Recent Amendments to the Japanese Copyright Act: Jail Time for Downloading Illegally Uploaded Material

Outline

On 20 June 2012, an amendment bill to the Japanese Copyright Act was passed by the Diet. The amendments provide punitive sanctions for downloading copyrighted material that had been uploaded illegally. The circumvention of the Contents Scramble System ("CSS"), which is used on DVDs, will also constitute a copyright infringement once the amendments are in force, even when the circumvention is for private use. The amendments also establish new categories of exceptions where copyrighted material can be used without the permission of copyright owners.

Details of the Amendments

1. Criminalization of Illegal Downloads

The amendments provide punitive sanctions for downloading copyrighted material that have been uploaded illegally, even when this is done for private use. The sanctions are either two years imprisonment, a maximum fine of JPY2 million, or both. While the previous amendments to the Copyright Act in 2010 made the downloading of such material illegal, these amendments go further and make the act of downloading punishable as a crime.

2. Circumvention of Encryption Systems

The amendments make it clear that the duplication of copyrighted material by circumventing the CSS or another type of encryption technology is a copyright infringement, even if the duplication occurs for private use.

Even prior to these amendments, the duplication of copyrighted material through the circumvention of copy protection functions, such as SCMS, which are often used on music CDs, was deemed to be a copyright infringement. The amendment now makes the act of circumventing the encryption system often used on DVDs, such as CSS, a copyright infringement.

3. Creation of New Exceptions

The amendments also clarify that the following uses do not constitute an infringement of copyright:

- the duplication or adoption of copyrighted material if such material is involved as an incidental object or sound which is difficult to split off from other subjects; provided that the duplication or adaptation is made in the form of photographing, sound recording or video recording;
- the use of the duplicated or adapted material made in the cases above;
the use of copyrighted material to the extent necessary to consider obtaining a license from the copyright owners;

- the use of published copyrighted material to the extent necessary for tests to develop or put into practical use technologies pertaining to the recording of copyrighted material; and

- the recording or adaptation of copyrighted material to the extent necessary to prepare for streamlining the data processing by computers in cases where information is provided through networks.

The amendments also establish other exceptions which are necessary to ensure that the utilization of books in the National Diet Library or other public libraries is legitimate from a copyright law perspective.

Practical Implications of the Amendments

1. For Internet Services Providers

The criminalization of downloading illegally uploaded material will mean that Internet Service Operators, especially those who allow users to upload and download content, will need to confirm that the content they provide does not infringe another person’s copyright so that the use of the service does not constitute a criminal offense.

2. For Users

The establishment of the new categories of exceptions may benefit users by allowing them to use copyrighted material more freely. However, due to the vagueness of the language used to describe the requirements for the exceptions, users will need to carefully review their use of materials and analyze whether or not they satisfy the requirements of the categories of exceptions. For instance, in the case of the exception relating to incidental photographing, users will need to consider whether (i) the photographed object is incidental to the main subject, and (ii) whether the incidental object is difficult to split off from the main subject.

Implementation

The amendments relating to the criminalization of illegal downloads and the circumvention of encryption systems will become effective on 1 October 2012. The remaining parts will become effective on 1 January 2013.

Conclusion

The amendments to the Copyright Act include both an enhancement of copyright protections and a clarification of what constitutes the legitimate use of copyrighted material by providing new categories of exceptions. Since 2008, the Japanese government has been discussing the possibility of introducing a comprehensive provision that generally limits the scope of copyright to the extent necessary to ensure that fair use is legal. However, instead of including a catch-all provision of this nature, the legislation has repeatedly established individual exceptions. Both copyright owners and users still need to carefully review the individual exceptions to maximize their interests.