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INFORMATION ON JAPAN RELATING TO THE QUESTIONNAIRE TONATIONAL
EXPERTS CONTAINED IN THE APPENDIX TO THE STUDY ON TRANSFER OF THE
RIGHTS OF PERFORMERS TO PRODUCERS OF AUDIOVISUAL FIXATIONS
(DOCUMENT AVP/IM/03/4)

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* The views expressed in the Study are those of the authors and not necessarily those of the Member States or the Secretariat of WIPO.

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PART I

Substantive Rules Governing the Existence, Ownership and Transfer of Audiovisual Performers' Rights

I. NATURE AND EXISTENCE OF AUDIOVISUAL PERFORMERS' RIGHTS

A. Characterization of Audiovisual Performers' Rights

1. *Does your national law characterize the contribution of audiovisual performers as coming within the scope of:*

- a. *Copyright*
- b. *Neighboring rights (explain what in your country "neighboring rights" means)*
- c. *Rights of personality*
- d. *Other (please identify and explain)*

The Copyright Law of Japan characterizes the contribution of audiovisual performers as coming within the scope of neighboring rights in principal.

Neighboring rights are also granted to phonogram producers, broadcasting organizations and wire diffusion organizations (§89), while copyright is granted to authors (§17).

The Copyright Law of Japan has provisions as regarding an "author" and the "authorship of a cinematographic work" as follows:

(Definitions)¹

"Article 2. (1) In this Law, the following terms shall have the meaning hereby assigned to them respectively:

- (ii) "author" means a person who creates a work;

(Authorship of a cinematographic work)

"Article 16. The authorship of a cinematographic work shall be attributed to those who, by taking charge of producing, directing, filming, art direction, etc., have contributed to the creation of that work as a whole, excluding authors of novels, scenarios, music or other works adapted or reproduced in that work; provided, however, that the provision of the preceding Article is not applicable."

¹ English text of the Copyright Law of Japan which is cited in this article is translated by Prof. Yukifusa OYAMA et al. See <http://www.cric.or.jp/cric_e/clj/clj.html>.

It is pointed out that performers like actors can be authors of a cinematographic work, if they are deemed to “have contributed to the creation of that work as a whole” by virtue of their own creativity.²

B. Scope of Rights Covered

Under the Copyright Law of Japan, audiovisual performers enjoy their rights without any formality (§89(1), (5)). The exclusive economic rights (except moral rights of performers as well as the right to secondary use fees and the right to remuneration) are called "neighboring rights" (§89(6)).

1. *Do audiovisual performers enjoy exclusive economic rights?*

a. *Fixation*

The Copyright Law of Japan has an article as follows:

Right of making sound or visual recordings

“Article 91. (1) Performers shall have the exclusive right to make sound or visual recordings of their performances.

Audiovisual performers enjoy the right of making sound or visual recordings. However, it is said that taking a photograph or sketching of a performance falls outside the scope of the right, which only covers "visual recording" i.e., “the fixation of a sequence of images on some material forms” (§2(1)xiv).³

b. *Reproduction*

Under the Copyright Law of Japan, "sound recording" or “visual recording” means not only the fixation of sounds or a sequence of images on some material forms but also “the multiplication of such fixation” (§2(1)(xiii), (xiv)).

“Article 2. (1) In this Law, the following terms shall have the meaning hereby assigned to them respectively:

(xiii) "sound recording" means the fixation of sounds on some material forms and the multiplication of such fixation;

(xiv) "visual recording" means the fixation of a sequence of images on some material forms and the multiplication of such fixation.”

² See, The Copyright System Council, CHOSAKUKEN SEIDO SHINGIKAI TOSHIN [Response to the Request of the Government] on 20 April, 1966, p.24.; Moriyuki KATO, CHOSAKUKEN-HO CHIKUJO KOJI [Commentary of Copyright Law], 4th Edition (2003), p.150.

³ See, KATO, *supra* note [2] p.481.

However, there are limitations on the right of making sound or visual recordings as follows

Right of making sound or visual recordings

“Article 91.

(2) The provision of the preceding paragraph shall not apply to performances which have been incorporated in cinematographic works with the authorization of the owner of the right mentioned in the same paragraph, except in the case where such performances are to be incorporated in sound recordings (other than those intended for use exclusively with images).”

Therefore, as a general rule, once performers authorize the incorporation of their performance in cinematographic works, the right of making sound or visual recordings no longer cover the reproduction of the performances which have been incorporated in cinematographic works.

However, there is an exception that the right of making sound recordings still covers the reproduction of a soundtrack of the cinematographic works in to a commercial phonograms , according to Article 91(2) of the Copyright Law of Japan, “except in the case where such performances are to be incorporated in sound recordings (other than those intended for use exclusively with images)”.

There are other limitations on the right of making sound or visual recordings as follows:

Fixation for broadcasting purposes

“Article 93.

(1) Broadcasting organizations which have obtained the authorization to broadcast performances from the owner of the right of broadcasting mentioned in Article 92, paragraph (1), may make sound or visual recordings of such performances for broadcasting purposes, provided that the contract has no stipulation to the contrary or that the sound or visual recordings are not intended for the purpose of use in broadcasting programs different from those authorized.

(2) The following shall be considered to constitute the making of sound or visual recordings mentioned in Article 91, paragraph (1):

- (i) the use and the offering of sound or visual recordings made in accordance with the provision of the preceding paragraph for a purpose other than that of broadcasting or for the purpose mentioned in the proviso to the same paragraph;
- (ii) the further offering, by broadcasting organizations which have been offered such recordings, of sound or visual recordings made in accordance with the provision of the preceding paragraph, to other broadcasting organizations for their broadcasting.”

