Preface

This book was first published in Japanese under the title "*Kaizokuban" no shisō: Jūhasseiki Eikoku no eikyū kopīraito tōsō* (Misuzu Shobō, 2007). The English edition is its translation, incorporating original text from the works cited as well as some revisions to reflect sources newly obtained after publication of the Japanese edition and correction of some errors.

The book treats the courtroom battles over copyright in eighteenth-century Britain from the viewpoint of the law, but also elucidates the process by which the practice of limited copyright became established by taking into account the social, cultural, and literary history of the times and looking at the interpersonal relations among lawyers and other personalities involved. The reader may well wonder why a book like this, written by a Japanese author on the eastern edge of Asia and three centuries later, is needed?

I became intrigued by the subject of copyright after listening to my son, in fourth grade at the time, tell about what happened to him at school. Children from the fourth grade up in Japan are taught about copyright to the effect as follows: "Writings or pictures/images created by others may not be freely copied or imitated. The content of published CDs may not be copied without permission. All works are under what is known as 'copyright,' so it is wrong to imitate or copy them without obtaining permission from their creators."

So the children in my son's class took the instructions to heart, but one day, he told me, a student in a creative arts class was stuck for an idea to fulfill the assignment on a class project and appealed to the teacher for help. As is often the case, the teacher advised: "Why don't you have a look at what your classmates are doing, and see if you can get an idea from them?" So the student went to look at the projects of his classmates who are good at creative arts, only to be told: "You know, if you copy what I'm doing, you'll be infringing on my *copyright!*"

That was not long after Prime Minister Koizumi Jun'ichirō proposed in 2002 that Japan should strengthen the foundations of its knowledge resources in order to become an intellectual property-based nation (*chizai rikkoku*) like the United States. Since that time, elementary school students have regularly been taught about copyright in this vein, through a public education campaign orchestrated by the Ministry of Education, Culture, Sports, Science and Technology and the Agency for Cultural Affairs. This is an ideal educational policy, at least as far as the advocates of copyright are concerned, but what troubled me was how such rules could adversely affect the school curriculum.

Copyright is a very self-serving right, a right artificially created in order to protect

the interests of specific people. But is this something that we should be teaching young children to boldly assert? Shouldn't we be teaching children about the importance of reaching out a helping hand to classmates in need of support, the value of mutual influence and cooperation, and how good creative work and good interpersonal relations can come about through helping and working with each other? This is the question that has concerned me in the past few years and that motivated me to write about "pirate" publishing, tracing it back to eighteenth-century England.

In terms of historical origins, Japanese copyright law derives from traditions of German civil law and is distinct from copyright as found in Anglo-American law. Still, both Anglo-American and Japanese copyright law basically set forth rights designed to support the "contents industry."

Let me introduce some examples of what I believe would be considered illegal under copyright in Japan.

- Copying all the pages of a book borrowed from a library.
- Copying selected pieces from various music CDs to make a private collection CD for distribution to "a number of" people.
- Making an original manga story using a favorite manga character [created by another artist], and putting it on sale at the Comic Market.
- Using an animation-film character or music from a mass-market CD on one's personal website.
- Streaming a program or commercial recorded from television on the Internet.
- Translating the text of a recently published novel or the dialogue of a recently released film produced overseas and posting it on the Internet.

Can one say without qualification that all of these actions are bad? Are we sure?

How long does the copyright to works apply? In Japan today, for works published under an individual's real name the period is fifty years from the death of the author; for those published by an organization, fifty years from date of publication; and for films, seventy years from their first release. These terms are quite long by comparison with patents, which are protected for only twenty years.

Author's rights were not always protected for so long under Japanese copyright. Under the old copyright law of 1899, author's rights were protected for thirty years following the death of the author and for photographs, for ten years after publication. Under the current law, which was enacted in 1971, protection for author's rights was extended to fifty years. The term of protection for films and photographs was also extended, but for fifty years after release/publication, which was rather shorter than the period extending from the death of their "author." Photographers' organizations then called for the extension of copyright for photographs, and in response, under the copyright law that was

revised again in 1996, it was extended to fifty years after the death of the photographer. The copyright to films, too, was extended from fifty years to seventy years in 2004. Behind the demand for the extension was, of course, the interests of the film industry.

The extension of film copyright occurred in response to those wanting Japanese copyright laws to conform to "international standards." The film industry was able to conveniently claim that, while United States law protects films for ninety-five years after their release, Japan was "behind the times" in setting the term as only fifty years. Supporting the movement were people who stood to lose if the term were set at fifty years and the copyrights to many works of Japan's "golden age" of cinema began to expire, one after another.

