

(by data)

Form 6

Grant No.	09-016
-----------	--------

Research Report

Name : Hazucha Branislav

Organization (at the time of the grant): School of Law, Hokkaido University

Title of Research: *Searching for an Efficient Legal Regime for Protection and Promotion of Cultural Diversity: A Comparative Study of US, France, Korea and Japan with Regard to Audio-Visual Sector*

Purpose of Research: The main purpose of the research was (i) to collect and analyze empirical data on the efficiency of current national legal frameworks for the protection and promotion of cultural diversity in the audiovisual sector in the United States, France, South Korea and Japan; and (ii) to identify conditions and factors under which individual legal mechanisms, such as those based on intellectual property rights, screen and other quotas, subsidies and other forms of state protectionism, work efficiently. The research was thus designed to study and compare the actual situation of the protection and promotion of cultural diversity in Japan with the situations in other developed countries, such as the United States, France and South Korea, which were selected due to their characteristic legal regimes aiming to protect and promote cultural diversity on national level, and their efficiencies and flaws in achieving the goal of respective regulations.

The individual countries can be divided into two main groups pursuant to their national approaches towards the role of state intervention and protection of domestic cultural industries in the protection and promotion of cultural diversity. The first, the so-called free-market approach is represented by the United States advocating that the government should only set up a necessary legal framework in form of strong intellectual property protection and should not intervene in any other way with the operation of free market. Although the current state of US audiovisual market is deemed to be highly competitive with the high level of cultural diversity, the US market is actually dominated by the production of a handful of multinational media conglomerates, the majority of which is based in the US, and the foreign or independent audiovisual production plays very marginal, almost less than *de minimis* role on the US market.

The second, state protectionist approach is represented, with different degree, in this research by France, Korea and Japan. The first two countries are traditionally seen as countries with strong protectionist regimes for their domestic audiovisual sectors, but there are considerable differences between all the three countries with regard to individual legal regimes and their actual impact on, and efficiency in, achieving the respective level of cultural diversity in the audiovisual sector in each of them. While the Japanese market (less relying on protectionist measures than markets in France and Korea) and Korean market are divided into two halves between domestic and foreign (mainly US) production; the French market is heavily dominated by foreign (especially, US) production.

Content/Methodology of Research: The research was conducted as interdisciplinary, empirical study. As to its interdisciplinary character, the research applied the insights from cultural economics and communication and cultural studies on cultural creativity and diversity for designing an adequate legal framework for efficient protection and promotion of cultural diversity in audiovisual sector. The necessary literature on legal framework and cultural economics and communication and cultural studies on cultural creativity and diversity in the English, French and Japanese has been acquired, if available, and has been surveyed.

As to its empirical character, it collected and analyzed data (i) on the current level of actual cultural diversity of audiovisual goods and services based upon their sales in studied countries; and (ii) on the impacts of legal measures on cultural creativity and diversity. In addition, through questionnaires and interviews with the three main stakeholders in Japan: (i) corporate copyright holders (*e.g.* television broadcasting companies, such as NHK, Fuji TV, TBS or TV

Tokyo), individual creators and performers; (ii) consumer electronics manufacturers (such as Fujitsu, Sony or Toshiba) and online service providers (such as NTT Resonant Inc., Nifty or Yahoo! Japan); and (iii) consumers. As to the last stakeholders, the survey of opinions of people in the streets of Sapporo was conducted. These data contained the necessary information (i) on the perception and satisfaction of Japanese consumers with the cultural diversity and quality of provided audiovisual goods and services as to their types, genres, origins and other important distinctive aspects; and (ii) on the responses of individual stakeholders to a particular legal regulation. In addition, Japanese and foreign literature on cultural diversity and legal regime for protection and promotion of cultural diversity was surveyed. The analysis of similar studies in other studied jurisdictions (if available) was undertaken and compared with the findings with regard to the situation in Japan.

The findings show that the fears of concentration of audiovisual industries on national and international level, and their impact on cultural diversity of audiovisual goods and services on national and international level are well founded. At the same time, the historical studies on the development of individual markets also prove that diversity of particular cultural good and services is lower when a market is fully competitive with a lot of small competitors comparing with the situation on market when certain degree of concentration (approx. 4 or 5 main competitors sharing 50 percent of market, while the remaining part of market is shared by a number of small and medium competitors) occurs. Another aspect showed in the study is that the negative outcome of concentration of particular market on diversity of available cultural goods or services can be undone by decentralization of production through outsourcing production to independent production companies. This requirement was also incorporated in regulation of TV broadcasting markets in some countries, *e.g.* the financial interest and syndication rule in the U.S., before their deregulation.

