



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

ALAI
2021
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COPYRIGHT, COMPETITION AND INNOVATION

QUESTIONNAIRE – NATIONAL REPORT OF JAPAN

Notes: This questionnaire aims at collecting information of law, caselaw and practices available in each country.

Please refer to the ALAI2021 program for further explanation on the Sessions and Panels.

Please, keep your answers short and factual.

Please send national report to rxalabarder@uoc.edu.

Deadline: 15 August 2021.

1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS

Identify and explain any specific instances where market competition and innovation concerns haven been specifically addressed by copyright law or caselaw in your country. This may include by means of:

1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.

There seems no explicit provision defining the scope of exclusive rights or interpretation therefor to account for competition and innovation concerns in Japanese Copyright Act (JCA).

However, a temporary storage is regarded as not coming within the concept of “reproduction” under the Japanese Copyright Act according to the widely accepted view. One judicial precedent, after stating that “in order to come within ‘reproduction’ under the Copyright Act,” the act of reproduction “must make a copy in a form incorporating the possibility of repeated use in the future,” determined that storage of data or the like on a RAM is of a temporary and transitory character and, accordingly, does not come within “reproduction” under the Japanese Copyright Act (Tokyo District Court, May 16, 2000, Hanrei Jihô No. 1751: 128 [Star Digio Case]. A translation is available at http://www.ip.courts.go.jp/app/files/hanrei_en/181/002181.pdf). That might be characterized as interpreting the scope of exclusive rights to account for competition and innovation concerns.

1.2.- Defining (or interpreting) the scope of exempted uses (E&L) on account of competition and innovation concerns.

Some provisions on copyright exception and limitation under the Japanese Copyright Act be characterized as defining interpreting the scope of copyright E&L to account for competition and innovation concerns. In particular, Article 47-4 and 47-5 are both computer-related provisions.

Article 47-4 of the JCA, which was introduced by the 2018 amendment (Law No.30 of 2018) and came into force on January 1, 2019, permits the copying, in the course of data processing, by



a computer of works in physical copies or upon receiving their wireless or cable transmissions (Art. 47-4(1)(i)); the copying in mirror or cache servers (Art. 47-4(1)(ii)); the reproduction and adaptation of a work for the purposes of preparing or recording data contained in the work in order to process that data by any computer, notably a server, feeding a communication network (Art. 47-4(1)(iii)) as well as any other equivalent uses of works that allow for the smooth or effective operation of computers (the main paragraph of Art. 47-4(1)) and the copying, in the course of the maintenance, repair or replacement of devices, of works by a computer (Art. 47-4(2)(i) and (ii)); the copying in backup servers (Art. 47-4(2)(iii)) as well as any other equivalent use of works for maintenance or recovery purposes using computers (the main paragraph of Art. 47-4(2)).

Article 47-5 of the JCA, which was introduced by the 2018 amendment (Law No.30 of 2018) and came into force on January 1, 2019, permits the copying of works and public transmission thereof on a minimal scale, including the use of thumbnails or snippets to offer a computer-based information location service such as a web search engine or a book search service (Art. 47-5(1)(i)); the copying of works and public transmission thereof on a minimal scale, including the use of snippets in offering a computer-based information analysis service such as a plagiarism detection service (Art. 47-5(1)(ii)) and the exploitation on a minimal scale by offering an equivalent and useful computer-based service that involves creating new expertise or information and enhancing consumer convenience, in so far as the service has been specified by a Cabinet Order in advance (Art. 47-5(1)(iii)).

1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, ECL, etc) or “joint-tariffs”, “one-stop-shops” ... and explain their impact in the market

The Japanese Copyright Act contains the provisions regarding compulsory licenses (Arts. 67 through 69). In particular, Article 69 provides for a license for the exploitation of a work regarding sound recording on a commercial phonogram where the person wishing to make the recording has failed to reach agreement with the copyright holder of the work through consultation, which is aimed at promoting the distribution of music and to contribute to the improvement of music culture by eliminating the monopoly of recording and transfer rights held by certain record companies (See Moriyuki Kato, *Chosakukenho-Chikujokogi [Commentary on Copyright Law]*, p.478). But, no compulsory licenses had been issued under Articles 68 or 69.

1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. ...)

No information.

1.5.- By any other means?

No information.

2. A STUDY CASE: DATA ECONOMY



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Data is called the “new oil” for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)

Notice: we are not only talking about corpuses specifically prepared for TDM purposes (i.e., electronic journals, databases, etc), but also about processing (machine reading) of works, in general, (texts, images, etc) available either online, in digital form or in analogue form.

2.1.- Is “machine reading” an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?

Under the Japanese Copyright Act, “machine reading” is regarded as an act of reproduction. But, the Japanese Copyright Act has a very broad copyright exception for text-and-data mining (TDM), Article 30-4(ii), under which an exploitation of works (not only legally accessible works but also copyright-infringing works) for text and data mining is widely allowed, whether for non-commercial or commercial purposes, and whether or not involving the use of computers. Under the Japanese Copyright Act, even if a copyright holder expressly makes a reservation (opt-out) for an exploitation of a work for commercial TDM, the Japanese TDM copyright exception applies to the exploitation regardless of the reservation. Even if you acquire a work based on a contract and copy it for TDM in breach of the contract, the act of copying would not constitute copyright infringement based on the Japanese TDM exception.

