

JAPAN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA accords Special Mention to Japan in this report to call attention to several areas where 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.

Online Piracy: Japan faces a serious and growing problem of online copyright piracy. The situation has worsened in the past year. All forms of copyright materials, such as musical recordings, audio-visual materials, business software, and book and journal publications, are suffering from widespread infringement via unauthorized peer to peer (p2p) and mobile services.

The motion picture industry reports that the online piracy problem continues to grow. In addition, it estimates that 90% of pirated DVDs and other optical media products sold by street vendors¹, or via Internet auction sites, originate either from illegal uploads (mostly to p2p networks) or from illegal imports. In spite of the criminal conviction of the developer of the "Winny" p2p file sharing system in 2006, it remains in operation and is the source of a great deal of online piracy. Many copyright sectors are impacted: for instance, one survey indicated that around 610,000 titles of business software with an estimated value of 19.5 billion yen (about US\$212 million at current exchange rates) were illicitly distributed using Winny over a single 6 hour period. IIPA applauds Japanese authorities for the arrest in September 2008 of an individual who added Japanese subtitles to digital files of movies, and uploaded them to the Winny system; this has already had a short-term positive impact. But p2p piracy of audio-visual products is increasing rapidly on the "Share" network, and the overall level of online piracy remains undiminished. While the enactment in 2007 of an anti-camcording law has decreased the overall number of thefts of new theatrical releases from cinema screens, technological advances have improved the quality of illegal camcords that are still being made, and well-organized criminal groups are quickly uploading and disseminating the pirate copies online.

Recording industry estimates indicate that nearly 400 million tracks were illegally downloaded to mobile phones in 2008, far more than the number of legitimate mobile music downloads, threatening the future growth of this critical market. Enabled by the rollout of third generation mobile phone receivers, Japanese consumers (particularly teenagers) flock to free unauthorized mobile sites. An October 2008 survey indicated that nearly two-thirds of mobile phone users in their early teens, and more than one-third of all users, are engaged in unauthorized music downloads. Unauthorized file sharing on PCs reached an estimated level of 84 million tracks in 2008, outstripping the legal market by a ratio of nearly 2 to 1. It is encouraging that three arrests were made in October and November 2008 of those who operated, uploaded to, and hosted mobile music piracy sites. But much more effort is needed if the mobile market segment, like others before it, is not to be lost to piracy.

One encouraging development in the past year has been a greater willingness of Internet Service Providers (ISPs) to discuss, at least, cooperative efforts to combat p2p piracy. News reports in March 2008 indicated that leading ISPs had agreed in principle to cut off the Internet connections of customers who repeatedly used them to upload files on Winny.² Soon thereafter, in a welcome break from the past, a consortium of copyright owners and service providers, with law enforcement and other government agencies as observers, began discussing how to work together more effectively, including the possibility of a coordinated "graduated response" system against repeat infringers, facilitation for the disclosure of contact details of customers who abuse the networks to commit infringements, and voluntary cooperation on technological solutions. Reportedly, the consortium is seeking to establish a guideline that would enable a coordinated

¹ Street vendors are especially prevalent in Western Japan, and some are involved with Yakuza organized crime groups.

² See http://news.cnet.com/8301-10787_3-9894891-60.html?tag=newsmag.



“graduated response” to begin operations in the spring of 2009. The Government of Japan should be more actively engaged in such private sector cooperative initiatives and ensure that concrete steps are implemented in 2009.

Beyond this, there is much more the government should do. The legally enforced anonymity of direct infringers using illicit p2p services like Winny and Share, and of unauthorized mobile music download sites, underscore the systemic inadequacy of Japan’s enforcement regime against online piracy. That regime, problematic when it was instituted almost a decade ago, is now clearly outdated, and must be overhauled for 21st century realities. One touchstone for this reform should be to give greater incentives for ISPs to take their share of responsibility for identifying and remedying online infringements. Among other changes, Japan should:

