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INTELLECTUAL PROPERTY LAW IN JAPAN. CONTEMPORARY TRENDS AND CHALLENGES

1. Introductory remarks

Intellectual property is increasingly being recognized as an important tool for economic development and wealth creation. The term "intellectual property" is used in international conventions as well as in the name of the World Intellectual Property Organization (WIPO). It refers to "property of things," mainly due to the adopted construction of absolute subjective rights. Copyright is a part of intellectual property law and means – in a narrower sense – a set of rules issued to protect the interests of authors and the legal connections related to the creation of works, their use and their protection. In a broader sense, the term also includes regulations referring to the so-called related rights, i.e. exclusive rights granted, inter alia, to performers, phonogram producers, radio and television broadcasters.[1] Japanese intellectual property history started shortly after the Meiji Restoration of 1868. Under the preceding Tokugawa regime, Japan had been a feudal caste society, strictly separated into Samurai knights, peasants, and on the lowest level of the hierarchy, craftsmen and artists. As the state philosophy was neo-Confucianism, that favored subordination to the community over individual self-realization in terms of creativity and innovation individual creativity was not much appreciated.[2] Henceforth, legal reform in Japan was driven and intellectual property was perceived as a useful tool to foster industrialization. The idea of intellectual property as an incentive instrument was part of the useful knowledge brought to Japan by a number of scholars who had returned from overseas study trips.[3] Shortly after Meiji, the first ordinances on patent, copyright, design, and

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[1] J. Barta, R. Markiewicz, *Prawo autorskie i prawa pokrewne*, Warszawa 2019; see also: J. Hughes, *The Philosophy of Intellectual Property*, "Georgetown Law Journal" 1998, no. 77, s. 296–330.

[2] P. Ganea, S. Nagaoka, *Japan* [in:] *Intellectual Property in Asia. Law, Economics, History and Politics. MPI Studies on Intellectual Property, Competition and Tax Law*, vol. 9, eds. P. Goldstein, J. Strauss, Berlin – Heidelberg 2009, pp. 1–25; Ch. Heath, *Inventive Activity, Intellectual Property* [in:] *History of Japanese law since 1868*, ed. W. Röhl, Leiden 2005.

[3] J.W. Hall, *Das Japanische Kaiserreich*, "Journal of the American Oriental Society" 1968, vol. 88, issue 2.

trademark protection were enacted. It has to be noted that the period from Meiji to the turn of the nineteenth century can be characterized as an experimentation phase in which the Japanese tested various legislation models to find the one which best suited the economic reality. At this early stage intellectual property was still perceived as an instrument for fostering the creativity of individual inventors and creators, rather than as a tool for securing corporate investment. To give an example, the founder of the Toyota Motor Company – Sakichi Toyoda obtained the first set of patents in hand loom technology in 1891. Japan has been modernising over the last 150 years, making changes due to socio-economic progress. Since the end of World War II (WWII) in particular, Japan's new constitution renounced war and Japan placed a strong focus on economic development.[4] It was not until the end of the Second World War that the number of corporate patent applications exceeded that of individual applications[5]. At present Japanese intellectual property law includes copyright provisions, protecting patents, industrial designs, trademarks and distinguishes provisions concerning protection of trade secrets and protection against unfair competition. Among the international agreements on the protection of intellectual property to which Japan is a signatory, the most important is the Berne Convention, which sets out the provisions for the protection of intellectual property and the consequences of their violation. It should be noted that Japan is also one of the parties to Anti-Counterfeiting Trade Agreement (ACTA), which was signed in January 2012 in Tokyo.

2. Selected intellectual property protection issues

2.1. Copyright protection in Japan

Copyright can be a powerful catalyst within national economies. The protection of copyright is a part of the responsibility of the cultural authorities of the Government of Japan i.e. the Japan Copyright Office (JCO) of the Agency for Cultural Affairs (ACA), which is a part of the Ministry of Education, Culture, Sports, Science and Technology (MEXT). The JCO has been carrying out a wide range of copyright policies such as the planning of copyright legislations, the improvement of right clearance systems, the planning of new policies to cope with the development of digitization and network, supervision over collective societies, educational activities for experts and the general public, participation in international norm-setting, cooperation programs for developing countries, countermeasures against piracy[6].

