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Japan: Law & Practice
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Law and Practice

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1. GENERAL INFORMATION

1.1 Governing Copyright Statute

The Copyright Act (Act No 48 of 1970) is the governing copyright statute. All references to statutes not otherwise specified will be to the Copyright Act of Japan. An [English translation](#) is also available online.

Other principal sources of law are as follows:

- the Act on Registration of Program Works (Act No 65 of 1986);
- the Act on Management Business of Copyright and Neighbouring Rights (Act No 131 of 2000);
- the 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 (Act No 137 of November 30, 2001); and
- the Act on Prevention of Cam-ripping Motion Pictures (Act No 65 of 2007).

1.2 Berne Convention

Japan is a member of the WTO and a party to all major international treaties, including the following:

- the Berne Convention for the Protection of Literary and Artistic Works (Paris Act);
- the Universal Copyright Convention (Paris Act);
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations;
- the WIPO Copyright Treaty;
- the WIPO Performances and Phonograms Treaty;
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); and

- the Beijing Treaty on Audiovisual Performances.

1.3 Foreign Copyright Holders

Foreign copyright holders are not required to follow any special steps to secure copyright protection in Japan.

2. COPYRIGHTED WORKS

2.1 Copyright Protection: Essential Elements

The essential elements required for copyright protection are the following:

- the work must be an expression; and
- the work must have a modicum of creativity.

These elements apply to all works. However, the level of creativity required for copyright protection may differ depending on the type of work at issue. For example, works having a utilitarian function generally require a higher level of creativity.

2.2 Copyright Protection: Special Notice and Registration of Works

In accordance with the Berne Convention, a special notice or registration is not required for a work to be protected via copyright.

The Copyright Act provides registration of the following items:

- real name of the author (Article 75);
- date of first publication (Article 76);
- date of creation for a computer program (Article 76-2);
- transfer or pledge of copyright and neighbouring rights (Article 77); and
- registration of items related to print rights or electronic print rights (Article 88).

Registration of the first three items provides a presumption effect to the veracity of the items. Regarding the transferring of rights, registration of transfer or pledge is necessary for a transferee/pledgee to assert its ownership/pledge against a third party. The same applies for the last item.

The [public register](#) is available online, only in Japanese. There is a specific register for [computer programs](#).

2.3 Categories of Copyrightable Works

Article 10, paragraph 1 of the Copyright Act lists the following categories as examples of copyrightable works:

- novels, scripts, articles, lectures and other literary works;
- musical works;
- choreographic works and pantomimes;
- paintings, engravings, sculptures and other artistic works;
- architectural works;
- maps, and figurative works of a scientific nature, including plans, charts, and models;
- cinematographic works;
- photographic works; and
- computer programs.

Compilations and databases are also listed as examples (Article 12 and Article 12-2).

These categories are only examples of copyrightable works, and the list is not exhaustive. The Copyright Act grants copyright protection to works which do not fall under the listed categories, provided that the work is a creative expression. Copyright protection extends to works that are fixed and those that are not.

2.4 Copyright Protection: Software

Software benefits from copyright protection. There are no special or additional requirements for copyright protection for software.

Software may also be protected by patent or as a trade secret. Patent protection requires that the software be an invention that has novelty and inventive step (Patent Act Article 29). Trade secret protection requires that the software is managed as a secret, is useful, and is not known to the public (Unfair Competition Prevention Act Article 2, paragraph 6). These protections may be cumulative as long as the requirements for each are satisfied.

2.5 Copyright Protection: Databases

Databases benefit from copyright protection as long as creativity exists in the selection or systematic construction of information contained therein (Article 12-2, paragraph 1).

There are no special requirements for copyright protection of databases.

Database may also be protected as a trade secret, or by tort law. Trade secret protection requires that the database is managed as a secret, useful and not known to the public. Databases may also be protected under tort theory if a database is used in a manner that unlawfully infringes the legally protected interests. These protections may cumulate as long as the requirements for each are satisfied.

2.6 Copyright Protection: Industrial Design

Industrial designs also benefit from copyright protection (See Article 2, paragraph 2). There are no special requirements for copyright protection under the Copyright Act. However, the majority of lower court precedents have required a higher level of creativity for industrial designs to be protected by copyright.

Industrial designs may also be protected as design patents or trade dress.

These protections may cumulate as long as the requirements for each are satisfied.

2.7 Copyright Protection: Distinct Categories

Fictional Characters

Fictional characters are not protectable separate and apart from each individual expression of such character. The Supreme Court of Japan has held that a fictional character itself is not protected by copyright, because it is an abstract concept rather than a concrete expression (Supreme Court decision on 17 July 1997). This does not rule out extending protections to the expression of such fictional character in fine arts, images, cartoons, animations or other means.

TV and Sports

TV formats and similar formats may possibly be protected as an artistic work or compilation work, depending on the specific expression at issue.

Whether sport events are protectable by copyright has not been widely discussed yet in Japan. Sports which have artistic elements, such as figure skating, may possibly be protectable as a work of choreography. A sporting event may possibly be protected as a compilation of the individual elements comprising the event.

Advertisement and Museums Exhibitions

Advertising copy and product labels may be protected as an artistic, photographic or literary work, if the expression has the requisite level of creativity. However, very short phrases are less likely to be protected, as there is less room to express creativity of the creator.

Whether museum exhibitions are protectable by copyright has not been widely discussed in

Japan yet. Depending on the specific expression, it may possibly be protectable as a compilation work.

Websites

Websites are protectable in their individual elements. For example, texts displayed on a website may be protected as a literary work; images or design of a website may be protected as an artistic, photographic or cinematographic work. Websites may also be protectable as a compilation work of the foregoing elements. Also, the underlying program or code as a work of computer programming is protectable by copyright.

Recipes

Recipes may be protectable as a literary, photographic, or artistic work depending on the mode of expression used to express the recipe. However, the underlying recipe itself is an abstract method or idea, and is not protectable by copyright.

Perfumes

Whether perfumes are protectable by copyright has not been widely discussed in Japan yet. There may be a slight possibility of protection as an uncategorised work.