This means if performers are deemed to grant broadcasting organizations with authorizations only to broadcast their performances, broadcasting organization may make sound or visual recordings of their performances “for broadcasting purposes” without a

separate authorization for making such sound or visual recordings (§93(1) and §93(2)(i)). Afterward, in case, broadcasting organizations would like to use those sound or visual recordings for purposes other than broadcasting (e.g. video gram, DVD), they need to obtain from performers a separate authorization of “making sound or visual recordings.”

c. Adaptation

The Copyright Law of Japan does not provide performers with any right of adaptation, which could be covered by the right of making sound or visual recordings, in cases that the adaptation of performances falls within a category covered by such right.

d. Distribution of copies, including by rental

Audiovisual performers enjoy the right of transfer of ownership (§95bis(1)).

Right of transfer of ownership

“Article 95bis.

(1) Performers shall have the exclusive right to offer their performances to the public by transfer of ownership of sound or visual recordings of their performances.

(2) The provision of the preceding paragraph shall not apply to the following:

- (i) performances incorporated in visual recordings with the authorization of a person who has the right mentioned in Article 91, paragraph (1);
- (ii) performances mentioned in Article 91, paragraph (2) and incorporated in some material forms other than recordings mentioned in that paragraph.

(3) The provision of paragraph (1) shall not apply in the case of transfer of ownership of sound or visual recordings of performances (except those mentioned in items (i) and (ii) of the preceding paragraph; the same shall apply hereinafter in this Article) which falls within any of the following items:

- (i) sound or visual recordings of performances the ownership of which has been transferred to the public by a person who has the right mentioned in paragraph (1) or with the authorization of such person;
- (ii) sound or visual recordings of performances the ownership of which has been transferred to a small number of specific persons by a person who has the right mentioned in paragraph (1) or with the authorization of such person;
- (iii) sound or visual recordings of performances the ownership of which has been transferred, outside the jurisdiction of this Law, without prejudice to the right equivalent to that mentioned in paragraph (1), or by a person who has the right equivalent to that mentioned in that paragraph or with the authorization of such person.

Performers enjoy the right of transfer of ownership on which there are limitations as follows

– Firstly, according to Article 95bis(2), the right of transfer of ownership does not cover the offering performances incorporated in visual recordings with the authorization of the owner of the right of making sound or visual recordings (§91(1)) and performances which have been incorporated in cinematographic works with the authorization of the owner of the right of making sound or visual recordings (§91(2)).

– Secondly, Article 95bis(3) apply a “first sale doctrine”.

Performers also enjoy the right of rental.

Right of rental

“Article 95ter.

- (1) Performers shall have the exclusive right to offer their performances to the public by rental of commercial phonograms incorporating their performances.
- (2) The provision of the preceding paragraph shall not apply to rental of commercial phonograms going beyond a period as provided by Cabinet Order within the limits of one to twelve months from the first sale of such phonograms (including commercial phonograms containing the same phonograms as those incorporated in such commercial phonograms; hereinafter referred to as "commercial phonograms going beyond the period").

However, there are certain limitations as follows:

– Firstly, the right of rental covers only the rental of “commercial phonograms”. Therefore, the right of rental does not extend to the rental of cinematographic works incorporating performers’ performances. Consequently the right of rental does not cover audiovisual performances.

– Secondly, the exclusive right of rental does not cover rental of commercial phonograms going beyond a period (12 months) from the first sale of such phonograms. After that period, performers enjoy only the remuneration right of rental of commercial phonograms incorporating their performances during remaining 49 years (§95ter(3)).

e. Public performance; communication to the public

Audiovisual performers enjoy the rights of broadcasting and wire diffusion (§92(2)) and the right of making transmittable (§92bis(1)).

Rights of broadcasting and wire diffusion

“Article 92.

- (1) Performers shall have the exclusive rights to broadcast and to diffuse by wire their performances.

- (2) The provision of the preceding paragraph shall not apply in the following cases:
- (i) where the wire diffusion is made of performances already broadcast;
 - (ii) where the broadcasting takes place of, or the wire diffusion is made of the following:
 - (a) performances incorporated in sound or visual recordings with the authorization of the owner of the right mentioned in paragraph (1) of the preceding Article;
 - (b) performances mentioned in paragraph (2) of the preceding Article and incorporated in recordings other than those mentioned in that paragraph.”

Audiovisual performers enjoy the rights of broadcasting and wire diffusion on which there are limitations as follows.

According to Article 92(2), the right of broadcasting and wire diffusion does not cover performances incorporated in visual recordings with the authorization of the owner of the right of making sound or visual recordings (§91(1)) and performances which have been incorporated in cinematographic works with the authorization of the owner of the right of making sound or visual recordings (§91(2)).

There are further limitations as follows

Broadcasting of fixations, etc. made for broadcasting purposes

“Article 94.

- (1) Unless otherwise stipulated in the contract, the authorization to broadcast a performance from the owner of the right mentioned in Article 92, paragraph (1) shall also imply the following:
- (i) broadcasting by the authorized broadcasting organization of the performances incorporated in sound or visual recordings in accordance with the provision of paragraph (1) of the preceding Article;
 - (ii) broadcasting, of the performances incorporated by the authorized broadcasting organization in sound or visual recordings in accordance with the provision of paragraph (1) of the preceding Article, by another broadcasting organization which has been offered such recordings;
 - (iii) broadcasting (not falling within the preceding item), by another broadcasting organization which has been offered by the authorized broadcasting organization programs incorporating authorized performances, of such performances.
- (2) When a broadcasting mentioned in any of the items of the preceding paragraph has been made, the authorized broadcasting organization mentioned therein shall pay a reasonable amount of remuneration to the owner of the right mentioned in Article 92, paragraph (1).”