In detail, see [Tatsuhiko Ueno, The Flexible Copyright Exception for “Non-Enjoyment” Purposes: Recent Amendment in Japan and its Implication, 70\(2\) GRUR International 145-152 \(2021\).](#)

2.2.- Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc based on reusing data produced by the Public sector.

There is Basic Act on the Advancement of Public and Private Sector Data Utilization (Law number: Act No. 103 of 2016). The translation is available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=2975&vm=04&re=01&new=1>. There are the following websites for Public Sector Information.

Policy Open Data (in Japanese)

<https://cio.go.jp/policy-opendata>

Open Governmental data (in Japanese)

<https://www.open-governmentdata.org/>

2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?

No information.



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Part 1&2 prepared by Tatsuhiro UENO (Professor at Waseda University, Tokyo)

3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND

Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:

3.1.- “Essential facilities” doctrines to foster the development of downstream markets

Japanese courts have never accepted “essential facilities doctrines”, nor does its competition authority, The Japan Fair Trade Commission (hereinafter “JFTC”). So, the case concerned isn’t known.

3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?

The case exactly related to copyright isn’t known. But JFTC consider it as anti-competitive, in regard to patent license, for licensors to impose limits on licensees as to the quality or suppliers of raw materials, components and other items needed to supply the product using the licensed technology (*Guidelines for the Use of Intellectual Property under the Antimonopoly Act**, 2007, revised 2016, pp. 19-20).

*https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/IPGL_Frand.pdf

3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.

The *Microsoft* case is known (JFTC Recommendation Decision No. 21 of 1998 on December 14, 1998*). *Microsoft* refused to install its “Excel” solely into personal computers of its clients. It forced clients to install its “Word” together with “Excel” aiming to exclude its competitors in the field of word-processing software for personal use. JFTC considered this behavior as one of Unfair Trade Practices prohibited under the article 19 of the *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade*** (Act No. 54 of April 14, 1947, hereinafter “AMA,” *The Antimonopoly Act*) and the article 10 (Tie-in Sales, etc.) of *Designation of Unfair Trade Practices**** (A Guideline, 1982, revised 2009).

*https://snk.jftc.go.jp/JDS/data/pdf/H101214H10J02000021_/H101214H10J02000021_.pdf (in Japanese)

** https://www.jftc.go.jp/en/policy_enforcement/21041301.pdf

*** https://www.jftc.go.jp/en/legislation_gls/unfairtradepractices.html

3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting ...

The JASRAC case is known (Supreme Court, on April 28, 2015, 2014 (Gyo-Hi) 75, Minshu Vol. 69, No. 3*). The practice of JASRAC specifying the collection method for royalties for licensing music copyrights to be used in broadcasting was held to have the effect of making it extremely difficult for



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other collecting societies to enter the market, which constitutes the element of "exclusion" referred to in the article 2, paragraph (5) of the *AMA*.

* https://www.ip.courts.go.jp/app/files/hanrei_en/204/002204.pdf

Last but not least, the article 19 of the *AMA* and the article 12 (Trading on Restrictive Terms) of *Designation of Unfair Trade Practices* prohibits resale price maintenance (hereinafter "RPM"). But certain types of RPM are exempted from general prohibition since 1953. This exemption applies, in particular, to copyrighted works (books, magazines, newspapers, record disks, music tapes, and music CDs). Japanese system of RPM exemption in 1997 is reported in pp. 83-88 in this OECD document*. JFTC decided in 2001 to uphold the RPM exemption for copyrighted works "for the time being"**.

* <https://www.oecd.org/competition/abuse/1920261.pdf>

**https://www.jftc.go.jp/hourei_files/chosakuken.pdf (in Japanese)

Thanks to RPM exemption, Japanese book publishers can keep the price of their books in any bookstores all over the country. On the other hand, the bookstores are not responsible to sell all the copies they have: they can send the remaining copies back to their publishers (consignment system). For detail, see <https://www.jbpa.or.jp/en/pdf/bookmarket.pdf> (by Seiichi Higuchi representing Japan Book Publishers Association, 2007).

Japanese newspaper market is also characteristic. In 2020, 95.51% of newspapers are delivered to home according to subscription*. In the same year, 61% of households subscribe to newspapers delivered to home everyday**.

*<https://www.pressnet.or.jp/english/data/circulation/circulation03.php>

**<https://www.pressnet.or.jp/english/data/circulation/circulation01.php>

Part 3 prepared by Makoto NAGATSUKA (Professor at Hitotsubashi University, Tokyo), aided by Hiroshi SUGISAKI (Ph. D. Student at the same University)

4. ONLINE MARKETS: "VALUE GAPS" (ONLINE PLATFORMS)

Notice that complete and valuable information resulting from the stakeholders' dialogue and written consultations currently launched by the EU Commission will be available at the time of the Congress. https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591

<https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>

Please include only information that is specific to your country.

4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

If you are an EU country, have you addressed the transposition of Art.17 CDSM Directive?

4.2.- Is there any norms and/or relevant caselaw or licensing addressing news aggregation?



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If you are an EU country, have you addressed the transposition of Art. 15 CDSM Directive?

4.3.- Is there any norms and/or relevant caselaw addressing other value gaps?

For instance, regarding cloud storage and compensation for private copying