Questions

I. Analysis of current law and case law

The Groups are invited to answer the following questions about specific exceptions or permitted uses existing in their national laws:

1. What exceptions or permitted uses apply to a service provider in relation to user-generated content (UGC)? Are there any limitations on those exceptions/uses, for example when the service provider is put on notice of unlawful content uploaded by internet users? Would they also apply to UGC sites which likely attract infringement? Which types of service provider may benefit from such exceptions: What content does your jurisdiction define as UGC? Would exceptions for UGC, for example, apply to UGC sites such as YouTube or social networking sites such as Facebook?

(Answer)

In light of the purpose of this question that is suggested in this context, it is our understanding that the term “service provider” used in this question means a business operator that merely provides a sort of bulletin board without directly engaging in the acquisition or transmission of information. In other words, a service provider is a company that provides an environment (platform) for the uploading or downloading of content. It is also our understanding that the term “UGC” used in the question means content generated by users.

In Japan, if a user uploads copyrighted UGC without consent of the copyright holder and/or transmits it to unspecified persons or a large number of persons, it is, in principle, the user, not the service provider, who would be held liable under the Copyright Act for the direct infringement of the right of reproduction (Article 21 of the Copyright Act), the right of...
adaptation (Article 27 of said Act), the right of making works transmittable (Article 23 of said Act), and/or the right of public transmission (Article 23 of said Act) of the copyright holder.

Based on this principle, the service provider of a UGC site such as YouTube or a social networking site such as Facebook would not be held liable for any infringement as long as the service provider simply provides a bulletin board, in other words, merely provides an environment (platform) for the uploading or downloading of content without directly engaging in the acquisition or transmission of information.

Despite this principle, there are some exceptional cases where the service provider is held liable.

For instance, according to lower court precedents, said principle would not apply to a case where a service provider is notified of the existence of unlawful content uploaded by an Internet user as long as the following conditions are met (direct infringement on the basis of inaction):

(a) it was technologically possible for the service provider to take measures to prevent the transmission in question;

(b) the service provider was aware that the uploading and/or transmission constituted infringement or the service provider was aware of the uploading and/or transmission due to a notice from the right holder and there are justifiable reasons to believe that the service provider was aware of the infringement; and

(c) the service provider failed to take measures to prevent the transmission.

Furthermore, based on the “Karaoke doctrine,” the service provider could be held liable if it is found to have been managing and controlling the site and receiving profits from the infringement.¹

Lower court precedents have shown that, in a case where a user uploads a work or an adaptation thereof without obtaining consent from the copyright holder and/or transmits it to unspecified persons or a large number of persons by using service provided by an ISP, etc., if the Karaoke doctrine is found to be applicable, the ISP, etc., would be deemed to be the person transmitting the work and would not be subject to the provision of the Act to Limit Liability of Providers concerning limitations on the liability for damages. In this case, the service provider could be held liable for copyright infringement, regardless of whether or not the conditions listed in (a), (b), and (c) above are met. For instance, a service provider

¹ In the judgment for the Club Cat's Eye case, the Supreme Court held that the operator of a Karaoke bar, which did not commit a direct infringement in reality, should be held liable, under the Copyright Act, for direct infringement of the right of performance on the grounds that the bar controlled the karaoke facilities where customers enjoyed singing karaoke and that the bar obtained profits from the Karaoke business. This judgment presented the so-called Karaoke doctrine, which has been used in many other Karaoke-related cases to determine the direct infringer of the right of performance. In many lower court cases on live piano performance, ballet performance, and music performance, etc., the court used said doctrine as a general legal theory to determine the direct infringer of the right of performance. In recent cases on new uses of music, movies, etc., that have been made possible thanks to the progress in digitisation and Internet connectivity, this doctrine has been widely used as a general legal theory to determine the direct infringer of the right of reproduction, the right of public transmission, etc. Consequently, lower court precedents have shown that the Karaoke doctrine could be applied on a case-by-case basis to some cases involving (i) Central P2P file exchange services, (ii) services that enable users to record and watch broadcasts through the Internet, (iii) services to store music contained on CDs, etc., for mobile phones, or (iv) video-posting website, video-sharing website, etc. Said doctrine, which is applied on a case-by-case basis, allows exceptional treatment of copyright infringement cases. Even if a user uploads a work or an adaptation thereof without obtaining consent from the copyright holder and/or transmits it to unspecified persons or a large number of persons by using service provided by an ISP, etc., it would be not the user but the ISP, etc. who would be held liable for direct infringement of the right of reproduction, the right of adaptation, the right of making works transmittable, and/or the right of public transmission as specified above.
managing and operating a UGC site that is likely to attract infringement could be held liable for copyright infringement.

On the other hand, in Supreme Court precedents (Rokuraku II case, Maneki TV case) involving not UGC but broadcasts, the Supreme Court found the transfer service provider as the direct infringer of the copyrights (the right of reproducing broadcasts, the right of making them transmittable, etc.). 2 3 These precedents established the judicial theory based on which a transfer service provider could be regarded as a direct infringer of copyright, while a service provider who provides a platform could be regarded as a direct infringer based on the Karaoke doctrine.

