

## Legal Issues Presented in a Recent Japanese Book Scanning Case

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### Introduction

Japanese copyright law is facing a new challenge, in the form of a practice referred to as “Jisui,” (literally translated as “cook your own food”), through which high quality cutting and scanning machines and a personal computer are used to produce a digitized book. This article reviews and analyzes the issues presented by a prominent recent Jisui case and the rule-making process within the government, from the perspective of a Japanese constitutional law scholar. Two options are noted as possible solutions to these issues, which were not anticipated by the drafters of the Constitution and statutes: statutory revision in the parliament; and modified judicial interpretation in the courts.

In common law countries, case law judges generally identify differences between, and similarities with, past cases, solving issues at bar case by case. Consequently, remedies are concrete to the immediate parties, but lack generality and predictability for the general public. In civil law countries, the members of parliament provide equal and abstract statutes for application to the general public and case decisions, but these laws lack concrete

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I appreciate Japanese intellectual property professors who met on 5<sup>th</sup> in June, 2015 at Meiji University with Professor Robert Merge at University of California, Berkeley.

remedies.

With Constitution that declares rule of law, due process of law, and a list of fundamental rights, Japan is both a civil law and, to some extent, a common law country, attempting to integrate the advantages of both types. In this context, by analyzing the aforementioned scanning case, this article considers how the current Japanese Copyright Act and Japanese courts have dealt with its issues.

## I. History of the Case

The aforementioned scanning case reveals new issues and practices that had not been anticipated in the original Japanese Copyright Act. Specifically, the practice of cutting out the pages of a paper book, scanning them, converting them into a digital file, and saving the book in the hard drive of their computer or on “the cloud.” These tools had once belonged only to publishers, and are now available to general readers. The general public can now digitize paper books themselves, some enterprising readers making this a profitable business, as members of the public are willing to pay money to a small digitalizing company to convert books from paper copy to digitized copy.

In common vernacular, this practice is known as “Jisui,” which translates as “cooking your own food,” and in this context, includes the distribution of the digitalized file to others in the general public.

In December in 2013, nearly one hundred and twenty famous authors and seven publishers<sup>1</sup> filed a petition in court against this practice, arguing infringement of copyright, indignant at seeing their book cut, and pages scattered and sold on the internet. Before filing their motion for an injunction, in September 2011, these authors and publishers had jointly distributed a questionnaire to one hundred electronic digitalizing companies all over Japan. The questions asked were, first, whether the companies continued this scanning business; second, whether their clients wanted the products only for private use in their homes; and third, whether they accepted such work from any companies. These fact situations and the issues they represent were not foreseen by the drafters of the Japanese Copyright Act.

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1 Kadokawa Shoten, Kodan-sha, Kobun-sha, Shuei-sha, Shincho-sha, and Bungei-Shunju.

## II. Issues

### 1. Provisions of the Japanese Copyright Act

#### (1) Purpose of the Copyright Act and Requirement for Author Consent

Japanese Copyright Act is similar to that in other countries. By limiting general use and exclusive economic profit to the author for a certain time period; The term of protection of copyrights begins from the date of creation of works and subsists for the life of the author plus 50 years as from the death of the mentioned author of works.<sup>2</sup>

The Japanese Copyright Act encourages creativity among authors, and protect an intrinsic intellectual property right of creator and author for proprietary reasons.<sup>3</sup> As provided by the parliament in this law, to use copyrighted works, one must obtain permission from the author, and often must pay a royalty to do so. The author's personal right<sup>4</sup> is not limited, even though the proprietary aspect is restricted. Even permissible copying under the Japanese Copyright Act may not be undertaken for purposes other than stated.<sup>5</sup>

#### (2) Exceptions to Requirement for Author Consent – Article 30

Japanese copyright provisions contain exceptions under which one does not need to obtain permission of the author, under Articles 30 to 47-8<sup>6</sup> of the Japanese Copyright Act. If one uses copyrighted text in an academic paper, for example, one is only required to provide a citation.<sup>7</sup>

Generally, one needs permission of an author when making a copy of recorded music or movies. Under Article 30, paragraph 1<sup>8</sup> of the Japanese Copyright Act (on "Private Use"), if its use is in the privacy of one's home, one does not need permission. The person who

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2 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.51.(Japan).

3 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.1.(Japan).

4 The author's personal right is personal to the individual, and is not negotiable (Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.59.(Japan).). If the author passes away, the right does not succeed.

5 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.49.(Japan).

6 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.30 to 47-8.(Japan).

7 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.48.(Japan).

8 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.30, para 1.(Japan).

uses it privately can make a copy as well. Under this provision, if its purpose is private use in the home, one may translate, arrange, or modify the music or other product freely.