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[4] E. Kakiuchi, *Cultural heritage protection system in Japan*, "Gdańskie Studia Azji Wschodniej" 2016, no. 10.

[5] P. Ganea, *Copyright History* [in:] *Japanese copyright law – writings in honour of Gerhard Schricker*, eds. P. Ganea, C. Heath, H. Saitô, Hague 2005.

[6] https://www.cric.or.jp/english/csj/csj1.html (accessed: 13.02.2022).

With regard to other international conventions, Japan has ratified or acceded among others to the Berne Convention in 1899, the WIPO Copyright Treaty in 2000, the WIPO Performances and Phonograms Treaty in 2002, the Beijing Treaty on Audiovisual Performances in 2014 and the Marrakesh VIP Treaty to enhance information access opportunities for persons with visual impairments etc. in 2019. In addition, it is worth to mention Japan's participation in the Universal Copyright Convention, the Phonograms Convention, the Rome Convention, and the TRIPS Agreement.

With reference to the Berne Convention for the protection of Literary and Artistic Works, it was formulated with the purpose of fostering harmonization of copyright law.[7] After the initial enactment, the copyright law of Japan was revised and amended several times in order to expand the range of copyright protection and to facilitate fair exploitation of works according to the international treaties. The Berne Convention contains a number of substantive provisions shaping the minimum convention on the content of copyright, in particular it includes protection of author's moral rights and economic rights. The essence of the so-called fundamental rights is introduced by art. 6 bis of the Berne Convention, which provides for absolute moral protection. The minimum convention contained in art. 6 bis does not cover the entirety of author's moral rights, but only the right to authorship of the work, the right to oppose any distortion, mutilation or detriment of the work which would be prejudicial to its honor or reputation. The Convention does not specify the means for the protection of moral rights or the length of time for which protection is to last. These matters are left to national regulations where protection is sought.[8] According to the Convention the user's action is considered to be an infringement only when it is prejudicial to the author's honour or reputation. In contrast, Japanese copyright law regards the user's action as infringing whenever the use is against the author's intent. Even if the users' modification of the work is beneficial to the author, as long as the author does not like the use, the use is prima facie infringement. Thus, it should be noted that Japanese copyright law has very strong moral rights, which limit even private fair use. In any case the existence of this strong moral right shows that Japanese copyright law uses a continental European conception of the moral rights doctrine.[9]

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[7] M. Sudo, S. Newman, *Japanese copyright law reform: introduction of the mysterious Anglo-American fair use doctrine or an EU style divine intervention via competition law?*, "Intellectual Property Quarterly" 2014, no. 1, p. 10.

[8] J. Błeszyński, *Prawo autorskie*, Warszawa 1988, pp. 31–32; A. Bogsch, *The Law of Copyright under The Universal Convention*, New York 1972, pp. 5–6; J. Barta, R. Markiewicz, *Prawo autorskie*…, p. 568; D. Czajka, *Ochrona praw twórców i producentów. Prawo autorskie i prawa pokrewne*, Warszawa 2010, p. 7; see also: S. Ricketstone, J. Ginsburg, *The Berne Convention: Historical and institutional aspects* [in:] *International Intellectual Property. A Handbook of Contemporary Research*, ed. D.J. Gervais, Northampton 2015.

[9] M. Sudo, S. Newman, *Japanese copyright law reform*…, pp. 10–11.

Among the developments of various political, legal, economic and social systems, the system of copyright in Japan was also established and developed gradually after the Meiji Restoration in 1868. The first legislation on copyright was the Publishing Ordinance, enacted in 1869, that provided for both the protection of copyright and the regulation on publishers. In 1887, the copyright part of this Ordinance became independent as a newly established legislation called the Copyright Ordinance, which is said to be the first copyright legislation in Japan and then it was transformed as a whole into the Copyright Law in 1899. After the initial enactment, the Copyright Law of 1899 was revised and amended several times as follows in order to expand the range of copyright protection and to facilitate fair exploitations of works. As a result, the new Copyright Act that was enacted in 1970 forms quite a unique law that combines elements of both Continental European and U.S. copyright. It has to be pointed out, however, that it protects the moral rights of authors and the neighboring rights of performers, phonogram producers and broadcasters. It has to be noted that the Copyright act contained, *inter alia*, such detailed provisions as the exploitation of works under compulsory license in the case where the copyright owner is unknown; registration systems (registration of the date of first publication, true name of the author, transfer of copyright, etc., which are not compulsory to have the eligibility of ownership), and an arbitration system for dispute settlement concerning copyright.

