 3) include installing or downloading programs in a computer file (Enforcement Ordinance, Annex 3, no. 13). The continuous service provision includes media on which sound, image, or programs have been recorded magnetically or optically (Enforcement Ordinance Art. 14 and Annex 6, no. 2 b.).

A distance-selling business is required to include some important information stipulated in the Act Regarding Specified Transactions and the Enforcement Regulation in the advertisement in accordance with the requirements in Artt. 8 through 10 of the Enforcement Regulation. However, it need not include a part of the information in the advertisement in accordance with the provisions in the Enforcement Regulation, provided that it announces in the advertisement that a writing or an electromagnetic record on which the required information has been recorded will be provided upon request without delay (Act Regarding Specified Transactions, Art. 11). The Enforcement Regulation allows a distance-selling business to provide information via e-mails, mobile terminals (so-called i-mode), or at the Internet websites of the business (Enforcement Regulation Art. 10 para. 3). The methods should enable the customer to output the information into a writing in cases where e-mails or websites are used. The information recorded in the business's file cannot be deleted or modified for six months after the information was recorded in the customer file exclusively for an individual customer in cases where mobile terminals are used (Enforcement Regulation Art. 10 para. 4).

A distance-selling business should also give a notice of acceptance or refusal of acceptance and provide some important information in a writing without delay in accordance with the provisions in the Enforcement Regulation in cases where it has received all or a part of consideration for a designated good, right, or service unless it sends the goods, transfers the right, or provides the service to the offeror without delay (Act Regarding Specified Transactions Art. 13 para. 1). However, instead of delivering a writing, it may provide the information using an electronic data processing system or other information and telecommunication technologies specified in the Enforcement Regulation, provided that the customer has agreed to receive such information electro-

2 Ministerial Ordinance No. 89/1976 (MITI), as amended by Ministerial Ordinance No. 152/2001.

3 Cabinet Ordinance No. 295/1976, as amended by Cabinet Ordinance No. 76/2001.

magnetically (Act Regarding Specified Transactions Art. 13 para. 2). The customer's approval can be given either in a writing or by electromagnetic means and revoked at the customer's will at any time (Enforcement Ordinance, Art. 7). The Enforcement Regulation allows a distance-selling business to provide information via e-mails, mobile terminals, or at the Internet websites of the business as well as by physical delivery of a magnetic disk, CD-ROM, or other medium on which the necessary information has been recorded (Enforcement Regulation Art. 14 para. 1). The methods should enable the customer to output the information into a writing in cases where e-mails or websites are used. The information recorded in the business's file cannot be deleted or modified for six months after the information was recorded in the customer file exclusively for an individual customer in cases where mobile terminals are used (Enforcement Regulation Art. 14 para. 2).

It should not make misleading presentations in the advertisement of distance selling with respect to condition of sales of a designated good, right, or provision of a designated service (Act Regarding Specified Transactions Art. 12; Enforcement Regulation Art. 11).

The competent minister may instruct a seller or service provider as a business to take necessary measures in cases where the business has violated the provisions in Art. 11 and 12 or Art. 13 para. 1, or has done one of the acts provided in the Enforcement Regulation (the acts to be deemed as against the will of the customer) and the competent minister deems that the fairness of the distance-selling transaction or the interests of customers is likely to be infringed (Act Regarding Specified Transactions Art. 14). A distance-selling business is deemed to have acted against the will of the customer in cases where the business has not displayed clearly – *i.e.* a customer can easily recognize – that the operation of a computer will be regarded as an offer of an electronic contract at the time the customer operates the computer, or where the business has not made it easy for a customer to verify and modify the content of its offer (Enforcement Regulation Art. 16 para. 1 nos. 1 and 2).

The competent minister may also issue a cease and desist order to a business of not longer than one year in cases where he deems that the fairness of a distance-selling transaction or the interests of customers are likely to be seriously infringed, or the business has not followed the instructions provided in Art. 14 (Act Regarding Specified Transactions Art. 15).

2. *Installment Sales Act*

The Installment Sales Act (*Kappu hanbai hô*)⁴ has several provisions to protect consumers, and it was amended in 2000 to cope with electronic commerce.

4 Law No. 159/1961, as amended by Law No. 126/2000.

First, the designated goods in the act were extended to include video software and the medium on which a computer program has been recorded (*Kappu hanbai hô shikôrei* [Enforcement Ordinance of the Installment Sales Act]⁵ Art. 1 para. 1 and Annex 1, no. 34).

Second, the definition of “certificates, etc.” (*shôhyô-tô*) was amended to include numbers, symbols, and marks to make it clear that the act is applied to cases where there is no physical presentation of a credit card, but the number, the name of the holder, expiration date, etc. have been transmitted electronically only (Art. 2 para. 1 no. 2).