Three instances of use fall outside this exception: first, making a copy of music or movies by automatic recording equipment for use by the general public; second, intentionally making a copy using technologically protected avoidance measures; third, intentionally downloading a copy, knowing that its file is digitized by a recording machine through public transmission. In these circumstances, one must pay a compensation fee to authors.<sup>9</sup>

This exception does not apply to the act of recording with a private camera for private viewing in the home.

### (3) Library Use – Article 31

Article 31<sup>10</sup> of the Japanese Copyright Act allows some libraries approved by cabinet order to make copies under certain conditions: for provision to patrons; for preservation; for provision to other libraries; and for translation for patrons. In addition, National Diet Libraries make electronic copies after receiving paper books to prevent loss of the book.

### (4) Transmission to the General Public – Article 30-1-1

Transmission of copies via broadcast and internet is prohibited without consent of the author under Article 30-1-1<sup>11</sup> of the Japanese Copyright Act.

The exception allows copying in machines for general public use. For example, in convenience stores, one is allowed to make copies using copy machines. One can also send copies to people with whom one is closely related. Again, only private use is allowed.<sup>12</sup>

### (5) Transfer Rights

The transfer of the original or copies to the general public is strictly prohibited. One

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9 Yuichiro Tsuji, *The New Media Model and IP in the Information-Oriented Society in Japan* in YAO-MING HSU, YUICHIRO TSUJI, WOLFGANG WURMNEST, *INTERNATIONAL BUSINESS LAW IN THE 21<sup>ST</sup> CENTURY: CHALLENGES AND ISSUES IN EAST ASIA* (Cambridge Independent Press 2013).

10 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.31. (Japan).

11 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.30, para 1,sec. 1.(Japan).

12 *supra* note 9.

may sell an original book that one has purchased on the market.

#### (6) Warrant of Complaint – Articles 119, 121-2(1), and 122-2(1)

The infringement of copyright under the Japanese Copyright Act shall constitute an offense meriting a warrant of complaint under Articles 119(1)(2), 120-2, 121-2, and 122-2 of the Japanese Copyright Act<sup>13</sup>, as the interests protected by Article 119 and 120 are private rights, including copyright, the author's personal right, publishing rights, the right to be identified as the performers of live or recorded performances, and other rights relating to copyrights. Therefore, the judgment of infringement needing criminal sanctions should be left to the complaint of the copyright holder. The government does not prosecute, if the victim does not complain.<sup>14</sup>

The right to copy a commercial phonogram recording without the author's consent under Article 121-2(1)<sup>15</sup> of the Japanese Copyright Act involves compensation of lost economic interests, and the judgment of whether copying constitutes an offense meriting criminal sanctions should be left to the manufacture of foreign phonograms, as well.

Protective orders under Article 114-6(1) of the Act<sup>16</sup> are to protect the operating profits of a company, and their merit in the courts should be open to the public under Article 82<sup>17</sup> of the Japanese Constitution.

If the content of operating business profit is opened to the public on the merit in the court, and its risk is expected. Thus, the court can issue protective order in litigation involving infringement of the moral rights of an author, a copyright, print rights, the moral rights of a performer, or neighboring rights.

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13 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.119, 120, and 122-2.(Japan).

14 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.123.(Japan).

15 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.122-2 para 1.(Japan).

16 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.114-6.(Japan).

17 NIHONKOKU KENPO[KENPO][CONSTITUTION], art.82. Trials shall be conducted and judgment declared publicly. Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

(7) No Warrant of Complaint – Article 120, and 120-2(1)(2), 121 and 122

Articles 120, 120-2(1) and (2), 121, and 122 of the Japanese Copyright Act do not require warrant complaints.

Article 120<sup>18</sup> provides for infringement of protected rights of an author who has passed away.

Article 120-2(1) and (2) provides criminal sanctions for: [(A)] transfer of the ownership or rents to the public; [(B)] manufacture, import, or possession for transfer of ownership or rental to the public; or [(C)] offer for use by the public, a device the sole function of which is to circumvent technological protection measures (including a set of parts [of such a device] capable of being easily assembled) or reproduction of a computer program the sole function of which is to circumvent technological protection measures, or transmits to the public, or makes transmittable, the aforementioned computer program.

Article 122<sup>19</sup> stipulates that “the source of the work as provided for in such item must be clearly indicated in the manner and to the extent deemed reasonable in light of the manner of the reproduction and/or exploitation.”

Article 121<sup>20</sup> provides that for distribution of a reproduction of a work for which reproduction the true name or widely known pseudonym of a person who is not the author is indicated as the author.

