

Topic 6: Outline of Copyright System in Japan and Issues Copyright Law Faces

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I Introduction

The purpose of this paper is, first of all, to show a bird's eye view of copyright systems in Japan by describing the structure and basic concepts of its Copyright Law, and secondly, by pointing out the current technological changes surrounding it, to clarify the meaning of problems and issues that Copyright Law faces today.

II Outline of Copyright Systems in Japan

II-1 Structure of the Copyright Law of Japan

In this paper, the word 'copyright' appears three times with three respective meanings. (see diagram 1). 'Copyright' in its broadest sense includes 'Copyright' as 'Author's Right' and Neighbouring Rights (Related Rights). Neighbouring rights are rights for persons who communicate works, etc. 'Copyright' as 'Author's Rights' consists of 'Moral Rights' and 'Copyright' as 'Economic Rights'. As 'Moral Rights' of authors are rights that are entirely personal, they cannot be transferred, but 'Copyright' as 'Economic Rights' can be transferred, because of its nature as economic property. The reason why the Japanese Copyright Law adopted the structure of having moral rights along with economic rights is that it took Continental Law as its basis. In Continental Law, works are regarded as a manifestation of the personality or character of authors. Thus, this theory results in the following article 17 of the Japanese Copyright Law. "the enjoyment of normal rights of authors and copyright shall not be subject to any formality" (Article 17), which is the so-called non-formality principle. This is based on the idea that it is impossible to set a standard, or to fix the method, or to select the person, to evaluate the value of a personality or character.

The current Copyright Law, which came into force in 1971, was revised around 30 times to comply with related international treaties (see diagram 2). As a result, the structure of the present Copyright Law has become so complicated that it is difficult for laypersons to understand its details at first sight (ref. the number at the bottom of diagram 1).

II-2 Specifics

This section deals with definition and explanation of 'rights owners', 'objects to be protected' and 'rights to be protected'.

II-2-1 Copyright (Author's Rights)

The author is the 'Rights Owner'. 'Author' means a person who creates a work (Article 1). As I mentioned in the above section, since Copyright (Author's Rights) is composed of 'Moral Rights' which cannot be transferred, and 'Copyright' as 'Economic Rights' which is transferable, the former automatically belongs to the author alone while the latter is able to be transferred to others through buying and selling or inheritance, etc., after once it automatically belonged to the author when the work was created. Therefore, anyone, including a legal person, can become the rights holder of 'Copyright' as 'Economic Rights' (see the top left of diagram 3). In the Japanese Copyright Law, there is an exceptional provision on authorship of a work created by an employee in the course of his duties, where if some conditions are met, the employer, including a legal person, can automatically obtain the authorship of a work, meaning it can become rightsholder of both the Copyright (Author's Rights) and 'Copyright' as 'Economic Rights' (Article 15). The other exceptional provisions are on the authorship of a cinematographic work (Article 16) and ownership of 'Copyright' as 'Economic Rights' in Cinematographic Works (Article 17).

'Objects to be protected' are 'Works' (see the right side of diagram 3). "Work" means a production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain (Article 2 (i))". This definition means that 'Objects to be protected' are not thoughts and sentiments themselves but concrete 'expression' which reflects those thoughts and sentiments on the production. That means ideas are not to be protected. Academically, expression is also divided into 'internal form' and 'external form'. Introducing the concept of internal form is instrumental for us to rationalise the right of the author of the pre-existing work on the derivative works. The idea of internal form is also essential in making the criteria to judge whether a production is reproduction or not.

'Rights to be protected' as 'author's rights' are 'Moral Rights' and 'Copyright' as 'Economic Rights'. 'Moral Rights' consists of three kinds of rights as shown in diagram 4, and rights included in 'Copyright' as 'Economic Rights' are shown in diagram 5. Since 'Copyright' as 'Economic Rights' consist of various rights, it is often referred to as

'Bundle of Rights'. These rights are classified into two categories. One is 'Exclusive Rights' i.e. 'Rights of Authorization', and the other is 'Remuneration Rights'. The former is the right to permit or authorize others to exploit works, and the latter is the right to request others to pay a reasonable amount of remuneration after a certain act has been done. The former is a much stronger right than the latter. Therefore, this right is the essential right of copyright owners and they may execute the right of demanding cessation (see diagram 12). Further, 'Exclusive Rights' (Rights of Authorization) are also classified into tangible or intangible exploitation. The typical case of tangible exploitation is the 'Right of Reproduction'.

