

# Intellectual Property and Regulation of New Technologies

## *A Case of Television on Demand in Japan*

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### *Abstract*

In the recent *Rokuraku* case, the Japanese Intellectual Property High Court found that a service provider did not infringe any exclusive rights of copyright or neighboring right holders when the provider stored for its customers devices which allowed them to record and transmit television broadcasts via the Internet for their private non-commercial purposes. At first glance heavily influenced by the recent trends in the strengthening of copyright protection worldwide in order to protect the interests of copyright and neighboring right holders, it might seem that the court erred in the case. The criticism of the court's ruling is even stronger when similar cases decided in Japan and other jurisdictions, as well as possible supporting justifications, are taken into account.

This Article, however, argues that the solution adopted by the court which allows for the provision of such services is more beneficial to society in the long run than any other possible solution which would partially or completely restrain such activities. To strike a just and fair balance between the interests of all affected stakeholders, *i.e.* content providers, technology and service providers and consumers, all of the social and economic implications of the possible solutions in the case must be carefully taken into account. By examining three possible scenarios which strike a balance between the interests of affected stakeholders, this Article shows the soundness and appropriateness of the approach adopted by the Intellectual Property High Court in the case. In the end, any other decision by the court would have brought fewer benefits and imposed more costs to society as a whole.

Many of the social costs borne by stakeholders who are not parties to the respective lawsuits can be easily overlooked by courts in copyright infringement cases involving the provision of new dual-use technologies or online services. This Article therefore concludes that the courts should be cautious when they are asked by plaintiffs to extend the scope of copyright liability and to adjust national copyright laws to new threats to the private interests of copyright and neighboring right holders brought about by the introduction of new technologies and business models.

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## INTRODUCTION

New digital and networking technologies are seen by copyright<sup>1</sup> industries as both a contemporary plague and panacea for their interests at the same time. On the one side, the technologies such as peer-to-peer networking technology allow their final consumers to exploit copyrighted works<sup>2</sup> in new ways and dimensions. This trend is seen by the major corporate copyright holders with severe fear and dislike.<sup>3</sup> On the other, the digital technologies empower copyright industries to exercise far-reaching control over the usage and exploitation of their huge portfolios of copyrighted works.<sup>4</sup> The various technological protection and digital rights management measures can considerably restrict the numerous ways in which individual consumers enjoy copyrighted works. Traditionally these practices were tolerated due to the then-existing level of the progress of technological protection measures.<sup>5</sup> The clashes and tensions brought by the introduction of individual technologies empowering one or the other side (*i.e.* consumers or corporate copyright holders) to control the usage and exploitation of copyrighted works by their consumers have already brought heated discussions at various levels of society;<sup>6</sup> changes of, and amendments to, international<sup>7</sup> and national copyright laws;<sup>8</sup> and many court rulings causing even new controversies.<sup>9</sup>

<sup>1</sup> For the purposes of this Article, the term “copyright” is used in a broad sense as used in common law countries, where it covers the economic rights of authors, performers, phonogram producers and broadcasting organizations. Accordingly, it covers the exclusive economic rights of author’s rights and neighboring rights as classified in civil law countries. In places where the analysis exclusively deals with neighboring rights, the term “neighboring rights” is used to make clear that it concerns only neighboring rights.

<sup>2</sup> For the purposes of this Article, the term “copyrighted works” is used in a broad sense to cover any subject matter of copyright or neighboring rights. At the places where the analysis exclusively deals with a specific subject matter of copyright or neighboring rights, such as “artistic work”, “sound recording” or “television broadcast”, the respective term is used to make clear that it concerns only that particular subject matter.

<sup>3</sup> See, e.g., Recording Industry Association of America, *Piracy Online*, [http://www.riaa.com/physicalpiracy.php?content\\_selector=piracy\\_details\\_online](http://www.riaa.com/physicalpiracy.php?content_selector=piracy_details_online) (last visited 10 Apr. 2009). The threats caused by peer-to-peer file sharing has recently led to the attempts to introduce so-called three-strikes rule; see, e.g., The Register, *French Pass “Three Strikes” File-Sharing Law*, available at [http://www.theregister.co.uk/2009/04/03/french\\_three\\_strikes/](http://www.theregister.co.uk/2009/04/03/french_three_strikes/) (last visited 10 Apr. 2009); Fox News, *Three Strike and You’re Offline: Music Industry, ISPs May Cut Internet Access for File-Sharers* (written by Liza Porteus Viana), available at [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,510283,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,510283,00.html) (last visited 10 Apr. 2009); Best Security Tips, *Virgin Media Slaps P2P with Three Strike Rule*, available at <http://www.bestsecuritytips.com/news+article.storyid+543.htm> (last visited 10 Apr. 2009).

<sup>4</sup> See, e.g., Pamela Samuelson and Jason Schultz, *Should Copyright Owners Have to Give Notice of Their Use of Technological Protection Measures?*, 6 J. TELECOM. & HIGH TECH. L. 41 (2007); Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003); Julie E. Cohen and Dan L. Burk, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001).

<sup>5</sup> See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Lydia Pallas Loren, *Redifining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1 (1997); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B. U. L. REV. 975 (2002).

<sup>6</sup> See, e.g., Fierce Telecom, *EU Can’t Pass 3-Strike Rule for Illegal Downloaders* (written by Dough Mohney), available at <http://www.fiercetelecom.com/story/eu-cant-pass-3-strike-rule-illegal-downloaders/2009-03->

The aim of this Article is to look at the most recent decisions of Japanese courts dealing with technologies that broaden the ways and possibilities with which their consumers can enjoy copyrighted works. The conventional perception of Japan is that it is a country with highly developed industries concentrating on the production of new technologies and innovations.<sup>10</sup> At the same time, similarly to many developed countries in other regions, Japanese companies also heavily rely on their intellectual property assets and their protection. Hence, some might expect that new reproduction and distribution technologies have already raised many controversial cases where the Japanese courts were asked to decide on the compatibility of new reproduction and dissemination technologies with the high level of protecting copyrighted works, the use and exploitation of which are significantly broadened by such technologies. In actuality, however, the situation is completely opposite. Even though the Japanese courts have not directly faced such controversy yet, they have been quite regularly asked to assess various uses of new reproduction and dissemination technologies as an indispensable part of commercial activities built on the exploitation of copyrighted works by consumers during the last few decades.<sup>11</sup>

This Article scrutinizes the most recent decision of the Japanese Intellectual Property High Court (知的財産高等裁判所) in the *Rokuraku* case where the court declined to extend the scope of copyright liability to increase the level of protection afforded to the interests of broadcasting companies against the providers of services based on time- and space-shifting of terrestrially broadcasted television programs by individual consumers.<sup>12</sup> Although some might argue that the court's decision disregards the "legitimate" interests of copyright holders, *i.e.* the Japanese main television broadcasting companies, this Article shows that the approach adopted by the court is the most efficient solution which it could adopt under the given circumstances. This solution was achieved by fully reflecting on the careful balance to be

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27?utm\_medium=rss&utm\_source=rss&cmp-id=OTC-RSS-FT0 (last visited 10 Apr. 2009); MTV News, *RIAA Drops Piracy Suit Against 66-Year-Old Grandmother: Her Computer Is Incapable of Accessing P2P Network She's Accused of Using* (written by Joe D.'Angelo), available at <http://www.mtv.com/news/articles/1479303/20030925/index.jhtml> (last visited 10 Apr. 2009); Betanews, *RIAA Sues Deceased Grandmother* (written by Nate Mook), available at <http://www.betanews.com/article/RIAA-Sues-Deceased-Grandmother/1107532260> (last visited 10 Apr. 2009).

<sup>7</sup> See, e.g., WIPO Copyright Treaty, 20 Dec. 1996, 828 U.N.T.S. 3, available at [http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf) (last visited 10 Apr. 2009) [hereinafter "WCT"]; WIPO Performances and Phonograms Treaty, 20 Dec. 1996, 36 I.L.M. 76 (1997), available at [http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs\\_wo034.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf) (last visited 10 Apr. 2009) [hereinafter "WPPT"].

<sup>8</sup> See, e.g., Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2863 (1998) (codified in scattered sections of 17 U.S.C.); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22 Jun. 2001.

<sup>9</sup> See, e.g., *Vereniging Buma and Stichting Stemra v. KaZaA B.V.* (Supreme Court, 19 Dec. 2003); *MGM Studios v. Grokster, Ltd.*, 2005 U.S. LEXIS 5212 (27 Jun. 2005); *Universal Music Australia Pty. Ltd. v. Shaman License Holdings Ltd.* [2005] F.C.A. 1242.

<sup>10</sup> See, e.g., William Lazonick, *The Innovative Firm*, in JAN FAGERBERG, DAVID C. MOWERY AND RICHARD R. NELSON (eds.), *THE OXFORD HANDBOOK OF INNOVATION* 29, 41-45 (OUP 2006) (describing the Japanese organization of innovative process).

<sup>11</sup> For an excellent analysis of concerned Japanese case law, see Yoshiyuki Tamura, 著作権の間接侵害 (*Indirect Copyright Infringement*), in DAINI TOKYO BAR ASSOCIATION (ed.), 著作権法の新論点 (NEW ISSUES IN COPYRIGHT LAW) 259 (Shojihomu, 2008); Katsumi Yoshida, 著作権の「間接侵害」と差止請求 (*"Indirect Infringement" of Copyright and Injunction Claim*), in YOSHIYUKI TAMURA (ed.), 新世代知的財産法 政策学の創成 (ESTABLISHING A NEW GENERATION OF INTELLECTUAL PROPERTY LAW AND POLICY THEORY) 253 (Yuhikaku, 2008); Yoshio Shiomi, 著作権侵害における「間接侵害」の法理 (*"Indirect Infringement" Doctrine in Copyright Infringement*), COPYRIGHT, No. 9, 2 (2007).

<sup>12</sup> *Rokuraku* case, H20-NE-10055 (Intellectual Property High Court, 27 Jan. 2009).

struck between the contravening interests of broadcasting companies, technology and service providers and customers in Japan. In this way, the court's decision properly and adequately fits the legal, social and technological environment so characteristic of Japan.

Section One enquires into the provision of commercial services based on the private use and exploitation of copyrighted works by consumers for their private non-commercial purposes. It starts by outlining the Intellectual Property High Court's ruling in the *Rokuraku* case, where the court found that the provider of the services in question did not infringe nor present any risk of infringing copyrights or neighboring rights held by the Japanese main television broadcasting companies. The provider stored and maintained devices owned by its customers, who were thus allowed to record television broadcasts and to transmit live or recorded television broadcasts via the Internet to any place where they could watch it. At first sight, some may argue that it is quite obvious that the service provider has built its business model on the exploitation of copyrighted works by its customers for their private use. She may deem the court's ruling an incorrect assessment of the given case and a too narrow interpretation of Japanese copyright law. The careful examination of other recent cases involving similar services clearly supports such a view by showing that the court had enough room in the *Rokuraku* case to find the service provider was infringing or presenting a risk of infringing any copyright or neighboring right under the *Japanese Copyright Act of 1970*.<sup>13</sup> The argument in favor of the view criticizing the court's ruling for its incorrect assessment of the case is even stronger when similar or analogous cases decided in several foreign jurisdictions are taken into account. In those cases, the courts usually distinguished between the private and public sphere in order to assess whether the exploitation of copyrighted works by consumers for their private non-commercial purposes was within the scope of commercial activities that can still be considered as copyright non-infringing uses. The private/public distinction allowed courts in those jurisdictions to find services based on such exploitation of copyrighted works by their consumers constituted an infringement on other persons' copyrights or neighboring rights.