The copyright to the classic film directed by Ozu Yasujirō (1903–1963), *Tokyo Story* (1953) expired in 2003 in Japan, but since the term of protection for films was extended in 2004, the copyrights to works like Kurosawa Akira's (1910–1998) *Seven Samurai* (1954) and Honda Ishirō's (1911–1993) *Godzilla* (1954) are now protected until 2024.

The strongest advocate of the extension of Japanese film copyright protection was the United States government, and the greatest beneficiaries of the extension were, it is known, the Hollywood film studios. For Disney films as well, the copyrights for classics like *Cinderella* (1950), *Alice in Wonderland* (1951), and *Peter Pan* (1953) had expired by 2003 under Japanese law, and if no change had been made, the same would soon be true for popular works like *The Lady and the Tramp* (1955), *Sleeping Beauty* (1959), and *One Hundred and One Dalmatians* (1961).

What kinds of things happen when copyright expires? First, there is no longer any restriction on reproduction of such works; anyone can copy and distribute them for their own profit. For the film companies, this is a problem because they are still profiting from the sale of such works. How about from the viewpoint of the consumer? From around 2000, we began to see copyright-expired movies becoming available on cheap DVDs on sale for about 500 yen. The older Disney movies are now being sold cheaply by non-Disney companies as works currently in the "public domain." Thanks to these versions, many films people had had few chances to see became easily available. For industry as well, new markets are opening up for inexpensive DVDs of out-of-copyright movies. Since they are cheap, they are more easily accessible for young people. Once available in inexpensive DVD versions, *Roman Holiday* (1953) and *Shane* (1953) gained a new set of fans. Scenes from *Roman Holiday* turn up in commercials on Japanese television and more people learned about the admirable career of its leading lady, Audrey Hepburn.

In the United States, copyright protection has been extended over and over. Under the first American copyright law of 1790, protection was only for twenty-eight years from the date of registration. In 1831 it was extended to forty-two years and in 1909 to fifty-six years. Mickey Mouse first appeared in the 1928 animation *Plane Crazy*. Since the copyright law protected film for at most fifty-six years under that new law, the copyright

to the Mickey Mouse film was to have expired in 1984. However, in 1976, the law was revised, making the copyright hold for individually authored works fifty years after the death of the author and works by corporate authors for seventy-five years after their public release. Now the copyright to the Mickey Mouse film would hold until 2003. In 1998, under the Copyright Term Extension Act (also called the "Sonny Bono Copyright Term Extension Act"), protection was even further extended for general works to seventy years after the death of the author and for corporate authors for ninety-five years after first public release. As a result, the copyright to *Plane Crazy* was extended to 2023. Since the protection of copyright has been extended whenever it looked as if the copyright to the first Mickey Mouse film might expire, America's copyright law is called the "Mickey Mouse Protection Act." Indeed, for the Walt Disney Company, copyright is a serious matter. It would not be at all surprising if rumors of considerable lobbying efforts by Disney in the U.S. Congress to seek revision of the act were true.

Once the copyright protection period has passed, of course, a work can be copied freely. There will always be people who will make use of such copies in their contributions to culture. In Japan, the Aozora Bunko ("Open-air Library") website makes available classics of literature for which the copyright has expired. Forming a digital archive of Japanese literature, it is an important and valuable site. The English site "Project Gutenberg" is likewise well known. Using these sites, we now have a vast amount of literature at our fingertips, available to read free of charge. Services like this are ones that one would think should be supported by public funds, but both Aozora Bunko and Project Gutenberg are sustained by volunteers. Projects like this could only have gotten off the ground through the efforts of volunteers and the rule that copyright will eventually expire.

The value of out-of-copyright works notwithstanding, the voices on the side of copyright holders arguing for the extension of Japan's copyright protection period are unbudging. The arguments advanced by the advocates of extension are as follows:

- The longer a work is held in high esteem, the stronger will be the motivation for creation of original works. The ideas and inspiration an author invests in a work deserve eternal protection.
- Fifty years after the death of an author, his spouse or children may be still living, and the expiration of the copyright taking away the revenue provided by the works could threaten their livelihood.
- The length of protection is shorter in Japan than in other advanced nations; Japan should bring itself into line with the international community.

The rebuttals of opponents of copyright extension, on the other hand, are as follows:

- Will further extending the protection of copyright for more than fifty years after the death of the author really inspire the creation of original works? On the contrary, the extension of copyright will obstruct the broad distribution of a work.
- Fifty years after the death of an author, do members of the author's/creator's family really need the income from royalties?
- In international comparison, Japan's copyright protection period is by no means short. Extension of copyright is not a general world trend, and by international law there is no need to extend it.

These are not the only views, but those favoring extension tend to appeal to the emotions based on a romantic notion of "author." Being rather of the sentimental type, I tend to be moved by such ideas, and yet, when you consider it objectively, that is a very strange argument. The arguments of the advocates of extension say nothing about the people who hold the keys to the copyright business. The holder of the keys is the contents distribution industry.

