Questionnaire for the ALAI Study Days 2015 in Bonn

Remuneration for the use of works

Exclusivity v. other approaches

Filled out by

ALAI Japan

A. Questions in relation to scope and enforcement of exclusive rights under existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

1. How are the following acts covered by the copyright law of your country (statute and case law):

   i. Offering of hyperlinks to works
   ii. Offering of deep links to works
   iii. Framing/embedding of works

iv. Streaming of works
v. Download of works
vi. Upload of works
vii. Supply of a platform for ‘user-generated content’
viii. Other novel forms of use on the internet.

Reply:
The acts of items i, ii, iii, vi, vii and viii indicated above are basically covered by the right of making transmittable under Article 23(1) Japanese Copyright Act (hereinafter referred to as “Act”). The act of item iv is covered by the right of public transmission (Article 23 Act) and the act of item v is covered by the right of reproduction (Article 21 Act).
For your information, our terminology is somewhat different from WIPO Treaties.
We use the right of “making transmittable” instead of “making available” and the right of “public transmission” instead of “communication to the public”.

2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (eg, users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?

Reply:
JASRAC, other CMOs, make licensing agreements with platform operators for all usages including individual uploaders’ contents. The agreements apply to the usages copyrighted songs on general services provided by YouTube, DWANGO etc.

3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:

- for content providers
- for host providers
- for access providers
- for others?

b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

Reply:

In Japan, the ISP Liability Limitation Act, being enacted on 27 November 2002, limits the liability for damages of intermediaries including Internet service providers and administrators of bulletin boards and applies not only to copyright infringement but also trade mark infringement and defamation.

Under the ISP Liability Limitation Act, even if any right of others is infringed by information transmission, an ISP shall not be liable for any loss incurred from such infringement unless (1) it is technically possible to make measures for preventing such information from being transmitted to the public, and (2a) in cases in which the ISP had known about the infringement of others' rights by information transmission or (2b) in cases in which the ISP had had knowledge of information transmission itself and in which the ISP could reasonably know about the infringement of the others' rights.

On the other hand, judicial precedents have been expanding the scope of an "infringer". A certain intermediaries including an operator of an electronic bulletin board service and a provider of a video sharing service may be regarded as an infringer on condition of the intermediary's management and control as well as its business profits. In addition, such intermediaries may not benefit from the safe harbor rule under Article 3(1) of the ISP Liability Limitation Act.

4. In these cases of infringement, who has standing to sue:

- the author
- the exclusive licensee
- the non-exclusive licensee
- the employer of the author
- the CMO that manages the exclusive right?

Reply:

Basically JASRAC and other CMOs take a legal action on behalf of individual right owner.

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

   - as a general rule for all kinds of contracts;
   - as regards 'best-seller' situations (i.e., when parties did not presume that the work would become a best-seller);
   - in the case of oppressive contracts;
   - in other cases;

   and if so, under what conditions?

   Reply:
   There is no rule.

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?

   Reply:
   In respect of copyright or rights of performers and phonogram producers, right to receive compensation for digital private sound and visual copying (Art. 30(2), 102(1) Act).
   In respect of rights of performers and phonogram producers, right for secondary use of commercial phonograms (Art. 95(1),97(1) ACT)

2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?

Reply:
Yes, there is the possibility as follows.

1. Exploitation of works in the case where the copyright owner thereof is unknown. The work may be exploited under the authority of a compulsory license issued by the Commissioner of the Agency for Cultural Affairs and upon depositing on behalf of the copyright owner compensation the amount of which is fixed by the Commissioner as corresponding to an ordinary rate of royalty, in the case, designated by Cabinet Order, where, after the due diligence, the copyright owner cannot be found for the reason that he is unknown or for other reasons (Art. 67(1) Act).
2. Exploitation of a work while applying for compulsory license(Ar.67bis (1) Act)
3. Broadcasting of works, provided that broadcasting organization requested the authorization to broadcast the work from the copyright owner and failed to reach an agreement or that the organization was unable to enter into negotiations with him(Art.68(1) Act).
4. Recording on commercial phonograms, provided that a person who intends to make a sound recording of a musical work requested the authorization from the copyright owner to make a sound recording of the work or to offer such recording to the public by transfer of ownership and failed to reach an agreement or that he was unable to enter into negotiations with the copyright owner(Art.69 Act).

3.

i. For which statutory remuneration rights does your law provide for obligatory collective management?

Reply:
The following rights are provided for obligatory collective management.

① Right to receive compensation for private sound and visual copying(Art.30(2), 102(1) Act)
② Rights to secondary use fees for commercial phonograms(Art.95 Act)
③ Right to remuneration for renting commercial phonograms(Art.95ter Act)

ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

Reply:
○Right to remuneration for wire diffusion of performances broadcast(Art.94bis Act)

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

Reply:

○As for compensation for private copying, basically a person who makes sound or visual recording for private use(Art.30(2),102(1) Act).