- Narrow its broad statutory private use exception (Article 30(ii)) to take into account the ability of home users to download unauthorized digital copies that can be easily re-disseminated, such as over mobile platforms or p2p networks. As noted above, the reality is that such downloading is feeding retail (including offline) piracy of audio-visual works and other copyright materials. In addition, the status quo threatens to undermine the prohibition on unauthorized uploads (the “making transmittable” right). Legislation remains under consideration to make the Article 30 exception inapplicable to copies knowingly made from unauthorized sources. It would be a major step forward if this principle were enacted into law and applied to downloads of all types of copyrighted materials from illicit mobile and p2p services. Japan should be encouraged to take this long-awaited step without further delay.
- Adopt a more streamlined system for notice and takedown of infringing material from networks, from online auction sites, and from user-generated content (UGC) sites. The 7-day waiting period provided in the Service Provider Liability Law for a takedown is clearly outmoded, and is being exploited by UGC sites and others to delay unjustifiably a response to notices from right holders.
- Provide 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. In the increasingly anonymized p2p environment, pirates are fully exploiting this deficiency in current law.
- In fulfillment of Japan’s obligations under the WIPO Internet Treaties to provide effective remedies against online infringements, ensure that injunctive relief is made available against indirect infringers (such as the providers of illicit mobile or p2p services) even if they do not themselves make “physical use” of infringing articles. This result appears consistent with case law from Japanese courts. If it is deemed advisable to codify this result in statute, Japan should do so in a way that clearly states, and does not unduly restrict, the range of cases in which such relief would be available.
- In line with recommendations of a subcommittee advising the Bunkacho (Culture Ministry), expand Article 113 of the copyright law to cover the situation in which the defendant offers to distribute unauthorized copies online but cannot be proven to have actually possessed the copies. Japan should be encouraged to move forward on this change as part of its effort to ensure that Article 113 covers all knowing unauthorized use of software programs, and possession of infringing copies with intent to violate any exclusive right of copyright owners.
- Relax the requirement for formal complaints before criminal proceedings can be commenced against those involved in piracy via p2p networks.

Other Issues. Along with online piracy, IIPA remains concerned about a number of legislative, regulatory and enforcement-related matters pending in Japan. The U.S. government should continue to engage actively with Japanese officials on the following issues, among others:

- **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 circumvention devices or software. These deficiencies should be remedied.

- **Exceptions to protection:** A range of exceptions to copyright protection remain under consideration in Japan. In general, Japan must proceed with caution, ensure that any new statutory exception meets a concrete and documented need, and respect all applicable international norms. With regard to specific proposals:
 - A possible exception for reverse engineering of computer programs is being studied. An international norm in this area is by now well-established, and reflected in case law in the United States and in the Software Directive in Europe. It spells out the circumstances under which decompilation of programs ought to be permissible in order to achieve interoperability. Any Japanese legislation should adhere carefully to this norm. Related proposals for more expansive exceptions, addressing error correction and research, are subject to considerable risk of abuse and raise serious questions. At a minimum these should be deferred pending further study.
 - No exception to copyright liability for the benefit of search engines should be considered without strong evidence of need. The parameters of the internationally recognized “3-step test” for restrictions on copyright protection must always be kept in mind. A better topic for study would be how to ensure that copyright law provides the maximum incentives for cooperation between search engine providers and rights owners in dealing with pervasive online copyright piracy.
 - A recently proposed exception for “information analysis” of online databases for research and development purposes needs far more study and focusing before any action is taken.
 - Japan should continue to rely on existing market mechanisms to resolve any issues faced by pharmaceutical companies in seeking to copy and distribute materials from scientific, technical and medical publications, including for disseminating information to customers in compliance with pharmaceutical regulations. No defensible justification has been offered for any proposed limitation of copyright protection in this area, and IIPA applauds the decision by the Japanese government to postpone any recommendation regarding such a proposal.
 - A recent proposal for Japan to graft a US-style “fair use” exception into its copyright law raises considerable concerns. While IIPA member associations recognize that a fair use approach can work to provide a regime of balanced and reasonable exceptions to protection, it would be extremely difficult to integrate this common-law doctrine into a civil law copyright system such as Japan’s. The likely adverse impact on the predictability of Japanese law could be highly detrimental to copyright owners and users alike.
- **Copyright term extension:** Japan has 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.
- **Statutory damages:** We urge Japan to move to implement a system of pre-set statutory damages for copyright infringement, at levels sufficient to achieve deterrence. Among other areas, such a change would substantially assist in the fight against online piracy, and against willful use of unlicensed software applications in the workplace, which is the single greatest source of piracy losses to the business software industry.
- **Educational exceptions:** IIPA remains concerned about the education exceptions in Article 35 of Japan’s copyright law. Japan should clarify the applicability of Article 35 to textbooks and course packs, and should build in technological safeguards to reduce the risk of infringement in the distance learning environment. In general,

Japan should ensure that both current and proposed exceptions do not undermine or discourage licensing arrangements and that they meet international standards.

- **Copy protections on digital free-to-air broadcasts:** IIPA is encouraged by indications that Japan's Ministry of Information and Communication will take into account the views of all affected industries in arriving at a new policy in this area, which could have a significant impact on the ability of copyright owners to prevent unauthorized re-distribution of their works contained in such broadcasts.