Currently, in response to rapid progress of the digital and network society, several amendments have been adopted to copyright law to strengthen the position of copyright. Those corrections should switch current balance between the stakeholders so that the minoritarian stakeholders, who are able to efficiently express their positions and interests in the policy-making process, should be required to take all the necessary actions and steps to protect their legitimate interests in enforcing their rights. An amendment to the Copyright Act of 2003 prolongs the protection term for cinematographic works (which, according to Japanese case law, also covers computer games) from fifty to seventy years, thereby enabling Japanese producers to enjoy longer protection in countries with similarly long protection terms on the grounds of the reciprocity principle.[10]

It has to be noted that art. 1 of the Japanese Copyright Act states that "The purpose of this Act is to provide for and to secure protection of the rights of authors (…) while giving due regard to the fair exploitation of these cultural products, and by doing so, to contribute to the development of culture." Thus, it is said that the ultimate purpose of the copyright law, "the development of culture," can be interpreted as "the expansion of the situation where a wide variety of works are provided to the society" in a utilitarian sense. However one can claim that in art. 1 more emphasis had to be put on the part "to provide for, and secure protection of, the rights of authors" and a rigid and restrictive interpretation of the limitations has

[10] P. Ganea, *Protected Works* [in:] *Japanese copyright law*…

to be given.[11] According to Japanese Copyright Act the scope of material protected is limited to "works" defined as "productions in which thoughts or sentiments are expressed in a creative way and which fall within the literary, scientific, artistic or musical domain." It has to be noted that to be copyrightable, a work must express thought or sentiment in a creative way and come within the literary, scientific, artistic, or musical domains. To clarify the types of works protected, art. 10 of the Copyright Act lists nine categories which are included as "works."[12] In particular, works of computer programming are protected under art. 10 (1) (ix). Article 10 (3) pointed out that "protection under this Act for a work set forth in paragraph (1), item (ix) does not extend to the programming language, coding conventions, or algorithms used to create the work." In this case, the meanings of these terms are as prescribed in the following items:

(i) "programming language" means letters and other symbols used as a means of expressing a computer program and the systems for their use;
(ii) "coding conventions" means special stipulations for the use of a program-ming language provided for in the preceding item in a specific computer program;
(iii) "algorithm" means a procedure in a computer program, which consists of a set of instructions for the computer.

One can claim that, in Japan, AI-generated works are not eligible for copyright protection due to lack of human author's intellectual creation. Under Japan's Copyright Act art. 2(1), a copyright-protected work is defined as a creation expressing "human thoughts and emotions." Thus, it appears difficult for AI to become the author of its own creations under the current law. To address this, the "Intellectual Property Strategy Headquarters" of the Prime Minister's Office has suggested specific policies for AI copyright policy in its "Intellectual Property Promotion Plan 2016." Specifically, this plan says that in order to promote AI creation, incentives to those involved in AI creation must be guaranteed. Therefore, it is necessary to recognize the copyright of AI creations as well. However, the policy also stated that granting IP protection to all AI-created works may be subject to excessive protection. Thus, it is necessary to limit the content and scope of recognition of rights in consideration of the need for such protection.

However, it is under discussion in Japan whether it is necessary to introduce some sort of legal protection for AI-generated works for the purpose of protecting investment in them. Also, pre-trained models and training data sets can be protected by copyright, as long as they are creative and considered as not AI-generated works but human author's own intellectual creation. Additionally, it should be noted that

[11] M. Sudo, S. Newman, *Japanese copyright law reform*…, pp. 1–24.