“‘Reproduction’ means the reproduction in a tangible form by means of printing, photography, sound or visual recording or otherwise”; (Article 2 item 1(xv)). Within the Copyright Law, the concept of 'Reproduction' is just as important as that of 'Works'. 'Copyright' as 'Economic Rights' can be transferred to others by buying and selling or by inheritance either as a whole or of individual branch rights that constitute a 'Bundle of Rights' (see diagram 5). In addition, both 'Copyright' as 'Economic Rights' and individual branch rights can be made use of not only as a whole but also individually or in partial by contract. When we understand such structure of the Copyright Law, it is easy for us to see why 'Copyright' as 'Economic Rights' is so complicated. Moreover, the complexity is facilitated when linked with 'Neighbouring Rights'.

II-2-2 Neighbouring Rights

'Neighbouring Rights' are quite different from 'Copyright' as 'Author's Right'. In this respect, the Copyright Law states as follows: “No provisions in this Chapter may be interpreted as affecting the protection of the rights of authors” (Article 90).

Then why do 'Neighbouring Rights' are protected by the Copyright Law? The reason is, first of all, when works are being communicated to others, there is creativeness that is similar to actually creating 'works'. Another reason, among others, is that if communicating 'works' are not protected, the protection of 'Copyright' as 'Author's Right' will not be ensured completely.

Four persons can be identified as 'Rights Owners' (see diagram 6). Although 'Wire Diffusion Organisations' are not protected under the Rome Convention, which sets out the system of protection for the holders of neighbouring rights, the Japanese Copyright Law offers much broader protection to

them. (see diagram 2) The official name of the Rome Convention is 'International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations'. I should like to mention here that the basic treaty for 'Copyright' as 'Author's Right' is the Berne Convention. Japan acceded to it in 1899, and enacted the old copyright law the same year. The 'National Treatment' of Rome Convention differs from that of the Berne Convention. Where the Berne Convention provides national treatment to citizens of other member countries, the Rome Convention provides that “National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention” (Article 2).

'Objects to be protected' are shown in diagram 6. An act of performance, an act of fixation i.e. sound recording, an act of broadcasting and wire diffusion are protected. The object to be protected in broadcasting, for instance, is not the programme itself, but the broadcasting signal to the public. If the programme being broadcast is a work, it can be protected as a work itself by Copyright. That is another matter. Here, 'the Public' is also one of the important concepts. The Copyright Law provides that as used in this law 'the public' includes a large number of specific persons (Article 2 (5)).

'Rights to be protected' as neighbouring rights (related rights) are shown from diagram 7 to 9. Performers have 'Moral Rights', which are limited in comparison with authors. Concerning lending of commercial phonograms, the rights are protected by 'Exclusive Rights' (Rights of Authorisation) only one year after the release, and the remaining 49 years they are protected by 'Remuneration Rights'.

Especially, 'Right of making sound or visual recording' (Article 91) of Performers is strictly restricted by Article 91(2). Namely, “The provision of the preceding paragraph (i.e. Right of making sound or visual recordings) shall not apply to performances which have been incorporated in cinematographic works with the authorisation of the owner of the right mentioned in the same paragraph, except in the case where such performances are to be incorporated in sound recordings (other than those intended for use exclusively with images)”. However, it is allowed to make a contract with the contents contrary to the said Article 91(2) when concluding a contract for authorization. Just for reference, 'cinematographic work' needs to be fixed in some material form (Article 2(3)). 'Phonogram Producers' have 'Economic Rights' consisting of 'Exclusive Rights' (Rights of Authorization) and 'Remuneration Rights' (see diagram 8). As for

'Broadcasting Organisations' and 'Wire Diffusion Organizations', they only have 'Exclusive Rights' for 'Economic Rights' as shown in diagram 9.

II-3 Limitation on Rights

It is said that the history of Copyright began about the middle of the fifteenth century when printing technology was invented. It can be said that it is newer than the right of ownership of tangible property. There might be some attempts to rationalize the existence of Copyright from approaches of legal history or philosophy of law. The great majority seek for the basis of the rationalization in incentive theory or public domain theory. The discussion on the matter is beyond the purpose of this paper. I would like to do further research on it in the Copyright Law.

The purpose of Copyright Law is provided for as follows: The purpose of this Law is, by providing for the rights of authors and the rights neighbouring thereon with respect to works as well as performances, phonograms, broadcasts and wire diffusions, to secure the protection of the rights of authors, etc., having regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture (Article 1). In the Copyright Law, works etc. are defined as cultural products, and fair exploitation of them is requested. That works are cultural products means that they are created on the intangible cultural inheritance of our predecessors. While the first emphasis is on the protection of copyright, fair exploitation requires adjustment of the balance between exploitation and copyright protection. Thus limitation on copyright is actualized by adjusting the balance, and the term of protection to be described in the following session, exists. In other words, exclusiveness of copyright is justified by the existence of its limitation and term of protection. When making the balance, social values that are equal to or more valuable than copyright should be taken into account. We can take, for instance, freedom of expression, protection of the weak, purpose of education and private use, etc. The details of limitation are shown in diagram 10.