(Copying for private use)
Article 30(2)
Any person who, for the purpose of private use, makes sound or visual copying on such a digital copying medium as specified by Cabinet Order by means of such a digital copying machine as specified by Cabinet Order shall pay a reasonable amount of compensation to the copyright owners concerned.
The provision of Art. 30(2) shall apply mutatis mutandis to the exploitation of performances and phonograms (Art. 102(1) Act).
On the other hand, we have the special provisions for private copying.

(Exercise of the right to claim compensation for private copying)
Article 104bis (1)
Where there is a society which is established for the purpose of exercising the right to claim compensation as mentioned in Article 30. (2) and 102(1) on behalf of the owners of such right and which is designated, with its consent, by the Commissioner of the Agency for Cultural Affairs as the only one society for private copying, the right to claim compensation for private copying shall be exercised exclusively through the intermediary of the designated society.

(Exceptional provisions for the payment of compensation for private copying)
Article 104quarter (1)
Any purchaser of a copying machine or a copying medium which is specified by Cabinet Order in accordance with the provision of Article 30 (2) shall pay, at the time of purchase and on the claim by the designated society, a lump-sum compensation for private copying the amount of which is fixed, for such copying machine and medium respectively, in accordance with the provision of Article 104sexies (1).

(Cooperation by manufactures and importers)
Article 104quinquies
When the designated society claims compensation for private copying in accordance with the provision of Article 104quater (1), any manufacturer or importer of specified recording machines or media shall cooperate with the designated society in claiming and receiving such compensation.

○ As for secondary use fees for commercial phonograms, broadcasting organizations or wire diffusion organizations shall pay the fees(Art.95(1) Act)

○ As for remuneration for renting commercial phonograms, the business owners of renting commercial phonograms to the public shall pay a reasonable amount of remuneration to the performers, whose performances are incorporated in such phonograms(Art.95ter (3) Act).

○ As for remuneration for wire diffusion of performances broadcast, wire diffusion organizations shall pay a reasonable amount of remuneration to the performers whose performances have been so diffused by wire(Art.94bis Act)

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?

Reply:
Basically the exploiters and the CMOs negotiate to fix the amount of compensation, fee or remuneration.

v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

Reply:
The Commissioner of the Agency for Cultural Affairs shall basically supervise intermediary organizations, ex. SARAH, Society for the Administration of Remuneration for Audio Home Recording, shall fix the amount of compensation and obtain the approval thereof from the Commissioner of the Agency for Cultural Affairs, which before the approval shall consult the Culture Council.

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?

Reply:
In part, the right owners face the strong opposition from manufacturers of machines or media against any attempt to add the new copying machines and media to be compensated.

vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

Reply:
In the cases of a compulsory license as indicated C2 above, the work may be exploited under the authority of a compulsory license issued by the Commissioner

of the Agency for Cultural Affairs and upon depositing on behalf of the copyright owner compensation the amount of which is fixed by the Commissioner as corresponding to an ordinary rate of royalty (Art. 67(1), 68(1),69 Act).

On the other hand, while applying for a compulsory license, the work may be exploited upon depositing a security money the amount of which shall be fixed by the Commissioner of the Agency for Cultural Affairs (Art.67bis Act).

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?

   Reply:
   In respect of compensation for private copying, the Act provides allocation only for collective purpose. The management organization shall allocate an amount corresponding to the rate fixed by Cabinet Order within 20% of the collected compensation for such activities as contributing to the protection of copyright and neighboring rights as well as to the promotion of the creation and dissemination of works(Art.104octies(1) Act).

2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?

   Reply:
   Within 20% for collective purpose. It is only regarding compensation for private copying.

3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?

   Reply:

In respect of the collected compensation for private copying, related organizations have determined; after deduction of an amount for collective purpose, the rest is allocated as follows:
As for private sound recording, 36% copyright owners, 32% performers, 32% phonogram producers
As for private audiovisual recording, 68% copyright owners, 32% neighboring rights owners

4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?

   Reply:
   Regarding the secondary use fee for broadcasting, fifty-fifty share between performers and phonogram producers.

5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

   Reply:
   Generally speaking, the Commissioner of the Agency for Cultural Affairs may order a management business operator to make a report on the business or financial situations or order any of staffs of the Agency to enter the office of the operator and inspect the business situations or an account book, documents or other materials, or to question the persons concerned (Art. 19(1) Act on Management Business of Copyright and Neighboring Rights).

E. Questions on new business models and their legal assessment

1. Which new business models do you know in your country in respect of the supply of works via the internet?

   Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

   Reply:
   iTune may be indicated.

2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found

No reply

3. In your country, are there offers that are based on flat rates, ‘pay-per-click’ or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

No reply

4. Within these business models, how do authors and performers get paid?

No reply

Please send your completed questionnaire to elisabeth.amler@ip.mpg.de by 15 March 2015