In this relation, in order to limit the right of reproduction, Article 47-5, paragraphs (1) and (2) were established on June 12, 2009, and enforced on January 1, 2010. Said provisions specify that, to the extent deemed necessary to accomplish the purpose of preventing a failure in transmitting a work as a result of a transmission delay or an equipment breakdown or restoring a work that has been lost, the work may be recorded on any auxiliary or backup recording medium other than such recording medium as an automatic public transmission server and also that, to the extent deemed necessary to improve the efficiency in relaying automatic public transmissions of a work, the work may be recorded on such part of the recording medium of said server that is shared for use by the relay transmissions.

Japan has no legal definition of UGC. In general, UGC means content contained on the websites of YouTube, blogs, and social networks available through the Internet. Content per se is defined in Article 2 of the Act on Promotion of Creation, Protection and Exploitation of Content (Act No. 81 of June 4, 2004) as “any cinema, music, drama, literature, photograph, comic, animation, computer game, or any letter, diagram, colour, oral words, movement, or video or any combination thereof, or any program created to provide such information through a computer (referring to a combination of orders to a computer created for the purpose of obtaining a certain result) that is generated as a result of creative activities of human beings and can be regarded as educational or entertainment content.”

2. What exceptions or permitted uses apply in relation to temporary acts of infringement? Do transient/temporary copies of electronic works, held for example

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2 The judgment of the First Petty Bench of the Supreme Court dated January 20, 2011 (2009(Ju)No. 788) was handed down for the Rokuraku II case. In this case, the provider managed and operated the main unit. Each user, who was allowed to operate a subordinate unit, could order the recording of a broadcast, etc., received by the main unit and the transmission of the recorded broadcast to his/her terminal. Based on this order, the main unit automatically digitized and recorded the broadcast, etc., and sent the digital data to the subordinate unit through the Internet so that the user could receive the transmitted data and watch the broadcast. Having found these facts, the Supreme Court held that the provider who managed and operated the main unit infringed the right of reproducing broadcasts.

3 The judgment of the Third Petty Bench of the Supreme Court dated January 18, 2011 (2009(Ju)No. 653) was handed down for the Maneki TV case. The Supreme Court found the transfer service provider to be liable for infringement of the right of making works transmittable and the right of public transmission. In this case, the operator connected a device to the Internet and input information to the device through the Internet so that the device could automatically transmit information to the receiver (user) upon a user’s request. Based on these facts, the Supreme Court found that, if information is continuously input to the device, the person who made such input shall be regarded as the transmitter of the information. More specifically, the service provider’s act of making arrangements necessary for the base station to receive analog TV broadcasts from antennas constituted an act of transmitting the broadcasts. The court held that the users may be regarded as the public from the viewpoint of the service provider. The service provider was engaged in the business of receiving broadcasts, digitizing them upon a user’s request sent via the Internet, and automatically transmitting the digitized data through the Internet. According to the judgment, the court seems to have interpreted this act of digitization as a part of the act of transmission from the base station to the user’s terminal. In the judgment, the court also held that the service provider’s act of connecting TV antennas with the base station connected to the Internet so that the base station could receive the broadcasts constituted the act of making works transmittable.
in a cache or in a computer's working memory (RAM) amount to infringing copies?

(Answer)

The Japanese Copyright Act has a copyright-limiting provision to permit ephemeral reproduction for the purpose of repair, etc. (Article 47-4 of the Copyright Act), a copyright-limiting provision to permit reproduction for the purpose of preventing a transmission failure (Article 47-5 of said Act), and a copyright-limiting provision to permit reproduction for the purpose of exploiting the reproduced work on a computer (Article 47-8 of said Act).

In Japan, it had been debated whether the accumulation of a work in the process of machine utilization or telecommunication should be regarded as reproduction in the first place. There were district court precedents where the court found that the temporary accumulation in RAM did not constitute reproduction. However, said precedents were viewed by a majority as judgments made specifically for those cases. Since even experts were divided over what types of accumulation, etc., would constitute reproduction or copyright infringement, there was a risk of confusion. To solve this problem, the Copyright Act was revised in 2009. The revised Act specifies that the momentary or transient accumulation, etc. of a work in the course of machine utilization or telecommunication would not constitute reproduction. In the revision, copyright-limiting provisions were established in order to clarify that any other ephemeral fixation that could be regarded as reproduction would not constitute copyright infringement as long as the exercise of copyright is considered to be inappropriate. Two of the abovementioned three copyright-limiting provisions, i.e., the copyright-limiting provision to permit reproduction for the purpose of preventing a transmission failure (Article 47-5 of said Act) and the copyright-limiting provision to permit reproduction for the purpose of exploiting the reproduced work on a computer (Article 47-8 of said Act), were newly established in this 2009 revision of the Copyright Act.

The copyright-limiting provision to permit ephemeral reproduction for the purpose of repair, etc. (Article 47-4 of the Copyright Act) specifies that any person who maintains or repairs a reproducing machine with built-in memory or who finds that a reproducing machine with built-in memory has a manufacturing defect or any part broken since before the date of purchase and replaces the machine with a similar machine may, to the extent considered necessary, make an ephemeral recording of the works contained in the built-in memory and store the recording on any recording medium other than the built-in memory and may, after the maintenance or repair, record the works on the built-in memory of said machine or the built-in memory of a similar machine.

The copyright-limiting provision to permit reproduction for the purpose of preventing a transmission failure (Article 47-5 of said Act) specifies that any person engaged in the business of providing an automatic public transmission server for use by other people to make automatic public transmissions may, to the extent deemed necessary to accomplish the purpose of preventing a transmission delay, etc., caused by access concentration, restoring a failure of the recording medium used for public transmissions, or improving the efficiency of relay transmissions of works, make a recording of works that have been made transmittable by the automatic public transmission server and store the recording on a certain recording medium.