Maps

Maps are protectable by copyright, and are listed as one of the examples of copyrightable works in the Copyright Act (Article 10, paragraph 1 item 6).

3. AUTHORSHIP AND COPYRIGHT OWNERSHIP

3.1 Authorship

The author is generally identified as the person who creates the work (Article 2, paragraph 1 item 2). The Copyright Act establishes a presumption of authorship if his or her name (or pseudonym)

is indicated as the author on the original work, or during the course of providing the work to the public, according to general practice (Article 14).

3.2 Joint Authorship

Joint works are works that are created by multiple persons, and the contribution of each person cannot be separated and used independently (Article 2, paragraph 1 item 12). The elements of joint authorship are:

- the subjective intent to jointly create the work; and
- the joint actions to create the work.

A joint author shall jointly own the copyright to the work (Article 65). A joint owner of copyright must obtain the consent of the other joint owners in order to:

- assign its interest, or provide its interest as collateral (Article 65, paragraph 1);
- exploit the work by itself; or
- license the exploitation of the work to a third party (Article 65, paragraph 2).

The other joint owners may not refuse to provide consent unless there is a legitimate reason (Article 65, paragraph 3). Conversely, a joint owner may file a legal action for injunction or damages against an infringer without consent from the other joint owners (Article 117, paragraph 2).

The joint authors of a work must reach an agreement in order to exercise the moral rights pertaining to the work (Article 64, paragraph 1). Thus, the joint authors must reach an agreement to publish the joint work for the first time, alter the joint work, or display the name of the authors of the joint work. Joint authors may not prevent such agreement from being reached against good faith (Article 64, paragraph 2). However, a joint author may file a legal action for injunction or damages against an infringer without consent

from the other joint authors (Article 117, paragraph 1).

3.3 Copyright Protection: Anonymous or Pseudonymous Works

Japan recognises copyright protection for anonymous or pseudonymous works. As a general rule, the term of protection for anonymous or pseudonymous works is 70 years from first publication (Article 52, paragraph 1).

However, the term is 70 years from the death of the author for the following cases (Article 51, paragraph 2):

- if 70 years have passed from the death of the author (Article 52 proviso);
- if the pseudonym is commonly identified with that author (Article 52, paragraph 2 item 1);
- if the true name of the author is registered within 70 years from first publication (Article 52, paragraph 2 item 2); and
- if the author publishes the work with their true name displayed as the author with 70 years from first publication (Article 52, paragraph 2 item 3).

The Japanese Copyright Act provides a compulsory licence scheme for the use of “orphan works”. If the copyright holder cannot be reached, even after a considerable effort has been made, one may apply for a “compulsory licence”, which is issued by the Commissioner of the Cultural Affairs Agency. Upon approval of the application, and the deposit of the compensation amount fixed by the Commissioner, one may exploit the work as prescribed under the compulsory licence (Article 67, paragraph 1). The work may be exploited during the review of the application, provided the applicant deposits a collateral (Article 67-2, paragraph 1).

3.4 Collective Works

The Copyright Act protects compilation works, which are works comprised of pre-existing materials selected or arranged in a creative manner (Article 12). The scope of copyright protection for compilation works only extends to the selection or arrangement, and not to the pre-existing materials.

3.5 Corporate Authorship

If the following requirements are satisfied, the work would be a “work for hire”. The corporation would be deemed to be the author of a “work for hire”, unless otherwise provided in contracts, work rules, or other means (Article 15).

- The work is created under the initiative of the corporation.
- The work is created by a person engaged in the business of the corporation.
- The work is created during the course of performance of duties.
- The work is published under the authorship of the corporation (not required for computer programs).

Whether or not the above requirements are met is determined by the degree of direction and supervision exercised by the corporation over the creator of the work.

A corporation and its employee can agree to vest the copyright of a work in the employee even if the work was created in the course of employment. Such agreements do not need to conform to any specified standards. Conversely, an agreement between a corporation and its employee to the effect that the copyright of works to be created will vest in the corporation even if the above requirements are not met may be found void due to employment regulations. The risk may be lower with respect to such an agreement between a corporation and its consultants/freelance workers.

This rule does not differ with regard to works created for public entities, such as universities.

4. SCOPE OF COPYRIGHT PROTECTION

4.1 Economic Rights of the Copyright Owner

Economic Rights Granted to the Copyright Owner

The following exclusive economic rights are granted to the copyright owner:

- right of reproduction (Article 21);
- right of performance (Article 22);
- right of screen presentation (Article 22-2);
- right of public transmission (Article 23);
- right of recitation (Article 24);
- right of exhibition (Article 25);
- right of distribution (Article 26);
- right of transfer (Article 26-2);
- right of lending (Article 26-3);
- right of translation and adaptation (Article 27);
- rights of the original author in connection with the exploitation of a derivative work (Article 28); and
- right to compensation for private recordings, etc (Article 30, paragraph 2; Article 33, paragraph 2; Article 38, paragraph 5).

Duration of Economic Rights

The duration of economic rights begins from the creation of the work (Article 51, paragraph 1). As a general rule, the term of protection continues until 70 years after the death of the author (Article 51, paragraph 2). To be precise, the protection ends at the end of the year during which such 70 years lapsed.

The exception to this rule according to the type of copyrighted work, or according to the author, are as follows.

- Anonymous or pseudonymous works: in general, 70 years after the work is made public (Article 52, paragraph 1). See **3.3 Copyright Protection: Anonymous or Pseudonymous Works**.
- Works attributed to an organisation: 70 years after the work is made public (Article 53, paragraph 1).
- Cinematographic works: 70 years after the work is made public (Article 54, paragraph 1).

Non-consensual Termination of Licences and/or Recapture of Rights.

The Japanese Copyright Act does not provide non-consensual termination of licences and/or recapture of rights.

4.2 Alienable Rights

Economic rights and neighbouring rights are alienable through mutual agreement in whole or in part (Article 61, paragraph 1; Article 101-2; and Article 103).