On the regional and international level, the findings show that the characteristics, such as size of market and consumption (*e.g.*, cinema attendance or DVD rentals or sales), of producing as well as importing country matter. The larger the economy is and the higher the cinema attendance is, the higher the flow probability and the volume of actual export of cultural goods and services are. Moreover, the same ratio of the increase of GDP as well as cinema attendance has much lower impact on increase of flow probability and actual flow volume in case of countries with smaller economy and cinema attendance than in case of countries with large economy and high cinema attendance. Accordingly, exporters with small market share are squeezed out from the market in favor of the exports with large market share.

Further factors affecting the flow of cultural goods and services are language and culture. If the countries share the same language and culture, there is higher flow probability and volume between them. This can explain the reason why Australian market with movies is fully dominated by production from the United States followed by the one from the United Kingdom. Similarly, the French and Spanish movies and TV programs play more important role in French and Spanish speaking countries than on other markets. On the other hand, although the English language is used in India, there is considerable cultural distance between India on the one side and the United Kingdom and United States on the other. This can explain why the local production plays so important role on the Indian market comparing to the Australian one. The same applies to Korean and Japanese markets which are significantly culturally distant from the Western cultural production. In this regard, it should be pointed out that the exporter's market size can better overcome cultural distance, since its production is often tuned to international themes and values, which can be easily translated from one country to another. Due to shared cultural values in the Far East, the Korean and Japanese cultural production can play an important role on the market in many Far East countries, such as PRC, Taiwan, Hong Kong, Singapore or Philippines. Moreover, due to its cultural uniqueness, certain cultural production, such as anime or video games produced in Japan, are easily marketable in the Western and other markets.

Conclusion/Observation

Intellectual property policies are an important, but not the only part of cultural policy. Although a close relationship between intellectual property policies and other cultural policies is evident in many jurisdictions, they are still often considered as two independent policies. Their frequent separate handling can cause inconsistencies amongst individual cultural policies and negative consequences of their operation on cultural diversity. Intellectual property policies as well as state protectionist policies relying on quotas, taxes, subsidies or other types of redistributive mechanisms and schemes can have inadvertent implications, *i.e.* either directly harming or insufficiently protecting and promoting cultural diversity. Furthermore, the differences in understanding cultural diversity often lead not only to a diverse

combination of cultural policies in individual countries, but also to clashes and trade disputes between some of them, especially those which mainly export cultural goods and services on the one side and those which are largely consumers of foreign cultural production on the other.

To smooth tensions and frictions in the field of cultural production, it is therefore essential that the institutions responsible for cultural affairs and intellectual property policies understand that the only way to achieve efficient protection and promotion of cultural diversity on the local, regional and global level is to strike an appropriate and adequate balance between individual cultural policies, *i.e.* intellectual property and other cultural policies. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions can assist the contracting parties to achieve a balance between individual policies and to calibrate an adequate role for intellectual property regimes as means of protecting and promoting a diversity of cultural expressions. However, the Convention also allows different ways for its implementation. Hence, individual countries have to be extremely vigilant in adopting any particular cultural policy in order to implement it and their actual implications on cultural diversity on the local, regional and global level have to be carefully studied.

In the past, the state protectionist measures were often abused for various purposes. They did not only harm the foreign industries, but also the domestic ones, since they failed to expose domestic manufacturers to a healthy competitive environment. Many of these shortcomings have been solved over the last two decades in many developed countries or emerging economies, such as France or South Korea. However, the policy makers should be careful in drafting any protectionist measures. They should always take into account that it is important to create a regime where the domestic industries will be exposed to sufficient competitive pressure. This will help to improve the quality of domestic production making it easily marketable not only domestically, but also internationally.

In this regard, it should be pointed out that in addition to intellectual property law and state protectionist measures, the careful calibration of competition law is also essential. The competition law should limit more extensively the concentration of cultural industries on national, regional and international level, especially when there are only a handful of companies (from three to five companies) which focus on production and distribution of individual cultural goods and services and which control over 80 percent of international flow of respective cultural goods and services.