



ALAI Congress 2022 – Estoril, Portugal

QUESTIONNAIRE

Japan

(ALAI Japan)

PANEL I – PERFORMER’S RIGHTS – A COMPARATIVE OVERLOOK

(Prepared by Mr. Takashi Inoue, the Geidankyo)

1- What types of performers are there according to your legal framework? “Performers” means an actor, dancer, musician, singer, or any other person who gives a dramatic performance of, dancing, giving a musical performance of, singing delivering, declaiming, or by any other means giving a performance of a work (including similar actions not involving the performance of a work but having the nature of a performing art), or a person who conducts or stages a performance (Article 2(1)(iii) and (iv), Copyright Law of Japan)

2- Do all types of performers enjoy Neighbouring Rights protection?

Yes, a performer who meets the above-mentioned definition of “performer” enjoys Neighbouring Rights protection.

3- Does the law distinguish between featured/non-featured performers? How? No

4- Which rights are awarded to each type of performer?

I- Live performances:

- a) Fixation; Article 91 (sound/audiovisual) Exclusive Right/ER
- b) Broadcasting; Article 92 (sound/audiovisual) Remuneration Right/RR
- b') Communication to the public; Article 92 and 92bis (sound/audiovisual) ER II- Fixed performances:
- c) Reproduction; Article 91 (sound/audiovisual)¹) ER d) Distribution; Article 95bis (sound) ER
- e) Rental; Article 95ter (sound) ER/RR

The law defines that the Exclusive Right just last 1 year from the date of the first sale,

¹Except fixed on a cinematographic work



for the rest of the term of protection, the Remuneration Right apply. f)
Making Available to the public; Article 92bis (sound/audiovisual*) ER g)
Communication to the Public; Article 95 (sound (Cablecasting)) RR h) Public
performance; N/A

i) Broadcasting; Article 95 (sound) RR

j) Retransmission; Article 94bis (audiovisual*) RR and 95 (sound (Cablecasting)) RR k) Direct
Injection; N/A → To be discussed

l) Any other rights (for example,

- Compensation for Private Copy of Sound and Audiovisual Recording; Article 30(3) and 102(1)

- Compensation for Public Transmission of Work for Educational Use; Article 35 and 102(1)

III- Are moral rights attributed to performers? Which prerogatives does it comprehend? Yes.

5- What is the nature of those rights? – Statutory? Contractual? Statutory rights

6- Which of them are exclusive rights/remuneration rights?

- Exclusive Rights: mentioned as “ER” in Q4.

- Remuneration Rights: mentioned as “RR” in Q4.

7- Which exceptions/limitations generate remuneration rights for performers?

- Compensation for Private Copy of Sound and Audiovisual Recording; Article 30(3) and 102(1)

- Compensation for Public Transmission of Work for Educational Use; Article 35 and 102(1)

- Remuneration for Rental of Sound Recording; Article 95ter → WPPT Article 9(2)

8- Which rights are transferred to music/audiovisual producers? For how long? No legal
presumptions of transfer.

9- Are there any legal presumptions of transfer or is it voluntary/contractual?

Voluntary/contractual transfer only.

10- Are there any unwaivable and inalienable remuneration rights? No.



11-What type of compensation is paid in exchange? How is it set? For how long?

The compensations mentioned in Q7 are paid for same term of protection, 70 years, in exchange of limiting exclusive rights.

12- How is “streaming” qualified in your Country for rights awarding purposes?

Right to Make Available for Transmission; Article 92bis

13- Whose authorization is it required for the “streaming” of music/audiovisual content?

Phonogram and film producers.

14- What is the estimated level of copyright infringement in your Country?

There are no statistics about domestic market.

Reference: Damage of Japanese contents piracy in global market is 1.9 trillion JPY
(According to CODA, 2019) <http://coda-cj.jp/en/about.html>

15- What is the current level of disclosure on economic returns from digital platforms? Very low.

“The Value Gap” problem is being discussed at the Government level.

16- How is performer’s compensation determined for each business model?

It is determined contractually, but in general, performers’ bargaining power is very low at every models.