Right of making available

“Article 92bis.

- (1) Performers shall have the exclusive right to make available their performances.
- (2) The provision of the preceding paragraph shall not apply to the following:
 - (i) performances incorporated in visual recordings with the authorization of the owner of the right mentioned in Article 91, paragraph(1);
 - (ii) performances mentioned in Article 91, paragraph(2) and incorporated in recordings other than those mentioned in that paragraph.

Audiovisual performers enjoy the right of making available on which there are limitations as follows.

- Firstly, the right of making available does not cover transmission itself, but an author’s “right of transmission” does (§23(1)). This is because “making available” means “the putting in such a state that the interactive transmission can be made” (§2(1)(ix *quinquies*)) under the Copyright Law of Japan.
- Secondly, the right of making available does not cover the making available of performances incorporated in visual recordings with the authorization of the owner of the right of making sound or visual recordings (§91(1)) and performances which have been incorporated in cinematographic works with the authorization of the owner of the right of making sound or visual recordings (§91(2)). (92bisℓ).

If performers are deemed to grant broadcasting organizations with authorizations only to broadcast their performances, broadcasting organization may make sound or visual recordings of their performances “for broadcasting purposes” (§93(1)) without a separate authorization from the performers, but may not make their so fixed performances transmissible. However this right does not apply to those performances being fixed on cinematographic works.

f. Other (please describe)

Other than the protection under the Copyright Law, not a few court cases accept the concept of “the right of publicity” of celebrities as an exclusive right, although it is not explicitly codified in any legislation.⁴ At this moment, no judgment of the Supreme Court has ever been heard.

⁴ E.g. Case of Tokyo District Court on 27 September, 1989, 1326 Hanrei-Jjiho p.137, “Hikaru-Genji,” which accepts the concept of “the right of publicity” as an exclusive right for the first time.

2. *What is the duration of performers' exclusive rights?*

The duration of the protection of exclusive rights of performers (neighboring rights) starts on the date when the performance takes place (§101(1)(i)) and shall expire at the end of a period of fifty years from the year following the date when the performance took place (§101(2)(i)).

3. *Do audiovisual performers enjoy moral rights?*

Under the Copyright Law of Japan, audiovisual performers enjoy moral rights in determining the indication of the performer's name (§90bis(1)) and in preserving the integrity (§90ter(1)) which were provided by a recent amendment of the Copyright Law of Japan on June 11, 2002.

a. *Attribution ("paternity")*

Right of determining the indication of the performer's name

“Article 90bis.

- (1) The performer shall have the right to determine whether his name, his stage name or any other alternative to his name should be indicated or not, as the name of the performer, when his performances are offered to or made available to the public.
- (2) In the absence of any declaration of the intention of the performer to the contrary, a person using his performances may indicate the name of the performer in the same manner as that already adopted by the performer.
- (3) It shall be permissible to omit the name of the performer where it is found that there is no risk of damage to the interests of the performer in his claim to be identified as the performer of his performances in the light of the purpose and the manner of exploiting his performances or where it is found that such omission is compatible with fair practice.
- (4) The provision of paragraph (1) shall not apply in any of the following cases:
 - (i) where the name of the performer is indicated in the same manner as that already adopted by the performer when his performances are offered to or made available to the public by the head of a government organization, by an independent administrative organ, etc, or by an organ of a local public entity in accordance with the provisions of the Government Organizations Information Disclosure Law, the Independent Administrative Organs, etc. Information Disclosure Law or the Information Disclosure Regulations;
 - (ii) where the name of the performer is to be omitted when his performances are offered to or made available to the public by the head of a government organization, by an independent administrative organ, etc. or by an organ of a local public entity in accordance with the provisions of Article 6, paragraph (2) of the Government Organizations Information Disclosure Law, the provisions of Article 6, paragraph (2) of the Independent

Administrative Organs, etc. Information Disclosure Law or the provisions of the Information Disclosure Regulations equivalent to those of Article 6, paragraph (2) of the former Law.”

b. Integrity

Right of preserving the integrity

“Article 90ter.

- (1) The performer shall have the right to preserve the integrity of his performances against any distortion, mutilation or other modification of them that would be prejudicial to his honor or reputation.
- (2) The provision of the preceding paragraph shall not apply to modifications deemed unavoidable in the light of the nature of performances as well as the purpose and manner of exploiting them or those deemed compatible with fair practice.

c. Divulcation

The Copyright Law of Japan does not provide performers with any right of making the performance public

In general, audiovisual performers enjoy their personal right under civil law. Therefore if someone’s act is deemed to be prejudicial to the honor or reputation of a performer, it could be considered that such act constituted an infringement of a performer’s personal right.

d. Other (please describe)

4. What is the duration of performers’ moral rights?

It is generally accepted that moral rights of performer expire at the same time of his death.⁵

However, even after the death of a performer his moral interests are still protected to a certain extent (§101ter).

Protection of the moral interests after the performer's death

“Article 101ter.

Even after the death of the performer, no person who offers or makes available performances to the public may commit an act which would be prejudicial to the moral rights of the performer if he were alive; provided, however, that such act is permitted if it is deemed not to be against the will of the performer in the light of the nature and extent of the act as well as a change in social situation and other conditions.”

⁵ See, KATO, *supra* note [2] p.574.

