



ICLG

The International Comparative Legal Guide to:

Copyright 2018

4th Edition

A practical cross-border insight into copyright law

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Japan

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1 Copyright Subsistence

1.1 What are the requirements for copyright to subsist in a work?

Copyright can subsist in a work in which thoughts or sentiments are expressed in a creative way, and which fall within the literary, scientific, artistic or musical domain.

1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

Copyright can arise in novels, plays, film scripts, dissertations, lectures and other literary works; musical works; choreographic works and pantomimes; paintings, engravings, sculptures and other artistic works; architectural works; maps and diagrammatical works of a scientific nature, such as drawings, charts and models; cinematographic works; photographic works; and computer program works. Typical examples of works which are excluded from copyright protection are mere communication of facts which are not expressed in a creative way, applied art which is usually mass-produced products and not categorised as fine art (please also see the response to question 7.1).

1.3 Is there a system for registration of copyright and if so what is the effect of registration?

Yes, there is a registration system operated by the Agency for Cultural Affairs (the ACA), and in the case of software programs, there is a registration system at the Software Information Centre (the SOFTIC).

Copyright can arise in a work, and it can be transferred without any copyright registration. However, the transfer (other than by inheritance or other general succession) of copyright or a restriction on the disposal of the copyright, and the establishment, transfer, modification or termination of a pledge on a copyright or a restriction on the disposal of a pledge established on the copyright, may not be asserted against a third party unless it has been registered.

The author of a work that is made public, anonymously or pseudonymously, may have his true name registered with respect to said work, regardless of whether he actually owns the copyright therein. The copyright holder of any work, as well as the publisher of an anonymous or pseudonymous work, may have registered said

work's date of first publication or the date when the work was first made public.

Furthermore, the author of a computer program may have the date of the creation of his work registered within six months from the work's creation.

1.4 What is the duration of copyright protection? Does this vary depending on the type of work?

The duration of a copyright begins at the time the work is created and subsists for 50 years following the death of the author (in the case of a jointly created work, for 50 years after the death of the last surviving co-author). The duration of a copyright for a work bearing the name of a juridical person or other corporate body as its author is 50 years from either the time the work was first made public, or, if the work was not made public within 50 years following its creation, 50 years from its creation.

The duration of a copyright in a cinematographic work is either 70 years from the time the work was first made public, or, if the work was not made public within 70 years from its creation, 70 years from its creation.

1.5 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

Yes. A copyrighted work can be registered as a trademark and be protected by a trademark right.

1.6 Are there any restrictions on the protection for copyright works which are made by an industrial process?

No, there is no restriction as long as a work meets requirements for copyright to subsist in a work (please also see the responses to questions 1.1 and 1.2).

2 Ownership

2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

In principle, the author who creates a work is the first owner of the copyright therein. However, there are different rules governing the

authorship of a work made by an employee (please see the response to question 2.3) and authorship of a cinematographic work.

Authorship of a cinematographic work is attributed to those who, by taking charge of producing, directing, filming, art direction, etc., have creatively contributed to the creation of the cinematographic work as a whole, excluding authors of novels, play and film scripts, music or other works adapted or reproduced in such cinematographic work who hold copyright in such adapted or reproduced work.

2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

Where a work is commissioned, the principal rule applies and the author is the first owner of the work. In practice, the commissioner obtains consent from the author for transfer of the copyright from the author and for not exercising his moral right to the commissioned work, which cannot be transferred under the law.

2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

The authorship of a work that is made on the initiative of an employer by an employee in the course of the performance of his duties in connection with the employer's business, and (except for computer program works) is made public by the employer as a work under its own name, is attributed to the employer unless otherwise agreed in contract terms or work regulations applicable at the time that the work was created.

2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

Yes, a copyright of a work can be owned jointly. A co-holder of a copyright in a work of joint authorship or of any other co-owned copyright ("joint copyright") may not transfer or pledge his share without the consent of the other co-holder(s). A joint copyright may not be exercised without the unanimous agreement of all co-holders, although a co-holder may not, without justifiable grounds, refuse to give the consent required. Co-holders may choose one of the co-holders to exercise their joint copyright as their representative. Limitations on the authority of a person to exercise the rights as a representative may not be asserted against a third party without knowledge of such limitations.