Section Two examines individual justifications for the imposition of copyright liability on the providers of such commercial services. Although several types of justifications can be applied to the imposition of copyright liability on the service provider in the *Rokuraku* case, the analysis is limited to those justifying the imposition of indirect copyright liability based on the concept of control over the acts of copyright infringements committed by customers. The reason for such limitation stems from the character of contemporary intellectual property rules, including copyright rules, which have slowly but steadily switched from their original unfair competition rule character towards the pure property rule one. This process still continues, since it is self-enforcing, especially, under the recent developments in international and national copyright laws worldwide. The more the copyrights and neighboring rights are understood as property rights, the more it becomes necessary to adapt copyright laws to keep pace with new technological developments which often allow for the designing of newer and more advanced business models based on numerous ways of exploiting copyrighted works by consumers. The changes of, and amendments to, copyright law have thus reinforced its property rule character even more. To provide copyright holders with sufficient protection against diverse forms of commercial activities built upon direct or indirect exploitation of their intellectual creative assets, the contemporary copyright rules understood as property rules can face only two options. They can be either amended by legislatures to directly apply to such new business models, or broadly interpreted by courts to catch numerous entities commercially profiting from such activities under direct or indirect liability concepts. As the former approach requires quite frequent amendments to statutory laws, the latter currently

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<sup>13</sup> Law No. 48 of 6 May 1970, as amended (著作権法) [hereinafter "Japanese Copyright Act"].

dominates in many countries. However, the main shortcoming of the second option is that it exposes to copyright liability the uses of new dual-use technologies or online services which are generally considered by millions and millions of their individual users to be normal and lawful.

It might seem from the analyses in Sections One and Two—especially due to the recent trends in the strengthening of copyright protection on the international and national levels—that the Intellectual Property High Court erred in the *Rokuraku* case for the second time after another similar ruling in *Maneki-TV* case.<sup>14</sup> Section Three, however, attempts to shed light on the decisions in both cases by scrutinizing three possible scenarios which strike a balance between all concerned stakeholders, *i.e.* broadcasting companies, service providers and consumers. This scrutiny aims to point out and to carefully examine the advantages and flaws of all three scenarios, including their legal, economic and social impacts on the interests of all affected stakeholders and other consequences. By comparing individual solutions available for the Intellectual Property High Court in both cases, this Article shows that the adopted solution was the best option under the given circumstances. In the long run, this solution will bring more benefits and less harm to copyright holders, technology and service providers and consumers than any other solution which the court could adopt.

Based upon the analysis of the *Rokuraku* case, this Article demonstrates that the courts must be very cautious when they are asked by plaintiffs to extend the scope of copyright liability in cases involving the provision of new dual-use technologies and online services. This is particularly the case in light of the fact that some important social costs are borne by stakeholders who are not parties to the lawsuit in question and those costs can, in those cases, be easily overlooked by courts, as shall be shown in Section Three.

## 1. PROVISION OF SERVICES BASED ON PRIVATE USE OF COPYRIGHTED WORKS

Recently, several cases dealing with services based on private uses of copyrighted works by consumers have attracted the attention of copyright holders, courts and the public in Japan. The services in question were based either on private copying or private transmission of terrestrially broadcasted television programs conducted by service consumers. In the most recent *Rokuraku* case, the Japanese Intellectual Property High Court found that the provider of such services does not infringe any copyright or neighboring right. At first glance it might seem that the court erred by finding a business model based directly on the exploitation of copyrighted works as not infringing any copyright or neighboring right. An unhurried examination of several aspects of, and circumstances surrounding, the court's ruling must however be taken in order to buttress or reject criticism of this kind.

For an adequate assessment of the court's decision, it is necessary to entirely comprehend its "path dependency"<sup>15</sup> in rulings of Japanese courts in previous similar cases. In addition to path dependency, another issue essential to evaluate the decision's adequacy is whether the copying and transmitting of terrestrially broadcasted television programs conducted by individuals for their non-commercial purposes upon which the questioned business model was built can still be considered as private in order to shield such service providers from any indirect copyright liability. To shed more light on the issue, it is worth

<sup>14</sup> *Maneki-TV* case, HANREI JIHOU, No. 1945, 95 (Tokyo District Court, 4 Aug. 2006); *Maneki-TV* case, H18-RA-10009 (Intellectual Property High Court, 22 Dec. 2006).

<sup>15</sup> See generally Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 165 (Constable and Company, 1920); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 92-104 (1990); John O. Haley, *Law and Culture in China and Japan: A Framework for Analysis*, 27 MICH. J. INT'L L. 895 (2006).

examining the situation in other jurisdictions where courts often emphasize the importance of the distinction between the private and public sphere under similar or analogous circumstances when they stretch the concept of copyright liability to embrace commercial activities of service providers similar or analogous to those in the *Rokuraku* case.

### *1.1. Rokuraku Case*

The service provider in the *Rokuraku* case allowed its customers to watch and record television broadcasts anywhere and at any time via the Internet connection. At first sight, the provided service seems to be the conventional streaming of television programs publicly broadcasted terrestrially within Japan via the Internet. Putting the actual technological organization of the *Rokuraku II* business model aside, the service provider's commercial activities could be easily judged a clear infringement of the right of communication to the public guaranteed by Article 8 of *1996 WIPO Copyright Treaty*<sup>16</sup> or particular rights to make available either fixed performances or phonograms guaranteed by Articles 10 and 14 of *1996 WIPO Performances and Phonograms Treaty*.<sup>17</sup> Both types of rights correspond to the rights of public transmission (公衆送信権) under Article 23 and the rights of making transmittable (送信可能化権) performances, phonograms and television broadcast under Articles 92*bis*, 96*bis* and 99*bis* of Japanese Copyright Act.

Nevertheless, the actual technical operation of the *Rokuraku II* system prevents so straightforward an application of Japanese copyright law. Its design brings several controversies which have to be faced by the current Japanese copyright law. All of them are related to the main problem of whether the activities of its provider and operator actually infringe directly or indirectly any exclusive right granted to copyright or neighboring right holders under the Japanese Copyright Act.

The *Rokuraku II* service provider developed and manufactured specific technological equipment composed of two exclusively connected units allowing communication between both of them. The first, the so-called mother *Rokuraku* unit (親機) can receive conventional television broadcasts and convert it into one which can be transmitted via the Internet. One of the mother unit's utilities also allows the recording of television broadcasts and streaming the recorded copy upon request from the second, so-called daughter *Rokuraku* unit (子機) via the Internet. The latter thus permits its holder to remotely control the former and to receive the transmitted television broadcast from it. As the transmitted television broadcast can be received only by a single daughter unit paired to a particular mother unit, it is generally considered that when an individual uses such technology<sup>18</sup> for private non-commercial

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<sup>16</sup> WCT, *supra* note 7, art. 8 (“Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”).

<sup>17</sup> WPPT, *supra* note 7, art. 10 (“Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”) and art. 14 (“Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”).

<sup>18</sup> Similar devices are currently marketed by numerous producers worldwide, but this aspect will be put aside for now in order to be examined in more details later; *see* text accompanying notes 30-31.

purposes, the respective exploitation of the television broadcast is a copyright non-infringing use of broadcasted television programs.<sup>19</sup>

In addition to marketing the *Rokuraku II* devices, their manufacturer provided its customers with hosting services. It stored and maintained the mother units owned by its customers within its premises. Furthermore, it made the stored devices completely functional. It arranged for a television broadcasting signal of sufficient quality to be received by its antenna and transmitted to the units stored in its premises, and the signal from them could then be transmitted through its server via the Internet to the corresponding daughter units in its consumers' possessions automatically upon request. The persons who actually directly controlled the mother units located in the service provider's premises were its individual customers. They could do so remotely. The role of service provider was just to ensure that the stored devices functioned properly in order to allow its customer to fully benefit from the provided services.

The plaintiffs in the *Rokuraku* case, the Japanese main television broadcasting companies, argued that the defendant created an environment for making reproductions of television broadcasts, and that it received an economic benefit from the exploitation of television programs by its customers. They pointed out several aspects of the defendant's commercial activities supporting their claims, such as the aim of its service, control and maintenance over the equipment and control over communication between mother and daughter devices.

The Intellectual Property High Court, however, rejected all of those claims.<sup>20</sup> It came to the conclusion that the copies, the results of television broadcast recording, were made by individual consumers of the *Rokuraku II* services and therefore were covered by private copying exceptions under Articles 30(1) and 102(1) of Japanese Copyright Act.<sup>21</sup> The defendant only created an environment and other necessary conditions for such legal activities.<sup>22</sup> The court discarded the plaintiffs' argument that they would be harmed by the defendant's activities. It considered the increasing and accumulating number of *Rokuraku II* customers as having no impact on the legality of activities conducted by individual consumers. In this finding, the importance of technological progress which enables new ways of using copyrighted works was also taken expressly into account.<sup>23</sup>

In addition, the court examined whether the defendant made any direct reproduction of television programs. The court did not find enough evidence to prove that the defendant had made any reproduction which could be considered as an infringement of copyright or neighboring rights. Finally, the court scrutinized the involvement of the defendant in organizing a system for committing copyright infringement. In one of the previous karaoke cases,<sup>24</sup> the Japanese Supreme Court (最高裁判所) found a karaoke bar liable for copyright infringement due to the level and scope of its involvement in public performances done by its customers. Applying this analysis to the circumstances in the *Rokuraku* case, the Intellectual Property High Court did not find any similar involvement of the service provider in the case.<sup>25</sup>

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<sup>19</sup> Japanese Copyright Act, *supra* note 13, art. 30(1), does not expressly use the word "non-commercial", but it refers only to "personal use or family use or other equivalent uses within limited scope". However, the limited scope of the private copying exception under Japanese Copyright Act, *supra* note 13, art. 30(1), implies that such reproduction should not be used in a broader scope for commercial purposes.

<sup>20</sup> *Rokuraku* case, *supra* note 12, at 31.

<sup>21</sup> *Id.* at 31-32.

<sup>22</sup> *Id.* at 32.

<sup>23</sup> *Id.*

<sup>24</sup> *Club Cat's Eye* case, 42(3) MINSHU 199 (Supreme Court, 15 Mar. 1988).

<sup>25</sup> *Rokuraku* case, *supra* note 12, at 33.

To make some preliminary comments before taking a closer look at the case, it should be pointed out that the court's ruling is based on a very restrictive literal interpretation of Japanese copyright law, especially the respective provisions on private copying exceptions. The court did not give enough emphasis to the fact that the service provider clearly built its business on the exploitation of copyrighted works, *i.e.* the recording and streaming of television broadcasts for commercial purposes. It is hardly convincing that the service provider receives no direct or indirect financial benefit from using television programs and broadcasts by its customers. Nonetheless, the question is whether copyright law should restrain a service provider from designing its business model on the exploitation of copyrighted works by its costumers for their private non-commercial purposes. To unravel this conundrum and thus to examine the adequacy of the Intellectual Property High Court's ruling in the *Rokuraku* case step by step, the following enquiry examines whether the court had enough room to find the service provider liable for copyright or any other neighboring right infringement under the current Japanese Copyright Act.

### *1.2. Rokuraku Case in a View of Recent Cases in Japan*

Within the last decade, several cases have been brought before Japanese courts to decide on whether diverse services based upon the exploitation of terrestrially broadcasted television programs by consumers for private purposes were infringing any exclusive right of the copyright or neighboring right holders in question. Individual cases vary, to some extent, on the actual scope of service provider's involvement in the recording or further transmitting of television broadcasts. In examining whether the Intellectual Property High Court had enough room to find that the defendant in the *Rokuraku* case infringed or created an environment for infringing any copyright or neighboring right, the following analysis commences with cases where the factual circumstances provided Japanese courts with sufficient foundation to find the concerned service providers liable for copyright infringement due to the technological design of provided equipment and services.

In the *Yoridorimidori* case,<sup>26</sup> the defendant was a company producing special servers which allowed time- and space-shifting of broadcasted television programs by individual clients connected to them. The servers were designed for, and sold to, real estate developers who placed them into the common premises of residential buildings. Together with the necessary technical support, they allowed individual owners of apartments in residential buildings to send orders to them to record individual television programs and to watch the recorded programs later at a convenient time in their apartments. The entire system was designed in such a way that the server always made only one copy of the recorded television broadcast even when several customers wanted to record the same television program.<sup>27</sup> Only one copy was then always saved on the server. That copy could then be accessed and watched by several individuals who ordered it recorded. In addition, the defendant could exercise ongoing control and maintenance of the entire system remotely. The Osaka High Court (大阪高等裁判所) came to the conclusion that the defendant supplied the system which was designed for copyright infringement and therefore it infringed the plaintiffs' right of reproduction. As a single copy was transmitted to several receivers, the court also found that the right of public transmission was infringed by the defendant.

To avoid the flaws of services similar to those provided by *Yoridorimidori* system and thus the possibility of being held liable for copyright infringement, the defendant in the

<sup>26</sup> *Yoridorimidori* case, H17-NE-3258 (Osaka High Court, 14 Jun. 2007).

