



WINDS FROM JAPAN

The Licensing Executives Society Japan

Copyright Fees for Performance at Music Lessons

By Yoko Natsume*

The Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) announced their intention to collect copyright fees from music schools earlier this year.

Following the announcement, a group of concerned private music schools and organizations together established the "Association for Protecting Music Education," to oppose JASRAC's new measure of collecting copyright fees for performance of songs at music lessons. Those organizations include private music schools and music teachers/studios, such as Yamaha Music Foundation, Kawai Musical Instruments Manufacturing Co., Ltd., Piano Teachers' National Association, etc. To-date over 300 entities have joined the Association.

JASRAC, which was established in 1939, is the largest management organization for administering music copyright in Japan; and until 2001 was the sole copyright management organization in Japan.

JASRAC controls a large share of the market and has served to collect copyright fees for the use of creative works based on consignment contracts with creators.

JASRAC also liaises with copyright licensing organizations abroad, and seeks through reciprocal arrangements with such organizations protection of music copyright.

The right of performance is one of several rights granted to authors of creative works under the Japanese Copyright Law.

Article 22 of the law provides that "[t]he author shall have the exclusive right to perform his work publicly ("publicly" means for the purpose of causing a work to be seen or heard directly by the public; the same shall apply hereinafter)."

JASRAC contends that demonstrative performance of songs by teachers at music lessons should be

interpreted as constituting "public performance" under the provisions of Article 22, and copyright fees thus apply.

On June 7, 2017, JASRAC submitted to the Agency for Cultural Affairs, Government of Japan, a fee plan for collecting 2.5 % of the annual revenues of music lesson tuition from major private music schools, and announced that JASRAC will start collecting fees from January 2018 onward. Soon after that, on June 20, 2017, Yamaha Music Foundation filed a lawsuit with Tokyo District Court, requesting a declaratory judgement to confirm non-existence of any obligation to pay copyright fees to JASRAC.

It is expected that it will take the court around three years to hand down a judgment. In the meantime, the Association for Protecting Music Education collected the signatures of over 557,000 people and submitted the same in the form of a petition to the Agency for Cultural Affairs in July, requesting them not to commence collection of fees, which is due to start in January, 2018.

There are two main issues here: firstly, whether the right of performance extends to performance of songs at music schools; and secondly, whether JASRAC's new measure will adversely affect the development of music education.

A judicial precedent exists that was handed down by the Nagoya High Court on February 7, 2003, in which it was ruled that playing music at social dance instruction institutes constitutes "public performance" under Article 22. The defendant, i.e., the dance school, argued that reproduction performance at social dance instruction institutes is merely instructional use for dance, and since such instruction is provided to specific persons who are under contract with the defendant, the performance does not constitute "public performance" under Article 22. However, the court held that a customer without any particular prior relationship with the dance school can join the school,

albeit that membership may be constrained by a number of available dance teachers and a size of the facilities.

Furthermore, it was held that such reproduction of music necessary for social dance instruction is performed in a systematic and continuous manner, and therefore, such reproduction performance should be considered as being directed to a non-specific and large number of people, in short, to the public.

The dance school also argued that their revenue from the class tuition is remuneration for dance instruction, and not for reproduction performance, and therefore, such reproduction performance is "for non-profit purposes and without charging any fees" under Article 38 of the Copyright Law. Article 38(1) provides "[i]t shall be permissible to publicly perform, present and recite a work already made public, for non-profit-making purposes and without charging any fees ("fees" includes any kind of charge to be imposed on the offering and the making available of a work to the public; the same shall apply hereinafter in this Article) to an audience or spectators; provided, however, that the performers or reciters concerned are not paid any remuneration for such performance, presentation or recitation." The court, however, did not find this argument persuasive, since under the provision of Article 38 use of creative works is permitted only when such use is not tied to any profit making either directly or indirectly.

Because reproducing (performing) creative music works is necessary for dance instruction, the court rejected the argument that use of creative music works is for a non-profit making purpose and that remuneration is for class tuition, and not for reproduction performance.

