CULTURE FIRST
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The 11th Culture First Press Conference regarding A Proposal to Create a New Remuneration System

November 14, 2013

85 Organizations for the Culture First Initiative

【Date】 November 14, 2013 15:00 – 16:30

【Venue】 The Tokai University Club “Asahi Room”

【 Moderator 】

Hideki MATSUTAKE

Director, Japan Council of Performers’ Organizations

【Speakers】

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President, Japanese Society for Rights of Authors, Composers and Publishers

Kazuo SHIINA

Managing Director, Japan Council of Performers’ Organizations

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Director, Recording Industry Association of Japan

Main Points of the Conference

■Due to the Supreme Court ruling in November, 2013, the current remuneration system for private audio and video recording has for the most part ceased to function. Lately, however, as observed in the establishment of the "Working Team on Appropriate Protection and Use/Distribution of Copyrighted Works" under the "Subcommittee on Legal/Basic Issues" of the Council for Cultural Affairs' Subdivision on Copyrights, an environment where we can address this issue is gradually developing.

■The re-examination of the remuneration system for private audio and video recording started with the "Agency for Cultural Affairs: discussion on the revision of the remuneration system for private audio and video recording" held on April 4, 2003. Such discussions also took place at the "Subcommittee on Legal Issues" from 2004 to 2005 and the "Subcommittee on Audio and Video Home Recording" from 2006 to 2008. However, in 2009, when a lawsuit was filed against Toshiba Corporation for its refusal to pay the video recording remuneration, the discussion came to a standstill. Since then, the gap between the system and reality has continued to widen.

■We therefore take this opportunity to propose a new way of thinking in order to secure an appropriate remuneration for creators, while also taking into consideration improvements in ease of use for consumers.

Before the Introduction of the Current "Remuneration System"

(1)The Previous Copyright Act

The previous Copyright Act, enacted in 1899, stipulated that private copying of published works was not considered to be copyright infringement; however, the only copying method allowed was manual copying, as under the requirements, the use of mechanical and/or chemical methods was prohibited.

(2) The Current Copyright Act

In 1970, when the Copyright Act was fully revised, the development and popularization of copying and recording devices was only just beginning. There was a need to promote cultural activities in the people's private sphere, including education and entertainment. And even with the right of reproduction restricted to allow private copying, the loss for the right holders at the time was minimal. In consideration of these and other facts, the current Copyright Act allows free and uncompensated private copying without the requirement of right holder authorization, as was the case during the previous Act, but with the abolishment of the copying method limitation which only allowed manual copying.

In this connection, when the Copyright Act was revised, it was noted that there was a possibility that the future development and popularization of copying methods may significantly harm the interests of the right holders and therefore this issue should be reviewed in the future.

(3) The Popularization of Digital Audio/Video Recording

Subsequently, audio/video recording devices and recording mediums were developed, and rapidly became popular items. As a result, private copying became widespread and rampant. In addition, as digital audio/video recording devices and mediums have become higher in quality and less expensive, it has become easy to make copies equal in quality to commercial CDs and DVDs. Consequently, the economic interests of right holders have been significantly prejudiced, surpassing the acceptable range set by the stipulations for the right of reproduction in Article 9.2 of the Berne Convention and Article 30 of the Copyright Act. This led to discussions about whether the losses of right holders due to private copying should be remedied.

Note 1) Article 9.2 of the Berne Convention stipulates that "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author," it shall be a matter for law in the affiliated countries to permit the reproduction of such works.

From the Introduction of the Current Remuneration System to its Breakdown

(1)The Introduction of the Remuneration System

While the quality of audio/video recording devices and other apparatuses improved dramatically, from the 1970's to the 1990's, both the public and private sectors considered establishing a system to balance out private copying and the economic interests of right holders. Consequently, in December 1992, the Copyright Act was revised so that, while private copying remained unrestricted with no requirement of right holder authorization, a measure to allow a certain amount of remuneration was introduced when the remuneration system for private audio and video recording was introduced in order to protect the economic interests of right holders.

(2) The Breakdown of the Remuneration System

However, due to the explosive popularization of personal computers, peripheral devices and other equipment that occurred after the introduction of the system, the copying of music and audio visual works shifted from single-purpose devices/mediums that the remuneration system covers to general-purpose devices/mediums. As a result, the remuneration system gradually lost its major function. Ultimately, in 2012, in the lawsuit between the Society for the Administration of Remuneration for Video Home Recording (SARVH) and Toshiba Corporation which took advantage of a loophole in the existing system and refused to pay compensation related to their DVD recorders that are not equipped with analog broadcast tuners, the Supreme Court supported the Intellectual Property High Court ruling (Note 2) which stated that "since the remuneration system for video recording only targets analog broadcasting as the recording source, and the recorders in question only record digital broadcasting, said recorders are not specified recording machines, and hence are outside the scope of the remuneration system." This delivered a fatal blow to the remuneration system for video recording. The Supreme Court ruling made the following two points clear: the first is that the cabinet order has a flaw; the second is that, because video recording machines specified under the current system do not exist in a real sense since July 24, 2011 when analog broadcasting ended, the remuneration system for video recording has collapsed. In parallel with this, the remuneration system for audio recording too is losing its major function as a result of the widened gap between devices/mediums specified under the system and the actual devices/mediums used for copying.

