

Japan

Can watching YouTube be the basis for arrest under the Copyright Act?

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On June 20 2012 the *Diet* passed a bill to amend the Copyright Act containing a provision on penalising illegal downloading. Somewhat surprisingly, this bill was passed quickly without substantive discussion, despite its controversial content.

This revision to the Copyright Act includes other important amendments, such as establishing new categories of exception where copyrighted material can be used without the copyright owner's permission. In particular, much has been made of the amendments that impose penalties for knowingly downloading copyrighted music or films that have been illegally uploaded. The new rules have also made the news due to the actions of a foreign hacker group that opposes the penalisation of illegal downloading, which cyberattacked several government websites in protest against the amendment.

Regulations on uploading and downloading of pirated music or films

Today, a variety of content is distributed over the Internet; furthermore, with increasingly sophisticated technology, it has become easier to distribute large-size and high-quality content. The Copyright Act protects content copyright (eg, music and films). Uploading copyrighted music or films to the Internet without the copyright holder's authorisation constitutes an infringement of the right to effect an automatic public transmission and the right to make the work transmittable. Under the existing Copyright Act, a party which infringes copyright shall be punished by imprisonment with work for a term

of not more than 10 years, a fine of not more than ¥10 million, or both. In principle, such an offence is prosecutable only on a complaint by the copyright holder. Therefore, copyright infringement under the existing Copyright Act is regarded as an extremely serious crime, which is accompanied by severe penalties.

However, the Copyright Act provides that as an exception to the general rules, it is permissible for the user of a work subject to copyright to reproduce the work for his or her personal or family use within a limited scope (private use). In other words, internet users who copy content such as music or film files for private use technically do not infringe the copyright holder's rights.

Before the 2009 amendment to the Copyright Act, downloading content that had been illegally uploaded to the Internet for the purpose of private use was not banned. However, pirated music or film files were being distributed in large quantities and, due to the rapid development of digital technology, the content industry consequently became concerned about the extent of pirating. In order to respond to a strong demand to strengthen the regulations on pirated content, the Copyright Act was revised in 2009 to provide that any digital sound or visual recording made by a party which is aware that such a recording was made by receiving an interactive transmission that infringes copyright (including an interactive transmission which is made outside Japan and which would constitute an infringement of copyright if it were made in Japan) constitutes copyright infringement. This is the case even if it is for private use purposes. However, no penalties exist to punish an offender for this type of infringement because the illegality of such an offence is considered insubstantial.

However, copyright holders have claimed that the downloading of pirated content has not decreased despite the amendment to the Copyright Act in 2009. In fact, the situation appears to have worsened. According to the Recording Industry Association of Japan, the number of estimated downloads of illegal files in 2010 was in the region of 4.36 billion. This was approximately 10 times the figure of 440 million legal downloads for paid music files in 2010 – amounting to a total of approximately ¥668.3 billion in lost revenue for the industry. In light of this situation, copyright holders such as the association appealed for the need to introduce penalties to combat illegal downloading, since the situation was having a serious influence on the content creation cycle.

On the other hand, some parties oppose the introduction of penalties for illegal downloading. For example, while it recognises that illegal downloading might inhibit the healthy growth of the content industry, the Japan Federation of Bar Associations objected to introducing penalties for illegal downloading. Its rationale for objecting to the revisions is as follows:

- illegal downloading by private citizens has not yet been socially recognised by the act as requiring penalties;
- there exists a less restrictive way to regulate illegal downloading, such as by penalising illegal uploading or improving education regarding copyright; and
- the actual enforcement of amendments to the Copyright Act in 2009 that ban downloading pirated music or film files should be carefully reviewed.

In addition, some opponents have also expressed concern that amending the act to include these penalties and new rules will merely increase the number of people subject to unnecessary imprisonment and will not actually address the underlying issue of genuine copyright infringement.

Introduction of a penalty system for illegal downloading

The amendment to the Copyright Act that provides penalties for downloading illegally uploaded music or film files was drafted and submitted by *Diet* members and passed in

June 2012, without either sufficient deliberation by the *Diet* or a public consultation. The amendment relating to the criminalisation of illegal downloading will come into effect on October 1 2012.

Under the amended Copyright Act, a party which downloads any digital sound or visual recording that infringes the copyright of the work while knowing that the work has been illegally uploaded shall be punished by imprisonment of up to two years, a fine of up to ¥2 million or both. This punitive provision still requires a complaint from the copyright holder for it to lead to prosecution.

In addition, the subject of the work that was protected by this penal provision is limited to any sound or visual recording that is distributed to the public for a fee. For example, this refers to any music or film that is being sold on a CD or DVD, or distributed via the Internet for a fee.

Identifying illegally uploaded files

Under the amended Copyright Act, the downloading of illegally uploaded music or film files infringes copyright by downloading illegally uploaded paid-for digital music or film files. From this definition, it is not clear what is and what is not illegal and punishable. For example, would watching music videos through streaming services such as YouTube be illegal and punishable under the act?

According to the Agency for Cultural Affairs – the regulatory agency of the Copyright Act – watching files through YouTube is not punishable because streaming produces only a cache file for a limited time. However, this is a matter to be determined by the courts in the future. As the definition of the new provision remains unclear, some people have criticised that this amended provision might conflict with the Constitution, which provides that there should be no punishment without law.

The Recording Industry Association of Japan uses the ‘L’ mark to illustrate whether the download website is a genuine site for legal downloads; this is one way to confirm whether the uploaded file is legitimate. The L mark authenticates music or film content that has been approved by content holders for online distribution. However, this mark has not been

widely publicised, so many internet users do not even know that it exists. Although some legal experts on copyright issues agree that in certain cases, it is relatively simple to ascertain whether digital files available for downloading have been pirated, in practice it is more difficult to tell.

Education about illegal downloading

There has been concern that introducing a penalty for illegal downloading will affect a large number of minors, many of whom have an insufficient understanding of copyright and who will become a target for the penalty. Therefore, the following rules were included as supplementary provisions in the revised Copyright Act 2012.

- Educating the nation:
 - national and local governments shall take necessary measures to educate people regarding the prevention of illegal downloading to deepen understanding of the importance of preventing an act infringing copyright as a result of illegal downloading; and
 - governments shall enhance education regarding the prevention of illegal downloading in schools or via other various opportunities in order to be deepen minors' understanding of the importance of preventing illegal downloading that infringes copyright.
- Measures by the company concerned – companies that offer or distribute works for a fee to the public shall endeavour to take measures to prevent an act that infringes copyright due to illegal downloading.
- Consideration regarding enforcement – when applying penal regulations against illegal downloaders, the regulator shall bear in mind that the use of the Internet should not be unfairly limited.

Other amendments

In addition, the 2012 amendment to the Copyright Act clarifies that copying copyrighted material by circumventing the content scramble system (used on DVDs) or other types of encryption technology will also constitute a copyright infringement, even if it is copying for private use.

Conclusion

The 2012 amendment to the Copyright Act providing for penalties for illegal downloading was abruptly established by lawmaker-initiated legislation without sufficient public consultation and, as such, has been heavily criticised.

Although some unclear issues surrounding the new rules remain, internet users are required to ascertain whether content is legitimate when downloading music or film files, even if it is for private use.

The actual application of these new rules by regulatory government in the future must be monitored closely. *iam*

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