3 Exploitation

3.1 Are there any formalities which apply to the transfer/assignment of ownership?

No, there are no formalities to the transfer/assignment of ownership. However, the transfer (other than by inheritance or other general succession) of ownership may not be asserted against a third party unless it has been registered (please see the response to question 1.3 above). It should be noted that, if the transferee would like to obtain (i) rights of translation, adaptation, etc. (i.e., the exclusive right to translate, arrange musically or transform, or dramatise, cinematise, or otherwise adapt his work), and (ii) a right in the exploitation of a derivative work (i.e., exclusive rights of the same types as

those possessed by the author of the derivative work), the transfer agreement must expressly refer to such rights, or it is presumed that such rights have been reserved to the transferor.

3.2 Are there any formalities required for a copyright licence?

No, there are no formalities.

3.3 Are there any laws which limit the licence terms parties may agree (other than as addressed in questions 3.4 to 3.6)?

No, there are not.

3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

Several types of copyright works have collective licensing bodies for their fields. Such bodies are generally entrusted with copyrights from their owners or undertake to management the use of the copyrights.

- Field of music and records: the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), and the Recording Industry Association of Japan (RIAJ).
- Field of literature, including novels and scripts: the Japan Writers' Association, the Writers' Guild of Japan (WGJ), and the Japan Writers Guild (JWG),
- Reproduction of publications: the Japan Reproduction Right Center (JRRC), and Japan Publishers Copyright Organization (JCOPY).
- Field of the arts: the Japan Artists Association (JAA), and the Japanese Society for Protecting Artist' Rights (JASPAR).
- Field of photography: the Japan Photographic Copyright Association (JPCA).
- Field of performing arts: the Centre for Performers' Rights Administration (CPRA).

3.5 Where there are collective licensing bodies, how are they regulated?

The Act on Copyright, etc. Management Service, enacted in 2001, regulates the collective licensing bodies. The collective licensing bodies dealing with copyrights and neighbouring rights are required to be registered, and their rules of management must be reported to the Agency for Cultural Affairs.

3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

The grounds to challenge the licence terms offered by a collective licensing body are basically the same as the defences that a defendant can assert in a copyright infringement action. The licence terms could be challenged on the ground that the use of the work is exempted from the Copyright Act for reasons such as private use of the work, quotations, educational use, and editorials. It is also possible to challenge the licence terms because a work is not copyrightable, the collective body is not authorised to license the work, or the calculation of the fee is not correct.

4 Owners' Rights

4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

A copyright includes the following rights and the exercise of such rights is restricted by the copyright holder or the holder of any of such right: rights of reproduction, performance (right to perform the work for the purpose of making it seen or heard directly by the public), screen presentation (right to make the work publicly available by screen presentation), public transmission (right to effect a public transmission of the work including, in the case of automatic public transmission, making the work transmittable), recitation, exhibition (when a work is an artistic work or unpublished photographic work), distribution (when a work is a cinematographic work), ownership transfer, rental, translation and adaptation of copyrighted work.

4.2 Are there any ancillary rights related to copyright, such as moral rights, and if so what do they protect, and can they be waived or assigned?

There are two types of ancillary rights: moral rights and neighbouring rights.

Moral rights cannot be waived or assigned. The moral rights of an author belong to the author of a work. The moral rights contain the right to make the work and derivative work thereof public, determine the indication of the author's name (i.e., determine whether it should be shown, or whether it should be his/her true name or a pseudonym), and maintain the integrity of his work and its title, without distortion, mutilation or other modification against the author's will.

A performer also has the following moral rights: the right to indicate his name; and the right to preserve the integrity of performance. In addition, a performer has the neighbouring rights to make sound or visual recordings of his performance, broadcast and to wire-broadcast his performance, make his performance transmittable, transfer ownership of his performance, and offer his performance to the public by rental. In addition, a performer has several rights to receive fees such as the right to receive secondary use fees from broadcasting organisations or wire-broadcasting organisations using commercial phonograms (the term phonogram as used herein is used and defined in the Copyright Act; it means the fixation of sounds on a material object such as a phonograph disc or recording tape) incorporating a sound recording of the performance through designated organisations.

Other than performers, producers of phonograms, broadcasting organisations and wire-broadcasting organisations also have neighbouring rights.

