

A Proposal to Create a New Remuneration System

1. History: Period Prior to and During the Operation of the Current System and the Recent Supreme Court Ruling against SARVH

(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 Convention¹ and Article 30 of the Copyright Act. This led to discussions about whether the losses to right holders due to private copying should be remedied.

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 legislation in the countries of the Union to permit the reproduction of such works.

(4) 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 implemented in order to protect the economic interests of right holders.

(5) The Demise of the Remuneration System

In the lawsuit between SARVH and Toshiba Corporation which 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 ruling² 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.

Additionally, as will be mentioned later in 2(2), because a stalemate where the relevant ministries are unable to reach an agreement has persisted under the current remuneration system for audio recording, the total amount of remuneration collected for audio recording has decreased year by year, and will surely fall to zero in due time.

2. 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

² The ruling at the first instance handed down by the Tokyo District Court held 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 of the Agency for Cultural Affairs responded to SARVH's inquiry in writing that the said recorder is a specified recording machine.

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 the compensation, but are not the party obligated to pay the compensation. The above-mentioned ruling of 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 to cooperate, and if such is the case, the remuneration system will literally stop functioning.

3. The Need for 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.

Also, there appears to be some discussion on replacing in certain areas the licensing system already in place with a remuneration system. However, we believe that areas already licensed are outside the scope of remuneration systems.

4. Proposal

In consideration of the above, we, the right holders, reconfirming the purpose of the Copyright Act which advocates the fair use of copyright works and protection of copyright, propose the creation of a new remuneration system with the following framework that addresses the issues of the current system, while still respecting to the fullest the consumers' enjoyment of cultural activities conducted through scientific and technological improvements and private copying.

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 the remuneration.

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