Private music schools and private teachers in Japan play an important role in music education for children. From this viewpoint, collection of fees from those who serve to teach music performance to children, i.e., nurturing musicians for the next era, does appear unacceptable to a great many people. In fact, not a few musicians have expressed their concerns about JASRAC's announcement. Not surprisingly, they are willing to permit free use of their own music works for educational purposes.

The Copyright Law of Japan provides provisions for limiting copyright for educational purposes (Articles 33 to 36). For example, Article 35(1) stipulates that

"[a] person who is in charge of teaching and those who are taught in a school or other educational institutions (except those institutions established for profit-making) may reproduce a work" "if and to the extent deemed necessary for the purpose of use in the course of lessons." Such reproduction (duplication) is also permitted for school textbooks, examination questions, etc., under certain conditions. However, there is no such provision for permitting performance of pieces of musical works for educational purposes.

The Copyright Law was inaugurated in 1970, and since then, usage of creative works has diversified, and especially with the recent proliferation of the Internet and accompanying evolution of information communication technologies (ICT), musical works are used in various new ways that were not anticipated when the Copyright Law came into force. Unpermitted and unpaid usage of creative works has recently increased exponentially, and should no longer be overlooked.

A management organization, such as JASRAC, makes steady efforts to identify such illegal usage and to start collecting copyright fees on behalf of creators on consignment.

The Copyright Law imposes limitations on copyright by listing types of usages for which copyright is limited. However, merely providing a list of limitations may no longer be viable in nurturing musicians, dance performers, etc., for the next era since new ways in which musical works are used arise as the ICT evolves. In developed countries abroad on the one hand there are provided not only individual limitations but also general limitations, such as those for ensuring fair use, and for promoting culture, and on the other hand measures have been taken to protect copyright under varying combinations of statutory licenses, private licenses, agreements between involved parties, and so forth.

The purpose of the Copyright Law is "to contribute to the development of culture" while "securing the protection of the rights of authors" (Article 1). It is apparent that future copyright protection should be based on far broader ground than that of a conflict between JASRAC versus private music schools.

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\* *Editor / Patent Attorney, OHCHI International IP*

# IP News from Japan

By Shoichi Okuyama, Ph.D.\*

## New Arbitration Clauses in Patent Act

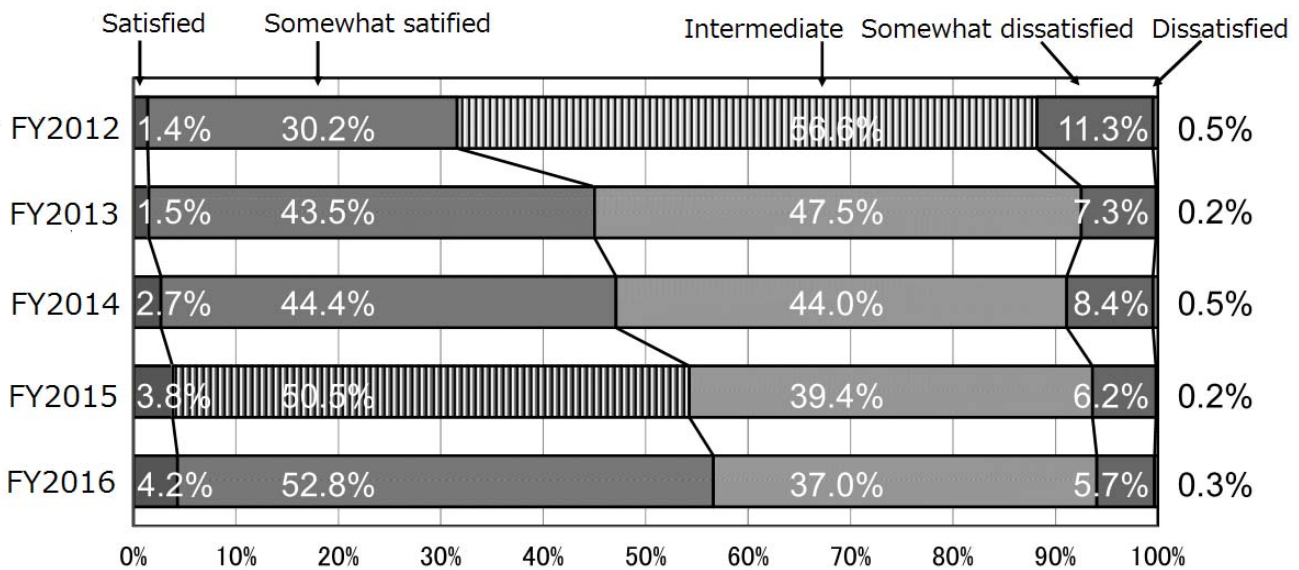
Recently, the Japan Patent Office (JPO) made public plans for new arbitration provisions in the Patent Act for standard essential patents. Under the plan, if an interested party files a request, the JPO will mobilize an expert committee to determine a reasonable royalty. Details have yet to be disclosed. The Intellectual Property Strategic Program 2017 finalized under the Prime Minister on May 16, 2017, has only one paragraph to this effect. Although the JPO said that this would provide an opportunity for an alternative and inexpensive resolution for small and medium companies that do not have sufficient financial resources to file suit at a court, this writer is not certain to whom the new scheme is directed and is afraid that this may merely result in another category of compulsory licenses.