[12] D. Karjala, *Lessons From the Computer Software Protection Debate in Japan*, "Arizona State Law Journal" 1984, vol. 1984, issue 1, pp. 53–82.

the Japanese Copyright Act has the explicit provision on copyright exception for text and data mining (art. 47) under which it is allowed to copy any work for the purpose of machine learning. This provision applies to a text and data mining not only for non-commercial purpose but also for a commercial purpose as well. According to art. 30(4) of the new Copyright Act, it is permissible to exploit a work as necessary if it is used in data analysis. As a result, there are no restrictions on the subject, purpose, and method of data analysis, and there is no obligation to compensate the copyright holder. It is now also permitted to provide learning data in cooperation with multiple corporations.

2.2. Industrial property law

Japanese industrial property law consists of the following: patent law containing procedures on the scope of patent law and other related matters; design law defining the design protection scope and other related matters; trademark law setting the scope of trademark protection and other related subjects; law on special safeguards, procedures, etc., in relation to Industrial Property Law, governing the electronic processing of information and activities of designated organizations for information processing and collection; patent agent law that provides for the duties and qualifications of agents, the Board of Patent Attorneys, and other matters.

It has to be noted that the main legal acts concerning patent law are: the Constitution of Japan (1947), Patent and Other Laws Amendment Act (2015), Prevention of Unfair Competition Act (1993), Utility Model Act (1959), Patents Act (1959), Trademarks Act (1959), Plant and Seed Variety Protection Act (1998). The source of Japanese patent law is the Patent Act of 1959 that consists of 204 articles.[13] According to the act, an invention is a new and unique technical solution that cannot be detrimental to public order, health or morality and it must also be useful in industrial application. It is worth noting that the priority for granting a patent is not given to the inventor, but to the one who first submits a relevant application to the Commissioner of Japanese Patent Office. The application should be accompanied by documentation, claim content and drawings. It is permissible to file an application in English, provided the applicant provides a translation within two months. Information on the invention is published within eighteen months from the date the patent application is filed in a bulletin accessible to the public. During the first six months, interested parties may file protests if they believe the application relates to an already patented invention, is incorrect in substance or if they believe the invention does not work. The application is only evaluated based on its merits after a fee is paid, and the granted patent is valid for a period of 20 years (annual patent fees have to be paid)

[13] Patent Act (Act No. 121 of April 13, 1959, as amended up to 1 October 2020), https://wipolex.wipo.int/en/text/580160 (accessed: 13.02.2022).

but this period can be extended in the case of medical inventions. The patent is recorded in the Patent Register and its holder has the right to grant both exclusive and general licenses. Compulsory licenses may be granted by the JPO, for example, if the public interest requires it or if it is possible to use one invention only in combination with another and the owner of the latter does not agree. If the application is rejected, the examiner shall notify the patent applicant of the reasons for his decision. The person, whether living in Japan or abroad, has ninety days to make corrections. Once he makes the correction, the procedure is restarted. As for the invalidation of a patent, in principle, anyone can request the Commissioner of the Japan Patent Office to initiate such proceedings. The case is examined by a panel of three to five experts. In order to prevent this, the patentee may correct ambiguities or impose restrictions. A negative decision can be appealed to the High Intellectual Property Court. This can be done within thirty days of receiving a copy of the decision.[14]

2.3. Intellectual property disputes

The 4th industrial revolution creates more cross-border disputes, which raise new and complex challenges in the enforcement of IP rights in this global environment, especially when compared to the traditional way of solving conflicts through national courts. The enforcement of IP rights in the digital area however raises some challenges to the traditional models. In view of the fact that intangible assets are becoming an increasingly important element in international transactions, as well as the fact that both domestic and foreign entities are parties to emerging conflicts, industrial property rights in Japan are more often being considered on the basis of norms from the perspective of private international law and the law of international civil procedure. In Japan, it is possible to enforce IP rights through the courts, and this is done in the so-called independent or concurrent mode. In the case of a clear infringement of an intellectual property right the initiation of a so-called main trial should be done. In the second case, which is among the most common in Japan and accompanies the main trial, the so-called preliminary litigation is initiated. This lasts for a relatively short period of time and, if the court rules on infringement, leads to the defendant suing the plaintiff to pay a deposit to the plaintiff and for the commencement of the main trial.

