

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 Report

SPECIAL MENTION

JAPAN

IIPA accords Special Mention to Japan in this report to call attention to several areas in which Japan is lagging in its efforts to keep its Copyright Law up to date with 21st century realities. We urge USTR to escalate its bilateral engagement with Japan in order to encourage positive action in the following areas, among others:

- **Statutory damages:** Japan's own IP strategy plan gave high priority to reform of damages provisions for its intellectual property laws, but key changes are yet to be made. We urge Japan to move more quickly to implement a system of pre-set statutory damages for copyright infringement, at levels sufficient to achieve deterrence.
- **Copyright term extension:** Japan recently increased the term of copyright protection, but only for cinematographic works. It should now follow through and get in step with most other OECD members by extending the term for all copyrighted works, as well as for producers of phonograms and performers, without conditioning the term extension on registration or similar formalities.
- **Technological protection measures (TPMs):** Current laws (the Copyright Act and the Anti-Unfair Competition Law) do not fully meet Japan's obligations under the WIPO Internet treaties to provide an adequate and effective legal regime against circumvention of TPMs. For instance, there are no criminal remedies (under the Unfair Competition Law) for trafficking in tools to circumvent access controls, and no civil remedies (under the Copyright Act) for dealing in copy control devices or services. These deficiencies should be remedied.
- **Private use exception:** The broad provision of Japanese copyright law on this topic (Article 30(i)) must be narrowed to take into account the ability of home users to download unauthorized digital copies that can be easily re-disseminated, such as over peer-to-peer (P2P) networks. The status quo threatens to undermine the prohibition on unauthorized uploads (the "making transmittable" right).
- **End-user infringement:** Article 113 of the copyright law should be re-examined to ensure that it covers all knowing unauthorized use of software programs, and possession of infringing copies with intent to violate any exclusive right of copyright owners.
- **Exceptions to protection:** Japan should do more to clarify the applicability of its expanded education exceptions (Article 35) to textbooks and course packs, and should build in technological safeguards to reduce the risk of infringement in the distance learning environment. It should also carefully monitor the impact of new

exceptions that take effect in June 2007 that could allow widespread unauthorized copying of scientific, technical and medical publications by pharmaceutical companies, patent applicants, and others, and should shelve further proposals to broaden the exception for pharmaceutical companies until that impact has been assessed. In both these areas, Japan should ensure that current exceptions do not undermine or discourage licensing arrangements and that they meet international standards.

- **Rental right:** The existing exclusive rental right for sound recordings is limited to one year, and thereafter becomes a remuneration right. Japan should finally modify its law to be consistent with that of other nations by providing an exclusive rental right for the full term of protection.
- **Compulsory licensing:** In December 2006, Japan eliminated the exclusive rights of sound recording producers over simultaneous retransmission of their recordings over networks via IP multicasting. A compulsory licensing system replaced it for commercial multicasting, but rights were evidently totally eliminated in the case of non-commercial retransmission via multicasting. The new law represents a significant step backward away from a system of exclusive rights that should govern transactions and towards outdated and unnecessary forms of compulsory licensing. IIPA understands that unlike the existing exclusive rights, rights of remuneration established under the 2006 amendments will be subject to the application of material reciprocity. This abandonment of the principle of national treatment is also highly regrettable. Within the bounds of international norms, experimentation with different approaches to addressing issues related to technological advances is understandable; but the level of protection deemed appropriate should apply equally to domestic and foreign rightholders. The U.S. government should engage the Government of Japan in an effort to ensure that American producers and performers, and other foreign rightholders, are not discriminated against under Japanese law.
- **Anti-camcording legislation:** Master copies for the vast majority of pirate audiovisual materials are stolen right off the screen by professional camcorder pirates who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). Camcorder pirates are often sophisticated criminals and typically sell the master recordings to illicit “source labs” where they are illegally duplicated, packaged, and prepared for sale on the black market, then distributed to bootleg “dealers” throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and in night markets around the world well before their international debuts. An essential element in the fight against camcorder piracy is the enactment of legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. We urge the Government of Japan to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation, and welcome the progress toward that goal that has been achieved so far, with proposals now pending before the Cabinet.

Finally, Japan faces a serious and growing problem of online copyright piracy. Infringement via peer to peer (P2P) services is widespread. Recording industry estimates indicate that over 150 million tracks are illegally downloaded every year, which is ten times more than the size of the entire legitimate music download sector in 2005. An alarming and even more recent development is the proliferation of unauthorized services for downloading ringtones and other music and sound recordings to mobile phones, a form of infringement that is enabled by the rollout of third generation mobile phone receivers. Japanese consumers (particularly teenagers) flock to these free unauthorized services, directly threatening the growth of the JPY 50 Billion (US\$411 million) market in legitimate mobile music services. P2P piracy and other online piracy in Japan also has a significant impact across the copyright industries, including in the book and journal publishing, audio-visual and business software sectors.

Japanese authorities have been responsive to this growing threat in some cases. For example, over the past year, the developer of the “Winny” P2P file sharing system was criminally convicted for aiding and abetting infringement; a Tokyo court ordered three major Internet Service Providers (ISPs) to reveal the names and addresses of 19 people who had uploaded large quantities of digital music files for dissemination via P2P services; and an operator of a site where cell phone users were offered free unauthorized downloads was arrested. However, systematic changes are needed before Japan’s response to growing online piracy will be fully effective. Among other changes, Japan should consider instituting a more streamlined system of notice and takedown of infringing material from networks and from online auction sites; a faster and more reliable method of requiring ISPs to disclose contact information on subscribers who have been identified as using the networks to carry out infringements; and relaxation of the requirement for formal complaints before criminal proceedings can be commenced against those involved in piracy via P2P networks.