

Drop the Beat



Technology has transformed our music-buying and selling patterns, but does it only come with benefits? Copyright experts across Asia paint a bigger picture with **Johnny Chan**.

In June 2015, the IP Strategy Headquarters of the Japanese government published the *IP Strategic Program 2015*, which provides the following matters as

for Private Sound and Visual Recordings or the introduction of new alternative arrangement, and take necessary measures thereupon, in order to return appropriate compensation to

creators for continuous reproduction of contents under the development of digital and network technologies," says Kei Iida, a partner at Nakamura & Partners in Tokyo. "The programme is designed to promote international protection of copyright and cooperation, by conducting negotiation between governments and integrated government-private appeal to the opposite government, in order to strengthen measures against pirates in foreign countries and to study measures against websites and acts providing pirates to Japan across the border through the internet."

Thereupon, the Council of Cultural Affairs' Subcommittee on Appropriate Protection, Exploitation and Distribution of Works of the Subdivision on Copyright of the has undertaken studying the compensation issue, while the Council's International Subcommittee of the

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Nakamura & Partners, Tokyo

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the copyright issues relating to music to be considered: "To study and conclude the reform of the Compensation System

Should the Music Industry Increase Its Transparency?

Transparency in the music industry is very important for artists. In Japan for example, artists may transfer part or all of the

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- Masanori Hiroe, managing partner,
Hiroe and Associates, Gifu City, Japan

copyright they hold to the Japanese Society for Rights of Authors, Composers and Publishers, which then becomes the copyright holder and is able to give authorization for use of songs, etc., to those who apply for it, says Masanori Hiroe, managing partner

at Hiroe and Associates in Gifu City. "JASRAC collects royalties from users and distributes them to artists after deducting their administrative fees. Since there are detailed provisions in place concerning the distribution method of royalties, this system ensures transparency for artists who entrust the administration of their works to JASRAC."

Do Owners Need To Pay Royalty For Playing Radio In Their Shops?

If people such as shopkeepers listen to the radio with speakers placed in the public and the music is loud enough for outsiders to hear, this would amount to a public performance and a communication to the public, says Pravin Anand, managing partner at Anand and Anand in New Delhi. "This would then go beyond fair use and need licenses from music owners."

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Similarly, playing music in a commercial business (whether a mall or shop tenant) or any other public setting would also constitute a public performance or communication under New Zealand's Copyright Act. Therefore, mall owners and their shop tenants would need to obtain a license from the relevant rights holder. "Rights holders are entitled to recover fees for the use of their works under New

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Zealand copyright law, which is consistent with the intentions of the Berne Convention and other related international copyright treaties," says Matthew Hayes, a senior associate at AJ Park in Wellington. "OneMusic is our joint licensing initiative between the Australian Prudential Regulation Authority and the Phonographic

not seem to wish to pay what the suppliers believe to be a fair price for the various services. "That is a commercial issue but one with not insignificant legal implications," Ross says. "At one end of the spectrum, theft is theft, whether of IP or other property, whatever the means."

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- Matthew Hayes, senior associate,
AJ Park, Wellington

Performance New Zealand Music Licensing, which provides a single license covering all the permissions required to play music in public. But as you might know, members of the public listening to the music in the mall or shop have no liability."

Is Copyright Often Abused To Kill Creativity Such As Changing Lyrics? It is not as far as the Japanese law is concerned. Enforcement of a right to maintain integrity (Article 20 (1) of the Copyright Law), which is a kind of moral right of an author, is not regarded as copyright abuse.

"Uploading of modified lyrics obviously constitutes an infringement of a right to maintain integrity of the author. Thus, the person who uploaded the lyrics will bear responsibility for monetary compensation of the spiritual damage of the author," says Kazuhiro Seto, a patent attorney at SETO Administrative Law Office in Osaka. "In case the author (not the copyright holder) of the original song admits such modification, the modifier will enjoy copyright protection on the modified parts of the lyrics, but such case is very rare."

Do Strict Penalties Not Deter Infringement and Reduce Public's Respect for Copyright? "The view we have of the Australian copyright law in practice is that criminalization of infringement, seizures, blocking and policing through ISPs no doubt all have slightly different roles to play, but the question is somewhat misconceived," says Gregory Ross, a partner at Eakin McCaffery Cox in Sydney. "We have real doubts as to the extent to which criminal processes would be adequate to handle an issue, especially given the internationalised aspects of digital transfer of relevant data."