17- Are there minimum amounts due? Any other economic benefits?

In some cases. For example, the contracts between small broadcasters and CMO regarding the secondly use of Sound Recordings.

18- Do UGC platforms contribute to such compensation schemes? How? No.

19- Has the Beijing Treaty been implemented in your Country, at least, in part?

Yes, at least. However, the Term of Protection is provided longer than the said Treaty.

20- Which rights are collected by Collective Management Organisations (CMOs)? For those rights mentioned in Q4

c) Reproduction; Article 91 (audiovisual*)



- e) Rental; Article 95ter (sound)
- f) Making Available to the public; Article 92bis (sound/audiovisual*) g) Communication to the Public; Article 95 (sound (Cablecasting)) i) Broadcasting; Article 95 (sound)
- j) Retransmission; Article 94bis (audiovisual*), 95 (sound (Cablecasting))

21- Which CMOs represent performers in your Country?

Sound: GEIDANKYO <https://www.cpra.jp/english/> Audiovisual: aRma <https://www.arma.or.jp/>

22- Do these CMOs comply with transparency principles? Yes.

23- Is it possible to find out how much income is provided by each type of rights?

- Reproduction (audiovisual*) : 660 million JPY
 - Rental (sound): 880 million JPY
 - Making Available to the public (sound) : 880 million JPY /(audiovisual*) : 550 million JPY
 - Broadcasting/Cablecasting/Retransmission (sound): 5.1 billion JPY
 - Retransmission (audiovisual*) : 500 million JPY
- (According to 2020 data)

24- What is the current litigation level for performers' rights in your Country?

From our point of view, it is not enough. Performers do not enjoy the protection for public performance.

25- Are there any relevant Court Decisions concerning performer's rights? Yes.

26- Does the Principle of National Treatment apply to all foreign performers?

Yes. As regarding the secondary use of the Sound Recordings, the Principle of Reciprocity applies.

27- Are there "appropriate and proportionate remuneration" provisions? No.

28- Are CMO's mandates always exclusive and encompassing all rights?



No.

29- Are there any partial/global revocation of transfer of rights agreements provisions? No.

30- Are there any provisions on contractual remuneration adjustments? No.

PANEL II – PHONOGRAM PRODUCERS' RIGHTS

(Prepared by Prof. Tatsuhiro Ueno)

1- Which rights are awarded to phonogram producers?

a) Reproduction;

The producer of a phonogram has the exclusive right to reproduce his phonogram (JCA Art. 96).

b) Broadcasting;

The producer of a phonogram has the right to receive secondary use fees for broadcasting or wire-broadcasting of his/her phonograms (JCA Art. 97). When a designated association exists, this right to receive secondary use fees can only be exercised by that association (JCA Art. 97(3)). At present, the Recording Industry Association of Japan (RIAJ) is designated as such.

c) Communication to the public;

The producer of a phonogram has no right to publicly play his/her phonograms under the Japanese Copyright Act. It is based on the reservation of the Japanese Government under Art. 16 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations at Rome on October 26, 1961 (See the Notice No. 514 of the Ministry of Foreign Affairs of Japan on 3 October 1989).

d) Distribution;

The producer of a phonogram has the exclusive right to transfer ownership of his/her phonogram (JCA Art. 97-2).



e) Rental;

The producer of a phonogram has the exclusive right to rent his/her phonograms (JCA Art. 97-3(1)). However, this rental right does not cover any commercial phonogram, the first sale of which took place one year or more ago (JCA Art. 97-3(2); Order for the Enforcement of the Copyright Act Art. 57-2). The phonogram producer will have a remuneration right instead (JCA Art. 97-3 (3)).

f) Making available to the public;

The producer of a phonogram has the exclusive right to make his/her phonogram “transmittable” (JCA Art. 96-2). It should be noted that “to make transmittable” means the uploading of data onto a network to enable them to be automatically transmitted under the Japanese Copyright (JCA Art. 2(1)(ix-5)), which was intended to correspond to the act of “making available to the public” provided in the international treaties (WPPT Arts. 10 and 14; WCT Art. 8) (See Tatsuhiro Ueno, The Making Available Right in the “Cloud” Environment: Toward the Harmonization of the Substantive Scope of the Right, in: Copyright and Related Rights in the “Cloud” Environment, The Report of the ALAI Congress in Kyoto 2014, pp.199).