II-4 Term of Protection

Diagram 11 indicates Term of Protection, but the beginning of each term varies according to rights. The duration of copyright begins with the creation of the work (Article 51). In the case of a cinematographic work, the term begins when the work is made public (Article 54).

Beginning of the terms of protection of the following neighbouring rights are as follows (Article 101).

- 1) when the performance took place, for performances;
- 2) when the first fixation of sounds was made, for phonograms;
- 3) when the broadcast took place, for broadcast;
- 4) when the wire diffusion took place, for wire diffusions.

Moral rights of authors ceases to exist by their death, which means the term of moral rights of authors is their lifetime. But, Article 60 provides that even after the death of the author, no person who offers or makes available a work to the public may commit an act which would be prejudicial to the moral rights of the author if he were alive.

II-5 Measures against Infringements

Diagram 12 indicates Measures against Infringements. Some features are as follows.

1) Civil Remedies

It is generally said that the Copyright Law has the nature of a special law of the Civil Law. When copyright is infringed upon, general terms of the Civil Law such as a compensation for damage (Article 709 of the Civil Code) apply in conjunction with civil and special measures provided for in the Copyright Law. But, there is not any provision on the 'Right to demand cessation' in Article 709. (There are some previous court decisions admitting the right to demand cessation in pollution cases etc., but they are not considered to be the effect of a compensation for damage.) Therefore, the Right to demand cessation is provided for by the Copyright Law in order to ensure the function of copyright as 'Exclusive (i.e. dominant) Rights'. Besides, the objects to be protected have been actually expanded by Article 113 (the Copyright Law) on acts considered to be infringements.

2) Criminal Remedies

Criminal punishment is provided for as a penalty for the infringement. But the infringement of copyright is in principle a crime indictable upon a complaint, except for some cases (Article 123). In accordance with Article 124, a fine shall be imposed upon a legal person as employer, in addition to the punishment of the offender.

At the end of this part, may I remind you that, in order to obtain copyright, there is no need for the author or performer to be in business such as professional novelist or professional singer, etc.

III Issues Copyright Law Face Today

The issues surrounding the Copyright Law today result from computerization, networking and digitalization. To put it more precisely, problems occurred due to the following changes.

- 1) Change in ‘work to be protected’ itself
Examples: appearance of the so-called multimedia, game software, database, etc.
- 2) Change in medium to be used for reproduction
Examples: appearance of CD, MD, DVD, hard disk, memory of server, etc.
- 3) Change in exploitation form
Example: appearance satellite broadcasting, internet, file-swapping software, etc.

The Copyright Law needs to comply with each technological change, but at the same time it must respond to unexpected circumstances caused by such technological changes as well. The ever-increasing pace of technological development has promoted a fundamental change in the function and effectiveness of Copyright Law. Distinction between the two, i.e. author and neighbouring rights holder, and user was comparatively clear when the Copyright Law needed to comply with the revision of the international copyright treaties, such as WCT and WPPT which were adopted in 1996. However, today it is necessary for the Law to respond to smooth and faster exploitation of works under the current situation where a person can become an author, a neighbouring rights holder, and user at the same time.

Under such circumstances, the following topics are under discussion or to be discussed at present.

- ① To realize distribution of digital contents easily
 - To promote secondary use of contents (especially old TV programmes) on the internet
 - To establish multilevel distributionship environment for search engines
 - To solve issues on works created by integrating multiple sources
- ② To introduce ‘fair use’ provision
- ③ To strengthen measures against illegal contents on the Internet
- ④ To review ‘Compensation System for Private Recording’
- ⑤ To review ‘Reproduction for Private Use’
 - Private sound or visual recording for illegal sound or visual recordings as well as illegal transmission
 - Private sound or visual recording from the

contents transmitted by lawful transmission business

- ⑥ To extend ‘Term of Protection’
- ⑦ To facilitate the ‘exploitation of copyrighted works’
 - Facilitating secondary use of copyrighted works created by multiple right holders
 - Facilitating secondary use in case where contract negotiation is difficult owing to the disappearance of right holders
 - Facilitating digital archive activity in libraries
- ⑧ To accelerate measures to prevent Pirated Copies to spread further
 - To regard the offering of transfer of pirated copies on the Internet as infringement
 - To review the idea that copyright infringement is a ‘crime indictable upon a complaint’
- ⑨ To review ‘Limitation on Copyright’
 - ‘Document supply to medical agencies’ on the basis of the provision of the Pharmaceutical Affairs Law
 - Exploitation of works to ensure ‘information access by the disabled’
 - Legislative issues on ‘search engine’
 - Issues on ‘reverse engineering’
 - Issues on ‘information use in the course of research development’
 - ‘Ephemeral fixation’ in the course of transmission or in using machines
 - ‘Indirect infringement’

