Copyright limitations and fair use of works

The Copyright Act is designed to establish copyright for protecting works while allowing the scope excluded from copyright protection so as to ensure the exploitation of works. This article explains the concept of "fair use" which is often discussed in the copyright community, from the standpoint of the Copyright Act of Japan.

Purposes and means under the Copyright Act of Japan

Some may find the term "Copyright Act" to be a law only focused on rights, as it contains the word "right" in the title; however, in addition to a number of provisions concerning rights, it also contains other types of provisions.

The first provision, Article 1 of the Copyright Act defines the purpose of this Act as "to contribute to cultural development" and, to that end, "to ensure protection for the rights of authors and other persons."

This indicates that the ultimate goal of the Copyright Act is the "cultural development," and the "protection for the rights of authors and other persons" is the means to achieve this. In this sense, although the Act has a number of provisions on rights, this Act is not for the protection of rights.

It should be also noted that the Copyright Act also requires that the protection of rights should be implemented while "attention is accorded to the fair exploitation of these cultural products." These "cultural products" include works, performances, phonograms, broadcasts, cablecasts, etc.

Thus, it could be said that the Copyright Act requires that the fair exploitation of works should not be ignored for achieving the objective of cultural development.

Copyright limitations for equitable exploitation of works

Then in what way can works be exploited in an equitable manner? It would be easily imaginable that a user of a third party's work could obtain a license from the author or other related right owner (copyright owner).

That being said, is it always impossible to use a work without license from a copyright owner? If it were necessary to obtain a license from the copyright owner every time a copyrighted work was used, I will leave it up to your imagination concerning whether this would result in an extremely stifling society.

Further, if this rule is strictly applied, a copyright owner such as a creator, photographer or painter would be at all times forced to make decisions as to whether they can grant licenses to prospective users, especially when their work

becomes popular, without regard to its importance, and would take away their resources that should be used for new creation.

However, in the first place, the use of a copyrighted work does not always infringe on copyright. For example, purchasing a painting and displaying it at home for appreciation purposes are not defined as copyright infringement under the Act, although these activities are "use" of the copyrighted work. Listening to music or reading novels is not infringing, either. Although these activities seem to be naturally excluded from copyright infringement, the legal ground for this lies in the absence of any provision under the Copyright Act that renders these activities infringing.

Then, what kind of act constitutes copyright infringement? In fact, the infringing acts are specifically provided in the Copyright Act, for example, making reproductions, posting on the internet, and playing a musical piece for unspecified audience. However, works can be used/exploited as long as it is not the exploitation within the meaning of the Copyright Act (so-called a statutory exploitation).

In addition, the Copyright Act also provides for cases where even an act that falls under a statutory exploitation of copyrighted works is permitted without license from the author, etc. These cases are called "copyright limitations" that exceptionally restrict copyright enforcement against an act that formally constitutes infringement.

The representative example of these copyright limitations is a reproduction for private use, such as copying books, paintings and musical pieces for an individual's own records or study purposes. The Copyright Act also provides for a number of copyright limitations, including a citation, exploitation for educational purposes and on-screen presentation for non-commercial purpose.

No "catch-all" copyright limitation under the Copyright Act of Japan

The Copyright Act of Japan is characterized by specifically listing the copyright limitations. It follows that a statutory exploitation which does not fall under any copyright limitations must be recognized as copyright infringement. This looks straightforward at a first glance.

However, there may be cases where the specific copyright limitations (special clauses) cannot cover new manners of exploitation of works emerging from the advancement of technology or change in society.

The Copyright Act has undergone revisions almost every year so as to catch

up with the advancement of technology or change in society. If an abstract rule on limitation of copyright (general provision), for example, "Enforcement of copyright is restricted against fair uses," is introduced, this might eliminate the need of making law revisions almost every year. This general limitation is commonly called a "fair use."

Is the concept of "fair use" of works accepted in Japan?

Nevertheless, the Copyright Act of Japan only provides for specific copyright limitation rules, not an abstract rule. Then, it should be said that no such rule is available unless it is stipulated in the Act.

However, in the past, there was a copyright infringement case in which a defendant raised a counterargument of "fair use" even in the absence of any express general provision on fair use in Japan and argued that therefore there was no copyright infringement. The defendant argued: "Although the Copyright Act of Japan has no general provisions concerning 'fair use' except for Article 32(1) which deals with 'citation,' a doctrine of 'fair use' as that provided in Section 107 of the Copyright Act of the U.S. should also be applied in Japan." ("Last Messages in Final Magazine Issues" Case (Tokyo District Court, 1994 (Wa) 9532, judgment rendered on December 18, 1995), https://www.courts.go.jp/app/hanrei_jp/detail7?id=13818)

In this court case, it can be understood that the defendant alleged that the "fair use" concept can be derived from a theory of law (doctrine) although it is not stipulated in a specific law. However, the court held as follows, concluding that the alleged infringement did not fall under a case where copyright enforcement is restricted (bold added for emphasis by the author).

"While recognizing the self-evident logic that, in order to achieve the ultimate goal of cultural development, due consideration needs to be paid for the fair exploitation of works in addition to the protection of rights of authors and other related parties, the Act specifically provides in details the cases and requirements of limitation of copyright in Articles 30 through 49 with the aim of striking the balance between private rights and interests of copyright holders and other related parties and the public interest in fair exploitation of works by third parties, **but does not contain an additional general provision equivalent to the 'fair use' doctrine**. Therefore, the court determines that **the Act restricts copyright in light of fair exploitation limited to cases specifically stipulated in these provisions**. Further, even taking into account the change in social circumstances

from the enactment of the Copyright Act to present, no situation can be found to justify the application of the 'fair use' doctrine as asserted by the defendant to the use of the magazine articles in the defendant's book, without any supporting ground in substantive law. The defendant's argument that the 'fair use' should be applied to this case as a general doctrine of copyright limitations is found to be unacceptable."

The court's holding that copyright is limited only for acts falling under these provisions on copyright limitations means that any statutory exploitation not falling under these limitations constitutes copyright infringement, even if it seems like a 'fair' use.

Although this court precedent was rendered by a district court about 30 years ago, it has been described as a leading case on "fair use" in Japan even now.

Summary

This article introduced the basic knowledge and approach to copyright limitations under the Copyright Act of Japan, as well as how the fair use was decided in the court precedent. For consultation on specific cases, please contact a patent attorney or other expert well-versed in copyright.

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