A copyright owner may transfer each individual subdivided rights (such as the right of reproduction, right to adaptation, or the right to public transmission) or the entire “bundle of rights” of the work as a whole. It should be noted that the right of translation or adaptation (Article 27), and the right of an original author in connection with the exploitation of derivative works (Article 28) are presumed to be excluded from the scope of transfer unless said rights are explicitly referred to in the transfer agreement (Article 61, paragraph 2). A copyright owner may also limit the transfer of economic rights to a work for a limited time period (ie, a transfer lasting three months), and/or limited to the transfer within a certain jurisdiction (ie, transfer of right to reproduction within Japan). Registration of transfer is necessary for a transferee to assert its ownership against a third party, such as the one who also alleges to be a transferee (Article 77).

4.3 Transmissible Rights

Economic rights and neighbouring rights are transmissible upon death. The succession is to be governed by any wills, and the rules of inheritance under the Japanese Civil Code. Registration of transfer is necessary even in the case of inheritance for a transferee to assert its ownership against a third party, such as the one who also alleges to be a transferee (Article 77). If there are no successors according to the Civil Code, the economic right will expire (Article 62, paragraph 1 item 1).

4.4 Transfer of Rights

Under the Japanese Civil Code, minors (currently persons under the age of 20, and to be amended to under the age of 18 as of 1 April 2022) will require the consent of their parent or legal guardian to exercise their legal rights or to enter into a valid contract (Japanese Civil Code Article 4; Article 5, paragraph 1).

Under the Japanese Civil Code, exercise or transfer of rights by persons with limited mental capacity may be rescinded by their legal guardian, or require consent from legal guardians to be legally valid (Japanese Civil Code Article 9; Article 17).

Minors and persons with limited mental capacity are required to be represented by a statutory agent, unless otherwise permitted under the Civil Code (Japanese Code of Civil Procedure Article 31).

Copyright transfer contracts can be either in writing or oral. It should be noted that if a copyright transfer contract does not explicitly state the rights of translation and adaptation (Article 27) and the rights of original author in the exploitation of a derivative work (Article 28) as the object of the transfer, these rights are presumed to be reserved to the transferor (Article 61, paragraph 2).

4.5 Copyright Exhaustion Doctrine

The Copyright Act provides that distribution rights for works excluding cinematographic works (“Right of Transfer”) are exhausted by the first authorised transfer by the copyright holder, or other specified transfers set forth (Article 26-2, paragraph 2). Right of Transfer to works that have been transferred outside Japan without prejudice to rights equivalent to the “Right of Transfer”, or through a transfer authorised by the rights holder will also be exhausted (Article 26-2, paragraph 2 item 5).

With regard to cinematographic works, there is no statutory provision prescribing an exhaustion. However, in relation to video games cassettes, which were categorised as cinematographic works, the Supreme Court held that the right to control the distribution of such works (“Distribution Rights”) are exhausted after the first authorised sale of the copy of the original work (Supreme Court Decision on 25 April 2002). There are other lower cases which opined similarly in relation to video cassettes or DVDs of cinematographic works.

4.6 Moral Rights of the Copyright Owner

Moral Rights under Japanese Copyright

The Copyright Act grants the following moral rights to the author of the copyrighted work.

Right to make a work public

The author has the right to make available or present a work to the public for the first time (Article 18, paragraph 1).

The author is presumed to have consented to making the work public for the following cases:

- if the author transfers the copyright to a work not yet made public;

- if the author transfers the original piece of an artistic or photographic work not yet made public; and
- if the copyright to an author’s cinematographic work vests in the producer by operation of Article 29 of the Copyright Act.

Furthermore, the right is restricted in certain cases where harmonisation with information disclosure laws and regulations become necessary (Article 18, paragraphs 4 and 5).

Right to attribution

The author has the right to display the true name or a pseudonym as the author’s name when the original copy of a copyrighted work (or any reproductions of the original work) is made available or presented to the public (Article 19, paragraph 1). If the author has already made such a display, the user of a work may display the name of the author in the same manner, unless the author has manifested otherwise (Article 19, paragraph 2).

The name of the author may be omitted if the omission is unlikely to harm the interest of the author in claiming authorship, in light of the purpose of the work and the circumstances of its exploitation, provided that the omission is compatible with fair practices (Article 19, paragraph 3). Similarly to the right to make public, the author’s name can be omitted in certain cases where harmonisation with the information disclosure laws and regulations are necessary (Article 19, paragraph 4).

Right to integrity

The author has the right to preserve the integrity of the copyrighted work and its title from any alteration, removal, or other modification that is contrary to the author’s intent (Article 20, paragraph 1). The Copyright Act provides the following limited statutory exceptions (Article 20, paragraph 2 items 1 to 4).

- modification that is unavoidable for school education purposes, if the copyrighted work is used under the statutory exceptions for such purposes;
- modification of an architectural work by means of extension, rebuilding, repair, or remodelling;
- modification necessary to make a computer program work compatible with a particular computer, or to use a computer program work more effectively; and
- modification that is unavoidable in light of the nature of the work and the purpose and circumstances of its exploitation.

Duration

Moral rights of the author subsist upon the creation of the copyrighted work. They do not require any formalities such as registration. As a general rule, moral rights are extinguished by the death of the author.

However, the Copyright Act grants post-mortem protection to a limited extent by prohibiting acts that would be prejudicial to the author's moral rights if the author was still alive (Article 60). However, this does not apply if such conduct is found not to be in conflict with the author's will in light of the nature and extent of the act, as well as changes in social circumstances and other conditions.

If the act is found to be in violation of the post-mortem rights, a surviving family member (a spouse, child, parent, grandchild, grandparent, or sibling) of the author may file an injunction or other relief (Article 116).

Moral Rights Are Not Alienable

In Japan, moral rights are not alienable (Article 59). Moral rights are based in the personhood of the author and therefore inseparable from the author. As such, it is common practice to insert a clause in a copyright transfer agreement

which restricts the author as the transferor from exercising moral rights against the recipient of the copyright or third parties designated by said recipients.

Moral Rights Are Not Transmissible upon Death

As explained, moral rights are extinguished upon the death of the author. Thus, moral rights will not be inherited. However, as explained above, the Copyright Act provides limited rights to surviving family members beyond the death of the author.