g) Cable Retransmission;

-The producer of a phonogram has the right to receive secondary use fees for broadcasting or wire-broadcasting of his/her phonograms (JCA Art. 97).

h) Direct Injection;

I am wondering the meaning of the “direct injection”, but if it means the real-time internet broadcasting of a phonogram via the Internet, the right of transmittable of the phonogram producer (JCA Art. 96-2) can cover it, because the real-time internet broadcasting of a phonogram constitutes uploading the phonogram on to the Internet.

i) Any other rights?

No.

2- What is the nature of those rights? – Statutory? Contractual?

The exclusive rights and remuneration rights of phonogram producers are statutory in the



Japanese Copyright Act.

3- Which of them are exclusive/remuneration rights?



| See above.

4- Which exceptions/limitations generate remuneration rights for phonogram producers? *The exception of the reproduction right for private digital recording generates remuneration rights for phonogram producers (JCA Art. 30(4), Art. 102(1)).*

Additionally, a new exception of the right of making transmission of phonogram producers for online simulcasting of commercial phonograms under Art. 96-3 which was introduced by the Amendment 2021 (Law No. 52 of 2021) provides for the remuneration right for phonogram producers (JCA Art. 96-3(2)).

5- Are there any legal presumptions of transfer or is it voluntary/contractual?

Art. 63(4) of the Japanese Copyright Act provides for, “[u]nless otherwise stipulated in a contract, the authorization referred to paragraph (1) in connection with the broadcasting or cablecasting of a work, does not include authorization to record the sound or visuals of the work”, and this provision shall apply mutatis mutandis to the transfer of neighboring rights (JCA Art. 103).

Additionally, Art 63(5) of the Japanese Copyright Act which was introduced by the Amendment 2021 (Law No. 52 of 2021) provides for the legal presumption for including authorization of online simulcasting in case of authorization of broadcasting or cablecasting.

6- What type of compensation is paid in exchange? How is it set? For how long?

| *There is no compensation in exchange of legal presumptions.*

7- How is producer’s compensation determined for each business model?

| *N/A*

8- Are there minimum amounts due? Any other economic benefits?

| *N/A*

9- Is digital piracy/streamripping still a major concern for phonogram producers?

| *Maybe yes. But according to the RIAJ, the number of the users of illegal music apps decrease significantly after the Amendment of the Japanese Copyright Act in 2020 (See*



<https://www.riaj.or.jp/news/id=289>).

10- Which rights are currently being collected via CMOs?



The secondary use fees and the remuneration for rental of the phonograms are collected via CMOs.

11- Which CMOs represent phonogram producers in your Country?

The Recording Industry Association of Japan (RIAJ) designated as the association to collect secondary use fees and remuneration for rental of the phonograms.

12- Do these CMOs comply with transparency principles?

Under Art.128 of the Act on General Incorporated Associations and General Incorporated Foundations, the general incorporated association, such as the Recording Industry Association of Japan (RIAJ), must publish its balance sheet without delay after the conclusion of its annual general assembly meeting.

The Commissioner of the Agency for Cultural Affairs, as provided by Cabinet Order, may ask an association to report on functions related to the secondary use fees or to submit account books, documents, and other data, and may make the necessary recommendations for improving the way the association's business is executed (Art.95(9), Art.97(4)).

13- Is it possible to find out how much income is provided by each type of rights?

The amount of receive secondary use fees is available in each balance sheet, (e.g. regarding the balance sheet in the fiscal year 2020 <in Japanese>, https://www.riaj.or.jp/f/pdf/r2_balance_sheet.pdf).

14- What is the current litigation level for phonogram producers in your Country?

N/A.

15- Are there any relevant Court Decisions concerning phonogram producer's rights?

