

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301

SPECIAL MENTION

JAPAN

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.

Japan faces a serious and growing problem of online copyright piracy. 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 peer to peer (p2p) and mobile services. The motion picture industry reports that 80% of pirated DVDs and other optical media products sold by street vendors (some of them involved with Yakuza organized crime groups), or via Internet auction sites, originate from p2p downloading. 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 most popular p2p system for music piracy. The motion picture industry reports that p2p piracy of its products has largely migrated to the “Share” network, but that the overall level of online piracy remains undiminished. Recording industry estimates indicate that over 150 million tracks were illegally downloaded in 2006, which is ten times more than the number legitimate music downloads to personal computers. An alarming and more troubling development is the proliferation of unauthorized services for downloading 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 robust growth of the JPY 70 billion (US\$652 million) market in legitimate mobile music services.

While Japanese authorities have been responsive to this growing threat in some cases, systematic changes are needed before Japan can effectively combat online piracy. Among other changes, Japan should consider the following: instituting a more streamlined system for notice and takedown of infringing material from networks and from online auction sites; providing a faster and more reliable method of requiring Internet Service Providers (ISPs) to disclose contact information on subscribers who have been identified as using the networks to carry out infringements; and relaxing the requirement for formal complaints before criminal proceedings can be commenced against those involved in piracy via p2p networks. (Additionally, many of the legislative changes discussed below could have a significant impact on online piracy.)

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:

- **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. Among other areas, such a change would substantially assist in the fight against willful use of unlicensed software applications in the workplace, which is the single greatest source of piracy losses to the business software industry.
- **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 mobile platforms or peer-to-peer (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). IIPA is encouraged by reports that legislation is 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 applied to downloads from illicit mobile and p2p services.

- **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.
- **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. A subcommittee advising the Bunkacho (Culture Ministry) has called for some expansion of this provision 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.
- **Exceptions to protection:** Japan is, once again, considering a new limitation to copyright that would allow widespread unauthorized copying of scientific, technical, and medical publications by pharmaceutical companies for distribution to their customers. No defensible justification has been offered for this limitation, and IIPA applauds the recent decision by the Japanese government to explore its options carefully and postpone any recommendation regarding the proposal. Market mechanisms are already in place for pharmaceutical companies to obtain necessary licenses for this copying and distribution. IIPA hopes that the government will continue to encourage use of these mechanisms to solve the problem. The publishing industry’s market in Japan would be seriously undermined if Japan were to implement the proposed limitation, calling into question the country’s compliance with international standards for exceptions to copyright protection. In addition, 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.
- **Injunctions against indirect infringers:** In fulfillment of Japan’s obligations under the WIPO Internet Treaties to provide effective remedies against online infringements, injunctive relief should be made available against 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 advisable to codify this result in statute, Japan should be encouraged to do so without unduly restricting the range of cases in which such relief would be available.
- **Liability of search engines:** IIPA urges caution in approaching this topic, which is also under study within the expert committees advising the Bunkacho. 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.

- **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.
- **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 it appears that rights were totally eliminated in the case of non-commercial retransmission via multicasting. The new law represents a significant step backward; a system of exclusive rights should govern these transactions. While effective collective licensing has an important role to play, elimination of exclusive rights will not succeed in promoting new paths for content distribution.
- **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.

IIPA is pleased to note that in 2007, Japan adopted legislation to prevent the unauthorized operation of audiovisual recording equipment in theaters while a motion picture is being exhibited. Vigorous enforcement of this law will help close off one important avenue for audio-visual piracy. Japanese authorities should also be commended for their increased use of the Organized Crime Punishment Law to seize the financial proceeds of organized groups engaged in enterprises based on piracy, including online auction sellers and street vendors.