Those who benefit most from the extension of copyright are not the authors but copyright holders and the companies that profit from the distribution of copyrighted works. The contents distribution industry simply exploits the idea of authorship to appeal to the emotions on the issue. Ironically, it is the authors whose work is being exploited, and nonetheless they are being used by the contents distribution industry to protect the industry's profit-making structure. Incentive to do original work is more likely to come from increasing royalties than from extending copyright. The fact that none among the authors who are seeking copyright extension dare to assert this idea is proof that they have been reduced to mere defenders of the contents distribution industry.

The debate on extension of copyright was carried out quite openly and extensively in Japan between 2006 and 2009, involving rights holders, scholars, lawyers, government officials, and users of copyrighted material. The conclusion of an Agency for Cultural Affairs advisory commission was that more public discussion was needed before extension of copyright should be acted upon. Until then, Japanese copyright law had been gradually strengthened through lobbying pretty much exactly as the rights-holders side wanted. The fact that the doubts about extension on the user side finally put a stop to that trend was epoch-making in the history of Japanese copyright. Naturally, attempts by rights holders aiming to secure extensions of the copyright protection period are bound to return, so it is difficult to know how the issue will be settled in the long run.

One of the reasons that interest in copyright arose and the question of copyright extension became a widespread topic of discussion was because such Japanese pop culture as manga and anime gained increasing popularity overseas. Those who became

excited about the prospects for generating national wealth through Japanese manga and anime—not only in the industry but even in the prime minister's official residence at one point—became concerned about having a firm grip on the rights involved, and that led to the emergence of measures of all sorts related to protection of so called intellectual property rights.

The immediate problem in international contents distribution is pirate publishing of Japan-made contents in Asia. Pirate editions of television dramas and anime programs and films circulate widely in Asia, apparently to the detriment of Japanese industry. Still, can it really be said that such pirate editions are as damaging as the government and industry say they are? What copyright tries to do is to prohibit copying in order to make the contents hard to obtain, using the rarity of the merchandise as the source of its value. However, in the age of the Internet, which has created revolutionary changes in content distribution, there must be other, quite different ways to generate value. My idea is that new sources of value will be found not by making content hard to obtain but by dispersing it very widely.

The case of Japanese manga and anime is a good one illustrating how broad dispersal achieved value. One can get a vivid image of just how many artists and supporters the dispersal of contents has generated by attending the eye-opening, massive event that is the "Comic Market" (Comiket) in Tokyo. Each of the biannually held Comiket events provides a venue for more than 30,000 sellers (circles) to sell self-published works, drawing more than half a million visitors over the three days it is held. There are probably few such heavily attended indoor events held anywhere the world. Most of the self-published works on sale at Comiket, moreover, are parodies of already published manga and anime, or adaptations of them. At Comiket, characters and images are dispersed to the point of virtual chaos. Some condemn the comic market as a corruption of public morals, but it nevertheless attracts many people, and the figure of half a million is evidence that it does generate new cultural value.

The process by which Japanese animation and manga spread to Europe and the United States, too, testifies to the way dispersion generates value. It is safe to say that the current popularity of Japanese-made anime in the West would not have happened if it had not been for the many copies made without permission by fans in each country, the illegal showings, and various other infringements of copyright.

Let us look at a specific example. The "pirate" editions of anime—what are known as "fan subbed" films—are often subtitled by fans conversant in the language of animated films, and, since they are done by people who love what they do, they are often of quite high quality in terms of translation. As soon as an animated work is aired on television in Japan, a video-recorded file is sent overseas, and fans set to work adding subtitles in their language. Often only one day passes before an anime is uploaded to a fan's website, complete with these "fan subs." Fan-subbed anime have been around since the spread

of household video-recording devices in the 1980s. Such handmade versions were, of course, bold infringements of copyright, but it was through such countless acts of piracy that the popularity of Japanese anime in the West came about.

"Pirate" publishing, in fact, has been the driving force in spreading Japan's pop culture overseas, not just in Asia, Europe, and the United States, but elsewhere, and represents an important distribution infrastructure in the world. But what makes "pirate publishing" piracy is copyright. When people and information cross borders, and the quantity grows, culture, too, seeps out, spilling over the borders of nations. The longer the term of rights protection is extended, the more likely it is to cause content to be "piratized."

The impact of pirate publishing is three-fold: first, it creates a market; second, because prices are low it increases the ranks of younger fans; and third, it encourages original work among those fans. It is easy to criticize pirate publishing, but to simply dismiss it as illegal or unethical blinds us to the complex and fascinating dynamics of culture.

Clearly there are many people even today who want to secure their rights "in perpetuity." The extension of copyright appears to be set upon a vector aimed at protection in perpetuity. The theme of this book is that there seems to be much to be learned from the history of the idea of perpetual copyright.