The copyright-limiting provision to permit reproduction for the purpose of exploiting the reproduced work on a computer (Article 47-8 of said Act) specifies that any person who exploits a work on a computer may, to the extent deemed necessary for smooth and efficient information processing, record the work on the recording medium of the computer in the course of computer-based information processing.
Regarding an ephemeral reproduction of an electronic work retained in a cache or in the working memory of a computer is not regarded as an infringing reproduction based on the copyright-limiting provision to permit reproduction for the purpose of exploiting the reproduced work on a computer (Article 47-8 of said Act).

3. Is there a private copying exception? If so, what is its scope? Should copyright levies apply for private use? If so what uses should be subject to the levy?

(Answer)

- Yes, there is a private copying exception. Regarding an act of reproducing a work for the purpose of private use, copyright limitations would apply to a case where a person makes a reproduction of a work “for his personal use or family use or other equivalent uses within a limited scope,” whereas no copyright limitations would apply to a case where a work is used for the purpose of public transmissions, etc. (Article 30, paragraph (1) of the Copyright Act). The applicability of this private copying exception is limited to cases where a work is reproduced for personal or family use and “other equivalent uses within a limited scope.” “Other equivalent uses” should not be broadly interpreted as cases where a work is reproduced for non-commercial purposes but should be narrowly interpreted as cases where the scale of reproduction is so small that its effect on the profits of the copyright holder is negligible.

   It should be noted, however, that, even in the case of an act of reproducing a work for the purpose of private use that falls under said paragraph, the private copying exception would not apply to said act if the work is reproduced by use of an automatic reproducing machine (videocassette recorder, DVD recorder, etc.) installed for use by the public (Article 30, paragraph (1), item (i) of the Copyright Act), or if the work is knowingly reproduced by the circumvention of technological protection measures such as copy protection (paragraph (1), item (ii) of said Article), or if the work is knowingly reproduced by downloading unlawful downloadable content and making a digital sound and visual recording thereof (paragraph (1), item (ii) of said Article). In these cases, reproduction is considered illegal.

- Even in the case of an act of reproducing a work for the purpose of private use that is subject to a private copying exception and is outside the scope of the copyright holder’s exclusive rights, if the reproduction is conducted by use of a machine for digital sound and visual recordings and a recording medium for digital sound and visual recordings, said act would be subject to the system of compensation for private sound and visual recordings established for the purpose of compensating the economic damage suffered by the copyright holder as a result of the advancement of the digital reproduction technology that allows mass reproduction without quality deterioration (Article 30, paragraph (2) of the Copyright Act).

- Any person who makes sound and visual recordings on a recording medium for digital sound and visual recordings (electromagnetic tape, optical disc, magnetic optical disk, etc.; Article 1-2 of the Order for Enforcement of the Copyright Act) designated by a designated machine for digital sound and visual recordings (MD recorder, CD recorder, DVD recorder, etc.; Article 1 of the Order for Enforcement of the Copyright Act) is subject to the system of compensation for private sound and visual recordings (Article 30, paragraph (2) of the Copyright Act). Therefore, any machine for sound and visual recordings with a built-in hard disk or built-in flash memory such as an iPod and any general-purpose machine such as a computer are not subject to said compensation system.

- In the Tokyo District Court judgment dated December 27, 2010 (2009(Wa)No. 40387), the court found a DVD recording machine with a built-in tuner for digital broadcasting and without a built-in tuner for analogue broadcasting as a designated machine specified in Article 1 of the Order for Enforcement of the Copyright Act, which is subject to the system of
Compensation money is included in the retail price of a designated machine for sound and visual recordings and the price of a designated recording medium. When such product is purchased, the designated management association collects the compensation money specified in the compensation rules of said system from the purchaser in a lump sum via a product distributor (Article 104-4 of the Copyright Act). The compensation money collected in a lump sum is allocated to the copyright holder, the performer, and the record producer through right holders' associations such as the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) according to the allocation ratios specified in the allocation rules of said system.

- Every manufacturer of the designated machines for sound and visual recordings or the designated recording media is required to cooperate in requesting and receiving the payment of compensation for private sound and visual recordings (Article 104-5 of the Copyright Act). In the abovementioned Tokyo District Court judgment dated December 27, 2010, the court held that this provision specifying the manufacturers’ “obligation for cooperation” in collecting compensation should be interpreted as merely imposing an abstract, unenforceable obligation for cooperation and should not be interpreted as statutorily obliging the manufacturers to include compensation money for private sound and visual recordings in the retail prices of the designated recording machines that they ship and to collect the compensation money and pay it to the designated management association.

- Compensation money must be collected in a lump sum in advance regardless of whether works will actually be reproduced, how many times works will be reproduced, or whether works will be reproduced for business use or private use. This is why any person who has paid the compensation for private sound and visual recordings has the right to request that the designated management association refund said compensation, by certifying that such designated recording machine or designated recording medium is used solely for purposes other than private sound and visual recording (Article 104-4, paragraph (2) of the Copyright Act).