It is said that prohibition of such act as mentioned in Article 101ter endures for ever.⁶ Under Article 120, “any person who violates the provision of...Article 101ter shall be punishable by a fine not exceeding three million yen”. But, as a matter of obtaining civil remedies, under Article 116, only performers’ bereaved family (“bereaved family” means surviving spouse, children, parents, grandchildren, grandparents, brothers or sisters of the dead author or performer) may make a demand mentioned in Article 112 (Right of demanding cessation) or a demand mentioned in Article 115 (Measures for recovery of honor, etc.). Therefore, after the death of bereaved family, no one may make a demand of civil remedies.

(Measures to protect the moral interests after the author's or the performer's death)

“Article 116.

- (1) After the death of the author or the performer, his bereaved family (“bereaved family” means surviving spouse, children, parents, grandchildren, grandparents, brothers or sisters of the dead author or performer; the same shall apply hereinafter in this Article) may make a demand mentioned in Article 112 of a person who violates or is likely to violate the provision of Article 60 or Article 101ter with respect to the author or the performer concerned, or a demand mentioned in the preceding Article of a person who has infringed moral rights of authors or performers intentionally or negligently or who has violated the provision of Article 60 or Article 101ter.
- (2) Unless otherwise determined by the will of the author or the performer, a demand by the bereaved family mentioned in the preceding paragraph may be made in the order of the enumeration of the bereaved family in that paragraph.
- (3) The author or the performer may appoint by will a person who acts for the bereaved family. In this case, the appointed person may not make a demand after the expiration of a period of fifty years from the year following the date of the author's or performer's death or, if any bereaved family still survive at the time of such expiration, after the death of all the bereaved family.”

5. *Do audiovisual performers have remuneration rights?*

Audiovisual performers enjoy the right to claim compensation for private recording (§102(1), §30(2)).

They also enjoy remuneration right for the broadcasting of fixations, etc, made for broadcasting purposes (§94(2)).

Furthermore, performers enjoy remuneration right for rental of commercial phonograms (§95ter(3)) and the right to secondary use fees for broadcasting of commercial phonograms (§95(1)). However, the remuneration right and the right to secondary use fees do not cover audiovisual performances, because the subject matter of these rights is only “phonograms”.

⁶ See, KATO, *supra* note [2] p.575.

a. *Are these in lieu of or together with exclusive rights? (Please explain)*

The right to claim compensation for private recording (§102(1), §30(2)) is based on or derived from limitation of the right of reproduction (§102(1), §30(1)). That is the reason why the term “compensation” is used in Article 30(2).⁷ Therefore, from this point of view, it can be said that the right to claim compensation for private recording (§102(1), §30(2)) is in lieu of exclusive rights.

On the other hand, the rights of broadcasting and wire diffusion (§92(1)) is from the beginning being restricted by some exceptions under Article 94(1). Therefore, from this point of view, it can be said that remuneration right for the broadcasting of fixations, etc. made for broadcasting purposes (§94(2)) is not based on or derived from limitation of the rights of broadcasting and wire diffusion (§92(1)) and it is independent of or together with exclusive rights.

b. *Describe the rights to remuneration that audiovisual performers have.*

Reproduction for private use

“Article 30.

- (2) Any person who, for the purpose of private use, makes sound or visual recording on such a digital recording medium as specified by Cabinet Order by means of such a digital recording machine as specified by Cabinet Order (excluding a machines having special efficiency generally not for private use but for business use, such as that for broadcasting, and machines having sound or visual recording functions incidental to the primary functions, such as telephones with sound recording function) shall pay a reasonable amount of compensation to the copyright owners concerned.”

“Article 102(1) [Limitations on neighboring rights] provides “...the provision of Article 30, paragraph (2)...shall apply mutatis mutandis to the exploitation of performances...which are the subject matter of neighboring rights...”. Article 30(2) provides remuneration right for private digital recording.”

“Article 94.

- (2) When a broadcasting mentioned in any of the items of the preceding paragraph has been made, the authorized broadcasting organization mentioned therein shall pay a reasonable amount of remuneration to the owner of the right mentioned in Article 92, paragraph (1).

Audiovisual performers enjoy remuneration right for broadcasting and rebroadcasting of the fixations, etc. made for broadcasting purposes (§94(2)). See above B-1-e.

⁷ See, KATO, *supra* note [2] p.234 (“...compensation means economic consideration or measure of compensation for limitation of copyrights”). The term “compensation” is also used in Article 33(2), Article 34(2), Article 36(2) and Article 38(5)), also in Article 33bis(2) after the date of January 1, 2004, under the Copyright Law of Japan.

6. *Are audiovisual performers' rights subject to mandatory collective management?*
- a. *Which rights?*
 - b. *Which collective management associations; how do they work?*

Under the Copyright Law of Japan, among the rights of audiovisual performers, the right to claim compensation for private recording is subject to mandatory collective management. Article 104bis(1) provides that “[w]here there is an association, which is established for the purpose of exercising the right to claim compensation...and which is designated, with its consent, by the Commissioner of the Agency for Cultural Affairs as the only one association throughout the country..., the right to claim compensation for private recording shall be exercised exclusively through the intermediary of the designated association”.

There is an association designated by the Commissioner of the Agency for Cultural Affairs, Society for the Administration of Remuneration for video Home Recording (SARVH), which was established for the purpose of exercising the right to claim compensation for digital video home recording.⁸ SARVH is a voluntary non-profit-making organization to collect and distribute compensation for digital video home recording for the sake of copyright owners, performers and producers of phonograms. SARVH has “the authority to deal, on behalf of the owners of the right and in its own name, with juridical and non-juridical matters in regard to the right to claim compensation for private recording” (§104bis(2)).

Exercise of the right to claim compensation for private recording

“Article 104bis.

