

Questions relating to Copyright Infringement on the Internet
- The Japanese Approach from a Comparative Perspective
by
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1. The development of the internet in recent years has been remarkable: it not only affects business transactions, but also penetrates our daily life. This phenomenon leads to new types of legal issues, which unavoidably have international impacts because the internet does not know any geographical borders. Currently, however, there are (still) no worldwide uniform substantive rules as *lex cyberia*, nor *lex mercatoria*, to regulate cross-border legal issues on the internet. Rather, every jurisdiction maintains its own legal system in principle so that a “conflict of laws” approach still appears to be indispensable to determine the law that governs specific legal problems.

2. In this speech, I would like to concentrate on copyright infringement on the internet from the perspective of the service provider’s liability. A typical situation is: a Japanese copyright owner requests a service provider with its principal place of business abroad to take down the allegedly infringing material from the website hosted by the provider. Suppose the provider refuses to remove the material, considering that it does not infringe the copyright. Do Japanese courts have jurisdiction to hear the case if the victim seeks remedies from the provider? Under which conditions can the provider be freed from liability? Which law is applicable to this question? Which law governs the copyright infringement?

3. First, in order to clarify the problems we face, I would like to shortly introduce the Japanese Statute on Limitation of Service Provider’s Liability (2001, entered into force on 27 May 2002), comparing its structure with the Digital Millennium Copyright Act (DMCA) of the United States (1998) and the E-Commerce Directive of the European Union (2000). To sum up, the Japanese legislation does not have sophisticated rules comparable to “notice- and-take-down” regime of the DMCA, nor does it categorize the service provider’s activities among “mere conduit,” “caching” or “hosting” (Articles 12-14 of the E- Commerce Directive; §§ 512 (a)(b)(c) of the US Copyright Act).

4. Second, turning to the question of international jurisdiction of Japanese courts when the victim brings suit against the provider, there are no specific rules in the Civil Procedure Code that address this situation. The case law takes the national jurisdictional rules as the starting point, according to which jurisdiction is granted to the place where defendant is domiciled or where the wrongful act took place. However, judges can refer to “special circumstances,” whenever it seems appropriate to decline jurisdiction in view of the balance of interests between the parties as well as due and expeditious process. It is not surprising that the Japanese court decisions often sacrificed legal certainty,

sometimes going even further than the elastic US jurisdictional rules, for the Japanese law lacks a comparable constitutional control based on "due process".

The "place of wrongful act" as a jurisdictional ground covers both *locus delicti commissi* and *locus damni*. With regard to copyright infringement on the internet, *locus damni* is understood as the place where the infringing material was downloaded. Though judges will have recourse to "special circumstances" *de lege lata* whenever the venue has scarce connection to the case and appears therefore to be an exorbitant jurisdiction.

5. As the third point, the question of the law applicable to copyright infringement and service provider's liability will be discussed.

As to the law governing copyright infringement on the internet, the majority of Japanese scholars advocate a distributive application of the law of the place of the downloading as the *lex loci protectionis*. The appropriateness of this solution shall be analyzed in light of Article 5 (2) of the Berne Convention. Also other possible solutions, such as pointing to the law of the country from which the infringement originated, are going to be reflected, taking the state of discussion in different jurisdictions (Germany, France and the US) into consideration. The Japanese statute on private international law, *Horei*, is currently undergoing a thorough reform, yet it will not provide any solutions in this respect, now that the Commission set up at the Ministry of Justice decided to abstain from introducing a specific provision on the law applicable to the infringement of intellectual property.

With regard to the liability of service provider as an intermediary, some Japanese authors say that the primary connecting factor shall be the place where the server is located; if that place is not known to the claimant of the copyright infringement, the connecting factor shall be the provider's principal place of business; and if that place is a "copyright heaven," the place where downloading occurred. I will subject this "cascading reference" approach to a critical analysis, not only from the viewpoint of practicality and reasonableness, but also concerning its conformity with Article 11 (1) of *Horei*, which objectively designates *lex loci delicti* as the law applicable to tort.