It has to be noted that, in 2020, the International Law Association's Committee on Intellectual Property and Private International Law drafted the Kyoto Guidelines on Intellectual Property and Private International Law. It provides soft-law principles on the private international law aspects of intellectual property, which

[14] See more: B. Jellonek, *Prawo patentowe w Japonii*, "Acta Erasmiana" 2017, vol. 14, pp. 26–35; *History of Industrial Property Rights: Chronology*, Japan Patent Office, http://www.jpo.go.jp/seido_e/rekishi_e/nenpyoe.htm (accessed: 13.06.2022).

may guide the interpretation and reform of national legislation and international instruments, and may be useful as a source of inspiration for courts, arbitrators, and further research in the field. The work of the Committee was built upon earlier projects conducted by the Hague Conference of Private International Law (HCCH) as well as several academic initiatives intended to develop common standards on jurisdiction, choice of law and recognition and enforcement of judgments in intellectual property matters. The Committee also worked in collaboration with several international organizations, particularly the World Intellectual Property Organization and the Hague Conference on Private International Law. The final text of the Guidelines consists of 35 provisions, which are divided in four sections: General Provisions (Guidelines 1–2), Jurisdiction (3–18), Applicable Law (19–31) and Recognition and Enforcement of Judgments (Guidelines 32–35). Such an initiative shows the importance of coherence and mutual compatibility between the different legal systems and systems for cross-border enforcement of IP rights.[15]

What is more, in Japan, indirect infringement of copyright does not entitle copyright owners to injunctive remedies, but only to monetary remedies of damages. As a result, Japanese copyright law has not permitted injunction against indirect infringement of copyright. Such incomplete remedy against indirect infringement of copyright had not resulted in serious inconvenience until digital technology recently enabled individuals to instantly make copies of works.

Such incomplete remedy against indirect infringement of copyright also has been eased by the so-called Karaoke Doctrine that deemed certain cases of indirect infringement to be direct infringement. This concept has made injunctive remedies available for some kinds of indirect infringement of copyright and it has resulted in the unfair contradiction that even in cases where reproduction is lawful, inducement of or assistance to such lawful reproduction may be held illegal under the Karaoke Doctrine. The Japanese courts deny injunctive remedies against indirect infringement of copyright, explains the Karaoke Doctrine, and analyzes instances when inducing or assisting lawful reproduction may be held to be illegal.

In Japan, damages for copyright infringement also are awarded under the general tort theory in accordance with art. 709–724 of the Civil Code of Japan. Article 709 of the Civil Code of Japan provides that "any person who intentionally or negligently infringes another person's right or legal interest shall be liable to compensate the damage caused thereby." Article 719(2) of the Civil Code expressly sets forth

[15] T. Kono, *Cross-border Enforcement of Intellectual Property – Japanese Law and Practice* [in:] *Research Handbook on Cross-border Enforcement of Intellectual Property*, ed. P. Torreman, Chelthenham, UK – Northampton 2014; see also: *Intellectual Property and Private International Law Comparative Perspectives*, ed. T. Kono, Washington 2012; T. Kono, A. Metzger, P. Asenio, *International Law Association's Guidelines on Intellectual Property and Private International Law (Kyoto Guidelines)*, "Journal of Intellectual Property, Information Technology and Electronic Commerce Law" 2021, vol. 12, no. 1.

that tort law also applies to indirect infringement, stating that "provisions of the preceding paragraph [liability of joint tortfeasors] shall apply to any person who incited or was an accessory to the perpetrator, by deeming [him] to be one of the joint tortfeasors." In addition to the general rule for calculation of damages, art. 14 of the Copyright Act sets forth three alternatives: the volume of infringing products sold by an infringer may be considered as the volume lost by the copyright owner; the profit earned by an infringer may be presumed to be the profit lost by the copyright owner; and reasonable royalty may be claimed instead of lost profits. Injunction orders are granted only under art. 112 of the Copyright Act. Article 112(1) of the Copyright Act states: "Against those who infringe or are likely to infringe moral rights, copyright, right of publication, moral rights of performers, or neighboring rights, the authors as well as the owners of these rights may make a demand for cessation or prevention of such infringements." Court cases have construed the concept of infringement in art. 112(1) direct infringement.

