Japan

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Japan is a civil law country with relatively developed internet-related intellectual property laws. The Japanese regulatory regime generally favours the protection of intellectual property rights through a series of acts including the Copyright Act, the Patent Act, the Trademark Act, the Unfair Competition Act, and Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (the 'Provider Liability Limitation Act'). The civil code in some of these areas, such as the Copyright Act, is relatively extensive with detailed regulations and significant case law that assists with the interpretation of the code. In other areas, such as the Trademark Act, the code is less extensive with respect to internet-specific issues.

In order to administer these laws, there are a number of specialised administrative and judicial departments tasked with the management and registration of intellectual property rights. These administrative offices include the Copyright Section of the Agency for Cultural Affairs, which handles the voluntary registration of Japanese copyrights; the Software Information Center (SOFTIC), which handles the voluntary registration of copyrightable computer programs and circuit board layouts; and the Japan Patent Office (JPO), which handles registrations of Japanese patents, design rights, trademarks, and the like. Since April 1 2005, Japan has used an Intellectual Property High Court to hear appeals from JPO decisions and district courts actions related to intellectual property.

In intellectual property cases, Japanese judges are bound by the nation's Constitution and enacted laws. Though non-binding, prior court judgments can influence lower courts. Although the Supreme Court and the Intellectual Property High Court have made various leading decisions, not all cases in Japan are reported and a significant percentage of the cases end in settlement, so intellectual property law in Japan is highly reliant on the plain text of various statutes.[1]

1. Copyright, database rights and design rights

1.1 Overview

Japanese copyright law grants exclusive rights to authors of literary, scientific,

1 This chapter frequently refers to unofficial English translations of statutes provided by the Japanese Ministry of Justice (available at www.japaneselawtranslation.go.jp), but the original Japanese language text of each statute is the actual law.

artistic, and musical works in which "thoughts or sentiments are expressed in a creative way".[2] In determining whether thoughts or sentiments are creatively expressed, courts consider factors such as the manner of expression (eg, the selection of words in a written work) and the extent to which a medium of expression allows a creator a wide variety of choices in preparing a work. Work in a medium where choices are limited is less likely to be deemed creative expression. For example, copyright law does not protect news reports and other "reports having the character of being mere communications of facts".[3]

Japanese copyright law also separately protects performances, phonograms, and broadcasts in addition to any underlying content.[4]

(a) Literary works and artistic works

Japanese copyright law can protect any internet or digital literary or artistic content that fits the statutory requirement of creative expression.[5] Indeed, courts have held that even postings to internet message boards are protectable where such postings satisfy that requirement.

Software is protectable as a 'computer program work' (and not as a 'literary work'),[6] but that protection does not extend to programming languages, rules and algorithms which are specifically excluded as protectable works.[7]

(b) Films, sound recordings, and broadcasts

Subject to the creative expression requirement, 'cinematographic works' are eligible for copyright protection.[8] In practice, this term captures all film, television, and similar audio/video content, including user-generated content uploaded to video sharing sites such as YouTube.[9]

Phonograms,[10] the performances recorded therein, and underlying musical compositions all receive independent protection.[11]

Broadcasts that involve transmissions made for simultaneous reception (such as online 'webcasts') are protectable as 'broadcasts' in addition to and separately from the content broadcast.[12]

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2 *Chosakukenhō* [Copyright Act], Law No 48 of 1970, Article 2(1)(i) (hereinafter 'Copyright Act').
3 *Ibid* at Article 10(2).
4 *Ibid* at Article 1. Performances, phonograms, and broadcasts are not 'copyrighted', but rather protected by so-called 'neighbouring right[s]'.
5 *Ibid* at Article 2(1)(i).
6 Note also that software is subject to a special (albeit voluntary) registration process through the Software Information Center (SOFTIC).
7 Copyright Act at Article 10(1)(ix), (3).
8 *Ibid* at Article 10(1)(vii).
9 'Cinematographic works' include any "work which is (i) expressed through a process producing visual or audio-visual effects similar to those of cinematography, and (ii) is fixed in an object" (*ibid* at Article 2(3)). Storage on a hard drive or other medium is generally sufficient to satisfy this and other 'fixation' requirements.
10 'Phonograms' are "fixations of sounds on phonographic discs, recording-tapes and other forms of tangible medium, excluding, however, those fixations [of sound] that are intended to be replayed exclusively with images" (*ibid* at Article 2(1)(v)).
11 *Ibid* at Articles 8, 7(ii).
12 *Ibid* at Articles 1, 2(1)(viii), 9, 9-2.

