Regarding the Act Partially Amending the Copyright Act
(2023 Amendment of the Copyright Act)

**Copyright Division, Agency for Cultural Affairs;
Japan Copyright Office (JCO)**

Table of Contents:

Japan FIT/IP WIPO Japan Funds-in-Trust Industrial Property Global

The WIPO Japan Office supports this article under a Funds-In-Trust Japan Industrial Property Global (FIT/Japan Industrial Property Global) project.

I. Introduction

A Bill Partially Amending the Copyright Act, submitted to the 211th session of the Diet, was approved and enacted on May 17, 2023, and promulgated on May 26 as Act No. 33 of 2023. This Act aims to ensure the fair exploitation of works and other subject matter and to contribute to the appropriate protection of copyright and neighboring rights. Accordingly, it introduces the following measures: the creation of a new compulsory license system in response to challenges posed by uncertainties surrounding the intentions of copyright and neighboring rights owners regarding the exploitation of their works and other subject matter to facilitate access to such works when permission cannot be readily confirmed; measures aimed at facilitating the internal transmission of works and other subject matter for use by legislative and administrative organs; finally, it includes measures to streamline the calculation of damages for copyright and neighboring rights infringement.

The Council for Cultural Affairs conducted deliberations for two years titled "Regarding Ideal Copyright Systems and Policies that Respond to the Digital Transformation (DX) Era" in the form of studies in response to an inquiry from the Minister of Education, Culture, Sports, Science and Technology in July 2021 From August to October 2021, interviews with 33 diverse stakeholders, including copyright and neighboring rights owners, such as creators, individuals exploiting works, and service providers

were conducted. This group comprised 10 individuals and 23 organizations and notably encompassed online creators and representatives of the so-called Generation Z. The aim was to explore desirable directions for simplified and centralized measures for confirming permission of the right holders, and regarding payment of consideration. In addition, a public consultation was conducted. In December 2021, the Copyright Subcommittee compiled the "Interim Report: Regarding 'Simple and Centralized Rights Handling Measures and Payment of Consideration' and 'Awareness-Raising and Education about Copyright Systems and Policies.' That Respond to the DX Era" which outlined the future direction to be taken. Subsequently, the Council for Cultural Affairs undertook deliberations on the amendment of the Copyright Act. These focused on the simple and centralized rights handling measures and payment of consideration, as well as deliberations on the restriction of rights concerning the transmission of works to the public within legislative and administrative organs. Furthermore, the Council reviewed methods for calculating damages in relation to piracy. Interviews with stakeholders (22 organizations) were conducted. In addition, public opinions were solicited on a draft report of these deliberations. By February 2023, the content of these discussions was compiled within the "First Report on Ideal Forms of Copyright Systems and Policies That Respond to the Digital Transformation (DX) Era" (hereinafter referred to as the "Council Report"). This document marked the conclusion on the efforts to amend the systems in question.

The Copyright Act was amended based on the findings of the Council Report in relation to three areas. First, a new compulsory license system for the exploitation of works and other subject matter was established, aimed at simplifying procedures. Private-sector organizations which have been designated and registered by the Commissioner of the Agency for Cultural Affairs (hereinafter referred to as "contact organizations") are now given oversight of these procedures. Secondly, amendments were made to allow the transmission of works and other subject matter to the public within legislative and administrative organs. This includes the internal transmission of works and other subject matter to the public by legislative and administrative organs utilizing cloud platforms or other transmission devices, as well as their transmission for administrative procedures like patent trials. Thirdly, revisions were made to the method for calculating damages in order to achieve effective relief for damages resulting from piracy, etc. More concretely, the damages caused by piracy may now include an amount equivalent to the license fee for the number of reproductions made by the infringer. In addition, clarification was made on the factors to be taken into account when determining this amount.

"Article XX of the New Act" indicates the Article number of the Copyright Act (Act No. 48 of 1970) after this Amendment Act comes into effect in the commentary below, whereas "Article XX of the Act" indicates the Article number of the Copyright Act before the amendment.