<sup>27</sup> The provided servers could be run in two different modes where their actual operation differed in details which had no impact on the final assessment of provided services under Japanese copyright law.

*Rokuga Net* case<sup>28</sup> arranged its system so that its users had to buy a computer which was equipped with a television tuner and kept by the defendant. Individual computers were connected to an antenna, booster and other necessary equipment allowing them to receive and record television broadcasts. At the same time, they were connected to the Internet allowing individual users to access their computers stored by the defendant. The operation of the entire system was therefore controlled and managed by the defendant. In order to schedule recording of selected television programs and then to watch them later, individual users were allowed to access remotely their computers by means of an application specially designed by the service provider.

Although each computer could be used directly only by a single user, the Intellectual Property High Court found the transfer of ownership title to individual computers as being just purported by the contracting parties. In addition, it considered all specially designed computers together with antenna and communication networks between the service provider and all its users to be a single system. The court thus concluded that the service provider was the main body which reproduced television programs. Its finding was based on several reasons. The reason why the service provider built and operated the entire system was to allow its users to receive the recorded television programs. The service provider provided the necessary environment for users' computers to properly function. The entire recording system was maintained and managed as a single system by the defendant. Finally, the service provider set up the rule under which the users could use the provided system. It decided the television channels, the programs which could be recorded, and the way they could be accessed by the concerned user through an authorizing system.

Comparing the court's findings in this case with those in the *Rokuraku* case, it seems that if the court had adopted similar reasoning to the circumstances in the *Rokuraku* case, it could have easily come to an analogous conclusion there, *i.e.* the *Rokuraku II* system was built on the exploitation of television broadcast with its users and its service provider designed the entire system as a single one. Actually, the lower court, Tokyo District Court (東京地方裁判所), did come to such conclusion also in the *Rokuraku* case.<sup>29</sup> However, the difference between both cases is still in the actual design of the entire system for recording and streaming television broadcasts. While the computers with television tuners were not separable from the entire system pursuant to the court's finding in the *Rokuga Net* case, the *Rokuraku II* system employed devices which could be used even without any assistance provided by their provider.

A further aspect which might implicitly affect the appellate court's decision in the *Rokuraku* case is the fact that several similar Internet-based multifunctional devices are currently widely available on the market. They are very similar to the *Rokuraku II* devices and are supplied by different producers. Although their actual utilities slightly vary from one producer to another, their main function is to allow the streaming of live or recorded television broadcasts between two exclusively linked units. One unit receives, stores and further transmits television broadcasts via the Internet to the other unit allowing its user to watch live or recorded television broadcasts wherever she finds herself at the moment. Both units are paired so that only a single receiver is allowed to watch the television broadcast transmitted from the main emitting unit at the same time. This new type of technology is designed to allow its user time- and place-shifting of television broadcasts in order to satisfy the market demands from specific groups of customers who travel and want to watch their favorite television programs. Accordingly, when one of the first such devices, Slingbox, was

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<sup>28</sup> *Rokuga Net* case, H17-RA-10007 (Intellectual Property High Court, 15 Nov. 2005).

<sup>29</sup> *Rokuraku* case, H18-YO-22046 (Tokyo District Court, 30 Mar. 2007).

introduced into the U.S. market, it immediately caused a severe negative reaction from Hollywood<sup>30</sup> and other concerned industries.<sup>31</sup>

In Japan, two such devices combined with additional services provided by two different providers have already been subject to the courts' scrutiny. Contrary to the *Rokuraku* case which is one of them, the service provider in *Maneki-TV* case used Location Free TV devices freely available on the market and produced by Sony Corporation. So far, the utilities of Location Free TV devices have not been directly questioned in Japan as to their compatibility with the Japanese copyright law. It is generally considered that the copies made by devices of this type are covered by private copying exceptions under Articles 30(1) and 102(1) of Japanese Copyright Act. The transmission of copies between the emitting and receiving units is also deemed not to amount to the infringement of the right of public transmission<sup>32</sup> or the respective rights of making transmittable under the Japanese Copyright Act.<sup>33</sup> The copies are just transmitted between the two exclusively linked units and therefore cannot be viewed by other individuals.

As the service provider in the *Maneki-TV* case has not designed any special software to maintain and operate its system, but only put together the devices available on the market, the Intellectual Property High Court evaluated this case as storing the lawful devices freely available on the market. It did not consider the service providers' activities to be a special arranging of a business model to evade application of Japanese copyright law to its services. In addition, the service provider provided the services in question as optional. The individuals could buy their Location Free TV devices and could use them at home, or they could leave it in the provider's premises for a monthly charge covering the rent of space in its premises, the provision of necessary utilities and the maintenance of stored devices. Contrary to the *Rokuraku* case, the Intellectual Property High Court examined only whether the *Maneki-TV* service allowed its customers the direct streaming of television broadcasts. As the service provider stored and maintained devices publicly available on the market, the court found no additional activity which was conducted by the defendant that would amount to an infringement of any exclusive right of copyright and neighboring right holders.

In relation to both cases, *i.e.* the *Maneki-TV* case and the *Rokuraku* case, it should be noted that both cases were clear cases of business models built on the exploitation of copyrighted works by their consumers. They were not conventional cases of private copying or private transmitting without the active involvement of any service provider. Nevertheless, the Japanese courts did not take this aspect into account in either case. They just literally applied the respective provisions of the Japanese Copyright Act so that they could come to the conclusion that the persons who made copies or retransmission of television broadcasts were individual users of the defendants' services and that the service consumers did so for private non-commercial purposes.

As shown above, the Intellectual Property High Court had enough room to interpret the Japanese Copyright Act to find service providers in both cases infringing or creating an environment necessary for infringing any copyright or neighboring right held by another

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<sup>30</sup> See, e.g., Andrew Wallenstein, *Slingbox Could Spark New Lawsuits: Place-Shifting Slingbox at Edge of New Frontier*, THE HOLLYWOOD REPORTER, 6 Jul. 2005, available at [http://www.hollywoodreporter.com/hr/search/article\\_display.jsp?vnu\\_content\\_id=1000973572](http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1000973572) (last visited 10 Apr. 2009).

<sup>31</sup> Compare Erica Ogg, *MLB Aims Brushback Pitch at Slingbox*, CNET NEWS, 1 Jun. 2007, available at [http://news.cnet.com/MLB-aims-brushback-pitch-at-Slingbox/2100-1030\\_3-6187915.html](http://news.cnet.com/MLB-aims-brushback-pitch-at-Slingbox/2100-1030_3-6187915.html) (last visited 10 Apr. 2009), with K.C. Jones, *NHL Checks Slingbox To Encourage Video-Sharing*, available at [http://www.marketresearchworld.net/index.php?option=com\\_content&task=view&id=1410&Itemid=76](http://www.marketresearchworld.net/index.php?option=com_content&task=view&id=1410&Itemid=76) (last visited 10 Apr. 2009).

<sup>32</sup> Japanese Copyright Act, *supra* note 13, art. 23.

<sup>33</sup> Japanese Copyright Act, *supra* note 13, arts. 92*bis*, 96*bis* and 99*bis*.

person. To shed extra light on the adequacy of the approach adopted by the court in both cases, the following analysis compares the adopted approach with approaches taken by courts in several other jurisdictions while handling similar or analogical cases.

### *1.3. Distinction between Private and Public Sphere*

In many jurisdictions, the issue of how to assess various business models directly or indirectly built on the exploitation of copyrighted works by their consumers for private non-commercial purposes is often very controversial, especially due to the conventional understanding of intellectual property rights, including copyright and neighboring rights, as property rights. The main idea behind the legal protection of intellectual property is that individuals perceive it as unjust when someone else commercially exploits the results of their intellectual creative labor. The modern copyright laws have, however, gone too far from their unfair competition origins towards their current, mainly property rule character. New technologies increasingly broaden the scope of persons, who can exploit copyrighted works, beyond the group of entrepreneurs who directly commercially exploit copyrighted works. This causes that contemporary copyright laws lose their efficiency in directly applying to numerous commercial activities built on direct or indirect exploitation of copyrighted works. To eliminate this inefficiency, the courts in several jurisdictions have interpreted their national copyright laws in a way which allows them to distinguish between uses occurring in the private sphere and those taking place in public sphere. In this way, they have partially adapted their respective national copyright laws so that they could be applied to new ways of commercially exploiting copyrighted works brought about by new technologies. With regard to the *Rokuraku* case and the *Maneki-TV* case, the following enquiry mainly focuses on adaptations made by courts in some jurisdictions in order to cope with diverse business models based on making reproductions of copyrighted works or performing copyrighted works by customers.

#### **(a) Business Models Based on Making Reproductions of Copyrighted Works by Customers**

Digital reproduction and networking technologies allow entrepreneurs to design various types of business models where the provided core or ancillary services are based on making reproductions of copyrighted works by service consumers for their private non-commercial purposes. For instance, in the English case *Sony Music Entertainment (UK) Limited v. Easyinternetcafe Ltd.* (hereinafter “*Easyinternetcafe* case”),<sup>34</sup> the defendant’s Internet cafés provided CD burning services to their customers. After storing files downloaded from the Internet on a private directory located on the Internet café’s server, an individual customer could ask its staff to burn the data onto a CD-R disc.<sup>35</sup> Although the Internet café’s employees could not see downloaded files actually burned on an empty disc without the concerned customer’s consent, the High Court of Justice refused the defendant’s “involuntary copying” argument.<sup>36</sup> It pointed out that this difficulty only arose due to the defendant’s choice not to know while carrying on such activities for profit.<sup>37</sup> Accordingly, even if there had been available a *mens rea* defence,<sup>38</sup> the court opined that the defendant should have taken

<sup>34</sup> *Easyinternetcafe* [2003] E.W.H.C. 62.

<sup>35</sup> The defendant charged equally GBP 2.5 for each CD-R and each burning of CD-R.

<sup>36</sup> See *Easyinternetcafe* [2003] E.W.H.C. 62, at §37.

<sup>37</sup> See *id.* at §35.

<sup>38</sup> For more details on distinction between *mens rea* and *actus reus*, see generally ALAN R. WHITE, *FOUNDATIONS OF LIABILITY: AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 43-47 (Clarendon Press, 1985); LEO KATZ, *BAD*

precautions to check whether any copyright infringement occurred during its commercial activities. The High Court thus emphasized that a person is not “being an automaton” in any possible situation.<sup>39</sup>

The *Easyinternetcafe* case can be compared to both abovementioned Japanese cases where customers sent orders through the defendants’ networks to devices maintained by the defendants. In this way, the defendants chose to close their eyes and built their businesses solely on the exploitation of copyrighted works. Nonetheless, there is still a considerable difference between *Easyinternetcafe* case and both Japanese cases. While *Easyinternetcafe*’s employer pushed the button to burn copyright infringing content on a CD disc for its customers, the service providers in both Japanese cases did not physically conduct such an act. They just designed their networks so that individual users could do so by sending commands through digital networks between the two paired units.

A much closer business model to those in the *Maneki-TV* and *Rokuraku* cases was the defendant’s one in the U.S. case *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (hereinafter “*Cablevision* case”),<sup>40</sup> where *Cablevision* Systems Corporation’s new server-based digital video recorder service allowed its customers to remotely record and to watch television programs retransmitted by *Cablevision*—a cable TV provider—at a later time. Its customers could remotely send orders to the system operated by the defendant through the device provided to them. Based upon the customers’ orders, the system automatically recorded the ordered television programs. The audiovisual recordings were saved on the service provider’s server so that the copy could be decoded and thus watched only by the device of customer who ordered the recording. In addition to the final copies of retransmitted television broadcast, the system made several copies of television broadcast in buffers during its operation. Accordingly, the U.S. courts in this case were to assess two types of copying the retransmitted television programs: buffer data and playback copies—recordings of television broadcast ordered remotely by the customers for later playback.