What my research for this book has confirmed for me is that the "expiration date" on what we know of as "copyright" was not something endowed by heaven or the gods, but was the prize that was won in an epochal struggle between "pirates" and the monopolists of culture they dared to challenge. We can no longer believe in the simple dichotomy of one side being good and the other side bad. Both sides were ultimately bent on the pursuit of profit, those on one side citing the rights of the author and those on the other appealing for the rights of the reader. I also want to present a view of history that shows how the confrontation between the two sides was influenced by the complexities of the interpersonal relations among members of the legal profession involved in the cases. To the scholar of law, for whom priority would no doubt be focused upon the detailed analysis of the logical structure of the trial proceedings, this approach may seem misguided. I am convinced, however, that the forces that move the currents of history cannot be found simply by tracing the arguments presented in the trials.

Many books have been published about copyright, but I do not think there are any others, including those in English, that portray Alexander Donaldson and his "pirate" publishing business in Edinburgh and discuss the complexities of the interpersonal relationships among the people around him in a broad social and historical context. Lacking much understanding of why there are limitations on the term of copyright and what led to the establishment of such limitations, it is easy for the arguments in favor of copyright extension, defending the prerogatives only of rights holders to hold sway. The history

of copyright in Japan has been little more than the successive adoption of systems from overseas. The uncritical acceptance of international rules and practices may be attributed to the nature of Japanese culture, but part of the reason I wanted to write this book was because I cannot help thinking that both practitioners and researchers have failed to consider sufficiently what is really at the root of the debate.

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This English edition has come about over several years, and I would like to explain a few points of consideration in its making. I first wrote, rather briefly, about Donaldson in my 2002 book *Nihon bunka no mohō to sōzō* [Imitation and Creation in Japanese Culture] (Kadokawa Shoten). I was aware that the Edinburgh bookseller was a key figure in considering the matter of copyright, but at the time I had not been able to thoroughly peruse the documents of his case, and I wanted to write something focused on him after I had done adequate research. Soon after publishing *Nihon bunka no mohō to sōzō* I was given the opportunity to spend nine months doing research in England at Cambridge University. The Japanese edition of *"Pirate" Publishing* took shape based on the sources I read in the library at Cambridge.

The work of reading documents written in eighteenth-century English, especially the complex language of the legal profession at that time was quite tortuous for me. I am, moreover, not a specialist in the history of Britain. Indeed, in the process of translating this book into English, we discovered a number of slight errors in the Japanese edition, which have been corrected here. I have also referred to a few works that I had not been aware of at the time of writing the Japanese edition. Among them, perhaps the most important is Ronan Deazley's *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain* (2004). I found out about Deazley's book while I was re-checking recent publications to prepare the English translation. His discussion coincidentally overlapped with mine.

Apparently when writing about Britain's parliament in the eighteenth century, it is usual to frame the discussion in terms of confrontation between the Tories and the Whigs. I have not attempted to follow that line of argument. From what I could see, neither of the parties was monolithic, and if I tried to introduce the matter of political parties, my discussion would become even more complex, making it difficult to give readers a clear bird's-eye view of the subject.

In writing, I tried to follow the primary documents I had read as closely as possible, but of course I have also relied heavily on previous research. Indeed, I probably would not have developed my interest in this subject if it had not been for such previous studies. I was particularly stimulated by reading Shirata Hideaki's *Kopīraito no shiteki tenkai* [The

Historical Development of Copyright] (Shinzansha, 1998); probably there are few studies tracing the history of Anglo-American copyright as meticulously as Shirata's anywhere in the world.

My own book is written for a general readership, so while striving to observe rigorous scholarly practice throughout, I have omitted major segments of the arguments presented in the *Donaldson v. Becket* trial. If I had included it all, the book would have been several times its current length and the story would have become so detailed that readers would have lost interest before getting to the end. I refer readers interested in the finer points to Deazley's work and the other titles listed in the bibliography.

My research for this book greatly benefited from the assistance of the librarians at the International Research Center for Japanese Studies (Nichibunken) where I am employed, who kindly helped me obtain numerous resources. Nichibunken selected this translation project as one volume of the Nichibunken Monograph Series, edited by Patricia Fister, and provided the funding. It was translated by Lynne E. Riggs of the Center for Intercultural Communication. I also benefited greatly from the contents of the 1911 edition of the *Encyclopedia Britannica*, which has many entries with detailed information about historical figures not famous enough to have been retained in more recent editions. The added bonus of the 1911 edition is that, thanks to its copyright having expired, it is available via the Wikipedia (English) website, where I could access it even from home. This has well confirmed for me the benefits of expired copyright. I am glad that this book will also be published in digital format under a Creative Commons License. Those who wish to access this book online may find it using an Internet search engine.

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Yamada Shōji
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