5. COPYRIGHT MANAGEMENT SYSTEMS

5.1 Anti-circumvention Right

In accordance with Article 11 of the WIPO Copyright Treaty, the Copyright Act deems circumvention of "Technological Measure for Restriction of Exploitation" as infringement of copyright, print rights or neighbouring rights (Article 113, paragraph 6). A "Technological Measure for Restriction of Exploitation" is defined as electronic or magnetic means to restrict a work from being viewed or listened to, or from being executed on a computer if the work is a computer program (Article 2, paragraph 1, item 21). Under this clause, the rights holder will be entitled to injunction, damages or other remedies granted under the Copyright Act.

5.2 Legal Remedies for Copyright Management Information

In accordance with Article 12 of the WIPO Copyright Treaty, the Copyright Act deems the following acts to "rights management information" as infringement of copyright, print rights or neighbouring rights (Article 113, paragraph 8):

- the intentional addition of false information as rights management information;

- the intentional removal or alteration of rights management information (excluding when it is due to technological constraints involved in the conversion of recording or transmission methods and any other case in which it is found to be unavoidable in light of the purpose and circumstances of the exploitation of the work or performance); and
- the distribution, importation, or possession for the purpose of distribution, of copies of a work or performance with the knowledge that an act in the preceding two items has been carried out on such work or performance, or the transmission to the public or making available for transmission of such work or performance with knowledge of such an act.

“Rights management information” is defined as information regarding a work or performance which falls under the following (Article 2, paragraph 1 Item 22):

- information that identifies the work or performance, the owner of the copyright or neighbouring rights and any other details that are specified by Cabinet Order;
- information on the terms and conditions of exploitation, if exploitation of the work or performance is authorised; and
- information that enables a person to identify the details referred to in the two points above by collating with other information.

Under this clause, the rights holder will be entitled to injunction, damages or other remedies granted under the Copyright Act.

6. COLLECTIVES

6.1 Collective Rights Management

Japan has a collective rights management system governed by the Act on Management Business of Copyright and Neighbouring Rights (Act

No 131 of 2000, the “Copyright Management Business Act”). The Japanese system allows the existence of several collective rights management societies as long as they register with, and submit the management rules to, the Cultural Affairs Agency pursuant to the Copyright Management Business Act.

Musical Works and Recordings

- Japanese Society for Rights of Authors, Composers and Publishers (JASRAC); and
- Recording Industry Association of Japan (RIAJ).

Literary Works, including Novels and Scripts

- Japan Writers’ Association;
- Writers’ Guild of Japan (WGJ); and
- Japan Writers Guild (JWG).

Publishing

- Japan Reproduction Right Center (JRRC); and
- Japan Publishers Copyright Organization (JCOPY).

Artistic Works

- Japan Artists Association (JAA); and
- Japanese Society for Protecting Artists’ Rights (JASPAR).

Photographic Works

- Japan Photographic Copyright Association (JPCA).

Performances

- Centre for Performers’ Rights Administration (CPRA).

Under the Japanese system, the rights owners entrust their rights to the collective rights management bodies, to be managed and exploited. Collective rights management bodies can manage copyright and neighbouring rights, but not moral rights of the author or the performer.

Thus, a separate consent from the moral rights holder will be necessary if the contemplated use involves the use of moral rights.

6.2 Collecting Society

Under the Copyright Management Business Act, the collective rights management bodies have the power to license the work and collect royalty payments, and to take necessary measures to protect the copyright associated with the work. The specific conditions on the powers of the collective rights management bodies will be determined by the management rules of each body, and the terms of the entrustment contract with the rights holder.

For example, JASRAC licenses the use of musical works in accordance with its management rules, which includes a very detailed royalty rate formula. JASRAC collects the royalty amount due, and distributes the amount in accordance with the entrustment agreement with the rights holder. As JASRAC holds the legal title to the copyright (albeit within the terms of the entrustment agreement), it may seek relief against copyright infringement in its own name, such as filing for injunctions and/or damages.

Collective rights management bodies have functioned to promote the efficient licensing of copyrighted works, and enforcement of rights thereof.

6.3 Synchronisation Rights

In Japan, synchronisation rights are included in the broader concept of reproduction rights. The Japanese Copyright Act does not recognise synchronisation rights as an independent and separate right.

7. EXCEPTIONS TO COPYRIGHT

7.1 Fair Use Doctrine/Fair Dealing

The Japanese system establishes a list of exceptions to copyright, which is similar to the approach of “fair dealing”. The exception list is comprehensive, and is set forth in Articles 30 to 50 of the Copyright Act. However, in recent years, the list has expanded considerably to adapt to the use of the internet. In particular, the amendment to the Copyright Act in 2018, which was further amended in 2020, introduced a number of statutory exceptions, including open-ended requirements, and balancing of factors similar to the approach of “fair use”.

A selected list of the important statutory exceptions, including the 2018 amendment, are as provided below.

Reproduction for Private Use

Article 30 of the Copyright Act provides a narrow exception for the reproduction of copyrighted works. See **7.2 Private Copying**.

Quotation

Article 32, paragraph 1 of the Copyright Act provides an exception for use of copyrighted works by quoting, provided that the quotation is consistent with fair practices, and within the scope justified by the purpose of news reporting, critique, study, or other use.

Due to the open-ended language of this exception, lower courts have attempted to establish a clear and concrete requirement.

Past court decisions have required the following two requirements for this exception to apply (Supreme Court decision on 28 March 1980):

- the quoted work can be clearly distinguished from the work using the quotation; and

- the quoted work is ancillary in relation to the work using the quotation.

However, recent lower court decisions have adopted a more holistic approach, which balances several factors, such as the purpose of use, the amount of the work being used, the nature of the use, and the impact on the interest of the copyright holder (Intellectual Property High Court decision on 13 October 2010).