II. Purpose and Outline of the Amendment

1. New compulsory license system for the exploitation of works

(1) Purpose of the amendment

With the advent of digitalization and DX, content creation, publication, transmission and exploitation have become easily accessible to anyone. Unlike the *professional* content provided via publishing companies or television stations, which had been the mainstream in the past, there has been a surge of content created by the general public, including amateurs, proliferating on the internet and being exploited more frequently. Such content is a mix of uses that are freely exploitable and such requiring authorization for use. In addition, there are growing demand for exploiting old works in new ways, such as digitizing archives and creating commentary videos on platforms like video-sharing websites.

The safe and confident exploitation of content hinges on the authorization of the copyright and neighboring rights owners. However, there have been instances where the permissibility of exploitation was unclear,

hindering smooth exploitation due to difficulties in contacting or identifying the rights owner. Furthermore, the costs for identifying and searching for the right holders associated with the authorization procedure often impeded the proper exploitation of content.

To address these issues while upholding the Copyright Act's principle of obtaining authorization from rights owners, a mechanism has been devised to facilitate the exploitation of works and other subject matter, along with the corresponding payment of consideration. This mechanism is particularly designed for cases where the intent of the copyright or neighboring rights owner regarding the permissibility of exploitation cannot be confirmed.

(2) Outline of the amendment

The provisions on the new compulsory license are applied mutatis mutandis under Article 103 of the New Act. Therefore, what is mentioned below on copyright and works also apply to neighboring rights as well as subject matters unless otherwise mentioned.

A. The new compulsory license system

Under the new compulsory license system, if a work is unmanaged and has been made public, and it satisfies certain requirements, such as the inability to confirm the copyright owner's intention regarding its exploitation, a person may exploit that work by receiving a compulsory license from the Commissioner of the Agency for Cultural Affairs (hereinafter referred to as "Commissioner" unless otherwise mentioned.) and by depositing compensation, amount equivalent to the ordinary rate of royalties, pursuant to the terms of the compulsory license.

While the new compulsory license system facilitates the exploitation of works when the intention of the copyright owner is uncertain, the current compulsory license system applies when the copyright owner is unknown or is presumed not to exist (hereinafter referred to as the "current compulsory license system"). Thus, the exploitation under the new compulsory license system is suspended, if the intention of the copyright owner is confirmed after the grant of the compulsory license. In this manner, the new system permits only a temporary exploitation until the copyright owner's intention is clarified, prompting negotiations between the copyright owner and the exploiters after the suspension of the compulsory license. This prevents a loss of licensing opportunities for the copyright owner while creating new exploitation opportunities.

Moreover, for the purpose to simplify and facilitate procedures, private sector entities acting as contact organizations can be designated to deal with certain tasks, such as accepting applications, verifying compliance with the requirements, and managing compensation-related functions in connection with the operation of the new compulsory license system.

B. Work subject to the new compulsory license system

A work subject to the new compulsory license system is referred to as "unmanaged work that has been made public" and is defined as follows: It refers to a work that has been publicly disclosed or clearly been presented to the public for a considerable amount of time (hereinafter referred to as a "work that has been made public"), which neither falls within criteria [i] nor [ii] outlined below (Article 67-3, paragraphs (1) and (2) of the New Act):

[i] the copyright for the work is managed by a copyright management service (Article 67-3, paragraph (2), item (i) of the New Act); or

[ii] the information necessary to smoothly confirm the copyright owner's intention regarding the permissibility of exploiting the work has been disclosed. Details of necessary information and the method of disclosure are to be specified by the Commissioner (item (ii) of the same paragraph).

In order to qualify under the new

compulsory license system, the case needs to satisfy both [i] and [ii] criteria outlined below:

[i] Despite taking the measures for confirming the copyright owner's intention regarding the permissibility of exploiting the unmanaged work that has been made public as specified by the Commissioner, the intention of the copyright owner remains unconfirmed. (Article 67-3, paragraph (1), item (i) of the New Act); and

[ii] it remains unclear whether the author intends to cease printing or otherwise exploiting the unmanaged works that has been made public (Article 67-3, paragraph (1), item (ii) of the New Act).