The current Japanese Patent Act has several provisions for compulsory licenses, but since the Act was established in 1959, no compulsory licenses have been granted.

## Applicant Satisfaction Improves

In March 2017, the JPO published a FY2016 survey report of applicant satisfaction for a variety of aspects of substantive patent examination. The survey included Japanese and non-Japanese applicants.

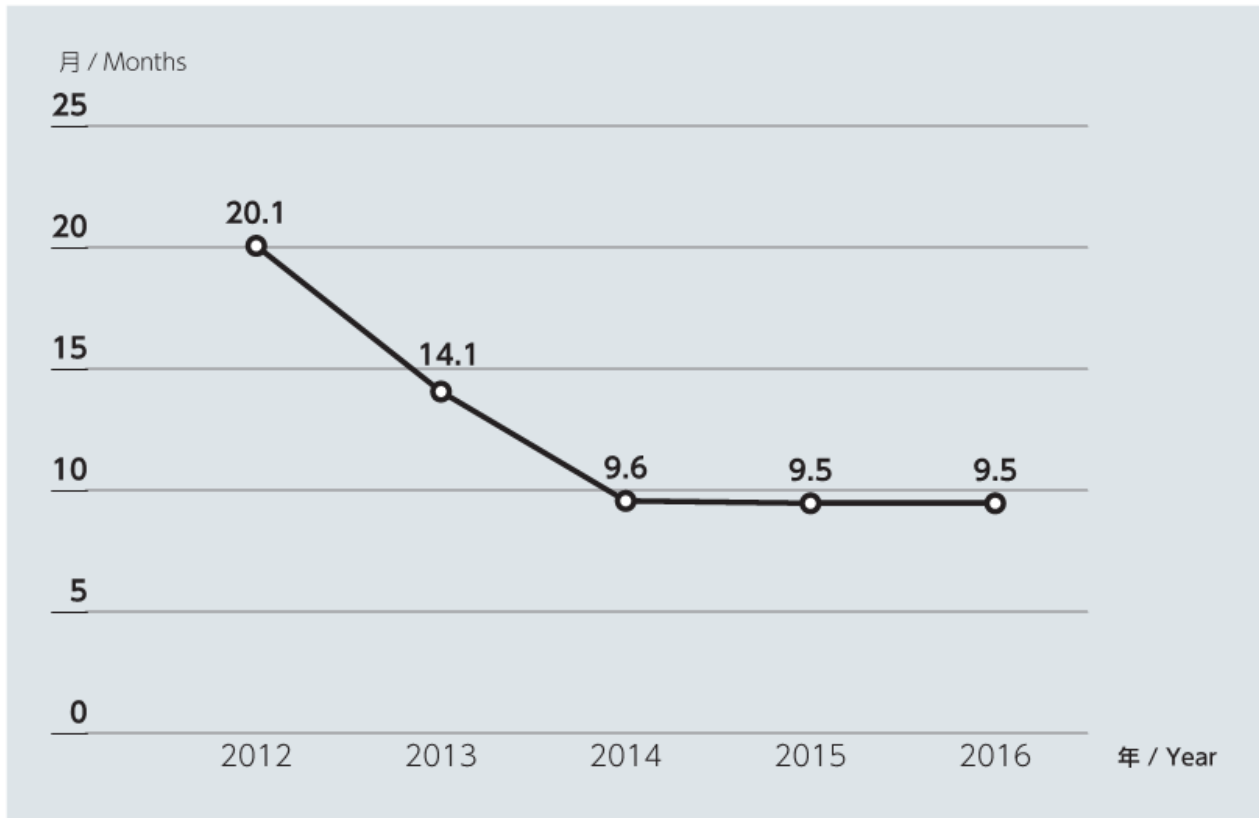
Since 2012, when the JPO first conducted this survey, the overall results have consistently improved.