Producers of phonograms have rights to reproduce his phonogram, make his phonogram transmittable, transfer ownership, and rental. Broadcasting organisations have rights to reproduce the sounds or images incorporated in its broadcast, rebroadcast and wire-broadcast, and make transmittable and transmit its wire-broadcasts to the public. Wire-broadcasting organisations have rights to reproduce the sounds or images in its cablecast, broadcast and to re-cablecast its cablecast, make its cablecast available for transmission using a special instrument that enlarges images to communicate its cable television broadcast to the public, based on the receipt of its cable television broadcast transmission.

4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

If an original work or a copy of a work is transferred to the public by the owner of the right to transfer, the subsequent transfer is not restrained by the same right. However, it is understood that for a cinematographic work to be presented on a screen, the owner of the right to distribute may exercise its right over the subsequent dealings even after the work has been put on the market with his/her consent.

In addition, it is generally permissible to exploit, in any way, an artistic work, the original copy of which is permanently installed in an outdoor location or an architectural work.

5 Copyright Enforcement

5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

No. Any dispute is expected to be settled through normal civil actions.

5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

An author can bring a claim for infringement based on his moral rights even after the author transfers his copyright in his work.

Collective licensing bodies, which do not own the copyright but are authorised by the copyright owner to do so, may also bring a claim.

5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

Yes. A person who commits one of the following actions is deemed to commit infringement on the moral rights of the author, copyrights, moral rights of the performer or neighbouring rights, and can be liable under the Copyright Act:

- importing, for the purpose of distribution in the country, objects made by an act which would have constituted an infringement on the moral rights of its author, copyrights, rights of publication, moral rights of performers or neighbouring rights if performed in the country;
- distributing, possessing for the purpose of distributing, or exporting as a business or possessing for the purpose of exporting as a business, objects made by infringing the moral rights of an author, copyrights, rights of publication, moral rights of performers or neighbouring rights, by a person who is aware of such infringement;
- using on a computer in the course of one's business a reproduction made by infringement of the copyright of a computer program work, to the extent that the person using the reproduction was aware of the infringement at the time that he acquired authority to use the reproduction; and
- intentionally adding false information as rights management information; intentionally removing or altering rights management information; distributing, importing or possessing for the purpose of distributing, a reproduction of

a work or performance with false information intentionally added as rights management information, removed or modified rights management information, and publicly transmitting or making transmittable such work or performance, etc., with knowledge of the infringement.

5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

As a defence to a claim of infringement, the defendant may argue that his/her act does not fall into the category of infringement because it lacks the dependence on the copyrighted work (it is understood that infringing work is required to be created with dependence on the infringed work to be found an “infringing work”) or substantial similarity to the copyrighted work (it is understood that infringing work is required to be substantially similar to the copyrighted work to be found an “infringing work”). If those two requirements are not met, the work of the defendant does not infringe the copyright.

In addition, if the act of the defendant falls under any of the following categories, it is exempt under the Copyright Act:

- reproduction of a work for private use;
- reproduction of a work in libraries;
- quotation from a work already made public in a fair manner within the extent justified by the purpose of the quotation;
- reproduction in school textbooks, schools and other educational institutions;
- reproduction or public transmission for examinations of knowledge or skills;
- reproduction or public transmission for those with disabilities;
- reproduction of editorials in newspapers and/or magazines in relation to current topics; and
- reproduction for judicial proceedings.

5.5 Are interim or permanent injunctions available?

Yes. Both interim and permanent injunctions are available for copyright infringement. An author, copyright holder, holder of the right of publication, performer, or holder of neighbouring rights may demand cessation of an infringement of moral rights, copyright, right of publication, or neighbouring rights of persons infringing or presenting a risk of infringing. When applying for such injunction, the author, the copyright holder, the holder of the right of publication, the performer or the holder of the neighbouring rights may also demand measures necessary to effect the cessation or prevention of the infringement, such as the destruction of objects constituting the acts of infringement, objects made by acts of infringement, and/or machines and tools used exclusively for acts of infringement. It is not necessary that the infringement be intentional or due to negligence to seek an injunction.