With regard to copies of copyrighted works made in buffers before making so-called playback copies by the system operated by the defendant, the courts had to decide whether these data satisfy the requirements for “copies” set up Section 101 of the *U.S. Copyright Act of 1976*<sup>41</sup> which requires that “a work is *fixed* by any method [in a material object] ... from which the work can be ... reproduced or otherwise communicated”. Based upon the interpretation of this provision, the U.S. District Court for the Southern District of New York concluded that the copies were made by the defendant under this provision, since buffer data were “[c]learly ... capable of being reproduced”.<sup>42</sup> However, the Second Circuit rejected such an extensive interpretation by pointing out that the definitions of terms “copies” and “fixed” in Section 101 set up two requirements: *embodiment* and *duration*.<sup>43</sup> As the data in buffers did not last for more than 1.2 seconds, the Second Circuit came to the conclusion that “the copyrighted works here are not ‘embodied’ in the buffers for a period of more than transitory duration, and are therefore not ‘fixed’ in the buffers.”<sup>44</sup>

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ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 165-209 (University of Chicago Press, 1987); Michael S. Moore, *Intentions and Mens Rea*, in RUTH GAVISON (ed.), *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART* 245-70 (Clarendon Press, 1987); John Finnis, *Intention in Tort Law*, in DAVID G. OWEN (ed.), *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, reprint edn., 229-47 (OUP, 2001).

<sup>39</sup> See *Easyinternetcafe* [2003] E.W.H.C. 62, at §36.

<sup>40</sup> See *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 2007 U.S. Dist. LEXIS 20787 (S.D.N.Y., 2007) [hereinafter “*CablevisionI*”]; *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 2008 U.S. App. LEXIS 16458 (2d Cir. N.Y., Aug. 4, 2008) [hereinafter “*CablevisionII*”].

<sup>41</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, as amended.

<sup>42</sup> *CablevisionI*, 478 F. Supp. 2d at 621-22.

<sup>43</sup> See *CablevisionII*, 536 F.3d at 127.

<sup>44</sup> *Id.*, at 130.

As to so-called playback copies, the U.S. courts were to decide who actually made the copies of retransmitted television programs, *i.e.* whether the customers or the service provider did so. The district court deemed made copies as “instrumental”, and not merely as “incidental”, to the system’s operation.<sup>45</sup> It thus found that the system’s operation contributes to making the concerned copies in such a major way that “copying at issue ... would be done not by the customer but by Cablevision, albeit at the customer’s request.”<sup>46</sup> But the Second Circuit was of opinion that “by selling access to a system that automatically produces copies on command, Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises, and it seems incorrect to say, without more, that such a proprietor ‘makes’ any copies when his machines are actually operated by his customers.”<sup>47</sup> In addition, it stressed the importance of keeping a clear line between direct and indirect copyright infringement. And in this case, many found facts such as “continuing relationship”, control over the system’s operation and “instrumental[ity]” of copying made by the system operated by the defendant were deemed by the Second Circuit “more relevant to the question of contributory liability.”<sup>48</sup> Accordingly, the court concluded that “on the fact of this case, copies produced by the [Remote Storage Digital Video Recorder (RS-DVR)] ... system are ‘made’ by the RS-DVR customer, and Cablevision’s contribution to this reproduction by providing the system does not warrant the imposition of direct liability.”<sup>49</sup> Nevertheless, the Second Circuit did not exclude defendant’s indirect copyright liability for any acts of copyright infringement committed by its users, but this was not the matter before the court in this case due to the limited scope of its scrutiny.

Another case where the courts were asked to assess a business model based on making reproductions of copyrighted works by customers can be found in another country closely akin through its legal traditions with the United Kingdom—Australia. Although this case is a bit remote to the use of digital technologies, it is very similar to both Japanese cases in the overall design of activities conducted by the defendant. It deals with a situation where a library installs equipment to enable its members to make copies of books, journals and other copyrighted works provided by the library for a fee, however modest.

The Australian courts considered such a scenario in the case of a university library providing photocopying facilities to its members. In *Moorhouse and Angus & Robertson (Publishers) Pty Ltd. v. University of New South Wales*,<sup>50</sup> the question before the Supreme Court of New South Wales, Equity Division, was whether the University of New South Wales should be held liable for authorizing various acts of infringement carried out by students using the library’s photocopying facilities. Justice Hutley J.A. compared the relationship between libraries and copyists to the one between property owners and trespassers. He pointed out that “[a] trespasser who trespasses to prove that the fence surrounding a property is scaleable or that the guards were ineffective does not thereby prove that the owner of the property authorized his exploit.”<sup>51</sup> This conclusion is very similar to the conclusions of the Japanese Intellectual Property High Court in both abovementioned cases.

Nonetheless, the High Court of Australia came to a different conclusion.<sup>52</sup> It found that the university granted or purported to grant a general authority, because it had *control* and

<sup>45</sup> See *CablevisionI*, 478 F. Supp. 2d at 620.

<sup>46</sup> *Id.*, at 621.

<sup>47</sup> *CablevisionII*, 536 F.3d at 132.

<sup>48</sup> *Id.*, at 132.

<sup>49</sup> *Id.*, at 133.

<sup>50</sup> *Moorhouse and Angus & Robertson (Publishers) Pty Ltd. v. University of New South Wales* [1975] R.P.C. 454 (*Moorhouse v. University of New South Wales I*); *Moorhouse v. University of New South Wales II* [1976] R.P.C. 151.

<sup>51</sup> See *Moorhouse v. University of New South Wales I* [1975] R.P.C. at 467 (*per* Hutley J.A.).

<sup>52</sup> See *Moorhouse v. University of New South Wales II* [1976] R.P.C. 151.

*knowledge* of, or *reason to suspect*, copyright infringement. Justice Harry Gibbs expressed it tersely:

It seems to me to follow from these statements of principle that a person who has under his control the means by which an infringement of copyright may be committed – such as a photocopying machine – and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorize any infringement that resulted from its use.<sup>53</sup>

Consequently, the university had reasonable grounds to suspect that some copyright infringements would have occurred if adequate precautions had not been taken. But it failed to take such precautions, *i.e.* either any effective supervision of photocopying machines or adequate notices warning individual users to abstain from any copyright infringing uses of the photocopying machines.<sup>54</sup> Further, the university was supplying not only the works which might be copied, but also the equipment and paper. Accordingly, the High Court of Australia found the university to be authorizing the making of infringing copies by providing copying machines and retaining control over the machines and copied books.<sup>55</sup>

Comparing the two cases from the United Kingdom and from Australia with the Japanese cases, it might appear at first glimpse that the Japanese Intellectual Property Court erred in its decisions in both cases. The severity of this criticism is not reduced by the findings of Second Circuit in the *Cablevision* case, where the Second Circuit did not, due to the limited scope of its scrutiny, assess whether the customers' activities are covered by fair use and whether the service operator is liable indirectly for any act of such copyright infringement. However, it should be made clear that making reproductions by users for their personal, family or other similar uses within a limited circle is covered by private copying exceptions in Japan.<sup>56</sup> Conversely, the copyright laws in the United Kingdom or Australia employ the concept of fair dealing which is a bit narrower in this case. Under the given conditions, they do not exempt making reproductions of copyrighted works by individuals from copyright liability.

This difference becomes even more obvious when we take into account a case decided under German copyright law which, similarly to Japanese copyright law, also provides a private copying exception. The German courts dealt with assessing a business model based on making reproductions of copyrighted works by customers in a case of copy shop, the premises or means of which could be used by its customers in order to make private copies. When someone made one's own copies by using the premises or means provided by a third party, the German Supreme Court (*Bundesgerichtshof*) found an adequate causal link between making photocopiers available in the copy shop and infringing reproductions made by the shop's customers. Since the provision of photocopying equipment makes copying easier, it creates a source of potential danger for the copyright holders. Hence, the court concluded that the shop owner is obliged to take reasonable measures to prevent infringing activities committed by its customers. At the same time, the court recognized that shop owner's possibilities are not limitless. The service provider cannot pass the line confining the privacy concerns guaranteed by Articles 1 and 2 of the *German Constitution of 1949 (Grundgesetz)*. As a substantial part of a shop's customers would use the photocopying equipment for non-infringing purposes, the service provider does not have to inspect every copy made or to

<sup>53</sup> See *Moorhouse v. University of New South Wales II* [1976] R.P.C. at 159.

<sup>54</sup> Cf. *Nationwide News Pty Ltd. and Others v. Copyright Agency Ltd.* [1996] 136 A.L.R. 273, 295.

<sup>55</sup> See *Moorhouse v. University of New South Wales II* [1976] R.P.C. 151.

<sup>56</sup> Japanese Copyright Act, *supra* note 13, 30(1).

prevent all infringing copying. Instead, it is sufficient for one to point out in the general provisions placed in the shop and regulating the use of photocopying machine that the customers should be aware of their duty not to infringe copyrights.<sup>57</sup> The privacy concerns thus considerably affected the outcome of case.<sup>58</sup>

### (b) Business Models Based on Performing Copyrighted Works by Customers

Similar controversies concerning the distinction between private and public sphere have been raised also by business models built on performing copyrighted works by individuals for their private non-commercial purposes. In the United States, several cases dealt with the interpretation of Section 101 of the U.S. Copyright Act which defines the term “[t]o perform ... a work ‘publicly’”. Section 101 contains two clauses. The first, so-called “public place” clause defines “[t]o perform ... a work ‘publicly’” as “to perform ... it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”.<sup>59</sup> While the first category is self-evident, the other is commonly referred to as a semi-public place which is “determined by the size and composition of the audience”.<sup>60</sup> The so-called “transmit” clause defines “[t]o perform ... a work ‘publicly’” as “to transmit or otherwise communicate a performance ... to a place specified by [“public place”] clause ... or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”<sup>61</sup>

To apply it to numerous business models based upon exploitation of copyrighted works through diverse forms of performances, the U.S. courts interpreted the provisions of Section 101 quite broadly. In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.* (hereinafter “*Redd Horne case*”),<sup>62</sup> the defendant operated two rental shops each with a small screening room. The customers could select a video cassette they wanted to view and watch it in an individual screening room. However, the video cassette players were not located in the individual rooms but in the stores’ central areas. In addition, only the defendant’s employees could operate video cassette players so that the signals were transmitted to monitors located in individual rooms. Accordingly, the *Redd Horne case* is analogous to the *Easyinternetcafe case* with regard to the pattern of the service provider’s activities. The difference between the two cases is only the type of exclusive right which was claimed to be infringed by the respective service provider. While in the *Redd Horne case* it was the right to perform copyrighted works publicly or the right to authorize public performance, in the *Easyinternetcafe case* it was the reproduction right.

In the *Redd Horne case*, the Third Circuit agreed with the district court’s note that “the showcasing operation is not distinguishable in any significant manner from the exhibition of films at a conventional movie theater.”<sup>63</sup> Further, it added as follows:

The services provided by Maxwell’s are essentially the same as a movie theatre, with the additional feature of privacy. The relevant “place” within the meaning of section

<sup>57</sup> See the “*copy shop*” case, 1984 GRUR 54 (BGH, 9 Jun. 1983).

<sup>58</sup> See Kamiel J. Koelman *et al.*, *Liability for Online Intermediaries*, at 16-17 (Institute for Information Law, 1998), available at <[http://www.imprimatur.net/IMP\\_FTP/liab.pdf](http://www.imprimatur.net/IMP_FTP/liab.pdf)> (last visited 21 Aug. 2003); ANDREAS DUSTMANN, *DIE PRIVILEGIERTEN PROVIDER: HAFTUNGSEINSCHRÄNKUNGEN IM INTERNET AUS URHEBERRECHTLICHER SICHT* 52 (Nomos Verlagsgesellschaft, 2001).

<sup>59</sup> 17 U.S.C. §101.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984).

<sup>63</sup> *Id.* at 159 (quoting 568 F. Supp. at 500).

101 is each of Maxwell's two stores, not each individual booth within each store. Simply because the cassettes can be viewed in private does not mitigate the essential fact that Maxwell's is unquestionably open to the public.<sup>64</sup>

In relation to the interpretation of the "transmit" clause, the Third Circuit referred to Professor Nimmer who wrote in this regard in his leading hornbook on the U.S. copyright law tersely:

[O]ne may anticipate the possibility of theatres in which patrons occupy separate screening rooms, for greater privacy, and in order not to have to await a given hour for commencement of a given film. These too should obviously be regarded as public performances within the underlying rationale of the Copyright Act.<sup>65</sup>

Accordingly, the Third Circuit came to the conclusion that the defendant was showing the same copy to numerous members of the public at different places and times. The court's reasoning thus seems to stem mainly from the "transmit" clause.

