Liability of intermediaries in Japanese Copyright Law

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Abstract

Under the Japanese Copyright Act (1970), there is no explicit provision or interpretation such as the “Störerhaftung” which allows a copyright holder to demand an injunction against intermediaries, while an injunction against a primary infringer is permitted under Article 112 of the Japanese Copyright Act.

Against this background, case law has held several online platforms liable for copyright infringement by expanding the substantive scope of a primary “infringer” based on the normative interpretations including the so-called “Karaoke theory”; an online video sharing platform, a P2P file sharing service and an online electronic bulletin board, while the Karaoke theory has been criticized by academics on the ground that it unreasonably expands the scope of a primary “infringer” without a clear dogmatic basis or theoretical rationale.

On the other hand, intermediaries that are not deemed primary infringers are not liable for injunctive relief in Japan, which is quite a contrast to Article 8(3) of the Information Society Directive (2001/29/EC). In fact, it has not been permitted in Japan for a copyright holder to seek a blocking injunction against an internet access provider ordering it to prevent its customers from accessing copyright-infringing websites, an injunction against a free Wi-Fi provider and an injunction against a website containing hyperlinks to copyright-infringing websites, on the ground that they cannot be deemed primary infringers even by using the Karaoke theory.

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2 Supreme Court, 15 March 1988, 42-3 Minshū 199 [Club Cat’s-Eye Case].

3 IP High Court, 8 September 2010, 2115 Hanreijin hō 102 [TV Break Case].

4 Tokyo High Court, 31 March 2005, Case No.405 (ne) of 2004 [File Rogue Case].

5 Tokyo High Court, 3 March 2005, 1893 Hanrei Jihō 126 [2-Channel Case].

6 Osaka District Court, 20 June 2013, 2218 Hanrei Jihō 112 [Rocket News 24 Case]; Tokyo District Court, 15 September 2016, Case No.17928 (wa) of 2015 [Retweet Case]. See also Supreme Court, 9 July 2012, 2166 Hanrei Jihō 140 [Modified URL Case] concerning the child pornography.
However, the situation is not common in Asian countries. For instance, the Korean Copyright Act has the provision under which a copyright holder may demand a blocking injunction against an ISP as the reasonable measure (Art.103bis) and the provision on the obligation on the special type of online service provider such as a provider of cyber-lockers to implement the necessary measures for filtering out unlawful material (Art.104). Moreover, as administrative measures, the KCC (Korea Copyright Commission) may issue a recommendation to an online service provider to take correction measures (Art.113ter), the MCST (Ministry of Culture, Sports and Tourism) Minister may order an online service provider to take correction measures (Art.133bis) and the Korea Communications Commission may issue a blocking order to an online service provider (Art.44septies of ICNA).

Why is an injunction against intermediaries not allowed in Japan?

Behind it might lie the ideas; (1) that an injunction should be rather limited compared to damages in general, since an injunction restricts the general freedom of conduct in the future, while monetary damages are just for compensation for the loss caused in the past and (2) that an injunction against intermediaries should be limited compared to against primary infringers, since while an injunction against primary infringers is an order to merely prohibit their own ongoing act, an injunction against intermediaries is normally an order to act a specific action such as blocking or filtering, which restricts the general freedom of conduct.

It is also reasonable that an injunction against intermediaries or the Störerhaftung is justified by the exclusive nature of absolute property right. However, copyright and the general freedom of conduct should be balanced as fundamental rights. The duty to act of intermediaries for the benefit of copyright holders needs to be justified.

In my view, it should be re-examined how to justify an injunction against intermediaries as an order to act a specific action continuing into the future for the benefit of copyright holders, although copyright is an absolute exclusive right.

The purpose of this presentation is to introduce the national approach regarding the liability of intermediaries in Japan\(^7\) and try to consider the possible theoretical implication for Europe.

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