Third, the act requires an installment business (typically a credit card company) to provide the customer with the members’ agreement, the contract documents, and the bill in a writing (Art. 33 para. 2, Art. 29-2, Art. 30, Art. 4 para. 1 through 3, Art. 29-3, Art. 30-2). However, under the amended act, instead of delivering a writing, the business may provide the information using an electronic data processing system or other information and telecommunication technologies specified in the Enforcement Regulation of the Installment Sales Act (*Kappu hanbai hô shikô kisoku*)⁶ provided that the customer has agreed to receive such information electromagnetically (Installment Sales Act Art. 4-2). The customer’s approval can be given either in a writing or by electromagnetic means and revoked at the customer’s will at any time (Enforcement Ordinance Art. 1-2). The Enforcement Regulation allows a distance-selling business to provide information via e-mails or at the Internet websites of the business as well as by physical delivery of a magnetic disk, CD-ROM, or other medium on which the necessary information has been recorded (Enforcement Regulation, Art. 1-10 para. 1). The methods should enable the customer to output the information into a writing in cases where e-mails or websites are used (Enforcement Regulation Art. 1-10 para. 2). The term of cooling-off starts running at the time of the delivery of the contract documents (Installment Sales Act Art. 4-4 para. 1 no. 1). Regarding this provision, in cases where the electromagnetic record equivalent to a contract document is provided via a computer and telecommunication line, the record shall be deemed to have reached a customer at the time when the record has been recorded in the computer the customer uses (Installment Sales Act 4-2 para. 2).

On the other hand, the Installment Sales Act still requires the business and the client-consumer to prepare a document in a paper-based writing. For example, the statement of the terms of credit contract in door-to-door sales (Installment Sales Act, Art. 30-6 and 4-3) should be made in a writing so that the consumer can check the terms and conditions of the offer. Because the date and time when the contract has become irrevocable are quite important for a consumer, a consumer should make a statement for cooling-off in a writing (Installment Sales Act Art. 30-6 and 4-4). A business should give a notice requiring the client to perform the contract in writing before the cancellation of a contract (Installment Sales Act Art. 30-6 and 5). This is because such a notice is very im-

5 Cabinet Ordinance No. 341/1961, as amended by Cabinet Ordinance No. 76/2001.

6 Ministerial Ordinance No. 95/1961 (MITI), as amended by Ministerial Ordinance No. 66/2002.

portant to give consumers an opportunity to avoid the cancellation of a contract and the duty to pay all the remainder, which may be disadvantageous for the client.

II. INFORMATION SERVICE PROVIDERS' LIABILITY AND PROTECTION OF VICTIMS

1. Before 2001 Legislation

Though the person who has transmitted illegal and harmful content is the principle party responsible for the damages suffered by the victim, ISPs offer subscribers the means to transmit the contents. This implies that ISPs may sometimes be able to control transmission of illegal or harmful contents.

However, ISPs have to keep the secret of communication under the Telecommunication Business Law (*Denki tsûshin jigyo hô*)⁷ (Art. 104). As a result, in usual cases it is impossible – or at least inadequate – for ISPs to be involved in the content of the subscribers. In addition, if ISPs should be responsible and liable for illegal or harmful contents posted by the subscribers, they might attempt to deter users or violate the subscriber's freedom of speech.

Of course, there are varying levels of control that can be exercised by ISPs, and the level of ISP liability might vary as well. It has been widely accepted that ISPs are not liable if they have no means to control the content. ISPs are rarely held liable without knowledge of the infringement caused from the contents unless they are the providers of the information. In contrast, many have argued that ISPs should be liable when they actually know that the content in the subscribers' sites has been infringing on another's right unless they take reasonable measures to remove the content or block the access to such contents.

Tokyo District Court (*Niftyserve (No. 1)* case)⁸ once held that Y1 – the system operator of the “*Gendai Shisô Forum*” – and Y2 – the Nifty, the ISP that had entrusted Y1 as a system operator – were liable for the damages of the plaintiff whose reputation had been injured by the statements in the forum on the grounds that Y1 had the duty to take appropriate measures to stop libel in the forum when Y1 became aware of the fact but did not take any measures, and Y2 was liable as a *de facto* employer of Y1 (Art. 715 *Minpô*⁹). However, the decision was reversed by the Tokyo High Court¹⁰ on the grounds that Y1 took appropriate measures while he owed a duty to remove harmful statements posted by the participants to the reasonable extent and within the reasonable period after taking due procedures.