Contrary to the *Redd Horne* case, the defendants in *Columbia Pictures Industries, Inc. v. Aveco, Inc.* (hereinafter "*Aveco*" case)<sup>66</sup> organized their business model with even less involvement from the side of the defendants' employees. The video cassette players were located in individual screening rooms and the customers could operate them directly. In addition, the customers were not limited to watching only the cassettes rented from the defendants, but they could bring their own cassettes. Although the defendants stressed that everything, including the operation of video cassette players, was done in the privacy of closed rooms by their clients without any direct involvement of the defendants' employees, the Third Circuit pointed out that performance at a place open to the public "does not require that the public place be actually crowded with people." In addition, it famously remarked that "[a] telephone booth, a taxi cab, and even a pay toilet are commonly regarded as 'open to the public,' even though they are usually occupied only by one party at a time."<sup>67</sup> Furthermore, it made clear that the decision in the *Redd Horne* case "turned not on the precise whereabouts of the video cassette players, but on the nature of Maxwell's stores."<sup>68</sup> Accordingly, it came to the conclusion that "this availability ... made Maxwell's stores public places" and that the defendants' operations therefore constituted an authorization of public performances of plaintiffs' copyrighted works.<sup>69</sup>

This decision is a bit perplexing, since it is not clear whether it is based upon the "public place" clause or the "transmit" clause. Although it refers to the *Redd Horne* case which was based upon the "transmit" clause, it seems that the Third Circuit based its decision in the *Aveco* case upon the "public place" clause.<sup>70</sup> Regardless of which clause the Third

<sup>64</sup> *Id.* at 159.

<sup>65</sup> MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT, 2-8, § 8.14[C][3], available at <http://www.lexis.com> (last visited 10 Apr. 2009).

<sup>66</sup> *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986).

<sup>67</sup> *Id.* at 63.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> This interpretation stems from the Ninth Circuit's opinion expressed in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989), where the Ninth Circuit rejected such a way of interpreting the "transmit" clause. It clearly states there that "other communication" should be interpreted within the scope of "transmission". Accordingly, the notion should be read as "other types of transmission", *i.e.* there needs to be a certain distance between the emitting device and receiving device, which is lacking in cases where the video cassette player is in the same room as the screen or television on which the movie is shown. This understanding of transmission is equivalent to the transmission under the Japanese Copyright Act, *supra* note 13, art. 2(viibis).

Circuit actually relied on, the court had to extend either one concept or the other. In this regard, it should be noted that the decisive point for the court was not who actually operated video cassette players, but who actually provided the services in question. Hence, the conclusion of the Third Circuit is very similar to those adopted by the Japanese Supreme Court and several other Japanese courts in the abovementioned karaoke case<sup>71</sup> and similar karaoke cases where service providers provided the necessary environment for the performance of copyrighted works, *i.e.* playing devices, pre-recorded media containing copyrighted works and premises, although the actual performance occurred in privacy.<sup>72</sup>

A much closer business model to those in the *Maneki-TV* and *Rokuraku* cases was the defendant's one in the abovementioned *Cablevision* case, where the U.S. courts were to assess streaming of recorded television programs ordered by the customers to watch them later at the time and the place convenient to the customers. The main controversy in this case was that the individual copies could be decoded and thus watch only by the devices held by the customers who ordered respective recordings of retransmitted television broadcasts. As both parties agreed that only the transmit clause applies to this case, the key question before the court was whether the clause requires potential audience of a particular transmission or potential audience of the underlying work being transmitted. Relying on the latter interpretation, the district court came to the conclusion that the defendant infringed the plaintiffs' exclusive rights to publicly perform their copyrighted works. It put it succinctly: "Cablevision would transmit the *same program* to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback."<sup>73</sup>

This interpretation of transmit clause was, however, rejected as too broad by the Second Circuit which focused its scrutiny on potential audience of a particular transmission. The Second Circuit thus found that "[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that transcriber, ... such transmissions are not performances 'to the public,' and therefore do not infringe any exclusive right of public performance."<sup>74</sup> At the same time, the court warned that "[t]his holding ... does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies."<sup>75</sup> Accordingly, it is not clear whether the business models examined in the *Maneki-TV* case or the *Rokuraku* case would be found as non-infringing of plaintiffs' exclusive rights to publicly perform their copyrighted works. Contrary to the service providers in both Japanese cases, *Cablevision* was a cable TV provider who retransmitted television broadcast upon the licenses obtained from the respective copyright holders. This was not the case of any service provider in the *Maneki-TV* case or the *Rokuraku* case.

It should also be noted that the character of the concerned commercial activity, *i.e.* whether it is the service providers' *main* or only *ancillary* business activity, plays an important role in the U.S. courts' assessment of a particular business model. For instance, the Ninth Circuit did not find the hotel liable for making available videodisc players for in-room viewing in the more recent case *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*<sup>76</sup> The court clearly distinguished this case from the previous cases decided by the Third Circuit based upon the "nature" of the defendant's operation. The Ninth

<sup>71</sup> *Club Cat's Eye* case, *supra* note 24.

<sup>72</sup> For an outline of individual cases, *see, e.g.*, YOSHIYUKI TAMURA, COPYRIGHT LAW, 2nd ed., 176-78 (2001).

<sup>73</sup> *CablevisionI*, 478 F. Supp. 2d at 623.

<sup>74</sup> *CablevisionII*, 536 F.3d at 139.

<sup>75</sup> *Id.*

<sup>76</sup> 866 F.2d at 279-81.

Circuit opined that “the rental of videodiscs to interested guests for viewing in guest rooms” was just incidental to the defendant’s main business activities, which was the provision of “living accommodations and general hotel services”.<sup>77</sup>

Similarly, the German courts refuse to impose on a vendor of printed material any general duty to check all goods she buys and resells to her customers, the final consumers. The more remote the third party is from the actual acts of infringement, the narrower the scope of her duty of care becomes under the German law. The German Supreme Court therefore found that a dispatching agent (*Spediteur*) cannot be obliged to check everything one transports for infringing contents.<sup>78</sup>

### (c) Private-Public Sphere Distinction and *Rokuraku* Case

As shown above, the courts in different jurisdictions have been willing to stretch particular doctrines of copyright liability quite broadly to cover diverse business models built on the exploitation of copyrighted works. At the same time, several cases demonstrate the cautiousness of courts to find commercial activities which are not directly built on exploitation of copyrighted works by end-users as infringing, directly or indirectly, any copyright or neighboring right. In cases where the copyright liability was stretched, the courts interpreted the respective liability doctrines in two different ways: (i) a service provider was deemed to be making reproductions or public performances directly; or (ii) such service consumers’ activities were considered to be infringing copyright directly and thus allowing the courts to hold the service provider indirectly liable for the copyright infringement committed by its customers.

Both approaches towards extending copyright liability in order to cover business models based on the exploitation of copyrighted works face considerable criticism. The former considers the activities of individual customers as the ones committed by the service providers. For this reason, it is hardly convincing. Furthermore, it causes legal uncertainty as to the future interpretation of other provisions of copyright law by courts. It makes unclear which activities of customers may be deemed to be ones conducted by technology or by service providers, when they are assessed by courts once again in the future.

The latter approach allows the court to find the commercial activities of service providers to be infringing someone’s copyright indirectly, since the service providers can exercise control over their customers.<sup>79</sup> But to do so, the activities of customers must be also found as infringing copyright or any other neighboring right. The question is whether this approach would be applicable to the *Rokuraku* case, since the court found reproductions made by individuals as covered by the private copying exception. To apply this approach to the *Rokuraku* case would then require interpreting the respective provisions of the Japanese Copyright Act, which provides private copying exceptions, more narrowly than actually done

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<sup>77</sup> See *id.* at 281.

<sup>78</sup> See *Spediteur* case, 1957 GRUR 342 (BGH, 15 Jan. 1957). See Koelman *et al.*, *supra* note 58, at 15; Kamiel J. Koelman and P. Bernt Hugenholtz, *Online Service Provider Liability for Copyright Infringement*, at 10 (WIPO, 1999), available at <[http://www.wipo.org/eng/meetings/1999/osp/pdf/osp\\_lia1.pdf](http://www.wipo.org/eng/meetings/1999/osp/pdf/osp_lia1.pdf)> (last visited 21 Aug. 2003).

<sup>79</sup> There are also other types of indirect copyright liability based upon the concepts of inducement, contribution or enablement of another person to commit copyright infringement; see, e.g., Branislav Hazucha, 他人の著作権侵害を助ける技術に対する規律のあり方—デュアル・ユース技術の規制における社会規範の役割— (*Enablement of Copyright Infringement: A Role of Social Norms in the Regulation of Dual-Use Technologies*), INTEL. PROP. LAW & POL’Y J., No. 24, September 2009 (forthcoming) (Japanese translation by Yoshiyuki Tamura and Kazunari Tanzawa). As in the cases analyzed in this paper, the service providers exercised the control over activities of their customers and had direct or indirect financial benefit from such activities, this paper enquires only into the indirect liability doctrines based upon the concept of control over infringing activities.

by the court in the *Rokuraku* case. In such a case, the court would have to come to the conclusion that the activities of the defendant's customers cannot be covered by private copying exceptions, since they are not done "within limited circle" (限られた範囲内において),<sup>80</sup> but as a part of commercial activity.

At this point, it should be pointed out that such an approach would face one considerable obstacle. It would put the activities of individuals, which are conventionally considered to be lawful and legitimate by a majority of society, out of the law. The problem to enforce such law often becomes even more alarming when the banned activities cause no or only insignificant harm to the legitimate interests of copyright holders,<sup>81</sup> as it was also found by the Intellectual Property High Court in the *Rokuraku* case.<sup>82</sup> The law then rarely possesses the necessary power to persuade individuals to comply with it without threatening them with severe sanctions.<sup>83</sup> The lack of persuasive power often leads to mass disrespect of the law. With regard to copyright law, this point was succinctly pointed out by Lord Templeman in *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc.* (hereinafter "*Amstrad* case") already more than twenty years ago:

From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent. Some home copiers may consider that the entertainment and recording industry already exhibit all the characteristics of undesirable monopoly—lavish expenses, extravagant earnings and exorbitant profits—and that the blank tape is the only restraint on further increases in the prices of records. Whatever the reason for home copying the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed.<sup>84</sup>

## 2. JUSTIFICATIONS FOR IMPOSITION OF VICARIOUS LIABILITY

As emphasized by Lord Templeman in the *Amstrad* case, individuals vary in their reactions to the law's requirements. There are some who always obey the law regardless of external factors such as sanctions and other forms of punishment,<sup>85</sup> and there are others who completely reject and disregard it. Nevertheless, both types of individuals are extremes. They are more the exception than the rule. The majority of entities regulated by law fall somewhere between the two extremes.

The following enquiry focuses on this majority of regulated entities which can be divided into two main groups. The first one consists of people who usually obey the law, because they have internal reasons for doing so. These individuals are the target of Herbert

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<sup>80</sup> Japanese Copyright Act, *supra* note 13, art. 30(1).

<sup>81</sup> See, e.g., Stan J. Liebowitz, *Copying and Indirect Appropriability: Photocopying of Journals*, 93 J. POLIT. ECON. 945 (1985) (showing "that the unauthorized copying of intellectual properties need not be harmful and actually may be beneficial").

<sup>82</sup> *Rokuraku* case, *supra* note 12, at 32.

<sup>83</sup> See, e.g., Hazucha, *supra* note 79, at 49-71; Amitai Etzioni, *Social Norms: Internationalization, Persuasion, and History*, 34 L. & SOC. REV. 157 (2000).

<sup>84</sup> *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc.* [1988] A.C. 1013, 1060.

<sup>85</sup> For an analysis of internal and external limitations which restrict each person in using available scarce resources for satisfying her desires, see Robert Cooter, *The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*, 75 FORDHAM L. REV. 1275 (2006).

