140 YEARS LATER, LOOKING AHEAD

WHOSE RIGHT IS COPYRIGHT?

OWNERSHIP AND TRANSFER OF COPYRIGHT AND RELATED RIGHTS

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Opatija, Croatia

QUESTIONNAIRE

Japan

Please send your responses to igor.gliha@pravo.hr and tomori.pal@eji.hu by June 30, if possible, but in any case, by August 31 at the latest.

Introduction:

This questionnaire is based on the Congress program and follows its structure:

- *Day 1 – Discussion of principles of copyright ownership*
- *Day 2 – The practical implementation of these principles*

The first day – and therefore the first part of the questionnaire – is divided into three sections corresponding to Sessions 2, 3 & 4 of the Congress program:

- *1 – Original ownership (To whom are copyright and neighbouring rights 9pattributed?)*
- *2 – Transfer of Ownership (How are rights granted or transmitted?)*
- *3 –What corrective measures, subsequent to transfers of rights, do laws accord authors or performers in view of their status as weaker parties?*

The second day focuses on the practical implementation of these rights, particularly in relation to the question of streaming (Session 5).

Each reply to these questions should indicate if the answer is the same or different (if so, how) with respect to neighbouring rights compared with authors' rights.

I. INITIAL OWNERSHIP [SESSION 2]

A. To whom does your country's law vest initial ownership? (Please indicate all that apply.)

1 — The author (human creator) of the work

a. Does your country's law define who is an author?

The Japanese Copyright Act defines an "author" as "a person who creates a work" (JCA Art. 2(1)(ii)), and further provides that an "author" shall enjoy the moral rights and copyright (JCA Art. 17(1)). A "person who creates a work" in this context means, as a rule, a natural person who has carried out a creative act in the sense of a real act. However, the authorship of a work for hire is ascribed to a juridical person or the like as the employer (JCA Art. 15).

b. For joint works (works on which more than one creator has collaborated), does your law define joint authorship? What is the scope of each co-author's ownership? (may joint authors exploit separately, or only under common accord)?

A work of joint authorship is defined as "a work collaboratively created by two or more persons with respect to which the contribution of each person cannot be severed and separately exploited" (JCA Art. 2(1)(xii)).

Once the requirements of co-authorship are satisfied, the moral rights of the coauthors of a work of joint authorship cannot be exercised, in principle, without the unanimous agreement of all the coauthors (JCA Art. 64(1)). Further, the copyright is co-owned by the coauthors and, in principle, co-owners may not transfer their shares without the consent of the other co-owners (JCA Art. 65(1)), or even exercise the copyright without the unanimous agreement of all the co-owners (JCA Art. 65(2)). It must be added that each co-owner may claim, without the consent of the other co-owners, remedies including an injunction or damages to his share (JCA Art. 117).

2 — Employers

a. Under what conditions, e.g., formal employment agreement, in writing and signed? Creation of the work within the scope of employment?

The Japanese Copyright Act provides for a unique work-for-hire system (Art. 15 of JCA), where the authorship of a work shall be attributed to employers including juridical persons. As a result, for instance, if a staff writer who is an employee at a newspaper company has written a news article in the course of the staff writer's duty, the authorship of the article is ascribed not to the staff writer who actually wrote the article but to the company under the Japanese work-for-hire system.

Article 15(1) of JCA stipulates, '[f]or a work (except a work of computer programming) that an employee of a corporation or other employers (hereinafter in this Article such a corporation or other employers are referred to as a "corporation, etc.") makes in the course of duty at the initiative of the corporation, etc., and that the corporation, etc. makes public as a work of its own authorship, the author is the corporation, etc., so long as it is not stipulated otherwise in a contract, in employment rules, or elsewhere at the time the work is made.'

Hence, the Japanese work-for-hire system is basically subject to the requirement (for any work except computer programs) that a work is made public as a work of the employer's own authorship, in other words, under its own name as the author. Therefore, for instance, if a company makes a publicity brochure created by its employee and published it under the company's own name as the author, the authorship of the work shall be attributed to the company.

It should be noted that this requirement has been broadly construed in case law and according to the major theories. As a result, even though a newspaper (bylined) article bears the name of an employee who actually wrote it, it can be regarded as not having been published by the newspaper company as a work under its own name, because this byline is not necessarily considered as the writer's personal identification of authorship, but merely an indication of in-house responsibility; and accordingly, the news article shall be regarded as being published under identification of authorship by the newspaper company, and, consequently, the authorship of the work shall be attributed to the newspaper company.

(See also, Tatsuhiro Ueno, Moral Rights in Japan: "Moral Rights" of Juridical Persons?, in: Ysolde Gendreau (ed.) Research Handbook on Intellectual Property and Moral Rights, (Edward Elgar, 2023) 384.)

3 — Commissioning parties

a. All commissioned works, or limited to certain categories?

There is no provision in the Japanese Copyright Act for a commissioned or specially ordered work. Author's rights are granted to an author who creates a work.

b. Under what conditions, e.g., commissioning agreement, in writing and signed by both parties?