7 Law No. 86/1984, as amended by Law No. 160/1999.

8 Decision of February 26, 1997: 1610 *Hanrei Jihô* 22.

9 Civil Code of Japan, Law No. 89/1896 and Law No. 9/1898, as amended by Law No. 41/2001.

10 Decision of September 5, 2001.

On the other hand, in the *Tokyo Metropolitan University case*,¹¹ the Tokyo District Court held that a network operator may be liable in torts only in exceptional cases where he/she has actual knowledge of libel and it is obvious for the operator that the manner of such libel is vicious and that damages might be serious. The court does not believe it just, in principle, to impose a duty on a system operator to protect the victim from the damages arising from a libel because a libel seldom affects the third party's interest, and it might be difficult for the network operator to tell whether a statement qualifies as a libel or not.

As far as the disclosure of sender data, a legal scheme had been studied for enabling the disclosure of confidential information so that the sender of infringing data can be identified under clearly defined conditions and due process. However, a telecommunications business must keep the confidentiality of telecommunication (Telecommunications Business Act Art. 104), and an ISP refused to disclose the identifying information of a subscriber in the *Niftyserve (No. 2) case*¹² so as to comply with the provision in the Telecommunication Business Act and to protect the privacy of the subscriber.

2. *ISP's Liability Limitation and Sender Data Disclosure Act*

a) *Overview on the New Law*

The "Law Regarding the Limitation on the Liability of Specified Telecommunications Service Providers and the Disclosure of Sender Data (*Tokutei denki tsûshin ekimu teikyôsha no songai baishô sekinin no seigen oyobi hasshin-sha jôhō no kaiji ni kansuru hôritsu*)¹³ limits information service providers' (ISPs') liability to the infringed person and the sender of claimed infringing data unless the ISP is a sender. A sender is defined as a person who has recorded any data in the recording medium of the specified telecommunications facilities used by a specified telecommunications service provider, or has inputted any data into the transmitting facilities of such specified telecommunications facilities in cases where such data will be transmitted to unspecified persons (the public). Thus, a person who edits or modifies the posted original messages, such as a bulletin board operator, is a sender who may be liable.

Art. 3 para. 1 provides that an ISP is liable for damages suffered by the victim resulting from a distribution of data only in cases where it has – or should have had – actual knowledge of the infringement. This implies that ISPs do not have to monitor the distribution of data by subscribers in ordinary cases. Para. 2 of Art. 3 limits an ISP's liability for the damages suffered by the sender of information that is blocked by the ISP. The ISP shall in principle make inquiries to the sender as to the blocking. Unless the ISP has a good reason to believe that another's right has been infringed, the ISP need

11 Decision of September 24, 1999: 1707 *Hanrei Jihô* 139.

12 Tokyo District Court, Decision of August 27, 2001, unpublished.

13 Law No. 137/2001.

not block the distribution of data if the sender has made an objection to the blocking within seven days of the inquiry.

In the same way, the ISP should hear the sender's opinion, in principle, before disclosing the sender data to the claimant (Art. 4 para. 2), and it is not liable for the damages suffered by the claimant as a result of the refusal to disclose unless it has refused intentionally or with gross negligence, or it is the sender (Art. 4 para. 4).

This act covers cases in which copyright or privacy have been infringed as well as cases of defamation. As the same rules apply to both cases (horizontal approach), the rules are a bit cautious regarding blocking transmission of claimed infringing data so as not to harm the freedom of speech.

b) Translation

LAW REGARDING THE LIMITATION ON THE LIABILITY
OF SPECIFIED TELECOMMUNICATIONS SERVICE PROVIDERS
AND THE DISCLOSURE OF SENDER DATA¹⁴

(Law No. 137/2001)

[Translation by the author]

Art. 1 (Purpose)

This Act provides the limitation on the liability of specified telecommunications service providers and the right to request the provider to disclose the sender data in cases where a distribution of information in a specified telecommunication has infringed a right.

Art. 2 (Definitions)

In this Act, the terms listed in the items below are defined as follows:

1. Specified telecommunication: transmission of telecommunication (referred to as telecommunication in item 1 of Article 2 of the Telecommunication Business Act (Law No. 86 of 1984)) intended to be received by unspecified persons (excluding the transmission of telecommunication intended to be received by the public);
2. Specified telecommunications facilities: telecommunications facilities (referred to as telecommunications facilities in item 2 of Article 2 of the Telecommunication Business Act) for any specified telecommunication;
3. Specified telecommunications service provider: a person who intermediates communication of others through the use of the telecommunications facilities, or provides the telecommunications facilities for the use of communications of others;

14 *Tokutei denki tsûshin ekimu teikyô-sha no songai baishô sekinin no seigen oyobi hasshin-sha jôhō no kaiji ni kansuru hōritsu.*

4. Sender: a person who has recorded any data in the recording medium (limited to those whose recorded data will be transmitted to unspecified persons) of the specified telecommunications facilities used by a specified telecommunications service provider, or has inputted any data into the transmitting facilities (limited to those whose inputted data will be transmitted to unspecified persons) of such specified telecommunications facilities.