5.6 On what basis are damages or an account of profits calculated?

Under the general tort theory, the owner of a copyright, etc. may seek damages that have a reasonable causal relationship with the infringing acts. In addition, the Copyright Act provides three methods to calculate the amount of damages in light of the difficulty of proving the actual damages that the owner incurred:

- profits obtained by the infringer;
- lost profits of the owner of the copyright, etc., the amount of which is calculated by multiplying the number of objects so transferred or the number of copies of the work

or performance, etc. that have been made as a result of the public’s receipt of that transmission, by the amount of profit per unit from objects (including copies transmitted and received) that the owner of the copyright, etc. could have sold if there had been no act of infringement; or

- the reasonable royalty (i.e., the amount of money that the owner of the rights should have received in connection with the exercise of the copyright or neighbouring right).

5.7 What are the typical costs of infringement proceedings and how long do they take?

The costs of judicial proceedings for an interim injunction are usually about JPY1 million to JPY5 million (including legal fees depending on counsel and case, and JPY2,000 for a filing fee), and for an action on the merits to seek damages and a permanent injunction are about JPY2 million to JPY10 million (including legal fees depending on counsel and case, and a filing fee). (The filing fee for an action on the merits depends on the amount claimed and the market size of the products subject to injunction.) Please note that filing fees are not recoverable, and legal fees are not fully recoverable by the prevailing party.

The amount of time from filing a case to a first instance decision depends on the case. It may take a few years. However, it usually takes from one to one-and-a-half years. If the case is appealed, it may take another one to two years. The time taken to obtain a preliminary injunction varies depending on the case, but it usually takes several months.

5.8 Is there a right of appeal from a first instance judgment and if so what are the grounds on which an appeal may be brought?

Yes. The party dissatisfied with the first instance judgment has a right to appeal. Appeal from a copyright-related judgment of a district court shall be made to the Intellectual Property High Court for civil cases over which the Tokyo High Court has jurisdiction or to other high courts for criminal cases and civil cases except ones with which the Intellectual Property High Court deals.

5.9 What is the period in which an action must be commenced?

An action for compensation in accordance with the Civil Code must be sought within the earlier of three years of both the infringement and the infringer becoming known, or 20 years of the infringement (whether known or not). An injunction cannot be sought after the act of infringement ends.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Yes. Intentional infringement can be a criminal offence (please see the response to question 6.2).

6.2 What is the threshold for criminal liability and what are the potential sanctions?

The Copyright Act includes several provisions concerning criminal liability, as shown below.

- A person who infringes copyright, right of publication or neighbouring rights (excluding some exemptions provided in the Copyright Act) is subject to imprisonment with labour for up to 10 years, a fine of up to JPY10 million, or both.
- A person who infringes an author's or performer's moral rights, or who, for profit-making purposes, causes a machine to reproduce copyrighted works or performances which constitute infringements or who commits an act deemed to constitute copyright infringement under the Copyright Act is subject to imprisonment with labour for up to five years, a fine of up to JPY5 million, or both.
- A person who infringes an author's or performer's moral rights after the author's or performer's death is subject to a fine of up to JPY5 million.
- A person who transfers or rents to the public, who manufactures, imports, or possesses for the purpose of transferring or renting to the public, or who offers for public use a device the principal function of which is to circumvent technological protection measures or copies of a computer program the principal function of which is to circumvent technological protection measures, or a person that transmits to the public or makes available for transmission such a computer program is subject to imprisonment with labour for up to three years, a fine of up to JPY3 million, or both.

7 Current Developments

7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

There was no significant legislative change in 2016. While some changes were expected in relation to the Trans-Pacific

Partnership, those changes have not been implemented. In case law, a discussion concerning the area of "applied art" (i.e., art works with practical function) arose following some noteworthy decisions by the Intellectual Property High Court. It has been understood that applied art may be copyrightable only when such applied art exhibits great creativity of the same level as fine art. However, some recent decisions by the Intellectual Property High Court suggest that applied art may be copyrightable as long as it meets the standard requirements for copyright to subsist in a work. In practice, the interpretations of these decisions vary and further updates are awaited.

7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

The Copyright Act has been updated to cover matters in relation to newly invented technologies. For example, it covers computer programs as copyrightable work, the right of automatic public transmission in addition to the typical broadcasting, and the right of making transmittable which captures activities on the Internet, as one of the copyright owner's right. It also enables rights' holders to have compensation for private sound and visual recordings, and has provisions to protect technological protection measures.

In these last few years, publication rights have expanded to include digital publications and wire transfers via the Internet. Also, under the recent amendments enacted in 2012, a person who has downloaded digital files which infringe copyrights of musical or visual works while knowing of the infringement can be found criminally liable.

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