Currently, the Trans-Pacific Strategic Economic Partnership Agreement (TPP) bears influence on Japan to have infringements related to such activities as not needing a warrant complaint for criminal prosecution. Its purpose is thought to protect copyright holders.

With regard to Jisui, making a digitalized copy in one's home constitutes an exception: if made for private use or shared within closed communities, such as family, it does not constitute infringement. One is prohibited from making a copy with the purpose to distribute beyond close friends, neighbors, or to the general public. There is one difficult case in interpreting this exception: first, a digitalized file is made for private use, then transferred in flash memory or I-pad, which does not infringe copyright because it does not involve digitalized copy. Emailing the digitized file does constitute infringement, however, because

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18 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.120.(Japan).

19 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.48 and 102, para 6.(Japan).

20 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.121.(Japan).

copies are produced in this process. Therefore, in the Jisui case, after you receive the digitalized book file from a Jisui company, a file is then sent to the general public, which is strictly prohibited. (Note that one is allowed to email the file to a closed community, such as family.)

## (8) Jisui and the Japanese Copyright Act

Reviewing whether the Act's provisions apply to Jisui, first, it should be noted that Jisui business companies started as small venture companies, such as in garages in private homes, and not libraries. The making of copies by Jisui business companies as an industry grew larger rapidly, as less expensive and a quicker process than could be done by existing larger publishers, and did not involve private use or consent of the authors. The ultimate purpose of its use is ambiguous, once the digitized file reaches the client.

One is allowed to sell cut and scattered paper books to other people. Transfer rights under Article 26-2<sup>21</sup> of the Japanese Copyright Act might be applied, but you are allowed to sell what you have already purchased on the market. Even though paper books are cut and scattered, and reassembled in such a dissolution process, their copyrights are still protected. The purpose of the Japanese Copyright Act is to guarantee a certain distribution on the market for the authors for a certain period of time.

## 2. The Japanese Sony Maneki TV case

The Jisui case shows the potential applicability of a "fair use" doctrine in Japan. There is no the U.S. "fair use" provision under the Japanese Copyright Act. Detailed provisions for infringement case of the Act present a limitative listing. In each case, the action under dispute is reviewed as to whether it constitutes infringement as provided in each article. Therefore, even though the action is supposed to be "fair," if it falls under the detailed provisions, it is considered an infringement of copyright in Japan.

With regard to "fair use," the case of Sony Corp. of America v. Universal City Studios, Inc.<sup>22</sup>, is a popular example in Japan. This case and the legal concept of "fair use" was introduced in Japan by Japanese constitutional law and copyright law scholars, but has not

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21 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.26-2.(Japan).

22 *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

been passed into law by the Japanese parliament yet.

A well-known common law case in Japan for copyright application to Jisui issues is the Maneki TV case.<sup>23</sup> Nagano Shoten provided a service called Maneki to view contents of a terrestrial television broadcast program outside Japan via internet. Two free Sony machines were used to transmit contents to viewers abroad: one was provided by the client and connected to a TV device in Japan, and the other was outside Japan for the client's use, kept by Nagano Shoten for the client. Terrestrial TV program companies sought injunction and damages for infringement of copyright by Nagano Shoten.

In 2011, the Japanese Supreme Court held that Nagano Shoten's service was infringement of copyright. The Court remanded the case to the intellectual property (IP) high court. The IP court held for the TV companies, and Nagano Shoten appealed. The appeal was dismissed in 2013.<sup>24</sup>

Citing the Maneki TV case, attorney Masakyuki Matsuda asked if rapid development change the existing legal framework of Japanese Copyright Act.<sup>25</sup>

This case is similar to the U.S. Aereo case,<sup>26</sup> in that the large TV contents business complained to Aereo that its service infringed copyright, not constituting fair use. The Aereo case shows serious conflict between venture internet companies and large terrestrial TV broadcasting companies who have greatly profited from the general public.<sup>27</sup> Similarly, the Jisui case reveals the conflict between venture electronic business companies and paper-based publishers.<sup>28</sup>

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23 Saiko Saibansho[Sup.Ct.]Jan.18, 2011. Hei 21 (ju)no.653,65 SAIKO SAIBANSHO MINJI HANREISHU[MINSHU]121.(Japan).

24 Chiteki Zaisan Koto Saibansho [Intellectual Prop.High Ct.] Jan.31, 2012, Hei 23 (ne) no.10009, 2142 Hanji [Hanrei Jihou] 96.

25 Masayuki Matsuda, *Inta-net ha Chosakuken Hou no Paradaimu wo Tenkan shitaka*[Internet Changes the Paradigm of Copyright?], [http://www.mhmjapan.com/sites/default/files/lawyers/pdf/internet\\_chosakuken.pdf](http://www.mhmjapan.com/sites/default/files/lawyers/pdf/internet_chosakuken.pdf) (last visited on 25 in June, 2015).