Exploitation without the Purpose of Enjoying the Thoughts or Sentiments Expressed in a Work

Article 30-4 of the Copyright Act introduced in 2018 provides an exception for the use of copyrighted works which are not for the purpose of appreciating the expressive content contained therein, unless in cases where the interests of the copyright owner will be unjustly harmed. The rationale for this exception is that such use would usually not prejudice the interest of the copyright owner. A non-exhaustive list provided is as set forth below:

- use in tests to develop or put into practice technology related to audio or visual recording, or other such exploitation;
- use in data analysis (meaning the extraction, comparison, classification, or other analysis of the constituent language, sounds, images, or other elemental data from a large number of works or a large volume of other such data); and
- use in computer data processing or other use without appreciation of the expressive content by human senses, other than those set forth in the preceding two items.

In order to ensure flexibility, Article 30-4 provides a catch-all clause in the third item, and does not restrict the method of use. However, it seeks to safeguard the interests of the copyright holder by removing “cases where the interests of the

copyright owner will be unjustly harmed” from the scope of the exception.

An example of this exception is the use of copyrighted works to create a machine learning data set for the development of artificial intelligence.

Exploitation of Works Incidental to the Exploitation of Works on a Computer

Also introduced in 2018, Article 47-4, paragraphs 1 and 2 provide exceptions to use of copyrighted works for smooth or efficient use in computers:

- reproduction as cache in electronic computers;
- reproduction by server administrators to prevent transmission failure;
- reproduction for information processing required for preparation of network transmission;
- temporary reproduction for maintenance and repair of devices with built-in memory;
- temporary reproduction for replacement of devices with built-in memory; and
- reproduction for backup in preparation for loss of server.

This exception also seeks to balance flexibility with the protection of the interests of the copyright holder, by not limiting the method of use but removing cases where it unjustly harms the interests of copyright holders from the scope of exception.

An example of this exception is creating a cache of a copyrighted image to accelerate the processing through computer networks, and the temporary replacement of music files in the memory of another recording medium.

Minor Exploitation Incidental to Computerised Data Processing and the Provision of the Results Thereof

Introduced in 2018, Article 47-5 provides that an entity that creates new knowledge or information by information processing using an electronic calculator (limited to those who comply with the standards specified by Cabinet Order) for the purpose of conducting the following services may, as far as it is deemed necessary and incidental to the provision of the results of such processing, use a copyrighted work for minor use, regardless of the manner:

- location search services;
- information analysis services; and
- other than those set forth in the two points above, any act of creating new knowledge and information through information processing by electronic computers as specified by Cabinet Order as contributing to the advancement of public benefit.

However, these exceptions shall not apply to cases where it unjustly harms the interests of copyright holders.

A key feature in Article 47-5 is the introduction of the concept of “minor use”, which is subject to broad interpretation. Whether a use would fall under “minor use” would depend on various factors, including the proportion and quantity of the copyrighted work used, and the granularity of the display for images. Another key feature is that cabinet orders will determine the applicable entity and the applicable acts. Any novel needs appropriate for the purpose of this article may be addressed by further expanding the scope of the exception by Cabinet Order.

An example of this exception is “book search service”, which would conduct word searches within the text of books, and retrieve biblio-

graphic information, the location of information, and a snippet of the text.

7.2 Private Copying Reproduction for “Private Use”

Article 30, paragraph 1 of the Japanese Copyright Act provides an exception to copyright for reproduction for “private use”, which is defined as personal use, family use, or any other use of a similarly limited scope.

The following uses are removed from the scope of this exception:

- reproduction by an “automated duplicator” (ie, a copying machine) which is available to the public;
- reproduction by circumvention of “Technological Protection Measures” (ie, a “copy-guard”); and
- reproduction of a copyrighted work received through illegal public transmission, with the knowledge of the illegal public transmission.

The copyrighted work may be adapted, translated, or altered during the course of the reproduction for “private use” (Article 47-6, paragraph 1 item 1). However, if the copy is distributed or made available to the public for purposes other than “private use”, the reproduction would retroactively be deemed as illegal (Article 49, paragraph 1 item 1).

In 2020, the Copyright Act was amended to remove knowingly downloading illegally uploaded copyrighted works from the scope of this exception (Article 30, paragraph 1 item 4). The amendment came into effect on 1 January 2021.

Other Exceptions

Other than the exception explained above, the Copyright Act provides the following limited exceptions for copying which could be characterised as private use:

- reproduction in libraries and similar facilities (Article 31; see “Exceptions Introduced by the Amended Copyright Act in 2021” below);
- reproduction in schools and other educational institutions (Article 35); and
- reproduction by the owner of a copy of a work of computer program (Article 47-3, paragraph 1).

Exceptions Introduced by the Amended Copyright Act in 2021

The Japanese Copyright Act was amended in May 2021, introducing the following exceptions to copyright.

First, in order to promote internet live streaming businesses in Japan, the amended Japanese Copyright Act introduced the concept of “simultaneous broadcast distribution”, and aligned their treatment with the existing broadcast-related rights regime (Articles 34, 38, 39, 40, 44, 93). These amendments have taken effect from 1 January 2022, with a follow-up scheduled within three years thereafter.

Second, to address the rising demand for digitisation of libraries under physical restrictions imposed by the COVID-19 pandemic, the amended Copyright Act introduced statutory exceptions to allow the National Diet Library to digitally transmit materials that are difficult to obtain (for example, out-of-print resources) and extracts of published works by email to certain libraries, subject to the payment of compensation (Article 31). This amendment will come into effect as of the date specified by a Cabinet Order within two years of its promulgation.

7.3 Reproductions of Cultural Goods/ Buildings

Article 46 of the Copyright Act provides an exception to copyright for the use of an artistic work where the original copy is installed outdoors (ie, a sculpture in a public park, etc), or

an architectural work, unless the use falls under any of the following:

- producing additional copies of a sculpture or making those additional copies available to the public by way of transfer;
- reproducing an architectural work through construction, or making copies of the reproduced architectural work available to the public through transfer;
- reproducing a work for permanent instalment in an outdoor location; and
- reproducing an artistic work for purpose of sales, or sales of those copies.