L.A. Hart's analysis. Hart argues that it is important to understand how individuals regard their own behavior, and how the law is believed by at least some participants to give them reasons for action.<sup>86</sup> The second group is composed of people who are detached participants obeying law because they are deterred by punishment. They fit into Oliver W. Holmes's construction of the *bad man*, characterized by him in the following way:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.<sup>87</sup>

Applying this understanding to contemporary legal theories, they can be divided into two groups—theories concentrating on Holmes's bad men, and those stressing the importance of taking into account also Hart's good men when the decision on imposing liability is to be taken in relation to a particular human conduct. Consequently, the following enquiry examines both approaches to justifying the imposition of copyright liability in the *Rokuraku* case. As the current legal scholarship is heavily influenced by the law and economics movement, the enquiry starts by scrutinizing the utilitarian efficiency theory targeting mainly Holmes's bad men and employing a cost-benefit analysis in designing liability regimes to induce changes in new activities which pose a risk of harm to the legitimate interests of others. The analysis then follows with an examination of theories emphasizing the need to respect the legitimate interests of Hart's good men. The aim is to scrutinize whether and to what extent they can enrich the view presented by utilitarian efficiency theory.

Before starting the enquiry into the justifications for the imposition of copyright liability in the *Rokuraku* case which would not stress only the importance of deterrence, but also the significance of persuasion in regulating new dual-use technologies and online services built on the exploitation of copyrighted works by their consumers for private non-commercial purposes it is worth pausing to remember one fact. As already mentioned above, developments in copyright law on the international and national levels during the last few decades have caused the change of its character from the original unfair competition rule character to the currently leading property rule.

As shown in the previous Section, the understanding of copyright rules as pure property rules often causes awkwardness in applying them to numerous cases where an entity designs its business model on the direct exploitation of copyrighted works by the customers of such services and copyrighted works. Not closing one's eyes to such a business model requires the court to find customers liable for copyright infringement when they exploit copyrighted works within the scope of such commercial activities. Only then can the provider be held liable for the infringement of copyrighted works as an indirect copyright infringer. Another solution is to stretch the concepts of direct copyright infringement under the current understanding of copyright rules as property rules to hold the service providers directly liable for operating their business models. The second way was often taken by the Japanese courts facing this kind of business models and the U.S. court while handling cases dealing with business models based on performing copyrighted works by customers. Due to the stretching of the concepts of direct copyright liability, both solutions seem to be sometimes too awkward and hardly convincing.

A much easier solution would be to switch from the contemporary understanding of copyright rules as pure property rules to an understanding of them as unfair competition rules. However, this would require considerable reform of intellectual property regimes worldwide

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<sup>86</sup> See HERBERT L.A. HART, *THE CONCEPT OF LAW*, 2nd edn., 56, 57, 88 (Clarendon Press, 1994).

<sup>87</sup> See HOLMES, *supra* note 15, at 171.

on both the national and international level. Due to this path dependency, the only feasible solution is to adapt the current copyright regimes and concepts step by step to ever-changing social and economic circumstances. The drawback of this approach is that copyright law becomes more and more complicated and hardly understandable not only by individuals who are supposed to comply with them but even to specialized lawyers and scholars who are supposed to deal with disputes between copyright holders, technology and service providers and consumers of copyrighted works and technologies used for their private non-commercial exploitation.<sup>88</sup>

As it is hard to expect any considerable conceptual change in the understanding of copyright law in near future, the following analysis concentrates mainly on the approach based upon an understanding of copyright rules as property rules. The aim of the following analysis is thus to enquire into whether there would have been sufficient justifications for the imposition of liability on the service provider in the *Rokuraku* case if the court had found the activities of its customers to be not covered by the private copying exception.<sup>89</sup> Another limitation of the following analysis is its concentration only on the imposition of indirect copyright liability based upon the concept of control over infringing activities. The defendant in the *Rokuraku* case exercised control over the activities of its customers and received direct or indirect financial benefit from such activities.<sup>90</sup>

### ***2.1. Cost-Benefit Analysis of Inducing Changes in Activity***

The main argument presented by the utilitarian efficiency theory is that the decision to impose liability on an individual for the injury in question is dependent upon policy considerations based on the premise that “making him liable for the consequences of the injury will promote an efficient allocation of resources to safety and care.”<sup>91</sup> When a third party exercises control over the wrongdoer or facilities, premises and equipments used for the commission of latter’s wrongdoing, the third party can be held liable for the outcome of such wrongdoing upon applying fault or no-fault liability principles.

Applying the utilitarian efficiency theory to the vicarious liability doctrine in copyright law, Douglas Lichtman and William M. Landes distinguish three rationales for the imposition of vicarious liability in cases, where one “hires an employee [or independent contractor] for a lawful purpose, but the employee’s [or independent contractor’s] actions on [one’s] behalf ... lead to copyright infringement.”<sup>92</sup> First, vicarious liability induces the third party “to exercise care either in hiring, supervising, controlling, and monitoring its employees [and independent contractors] so as to make copyright infringement less likely.”<sup>93</sup> In addition, the prevention and monitoring measures of this kind are usually “at a relatively low cost”.<sup>94</sup> Another rationale is that “it is usually much cheaper for copyright holders to sue one

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<sup>88</sup> See generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

<sup>89</sup> The question of whether such activities by customers cause any harm to broadcasting companies and thus should be considered as copyright-infringing uses of copyrighted works is put aside for now and is examined later; see Section 3 below.

<sup>90</sup> See text accompanying note 79.

<sup>91</sup> See WILLIAM M. LANDES AND RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 229 (Harvard University Press, 1987). The search for the cheapest solution for the prevention of accidents leads economic analysis of law also to the cost of administering the tort cases. Although it is an interesting perspective, it does not advance our analysis and I will not pursue this line of argument in further discussion. For more details, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 5th edn., 195-96, 615-16 (Aspen Law & Business, 1998).

<sup>92</sup> See Douglas Lichtman and William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 *HARV. J. L. & TECH.* 395, 398 (2003).

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*, at 399.

employer [or one owner of an entertainment venue] rather than suing infringing employees [or independent contractors].”<sup>95</sup> The number of direct infringers is generally bigger than the number of indirect ones. In addition, it is difficult to identify and file lawsuits against direct infringers in many cases. The third foundation is the direct infringers’ insolvency argument. As the direct copyright infringers are usually judgment-proof, indirect liability helps to minimize the probability that the aggrieved copyright holders will remain un-indemnified. The fact of “putting the employer’s resources on the line” increases “the odds that the harm from infringement will be internalized.”<sup>96</sup> Especially, in the case of independent contractors, the hired bands and other performers sometimes publicly perform copyrighted works without permission of, and remuneration to, the concerned copyright holders. Further, these performers are often short of “resources needed to pay for the associated harm.”<sup>97</sup> Under these circumstances, Lichtman and Landes suggest that “indirect liability has real policy allure” and “prevents the externalization of copyright harm”.<sup>98</sup>

Finally, they put forward that “the threat of vicarious liability has encouraged dance halls, concert halls, stadiums, radio stations, television stations, and other similar entities to look for an inexpensive way to acquire” an authorization granted by the concerned copyright holder.<sup>99</sup> But it would be too expensive to search for and obtain proper authorizations from individual copyright holders of each copyrighted work which might be used by persons under the would-be indirect infringer’s control, especially when such usage has often only marginal character. The solution of the “marginal use” problem through saving enormous transaction costs is a blanket license sold by performing rights societies.<sup>100</sup>

Although the utilitarian efficiency approach sheds light on the issue of vicarious liability and provides an interesting perspective, its quantitative and mechanical application might, in some “hard cases”,<sup>101</sup> disregard the third party’s agency and take her only as an instrument for the achievement of the final goal, which is “efficient cost allocation” and “public wealth maximization”. To apply these two main criteria without taking into account the broader social reality might lead to the situation that the emphasis would be made on *deterrence* and *cost allocation*. For sufficient attention would not be paid to certain hidden costs, such as restrictions on the technology provider’s personal autonomy and freedom to engage in innovating activities. For instance, main corporate copyright holders have recently changed their enforcement strategies on the Internet. They stress that the Internet service providers should play a more active role in copyright enforcement on the Internet by restraining the usage of their Internet services for peer-to-peer file sharing.<sup>102</sup> Going even further, one may claim that since the Internet Corporation for Assigned Names and Numbers (ICANN) manages the Domain Name System (DNS) and oversees the distribution of unique Internet Protocol (IP) addresses and domain names, it can distribute the costs of wrongdoings committed on the Internet more efficiently to individual Internet service providers. A similar argument can be applied to the producers of reproduction and distribution technologies, since they can allocate the costs of private copying on their users. In this line of argument, the

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<sup>95</sup> See *id.*, at 398.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*, at 399.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Hard cases are cases where the law does not provide us with a clear answer; see, e.g., Ronald Dworkin, *Is There Really No Right Answer in Hard Cases?*, 53 N.Y.U. L. REV. 1 (1978), reprinted in RONALD DWORIN, A MATTER OF PRINCIPLE 119 (Harvard University Press, 1985) (arguing that the courts should apply underlying normative considerations in hard cases).

<sup>102</sup> See, e.g., IFPI, *Digital Music Report 2009: New Business Models for a Changing Environment*, at 24-25, available at <http://www.ifpi.org/content/library/dmr2009.pdf> (last visited 10 Sept. 2009).

technology and service providers should play a role of “gatekeeper” or “public purse” without any consideration of her actual and direct participation in an act of copyright infringement.

The main problem of imposing vicarious liability on a third party in such a way is that in many cases the adopted legal regime is missing the necessary internal underpinning, which can lead to evasion of the law rather than to its acceptance and internalization by the targeted subjects. For it shows disrespect to a significant part of society by treating it as society of bad men. Regulations based upon that premise then often bring two outcomes which are completely opposite to those which they initially were expected to achieve.<sup>103</sup> First, most of the targeted subjects find their way out, *i.e.* they find ways to avoid the strict application of such regulations.<sup>104</sup> Second, the adoption of such regulations creates an atmosphere of distrust within the entire society and also gives to the obeying part of society the message that they are not trusted and that others do not obey the respective law. Accordingly, even the part of society which would normally obey the law often searches for ways out.<sup>105</sup>

In order to achieve stable compliance with copyright law, it is therefore essential to concentrate on creating an environment where direct copyright infringers or at least persons who enable them to commit acts of copyright infringement have reasons to voluntarily comply with copyright standards rather than stressing only the importance of coercive actions against specific entities. Hence, it is crucial to design respective provisions of copyright law so that they possess sufficient persuasive power toward individual regulated subjects. This can be achieved by the law treating a technology or service provider as a *responsible* person, who bears the outcome of its conduct, whether it is praised or blamed for the outcome.<sup>106</sup> In this way, the need to respect the legitimate interests of Hart’s good men would be taken into account in designing an efficient regulation. Only such regulation can have sufficient persuasive power towards Hart’s good men and can also act as an efficient external inducement to change the activities of Holmes’s bad men by employing sanctions and other forms of punishment.

## 2.2. Free Choice and Actual Control

It is generally accepted in modern societies that each person should care about what happens under her control. Accordingly, when one exercises control over persons who can infringe someone’s copyright or over premises where an act of copyright infringement can occur, she should not close her eyes.<sup>107</sup> A third party should care and thus should bear responsibility for the harm caused when she failed to use her right or ability to control activities conducted by another person and leading to such harm. The question remains why and when a third party should do so. Why and when should anyone have a duty to supervise and monitor the activities of another person?

Life brings various situations where the level of control that a third party can actually exercise diverges. They can be somewhere between the two extremes: (i) a third party has *actual ongoing control*; or (ii) a third party has *no actual control*. In the former scenario, a third party can have the right or ability to control direct copyright infringers, premises or

<sup>103</sup> For outlining main points in this regard, see Hazucha, *supra* note 79.

<sup>104</sup> See *id.*, at 65.

<sup>105</sup> See *id.*, at 65-66; Donald C. Langevoort, *Monitoring: The Behavioural Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 94-100 (2002).

<sup>106</sup> See, e.g., Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 L. Q. REV. 530 (1988), reprinted in HONORÉ, *infra* note 117, at 14, 23-31 (Hart Publishing, 1999).