**Overall Satisfaction Rating of Patent Examination on non-PCT Applications**

Also, the JPO published its “2017 Status Report” in Japanese and English. Although the 320,000 patent applications in total filed in 2016 has been relatively constant for years, examination is now much faster compared to four or five years ago. In 2016, the first office action issued in as little as 9.5 months after the request for examination was filed.

Chart 2-1-1 : Changes in the FA Pendency (CY annual average) of Patent Examination



(Notes)

The FA Pendency (CY annual average) of patent examination is a calendar year annual average of the period from filing a request for examination to issuing the first notice of an examination result (which is mainly a notice of patent grant or reasons for refusal for a patent application) by an examiner to the applicant.

**New JPO Commissioner and Vice Commissioner**

On July 5, 2017, Naoko Munakata became the Commissioner of the Japan Patent Office. Ms. Munakata is the first female JPO commissioner. She was not well known to the IP community but has been a strong proponent of the Trans-Pacific Partnership (TPP) at the Ministry of Economy, Trade and Industry (METI). In addition, Mr. Kunihiko Shimano assumed the top examiner position as Vice Commissioner

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* Editor / Patent Attorney, Okuyama & Sasajima

LES Japan 40th Annual Summer Conference 2017 in Kobe

By Mitsuo Kariya*

The LES Japan 40th Annual Summer Conference 2017 was held on 14th and 15th of July 2017 in Kobe city, Hyogo prefecture, which is known as one of the largest port cities in Japan. The infrastructure of Kobe city was severely damaged by the earthquake in 1995 however it is now completely recovered. The meeting venue was the Kobe Convention Center located in Port Island, an artificial island developed in 1981 to form a waterfront city.

The Conference started with opening remarks by Mr. Kazuhiro Kobayashi (photo 1), Chair of the Organizing Committee and Ms. Junko Sugimura (photo 2), President of LES Japan. Mr. Kobayashi introduced various good aspects of Kobe and welcomed the attendees to his hometown. Ms. Sugimura discussed her expectation for LES Japan's contributions to "Sailing for New Knowledge", the theme of the conference.



photo 1

Opening Remarks by Mr. Kobayashi



photo 2

Speech by Ms. Sugimura

The first program of the conference was a keynote speech, "Retinal Cell Treatment using iPS Cells" by Dr. Masayo Takahashi (photo 3), Project Leader,

Laboratory for Regeneration Riken Center for Developmental Biology.