7.4 Activities Carried Out by Intermediaries

The Provider Liability Limitation Act establishes a “notice and take-down” exception to copyright for activities carried out by intermediaries such as internet service providers. The Provider Liability Limitation Act is loosely modelled on the Digital Millennium Copyright Act of the United States. It seeks to limit the potential liability owed to copyright holders, and also potential liability owed to distributors of infringing content by “taking down” the alleged infringing content.

Article 3, paragraph 1 of the Provider Liability Limitation Act provides that a “specified telecommunications service provider” (ie, ISPs) shall not be liable for damages to the copyright holder which was caused by the distribution of content, unless it was technically possible to block the distribution, and falls under any of the following:

- it knew that distribution of content infringed the copyright of the copyright holder;
- it knew the distribution of content, and there are reasonable grounds to find that it could have known that the content was infringing;
- or

- the infringing content was distributed by the “specified telecommunications service provider” itself.

Article 3, paragraph 2 of the Provider Liability Limitation Act provides that a “specified telecommunications service provider” shall not be liable for damages to the distributor which was caused by blocking the distribution of the content, if it falls under any of the following:

- there are reasonable grounds to believe that the content was infringing; and
- the distributor fails to respond within seven days to an inquiry from the “specified telecommunications service provider”, whether to comply with a takedown request from the copyright holder.

7.5 Satire and Parody

The Japanese Copyright Act does not provide a statutory exception to copyright for satire and/or parody. Although there have been several cases arguing for an exception to copyright for satire and/or a parody use, the Japanese courts have repeatedly refused to establish such an exception.

The Supreme Court of Japan held that a photographic montage which was intended as a satirical commentary on automobile-related pollution infringed the moral right (the right to integrity) of the photographer (Supreme Court decision on 28 March 1980).

7.6 Copyright: Freedom of Speech/ Right of Information

In Japan, freedom of speech and the right to information disclosure is addressed by incorporating these interests into the statutory exceptions to copyright protection, as further described below.

Freedom of Speech

Quotation (Article 32)

See **7.1 Fair Use Doctrine/Fair Dealing**.

Reprinting of editorial commentary on current affairs (Article 39)

Editorial commentaries printed and published in a newspaper or a magazine may be reprinted in another newspaper or magazine, broadcasted, or publicly transmitted, unless such use is expressly prohibited (Article 39, paragraph 1). Such broadcasted, cablecasted, or publicly transmitted editorial commentary can be communicated to the public through a receiver (Article 39, paragraph 2).

Exploitation of political speeches (Article 40)

Political speeches and other statements delivered to the public can be exploited in any manner, except for making a compilation of speeches or statements by the same author (Article 40, paragraph 1). If it is found to be justifiable for the purpose of news reporting, public speeches or other public statements made at national or local government agencies can be printed in a newspaper or a magazine, broadcast, or cablecast, or publicly transmitted (Article 40, paragraph 2).

Right of Information

Use of government-created works

Copyrighted works created by the government for public relations purposes may be reprinted in newspapers, magazines or other printed publications, unless expressly prohibited (Article 32, paragraph 2).

Reporting of current events (Article 41)

Copyrighted works that comprise a current event, or those that are seen or heard during the course of news reporting, may be reproduced or used for legitimate news reporting purposes (Article 41).

Exploitation for disclosure pursuant to the act on access to administrative organs' information and other provisions (Article 42-2)

Copyrighted works may be used as necessary to disclose information to the public under the applicable information disclosure laws and regulations (Article 42-2).

Other Human Rights

Reproduction in order to prepare a large-print textbook (Article 33-3)

Copyrighted works printed in school textbooks may be reproduced with enlarged letters, illustrations, and adaptation necessary for use by children with disabilities (Article 33-3, paragraph 1).

Reproduction for persons with visual and vision-related impairments (Article 37)

Copyrighted works which have been made available to the public can be reproduced in Braille (Article 37, paragraph 1). Braille data of such works may be recorded on a medium or publicly transmitted (Article 37, paragraph 2). Such copyrighted works may be recorded onto an audio tape to be leased to persons with visual impairments by designated facilities (Article 37, paragraph 3).

Reproduction for persons with hearing impairments (Article 37-2)

Copyrighted works which have been made available to the public can be used to the extent necessary by designated businesses promoting the welfare of persons with hearing impairments (ie, creating subtitles or inserting subtitles onto images).

8. NEIGHBOURING / ENTREPRENEURIAL / COPYRIGHT-RELATED RIGHTS

8.1 Neighbouring Rights

Performers

Performers enjoy the following neighbouring rights for 70 years from the performance (Article 101, paragraph 1 and 2).

Neighbouring rights

- Sound recording and visual recording rights (Article 91);
- broadcasting and cablecasting rights (Article 92);
- right to make available for transmission (Article 92-2);
- right of transfer (Article 95-2); and
- right to lease (Article 95-3).

Moral rights

- Right of attribution (Article 90-2); and
- right to integrity (Article 90-3).

Remuneration rights

- Remuneration rights for use of cablecast of broadcast performances (Article 94-2);
- remuneration rights for secondary use of commercial phonograms (Article 95, paragraph 1);
- remuneration rights for use of rentals of commercial phonograms (Article 95-3, paragraph 3); and
- remuneration rights for compensation of private audio/visual recording (Article 102, paragraph 1; Article 30, paragraph 2).

Producers of Phonograms (Record Producers)

Record producers enjoy the following neighbouring rights for 70 years from the recording (Article 101, paragraph 1 item 1, and Article 101, paragraph 2 item 2).

Neighbouring rights

- Right of reproduction (Article 96);
- right to make available for transmission (Article 96-2);
- right of transfer (Article 97-2, paragraph 1); and
- right to lease (Article 97-3, paragraph 1).

Remuneration rights

- Remuneration rights for secondary use of commercial phonograms (Article 97, paragraph 1);
- remuneration rights for use of rentals of commercial phonograms (Article 97-3, paragraph 3); and
- remuneration rights for compensation of private audio/visual recording (Article 102, paragraph 1, Article 30, paragraph 2).