- A report to be submitted to as early as the 2011 Diet sessions addresses the issue of a device or program used for the purpose of circumventing technological protection measures, which is not restricted by the current Act. The report proposes that the act of (i) renting it to the public, (ii) producing, importing, or owning it for the purpose of transferring it to the public, or (iii) providing it to the public, using it for public transmissions or making works transmittable should be deemed as copyright infringement. If such revision proposed in the report is made to the Copyright Act, the act of producing or distributing such products as Majikon, which allows the operation of pirated software, and ripping software, which allows the decryption of DVDs, etc., would be newly prohibited as copyright infringement.

4. **Under what conditions do the hyperlinking or location tool services provided by search engines infringe copyright? Are there any exceptions or permitted uses relevant to this activity?**

(Answer)

In principle, hyperlinking and location tool services do not infringe copyright as long as such services merely provide instructions to move to another website to access certain
information because, in that case, such services do not offer a function of reproducing or transmitting information.

In some exceptional cases, however, a dispute could arise as to whether the provider of such services should be regarded as a direct infringer from a normative viewpoint under the Karaoke doctrine or from the perspective of inaction. Such cases include cases where a service provider provides direct inline links to many infringing contents and allows viewing of the contents on the website of a search engine by use of the framing technique and cases where a service provider provides a link to some content that clearly infringes copyright and fails to remove the link even after receiving a notification from the copyright holder.

Both laws and precedents do not necessarily provide a clear explanation as to in what cases a service provider is regarded as a direct infringer from a normative viewpoint under the Karaoke doctrine or from the perspective of inaction.

On the other hand, in the revised Copyright Act (established on June 12, 2009, promulgated on June 19, 2009, and enforced on January 1, 2010), in relation to the services provided by search engines, a new provision was established in order to limit copyright as follows: Any business operator designated by Cabinet Order who engages in the business of searching, in response to a request from the public, for the Uniform Resource Locators (URLs) related to works, etc., that have been made transmittable and providing search results may, to the extent deemed necessary for the performance of said search and the provision of said search results, record (adapt) the prescribed transmittable works on a recording medium and may, in response to a request from the public, provide said URLs and make automatic public transmissions of the (adapted) works recorded on said recording medium (the main text of Article 47-6 of said Act), provided, however, that the operator shall not make such automatic public transmissions if it is aware that an act of making the works transmittable would constitute copyright infringement (the proviso of Article 47-6 of said Act).

In cases involving hyperlinking or location tool services provided by search engines where a service provider may be regarded as a direct infringer from a normative viewpoint under the Karaoke doctrine or from the perspective of inaction, both laws and precedents are not always clear about whether the abovementioned copyright-limitation provision is applicable, especially in relation to the interpretation of the abovementioned term “to the extent deemed necessary for the provision of said search results.”

5. Are there any other exceptions or permitted uses which you consider particularly relevant to the digital environment (not previously studied in Q216 A)?

(Answer)

Engineers who perform reverse engineering of computer programs sometimes print out the disassembled object code in order to conduct an analysis. Therefore, it is not rare that they commit copyright infringement by making reproductions or adaptations in the process of reverse engineering. Such mid-course act of making reproductions or adaptations in the course of reverse engineering is inevitable for engineers to check the expressions in the programs for the purpose of ensuring interoperability and discovering defects. In Japan, it has long been discussed how copyright should be limited by legislation.

Article 47-2 of the current Copyright Act is a copyright-limiting provision applicable to computer programs that permits examination and analysis of computer programs to a certain extent in some cases. However, under said Article, the act of reproduction and adaptation is permitted only to the extent deemed necessary for his own exploitation of the computer program on a computer. Therefore, said Article is not applicable to cases involving an act of reproduction or adaptation beyond the extent necessary for the execution of the computer.
program. The Patent Act specifies that a patent right shall not be effective against “the working of the patented invention for experimental or research purposes” (Article 60 of the Patent Act). Therefore, it has been pointed out that it is unreasonable to find a copyright effective in those cases just because the expressions in a computer program are reproduced.

In recent years, due to the risk of infringing copyright in the process of reverse engineering, engineers are hesitant to analyse computer programs for the purpose of identifying and correcting vulnerabilities. From the perspective of developing innovative software and ensuring information security, there has been an increasing call for copyright limitations by legislation. To address this issue, the Japanese government has been discussing the possibility of introducing a copyright-limiting provision applicable to the act of reproduction and adaptation committed in the process of reverse engineering. In January 2009, the Subdivision on Copyright of the Council for Cultural Affairs issued a report, which failed to present a conclusion on this issue and simply stated that further study would be necessary before introduction of such provision.

The aforementioned report presumes that the following three purposes of reverse engineering need to be studied: (i) maintenance of interoperability, (ii) examination of the expressions in a computer program for the purpose of discovering defects and identifying vulnerabilities, and (iii) extraction of ideas that are necessary to develop innovative computer programs. Said report discusses each of these three cases from the perspective of whether it would be appropriate to limit copyright and what conditions should be imposed on copyright limitations. Regarding case (i) mentioned above, the report finds that copyright should be limited in principle. The report states that, in view of foreign legislations, a copyright-limiting provision should be designed to be applicable only if the following conditions are met: (1) a reproduction of the computer program is made based on a legitimate right to use a reproduction, (2) the information necessary to ensure interoperability is unavailable without reverse engineering or is not obtainable by any other means, and (3) the information gained in the process of examination and analysis of a computer program or as a result thereof will not be provided to a third party for any purpose other than the original purpose or used in any other way that could unlawfully damage the interests of the right holder. Regarding case (ii), the report recognizes the necessity of copyright limitations, while pointing out that the copyright limitation system should be designed in such a way that copyright limitations would not be applied to any cases where a computer system is analysed for a malicious purpose such as the creation of a computer virus or an attack on a computer system. Regarding case (iii), the report states that it would be impossible to apply the same copyright limitations to all of the cases involving the development of innovative computer programs and that it would be necessary to continue a detailed case-specific study in order to find a proper balance between the importance of the reverse engineering in society and its effect on copyright holders.