In terms of a recent one, the Osaka District Court held that the plaintiff who made so- called "mixing" of an existing phonogram was not recognized as a phonogram producer, because (Court Osaka District Court, April 19, 2018 (Case number 2017 (Wa) 781) [Jaco Pastorius Case]). The translation in English is available (https://www.ip.courts.go.jp/app/files/hanrei_en/581/002581.pdf).



16- Are there any revocation of transfer of rights' agreements provisions?

| *No.*



17- What is considered a “phonogram published for commercial purposes”?

Art.2(1)(vii) of the Japanese Copyright Act stipulates, “commercial phonogram” means a copy of a phonogram that is produced for the purposes of commercial distribution’.

18- Is there any type of phonograms that is published for non-commercial purposes?

Art.2(1)(v) of the Japanese Copyright Act stipulates, “phonogram” means the fixation of sounds on a material object such as a phonograph disc or recording tape (other than of sounds that are intended to be played exclusively alongside images)’. Therefore, a phonogram that is published for non-commercial purposes is also covered by the concept of phonogram in the meaning of the Japanese Copyright Act and protected thereunder.

19 - Which rights are involved in audiovisual synchronization (“production music”)?

The exclusive right to reproduce his phonogram of phonogram producers (JCA Art. 96) covers audiovisual synchronization, because “reproduction” means ‘the physical replication of a work through printing, photography, or copying, through the recording of sound or visuals, or in any other way’ (JCA Art.2(1)(xv)).

20- Which rights are involved in mood music/sound branding licensing?

There is no particular provision for the use of phonogram in mood music or sound branding licensing.

PANEL III – BROADCASTERS AND FILM/AUDIOVISUAL PRODUCERS RIGHTS

(Coming soon)

PANEL IV– DATABASE PRODUCERS’ AND PUBLISHERS RIGHTS

(Prepared by Prof. Makoto Nagatsuka)

1- Are Databases legally protected in your Country? How?

Yes. Copyright Act (Act No. 48 of 1970) does. Its Article 2(10)ter defines “database” as an aggregate of data such as articles, numerical values, or diagrams, which is systematically constructed so that such data can be searched with a computer. And its Article 12bis protects as a work in the meaning of its Article 2(1)(i) a database that, by reason of the selection or systematic construction of information contained therein, constitutes a creation.

2- Is there a *Sui Generis* Database producers’ right or equivalent protection in your Country?



No.

3- Is it possible to evaluate its efficiency and level of enforcement?

N/A

4- Is there any different form of protection for Database producers or for ownership of data?

Yes. Unfair Competition Prevention Act (Act No. 47 of 1993), updated by the Act No. 33 of 2018, defines at its Article 2(7) “shared data with limited access” as technical or business information that is accumulated to a significant extent and is managed by electronic or magnetic means (an electronic form, magnetic form, or any other form that is impossible to perceive through the human senses alone) as information to be provided to specific persons on a regular basis. Information that is kept secret is excluded.

And its Articles 2(1)(xi)~(xvi) protect “shared data with limited access” from certain acts of improper acquisition, use and disclosure. These improper acts are named “unfair competition” (Article 2(1)(i)) and subject to injunction (Article 3) and compensation (Article 4) by civil jurisdiction. There is no penal sanction.

5- How does it work? Is it effective?

Too early to answer. Today, there is no court decision which applies this article.

6- How do the courts of your Country balance the *sui generis* right with freedom of information and freedom of competition?

N/A

7- Is the *sui generis* right protected against circumvention of TPM designed for controlling access?

N/A

8- Is there a special protection against online uses of press publications in your Country?

No. But in Japan, according to Article 15(1) of Copyright Act, a newspaper company is an author of a journalistic article and even of a set of newspaper, because they are made by its employees in the course of duty at the initiative of the company. Therefore, Japanese newspaper companies are already copyright holders. They don't need neighboring right to be enacted to negotiate with online platformers who use their contributions without their permissions. They could unite under the flag of their copyright, but they didn't...

9- Does it apply to scientific journals and hyperlinks? How does it work? N/A