Note 2) The ruling of the first instance handed down by the Tokyo District Court judged that the said recorder is a specified recording machine and hence is within the scope of the remuneration system. In addition, prior to this lawsuit, the Director of the Copyright Division at the Agency for Cultural Affairs responded to SARVH's inquiry in writing that the said recorder is a specified recording machine.

Remuneration Collected for Private Audio and Video Recording

■Remuneration for private audio recording

Due to a demand for CD-Rs for music, the remuneration has not completely evaporated, but has plummeted to approximately 4-5% of its peak (The 2013 figure is from the first half of the year).

■Remuneration for private video recording

The 2012 Supreme Court ruling confirmed defeat for the right holders side in the Toshiba lawsuit. As all existing products are devices made specifically for digital broadcasting, and the final ruling held that devices made specifically for digital broadcasting are outside the scope of the system, in 2013, the amount collected has fallen to zero.

FY	Remuneration for private audio recording	Remuneration for private video recording	Total
1996	1.007 billion yen	—	1.007 billion yen
1997	1.815 billion yen	—	1.815 billion yen
1998	2.551 billion yen	—	2.551 billion yen
1999	3.058 billion yen	—	3.058 billion yen
2000	3.895 billion yen	—	3.895 billion yen
2001	4.036 billion yen	0.128 billion yen	4.164 billion yen
2002	3.304 billion yen	0.285 billion yen	3.589 billion yen
2003	2.824 billion yen	0.838 billion yen	3.662 billion yen
2004	2.339 billion yen	1.483 billion yen	3.822 billion yen
2005	2.018 billion yen	1.950 billion yen	3.968 billion yen
2006	1.507 billion yen	2.096 billion yen	3.603 billion yen
2007	1.154 billion yen	1.645 billion yen	2.799 billion yen
2008	0.820 billion yen	1.881 billion yen	2.501 billion yen
2009	0.544 billion yen	1.888 billion yen	2.432 billion yen
2010	0.370 billion yen	2.578 billion yen	2.948 billion yen
2011	0.272 billion yen	2.556 billion yen	2.828 billion yen
2012	0.335 billion yen	0.573 billion yen	0.908 billion yen
2013	0.094 billion yen	0 yen	0.094 billion yen

Outline and Issues of the Current System

(1)Outline

In Japan's Copyright Act, the underlying principle is that the person that engages in private copying by using an audio/video recording device or medium specified by the cabinet order (hereinafter called "specified recording machines") is obliged to pay the compensation. However, a special provision adds that the manufacturer or importer (hereinafter called "manufacturers"), designated as the party obligated to cooperate, should include the compensation in the sales price of specified recording machines, and pay compensation from the sales proceeds received from the buyer to the designated association. The current remuneration system is based on this special provision.

(2) Issues

The first issue is that the scope of compensation is stipulated by a cabinet order enacted by the Cabinet. This means that, to specify a new audio/video recording device in the cabinet order, an agreement is required between the relevant ministries, namely the Ministry of Education, Culture, Sports, Science and Technology and the Ministry of Economy, Trade and Industry. As a result, without an agreement between the relevant ministries, such devices cannot be included in the scope of the remuneration system, even if such devices are available in the marketplace. In reality, large quantities of high-quality digital audio players and high-capacity external hard disks continue to be manufactured and sold, but they are not within the scope of the remuneration system.

The second issue is that the manufacturers of specified recording machines are obligated to cooperate in the charging and collecting of compensation, but are not the party obligated to pay the compensation. The above-mentioned ruling at the first instance between SARVH and Toshiba held that the obligation of cooperation by a manufacturer is not legally enforceable. Based on this logic, a manufacturer will not assume any legal responsibilities even if they violate their obligation of cooperate, and if such is the case, the remuneration system will literally stop functioning.