One of the recent court cases on reverse engineering is a case where the parties disputed whether it was illegal to reproduce and adapt a computer program related to foreign exchange margin trading software (automatic trading program) (Osaka District Court, October 15, 2009). While finding that the defendant reproduced or adapted the plaintiff’s program in the course of creating the defendant’s program, the court pointed out that the defendant created its program solely for the purpose of examining the performance of each case of margin trading and determining the appropriate parameter so that the defendant can create a program that enables users to gain greater profits through FX trading. The court also pointed out that the defendant’s program was neither distributed nor disclosed to any third party. Based on these findings, the court dismissed the plaintiff’s claims by holding that the plaintiff’s act of claiming that the defendant committed copyright infringement just because the defendant reproduced and adapted the plaintiff’s program and demanding damages constituted an abuse of rights (Article 1, paragraph (3) of the Civil Code).
Article 47-7 of the Copyright Act, which was established in the 2009 revision of said Act (Reproduction, etc., for information analysis), specifies that copyright shall not be exercised against the act of reproducing or adapting a work on a recording medium for the purpose of information analysis to be conducted on a computer under certain conditions. The types of works subject to this provision are not limited. A report issued by the Subdivision on Copyright of the Council for Cultural Affairs in January 2009 presents the following examples of information analysis: (1) website information analysis and language analysis in which the use of a specific language or character string is analysed and statistically processed and (2) sound analysis and video/image analysis in which the meaning of the sound wave, video, character string, etc., comprising a certain sound, video, image, etc., is analysed. However, the types of information analysis should not be limited to these examples. On the other hand, computer program reverse engineering is usually conducted for the purpose of examining the meaning of orders related to the program. In this process, statistical analysis is not conducted in most cases. In this sense, it is interpreted that reverse engineering of a computer program cannot be regarded as “information analysis.” Under said provision, when the results of information analysis are presented, it is prohibited to exploit the works subject to the information analysis. The results may be presented or provided only if the results are presented or provided in the form of statistical data, etc., in which the works subject to the analysis are not exploited. Recently, Japan has seen the introduction of new services that enable users to search and analyse users’ comments on the Internet including blogs, review sites, and social media. The establishment of said Article is one of the factors that have promoted the emergence of those new services.

II. Proposals for harmonization

The Groups are invited to put forward proposals for the adoption of harmonised rules. More specifically, the Groups are invited to answer the following questions without regard to their national laws:

6. In your opinion, are the exceptions to copyright protection for (i) user-generated content, (ii) transient/temporary copies, (iii) private copying (taking into account any copyright levies) and (iv) hyperlinking in your country/region suitable to hold the balance between the interest of the public at large and of copyright owners in the hi-tech and digital sectors?

(i) User-generated content

(Answer)

In the case of any content generated and sent from a user to a service provider, even if the content infringes a copyright, the service provider would not be held liable for damages in principle under the Provider Liability Limitation Act unless there are special circumstances (the application of the provisions of the Provider Liability Limitation Act mentioned in I, 1 above and the satisfaction of the conditions, (a), (b), and (c) presented by a lower court). However, if the Karaoke doctrine is applied, the limitations on the liability for damages imposed by the Provider Liability Limitation Act would lose effect. This means that a service provider could be held liable for copyright infringement regardless of whether the abovementioned conditions, (a), (b), and (c) are satisfied. Therefore, a service provider could be held liable for direct infringement from a normative viewpoint under the Karaoke doctrine, i.e., from the perspective of who manages and controls the infringing activities and who receives profits from those activities, as well as from the perspective of inaction under the Provider Liability Limitation Act. These judgment criteria, which are not always clear, are problematic for service providers in some cases and, consequently, are hindering the development of new services that would promote the distribution and diffusion of works.
In the Maneki TV case, the Supreme Court found that the right of public transmission was infringed. In this case, the court found that the act of infringement was committed by a company controlling and managing the equipment that enabled users to select broadcasts, order the transmission thereof, and have the equipment automatically start transmitting those broadcasts to the user. This judgment has received criticism that its applicability to other cases is unclear.

(ii) Ephemeral reproduction

(Answer)

Regarding ephemeral reproduction, the Japanese Copyright Act has a copyright-limiting provision to permit ephemeral reproduction for the purpose of repair, etc. (Article 47-4 of the Copyright Act), a copyright-limiting provision to permit reproduction for the purpose of preventing a transmission failure (Article 47-5 of said Act), and a copyright-limiting provision to permit reproduction for the purpose of exploiting the reproduced work on a computer (Article 47-8 of said Act). These provisions are applied to cases where there is a strong need for ephemeral reproduction and are suitable to achieve a proper balance between the public and copyright holders because these types of ephemeral reproduction permitted under said provisions would not unreasonably harm the interests of copyright holders.