26 *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

27 Yuichiro Tsuji, *Case Analysis —ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), 49(1) Waseda Comparative Law Journal 243-254(2015).

Naoki Koizumi, *Maneki TV RokurakuII Saihan no Ronri Kozo to Inpakuto*[Maneki TV Rokuraku II, Supreme Court decision and their impacts] 1423 JURISTO 6 (2011).

Naoki Koizumi, *Case review*, 1438 JURISTO 6 (2012).

28 Japan and the U.S. has same copyright issue in common. These cases rises conflict between traditional broadcasting companies and internet service providers. In *Aereo* case, the availability of the local rule was discussed.



### III. Outcome of the Case in 2013

In December 2011, famous novel and manga authors, such as Jiro Asada, Arimasa Osawa, Go Nagai, Mariko Hayashi, Keigo Higashino, Kenshi Hirokane, and Buronson sought an injunction against Jisui companies, SCAN × BANK, which provides services to digitize original paper based novels and manga.

In February 2012, Jisui companies accepted the complaint and stopped their business. They submitted evidence that scanning machines had already been destroyed, and the publishers withdrew their complaint and the case was closed. The registration of the Jisui companies was dissolved in May 2012.

### IV. Constitutional Analysis

#### 1. Common Law or Civil Law Approach

Limited enumeration under the Japanese Copyright Act is controversial, if the action in dispute constitutes infringement of copyright as provided in each article. Japan is a civil law country and has adopted a common law approach in part.

The one reliable case for private use is a Tokyo district case,<sup>29</sup> which did not clarify the gray zone well. The common law approach has merit in that it provides a remedy to one case, but it has less general uniformity than a civil law approach.

The Jisui service providers are not users of the copies themselves, and they accepted money from clients among the general public. Some argue that scanning machines constitute an “automatic copy machine” under Article 30(1)(1) of the Japanese Copyright Act,<sup>30</sup> and that the Jisui service providers should be held criminally responsible.

The background of this argument is that economic interests do not return to the author in a case of Jisui, and the publishing business does not gain economic profit. This is one of several interpretations of the Japanese Copyright Act, and clarifies points not yet addressed in case law. The issue is that judges in court not only provide remedy to the party in case,

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29 Tokyo Chiho Saibansho [Tokyo Dist.Ct.] July 22, 1977, Showa48(Wa) no.2198, 369 HANTA[Hanrei Times]268.

30 <http://ebook.itmedia.co.jp/ebook/articles/1109/06/news064.html> (last visited on 25 June, 2015).

but also partly take the role of shaping policy for the future.

## 2. No “Fair Use” Provision in Japan

In other countries like the U.S., the fourth factor, economic interest<sup>31</sup>, is the main factor in reviewing whether the action in dispute infringes or not. The Japanese Copyright Act does not provide for “fair use,” but copes by applying detailed limiting articles. To consider the possibility of “fair use” in Japan, illegal download cases in Japan relating to private copies are reviewed.<sup>32</sup>

## 3. Civil Law Approach to Illegally Downloading Files

The civil law approach has both merit and disadvantages. The Japanese parliament first made uploading movies a punishable crime by amending Article 30<sup>33</sup> [Reproduction for Private Use] of the Japanese Copyright Act. This particular issue was reviewed in the Winny case<sup>34</sup>, which, along with the Jisui case, showed that the drafters of the Japanese Copyright Act had not anticipated certain circumstances and issues.<sup>35</sup> The amended provision of the Japanese Copyright Act covers only movies, not paper manga and comics. The Japanese parliament has put detailed limiting provisions in the Japanese Copyright Act after some case decisions brought up copyright infringement issues. Hence, it is unclear if it is possible to interpret digitized files of paper books as still under private use. When it is unclear, the author’s consent is the principle by which an infringement judgment can be made.

On the other hand, it is possible to conclude that copying by Jisui service providers is not private use under Article 30, and that both clients and companies are punishable.

Returning to the principle of author’s consent, in the case of musical compact discs, such as in the Winny case, the conflict between the musician and the general user of music is revealed. In view of this case’s resolution, one possible answer in the Jisui case is private compensation that Jisui companies pay to authors who consent. This may cause the same

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31 17 U.S.C.107. Purpose and character of the use, nature of the copyrighted work, amount and substantiality, effect upon work’s value. *Sony Corp. of America v. Universal City Studios, Inc.*

32 *supra* note 9.