- (1) Where there is an association, which is established for the purpose of exercising the right to claim compensation as mentioned in Article 30, paragraph (2) (including the case where its application *mutatis mutandis* is provided for under the provision of Article 102, paragraph (1); the same shall apply hereinafter in this Chapter) (hereinafter in this Chapter referred to as "compensation for private recording") on behalf of the owners of such right (hereinafter in this Chapter referred to as "the owners of the right") and which is designated, with its consent, by the Commissioner of the Agency for Cultural Affairs as the only one association throughout the country for each of the following two categories of compensation for private recording (hereinafter in this Chapter referred to as "the designated association"), the right to claim compensation for private recording shall be exercised exclusively through the intermediary of the designated association:
 - (i) compensation for sound recording made for the purpose of private use (excluding such sound recording as made exclusively with visual recording; hereinafter in this Chapter referred to as "private sound recording");
 - (ii) compensation for visual recording made for the purpose of private use (including such visual recording as made exclusively with sound recording; hereinafter in this Chapter referred to as "private visual recording").

⁸ <http://www.sarvh.or.jp/>.

- (2) The designated association shall have the authority to deal, on behalf of the owners of the right and in its own name, with juridical and non-juridical matters in regard to the right to claim compensation for private recording.

II. INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

A. Who is the initial owner?

1. *In your country, is the performer vested with initial ownership?*
2. *Is the performer's employer/the audiovisual producer so vested?*
3. *Is a collective so vested?*
4. *Anyone else? Please explain.*

Under the Copyright Law of Japan, only performers are vested with initial ownership, as Article 89(1) provides “[p]erformers shall enjoy the rights mentioned in Article...” and Article 89(5) provides “[t]he enjoyment of the rights referred to in any of the preceding paragraphs shall not be subject to any formality”.

B. What is owned?

1. *Is the performer the owner of rights in her performance?*
2. *Is she a co-owner of rights in the entire audiovisual work to which her performance contributed?*
3. *Other ownership? Please describe.*

Under the Copyright Law of Japan, performers are initial owner of all rights in their performances. The Copyright Law of Japan does not provide so-called “work for hire” as a matter of performers’ rights, while there is a provision of “authorship of a work made by an employee in the course of his duties” (§15) applied to authors.

However, as aforementioned, performers like actors can be authors of a cinematographic work, if they are deemed to “have contributed to the creation of that work as a whole” by virtue of their own creativity.⁹

⁹ See, *supra* note [2].

III. TRANSFER OF AUDIOVISUAL PERFORMERS' RIGHTS

A. Legal provisions regarding contracts

1. *Does the copyright/neighborhood rights law, or other relevant legal norm set out rules regarding transfers of rights?*

2. *Please indicate if the rule is a rule of general contract law, or is a rule specified in the law of copyright and/or neighboring rights.*

In Japan, "transfer" ("Joto" in Japanese) means an assignment and does not include any license.

As a matter of a rule of the Copyright Law of Japan, Article 103 [Transfer, exercise, etc. of neighboring rights] provides "[t]he provision of Article 61, paragraph (1) shall apply mutatis mutandis to the transfer of neighboring rights...". And Article 61(1) [Transfer of copyright] provides "[c]opyright may be transferred in whole or in part." Therefore neighboring rights may be transferred in whole or in part by specifying what rights are to be transferred or for what types of exploitation.

Article 103 applies only to "the transfer of neighboring rights".¹⁰ It is said that remuneration right for rental of commercial phonograms (§95ter(3)) and the right to secondary use fees for broadcasting of commercial phonograms (§95(1)) are by nature transferable.¹¹ The point here is that if performers transfer all of their neighboring rights, it does not mean that they have also transferred their remuneration right for rental of commercial phonograms (§95ter(3)) and the right to secondary use fees for broadcasting of commercial phonograms (§95(1)).¹²

On the other hand, remuneration right for the broadcasting of fixations, etc. made for broadcasting purposes (§94(2)) is derived from the rights of broadcasting and wire diffusion (§92(1)), as Article 94(2) provides "the authorized broadcasting organization...shall pay a reasonable amount of remuneration *to the owner of the right mentioned in Article 92, paragraph (1)*", not "to the performers" (see, §95(1), §95ter(3)).¹³ Therefore, once performers transfer the rights of broadcasting and wire diffusion (§92(1)), in the absence of any contrary contract, they are deemed to also transfer their remuneration right for the broadcasting of fixations, etc. made for broadcasting purposes (§94(2)).¹⁴

¹⁰ Under the Copyright Law of Japan, exclusive economic rights of performers (except moral rights of performers as well as the right to secondary use fees and the right to remuneration) are called "neighboring rights" (§89(6)).

¹¹ See, KATO, *supra* note [2] p.587.

¹² See, KATO, *supra* note [2] p.587.

¹³ See, KATO, *supra* note [2] p.587.

¹⁴ See, KATO, *supra* note [2] p.587.

3. *Must the transfer be in writing?*

The law does not mention.

4. *Must the terms of the transfer be set forth in detail, e.g., as to the scope of each right and the remuneration provided?*

The law does not mention.

5. *Must the writing be signed by the performer? By the transferee?*

The law does not mention.

B. Transfer by Operation of Law

1. *Are there legal dispositions transferring either the performer's exclusive rights, or a share of the income earned from the exercise of her exclusive rights, or from the receipt of remuneration rights?*

2. *Expropriation*

3. *Bankruptcy*

4. *Divorce; community property*

5. *Intestacy*

6. *Other (please explain)*

Under the Japanese Law, there are no provisions particularly related to legal dispositions of performances' rights to which general rules shall apply.