(c) Typographical arrangements of a published edition

Though unlikely, a typographical arrangement could conceivably qualify as an 'artistic work' if it is a sufficiently creative expression of thought or sentiment.[13]

(d) Protection of the user interface

Graphical user interfaces (GUIs) have been held protectable as creative works where they meet the creative expression requirement.[14]

(e) Computer-generated works

Computer-generated works, such as computer graphics and automated programs, are eligible for protection to the extent that they are the product of human creativity. Where a computer is a mere tool used by a creator to express thoughts and sentiments in a creative way, the resulting work is protectable.[15]

(f) Websites protected as databases

Under the Copyright Act, a database is "a collection of information ... which is systematically organised so that such information can be searched by [a] computer".[16] A database may be independently protected where such database constitute an intellectual creation "by reason of the selection or systematic construction of information contained therein".[17] Where a website meets that standard, it would be protectable as a database. Regardless of the effort involved in their creation, databases that lack sufficient creativity are not eligible for protection.

(g) Compilations

A compilation, which is any collection that is not a 'database',[18] may be independently protected where it "constitute[s an] intellectual creation [through the] selection or arrangement of [its] contents".[19] Again, only compilations that have sufficient creativity are eligible for protection.

1.2 Infringement

A person infringes Japanese copyright by violating a rights-holder's copyrights, neighbouring rights (which are the rights associated with broadcasting and communicating works and are held, eg, by a broadcaster) or moral rights.[20]

(a) Copying

Under the Copyright Act, a rights-holder has the exclusive right to reproduce their

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13 See *ibid* at Article 2(1)(i).
14 *Tōkyō Chihō Saibansho* [Tokyo Dist Ct] June 13 2001, Hei 13 (yo) no 22014, 131 *Hanrei jihō* 1761; *Ōsaka Chihō Saibansho* [Osaka Dist Ct] March 30 2000, Hei 10 (wa) no 13577.
15 Agency for Cultural Affairs Copyright Comm'n, Ninth Subcomm, Computer Creations Report, ch 3 (1993).
16 Copyright Act at Article 2(1)(x)-3.
17 *Ibid* at Article 12-2 (1).
18 Any work that meets the definition of a 'database' is not additionally or alternatively protectable as a 'compilation' (*ibid* at Article 12(1)).
19 *Ibid* at Article 12(1).
20 See *ibid* at Articles 18-20, 21-50. Moral rights are discussed at section 1.12.

work,[21] which can be infringed upon by the production of digital copies. Thus, unauthorised uploading, downloading, or file sharing can constitute unlawful reproduction.

(b) Issuing copies to the public

Issuing unauthorised reproductions to the public, whether done for profit or not, can infringe on a rights-holder's exclusive right to transfer ownership of reproductions to the public.[22] Nonetheless, authorised owners may sell or transfer their reproductions of a work.[23] Thus, a person infringes copyright where that person uploads a copy of a copyrighted work to a website and allows others freely to download that work without the authorisation of the work's owner.

(c) Communicating the work to the public

Even if no copy is made or transferred, communicating a protected work to the public can infringe the right of public transmission.[24] Moreover, even where no transmission actually occurs, merely making a work transmittable or available for transmission can also infringe.[25] Thus, for example, a user could infringe by making protected content available to stream on demand over the Internet without authorisation.

(d) Perform, show or play the work in public

A rights-holder has the exclusive right to perform, present on screen, recite, or exhibit their work.[26] Accordingly, unauthorised public performance, even online, would likely infringe at least one of these rights.

A rights-holder also has the exclusive rights to make recordings of a performance and to broadcast that performance or recording,[27] meaning that both unauthorised recording and/or streaming can infringe.

(e) Rent or lend the work to the public

A rights-holder has the exclusive right to offer their work to the public for rent.[28] This provision does not apply to cinematographic works[29] or phonographic works,[30] for which special rules apply.

(f) Authorising another person to do any of the above

Though Japanese law does not explicitly contain a provision prohibiting the indirect infringement of copyright, courts punish indirect infringement under a doctrine of

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21 Copyright Act at Article 21. 'Reproduction' is "reproduction in a tangible form by means of printing, photography, photocopy, sound or visual recording or other methods" (*ibid* at Article 2(1)(xv)). Creating digital copies on a hard disk, CD, or other storage medium qualifies as "reproduction in a tangible form".
22 *Ibid* at Articles 21, 26, 26-2, 26-3.
23 *Ibid* at Article 26-2(2).
24 *Ibid* at Article 23. See *ibid* at Article 2(1)(vii)-2, (ix)-4.
25 *Ibid* at Article 23(1).
26 *Ibid* at Articles 22, 22-2, 24, 25.
27 *Ibid* at Articles 21, 2(1)(xv)(a).
28 Copyright Act at Article 26-3; see also *ibid* at Article 2(8).
29 *Ibid* at Article 26-3.
30 *Ibid* at Article 95-3.