Broadcasters

- Broadcasters enjoy the following neighbouring rights for 50 years from the broadcast (Article 101, paragraph 1 Item 3, and Article 101, paragraph 2 item 3);
- right of reproduction (Article 98);
- broadcasting and cablecasting rights (Article 99);
- right to make available for transmission (Article 99-2); and
- right to communicate television broadcasts to the public (Article 100).

Cable Broadcasters

- Cable broadcasters enjoy the following neighbouring rights for 50 years from the cable broadcast (Article 101 paragraph 1 item 4; Article 101 paragraph 2 item 4);
- right of reproduction (Article 100-2);
- broadcasting and cablecasting rights (Article 100-3);
- right to make available for transmission (Article 100-4); and
- right to communicate cable television broadcasts to the public (Article 100-5).

8.2 Transferring/Licensing/Sale of Neighbouring Rights

Neighbouring rights can be transferred, licensed or sold in whole or in part (Article 61, paragraph 1; Article 103). Remuneration rights can be transferred or sold. The moral rights of the performer cannot be transferred, licensed or sold (Article 101-2).

Japan does not require a specific type of contract to transfer or sell neighbouring rights and remuneration rights, or to license neighbouring rights.

8.3 Copyright Exceptions Applicable to Neighbouring Rights

Almost all of the statutory exceptions for copyright apply to neighbouring rights (Article 102, paragraph 1).

9. COPYRIGHT INFRINGEMENT AND LITIGATION

9.1 Types of Copyright Infringement

Unauthorised exploitation of a copyrighted work under any of the exclusive rights explained in **4.1 Economic Rights of the Copyright Owner**, **4.6 Moral Rights of the Copyright Owner**, or **8.1 Neighbouring Rights** are considered to be infringement.

The following acts are also deemed to constitute infringement of copyright, moral rights or neighbouring rights:

- importing an infringing item for the purpose of distribution in Japan (Article 113, paragraph 1 item 1);
- committing any of the following acts regarding infringing items with knowledge of infringement; distributing, possessing for the purpose of distributing, offering to distribute,

- export in the course of business, possession for the purpose of exporting (Article 113, paragraph 1 item 2);
- providing hyperlinks to facilitate the use of infringing content through “leech sites” and “leech apps”, which are websites and apps for such use (Article 113, paragraph 2 item 2A and 2B);
 - knowingly using an illegal copy of a computer program on a computer for business purposes (Article 113, paragraph 5);
 - circumvention of “Technological Measure for Restriction of Exploitation” (Article 113, paragraph 6), see **5.1 Anti-circumvention Right**;
 - distributing command code to be used for circumvention of “Technological Measure for Restriction of Exploitation” or “Technological Protection Measures” (Article 113, paragraph 7);
 - alteration of “Rights Management Information” (Article 113, paragraph 8), see **5.2 Legal Remedies for Copyright Management Information**;
 - knowingly importing, possessing, and distributing commercial sound recordings intended for distribution outside Japan, provided that the domestic distribution unreasonably harms the interest of the copyright or neighbouring rights holder (Article 113, paragraph 10); and
 - exploitation of a work in a way that is prejudicial to the honour or reputation of the author (Article 113, paragraph 11).

9.2 Defences against Copyright Infringement

The following defences are available against infringement claims.

Lack of Copyright Protection

Defendants may raise the lack of copyright protection as a defence. Common reasons for this defence would be either the alleged infringed work is only an idea or fact which is not protect-

able by copyright, or the alleged infringed work lacks the requisite level of creativity.

Lack of Standing

Defendants may raise lack of standing as a defence against plaintiffs who are not the owner of copyright, moral rights or neighbouring rights. For further details on the ownership of these rights, see **4.2 Alienable Rights**, **4.3 Transmissible Rights**, **4.6 Moral Rights of the Copyright Owner** and **8.2 Transferring/Licensing/Sale of Neighbouring Rights**.

Licence

Defendants may raise a licence defence as a complete defence. Licences may be exclusive or non-exclusive, written or oral, express or implied. A licence is valid even against a party which is assigned a copyright or neighbouring after the licence was granted regardless of the assignee’s awareness of the licence at the time of assignment.

For further details on licensing see **4.2 Alienable Rights** and **8.2 Transferring/Licensing/Sale of Neighbouring Rights**.

Statutory Exceptions

Defendants may raise any of the applicable statutory exceptions as defence to copyright, moral rights, and neighbouring rights as set forth in the Copyright Act. For further details of the statutory exceptions see **4.5 Copyright Exhaustion Doctrine**, **7. Exceptions to Copyright**, and **8.3 Copyright Exceptions Applicable to Neighbouring Rights**.

Expiry of Copyright Term

Defendants may raise the expiry of the copyright protection term as a defence. See **4.1 Economic Rights of the Copyright Owner** and **8.1 Neighbouring Rights**.

Statute of Limitation Damages Claims

Defendants may raise a statute limitation defence against damages claims. The statute of limitation for damages caused by copyright infringement (which is classified as a tort) is either three years from when the victim came to know of the damage and the infringer, or 20 years from infringement (Japanese Civil Code Article 724).

The statute of limitation for a claim to return unjust enrichment, which corresponds to reasonable royalty that an unauthorised user of a copyrighted work should have paid, is either five years from when the copyright holder came to know of the unauthorised user and its use, or ten years from use (Japanese Civil Code Article 166, paragraph 1).

9.3 Proceedings Available to the Copyright Holder

Copyright holders may pursue infringement claims in the civil court proceedings pursuant to the Code of Civil Procedure of Japan. Copyright holders may choose either or both of a lawsuit on the merit and/or a request for preliminary injunction.

No formalities (such as registration of the copyrighted work) are required before initiating court proceedings to pursue infringement.

Copyright holders may file an application for import suspension in the customs office. Further, copyright holders may choose to file a criminal complaint with law enforcement authorities, such as the police or the public prosecutors' office.

9.4 Jurisdiction for Copyright Proceedings

Subject Matter Jurisdiction

The Summary Court has jurisdiction over all civil cases having economic value of JPY1,400,000 or less (Court Act Article 33, paragraph 1). The

District Court has jurisdiction over all civil cases exceeding JPY1.4 million (Court Act Article 24, paragraph 1). The economic value of a civil case, which should include an estimated value of an injunction claim, is determined by the rules established by the Supreme Court of Japan.