C. Irrebuttable Presumptions of Transfer

1. *Does the employment relationship between the audiovisual performer and the producer give rise to an irrebuttable transfer of the performer's rights?*

2. *What rights does the transfer cover?*

3. *If fewer than all rights, please identify and explain which rights are transferred and which are retained.*

There are no provisions of presumption under the Copyright Law of Japan. Generally speaking, rights of audiovisual performers may be transferred by contract, not by law.¹⁵

D. Rebuttable Presumptions of Transfer

1. *Does the employment relationship between the audiovisual performer and the producer give rise to a rebuttable transfer of the performer's rights?*

2. *What rights does the transfer cover?*

3. *If fewer than all rights, please identify and explain which rights are transferred and which are retained.*

There are no provisions of presumption under the Copyright Law of Japan. Generally speaking, rights of audiovisual performers may be transferred by contract, not by law.

¹⁵ However, as aforementioned, by virtue of Article 91(2), once performers authorize incorporation of their performance in cinematographic works, the right of making sound or visual recordings no longer cover the reproduction of the performances which have been incorporated in cinematographic works in principle. One may argue that such a provision is characterized with respect to a kind of an irrebuttable transfer; however, precisely speaking it is not "transfer" but something like "abandonment".

E. Contract Practice

1. *If the transfer of audiovisual performers' rights is not effected by a legal presumption, are there standard contractual provisions?*

2. *Do these provisions appear in collective bargaining contracts?*

3. *In individually negotiated contracts?*

4. *What rights do these provisions transfer? Please describe.*

There are no standard contractual provisions which cover all the individual contracts.

F. Limitations on the Scope or Effect of Transfer

1. *Does copyright/neighborhood rights law or general contract law limit the scope or effect of transfers? Please indicate which law is the source of the limitation.*

2. *Do these limitations concern:*

- a. *Particular rights, e.g., moral rights*
- b. *Scope of the grant, e.g., future modes of exploitation*
- c. *Other (please describe)*

Article 101*bis* prohibits any transfer of performers' moral rights as follows.

(Inalienability of moral rights of performers)

“Article 101*bis*. Moral rights of the performer shall be exclusively personal to him and inalienable.

Copyright Law of Japan does not limit the scope or effect of transfer as concerning performers' exclusive rights and remuneration rights.”

On the other hand, as a matter of transfer of copyright, Article 61(2) provides as follows.

“Article 61

- (2) Where a contract for the transfer of copyright makes no particular reference to the rights mentioned in Articles 27 [Rights of translation, adaptation, etc.] and 28 [Right of the original author in the exploitation of a derivative work], these rights shall be presumed to be reserved to the transferor.”

However, Article 103 does not mention that Article 61(2) shall apply *mutatis mutandis* to the transfer of neighboring rights. It seems that such rule does not apply to neighboring rights.

In general, as for the rule of general contract law, it can be said that the Civil Code of Japan shall have an effect on limiting the scope or effect of transfer, particularly Article 90 [The public order and good morals] of the Civil Code of Japan.

The public order and good morals

“Article 90. A juristic act whose object is contrary to the public order or good morals is null and void.”

3. *Do audiovisual performers enjoy a legal right to terminate transfers of rights?*

a. *Is this termination right transferable?*

b. *Waivable?*

As aforementioned, under the Law of Japan, rights of audiovisual performers may be transferred by contract. Therefore in other words that audiovisual performers enjoy a legal right to terminate transfers of rights.

PART II

International Private Law Rules for Determining the Law Applicable to Transfer of Audiovisual Performers' Rights

I. LAW APPLICABLE TO DETERMINE INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

A. What country's (countries') copyright/neighbors rights law determines whether the granting performer initially owned the rights transferred:

1. *The country of origin of the audiovisual work?*

- a. *If so, how does your country's law determine what is the country of origin of the audiovisual work?*
- b. *By reference to Berne Conv. Art. 5.4?*
- c. *By reference to the country having the most significant relationship to the work's creation or dissemination?*
- d. *Other? Please describe.*

2. *The country of residence of the performers? In the event of multiple countries of residence, the country in which the majority of featured performers resides?*

3. *The country designated by (or localized to) the contract of transfer?*

4. *Each country in which the work is exploited?*

Japan's answer is 4.

It is thought in Japan that among Berne Convention countries copyright/neighbors rights are born and exist in each country at once when and after such rights are vested in one of the countries party to Berne Convention. The rights in respective countries are different from others. Respective rights are governed by the respective country's law. Accordingly, the law of each country in which the work is exploited determines whether the granting performer initially owned the rights transferred.

The second sentence of Article 5(2), Article 7(8), the second sentence of Article 10bis(1), and Article 14bis(2)(a) are interpreted in Japan in general to provide that the law of the country where protection is claimed is the governing law on the matters prescribed there. The law of the country where protection is claimed is in this context the law of the country where the work is exploited and/or where the infringement is committed.

5. *When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), how is the substantive copyright or neighboring rights law underlying the initial ownership of the rights determined?*

- a. *with reference to the country from which the communication originates?*
- b. *or with reference to the country or countries in which the communication is received?*

With regard to item 5, Japan's answer is b.

When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), the law of the country or the laws of the countries in which the communication is received should determine the initial ownership of the rights of the work within its country or within their countries respectively. This is because as stated above each country's law determines the rights within its territory, and in the case of cross-border transmission the law of the receiving country should govern the initial ownership of the rights irrespective of the country from which such work is transmitted.