33 Chosakuken hou[Japanese Copyright Act], Law No. 69 of 1912, art.119.(Japan).

34 Saiko Saibansho [Sup.Ct.] Dec.19, 2011, Hei 21(A) no.1900.

35 *supra* note 9.

conflict between authors and general readers, as this cost will ultimately be passed on to general readers. Such a private compensation system may force general readers some inconvenience and therefore bring unnecessary conflict between authors and general public.<sup>36</sup>

#### 4. Why No “Fair Use” in Japan

From the 2000s, the Japanese government has considered the comprehensive restrictive list of provisions of the Japanese Copyright Act.

##### (1) Committee in the Japanese Parliament on the Urawa Case

Professor Iwao Kidokoro criticized one component of committee for the amendments, saying that members from specialized interest groups only represented their own economic interests, ignoring the opinions and interests of the general public.<sup>37</sup> The Agency of Cultural Affairs convened several committees that provided comments to the drafted statutes.

Kidokoro sees changes in the text of provisions of the Japanese Copyright Act from being general “comprehensive” restrictions to being “general” restrictions of rights.

From my constitutional law studies perspective, Article 41<sup>38</sup> of the Japanese Constitution declares that the Diet is the highest state organ authorized to pass statutes. Committee opinions are merely advisory, and do not bind the members of the Diet. Committee opinions do not analyze and reflect concern and interest for general public. The Japanese Constitution demands that the parliament shape policy and carefully review the facts supporting social and economic legislation. Article 62 of the Constitution<sup>39</sup> provided each house of the Diet with the right to conduct investigations in relation to government. One of the important missions for the Diet is to prevent disputes by statutes arising between

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36 Robert Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293,1319, 1361-2 (1996).

37 IWAO KIDOKORO, *CHOSAKUKEN HOU GA SOSHAL MEDIA WO KOROSU* (Japanese Copyright Act Kills Social Media) [Japanese] 52-66 (PHP2013).

38 NIHONKOKU KENPO[KENPO][CONSTITUTION], art.41. The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

39 NIHONKOKU KENPO[KENPO][CONSTITUTION], art.62. Each House may conduct investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records.

their application to the general public and abstract cases.

In the Urawa case, Ms. Urawa, a housewife, killed her three children and attempted to kill herself in April 1948 because her husband enjoyed gambling and did not work. In July 1948, she was arrested and prosecuted, and was sentenced to three years in prison, suspended for three years. In October 1948, the Committee on Judicial Affairs of the House of Councilors began investigating the management of prosecution and the judiciary. The members chose the Urawa case for review, and summoned Ms. Urawa and her husband. In March 1949, the Committee declared the three-year prison sentence, suspended for three years, to be too lenient and unfair.

In 1949, the Japanese Supreme Court criticized this report and explained that the power to conduct investigations in relation to government is not a principal and independent power, but a subsidiary power of each house to pass statutes and deliberate the budget.

The Japanese Diet may exercise the power to investigate the case on the same timeline, if its purpose is different from that of the court. The power of the Diet to investigate is future oriented, to prevent dispute. It is required not to infringe the right of privacy, and defamation should not happen in investigation. The authority to investigate of each house may not be used as an arbitrary tool to criticize the decision of the court, which would contravene the independence of judicial power.<sup>40</sup>

In contrast, the court is expected to review the case and controversies that happened in the past, and gives a concrete remedy in each case. The judiciary is also able to review social and economic fact, if the right or freedom was seriously infringed in cases where the statute is obsolete.<sup>41</sup>

Following Kidokoro, who was a member of the Committee of Japanese Copyright Act, the role of the Diet to shape general future policy for the Act is lost, under the influence of special interests represented on the Committee, the political process being distorted by the Committee's opinion.<sup>42</sup> The deliberation of the Committee had lost the power to investigate and shape policy for the future of the Japanese Copyright Act, and the amended statutes are

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40 For further discussion, NOBUO KOCHU, *KOKUSEI CHOSA KEN NO KENKYU*, 55, 62- [The Research on the Power to investigate National Politics] (Houritubunkasha 1990).

41 Hidenori Tomatsu, *KENPO* 91 [Constitution](Kobundo 2015).

Masato Ichikawa, *KENPO*[Constitution](Sinseisha 2014).

42 Shigenori Matsui, *KENPO* 68-70, 173- [*Constitution*] (Yuhikaku 2007).

the result of compromise of among the stakeholders in the Diet.

## (2) Expected by Drafters

If the political process channels between the interests of the people and the Diet, the court has duty to actively intervene to correct the process.<sup>43</sup> If the judges can conclude that the drafters of the Japanese Copyright Act must have predicted the Jisui issue, they might succeed at providing a remedy, but this would be very hard. This is because in 1976, the Committee of the Agency on Cultural Affairs submitted a report on the Japanese Copyright Act on issues of copies, analyzing the possibility of the “fair use” provision under the Japanese Copyright Act. This report concluded that the term “fair” was too abstract<sup>44</sup>, and depended on continuing changes in social, economic, and cultural phases too much. In any phase, the undue infringement of an author’s right was not permissible. The report concluded that this was the grounds of Article 30 of the Act. The flexible interpretation of Article 30 should be avoided.