(iii) Reproduction for private use (in consideration of the system of compensation for private sound and visual recordings)

(Answer)

In Japan, Article 30, paragraph (1) concerning a private copying exception specifies that a copyright holder’s exclusive rights are not effective against an act of reproducing a work for private use. However, in the case of a certain type of act that affects the copyright holder’s economic profits to a great degree, even if said act is subject to the private copying exception, said act would not be immune from infringement and compensation. Under Article 30, paragraph (2) of the Copyright Act, compensation for private sound and visual recordings is paid to copyright holders. In this way, Japan has a two-layered system to adjust the balance between the public and copyright holders in the high-tech and digital sectors, in which the profit balance between the two could change over time.

Meanwhile, Article 30, paragraph (1) of the Copyright Act is a private copying exception provision that specifies the scope of copyright holders’ exclusive rights. In cases to which said Article is applicable, the so-called Karaoke doctrine is widely adopted in judicial practice in order to find, from a normative viewpoint, that it is not individuals but the service provider that should be held liable for direct infringement of a right of reproduction. Said doctrine is applied especially to cases involving service providers in order to enable copyright holders to exercise their exclusive rights in order to protect their legitimate interests.

Recently, there has been a series of Supreme Court cases involving services to record or transfer broadcasts based on orders from service users. In those cases, the Supreme Court overturned the prior instance’s judgment of non-infringement. The Supreme Court found that it is not users but the service provider that committed an act of reproduction and public transmission and should therefore be held liable for copyright infringement. For example, in the Supreme Court judgment on the Rokuraku II case (January 20, 2011), the court presented the judgment criteria for determining who committed an act of reproduction by holding that “a judgment as to who reproduced the work should be made in consideration of various factors including the subject matter and the means of reproduction, and the nature
and degree of involvement in the act of reproduction. The court further held that the service provider not only provided an environment where reproductions could easily be made but also received broadcasts and put the broadcast data into reproducing machines that were managed and controlled by the service provider. The court found that the service provider was in charge of the act of reproduction on the grounds that it played a key role in making it possible to reproduce broadcasts by use of the reproducing machines. Meanwhile, in the Supreme Court judgment on the Maneki TV case (January 18, 2011), the court presented the judgment criteria for determining who committed an act of public transmission by holding that “In this case, machines are connected to telecommunication lines installed for public use. Those machines had the function of receiving information and automatically transmitting it to service users upon their request. Those machines continuously receive information and are connected to such telecommunication lines. In a case like this, the person who puts such information into those machines should be regarded as in charge of transmission. These legal theories that were presented in the abovementioned Supreme Court precedents have allowed flexible approaches to individual cases so that they can be settled in a reasonable manner in consideration of the specific circumstances of each case. Such flexibility is desirable in the high-tech and digital sectors, in which the profit balance between the public and copyright holders could change over time. However, in light of the international nature of said sectors, it would be reasonable to clarify the judgment criteria for identifying infringers by legislation. Such criteria would prevent excessive reliance on interpretation theories.

The current system of compensation for private sound and visual recordings has been criticized for such reasons as the collection of a flat amount of compensation money at the time of product purchase regardless of the frequency and purpose of reproduction of works, the lack of flexibility to deal with reproductions made by newly marketed devices equipped with the function of sound and visual recording, the risk of double charge on a reproduction made by downloading a work from the Internet, and the poor effectiveness of the compensation return system. Therefore, it is hard to say that the system of compensation for private sound and visual recordings can properly and flexibly compensate for reproduction carried out for private use in the high-tech and digital sectors. Said system has been regarded as a provisional system that will play a less important role in the future.

(iv) Hyperlinking

(Answer)

As described above, judgments of direct infringement or non-infringement have been made from a normative viewpoint under the Karaoke doctrine or from the perspective of inaction. Both the Copyright Act and precedents have taken the approach that such judgment is ultimately a matter of legal interpretation made specifically for each case. This approach per se might be suitable for finding a proper balance between the public and the copyright holder in each specific case even in the high-tech and digital sectors, provided, however, that the applicability of the two judgments, i.e., the Supreme Court judgment on the Maneki TV case (January 18, 2011) and the Supreme Court judgment on the Rokuraku II case (January 20, 2011) should be narrowly construed to that specific cases.

Similarly, the abovementioned copyright-limiting provision concerning the services provided by search engines (Article 47-6 of the Copyright Act) might be suitable for striking a balance between the public and the copyright holder in each specific case even in the high-tech and digital sectors, especially if the aforementioned term “to the extent deemed necessary for the provision of said search results” is interpreted accordingly.

7. Are these exceptions and permitted uses appropriate to the technology, understandable and realistic? Do they contribute to a situation where copyright is enforceable in practice?
(i) User-generated content

(Answer)

As explained in 6 (i) above, judgments of direct infringement or non-infringement have been made from a normative viewpoint under the Karaoke doctrine, i.e., from the perspective of who manages and controls the infringing activities and who receives profits from those activities, and from the perspective of inaction under the Provider Liability Limitation Act and based on lower court precedents. These judgment criteria, which are not always clear, are problematic for service providers in some cases and, consequently, are hindering the development of new services that would promote the distribution and diffusion of works.