N/A (See a. above).

4 — The person or entity who takes the initiative of the work's creation (e.g. Producers; publishers) of certain kinds of works, e.g., audiovisual works; collective works

a. scope of ownership of, e.g. all rights, or rights only as to certain exploitations; what rights do contributors to such works retain?

Under the Japanese Copyright Act, the copyright to a cinematographic work is ascribed not to the authors (i.e., the director, etc.), but to the producer of the cinematographic work; namely, "the person who takes the initiative in, and the responsibility for, the production of a cinematographic" (JCA Art. 2(1)(x)). In other words, it is provided that the copyright to a cinematographic work "shall belong to the producer of the cinematographic work, provided that the authors of the cinematographic work have undertaken to participate in the making of the same" (JCA Art. 29(1)). This is construed to mean that, when a cinematographic work is produced, the copyright and the author's moral rights belong, at first, to the authors (i.e., the director, etc.), but the copyright alone immediately shifts to the producer of the cinematographic work.

On the other hand, there is no provision in the Japanese Copyright Act for a collective work.

5 — Other instances of initial ownership vested in a person or entity other than the actual human creator? (Other than 6, below.)

No.

6 — If your country's law recognizes copyright in AI-generated works, who is vested with original ownership? (e.g., the person providing the prompts to request an output? The creator of the LLM model and/or training data? someone else?)

Under the Japanese Copyright Law, there must be a human author for copyright to subsist in a work. Therefore, AI-generated work cannot be considered as a copyrightable work in the meaning of copyright law.

On the other hand, a work created by human author using a computer as a tool is considered as a copyrightable work, although it is sometimes difficult to distinguish between a work created by a human author using a computer and AI-generated work.

There is no special provision on AI-generated work. Therefore, there is no author in AI-generated works that are not considered copyrightable works.

[b. For presumptions of transfers, see II (transfers of ownership, below)]

B. Private international law consequences

1 — To what country's law do your country's courts (or legislature) look to determine initial ownership: Country of origin? Country with the greatest

connections to the work and the author(s)? Country(ies) for which protection is claimed?

As for works-for-hire, according to case laws and majority theory, the country of origin. But as for audiovisual works, the country for which protection is claimed is also selected by the Japanese IP High Court.

II. TRANSFERS OF OWNERSHIP [SESSION 3]

A. Inalienability

1 — Moral rights

a. Can these be granted to the grantee of economic rights? To a society for the collective management of authors' rights?

No. Under the Japanese Copyright Act, moral rights and economic rights (copyrights) are granted to an author (Art. 17(1)). Then CMOs can manage only economic rights.

b. May the author contractually waive moral rights?

Under the Japanese Copyright Act, the author's moral rights and the performer's moral rights are personal and exclusive to the author and the performer respectively, and cannot be transferred (Art. 59 and Art. 101-2). However, there is no explicit provision on the waiver of moral rights. Therefore, according to the minority theory in Japan, moral rights can therefore be waived.

2 — Economic rights

a. May economic rights be assigned (as opposed to licensed)? May an author contractually waive economic rights?

Under the Japanese Copyright Act, copyrights are transferable (JCA Art. 61(1)). A contract on transfer of rights is valid even if it is not in writing under Japanese law. Copyrights can also be included in one's heritage.

There is no provision for the waiver of copyright. However, it is generally accepted that copyright can be waived.

b. Limitations on transfers of particular economic rights, e.g., new forms of exploitation unknown at the time of the conclusion of the contract.

Article 61(2) of Japanese Copyright Act provides that "where a contract for the transfer of copyright makes no particular reference to the rights provided for in Article 27 or 28 as the rights being transferred under the contract, it shall be presumed that such rights have been reserved to the transferor".

The rights in Articles 27 and 28 include the rights of translation and adaptation and the rights of the original author in the exploitation of a derivative work.

B. Transfers by operation of law

1 — Presumptions of transfer:

a. to what categories of works do these presumptions apply?

*See **I**-A-4 above. The immediate shift of copyright to the producer of the cinematographic work (JCA Art. 29(1)) can be seen as a sort of transfer non-rebuttable by operation of law.*

b. are they rebuttable? What must be shown to prove that the presumption applies (or has been rebutted)

No.

c. Scope of the transfer: all rights? Rights only as to certain forms of exploitation?

All rights.

d. Conditions for application of the presumption (e.g. a written audiovisual work production contract; provision for fair remuneration for the rights transferred)?

When the authors of a cinematographic work have undertaken the producer to participate in the making of the work.

2 — Other transfers by operation of law?

No.

C. Transfers by contractual agreement

1 — Prerequisites imposed by copyright law to the validity of the transfer, e.g., writing, signed, witnessed, recordation of transfer of title?

No. A contract on transfer of rights is valid even if it is not in writing under Japanese law.

2 — Do these formal requirements include an obligation to specify what rights are transferred and the scope of the transfer?

