

## Copyright Protection on Pornography in Japan

Student Note

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### Abstract

Most courts in Taiwan have denied legal redress in infringement suits to holders of copyrights on immoral or obscene works by applying judicially-created doctrines. These judgments were based on the Supreme Court held that adult films are not copyrightable because these films are against social order or public interest, and in no way promoted social development in 1999. However, the Taiwan Intellectual Property Office (“TIPO”) has tended to recognize porn films as copyrightable works. In an administrative letter of explanation issued in 2008 (Zhi-Zhu-Zi No. 09700025950), TIPO stated that if adult films are original, they are covered by copyright regardless of whether they are also categorized as obscene material. Porn isn’t an object of copyright protection until the IP Court in 2014 held that a pornographic work is entitled to copyright protection as long as it meets the originality requirement. Contrary to individual opinions in Taiwan, porn is taken it for granted that AV can be protected under Copyright Act in Japan.

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## **I. Introduction**

Adult entertainment companies in Japan have focused on Taiwan where websites openly sell their videos and TV channels air their content without permission. For many years, Japanese porn producers tried to seek copyright infringement lawsuits against Taiwanese pirates in the hope of holding them accountable for profiting from their content. The adult producers claimed that the pirates were spreading obscene material and damaging children didn't gain any ground either. The prosecutors decided that since the pirate sites displayed warnings and blocked minors from accessing their websites then there was no case to answer there either.

Nevertheless, the Supreme Court in Taiwan denied the originality of adult videos,<sup>1</sup> they hold that because copyright which aims at "protecting the rights and interests of authors with respect to their works, balancing different interests for the common good of society, and promoting the development of national culture." Nevertheless, porn films are against social order or public interest, and in no way promoted social development. According to the court, porn is not included, and can't be copyrighted for a long time.

For years producers of porn movies in Japan have bemoaned the lack of protection their content has received in Taiwan. However, on February 20, 2014, the Intellectual Property Court affirmed that the originality of adult videos.<sup>2</sup> It has become the first judgment held that adult videos can be copyrighted and the new standard for the other courts to hear and decide similar cases in the future.

## **II. Legal Protection of Adult Videos in Japan**

Under Japanese Copyright Act, Article 1 provides that the purpose of this Act is to provide for, and to secure protection of, the rights of authors, etc. and the rights neighboring thereto with respect [copyrightable] works as well as performances, phonograms, broadcasts and wire-broadcasts, while giving due regard to the fair exploitation of these cultural products, and by doing so, to contribute to the development of culture. In short, copyright is to protect and promote the development of national culture.

"Work" means a production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain.<sup>3</sup> Article 10 provides the Illustrations of works.

However, do adult videos belong to works under Japanese Copyright Act? In light of Article 2, Para. 1, Subpara. 1, it can't be inferred that Congress

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<sup>1</sup> See Supreme Court Criminal Decision No. 1999- Tai-Shang-250.

<sup>2</sup> See Intellectual Property Court criminal decision No. 2014- Xing Zhi Shang Yi Zi -74.

<sup>3</sup> See Art. 2, Para. 1, Subpara. 1 of the Japanese Copyright Act.

intended that obscene materials could not be copyrighted. In general, porn films are deemed a kind of cinematographic works<sup>4</sup>, the reason is in light of Article 2, Para.3 which provides that “cinematographic work” includes a work which (i) is expressed through a process producing visual or audio-visual effects similar to those of cinematography, and (ii) is fixed in an object. All of porn videos can meet the factors of this article.<sup>5</sup>

Furthermore, they are found as a creation in which thoughts or sentiments with “originality” by a human mind and can be copyrighted under Article 2. Thus, to protect adult videos could apply the regulatory purposes of copyright- contribute to the development of culture in Japan.

Although porn films are recognized as copyrightable works, these work often face statutory limitations with respect to their distribution. Due to obscene materials of porn films, spreading obscene materials may damage the health of teenagers and children.

So the main regulation of porn is Article 175 of Japanese Penal Code, it provides, “A person who distributes, sells or displays in public an obscene document, drawing or other objects shall be punished by imprisonment with work for not more than 2 years, a fine of not more than 2,500,000 yen or a petty fine. The same shall apply to a person who possesses the same for the purpose of sale.”

We can find that whether porn is in violation of the above article, the point is porn can't be distributed, sold or displayed in public an obscene document, drawing or other objects. However, how to define “an obscene document?” In Japan, there is a general opinion that was made by the Supreme Court of Judicature,<sup>6</sup> which was the highest judicial body in the Empire of Japan. The Court defined an obscene document as one that text or pictures and any other items can excite sexual desire; to make general people feel shame and disgust. The definition is remained ever since in Japan.

### **III. The Judgment of Adult Videos in Japan**

The following context I'll introduce a case how to find the protection of adult videos under the Copyright Act in Japanese courts.

In Japan, if someone sells unauthorized copies of AV (so-called bootleg) or, the copyright owner has a right to seek injunction.<sup>7</sup> I'll introduce a case

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<sup>4</sup> See Art. 10, Para. 1, Subpara. 7 of the Japanese Copyright Act.