(ii) Ephemeral reproduction

(Answer)

The three provisions, i.e., the copyright-limiting provision to permit ephemeral reproduction for the purpose of repair, etc. (Article 47-4 of the Copyright Act), the copyright-limiting provision to permit reproduction for the purpose of preventing a transmission failure (Article 47-5 of said Act), and the copyright-limiting provision to permit reproduction for the purpose of exploiting the reproduced work on a computer (Article 47-8 of said Act), are all appropriate to the technology, understandable, and realistic. These provisions are considered to be positively contributing to a situation where copyright is enforceable in practice.

(iii) Production for private use (in consideration of the system of compensation for private sound and visual recordings)

(Answer)

As described in 6 (iii) above, the parallel application of both the private use exceptions and the system of compensation for private sound and visual recordings is appropriate to the technology, understandable, and realistic, providing a certain degree of flexibility in a sense. Even if it is impractical to exercise a copyright against each individual user, the Karaoke doctrine could allow the copyright holder to exercise his exclusive rights against the service provider. This system is considered to be positively contributing to a situation where copyright is enforceable in practice.

However, in order to more appropriately and flexibly deal with the changing profit balance between the public and copyright holders in the high-tech and digital sectors, it would be necessary to make adjustments in the private use exceptions and the system of compensation for private sound and visual recordings in view of the recent developments in various copyright protection technologies.

(iv) Hyperlinking

(Answer)

As explained above, while judgments of direct infringement or non-infringement have been made from a normative viewpoint under the Karaoke doctrine and from the perspective of inaction, both the Copyright Act and precedents have failed to provide clear judgment criteria. In an exceptional case where a judgment of direct infringement may be made from a normative viewpoint under the Karaoke doctrine or from the perspective of inaction, it is unclear whether the abovementioned copyright-limiting provision (Article 47-6 of the Copyright Act) could be found applicable. Both the Copyright Act and precedents have failed
to provide clear judgment criteria especially for how to interpret the abovementioned term “to the extent deemed necessary for the provision of said search results.”

The lack of clear judgment criteria is not necessarily desirable for copyright holders, search engine service providers, and the public.

8. **What, if any, additional exceptions would you wish to see relevant to these areas?**

   **(Answer)**

   Since the provisions on case-specific exceptions and permitted uses of the Japanese Copyright Act were established after due consideration, they are appropriate to the technology, understandable and realistic and are contributing to a situation where copyright is enforceable in practice. However, the current approach of applying those provisions based on case-specific interpretation would be unsuitable for dealing with fast-developing technologies and business models in the high-tech and digital sectors. It would be necessary to establish a general provision concerning exceptions and permitted uses.

   In Japan, discussions are currently underway about the possible introduction of a general provision concerning copyright limitations to the Copyright Act. Preparations are being made for future legislation by considering the introduction of copyright limitations to permit the following Use A through Use C:

   (1) **Use A**

   “A use of a work that takes place as a part of another act conducted not primarily for exploiting said work, where the use of said work is regarded to be insignificant in terms of quality or quantity under social norms” such as utsurikomi (incidental inclusion);

   (2) **Use B**

   “A use of a work that inevitably takes place in the process of making legal use of said work, where the use of said work is regarded to be insignificant in terms of quality or quantity under social norms” such as (a) reproduction of a work on a master tape, etc. that takes place during the process of recording said work on CDs with permission; and (b) reproduction of a work in the first draft, etc. that takes place in the process of preparing a textbook pursuant to Article 33, paragraph (1) of the Copyright; and

   (3) **Use C**

   "A use of a work that is not regarded, in light of the type and purpose of the work and the objective and manner of the use, as a use for the purpose of enjoying the expressions in the work by perceiving said expressions" such as reproduction of films or music to the extent necessary for the development of technology related to replay of films or music or for the verification of such technology.

   There has been a criticism about limiting the applicability of the general provision concerning copyright limitations to only those three types of use, i.e., Use A through Use C. Discussions are still underway about the issues related to the exploitation of a work as a parody and the development of cloud computing.

9. **Given the international nature of the hi-tech and digital sectors, do you consider that an exhaustive list of exceptions and permitted uses should be prescribed by international treaties in the interests of international harmonisation of copyright?**
Might you go further and say that there should be a prescribed list? If so, what would you include?

(Answer)

As far as the high-tech and digital sectors are concerned, it would be desirable to seek international harmonization as much as possible. To achieve this goal, preparation of a list would be necessary. Since regional diversity should be respected, a prescribed list should not be prepared. Preparation of an exhaustive list that offers a certain level of freedom of choice to each region would suffice.

Given the extremely fast pace of technological and business innovation in the high-tech and digital sectors, the exclusive nature of copyright will continue hindering the development of new products, systems, and services that would provide both the creators and users with great profits and benefits, just as had been experienced in the past in the fields of search engines and statistical analysis systems. In order to prevent this situation, it would be necessary to consider the possibility of establishing additional copyright-limiting provisions applicable specifically to the high-tech and digital sectors. Since information on the Internet travels across national borders, copyright limitations on such information should be internationally harmonized to the greatest possible extent.

Unlike patent law, copyright law is closely related not only to national and regional industry but also to national and regional culture, society, etc., and is designed to reflect diversity. Therefore, national and regional diversity of copyright law should be preserved in order to respect the national and regional differences in culture, history, and legal system as well as in the history, direction, and degree of industrial development. International harmonization should be pursued only for basic issues to the extent reasonably feasible.

Summary

1. If a user uploads illegal content to the website of a service provider, it is the user, not the service provider, that would be held liable in principle.

