

**ALAI BRUSSELS 2014**

**Moral rights in the 21<sup>st</sup> century**

**The changing role of the moral rights in an era of information overload**

**QUESTIONNAIRE**

**REPORT JAPAN**

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#### QUESTIONNAIRE

#### Response of the Japanese Group

#### Prepared by Hiroshi SAITO

1. Please describe the origin, the objectives and the underlying philosophy of the moral rights in your country.

Under the Japanese Copyright Act, the author shall enjoy moral rights as well as copyright. Our legal system maintains a dualistic tradition, which distinguishes between moral rights and copyright as economic right. Our legal system regards moral rights as important. It should be noted that moral rights protection under our Act goes beyond Art. 6bis of the Berne Convention. Such features of our Act we will indicate in the following paragraphs.

2. What do the moral rights consist of in your country:
  - right of disclosure (divulagation)
  - right to claim authorship (paternity right)
  - right to respect and integrity
  - right to repent or to withdraw
  - other elements: ...?

Articles 18 to 20 of the Japanese Copyright Act provide for three categories of moral rights. Namely right of disclose the work to the public(Art.18), right to determine the indication of the author' s name(Art.19) and right to preserve the work' s integrity(Art.20). In addition to these common moral rights, in our Copyright Act there are some provisions which function to protect the personality value of the work; protection of the moral interests after the author' s death (Art.60), right to withdraw in limited sense; right to terminate the publication right(Art.84-2) and right of the author' s honour(Art.113-6).

Differently from Art. 6bis of the Berne Convention which remains silent on right to disclose the work to the public, our Copyright Act provides three categories of moral rights including right to disclose the work to the public. As the most important feature of moral rights in Japan we

can indicate right to preserve the work's integrity. While Art. 6bis of the Berne Convention limits the integrity right to the prevention of work modifications prejudicial to the author's "honour or reputation", Art. 20 of the Japanese Act instead grants the author the right to proceed against any modification "against his will".

As for right of withdrawal, the Japanese Act recognizes it in a limited scope; "When the belief of the author who has the reproduction right in his work differs from the content of the work, he may terminate the right of publication by notifying the owner of the publication in order to halt forever the publication of the work, provided that he makes compensation in advance for damages usually caused to the owner of the right of publication by such termination."

Moreover, independently of the moral rights provisions, Art. 113-6 of the Japanese Act stipulates that an act of exploitation of a work prejudicial to the honour and reputation of the author shall be regarded as infringing his moral rights.

3. Can the moral rights be transferred or waived in your country?

No, the moral rights can not be transferred or waived. According to the Japanese Act, moral rights of the author shall be exclusively personal to him and inalienable.

4. Which is the term of protection of the moral rights in your country? Is it identical to the term of protection of the economic rights? Can the moral rights be exercised after the death of the author and by whom? Are works in the public domain still somehow protected under moral rights?

The Japanese Act contains different provisions from the Berne Convention. In Japan the moral rights expire at the moment of the author's death. However Art. 60 of our Act protects the author's moral interests even after his death by prohibiting acts which would be prejudicial to his moral rights if he were alive. By whom remedy against infringement on the moral interests of a dead author may be claimed? According to Art. 116-1 of the Japanese Act, the bereaved family:

the spouse, child, parents, grandchild, grandparents, brother or sister of the author or a person appointed previously by the author may do so. Moral interests of the dead author are protected until the death of all the bereaved family and, when the appointed person may make such a claim, until the end of a period of fifty years after the death of the author. In the latter case, if any bereaved family member still survives at the end of the fifty year period mentioned above, protection continues until the death of the bereaved family member.

On the other hand, we have a penal provision (Art. 120), according to which moral interests of the dead author shall be protected permanently.

5. Do other types of rights (such as "personality rights", "civil rights", "publicity rights", "portrait rights" or other, depending on the jurisdiction) complement the protection of the moral rights in copyright?

Personality rights might play a complementary role for the protection of the moral rights.

6. Does the legislation or case law in your country provide sanctions or other mitigating mechanisms for the abusive exercise of the moral rights, in particular by the author and/or his/her heirs?

Art. 1–3 of the Japanese Civil Code disallows the abuse of rights including moral rights.