IV Conclusion

To end my presentation, I would like to refer to the relationship between copyright, which is one of intellectual properties, and development. One can expect that by establishing a domestic market where copyright is protected appropriately, we can protect and develop our own culture. The existence of such a market, which ensures the protection of copyright, serves as an assumption for the transfer of Intellectual Property or knowledge. And then, the transfer of knowledge, which will be facilitated by the protection, will enable the country to reduce or bridge the digital divide or knowledge gap and to join a knowledge-based society as an indispensable member.

Note: Translations of articles of Copyright Law of Japan from ‘Copyright Law of Japan 2008’ translated by OYAMA Yukifusa and others, published by Copyright Research and Information Center (CRIC) 2008.

Appendix: Activities on Copyright Education by JCO

1. Domestic Activities

- Copyright Education for Children
 - Handing out cartoon booklets
 - Producing educational software
 - Producing teaching manual for teachers
 - Practical research of copyright education at model schools
- Copyright education for adults
 - Training sessions held by the national government
 - Copyright educator training
 - Development of a 'Standard Training Curriculum'

2. Regional Activities (Asia and the Pacific)

- Asia-Pacific Copyright System Enhancement (APACE) program (since 1993)
- Training Seminar (since 2007, the predecessor started in 2002)
 - Asian Copyright Seminar (since 1997)
 - Asian Copyright Handbook (in English)

Outline of Copyright Systems in Japan and the Issues the Copyright Law Faces

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I Outline of Copyright Systems in Japan

1. Structure of the Copyright Law in Japan
2. Limitation on Rights
3. Term of Protection
4. Measures against Infringements

II Issues the Copyright Law faces

I Outline of Copyright Systems in Japan

1

1. Structure of the Copyright Law of Japan

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    graph LR
      Copyright[Copyright] --> Author[Author's Right (Copyright)]
      Copyright --> Neighboring[Neighboring Rights (Related Rights)]
      Author --> Moral[Moral Rights ①]
      Author --> Economic[Economic Rights (Copyright) ②]
      Moral --- Inalienable[inalienable]
      Economic --- Alienable[alienable]
    
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124 articles + 48 articles with a branch number + 35 supplementary provisions

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Brief History of Copyright Treaties

- 1886 Berne Convention for the Protection of Literary and Artistic Works (amended in 1908, 1928, 1948, 1971)
- 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Related Right)
- 1994 WTO/TRIPS agreement
- 1996 WIPO Copyright Treaty
WIPO Performances and Phonograms Treaty

3

Copyright (Author's Right)

- [Rights Owners]
 - Moral Rights① = Author only
 - Economic Rights② = Author (Copyright) and/or Copyright Owner
 - (Exception : § 15 § 16 → § 29)
- [Objects to be Protected]
 - Works (definition : § 2)
 - Examples(§ 10)
 - literary works
 - musical works
 - choreographic works
 - artistic works
 - architectural works
 - map and figurative works
 - cinematographic works
 - photographic works
 - (computer) program works
 - Derivative Works (§ 11)
 - Compilations(§ 12)
 - Database works(§ 12bis)

Slide No.④ and Slide No.⑤

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Moral Rights of Authors ①

- Right of making the work public(§ 18)
- Right of determining the indication of the author' s name(§ 19)
- Right of preserving the integrity (§ 20)

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Copyright (Economic Rights) ②

Bundle of rights

- **Exclusive Rights**
 - Rights of Reproduction(§ 21)
 - Right of Performance (§ 22)
 - Right of Presentation (§ 22bis)
 - Right of public transmission, etc. (§ 23)
 - Right of recitation (§ 24)
 - Right of exhibition (§ 25)
 - Right of distribution (§ 26)
 - Right of transfer of ownership(§ 26bis)
 - Right of lending(§ 26 ter.)
 - Right of translation, adaptation, etc (§ 27)
 - Right of the original author in exploitation of a derivative work (§ 28)
- **Remuneration Rights**
 - Rights to receive compensation for private digital recording(§ 30 ☉)

6

Neighboring Rights(Related Rights)