Meanwhile, the intention of the copyright owner includes an "opt-out," meaning a manifestation by the copyright owner that they choose not to be bound by this system.

The new compulsory license system permits temporary exploitation for the period where the intention of the copyright owner cannot be confirmed. If it is possible to contact and to negotiate terms of exploitation of the work with the copyright owner, it is preferrable to pursue negotiations instead of allowing exploitation under this system.

Therefore, within the new mechanism, the Commissioner may revoke the compulsory license at the request of the copyright owner. This revocation may be granted when the copyright owner of the relevant work takes the necessary steps for accepting a request for consultation from the licensee of the compulsory license. Such steps include entrusting the management of the copyright for the work to a copyright management service (commencement of centralized management) or publicly disclosing contact information and any other necessary information for receiving consultation requests regarding the exploitation of the work.

Since the system adopts such a mechanism which respects the copyright owner's intentions regarding the exploitation of an unmanaged work that has been made public, the duration of exploitation under a compulsory license is limited to a maximum of three years. Even in cases where the copyright owner's intentions are unclear at the time an application is filed for exploitation, the possibility remains that centralized management will commence or the copyright owner's intentions will become apparent subsequently. Thus, this measure is provided to ensure an opportunity for reconfirming the copyright owner's intention.

In addition, when the Commissioner issues a compulsory license, the Commissioner must publicly announce the relevant information necessary for identifying the work, the method of exploitation, and the duration of exploitation. This can be accomplished through the internet or by any other appropriate channel.

Meanwhile, provided that the requirements are met, a compulsory license under the new system is eligible for renewal. If a person wishes to continue exploiting the unmanaged work that has been made public, they may also opt for using the current compulsory license system designed for cases where the copyright owner is unknown, among other circumstances. This system has no statutory limit on the period of exploitation if the copyright owner, etc. remains unknown.

C. Regarding compensation

The new compulsory license system, although temporarily, enables exploitation of an unmanaged work that has been made public without the authorization of the copyright owner. Consequently, payment of compensation is required for the exploitation of an unmanaged work that has been made public under this system.

Similar to the current compulsory license system in cases where the copyright owner is unknown, etc., the determination of compensation is bestowed upon the Commissioner and the Council for Cultural Affairs must be consulted on this matter.

If a compulsory license is revoked during the stipulated period of exploitation specified by the compulsory license, the copyright owner is entitled to reimbursement from the deposited compensation. This reimbursement corresponds to the period extending from the issuance of the compulsory license to the date of the revocation disposition (the amount equivalent to the compensation as of the time of the rescission).

The procedures for calculating and determining compensation, as well as the subsequent deposit thereof, have historically been complicated and time-consuming. Consequently, the recent amendment aims to streamline and expedite these processes by enabling contact organizations, private-sector entities designated or otherwise involved by the Commissioner, to manage administrative tasks related to calculating compensation equivalent to ordinary royalty rates and ensuring proper procedures. These contact organizations are prescribed as the following according to the operations they perform and the functions of the organizations: [i] a designated compensation management organization which accepts and manages compensation, etc., and [ii] registered checking organizations which accept applications for using the new compulsory license system, verify compliance with the requirements, and calculate compensation amounts equivalent to ordinary royalty rates.

Both the designated organization and registered organizations are to be designated or registered by the Agency for Cultural Affairs based on applications.

Under the current compulsory license system, a copyright owner has the opportunity to receive compensation for the exploitation conducted under a compulsory license. However, in numerous instances, copyright owners did not come forward, leading to situations where compensation remained unpaid.