<sup>5</sup> Based on Article 2, Para. 1, Subpara. 1 of the Japanese Copyright Act, we can extend to explain the copyright protection for pornography, including even obscene materials.

<sup>6</sup> It existed from 1875 to 1947. The court was composed of 120 judges in both civil and criminal divisions. Five judges would be empaneled for any given case. See <http://www.geocities.jp/since7903/kantyou/daishinin.htm> (last visited June 20, 2014).

<sup>7</sup> Article 112 of the Japanese Copyright Act provides:

(1) The author, the copyright holder, the holder of the right of publication, the

about possession or distribution of unauthorized video tapes.

Whether an AV is a cinematographic work, the Tokyo District Court held, “Porn is a plaintiff work which falls within a cinematographic work.”<sup>8</sup> Adult videos are a cinematographic work in the precedent of many other.

### **A. The brief of the judgment**

Plaintiffs, Athena video Inc., F E. Metal Corporation, Cinemagic Corporation, Japan Home Video Inc., Max-et Inc., Media Station Ltd., which were adult entertainment companies and the copyright holders of porn films. These companies provided video tapes to the dealers of adult video franchise system, which are entitled 日本ビデオ販売 Inc.

The defendant, 日本ビデオ販売 Inc., which obtained legal copies of the porn movies from plaintiffs and sold pornographic video tapes. However, the defendant reproduced pornographic videos without plaintiffs' permission and sold the porn video tapes and supplied pirated editions to its own franchise system.

One of the plaintiffs was a member of the Nihon Ethics of Video Association<sup>9</sup> (“NEVA”), which was a Japanese video rating organization. NEVA found the defendant sold unauthorized duplication of plaintiffs' works. Later, plaintiffs wrote attestation letters to request the defendant to destruct the illegal copies and stop infringing; otherwise, they would bring an action against the defendant. However, the defendant refused to stamp or sign the letters. Therefore, plaintiffs asserted that the defendant violated Article 175 of the Japanese Penal Code and Copyright Act and sued for an injunction at the Tokyo District Court.

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performer, or the holder of neighboring rights may demand that persons infringing, or presenting a risk of infringing, on his moral rights of author, copyright, right of publication, or moral rights of performer or neighboring rights, as applicable, cease the infringement or not infringe, as the case may be.

- (2) When making the demand provided for in the preceding paragraph, the author, the copyright holder, the holder of the right of publication, the performer or the holder of the neighboring rights may [also] demand the taking of measures necessary to effect the cessation or prevention of the infringement, such as the destruction of objects constituting the acts of infringement, objects made by acts of infringement, and/or machines and tools used exclusively for acts of infringement.

<sup>8</sup> Tokyo District Court in Year 1996 (Wa) No. 1590 (no copyright infringement injunction).

<sup>9</sup> It was a voluntary organization to ensure adherence to Japanese obscenity laws, which prohibit any display of genitals. This is accomplished by a mosaic pixilation that is applied to videos for sale in Japan, and the NEVA seal is placed on all videos produced by member studios, which included the larger and older adult video studios in Japan.

The Tokyo District Court found that plaintiffs had issued 169 attestation letters to notice the defendant and there had discovered 582 unauthorized porn films in the defendant's directly-managed stores. The judgment didn't explain why porn films are cinematographic works, the judges indicated that due to the defendant's unreasonable action and possession of unauthorized copies, we can assume the infringer's attempt to immunize their illegal acts and cause damage to plaintiffs' cinematographic works. The defendant was obviously violate the purpose of the Japanese Copyright Act.

## **B. Comments of the judgment**

The Tokyo District Court ruled that the defendant infringed plaintiffs' "cinematographic works" but didn't illustrate why porn films belonged to cinematographic works. The reasons are quite simple, the Japanese Copyright Act doesn't exclude porn from protection objects. There is no denying that porn is expressed through a process producing visual or audio-visual effects similar to those of cinematography, and is fixed in an object.

There was another famous judgment<sup>10</sup> about a video rental store bought the products of Soft On Demand Inc. ("SOD") which is a Japanese adult video group of companies and illegally duplicated the products, so that the store could provide the unauthorized copies for people to rent. The judgment hold that porn films were cinematographic works, hence the producers enjoyed rights of distribution under Article 26 of the Japanese Copyright Act.<sup>11</sup>

## **IV. Conclusion**

In Japan, adult entertainment has become just like "adult industry." Despite the Copyright Act contains the goal of efficiently utilizing and allocating the social resources so as to optimize the total social benefit. To recognize porn as a copyrightable object is different from to control obscenity. Moreover, denying copyright protection to works adjudged obscene by the standards of one era would frequently result in lack of copyright protection and it will be lack of financial incentive to create.

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<sup>10</sup> See 東京地裁 平成10年(ワ)第17625号.

<sup>11</sup> Article 26 of the Japanese Copyright Act provides:

- (1) The author of a cinematographic work shall have the exclusive right to distribute his work by distributing reproductions of said cinematographic work.
- (2) The author of a work reproduced in a cinematographic work shall have the exclusive right to distribute his work by distributing reproductions of the same.

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