7. How would a conflict between the exercise of a moral right and of any other proprietary right, such as the right to "material" property on the "carrier" of the work, be solved in your country? (e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,...)

For avoiding such a conflict, in the Japanese Copyright Act there are a number of limitations and exceptions to moral rights (Art. 18–2, 20–2). For instance, provisions to protect integrity of the work do not apply to the following four types of distortions (Art. 20–2).

- (i) Changes of ideographs or words or other modifications deemed unavoidable for the purpose of education in the case of the exploitation of works in school textbooks.

- (ii) Modification of an architectural work by means of extension, rebuilding, repairing or remodeling
- (iii) Modification which is necessary to enable use on a specific computer a program work which is otherwise unusable on that computer, or to make more effective the use of the program work on a computer
- (iv) Other modifications not falling within those mentioned in the preceding three items, which are deemed unavoidable in the light of the nature of the work as well as the purpose and the manner of exploitation

8. How would a conflict between the exercise of a moral right and the exercise of the right to freedom of expression or other fundamental rights be solved in your country?

Such a conflict has been discussed in particular parody of painting, photograph, video game.

Generally speaking, in Japanese case law it seems difficult for parody to be recognized as an independent proper expression.

9. How do authors exercise their moral rights in practice? Do they consider this a matter of importance? How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)? How do they impose respect of their moral rights when they are faced with derivative works? Do licences (in particular via creative commons) commonly provide a prohibition to create derivative works? Are there in your country model contracts per sector (such as the literary, audiovisual, musical, graphic arts or artistic sectors) that are made available by professional organisations or by collective management organisations and that contain clauses regarding the moral rights? If so, which ones?

Of course, moral rights are very important for the author. The author has an opportunity to consent or not to when to disclose, how to indicate his name or how to modify his work. On the other hand, it would not seem so difficult to suppose his consent. The one who has licensed to reproduce his work of music for a commercial CD would be considered to have consented to disclose his work. The one who has licensed to adapt his work would also not be able to prohibit modifications of his work within the scope of adaptation he licensed.

Basically, collecting societies such as JASRAC, RIAJ do not manage moral rights.

10. Do collective management organisations play a role in the exercise of the moral rights in your country?

No.

11. In your country, is it provided in legislation, case law and/or scholarly literature how the moral rights apply with regard to particular forms of use, such as:

- “artistic quotation”
- user generated content
- folklore
- orphan works
- cloud computing
- alternative (free) licensing schemes (in particular open source licences or creative commons)
- international aspects (determination of jurisdiction and applicable law)

In the light of nature of the work as well as the purpose and the manner of exploitation, application of moral rights may be changeable, as indicated in para. 7 above.

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12. The objective of certain moral rights appears to be changing in the digital context. The right of disclosure, which enables authors to decide when their works can be made public, is invoked at times to protect the confidentiality of certain kinds of content or data or their private dimension. The right to claim authorship (paternity) is changing into a right of attribution which places more emphasis on the identification of one contributor among others (for example, on Wikipedia or in free licences) than on recognition of authorship. Lastly, the right of integrity may become a right through which to protect a work’s authenticity. Indeed, while modifications to works are more and more widely authorised, authenticity is assuming greater importance, notably through the use of technological measures to guarantee it. In your country, are there any indications in legislation, case law and/or scholarly literature that the moral rights “shift” in a digital environment:

- From a divulgation right to a right to the protection of privacy (private life)?
- From a right to claim authorship (paternity) to a right to attribution?
- From an integrity right to a right to respect the authenticity of the work?
- Up to acknowledging similar interests and rights akin to moral rights for auteurs and performing artists, for the benefit of publishers, producers and broadcasters?

Though in a digital environment newer ways to exploit the work have been found, the moral right system should not step off the pivot leg and be still based on the author’ s consent.

Of course it seems necessary to have the possibility of protecting moral rights by technological measures, which are, for instance, by inserting codes or signals to identify the author and to prevent modification of the work. Such codes or signals may be decoded or deleted by the author' s consent.

In today' s digital environment, of importance would be protection and management of moral rights by technological measures, not by legislation for newer concepts.

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