<sup>107</sup> See *Shapiro*, 316 F.2d at 309; see also Barbara Kolsun and Jonathan Bayer, *Indirect Infringement and Counterfeiting: Remedies Available against Those Who Knowingly Rent to Counterfeiters*, 16 CARDOZO ARTS & ENT. L. J. 383, 389-90, 394-96, 409 and 419 (1998) (analyzing the doctrine of “willful blindness”: “[t]hose who shield their eyes to the infringing acts of their tenants or vendors have the requisite knowledge.”).

means twenty four hours a day and seven days a week. The owner of such premises or equipment must then know when her premises or equipment can be used for copyright infringement and can effectively prevent it. For instance, when a third party hires a singer, organizes a concert or provides photocopiers for reprography, she has to expect that her activity can lead to copyright infringements. Accordingly, she can draw the potential direct infringers' attention to their duties under copyright law, can ask them for copyright clearance or can arrange a proper authorization from the affected copyright holders by herself. In the latter scenario, a third party disposes of limited control. For instance, a landlord has the right to enter premises, but she has no right or ability of ongoing control over the leased premises, since it would collide with the tenant's privacy interests. To sum up, a third party can be found in different situations where one can be expected to exercise control over the acts done by another person.

If we look at cases where a third party has actual ongoing control, several similarities can be found. On the one hand, a third party participates in creating a risk of causing harm to a victim in the future and can exercise control over the principal's wrongdoing.<sup>108</sup> On the other, a third party has some kind of benefit. Tony Honoré therefore suggests that we should understand the imposition of liability in these cases as "taking the rough with the smooth"<sup>109</sup> and "luck lottery",<sup>110</sup> since the risk and benefit go hand in hand. *Ubi emolumentum, ibi onus* ("where there is a gain, there is also a burden").<sup>111</sup>

For instance, in the case of vicarious liability, one can pursue a particular goal either by oneself or through another person acting on one's behalf. The former situation represents a normal and natural state, where a person acts and bears responsibility for her own conduct. Nonetheless, everyday life brings a variety of situations where one person's capability to pursue her goals by her own deeds is naturally limited. It is impossible for her to be at two places at the same time and it is then convenient to ask another person to do something on the former's behalf.

In reality, the fact that someone acts through another person does not harm anyone. The converse is true. It makes possible and smoothens a number of social interactions which would not be possible otherwise. A similar normative consideration can be found in cases where a third party opens her premises or provides movable things to the public. Although the guardianship cases are a bit different from the previous two types of control, the establishing of family, upbringing of offspring and guardianship of minors or mentally ill persons also bring a lot of benefits in the form of satisfaction of particular personal and social wishes, wants, urges and needs. Therefore, when one receives a benefit from such a social arrangement, it is generally accepted that one should also bear the respective negative outcomes.

Returning back to vicarious copyright liability of technology and service providers, the questions are (i) to what extent the provider can exercise actual control over the end-users' usage of technology or service for unauthorized exploitation of copyrighted content, and (ii) to what extent the provider intentionally prevented itself from having such a possibility. This is crucial especially in cases where a technology and service provider controls the design of reproduction and distribution technology and related services, and where the technological design of the provided technologies or services purposely prevent the provider from exercising direct control over the usage of technologies or services, especially in cases where

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<sup>108</sup> See, e.g., George Fletcher, *The Fault of Not Knowing*, 3 THEORETICAL INQ. L. 265 (2002); Robert L. Rabin, *The Fault of Not Knowing: A Comment*, 4 THEORETICAL INQ. L. 427 (2003).

<sup>109</sup> See TONY HONORÉ, *RESPONSIBILITY AND FAULT* 9 (Hart Publishing, 1999).

<sup>110</sup> See *id.* at 23-31.

<sup>111</sup> See Justinian, *Institutes* 1.17; *Digest* 17.2.55; 50.17.10.

the provider can commercially benefit directly or indirectly from the use of copyrighted works enabled by the provided technologies or services.

It may be disputed as to why such a technology or service provider evaded any possibility of exercising ongoing control over the usage of the provided technologies. Nonetheless, any normative extension of vicarious liability based on the concept of control in order to also cover control over the development of new reproduction or dissemination technologies would have significant normative implications on the entire concept of a tortious liability regime based upon the idea of control not only in copyright law, but also in other branches of law. It would mean that ICANN or Internet service providers could be held liable for any wrongdoing committed by Internet users. Extending this idea to other areas of everyday life might mean a creation of Panopticon,<sup>112</sup> where anyone could be observed all the time and everywhere, thus conveying a “sentiment of an invisible omniscience”.<sup>113</sup>

### 2.3. *Technology and Service Provider as “Chaperone”*

The concept of control for the purpose of imposing vicarious liability in copyright law has passed a long history, where the positions of particular participants in such a three-party legal relationship underwent significant changes, adaptations and adjustments according to technological progress. The significant factor in favor of extending the technology or service providers’ strict liability is always the copyright holders’ claim that a third party, which can exercise control over the direct infringers or premises, facilities and other equipments used for copyright infringements, should play a role of “gate keeper” or “public purse” in order to induce her to make changes in her activity. But not all solutions of this kind can represent practical and effective protection for the copyright holders. Holding a technology or service provider who is in a passive position liable for copyright infringements committed by its customers would bring high social costs and could chill future technological progress, including the development of the Internet and particular networking technologies. In addition, the extension of liability based upon control over direct copyright infringements, as proved by the recent shift from a “server-client” model to peer-to-peer models of networking,<sup>114</sup> has usually the opposite effect and induces the technology providers to avoid any situation where they could be found to be able to exercise control over other persons’ copyright infringements.

An approach, which takes into account the importance of the persuasion power of law towards a considerable part of the subjects it regulates and broader society, can thus enhance our understanding of the relationship between copyright protection and the development of new reproduction and dissemination technologies and services based upon a cost-benefit analysis of inducing changes in inherently dangerous activities. As shown above, the rationale behind the duties to control and prevent the principal’s wrong is that a technology or service provider has freely chosen to embark upon a particular activity and therefore should also bear

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<sup>112</sup> See JEREMY BENTHAM, *THE PANOPTICON WRITINGS* 29 (Miran Bozovic ed., Verso, 1995).

<sup>113</sup> For panoptic theories of the information age, see, e.g., OSCAR GANDY, *THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION* (Westview, 1993); Stan Karas, *Privacy, Identity, Databases*, 52 AM. U. L. REV. 393 (2002); Stan Karas, *Enhancing the Privacy Discourse: Consumer Information Gathering as Surveillance*, 7 J. TECH. L. & POL’Y 3 (2002); Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297 (2004); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (Vintage Books, 2001); Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 852-54 (2000); Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 864-66 (2002); see also Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1413-18 (2001) (exploring the limits of the panoptic metaphor). Within the legal literature on the shaping of the information age, the most sophisticated use of Foucauldian theory is James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997).

<sup>114</sup> See Hazucha, *supra* note 79.

its negative consequences when it can exercise ongoing control over the principal's wrongdoing. The provider gains profit through providing such technologies or services and thus should take adequate precaution measures in order to avoid harming the legitimate interests of copyright holders. The understanding of control in terms of free choice and taking an individual as a responsible person adds and broadens our viewpoint on the legal relationship of this kind. A third party should then play the role of "chaperone", when she participates in some way upon, and can exercise actual ongoing control over, a wrongdoing committed by another person, and when the imposition of liability upon her leads to the efficient allocation of resources to safety and care.

None the less, the concept of "chaperone" does not contemplate liability for the provider's failure of making the concerned product or service less susceptible to unlawful uses, where no control over the user of the product exists. The reason is that the implementation of an overall monitoring and filtering system would have high social costs due to the exposure of the vast majority of the population to the possibility of privacy invasions. In addition, the liability overextension based upon the concept of control would significantly chill innovation of new reproduction and dissemination technologies and services which can be used for both infringing and non-infringing uses.

To apply this understanding of individual grounds for the imposition of vicarious copyright liability to the *Rokuraku* case, both types of justifications support the imposition of liability on the service provider. For the provider could exercise control over the activities of individual users and could directly or indirectly benefit from such activities. According to the utilitarian efficiency theory, the imposition of vicarious liability would induce the service provider either to change its business model to avoid causing any harm to copyright holders, or to buy a blanket license from the concerned collecting society.<sup>115</sup> In addition, achieving changes in service provider's activities has a more considerable impact on the level of complying with the requirements of copyright law than achieving changes in the behavior of service provider's individual customers. Similarly, the imposition of liability on the service provider in the *Rokuraku* case can also be justified by justifications based upon the service provider's agency and corrective justice. There is no doubt that the service provider participates in the creation of the risk of exposing copyright holders to future harm. If the provider's activities then harm or create a risk of harming the copyright holders' legitimate interests, it should bear responsibility for the harm caused. Accordingly, it is essential to examine whether any such harm or risk actually or at least potentially existed in this particular case.

Although the previous analysis tends to support the argument that the Intellectual Property High Court failed to properly and adequately apply the Japanese Copyright Act in the *Rokuraku* case, before coming to a final conclusion on the adequacy of the adopted approach it is vital to examine possible solutions which strike a balance between the contravening interests of the affected stakeholders in this case, including their implications on the individual interests of affected stakeholders and which achieve a fair and just balance of between these contravening interests.

### 3. POSSIBLE SOLUTIONS AND THEIR IMPLICATIONS

In general, there are three possible ways that a balance of the contravening interests of the concerned stakeholders can be struck.

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<sup>115</sup> As broadcasting companies have considerable stakes in television on demand services, it would be very difficult for such service providers to acquire any blanket license from broadcasting companies. For more detailed analysis on this point, see Section 3 below.

### 3.1. Strengthening Exclusive Rights of Copyright Holders

The first option is to hold the service provider liable directly or indirectly for copyright infringement due to the nature of its activities which are done for commercial purposes. This would lead to a situation where the television broadcasting companies could easily shut down the services competing with those provided by them or other companies upon license agreements.

The result brought about by this option would be a strong level of protection for the interests of television broadcasting companies, especially in adequately guaranteeing that only television broadcasting companies are entitled to stream, or to license streaming of, their television broadcasts. In this regard, it should be noted that the current Japanese copyright law recognizes a safe harbor in case of retransmission via wire under certain conditions. Article 99(2) of the Japanese Copyright Act excludes retransmission via wire conducted by a person who is required to do so under specific provisions of laws and other regulations<sup>116</sup> from the exclusive rights to rebroadcast and to diffuse by wire the broadcast held by broadcasting companies. Nevertheless, this exemption is not applicable to the services provided by the service provider in the *Rokuraku* case. It applies only to conventional cable television providers which retransmit television broadcast via special cable networks. In order to provide this type of service, the provider needs to obtain a license which is granted territorially under the cable television broadcasting law so that its territory is consistent with the territorial division of broadcasting areas adopted by television broadcasting companies. Hence, the result of a scenario based on the imposition of copyright liability on providers of services similar to the *Rokuraku II* and the *Maneki-TV* ones would be that the provision of such services would be banned.

Although the situation in the *Rokuraku* case or the *Maneki-TV* case may look very similar to using karaoke equipment for commercial purposes, it should be made clear that there is a minor, but crucial difference. Record labels rarely have direct stakes in karaoke business activities, *i.e.* it is not usual that record labels also operate karaoke venues. The actual situation with streaming television broadcast is completely opposite. Many television broadcasting companies directly provide their own television-on-demand services.

The main problem with services currently provided by the concerned television broadcasting companies is that their scope is limited only to television programs broadcast by individual companies. If consumers want to watch television programs broadcast by several channels or broadcasting networks, they have to subscribe to several services provided by individual broadcasting companies. In addition, the provided services are very limited even as to the range of broadcasted television programs offered online by the respective television broadcasting companies. For instance, “NHK on demand” service provides a limited monthly subscription for its customers. Its subscribers can watch 150 television programs a month from a preselected group of programs for a JPY1,470 monthly fee. All additional programs are to be paid separately for JPY105-315 charge per program. The current situation with conventional TV online streaming can thus hardly satisfy the interests of individual consumers, since such services are too expensive and inconvenient for them. But, so far, there is no other online service which would provide streaming of even a few, let alone all, available terrestrial television broadcasts in Japan.