The underlying issue would appear to be that consumers do

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At a time when copyright infringement is prevalent and technology is developing at a rapid rate and through sundry mechanisms, it is necessary to implement a range of enforcement mechanisms, Ross says. "These would, to varying extents, include the criminalization of infringement, seizure of infringing material and blocking of websites."

"The legal mechanisms and the consequences that follow if copyright laws are breached convey a message to ordinary users that copyright laws need to be respected and that infringement will not be tolerated," Ross says. "Meanwhile, some aspects of the law which are outdated will need updating from time to time."

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In Australia, some legislative provisions have been made better to balance the rights and obligations of the end user and the provider of the relevant IP content. "These include those to do with time shifting and the like," says Christina Cavallaro, an associate at Eakin McCaffery Cox in Sydney. "Further changes are proposed from time to time."

"Civil remedies for copyright infringement can sometimes be

insufficient to deter an infringer who considers that the payment of damages or account of profits to a copyright owner is simply

criminal penalty may be a stronger and more effective tool to dissuade the infringer from continuing with its infringing conduct.”

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- Christina Cavallaro, associate,
Eakin McCaffery Cox, Sydney

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another cost of running its business,” Cavallaro says. “Instead, for infringers operating in that sense, the prospect of facing a

proceedings would deter an importer from making a claim for goods which they know are infringing.”



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Those provisions, of course, are not intended to handle online infringement. In a digital age where infringing material can be accessed online with ease, it has been necessary to introduce additional mechanisms to disable access to websites that infringe copyright. "Recent legislative changes to the Australian

court usually do not have binding effects on another local court in other districts."

In some cases, he says, Chinese courts do cite provisions like Article 53 of the copyright law and Rule 28 of the Computer Software Protection Provisions. "According to the provisions, if the publisher or producer of a copyrighted work fails to establish the lawful authorization he has obtained, then the distributor shall be liable for the infringement. In a computer software copyright infringement case in 2005, the Wenzhou Intermediate Court located in Zhejiang province held as follows: after the duplicates of the copyrighted works has been distributed legally, the owner of such duplicates is entitled to having it assigned to a third party, and the copyright owner has no right to prevent such assignment. In other words, the distribution right entitled to the copyright owner has been exhausted for those duplicates legally distributed."

In some other cases, Chinese courts have accepted the exhaustion doctrine based on the ground that the accused act does not fall under the scope of the right specifically prescribed by the copyright law. "For example, in two copyright

infringement cases in 2014, the Beijing First Intermediate Court ruled as follows: the accused movies are provided by a third party video website authorized for online broadcast by the copyright owner. The copyright law does not entitle the right of link to the copyright owner. Under the condition that the third party video website has already obtained authorization from the copyright

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- Jason Wang, managing partner,
Beijing East IP Law Firm, Beijing

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Copyright Act now allow copyright owners to apply to the court to seek an injunction against a carriage service provider to 'block' access to websites if the court is satisfied that its primary purpose is to infringe copyright or facilitate the infringement of copyright," Cavallaro says. "However, in implementing this method of enforcement, there is certainly going to be the risk that legitimate file-sharing websites that do not intend to host infringing material could be detrimentally affected if ISPs are determining which websites will be blocked."

Australia presently has a piece of litigation going through the court system which has clearly demonstrated the ability of the court to handle issues related to digital infringement in a civil, not criminal context, Cavallaro says. "As recently as December 16, 2015, the Federal Court of Australia in the case of *Dallas Buyers Club LLC v iiNet Limited* has again demonstrated its preparedness to use the powers of the court to achieve a just balance between the rights of the end consumer, the digital middleman and the original provider of IP content."

Used e-Books and e-Songs

The most important issue for the second-hand market of copyrighted goods is the exhaustion doctrine or first sale doctrine.

"Currently, there is no specific provision regarding such doctrine under the Chinese copyright law," says Jason Wang, managing partner at Beijing East IP Law Firm in Beijing. "In judicial practice, decisions of some Chinese courts tend to accept such doctrine by citing provisions of the Chinese copyright law. As China is not a case law country, the precedent decisions rendered by a local

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The scope of fair use exemptions is broad and may depend on the interpretation of the court on a case-by-case basis.