Therefore, an amendment was enacted to address this issue. Under the revised provision, if the copyright owner fails to appear, a portion of the compensation — calculated with consideration for anticipated future payments — must be allocated to endeavors related to safeguarding copyright and neighboring rights. In addition, funds are directed towards initiatives that facilitate exploitation and promote the creation of works. This applies to both the current and new compulsory license systems. This measure ensures the effective utilization of compensation associated with work exploitation under the compulsory license systems, benefiting copyright and neighboring rights owners, exploiters, and others involved in the creation and protection of works.

Furthermore, the Council Report highlights that the funds generated through these initiatives will be utilized for various endeavors, such as creating a database that aggregates information on rights for various works and other subject matters and contributes to both exploitation of works and the facilitation of payment of consideration.

Under the existing compulsory license system, the amount of compensation is determined by the Commissioner based on the materials submitted by the applicant for calculating the compensation. However, stakeholders, including individuals exploiting works and rights-related service providers who received inquiries, have pointed out that collecting such materials is laborious and entails associated costs.

Thus, under the new compulsory license system, registered checking organizations with a requisite level of expertise are tasked with this responsibility. Such organizations gather information and data relating to calculating the equivalent amount of royalties and develop predefined standards for such calculations. By determining these standards in consultation with the Council for Cultural Affairs in advance, individual applications for exploitation no longer require further consultation with the Council for Cultural Affairs.

2. Transmission to the public of works in legislative and administrative organs

(1) Purpose of the amendment

Article 42 of the Act provided that it is permissible to reproduce a work and other subject matter without the authorization of the copyright or neighboring rights owner, if and to the extent that this is found to be necessary for judicial proceedings or for internal use by a legislative or administrative organ. This provision aimed to facilitate smooth and efficient utilization of materials necessary for decision-making and enforcement by the State, considering the public nature of ensuring appropriate legislation and administration.

This article, however, only allowed reproduction while it was not possible to store a work or other subject matter on a cloud platform, attaching a work or other subject matter to emails sent to multiple personnel within a department, or displaying a work or other subject matter that has been transmitted to the public on a monitor at work. As legislative and public organizations increasingly embraced digitalization and networking, the system failed to sufficiently respond to the exploitation of works and other subject matters in these settings.

To address these limitations and advance the infrastructure of digital society, the Amendment Act enabled two key provisions

[i] The transmission to the public of works and other subject matters for internal uses by legislative and administrative organs, and

[ii] the transmission to the public of a work and other subject matter for conducting the administrative procedures, such as patent examination, prescribed by laws, without the authorization of the copyright or neighboring right owner, to the same extent as the extent to which reproduction is allowed under Article 42 of the Act, if it does not unreasonably prejudice the interests of the copyright or neighboring right owner.

(2) Outline of the amendment

The provisions below are applied mutatis mutandis under Article 102 of the New Act. Therefore, what is mentioned below on copyright and works also apply to neighboring rights as well as subject matters unless otherwise mentioned.

A. Transmission to the public of works for internal use by legislative and administrative organs by utilizing the cloud or other transmission devices (Article 42 of the New Act)

With the recent amendment, it is now possible to store a work on a cloud platform within a department or attach a work to an email sent within a department for internal uses by a legislative or administrative organ, without requiring authorization of the copyright owner.

However, the scope of the exploitation of a work enabled by this amendment is the same as the scope of exploitation of a work "for internal use" before the amendment. Therefore, "if the action would unreasonably prejudice the interests of the copyright owner," such as adversely affecting an existing business, by means of, for instance, a clipping service, the transmission to the public, etc. would accordingly require authorization of the copyright owner.

B. Transmission to the public of works for conducting administrative procedures, etc., such as patent trials

The transmission of works to the public for conducting judicial proceedings and administrative trial proceedings (i.e. trials and other quasi-judicial proceedings conducted by administrative authorities) differs from that for internal uses by legislative and administrative organs since these provisions could also apply to general public using such procedures. Thus,

these provisions were set up separately from Article 42 of the Act.

On such basis, the recent amendment has introduced a new provision allowing for transmissions to the public during administrative trial proceedings. This also clarified that these provisions could be applied to administrative trial proceedings under the provisions of the Patent Act and other Acts specified by Cabinet Order.