The Significance of Remuneration for Private Copying

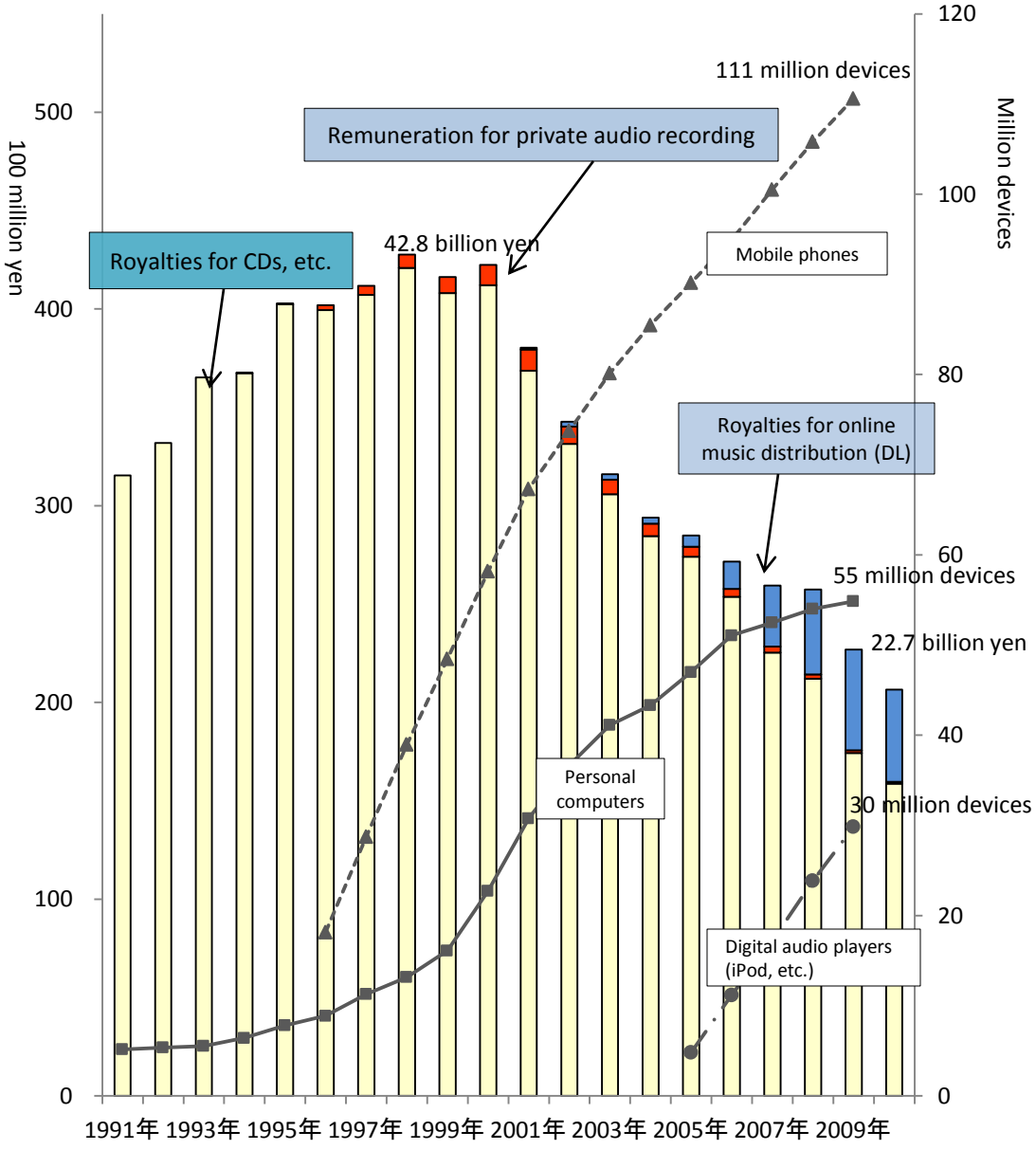
■In contemporary society, where digital copying technology is highly advanced, arts and culture cannot be enjoyed without private copying. As such, the interests of the three parties affected by private copying, namely the consumers, the suppliers of the means of copying, and the right holders, need to be balanced.

■The ability to privately copy copyright works freely without authorization allows consumers to effortlessly enjoy cultural activities such as education and entertainment. The suppliers of the means of copying manufacture and sell a large number of devices equipped with copying functions and distribute them on the market to earn significant profits, on the premise that consumers privately copy copyright works.

■On the other hand, the right holders provide copyright works to society through creative activities. However, due to the restriction on the right of reproduction, they are not fairly compensated for the vast amounts of private copying taking place daily. As the remuneration system is virtually non-functional, we must say that there is an enormous lack of balance between the three parties.

■In order to correct this imbalance, it is necessary to focus on how the interests of the three parties are actually allocated, and to create a remuneration system equipped with economic rationality.

Decrease in Royalty for Music Works and Dissemination of Copying Devices (surveyed by JASRAC)



Major Domestic Events

1992	MiniDisc (MD) launched
1993	Remuneration system for private audio and video recording introduced
1999	Outlawing of copying by way of circumvention of technological protection measures (Napster launched in the U.S.A.)
2001	iPod launched
2002	Winny launched Partial music ringtone distribution launched Amazon Marketplace launched
2004	Realtone distribution launched
2005	iTunes Music Store services launched YouTube services launched
2007	iPhone launched
2010	iPad launched

※The line graph displays the result of an estimate based on the following information:

[Mobile Phones] The number of mobile phone subscribers (reported by the Telecommunication Carriers Association)

[Personal Computers] The number of major durable goods, etc. owned by households (reported by the Cabinet Office) and the number of households (a census)

[DAP] The accumulated number of shipments (“A Research for Information and Media Society 2011”)

A Proposal to Create a New Remuneration System

(1) The subject of the remuneration should be the copying function provided for the purpose of private copying.

The copying function that is provided for the purpose of private copying, without differentiating between recording devices and recording mediums, should be the subject of the remuneration.

(2) The supplier of the copying function should be obligated to pay remuneration.

The party that earns a profit by supplying copying functions to consumers should be the party obligated to pay the remuneration.