The duty of interpretation of text in the statutes rests with the judges, not committees of the Diet.<sup>45</sup> Moreover, there should not be undue importance placed on the 1976 report, although it at least resulted in judges refraining from exercising flexible interpretation to some extent.<sup>46</sup>

## (3) Bills by the Government and Members of the Diet

The Jisui case illustrates political channels in the Diet, wherein bills in Japan are submitted by two routes: the executive branch and members of the Diet.

Unlike in presidential systems, the government is eligible to bring bills to the Diet. Cabinet members are appointed by the prime minister under Article 68<sup>47</sup> of the Japanese Constitution, and a majority of their number must be chosen from among the members of

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43 *Id.*

44 Matsuda, *supra* note 25.

45 NIHONKOKU KENPO[KENPO][CONSTITUTION], art.76.

46 HIDEYUKI OSAWA, *GENDAI GATA SOSHO NO NICHIBEI HIKAKU* 74- [Japanese and the U.S. comparison of modern litigation](Kobundo 1988).

47 NIHONKOKU KENPO[KENPO][CONSTITUTION], art.68. The Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet. The Prime Minister may remove the Ministers of State as he chooses.

the Diet. The prime minister can submit a bill as a cabinet member, under Article 72.<sup>48</sup> This is because in the Japanese parliament, the cabinet and the Diet are expected to work together, rather than conflict each other, in a presidential system. Before being submitted to the Diet, the bills are strictly reviewed by the Cabinet Legislative Bureau (CLB)<sup>49</sup>, which is called the keeper of the Constitution for the government. The special expertise and authority of the CLB review is beneficial, but time-consuming.

In the meantime, member of the House of Representatives can submit a bill only if twenty (20) members approve. In the House of Councilors, ten (10) members must approve.<sup>50</sup> If the bill involves the budget, the House of Representatives requires fifty (50), and House of Councilors, twenty (20).<sup>51</sup> Bills introduced by members of the Diet do not need review by the CLB, but each house has its own legislative bureau that assists with drafting and reviewing the bills. This process is less time consuming than the CLB review.

To avoid the lengthy CLB review process, amendment of the Japanese Copyright Act illegalizing downloading files was drafted by the members of the Diet, not the CLB, and the Committee became involved in the process.

As mentioned, Article 62 of the Japanese Constitution also gives power to each House to consider economic and social facts supporting legislation.<sup>52</sup>

The power to investigate legislative fact should not negligently exercise, ignoring the minority in the parliament<sup>53</sup>, and the Committee should not miss the future-oriented viewpoint to shape policy for the general public.

One attorney thinks that the Agency of Cultural Affairs might lose the future-oriented role to support social and economic fact supporting the statutes. She criticized the Agency of Cultural Affairs for not seeing the necessity of drafting amendments because they viewed the current Japanese Copyright Act as causing no damage, and the bills that need factual social and economic change in the past, and contract between private parties in each case as

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48 NIHONKOKU KENPO[KENPO][CONSTITUTION], art.72. The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches.

49 Japanese Cabinet Legislative Bureau, <http://www.clb.go.jp/> (as visited on 25 June, 2015)

50 Kokkai ho [The Diet Act] Law No. 86 as of 2014, art. 56 (Japan).

51 *Id.*

52 *supra* note 41.

53 *supra* note 40.

appropriate. She thinks this attitude loses its future-oriented viewpoint that would allow it to cultivate cultural development in the context of the Japanese Copyright Act.

Kidokoro believes that this is attributable to the Committee established under the Agency of Cultural Affairs, not the Ministry of Economy, Trade and Industry (METI), which puts greater priority to economic interest.

## 5. Pirates and the Civil Law Approach

Amendment proposal of the Japanese Copyright Act occurs with a civil law approach that might prevent piracy. In January 2015, the Diet amended the Act, reconsidering the piracy of paper books again, and clarifying the publisher's rights with regard to electronic books. This 2015 Japanese Copyright Act allowed publishers to obtain injunctions against uploading pirated material distributed on internet. Articles 79, 80, 81, and 84<sup>54</sup> of the Japanese Copyright Act were revised to cover electronic books.

First, the authors are eligible to give a person the following rights to the works:<sup>55</sup>

- 1) to publish, copy, and distribute documents or pictures in paper form or on CR-ROM; and
- 2) to transmit by internet the copies stored in recording media (electronic publication by internet).