With regard to judicial proceedings under the provisions of the Code of Civil Procedure and other Acts specified by Cabinet Order, provisions allowing the transmission of works to the public have been established by the Act for Partial Amendment of the Code of Civil Procedure, etc. in 2022 and the Act on the Development of Laws to Promote the Utilization of Information and Communications Technology in Civil Proceedings in 2023. These legislative activities align with the various amendments aimed at digitalizing judicial proceedings.

Similar to the case of judicial proceedings, etc., the transmission of works to the public for conducting the administrative procedures prescribed in Article 42, paragraph (2) of the Act prior to amendment differs in nature from that for internal uses by legislative and administrative organs. These provisions could also be applied to general public using the procedures. Therefore, the Amendment Act sets up provisions for transmission to the public separately from Article 42 of the Act.

On such basis, transmissions to the public were enabled for administrative procedures to the extent as under Article 42, paragraph (2) of the pre-amendment Act since the administrative procedures to which the provisions are applicable were already clearly set there. However, the transmission to the public needs to be conducted in accordance with the provisions of the respective Acts that enable electronic applications, etc. and adhere to the information security policies established by the respective administrative organs.

In the respective procedures outlined above, the transmission to the public under the respective Articles cannot be conducted "if the action would unreasonably prejudice the interests of the copyright owner," for instance, by impeding an existing licensing business. In such instance, the authorization of the copyright owner would be required, in accordance with the principle.

3. Calculating damages from piracy, etc.

(1) Purpose of the amendment

The Copyright Act includes provisions for determining the amount of damages that a copyright and neighboring right owner can seek for copyright and neighboring right infringements as special provisions under Article 709 of the Civil Code (Act No. 89 of 1896). They serve to alleviate the burden of proof on the copyright or neighboring right owner concerning damages.

In recent years, however, the damage caused by piracy websites has escalated significantly. Particularly, piracy-related damage concerning manga has seen a rapid rise, exacerbated by the increased usage of piracy websites during the COVID-19 pandemic. With regard to claims for compensation for such piracy damage, there have been concerns raised regarding the benefits gained by infringers. It was observed that such infringers were often making profits exceeding the legitimate sales capacity of right holders. Additionally, instances have occurred where the approved damages, equivalent to royalties, were deemed low, resulting in a substantial portion of the significant profits acquired through infringement remaining with the infringers.

In response to this, and with an aim to implementing effective measures against the escalating copyright infringements to address the damage suffered by right holders, the method for calculating damages under the Copyright Act was revised in the same manner

as for the Patent Act. Specifically, [i] the revision now allows for the addition of the amount equivalent to the license fee to the damages calculation for the portion exceeding the capacity of the copyright or neighboring right owner to sell, etc., and [ii] it explicitly states that in calculating the amount equivalent to the license fee, consideration must be made to the amount likely to be determined through negotiations on the premise that the copyright or neighboring right was infringed may be taken into account.

Under the Patent Act, which operates within the same intellectual property law system, a similar amendment was made in 2019.

(2) Outline of the amendment

A. Approval of the amount equivalent to the license fee in the calculation based on the number transferred, etc. by the infringer

Article 114, paragraph (1) of the Act provides that the damage amount is determined by multiplying the number of infringing objects sold by the infringer (i.e., the number transferred, etc.) by the profit per unit of the original objects (i.e., the profit per unit of the copyright or neighboring right owner). However, if the number of objects exceeds what is proportionate to the copyright or neighboring rights owner's ability to sell, or if there are circumstances preventing the sale, the corresponding number is deducted from the damage amount. It was not explicitly clear from the Act's provisions, nor was it established in judicial practice, whether compensation for the amount equivalent to the license fee as prescribed in Article 114, paragraph (3) of the Act would be approved for the deducted portion.

In light of the fact that intellectual property right holders can gain profits not only from exercising their rights by themselves but also from licensing out their rights, an amendment to the Patent Act was made in 2019. The amendment explicitly states that the amount equivalent to the license fee may be claimed in such cases. Owing to the similar nature of copyright and patent rights, a similar amendment was subsequently made to the Copyright Act.