- Say Sujintaya, partner,
Baker & McKenzie, Bangkok

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owner, such copyright owner has exhausted its rights," Wang says. "Despite some precedents including the above cases, currently, there are no precedents regarding the electronic copyrighted goods like books, software, music on the second-hand market in China similar to the cases like *UsedSoft*, *ReGigi*, *Tom Kabinet* in Europe and US."

The second issue is that the situation for intangibles on the second-hand market is somewhat different from the physical goods.

For e-books, software and music, there are some theoretical discussions based on the cases such as *UsedSoft*, *ReGigi*, *Tom*

Kabinet in Europe and the US. One view is that reselling of the said materials does not constitute infringement. However, there are opposing views that reselling of such constitutes infringement based on the following grounds: “first, the price for purchasing the physical goods includes the value of both the works and the physical carrier. However, the price for purchasing the intangible goods only contains the value of the works and does not contain that of the physical carrier. Second, during the reselling of the physical copyrighted goods, the physical carrier is transferred as well, and the reseller cannot have access to the works via such physical carrier any longer,” Wang says. “But regardless of the views, it is still possible that the reseller may keep works in electronic form. For the time being, the possibility to introduce

if a copyright owner found infringing content on any websites, they would notify the ISPs to take down such infringing content and the ISPs usually cooperate. “Currently, Section 32/3 of the new Copyright Act highlights the difficulty involved in the current practice in which the copyright owner has to apply for a Court order to have the ISPs take down the infringing content,” says Sujintaya. “Since the new Copyright Act came into effect in August 2015, the volume of infringing content that has been voluntarily taken down by the ISPs has declined by some 30%. However, said number increased during the months of September and October as the copyright owners have applied for Court orders, and the ISPs now understand that copyright owners are serious in taking action against alleged infringers.”

Section 32/3 creates difficulty for copyright owners, and is onerous in terms of the duration of time required to issue take down notices. says Praewpan Hinchiranan, an associate at Baker & McKenzie in Bangkok. “As such, Section 32/3 should be amended to promote the music industry in the current digital time, and to allow copyright owners to proceed directly with the ISPs to issue take down notices. If the ISPs comply with the copyright owners’ take down notices, they will be exempted from any incurred liability. However, if the said take down notices cause any damage to any person, [that person] is entitled to proceed with a lawsuit against the copyright owners.”

“For the known ISPs and copyright owners, the take-down action depends on the personal relationship between the copyright owners and the ISPs. If there is a change in the position of the ISPs, the volume of voluntary cooperation of the ISPs in taking down the infringing contents may decrease,” adds Hinchiranan. AIP

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the concept of the exhaustion doctrine in our copyright law is little, especially for the issue of reselling of the intangibles on the second-hand market. This issue still needs to rely on court decisions.”

Music Fair Use

To date, much of the existing music piracy occurs on social media sites. The fair use exemptions in Thailand apply to music which is protected as copyrighted work whether as a musical work, literary work, sound recording, or broadcasting work. “The scope of fair use exemptions is broad (e.g. for the purposes of non-profit research or study, or for the personal use of individuals, along with their family members or close relatives), and may depend on the interpretation of the court on a case-by-case basis,” says Say Sujintaya, a partner in the intellectual property practice group at Baker & McKenzie in Bangkok. “For example, when Mr. A shares a popular song from his social media account to that of his friend’s page and the friend can see such share on their newsfeed, would it be protected as a fair use exception? In such case, the applicable circumstances, including the nature and function of the social media page, as well as the intention of Mr. A, could be used to consider whether such act conflicts with and unreasonably infringes the copyright owner’s rights. If it appears that the act of sharing the copyrighted song infringes the rights of the copyright owner, the copyright owner can issue a notice to Mr. A, or the applicable social media service provider, to take down such infringing content from the website or platform in question.”

In addition to the ambiguity of fair use exceptions for music and the uncertainty of interpretation of such exceptions by the music industry, in normal practice prior to the new Amendment to the Copyright Act B.E. 2558 (A.D. 2015) becoming effective,