Dr. Takahashi discussed areas of advanced medical care, which are now receiving significant interest. She explained various issues and difficulties which are not known by ordinary people and are often misunderstood. It was a great opportunity for the attendees to learn about her extensive efforts in academic research, safe surgery, contributions to laws and regulations and employment support to sight-restricted people.



photo 3

Speech by Dr. Takahashi

The second program was a guest speech, "Sake compared with Wine - a sense of miracle distance - similar but different characteristics" by Mr. Masakazu Minatomoto (photo 4), General Manager/Sommelier, Kobe-Shu-Shin-Kan, a sake brewery established in 1751 and known by the brand "Fukujyu" which has been served at the Nobel Prize award ceremony official events since 2008. Mr. Minatomoto discussed a comparison between sake made from rice and wine made from grapes. The audiences were impressed with his deep knowledge in both sake and wine and the passion to promote the true beauty of sake.



photo 4

Speech by Mr. Minatomoto

The banquet started with a congratulatory speech by Kobe City Mayor, Mr. Kizou Hisamoto (photo 5) and a toast to a drink by Mr. Peter K. Hess (photo 6), President of LES International. The participants tasted the sake “Fukuju.” We also received guests of honor, Ms. Audrey SN Yap, Vice-President of LESI International and Mr. Chiew Yu Sarn, Co-Chair of LESI Asia-Pacific committee.



photo 5
Speech by Mr. Hisamoto



photo 6
A Toast by Mr. Hess

All participants enjoyed precious moments for chatting and networking with selected drinks and a good combination of local foods and international foods (photos 7&8).



Photo 7
Kagami-biraki (a sake barrel opening)
(From the left, Mr. Hess, Ms. Sugimura, Mr. Hisamoto and Ms. Yap)



photo 8
Guest Speakers at Banquet
(From the left, Ms. Sugimura, Mr. Fujiwara, Mr. Minatomoto, Dr. Takahashi and Dr. Nakatomi)

In the middle of the banquet, Mr. Takeharu Mibuchi and Mr. Masahiro Ezaki were commended for their numerous long-term contributions to the society (photo 9).



photo 9
Award Ceremony
(Award to Mr. Mibuchi)

The participants also enjoyed a performance by Takarazuka Review musical actresses, Ms. Masako Kusabue and Ms. Miki Asazono (photo 10).



photo 10
Performance

On the second day, four workshops (photo 11) were organized by working groups of LES Japan. Latest IP topics were discussed by: 1) US Issues WG; 2) Healthcare WG; 3) Branding WG; and 4) Asian Issues WG.



photo 11
Workshop

After the workshops, a panel discussion (photo 12) was held based on the theme of “Rolls and Effort of Intellectual Property Organization for New Business Creation” by Mr. Keisuke Yuzawa, General Manager of Intellectual Property Department, Kobe Steel, Ltd.; Mr. Yuichi Shimogaki, General Manager of Intellectual Property Department, Research and Development Division, TOA Corporation; and Mr. Koji Saito, General Manager of Intellectual Property Department, Global Legal & Compliance Division, ASICS Corporation.

The panelists discussed a shift of their intellectual property organization’s rolls and efforts from patent

and trademark prosecutions to IP support at the early stage of new business creation. The discussion was facilitated by Mr. Shoei Imai, General Manager of Intellectual Property Headquarters, Fujifilm Corporation. The participants were inspired by active discussions among the experienced IP managers.



photo 12
Panel discussion

The conference logo of the 2019 LES International conference in Yokohama was introduced to the audiences and a prize was given to the winner of the logo competition by art college students.



photo 13
LES 2019 Conference Logo Creator

The conference concluded successfully with a closing speech by Mr. Tsuyoshi Dai, Chair of the Organizing Committee for the next year announcing the 2018 LES Japan Annual Summer Conference in Sapporo city, Hokkaido prefecture on July 6 and 7, 2018.

We look forward to seeing you in Sapporo next year.

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\*Editor/Licensing Vice President at GE Japan Inc.,  
Patent Attorney

## Editors' Note

This issue includes articles relating to Copyright Fees for Performance at Music Lessons; "IP News from Japan" and LES Japan 40th Annual Summer Conference 2017 in Kobe.

Thank you for your support of "*Winds from Japan.*" This newsletter will continue to provide you with useful information on activities at LES Japan and up-to-date information on IP and licensing activities in Japan.

If you would like to refer to any back issues of our newsletters, you can access them via the following URL: <http://www.lesj.org>

(MK)

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