Art. 3 (Limitation of Liability for Monetary Compensation)

(1) In cases where another's right has been infringed through a distribution of information in a specified telecommunication, the specified telecommunications service provider who uses specified telecommunications facilities available for the specified telecommunication (hereinafter referred as "the provider" in this paragraph) shall not be liable for the damages unless it is technically possible to take measures to block the transmission of the data infringing the right to the public and it falls within the cases stipulated in the items below. However, this shall not apply to cases where the provider is the sender of the data infringing the right:

1. where the provider knew that the distribution of the data in the specified telecommunication was infringing another's right; or
2. where the provider knew of the distribution of the data in the specified telecommunication and there is a good ground that he could have known that the distribution of the data in the specified telecommunication was infringing another's right.

(2) A specified telecommunications service provider shall not be liable, in cases where he took measures to block the transmission of data in a specified telecommunication, for damages suffered by the sender of the data whose transmission was blocked by such measures, provided that the measures were taken only to the extent necessary to block the transmission to the public and it falls within the cases stipulated in the items below:

1. where the provider had good grounds to believe that another's right had been unduly infringed through the distribution of data in the specified telecommunication; or
2. where the person who insisted that his right had been infringed through the distribution of data in a specified telecommunication specified the data that had infringed his right (hereinafter referred to as "claimed infringing data"), the infringed right, and the reasons why he believed that the right had been infringed (hereafter referred to as "claimed infringing data, etc." in this item) and requested the provider take measures to block the transmission of the claimed infringing data (hereafter referred to as "transmission blocking measures" in this item), and the provider made inquiries to the sender of the claimed infringing data, giving

the claimed infringing data, etc., as to the sender's will to agree to the transmission blocking measures but did not receive a response from the sender that the sender did not agree to the transmission blocking measures within seven days after the date the inquiries had been made.

Art. 4 (Request for the Disclosure of the Sender Data, etc.)

(1) A person who insists that his right was infringed through a distribution of data in a specified telecommunication may request the specified telecommunications service provider who uses specified telecommunications facilities available for the specified telecommunication (hereinafter referred as "the disclosure-related provider") to disclose the sender data (name, address, and other data relevant to identify the sender of the claimed infringing data as stipulated in a Ministry of Public Management, Home Affairs, and Post and Telecommunications Ordinance; hereinafter the same) in the hand of the provider regarding the infringement of the right, provided that it meets the conditions stipulated in the items below:

1. it is obvious that the right of the claimant for the disclosure has been infringed through the distribution of the claimed infringing data; and
2. the claimant needs the sender data for the disclosure to claim the damages, or there are good grounds to be disclosed the sender data.

(2) Upon receiving the request to disclose in accordance with the provisions in the preceding paragraph, the disclosure-related provider should hear the opinion of the sender on whether to disclose unless he is not able to get in touch with the sender of the claimed infringing data in the request to disclose, or otherwise special circumstances exist.

(3) The person who has been disclosed the sender data in accordance with the provisions in paragraph 1 shall not use the data for improper purposes and unduly harm the reputation or the peace of the life of the sender.

(4) The disclosure-related provider shall not be liable for the damages suffered by the person who requested to disclose caused by the refusal to disclose in accordance with the provisions in paragraph 1 unless he acted in bad faith or was grossly negligent. However, this shall not apply to cases where the requested provider is the sender of the claimed infringing data related to the request to disclose.

ZUSAMMENFASSUNG

Der Beitrag stellt zum einen die Änderungen im Gesetz über spezielle Handelsgeschäfte und im Abzahlungsgesetz vor, zum anderen das neue Gesetz über die Beschränkung der Haftung von Internetdiensteanbietern.

In dem Gesetz über spezielle Handelsgeschäfte wie auch im Abzahlungsgesetz seien eine Reihe von Vorschriften angepaßt worden, um moderne Methoden der Datenverarbeitung angemessen berücksichtigen zu können, ohne den Schutz der Konsumenten zu verringern.

Das Gesetz über die Beschränkung der Haftung von Informationsdiensteanbietern bestimme, daß ein solcher Anbieter für Persönlichkeitsverletzung und sonstige Rechtsverletzungen durch das Einstellen von Daten in das Internet nur dann hafte, wenn er hiervon positive Kenntnis gehabt habe oder hätte haben müssen. Darüber hinaus würden die Pflichten zur Herausgabe von Kundendaten des Anbieters zur privaten Verfolgung von Rechtsverletzungen sowie das damit im Zusammenhang stehende Verfahren geregelt.

(die Red.)