vicarious liability similar to respondent superior. Liability under that theory depends on:

- whether the party in question:
  - manages, or
  - controls a third party committing an infringing act; and
- whether the third party's infringement was profitable to the first party.[31]

(g) Secondary infringement

Distributing, possessing for the purpose of distributing, and exporting infringing objects by a person who is aware of such infringement is itself infringement.[32] Importing goods for the purposes of distribution that were made by an act that would have been infringing if performed within Japan is also infringement.[33]

1.3 The test for copyright infringement

Generally, to state a claim for infringement, a claimant must show that the allegedly infringing work is both: similar to; and 'dependent' upon (ie, actually copied from) the protected work. Under this standard, the essential characteristics of the original work must be copied. Even the extensive copying of unprotected elements of a work, such as facts, ideas, or tropes, does not infringe. Moreover, even where a work is substantially similar to an existing copyrighted work, unless the original work was actually copied, there is no infringement.

1.4 Exceptions and defences to copyright infringement

Japan has the following limited number of statutory exceptions to infringement.

(a) Format shifting

It is untested whether format shifting constitutes infringement, but given the inclination of the courts strictly to interpret creation of a copy, it is likely that format shifting would constitute infringement.

(b) Personal copying rights

The 'private use' exception allows reproduction for "personal use or family use or other equivalent uses within a limited scope" even though such reproduction would otherwise infringe.[34] Nonetheless, if a user downloads (and thereby copies) an infringing work uploaded on the Internet while knowing the downloaded work is infringing, even though such an act would qualify as a personal use, such downloading would be an infringing act.[35]

(c) Time shifting

Recording broadcast content for later use involves reproduction and thus could

31 *Saikō Saibansho* [Sup Ct] March 15 1988, *Shōwa* 59 (o) no 1204, 1 *Hanrei jihō* 981. See also *Tōkyo Kōtō Saibansho* [Tokyo High Ct] March 3, 2005, *Heisei* 16 (ne) no 2067; *Tōkyo Kōtō Saibansho* [Tokyo High Ct] March 31, 2005, *Heisei* 16 (ne) no 405.
32 *Ibid* at Article 113(1)(ii).
33 *Ibid* at Article 113(1)(i).
34 *Ibid* at Article 30(1).
35 *Ibid* at Article 30(1)(iii).

infringe; however, as a practical matter, such time shifting would often fall under the private use exception (discussed in section 1.4(b) above).

(d) Fair use

Japanese law contains no broad 'fair use' provision, but instead includes a number of narrow statutory exceptions to infringement.

For example, under the quotation exception, it is permissible to "quote from and thereby exploit a work already made public, provided that such quotation is compatible with fair practice and to the extent justified by the purpose of the quotation, such as news reporting, critique or research".[36] In practice, courts further require that the quotation be: distinguishable from the rest of the work; relatively 'subordinate' to the rest of the work; and properly cited.

(e) Caching/temporary copies as part of communication processes

Where limited to the extent necessary to prevent communication failure[37] and/or to allow for proper functioning of a computer system,[38] caching and other forms of temporary copying (eg, in RAM) which might otherwise infringe are permitted.

The law also exempts search engines from liability for any allegedly infringing conduct to the extent that such conduct is "for the provision of ... search results".[39]

(f) Hosting

Hosting infringing content online and allowing that content to be downloaded by users could each violate, *inter alia*, the right to reproduce and/or to transfer ownership to the public.[40] Hosting user-uploaded content can also result in secondary liability (discussed in section 1.6(a) below).

(g) Back-up copies

The Copyright Act contains a special exception for necessary computer program back-up copies created by the user.[41] The same provision also exempts reproduction of computer programs for purposes of installation, debugging, and transplantation.[42] This provision does not authorise or protect the transfer of such copies to third parties.

(h) Reverse engineering

Reverse engineering is not infringement insofar as it involves the reproduction of a copyrighted work for the purposes of analysing it with a computer.[43] This definition explicitly includes reverse engineering for the purpose of analysing source code.[44]

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36 *Ibid* at Article 32(1).
37 *Ibid* at Article 47-5.
38 Copyright Act at Article 47-8.
39 *Ibid* at Article 47-6.
40 *Ibid* at Articles 21, 26, 26-2.
41 *Ibid* at Article 47-8.
42 *Ibid.*
43 Copyright Act at Article 47-7.
44 *Ibid.*