II. LAW APPLICABLE TO TRANSFERS OF RIGHTS

A. Transfers by operation of law

1. *Does your country's law or case law give local effect to a transfer by operation of a foreign country's law?*

- a. *by expropriation*
- b. *bankruptcy*
- c. *divorce; community property*
- d. *intestacy*
- e. *other (please explain)*

According to Japanese lawyer's view in general, an act of a foreign state is to be recognized in principle if, *inter alia*, such foreign country has jurisdiction over the person or property affected by such act and the result of such acts is not against the due process and the public order of Japan.

With regard to expropriation by a foreign country, Tokyo High Court Judgment on 11 September 1953 applied the act of state doctrine which was very similar to the American one, to the question of the validity of the Iranian Government's expropriation of crude oil situated in Iran¹⁶. The plaintiff in this case was an English company, *Anglo-Iranian Oil Company*, and the defendant was a Japanese oil refining company, *Idemitsu Kosan Co. Ltd.* The defendant bought crude oil in Iran and brought it to Japan after the expropriation was made by Iranian Government. The plaintiff attached the crude oil claiming that it belonged to

¹⁶ *Kosai Minshu*, Vol.6, No.11, p.702. The defendant won the case.

the plaintiff. The court held that, with regard to such an expropriation within the territory of Iran, “there is no established principle under international law for a court of a state to hold invalid the effect of the law legislated properly by a foreign state.” Accordingly, Japan would give local effect to a transfer of copyright/neighborhood rights. Answer of Japanese law as to item “a” is yes.

Although there has been no other case concerning the act of state doctrine in Japan, it is considered to be possible for this doctrine to encompass other kinds of public activities of a foreign state.

A foreign judgment is one of the examples of act of foreign state.

With respect to the rules on recognition and enforcement of foreign judgments, Japan has a set of explicit provisions.¹⁷ Regarding recognition, Article 118 of the Civil Procedure Code provides as follows:

“Article 118:

A final and conclusive judgment rendered by a foreign court shall have its effect insofar as it satisfies the following conditions:

- i. The jurisdiction of the foreign court is not denied either by the law or the treaty;
- ii. The defeated defendant was served summons or an order necessary for the commencement of the procedure other than by service by publication, or has voluntarily appeared without being so served;
- iii. The judgment of the foreign court is not contrary to the public order or good morals in its contents and proceedings upon which it was based; and
- iv. Reciprocity is guaranteed.”

With regard to enforcement of foreign judgments, Article 24 of the Civil Execution Code provides as follows:

“Article 24:

1. An action for execution order for a judgment rendered by a foreign court shall be under the jurisdiction of the district court of the general venue for the debtor or, in a case where there is no such general venue, it shall be under the jurisdiction of the district court where subject matter of the claim or any attachable property of the debtor is located.
2. An execution order shall be rendered without reviewing the merits of the judgment.
3. An action in accordance with paragraph 1 shall be dismissed where the finality and conclusiveness of the judgment rendered by the foreign court is not proven, or where it does not fulfill the conditions set forth in the subparagraphs of Article 118 of the Civil Procedure Code.
4. In the execution order, it shall be declared that an execution is granted based upon the judgment rendered by the foreign court.”

¹⁷ See, generally, M. Takeshita, “The Recognition of Foreign Judgments by the Japanese Courts”, 39 Japanese Annual of International Law 55 (1996).

Accordingly, if transfer of copyright/neighborly right is ordered by a foreign judgment, Japan recognizes and enforces such judgment when it satisfies the requirements provided for in Article 118 of the Civil Procedure Code and Article 24 of the Civil Execution Code. For example, transfer of such right is ordered as a settlement of matrimonial property in a divorce judgment, such transfer is to be recognized and enforced in Japan insofar as such judgment satisfies the requirements. Therefore, Japanese answer to item “c” is yes.

Transfer of rights by operation of bankruptcy law and orders is also a result of foreign act of state. Although there has been no reported case in Japan as to transfer of copyright/neighborly right by operation of bankruptcy law and order, it is thought that such effect would be recognized insofar as the bankruptcy court has jurisdiction and such effect is not against Japanese public order. The answer under Japanese law as to “b” is yes.

Transfer of rights by operation of succession law in the case of intestacy is considered in Japan not as a result of the act of a foreign state but as a result of application of applicable law. Therefore, insofar as the transfer is the result of application of the national law of a decedent which is designated by Japanese private international law, Article 26 of *Horei*(Application of Law(General) Act, 1898, Japan recognized such transfer. Accordingly, the answer of Japanese law as to item “d” is yes.

B. Transfers effected by contract

3. *When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others); is the substantive copyright or neighboring rights law underlying the grant determined:*

- a. *with reference to the country from which the communication originates?*
- b. *or with reference to the country or countries in which the communication is received?*

When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), the law of the country or countries in which the communication is received is to be applied to the substantive matters of copyright or neighboring rights.

2. *What law governs issues going to the scope and extent of a transfer:*

- a. *The (single) law of the contract?*
- b. *The substantive copyright/neighborly rights laws of the countries for which the rights are granted?*

The law of the contract is applied to the contractual matters and the substantive copyright/neighborly right law of the country in which the transfer takes effect is applied to whether or not such right is transferable and what requirements are to be satisfied.

Tokyo High Court Judgment on 30 May 2001 held as follows¹⁸:

“The law applicable to transfer of copyright is to be determined separately, on the one hand, as to the contractual matters which is the cause of the transfer, and on the other hand, as to the quasi-in-rem matters governing the control of the proprietary aspect of the copyright.”