Japanese courts can decline jurisdiction on the basis of the "special circumstances doctrine" if the declaration of jurisdiction is contrary to the principles of fairness as between the parties and of the expectation of a proper and speedy trial Japanese courts should decline jurisdiction[16]. This flexibility allows judges to accommodate the application of each ground of jurisdiction to the particularities of each case. However, as several Japanese authors have affirmed, it may lead to legal uncertainty. Due to this, it is claimed that to reach a balance between effective enforcement of IPR and defendant's right, a general provision establishing the "special circumstances doctrine" should be avoided.[17]

3. Contemporary IP issues

3.1. Distribution of copyrighted works

Widespread Internet use, together with the digitalization of copyrighted works, has dramatically changed the form of distribution of copyrighted works. In this situation, the Japanese Copyright Office (JCO) takes the following measures in terms of the promotion of distribution of copyrighted works: as for the management of copyright and related rights, the Law on Management Business of Copyright and Related Rights, went into effect in 2001 in response to the progress of deregulations,

[16] A. Lopez-Tarruella Martinez., *Towards a Unified System of Jurisdiction in the Field of Intellectual Property between Japan and Europe*, "IIP Bulletin" 2010, no. 10.

[17] T. Kono, *Recent Judgments in Japan on Intellectual Property Rights, Conflicts of Laws and International Jurisdiction* [in:] *IP and Private International Law: Heading for the Future*, eds. J. Drexl, A. Kur, Oxford – Portland 2005, pp. 229–230; T. Ueno, *International Jurisdiction in Intellectual Property Rights Infringement Cases*, p. 8.

regulates collective management system for copyrighted works, which is widely used for the convenience of users of copyrighted works and for increasing effectiveness of rights management. JCO supervises the collective management of copyrights. the Japanese Society for Rights of Authors, Composers and Publishers submitted a set of rules for the collection of usage fees when music is performed in music classes and in similar locations, in response to which the Society for the Protection of Music Education, which represents users, requested a ruling by the Commissioner for Cultural Affairs to defer the enforcement of the rules.

Since digital technology has made the reproduction, dissemination and adaptation of works extremely easy, the possible modes of exploitation have increased greatly in number and diversity. Applying a rigid interpretation of existing Japanese copyright law renders a very wide range of users' actions illegal, even if these uses of protected works are not detrimental to the authors. The cases show various paths taken by judges to avoid an overly strict interpretation of the law. These include relying on the "abuse of rights" provisions of the Civil Code, expanding an interpretation of individual limitation clauses, applying a principle of the presumption of tacit consent, utilising the principle of exhaustion of rights, and others.[18]

3.2. Cosplay case and YouTube case

Cosplay, which is a portmanteau of the words "costume play," describes a situation where cosplayers dress up as specific characters. Those in costumes often play the role of the character they are seeking to portray, as well as the appearance. Popular sources of cosplay include anime (Japanese computer animation) and manga (Japanese comics or graphic novels). It has to be noted that cosplay has grown increasingly popular, with some cosplayers earning large sums of money from endorsements and as social media influencers. As there is no law which protects both the cosplayer and the copyright owner, new rules to regulate potential copyright disputes between cosplayers and the owners of the relevant IP have been discussed. Currently, if a person is engaging in cosplay as a hobby and they are not making money from it, they are not breaking any laws. However, if images of that person in cosplay are shared online or sold, it could be argued that the cosplayer falls foul of Japan's copyright laws as they presently stand.[19]

Another interesting contemporary case was heard before Sendai District Court that decided that the fast movies, which are movies that have been edited to about

[18] M. Sudo, S. Newman, *Japanese copyright law reform*…, p. 11; see: *Hanako Kono v Sukora and Aoba Syuppan*, Tokyo District Court, February 23, 1996, H5(wa) No. 8372. 94; *(Ex) A v Nagaoka Syoten Inc*, Tokyo District Court, July 25, 2001, H 13 (wa) No. 56. 95; *(Ex) A v Kousa Netsugaku Kougyou Inc*, Tokyo District Court, February 27, 2006, H 17(wa) No. 1720.

[19] *Japan considers new cosplay copyright rules*, "World Intellectual Property Review", 27.01.2021, www.worldipreview.com/news/japan-considers-new-cosplay-copyright-rules-20973 (accessed: 13.02.2022).