There is basically no provision on copyright contract law in the Japanese Copyright Act. Exception : Article 61(2) mentioned A-2-b above.

3 — Does your country's law permit the transfer of all economic rights by means of a general contractual clause?

There is no provision prohibiting the transfer of all economic rights by a general contractual clause in the Japanese Copyright Act.

Article 61(2) mentioned A-2-b above does not function anymore when the contractual agreement makes particular reference to the rights provided for in Article 27 or 28.

4 — Does your country's law permit the assignment of all rights in future works?

There is no provision prohibiting the transfer of all copyright in future works in the Japanese Copyright Act. The validity depends on the interpretation of the general contract law under civil law.

D. Private international law

1 — Which law does your country apply to determine the alienability of moral or economic rights and other conditions (e.g. the country of the work's origin? The country with the greatest connections to the work and the author(s)? The country(ies) for which protection is claimed?)

TBD.

III. CORRECTIVE MEASURES, SUBSEQUENT TO TRANSFERS OF RIGHTS, ACCORDED TO AUTHORS OR PERFORMERS IN VIEW OF THEIR STATUS AS WEAKER PARTIES [SESSION 4]

1 — Does your law guarantee remuneration to authors and performers?

TBD.

a. By requiring payment of proportional remuneration in certain cases (which)?

b. By a general requirement of appropriate and proportionate remuneration?

c. By adoption of mechanisms of contract reformation (e.g., in cases of disproportionately low remuneration relative to the remuneration of the grantees?

d. By providing for unwaivable rights to remuneration in the form of residual rights?

2 — Does your law require that the grantee exploit the work?

a. Does your law impose an obligation of ongoing exploitation? For each mode of exploitation granted?

TBD.

b. What remedies are there if the grantee does not exploit the work?

TBD.

3 — Does your law impose a transparency obligation on grantees?

TBD.

a. — What form does such an obligation take (accounting for exploitations, informing authors if the grantee has sub-licensed the work, etc)

b. — What remedies are available if the grantee does not give effect to transparency requirements?

4 — Does your law give authors or performers the right unilaterally (without judicial intervention) to terminate their grants?

a. Under what circumstances?

i. After the lapse of a particular number of years?

TBD.

ii. In response to the grantee's failure to fulfil certain obligations, under what conditions?

TBD.

iii. As an exercise of the moral right of "repentance"? (Examples in practice?)

Article 84 (3) JCA, concerning the Claim to the Extinguishment of Print Rights, stipulates as follows : "If the convictions of an author that is the owner of reproduction rights or public transmission rights come to differ from the content of the author's own work, the author may extinguish the print rights to that work by notifying the owner of the print rights of this, in order to stop the act of printing or public transmission of that work; provided, however, that this does not apply if the author does not compensate the owner of print rights in advance for the damages that would usually arise from such stoppage." This clause is rarely used in practice.

IV - STREAMING, TRANSFER OR RIGHTS, AND THE MANAGEMENT OF LARGE CATALOGUES [SESSION 5]

TBD.

1 — Applicable statutory right

a. What specific statutory right applies to licensing the streaming of works and performances?

i. Is it the right of communication to the public modelled after Article 8 of the WCT for authors, and the right of making available modelled after Articles 10 and 14 of the WPPT for performers and phonogram producers?

ii. Another right or a combination of rights?

b. For authors, does this right cover both musical and audiovisual works? For performers, does this right cover both performances fixed in phonograms and audiovisual fixations?

2 – Transfer of rights

a. Are there any regulations in your country's law that limit the scope of a transfer or license to the forms of use already known at the time of the transfer or license?

b. If there are such regulations, when the statutory right referred to in section 1 was introduced into your law, was it considered a new form of use to which the limitation in subsection 2a. above applies?

c. Are there any cases in your country's law when the statutory right referred to in section 1 is presumed to have been transferred to the producer of a phonogram or audiovisual fixation?

3 — Remuneration

a. Are authors/performers entitled to remuneration for licensing the streaming of their works/performances?

b. Do authors and/or performers retain a residual right to remuneration for streaming even after licensing or transferring the statutory right referred to in section 1?

4 — Collective management

a. In your country's law, is collective management prescribed or available for managing the right referred to in section 1? If so, what form of collective management is prescribed (e.g. mandatory or extended)?

b. If authors and/or performers retain a residual right to remuneration (ss 3 b.), is collective management prescribed for managing this residual right to remuneration? If so, what form of collective management is prescribed (e.g. mandatory or extended)?

5 — Transparency and the management of large catalogues

a. Does your law (or, in the absence of statutory regulations, industry-wide collective agreements) guarantee that authors and performers regularly receive information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights? If yes, what is the guaranteed periodicity and content of such information?

b. Are you aware of any case law where the complex chains of copyright titles, typical of large streaming catalogues, have made the management of works or performances non-transparent or otherwise challenging, such as, for example, the case of Eight Mile Style, LLC v. Spotify U.S. Inc. **(**https://casetext.com/case/eight-mile-style-llc-v-spotify-us-inc-1)?