- [Rights Owners]
 - Performers
 - Phonogram Producers
 - Broadcasting Organizations
 - Wire Diffusion Organizations
- [Objects to be Protected]
 - "Performance"
 - "Phonograms"
 - "Broadcasting"
 - "Wire Diffusion"
- [Rights to be protected]
 - Slide No. ☉- Slide No. ☉

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Rights of Performers

- **Moral Rights**
 - Rights of determining the indication of the author' s name (§ 90bis)
 - Right of preserving the integrity(§ 90ter)
- **Economic Rights**
 - Exclusive Rights**
 - Rights of making sound or visual recording(§ 91 → limitation § 91 ☉)
 - Right of broadcasting and wire diffusion(§ 92)
 - Right of making transmittable(§ 92bis)
 - Right of transfer of ownership(§ 95bis)
 - Right of lending of commercial phonograms (the first one year only after the release)(§ 95 ter)
 - Remuneration Rights**
 - Wire diffusion of performances broadcast (§ 94bis)
 - Secondary use of commercial phonograms(§ 95)
 - Lending of commercial phonograms (for 49 years from the second year after the release)(§ 95 ter)

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Rights of Phonogram Producers

- **Economic Rights**
 - Exclusive Rights**
 - Right of reproduction(§ 96)
 - Right of making transmittable(§ 96bis)
 - Right of transfer of ownership(§ 97bis)
 - Right of lending (the first one year only after the release)(§ 97ter)→ref. § 95ter.
 - Remuneration Right**
 - Secondary use of commercial phonograms(§ 97)
 - Lending of commercial phonogram (for 49 years from the record year after the release)(§ 97ter☉) → (ref. § 95ter)

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Right of Broadcasting Organizations

- **Economic Rights**
 - Exclusive Rights**
 - Right of reproduction (§ 98)
 - Right of rebroadcasting and wire diffusion(§ 99)
 - Right of making transmittable(§ 99bis)
 - Right of communication of television broadcasts(§ 100)
 - Rights of Wire Diffusion Organizations**
 - **Economic Rights**
 - Exclusive Rights**
 - Right of reproduction (§ 100bis)
 - Right of rebroadcasting and wire rediffusion(§ 100 ter.)
 - Right of making transmittable(§ 100quater)
 - Right of communication of wire television diffusions(§ 100 quinquies)

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2. Limitation on Rights

- ◆ **Limitation on Copyright (Economic Rights)**
 - Example of limitations (§ 30~ § 47ter)
 - Reproduction for personal use
 - Reproduction in and by libraries
 - Use for Quotation
 - Reproduction in education institutions
 - Use for handicapped people
 - Specific acts for non-profit-making purpose (performance, recitation, cinematographically present, and so on)
- ◆ **Limitation on Neighboring Rights**
 - Some provisions of article 30 and below shall apply mutatis mutandis (§ 102)

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3. Term of Protection

- ◆ **Author's Right: 50 years after his/her death (§ 51)**
 - Cinematographic work's Right : 70 years following the making public of the works (§ 54)
- ◆ **Neighboring Rights (§ 101)**
 - Producer of Phonograms' Right : 50 years from the end of the year in which the first fixation of sounds is made
 - Broadcasting Organization's Right : 50 years from the end of year in which the broadcast takes place
 - Performer's Right : 50 years from the end of the year in which the performance takes place

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4. Measures against Infringements

- ◆ **Civil Remedies**
 - General Provisions for Civil Remedies (Civil Code) (§ 709)
 - Special Provisions for Copyright (Copyright Law) (ex. Presumption of amount of damages (§ 114))
- ◆ Acts considered as infringements (Copyright Law) (§ 113)
- ◆ **Border Measures and other Preventive Measures**
 - Custom Tariff Law
 - Copyright Law (Right of demanding cessation) § 112
- ◆ **Criminal Remedies (Crime indictable upon a complaint)**
 - Copyright Law
 - [on a person] (§ 119)
 - Imprisonment : up to 10 years or
 - Monetary fine : up to 10 million yen or
 - Both imprisonment and fine will be changed.
 - [on a legal person] (§ 124)
 - Monetary fine : up to 300 million yen will be changed in addition to the infringer.



- Realization to distribute digital contents easily
- Introduction of 'fair use' provision
- Strengthening of response against illegal contents on the internet
- Review of 'Compensation System for Private Recording'
- Review of 'Reproduction for Private Use'
- Extension of 'Term of Protection'
- Making smooth the 'exploitation of copyrighted works'
- Prevention 'Counter Measure against Pirated Copies' spreading
- Review of 'Limitation on Copyright'