Second, publishers enjoy all or part of the following rights:<sup>56</sup>

- 1) to make copies of documents or pictures with intent to distribute on the internet, including making copies in stored media; and
- 2) to transmit on the internet by using copies of the works stored in storing media.

Third, the publisher owes the following duties, except in cases of special treatment: duty to publish or transmit via internet within six months after receiving a manuscript; and duty to continue publishing or transmitting by practice. This duty is set aside by the author, if the publisher infringes the duty imposed.

Fourth, in preparing necessary measures under the Beijing Treaty on Audiovisual Performances, performance by people of the state concluding the treaty is added to protected

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<sup>54</sup> Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.79,80,81 and 84(Japan).

<sup>55</sup> Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.79.(Japan).

<sup>56</sup> Chosakuken hou[Japanese Copyright Act], Law No. 69 of 2014, art.80.(Japan).

performances.

## 6. Rulemaking by Stake Holders

Voluntary control by business companies without statutory responsibility is one possible approach between common and civil law approaches. The Japan Book Digitization Carriers Association (JABDA)<sup>57</sup> was launched in June in 2013, announcing four basic principles:

First, digitalization targets only books held in private. Digitization is performed by consent of the authors. Even if the same book is digitized, consent is required. Digitization does not accept cut and scattered books.

Second, control of cut and scattered books is disposed of after digitization.

Third, safe measures are set in place to prevent negligent distribution by accident. Digitized files are tagged a certain information.

Fourth, an independent third party is established to maintain the measures above. Business companies are encouraged to take part in JABDA. The companies complying with these duties are published as appropriate parties.

The rulemaking by stake holder considers and reflects special expertise and economic interests. These parties are not same as the voters connecting with the Diet by vote.

## 7. Slippage

Reliance on the passage of statutes in the parliament is not a perfect cure. The word “Slippage” is used by environmental law studies which is helpful to analyze the issue at hand.<sup>58</sup> In Japanese manga, many people use secondary creation from original works. These secondary works infringe copyright, but are not prosecuted. Professor Lawrence Lessig<sup>59</sup> argues that this inspires creativity in Japan, as most secondary works are created not for economic profit, but out of sincere love for the works by fans. Lay manga creators or animators publish their works in magazines by deforming original works, in a practice

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57 The Japan Book Digitization Carriers Association (JABDA), <http://www.jabda.or.jp/> (last visited on 25 June, 2015).

58 Daniel Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 Harv. Envtl. L. Rev. 297(1999).

59 LAWRENCE LESSIG, *FREE CULTURE* 295 (Penguin Books 2004).



called Otaku or Dojinshi. There are slight gaps between the conceptions of rights and economic profit.

For example, Kadokawa permitted MAD movie, and put official seals on subsequent movies, sounds, and pictures that were edited and newly created by fans. By obtaining official seals, Kadokawa manages these works. Before the internet spread out, these MAD tapes, some of excellent quality, were distributed in small closed circles. These movies were uploaded on Youtube, obtaining many viewers. Such uses are infringements of copyright, but by permitting these uses, more people watch and enjoy and purchase derived goods of original works.

Creating stricter legal responsibility would not have guaranteed profits; moreover, the Japanese found a way to collect profits from its derived goods, such as secondary novels, dolls, small items, or posters that are sold.<sup>60</sup>

Judgments by the court also are not a cure-all. Judges are expected to review legislative facts for obsolescence, and hesitate to answer policy- or future-oriented questions such as required when designing a copyright legal scheme to return economic interest to the original creator.

Statutes are suppressed and revised under the pressure of interest groups.<sup>61</sup> In Japan, the organizations established for creators do not reflect the voices of creators precisely. Passing statutes might not protect copyright precisely. Kidokoro argues that well-organizations threaten rights of its member inside once it is established.

There are mixed approaches that might be helpful. Some people create their works for economic interests or for their own personal satisfaction.<sup>62</sup> Other people provide free access to works to a certain extent, then charge fees to those who want to use their profit further.

## 8. Legal Education

Not many Japanese writers and publishers understand the notions of law and rights in the Japanese Copyright Act. Between authors and publishers, not many contracts have been

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<sup>60</sup> *supra* note 36.

<sup>61</sup> DANIEL FARBER & PHILLIP FRICKEY, *LAW AND PUBLIC CHOICE* 12-37 (Univ. Chicago Press 1991).

<sup>62</sup> Farber, *Commentary : Free Speech without Romance, Public Choice and The First Amendment*, 105 Harv. L. Rev. 554, 582 (1991).

concluded in writing in Japan, and the concept of economic profits baffles both creators and publishers.