“With regard to determining the law applicable to the validity and effect of the contract of transfer, which is the cause of the transfer of copyright, Article 7¹⁹ of Horei, which is the general choice of law rule on the law applicable to contract, is applied. Under Article 7, firstly, the applicable law shall be determined by the will of the parties under Article 7, and implicit choice of law by the parties in consideration of the contents, parties, object and so on of the contract shall be honored. In this case, under the contract of the transfer of copyright the inheritance entity established under the law of Missouri, the Appellant, was to transfer the copyright effective within Japan to the Japanese, the Appellee. Although there is no explicit designation of governing law in the contract, it is appropriate to suppose that the parties agreed on Japanese law as the governing law of the contract.”

“Next, the law applicable to the quasi-in-rem matters governing the control of the proprietary aspect of the copyright is to be considered.”

“The contents and effect of copyright is determined in accordance with the law of the country which protects the copyright (hereinafter cited as “protecting country”). Since the copyright has an exclusive effect to exploit the work against third parties, the quasi-in-rem matters with regard to the alteration of the control over the copyright shall be the law of the protecting country, just as the acquisition and lost of the in rem right of the property shall be governed by the law of the place where the property is situated.”

“In this case, the Japanese law as the protecting country’s law shall govern the quasi-in-rem effect of the transfer of the copyright at issue. Under Japanese law, the transfer in terms of quasi-in-rem effect occurs immediately by the conclusion of the contract in person. Accordingly, as the result of the conclusion of the contract between the parties in this case, the copyright is transferred from the Appellant to the Appellee.”

In this way, the law applicable to the contract itself is applied to the contractual matter of the transfer and the law applicable to the *quasi-in-rem* matters of the copyright, that is the law of the protecting country, is applied to the proprietary aspect of the copyright.

¹⁸ Hanrei Jiho, No.1797, p.111, at 127-128.

¹⁹ Article 7(1) The formation and effect of a juristic act shall be governed by the law chosen by the parties.

(2) Where it is uncertain what law was chosen by the parties, the law of the place where the act was done shall govern.

3. *What law governs issues going to the validity of the form of a transfer:*
 - a. *The (single) law of the contract?*
 - b. *The substantive copyright/neighborhood rights laws of the countries for which the rights are granted?*

With regard to the contractual aspect of transfer, in accordance with Article 8²⁰ of *Horei*, the validity of the form is admitted if it satisfies the requirements either of the law applicable to the contract itself (*lex causae*) or of the law of the place where the contract is made (*lex loci actus*).

With regard to the *quasi-in-rem* aspect of the transfer, the law of the country where protecting is claimed, in other words, the law of the country which provides the protection to the copyright, shall be applied to the validity of the form in this respect.

C. The Role of Mandatory Rules and *Ordre Public*

1. *Do mandatory rules (lois de police) automatically apply local law to local exploitations made under a foreign contract?*

Yes. In accordance with Japanese private international law, as stated above, the governing law is the law of the country where the exploitations are done. Accordingly, not only the mandatory rules but also other normal rules apply to the local exploitations irrespective of the law governing the contractual relations.

Incidentally, it is admitted in general among Japanese private international lawyers that mandatory rules (*lois de police*) shall apply irrespective of the governing law determined by the ordinary choice of law rules. There is just one case on this matter. In the case where an American pilot of airplane working in Japan was dismissed under the California law which governed the labor contract, Tokyo District Court judgment on 26 April 1965²¹ held as follows:

“The effect of dismissal shall be determined in accordance with the labor law of Japan where the Plaintiff was working. To this extent the application of Article 7²² of Horei shall be excluded. This is because the labor law governing labor contracts is different from ordinary private law governing contractual relations in general. ... The labor law is unique to an individual country and each country is regulating the freedom of contract in the way it considers appropriate. Therefore, when the labor is in fact being provided in Japan under the contract as in this case, the freedom of choice of governing law as provided for in Article 7 of Horei shall be limited by the labor law that has territorial effect as the public order.”

²⁰ Article 8 (1) The formalities of a juristic act shall be governed by the law applicable to the effects of that act.

(2) Notwithstanding the preceding paragraph, formalities that satisfy the requirements of the law of the place where the act was done shall be effective, unless the act is designated to establish or dispose of a right *in rem* or a right requiring registration.

²¹ *Roudo Minji Saibanreishu*, Vol.16, No.2, p.308; *Hanrei Jiho*, No.408, p.14.

²² Article 7 of *Horei* determines the law applicable to contracts in general. See, *supra* note 4.

In this case, Article 7 of the Labor Association Act was applied and the dismissal was held null and void because such dismissal was deemed to be wrongful pressure against the labor association activities.

2. *Describe the instances in which mandatory rules apply to transfers of rights by audiovisual performers.*

As stated above, there is no case on the application of mandatory rules to transfers of rights by audiovisual performers.

In consideration of the above cited Japanese case, it would be considered that if the audiovisual performers perform in Japan under the contract governed by a foreign law, Japanese court would apply certain provisions of the Japanese labor law irrespective the governing law of the contract.

3. *Do local courts, having initially identified the applicability of the law of the foreign contract, nonetheless apply local law on grounds of public policy/ordre public?*

Article 33 of *Horei* provides for public order exception as follows:

“Article 33

Where a case shall be governed by a foreign law but application of it would be contrary to public policy, the foreign law shall not apply.”

4. *Describe the instances in which the ordre public exception applies to invalidate transfers of rights by audiovisual performers*

There has been no case on this matter in Japan.

Where the copyright/neighborly right of an audiovisual performer is transferred in accordance with foreign law according to which even the contract made under undue influence or in other inappropriate situation is valid and effective, the result of application of such governing law would be denied in accordance with Article 33 of *Horei*, and the transfer is denied in Japan.

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