

Copyright exhaustion in Japan and Asia

Eiichiro Kubota

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Right of transfer of ownership

- The Japanese Copyright Law provides for a "right of transfer" in Article 26-2.1

"The author shall have the exclusive right to offer his work (except a cinematographic work; the same shall apply hereafter in this Article) to the public by transfer of ownership of the original or copies of the work (excluding copies of a cinematographic work in the case of a work reproduced in the cinematographic work; the same shall apply hereinafter in this Article)"

There is a separate "right of distribution" for cinematographic work

Exhaustion of "right of transfer"

- Article 26-2.2 provides for exhaustion of the "right of transfer" as follows;

"The provisions of the preceding paragraph shall not apply in the case of the transfer of ownership of such original or copies of a work as falling within any of the following items:

(i) The original or copies of work the ownership of which has been transferred to the public by a person who has the right mentioned in the preceding paragraph or with the authorization of such person;"

Exhaustion of "right of transfer"

- The "original or copies of work" in Article 26-2.2 (i) are understood to be "physical copies" and do not include "digital copies"
- The issue will be whether Article 26-2.2 is an exhaustive list of when exhaustion occurs and there is no room for copyright exhaustion in other circumstances

Supreme Court decisions on IPR exhaustion

- Patents

- BBS aluminum wheel case (July 1, 1997)
- Canon Ink tank case (November 8, 2007)

- Copyrights

- Second hand game software case (April 25, 2002)

Second hand game software case

- The issue was whether video games sold in CD-ROMs can be seen as "cinematographic work" that is not subject to exhaustion
- The Supreme Court mentioned that copyrighted work can be subject to exhaustion because:
 - Protection of copyrights should be given considering the public interest
 - If each purchaser needs to acquire a license from the copyright owner, that will hinder free flow of goods
 - The copyright owner has a chance to be compensated and there is no need for multiple compensation