Article 114, paragraph (1), item (i) of the New Act specifies the calculation method for determining the amount of damages resulting from lost profits due to a decrease in the number of units sold. Additionally, Article 114, paragraph (1), item (ii) of the New Act provides the calculation for the amount equivalent to the license fee. This amount relates to instances where the infringer transfers units exceeding the right holder's capacity to sell or units that the right holder would have been unable to sell, resulting in lost profits due to a loss of licensing opportunities. The total sum of these amounts constitutes the damage amount calculated pursuant to Article 114, paragraph (1) of the New Act.

As for Article 114, paragraph (2) of the Act, this paragraph initially presumes the amount of the infringer's profits to be the amount of damages. However, in judicial practice, this presumption under paragraph (2) has been deemed to be rebutted for the portion exceeding the right holder's ability to sell, etc., similar to the treatment under paragraph (1). Furthermore, concerning the portion for which the presumption under paragraph (2) has been deemed to be rebutted, the amount equivalent to the license fee corresponding to that portion should be approved as an amount of damage, akin to the provisions in Article 114, paragraph (1) of the New Act.

B. Clarification of the factors to be taken into account in the approval of the amount equivalent to the license fee

Article 114, paragraph (3) of the Act allows to claim an amount equivalent to the sum that the right holder should have received in relation to the exercise of the copyright or neighboring right (the amount equivalent to the license fee). This amount may be claimed as the amount of damages in cases of infringement.

The license fee in cases of copyright or neighboring right infringement is assumed to be higher in amount than the license fee under an ordinary agreement. This is because the right holder has lost the opportunity to determine whether or not to authorize exploitation, and that the infringer has exploited the work without various restrictions that would typically have been imposed under a licensing agreement, among other factors. Initially, the wording of paragraph (3) was "the amount of money that the owner should have normally received" at the time of the enactment of the Act. However, upon the 2000 amendment of the Copyright Act, the term "normally" was deleted. This deletion aimed at clarifying that a reasonable amount equivalent to the license fee could be approved in consideration of the specific circumstances between the parties to the litigation, without being bound by general amounts of license fees. Despite this amendment, there have been indications that it remained unclear whether an amount equivalent to the license fee which adequately takes into account the specific circumstances between the parties to the litigation was consistently approved in actual court judgments as a result of this amendment.

The Patent Act was amended in 2019 to clearly state that, in calculating the amount equivalent to the license fee, the amount that would likely be determined through negotiations based on the premise that the right was infringed may be taken into account. The amendment to the Copyright Act, which mirrors the Patent Act, explicitly states that specific circumstances arising from copyright or neighboring right infringements may be taken into account in determining the amount equivalent to the license fee under Article 114, paragraph (3) of the Act. This amendment is anticipated to potentially increase the approved amount equivalent to the license fee as damages compared to the present state.

Specifically, paragraph (5) was added to Article 114 of the New Act explicitly stating that in approving an amount equivalent to the compensation that the right holder should have received in connection with exercising the copyright or neighboring right as prescribed in Article 114, paragraph (1), item (ii) and paragraph (3) of the Act, consideration may be given to what the copyright owner, etc. would receive if they agreed on compensation for the exercise of the copyright or neighboring right with the infringer, assuming infringement occurred.

4. Effective dates

The effective dates for the respective amendments are as follows:

(1) January 1, 2024

Revision of the transmission to the public of works by legislative and administrative organs and the method for calculating damages

(2) Day specified by Cabinet Order within a period not exceeding two years and six months from the date of promulgation (the date of promulgation: May 26, 2023)

Preparatory actions concerning designation, etc. of the designated compensation management organization and registration, etc. of the registered checking organizations

(3) Day specified by Cabinet Order within a period not exceeding three years from the date of promulgation (the date of promulgation: May 26, 2023)

The new compulsory license system concerning exploitation of works (excluding the matters concerning (2) above)