The Japan Writer's Association (JWA)<sup>63</sup> published one statement on publication contracts for digitalized books. The JWA thinks that the unique and traditional practice for publication and its distribution system have supported the Japanese publishing culture. In this process, strong solidarity was cultivated, which encouraged the publishing culture, stability of literature, and the driving force of creative development. Publishers and writers have no need for contracts, and so are unfamiliar with negotiating written agreements, and feel reluctance to contracts in themselves. These days, digitized books have been popular and files by Jisui have spread across the internet. The importance of contracts is now recognized, and detailed agreement is needed. The development of digitized book publication is still on the way, and illegal file sharing is a serious concern. Appropriate contracts and model formats for contract writing need to be discussed for the future.

## V. Conclusion

Japanese Copyright Act is facing a new challenge which is presented by a prominent recent Jisui (literally translated as “cook your own food”). In Jisui, high quality cutting and scanning machines and a personal computer are used to produce a digitized book.

Two options are noted as possible solutions to these issues, which were not anticipated by the drafters of the Constitution and statutes: statutory revision in the parliament; and modified judicial interpretation in the courts. The civil law approach has both merit and disadvantages. Japan is a civil law country and has adopted a common law approach in part. Reliance on the passage of statutes in the parliament is not a perfect cure.

The Japanese parliament first made uploading movies a punishable crime by amending Article 30 of the Japanese Copyright Act. The Jisui case showed that the drafters of the Japanese Copyright Act had not anticipated certain circumstances and issues. The amended provision covers only movies, not paper manga and comics. The Japanese parliament has put detailed limiting provisions in the Japanese Copyright Act after some case decisions

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63 Nihon Bungeika Kyokai [Japan Writer's Association], <http://www.bungeika.or.jp/> (last visited on 25 in June, 2015).

brought up copyright infringement issues.

With Constitution that declares rule of law, due process of law, and a list of fundamental rights, Japan is both a civil law and, to some extent, a common law country, attempting to integrate the advantages of both types. In this context, by analyzing the aforementioned scanning case, this article considers how the current Japanese Copyright Act and Japanese courts have dealt with its issues.

Method to list each provisions for each case under the Japanese Copyright Act is controversial, if the action in dispute constitutes infringement of copyright as provided in each article.

The Japanese Constitution demands that the parliament shape policy and carefully review the facts supporting social and economic legislation. From Constitutional law studies perspective, Article 41 of the Japanese Constitution declares that the Diet is the highest state organ authorized to pass statutes. Committee opinions are merely advisory, and do not bind the members of the Diet. Committee opinions sometimes do not analyze and reflect concern and interest for general public.

Article 62 of the Constitution provided each house of the Diet with the right to conduct investigations in relation to government. One of the important missions for the Diet is to prevent disputes by statutes arising between their application to the general public and abstract cases.

In Urawa case, the Committee on Judicial Affairs of the House of Councilors began investigating the management of prosecution and the judiciary, and reviewed the case. The Japanese Supreme Court criticized parliament report and explained that the power to conduct investigations in relation to government is not a principal and independent power, but a subsidiary power of each house to pass statutes and deliberate the budget.

For consideration of fair use doctrine and revision of the Japanese Copyright Act, the Agency of Cultural Affairs convened several committees that provided comments to the drafted statutes.

In the parliament, the members from specialized interest groups only represented their own economic interests, ignoring the opinions and interests of the general public. If the political process channels between the interests of the people and the Diet dysfunctions the court has duty to actively intervene to correct the process. If the judges can conclude that

the drafters of the Japanese Copyright Act must have predicted the Jisui issue, they might succeed at providing a remedy, but this would be very hard.

The Jisui case illustrates political channels in the Diet, wherein bills in Japan are submitted by two routes: the executive branch and members of the Diet.

Unlike in presidential systems, the government is eligible to bring bills to the Diet. Cabinet members are appointed by the prime minister under Article 68 of the Japanese Constitution, and a majority of their number must be chosen from among the members of the Diet. The prime minister can submit a bill as a cabinet member, under Article 72.

Amendment proposal of the Japanese Copyright Act occurs with a civil law approach that might prevent piracy. In January 2015, the Diet amended the Act, reconsidering the piracy of paper books again, and clarifying the publisher's rights with regard to electronic books.

Fair use doctrine may be a tool to break the platform of a few limited large companies controlling.<sup>64</sup> The protected right by fair use is individual right. Before importing the U.S. fair use doctrine, we need to ask what the Japanese Constitutional value protected by fair use doctrine in Japan is.

(Associate Professor)

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64 Merges, *A Transactional View of Property Rights*, 20 Berkeley Tech. L.J. 1477 (2005).