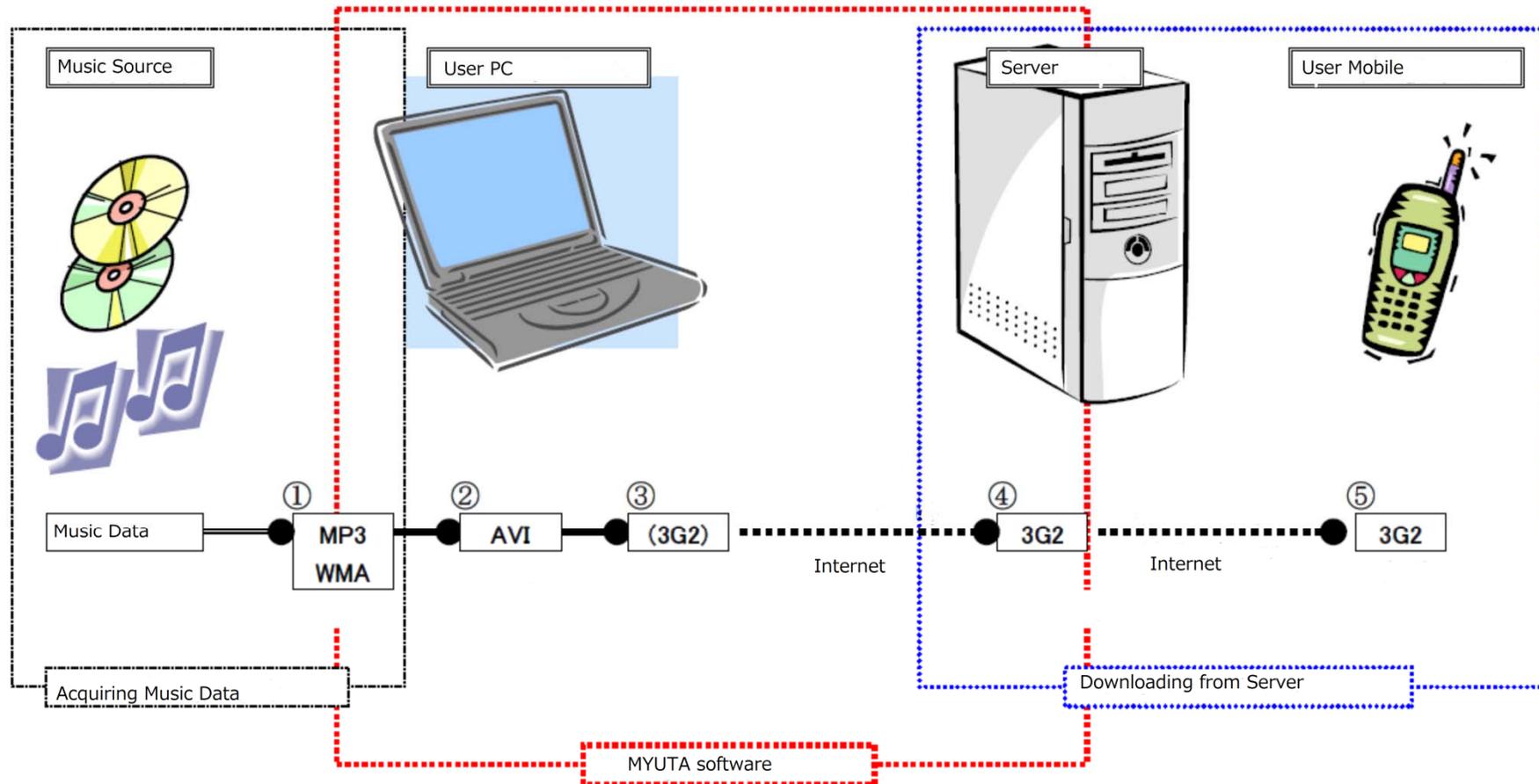
Second hand game software case

- The Court found that the video games are "cinematographic works"
- However, the Court mentioned that although Article 26-2 excludes cinematographic work, that does not mean that video games are not subject to exhaustion
- From this Supreme Court decision, it seems like the Supreme Court is not taking the position that Article 26-2.2 is an exhaustive list

The trend in Japanese Courts

- Japanese Courts tend to be more pro-copyright holder and strict to new businesses
 - MYUTA case (Tokyo District Court, May 25, 2007)
 - Maneki TV case (Supreme Court, January 18, 2011)
 - Rokuraku II case (Supreme Court, January 20, 2011)

MYUTA case



MYUTA case

- The case started in 2006 when smart phones were not that popular
- Music downloads to mobile phones was a huge market for the music industry
- It was technically difficult for consumers to load music to personal mobile phones from CDs or PCs
- Company named Image City ("IC") provided MYUTA, a service that enable consumers to download music to their mobile phones from purchased CDs

MYUTA case

- IC provided customers with the MYUTA software that enables changing the format of the musical data and uploading to the Server which was managed by IC
- The MYUTA service started as a beta version for free but IC intends to charge its customers in the future
- JASRAC, the Japanese musical copyright administration society sent a warning letter to IC
- IC filed a DJ action

MYUTA case

- The Court found that IC rather than the customers is the person who is copying the musical data and is transmitting the data applying the Karaoke Doctrine
- As a result, the Court found that IC is infringing the rights of reproduction and the rights of transmission of the music copyright holders

Conclusions

- Under Japanese law, it is a possibility that the copyright will be exhausted once the software is downloaded and the consumer lawfully acquires a digital copy of the software although this is still an open question
- However, given the trend in Japanese Courts which give more weight to copyrights than to encouraging new businesses, my personal view is that the Courts will not find exhaustion in such cases

Copyright exhaustion in China

- Copyrights are protected by the Copyright Law which was made in 1990 and revised in 2001
- Further amendment of the Copyright Law is currently under discussion
- The current Copyright Law is silent about copyright exhaustion
- However, some case law have found copyright exhaustion under certain circumstances

Copyright exhaustion in South Korea

- Article 20 of the Copyright Law states as follows:

"The author shall have the right to distribute the original or reproduction of his work unless the original or reproduction of a work is offered for transaction by means of selling, etc. with the authorization of the owner of the property rights."
- Article 2.22 defines "reproduction"

"Reproduction" shall mean the fixation of works or the reproduction of works in tangible media of expression by means of printing, photographing, copying, sound or visual recording or other means

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