The limited scope of online services is more an exception than the rule. An excellent example in another branch of copyright industries is the iTunes service which provides a broad

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<sup>116</sup> Cable Television Broadcasting Act of 1972, Law No. 114 of 1 July 1972, as amended (有線テレビジョン放送法).

range of sound recordings from the portfolios of numerous record labels. But this was not always the case.<sup>117</sup> In the beginning, the record labels' business models were based on services exclusively providing sound recordings only from one or several record labels under very restrictive conditions as to the use of downloaded music files. As the provided services did not fit to the customers' demands for such services under reasonable conditions, none of them was commercially successful. It took several years to change the situation in the music market. It occurred when Apple came with its iTunes service. Apple had at that time no direct considerable stake in the recording industry and it decided to set up its iTunes service in order to spur the sales of its iPod devices. To do so, iTunes service had to provide its customers with a broad array of music under conditions attractive to its customers. This was one of main reasons why the outcome of Apple's efforts was the first commercially viable online music downloading service with authorized copies of copyrighted works.

It seems that the current situation in online television program streaming services in Japan is quite similar to the one in the field of online music downloading several years ago—before iTunes entered the market. As several of the main Japanese television broadcasting companies operate their own television-on-demand services, they are unwilling to allow competing commercial activities, such as the provision of services similar to the *Rokuraku II* and the *Maneki-TV* ones. At the present, they do not have enough incentive to grant other service providers with a necessary license for the provision of competing online services. Based upon previous experiences in iTunes and other similar cases, we can expect that services similar to those provided by iTunes service at the moment will also be provided in the area of online television program streaming. The problem is that it can still take several years until the market will come up with services which will be more adjusted to the customers' actual demands. Until this happens, the consumers who currently do not have sufficient access to television broadcasting in rural areas or abroad would not have any viable option to receive television broadcast publicly available in Japan under reasonable conditions. The strong protection of television broadcasting companies' interests would thus bring considerable social costs which should be borne by Japanese society as a whole.

### 3.2. *No Liability of New Online Service Providers*

The second possible scenario is the one adopted by the Intellectual Property High Court. Although it might be seen by some as an error and an overly restrictive interpretation of the respective provisions of the Japanese Copyright Act which disregards the legitimate interests of the affected copyright holders, it can also lead to the adjustment of television broadcasting companies' business models under certain conditions. To understand the present situation in Japan properly, it has to be noted that a majority of new models of cell phones allow their users to receive television broadcasts. Any of such users can watch television programs at any time and any place she wants if the television signal can be received with sufficient quality at a particular place. Consequently, the main target customers of services similar to those in the *Rokuraku* and *Maneki-TV* cases are the users who do not have good access to television broadcasting because of insufficient coverage by television broadcasting signals. This is the case in some rural areas and territory outside Japan.

The first group of target customers is thus composed of residents living in areas which do not have sufficient coverage by television broadcasting signals, but have good access to the Internet. If the broadcasting companies are interested in this group of customers, they can be induced, by the services similar to the *Rokuraku II* and *Maneki-TV* ones, to invest in

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<sup>117</sup> See, e.g. LITMAN, *supra* note 88; LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* (2004).

providing these areas with sufficient coverage by television broadcasting either via terrestrial or satellite broadcasting, or via the Internet. But in many cases, this improvement would require considerable investment from the side of broadcasting companies. Therefore, the services such as the *Maneki-TV* and *Rorukaru II* ones can be one of the possible ways to provide the residents of these areas with sufficient television broadcasting coverage under reasonable conditions.

The second group of target customers consists of people who are outside Japan and do not have access to Japanese television broadcasting. The arguments in favor of a ban on services similar to the *Rokuraku II* and *Maneki-TV* ones is also hardly convincing with regard to this group of target customers for several reasons. If broadcasting companies were interested in the audience of the *Rokuraku II* and *Maneki-TV* services, they could already provide it with adequate services via the Internet. The broadcasting companies' position is even less compelling when the economics of online television streaming is taken into account. The current Japanese copyright law requires the providers of services similar to the *Rokuraku II* and *Maneki-TV* ones to design their business models in an economically inefficient way. As their business models must be based on separated units for each user in order to satisfy the requirements of current Japanese copyright law, they cannot benefit from synergic effects of providing television program streaming services through more efficient technological solutions. The providers of such services then have to bear additional costs for the operation and management of their systems and they also need adequate space to locate emitting devices for each individual user. Accordingly, there is a sufficient margin for broadcasting companies to redesign their current business models so that the customers' demands would be more taken into account and the redesigned services would still be commercially viable, since their costs would be much lower than those of the *Rokuraku II* and *Maneki-TV* systems.

Another possible group of customers for the *Rokuraku II* and *Maneki-TV* services is composed of those who are not satisfied with the quality of locally provided television programs and are willing to pay more for the programs broadcast in metropolitan areas, especially the Greater Tokyo Area. Although there are several arguments presented by broadcasting companies to support their standpoint in favor of the first option of striking a balance between the interests of the concerned stakeholders, it should be noted that they are mainly applicable to this last group of target customers and rarely to the two previous groups.

The main argument against allowing the *Rokuraku II* and *Maneki-TV* services put forward by broadcasting companies is that such services can undermine the entire system of television broadcasting, including their revenues from commercial advertizing. The major broadcasting companies divide the territory of Japan into several regions which are covered by regional broadcasting so that they can target particular groups of population with commercials and thus enhance their revenues. The broadcasting companies therefore argue that if the *Rokuraku II* and *Maneki-TV* services are allowed, their local branches will lose a considerable amount of revenues from local advertizing, which will lead to the complete dismantling of their entire organization of territorially divided television broadcasting.

Nevertheless, the argument based on potential losses in revenues from commercial advertizing is hardly convincing for several reasons. With regard to the first two groups of customers, the services similar to the *Rokuraku II* and *Maneki-TV* ones actually increase the size of broadcasting companies' audience and thus also the possibility to obtain higher revenues for broadcasting companies from commercials sold. As to the last group of customers, it is highly questionable as to whether the law should protect the creation of artificial barriers of this kind, especially when the barriers only shield inefficient television broadcasting of low quality. By switching from locally broadcast programs to programs broadcast in other areas, this group of customers can show its dissatisfaction with the different quality of television broadcasting in individual regions in Japan. Allowing the *Rokuraku II*

and *Maneki-TV* services can thus stimulate an affirmative reaction of television broadcasting companies to customers' demands, which would lead to an increase in the quality of provided television broadcasting throughout Japan and, as a consequence, an increase in the value of commercial advertising.

Furthermore, the potential harm of services similar to the *Maneki-TV* and *Rokuraku II* ones caused to the interests of broadcasting companies due to their considerable increase is minimal. From a long term perspective, the chance of covering a broader market and creating larger network of users by such services is very bleak due to their higher costs and marginal groups of target customers as described above. The marginality of the market for such services can be seen also in its current size which is not too significant. In the *Maneki-TV* case, the service provider had around a hundred customers, a number which does not actually cause any significant threat to broadcasting companies. In the *Rokuraku* case, the situation is a bit better for the concerned service provider, but still the actual numbers hardly amount to any serious threats for the current conventional business models of the main Japanese television broadcasting companies.

In addition, when the present *Rokuraku II* pricing scheme is compared with the schemes of conventional cable networks, it becomes clear that services similar to the *Rokuraku II* and *Maneki-TV* ones are not actual substitutes to the services provided by conventional cable networks and can hardly affect the revenues of cable networks and broadcasting companies' royalties. The fees charged by such services are considerably higher than those charged by conventional cable networks. Furthermore, the range of television channels provided by cable networks is broader than the limited selection offered by the *Rokuraku II* and *Maneki-TV* services.

To sum up, the second scenario based on no liability imposed on the providers of services similar to the *Rokuraku II* and *Maneki-TV* ones brings a limited cost to broadcasting companies in the form of direct competition with "television on demand" services provided at the present by individual broadcasting companies via the Internet. However, as shown above, the paid services as designed at the present were hardly viable even before the appearance of any services such as the *Rokuraku II* and *Maneki-TV* ones due to their narrow scope and lack of sufficient additional value provided to their customers for the high price currently charged. Even without imposing any liability on the providers of services similar to the *Rokuraku II* and *Maneki-TV* ones, the broadcasting companies can easily redesign their business models so that their services will be commercially viable—competitive with services similar to the *Rokuraku II* and *Maneki-TV* ones and satisfying the consumers' demands in a better way. At the same time, the provision of such services has significant social benefits which outweigh the abovementioned social costs which are to be borne by broadcasting companies. Although the market will, as shown above, sooner or later lead to the designing of television program streaming services similar to the iTunes service in the field of online music downloading services under both above-described scenarios—with or without the imposition of any liability on providers of services similar to the *Rokuraku II* and *Maneki-TV* ones—there is still considerable difference between both scenarios. As a result of the allowance of such services under a no-liability based scenario, a considerable part of the population can benefit from sufficient access to television broadcasting under reasonable conditions without having to wait for the market to force broadcasting companies to redesign their business models. It can still take several years especially when the majority of the *Rokuraku II* and *Maneki-TV* customers present a marginal group of customers to the main broadcasting companies.

### ***3.3. Blank Licenses and Levies***

The third possible scenario would be somewhere in between the two previously described scenarios. Under this scenario the service providers would be obliged to pay some percentage of revenues they obtain from their customers for the provision of the services in question. The broadcasting companies would not, however, be empowered to demand the service providers refrain from the provision of such services when the latter paid reasonable royalties to the former. This solution would solve the main obstacle faced by the first scenario based on the imposition of copyright liability on service providers—the lack of interest on the side of broadcasting companies to authorize such service providers to retransmit their television broadcast via the Internet. Although the third scenario seems to strike a just and fair balance between the contravening individual interests of concerned stakeholders more appropriately and adequately than the one adopted by the court in the *Maneki-TV* case and the *Rokuraku* case, it should be mentioned in order to clarify the court's actual reason for adopting the given approach that the court in both cases faced only two extreme options, *i.e.* to restrain or to allow such commercial activities.

Another point which also has to be taken into account is that the Japanese copyright law already imposes levies on some recording devices and media used by some of these services, especially the *Rokuraku II* system. Although the Japanese copyright law does not directly impose any levies for providing services based upon the exploitation of copyrighted works by their users for private non-commercial purposes, the approach adopted by the Japanese courts can induce the Japanese government and legislature to adopt the respective legislative changes which do not require considerable changes in the concepts employed by the current Japanese copyright law because it already recognizes some forms of levies for private copying. At the same time, it should be kept in mind that the levy regimes have their own drawbacks, such as their administration costs and the often limited amount of collected funds compared to the actual size of levied activities.<sup>118</sup>

## CONCLUSION

Although at first glimpse the approach adopted by the Intellectual Property High Court in the *Rokuraku* and *Maneki-TV* cases seems to be at odds with the current trends in providing the right holders with a high and efficient level of copyright and neighboring rights protection worldwide, this Article has proved that they were the best possible decisions which the court could adopt under the given conditions and circumstances of both cases. Actually, finding the service providers liable for infringing the exclusive rights of broadcasting companies would bring more social costs than benefits to Japanese society as a whole. By striking a balance between the interests of technology and services providers on the one side and copyright and neighboring rights holders on the other in the way adopted by the court, the court also indirectly took into account the interests of consumers of the television broadcasts in question.

In addition, the solution adopted will induce the broadcasting companies to adjust their business models if they are interested in attracting the audience of services such as those assessed in the *Maneki-TV* case and the *Rokuraku* case. To do so, the broadcasting companies would not face any disadvantage against such service providers. Conversely, the Japanese copyright law provides the copyright holders with sufficient advantages since it requires the service providers to design their business model in a very inefficient way from an economic

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<sup>118</sup> See, *e.g.*, Branislav Hazucha, *Community as a Holder of Intangible Cultural Heritage: A Broader Public Policy Perspective*, in TOSHIYUKI KONO (ed.), *INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY: COMMUNITIES, CULTURAL DIVERSITY AND SUSTAINABLE DEVELOPMENT* 223, 242-243 (Intersentia, 2009) (pointing out this problem in different context).

point of view. Accordingly, such service providers have to bear extra costs which they in turn have to allocate to their individual consumers. Well, “[t]he die is cast!”

Only the future situation with television broadcasting and the availability of its broadcasts via the Internet will show whether the balance recently struck by the Intellectual Property High Court between the interests of all the concerned stakeholders is viable. And even in cases where broadcasting companies feel an urgent need to strengthen the level of copyright protection in order to protect them against services similar to the *Maneki-TV* and *Rokuraku II* ones, the legislature can do so. In such case, there is a higher chance that the interests of all affected stakeholders will be taken into account more properly than in a lawsuit between individual parties where the courts’ capability to do so is limited.