   The same applies to cases where a user uploads UGC to the website of a service provider.

   In some exceptional cases where certain conditions are met, a service provider could be held liable (direct infringement on the basis of inaction).

   Furthermore, in January 2011, the Supreme Court handed down judgments stating that the two business operators providing TV broadcast transfer service or providing TV broadcast recording and transfer service through the Internet should be held liable for infringement of the right of public transmission or the right of reproduction.

2. The Japanese Copyright Act includes some copyright-limiting provisions that permit ephemeral reproduction as long as it is conducted for a certain purpose or in a certain manner (Article 47-4, 47-5, 47-8).

3. In Japan, private copying is legal in principle (Article 30, paragraph (1)).
However, this private copying exception would not apply to the following cases where an act of private copying is considered illegal: a case where a work is reproduced by use of an automatic reproducing machine (videocassette recorder, DVD recorder, etc.) installed for use by the public (Article 30, paragraph (1), item (i)), a case where a work is knowingly reproduced by the circumvention of technological protection measures such as copy protection (paragraph (1), item (ii) of said Article), or a case where a work is knowingly reproduced by downloading unlawful downloadable content and making a digital sound or visual recording thereof (paragraph (1), item (iii) of said Article).

Any person who makes reproduction by use of a machine for digital sound or visual recordings is required to pay a certain amount of compensation under the system of compensation for private sound and visual recordings (Article 30, paragraph (2)).

4. In Japan, hyperlinking and location tool services provided by search engines are legal in principle.

There has been a discussion as to exceptions to this principle. No clear criteria have been established to determine in what cases such services should be considered illegal.

Résumé

1. Concernant les fournisseurs de services internet, c’est en principe la responsabilité de l’utilisateur qui est engagée, et celle du fournisseur ne l’est pas, même dans le cas où l’utilisateur a mis en ligne un contenu illégal sur le site du fournisseur. Cette règle reste inchangée lorsque l’utilisateur met en ligne sur le site du fournisseur un contenu généré par l’utilisateur (UGC).

Toutefois, il existe des exceptions pour lesquelles la responsabilité du fournisseur est reconnue, s’il est constaté que certaines conditions requises sont remplies (contrefaçon directe par omission).

De plus, au Japon, des jugements reconnaissant des violations du droit de diffusion publique ou du droit de reproduction ont été rendus en janvier 2011 par la Cour suprême, à l’encontre de prestataires offrant en ligne des services de transfert de programmes télévisés ou d’enregistrement et de transfert de programmes télévisés.

2. Concernant les copies provisoires, il existe au Japon des règles qui limitent les droits en ne considérant pas comme illéites les copies réalisées pour certains objectifs définis ou sous certaines formes déterminées (Articles 47-4, 47-5, 47-8).

3. Au Japon, la copie privée est en principe licite (Article 30-1).

Toutefois, des exceptions sont prévues. Ainsi, sont exclues des exceptions de copies privées et sont illéites, la copie utilisant des appareils de reproduction automatique (magnétophone, enregistreur de DVD, etc.) installés dans un but d’offre à l’utilisation publique (Article 30-1-1) ; les cas de copie réalisée en contournant, en connaissance de cause, les moyens technologiques de protection contre la copie (Article 30-1-2) ; et l’enregistrement de sons ou d’images numériques réalisé en téléchargement, en connaissance de cause, des contenus distribués illégalement (Article 30-1-3).

Par ailleurs, les prélèvements du droit d’auteur existent à l’égard des appareils d’enregistrement de sons ou d’images numériques, et consistent à imposer le paiement d’une compensation définie (Article 30-2).

4. Au Japon, les services reposant sur des liens hypertexte et des outils de localisation fournis par les moteurs de recherche sont en principe licites.
Par ailleurs, le débat est en cours concernant les exceptions illicites, mais aucun critère clair n’a encore été présenté pour caractériser l’illicité.

Zusammenfassung

1. Im Falle von Internetdienstanbietern haftet auch für den Fall, dass ein Benutzer rechtswidrige Inhalte auf die Site eines Anbieters hochlädt, in der Regel der Benutzer, nicht aber der Internetdienstanbieter.

Dies gilt auch dann, wenn ein Benutzer UGC (User Generated Content) auf die Site eines Anbieters hochlädt.

Wenn allerdings ein Internetdienstanbieter bestimmte Vorraussetzungen erfüllen soll, kann es ausnahmsweise auch vorkommen, dass der Anbieter zur Verantwortung gezogen wird (aufgrund einer direkten Verletzung durch Unterlassung).


2. In Japan existiert eine rechtsbeschränkende Bestimmung, die besagt, dass bei vorübergehender Vervielfältigung eine Vervielfältigung zu einem bestimmten Zweck oder in einer bestimmten Form nicht rechtswidrig ist (Art. 47.4, 47.5 und 47.8).


Was digitale Aufnahme- oder Aufzeichnungsgeräte betrifft, existiert ein Ausgleichssystem für private Aufnahmen/Aufzeichnungen, das die Zahlung eines bestimmten Entschädigungsbetrags vorschreibt (Art. 30, Abs. 2).


Zwar wird über bestimmte Ausnahmen diskutiert, doch es existiert gegenwärtig noch keine klare Beurteilungsgrundlage dazu, in welchen Fällen eine Rechtsverletzung vorliegt.