Territorial Jurisdiction

Injunction claims

- Location of the defendant (Code of Civil Procedure Article 4); and
- the place where the infringing act occurred, or where the result of the infringement occurred (Code of Civil Procedure Article 5, item 9).

Damages claims

- Location of the defendant (Code of Civil Procedure Article 4);
- the place where the infringing act occurred, or where the result of the infringement occurred (Code of Civil Procedure Article 5, item 9); and
- the location of the plaintiff (Code of Civil Procedure Article 5, item 1)

The Tokyo District Court or the Osaka District Court have concurrent jurisdiction with the court determined by the rules described above (Code of Civil Procedure Article 6-2).

Special Rules for Computer Programs

Depending on the territorial jurisdiction, the Tokyo District Court (or the Tokyo Summary Court) or the Osaka District Court (or the Osaka Summary Court) have exclusive jurisdiction as the court of first instance with respect to cases having economic value exceeding JPY1.4 million (Code of Civil Procedure Article 6, paragraph 1 items 1 and 2).

9.5 Necessary Parties to Copyright Infringement Proceedings

The owner of the copyright, moral right or neighbouring right may initiate infringement proceedings.

A joint owner of a jointly owned copyrighted work may initiate an infringement proceedings by itself, and does not require other joint owners to file as co-plaintiffs.

Non-exclusive licensees of copyright or neighbouring rights do not have standing to initiate an infringement.

Exclusive licensees are generally regarded as lacking standing for seeking injunctive relief, while they are found to have standing for seeking compensation of damages in some lower court precedents.

9.6 Third Parties to Copyright Proceedings

Third parties may be involved in the copyright proceedings as witnesses, expert witnesses, potential co-plaintiffs or co-defendants, and interveners.

9.7 Urgent Measures

An alleged victim to the infringement may file for a preliminary injunction as an urgent measure against copyright infringement (Civil Provisional Remedies Act Article 23, paragraph 2). The applicant must claim and provide evidence to the court that there is:

- a likelihood of copyright infringement; and
- that the applicant will suffer irreparable damages if relief is not granted until a permanent injunction is ordered.

If the court finds that these requirements are satisfied, it will issue a preliminary injunction, on condition that the applicant post a bond deter-

mined by the court. The bond is to cover the damages to the alleged infringer if the preliminary injunction is found to be in error in the later proceedings.

9.8 Role of Experts in Copyright Proceedings

In general, the roles of experts in copyright proceedings is rather limited. The involvement of experts in copyright proceedings is not so common.

Experts may play a more important role in software copyright proceedings, where technical expertise is required. Experts may also join in arbitration or mediation proceedings on an ad hoc basis.

9.9 Counterfeits and Parallel Imports

Seizure of counterfeits and illegal parallel imports are provided through the Customs Act. Owners of intellectual property such as copyright may file a petition to the head of the local customs office to block the import of counterfeit and illegal parallel imports (Customs Act Article 69-3, paragraph 1). An outline of the procedure is as follows:

- the head officer of the customs office will notify the importer named in the application to file for an opinion in response to the petition;
- if the importer objects to the petition, the head officer of the local customs office will order the parties to submit additional written opinions and evidence to support their position;
- upon review of the filing and the evidences, and hearing the response from the importer of the alleged infringing item, the head officer of the customs office will either issue a written certification that the disputed items is an infringing item, or reject the petition; and

- if the item is found to be infringing, the importer is given three months to appeal to the written certification.

9.10 Remedies and Sanctions

The following remedies are available:

- injunctive relief (Article 112, paragraph 1);
- monetary relief (Article 114); and
- destruction of infringing objects and the tools and instruments used solely for infringement (Article 112, paragraph 2).

9.11 Copyright Infringement as Administrative or Criminal Offences

Infringement of copyright, printing rights and neighbouring rights is punishable by imprisonment for a term not exceeding ten years or a fine not exceeding JPY10 million, or both (Article 119, paragraph 1). Infringement of moral rights is punishable by imprisonment for a term not exceeding five years or a fine not exceeding JPY5 million, or both (Article 119, paragraph 2 item 1).

A rights holder may file a criminal complaint to the local law enforcement officials (local police office or the public prosecutor office). Upon review of the complaint and evidence submitted, the law enforcement will decide whether to investigate and possibly bring the matter to the Courts through the Code of Criminal Procedure.

9.12 Appellate Procedure for Copyright Proceedings

The seven High Courts (Sapporo, Sendai, Intellectual Property High Court, Nagoya, Osaka, Hiroshima and Fukuoka) have appellate jurisdiction over cases coming from the district courts within its respective territorial jurisdiction. The Intellectual Property High Court has jurisdiction

over all appellate cases concerning computer programs having economic value exceeding JPY1.1 million (Code of Civil Procedure Article 6, paragraph 1 item 3). The Supreme Court of Japan has jurisdiction as the final court over appeals to High Court decisions.

9.13 Costs of Copyright Litigation

The plaintiff has to pay a court fee upon filing a complaint, and both parties bear their own costs during the infringement proceedings. A plaintiff may claim the costs of litigation, such as court fees to be compensated by a defendant, and a plaintiff may seek compensation of its attorneys' fees as a part of the damages incurred by copyright infringement. Upon issuing its ruling, the Court has the discretion to allocate the cost of the litigation to the parties depending on the outcome. In practice, around 10% of the damages to be awarded as compensation for infringement are added as compensation to cover the plaintiff's attorneys' fees.

9.14 Alternative Dispute Resolution

Alternative dispute resolution (ADR) is not yet a common way to settle a copyright case. ADR is not compulsory.

Either the Japan Commercial Arbitration Association or the Japan Intellectual Property Arbitration Center is usually selected as the institution for arbitration or mediation, although the number of cases dealt by both institutions is not large.

Furthermore, the Tokyo District Court and the Osaka District Court hold, if both parties agree to such proceeding, mediation for copyright disputes, where a judge from IP divisions of said courts and two attorneys experienced in copyright would form a mediation committee.

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