10 minutes long without permission from the copyright holder, "could impede the development of movie culture" and "could destroy the profit structure of movies and deserve severe condemnation." According to the ruling, the convicts breached the copyright of each movie's distribution company by posting the shortened versions on YouTube with an accompanying narration describing the plot.[20]

3.3. TDM exceptions

Text and data mining (TDM) is a method of computer-assisted text and data analysis that makes full use of the vast amount of data and text generated and available in the digital world. It has to be noted that Japanese TDM exception is much broader than the DSM Directive exception expressed in art. 3 and 4. In Japan, it is permissible to exploit work, in any way and to the extent considered necessary, in any of the following cases, or in any other case in which it is not a person's purpose to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in that work; provided, however, that this does not apply if the action would unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the work or the circumstances of its exploitation:

(i) if it is done for use in testing to develop or put into practical use technology that is connected with the recording of sounds or visuals of a work or other such exploitation;
(ii) if it is done for use in data analysis (meaning the extraction, comparison, classification, or other statistical analysis of the constituent language, sounds, images, or other elemental data from a large number of works or a large volume of other such data; the same applies in art. 47-5, paragraph (1), item (ii));
(iii) if it is exploited in the course of computer data processing or otherwise exploited in a way that does not involve what is expressed in the work being perceived by the human senses (for works of computer programming, such exploitation excludes the execution of the work on a computer), beyond as set forth in the preceding two items (art. 30-4 Japanese Copyright Act).

Therefore, actions that are not taken for the enjoyment of the ideas or emotions expressed in a work do not prejudice the opportunities of the copyright owner to receive compensations from those who intend to enjoy the ideas or emotions expressed in the work and the interests of such copyright owner intended to be protected by the Copyright Act will, normally, not be prejudiced." TDM is permissible even for commercial purpose but not-computational TDM is also permissible.

[20] *Three found guilty in Japan for uploading 'fast movies'*, "The Independent Voice in Asia. The Japan Times", 17.11.2021, https://www.japantimes.co.jp/news/2021/11/17/national/crime-legal/3-guilty-japan-uploading-fast-movies/ (accessed: 21.07.2022).

4. Conclusions

Currently, the approach to the protection of intellectual property creations is changing and evolving over time depending on the philosophical concepts adopted, models of such protection, as well as political and legal doctrines. The theories of international protection of intellectual property rights, especially the problem related to the so-called principle of territorial jurisdiction, are currently under development in Japan. Among other things, this has an impact on the slowing down of transactions between Japanese and foreign business entities. Many issues, e.g. IPR violations via the Internet and satellite transmissions, are still unresolved in Japan. However, Japanese government is currently working on regulating the legal situation of AI creations. It is being designed along the lines of trademark protection rights or unfair competition law. The degree of protection will be related to the popularity of the creation. The right holder will be the entity that created the AI algorithm.[21]

Current Japanese copyright law stands in the way of innovation and is based on the civil law doctrine from the 19th century. The Japanese Copyright Act has been forced to deal with a much-expanded range of exploitation by users within the existing legal framework and paradigm. At present, there is still no provision recognising reverse engineering and parody as exceptions to copyright. However, IP law in Japan is refracted through a uniquely Japanese prism, a refraction that creates uniquely Japanese problems. With the advent of digital technology, the Japanese IP regime has been facing tremendous challenges and the Japanese IP law system will certainly need to be adapted to these changes.

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STRESZCZENIE

PRAWO WŁASNOŚCI INTELEKTUALNEJ W JAPONII – WSPÓŁCZESNE TRENDY I WYZWANIA

Celem niniejszego artykułu jest analiza prawa własności intelektualnej w Japonii pod kątem współczesnych wyzwań i trendów rozwoju, z uwzględnieniem przede wszystkim prawa autorskiego. Wśród zagadnień prawa własności intelektualnej te związane z prawem autorskim mają szczególne znaczenie, głównie ze względu na szybki rozwój nowych technologii i zagadnień związanych ze sztuczną inteligencją. W związku z tym, w odpowiedzi na transformację cyfrową mogą być potrzebne nowe strategie w zakresie własności intelektualnej, a także nowe rozwiązania prawne. W artykule omówiono również wyjątek TDM w japońskim prawie autorskim oraz wybrane orzeczenia sądowe.