Use and Citation of Copyrighted Works in Webinars, Etc.

Is it possible to use any specific content or expression in a book that I did not write for myself in Webinars or other presentations?

In general, you may be able to use them, but in order to do so without obtaining the consent of the copyright holder, you must follow certain rules of citation under Japanese law (Article 32 of the Copyright Act) as explained in detail below.

Any specific content or expression in a book is considered a copyrightable work if it shows the author's creativity (Article 2, Paragraph 1, Item (i) of the Copyright Act), and if so, the author is protected by Japan's Copyright Act. In terms of protection, the author is the owner of the copyright (Article 17, Paragraph 1 of the same Act) and has the exclusive right to reproduce the work (Article 21 of the same Act) (associated right) which is covered by the copyright. As a result, the copyright holder will be able to exercise the right to demand an injunction (Article 112 of the same Act) and the right to claim damages (Article 709 of the Civil Code) against a person who reproduces and exploits his/her work without his/her permission.

However, the Copyright Act also imposes certain restrictions (Article 30 et seq. of the same Act) on the exercise of copyright (Right of Reproduction per this question) in order to ensure the fair use of cultural products (Article 1 of the same Act). One of the requirements for use of copyrighted works is citation (Article 32 of the same Act).

It is not always clear from the provisions of the Copyright Act what circumstances constitute a "citation"; however, Article 30, Paragraph 1 of the former Copyright Act prior to the enactment of the current Copyright Act contains a provision concerning "citation", which is a predecessor of the current law, and a Japanese Supreme Court decision (Supreme Court, judgment of March 28, 1980; *Minshu* (Supreme Court Civil Case Reports) Vol. 34, No. 3, p. 244 (Montage Case)) sets forth an interpretation of this provision. It is believed that this interpretation can also be used to interpret current laws.

According to the ruling, in order to be considered a citation, it is necessary to be able to distinguish clearly between the present work and cited work (distinctiveness) and to recognize that the former is the main work and the latter is subordinate (master-subordinate relationship).

Therefore, it is necessary to meet this requirement if you intend to use some specific content or expression taken from books that you did not write.

In order to be clearly distinguishable, the cited work must not be so integrated as to be indistinguishable from the present work. (Tokyo District Court, judgment of April 28, 1986; *Hanji* (Hanrei Jiho) No. 1189, p. 108 (Bungo Stone Bath Case), denied the distinctiveness of the cited work when pages 19 through 37 thereof were reproduced in their original form, and thus the two papers were held indistinguishable.)

In order to be able to say that there is a master-subordinate relationship, the cited work must not have a higher prominence than the present work. (Tokyo District Court, judgment of May 22, 1991; *Hanji* (Hanrei Jiho) No. 1421, p. 113 (Textbook Tapes Case) denied that the master-subordinate relationship was established when the basic sentences, main text, and newly published word sections of middle school English textbooks were read, sung and recorded, and other recordings were merely instructions on how to use the tape or where to read. However, in this case, the plaintiff who acquired the exclusive right to manufacture and sell audiotapes from the copyright holder claimed infringement.)

Therefore, in order to be recognized as a citation, consideration must be given to satisfying the requirements of both distinctiveness and master-subordinate relationship.

It is also required that the source of the work and the name of the author be clearly indicated when citing (Article 48, Paragraphs 1 and 2 of the same Act).

In recent cases involving lower courts, an increasing number of courts have determined, in accordance with the provisions of Article 32 of the Act, that citations must be "in conformity with fair practice" and "to the extent justified for the purpose of the citation" (For example, Tokyo District Court, judgment of June 13, 2001; *Hanta* (Hanrei Times) No. 1077, p. 276 (Absolute Pitch Case), and the Intellectual Property High Court, judgment of October 13, 2010; *Hanta* (Hanrei Times) No. 2092, p. 135 (Art Appraisal Case)). However, if the

conditions for distinctiveness and master-subordinate relationship described above are met and the origin and author name of the work are clearly indicated, it is considered normal to be legally protected as a citation under Article 32 of the Act by under the latest judicial precedent.

[Reference]
"Provisions on Restrictions (1) – Citation" by Shigeru Osuga in 'Intellectual Property Practice Outline III' (Seirin Shoin, 3rd edition, 2014) edited by Toshiaki Makino, et. al., p. 170

Precautions for Downloading, Etc. of Illegal Videos

It seems that the use of content services, such as those offering videos, music, comics, etc., has been increasing due to the effects of the Novel Coronavirus. Please let me know the circumstances under which uploading and downloading of such content becomes illegal.

1. Illegal Uploading

Content on the Internet is legally protected as a copyrighted work based upon the existence of creativity (Article 2, Paragraph 1, Item 1 of the Copyright Act). The act of uploading content on the Internet is deemed a transmission to the public (Item 7(2) of the same Paragraph), and the author has the exclusive right (Article 23, Paragraph 1 of the Copyright Act) to make a transmission of the work to the public (right to transmit to the public).

Uploading content without the permission of the copyright holder is an illegal act under Japanese law that violates the above right to transmit to the public and can result in criminal liability (imprisonment with work for not more than 10 years or a fine of not more than 10 million Yen, or both) in addition to civil liability (Article 119, Paragraph 1 of the Copyright Act).

For example, the act of scanning comics and posting them on blogs, etc., the act of uploading TV programs and movies on YouTube, etc., and the act of uploading audio, such as CD's, on YouTube, etc., are all acts of infringement of the right to transmit to the public if the permission of the copyright holder is not obtained.

In recent years, it has become common for ordinary people to sing or play songs and post them on SNS, etc.; however, in such case, if the permission of the copyright holder has not been obtained, it may be a violation of the right to transmit to the public. However, it may be possible to release songs managed by the Japanese Society for Rights of Authors, Composers and Publishers ("JASRAC") without the need for any procedures by using SNS, with which JASRAC has a licensing agreement. (For example, YouTube, Instagram, and Facebook have license agreements, but Twitter does not.)

2. Illegal Downloading

In principle, downloading (meaning saving to a computer terminal) of any content uploaded on the web without permission (hereinafter referred to as "Illegal Content") is an infringement of the right of reproduction under Japanese law (Article 21 of the Copyright Act).

However, under current laws, downloading of Illegal Content for private use is permitted unless: (i) the user is aware of the illegality; and (ii) the user "records the sounds or visuals in digital format" (Article 30, Paragraph 1, Item 3 of the Copyright Act). In such case, the user may face civil or criminal liability (imprisonment with work for not more than two years or a fine of not more than 2 million Yen, or both) for private use if the user satisfies both (i) and (ii) above (Article 119, Paragraph 3 of the Copyright Act).

In other words, downloading of Illegal Content for private use is prohibited only for recorded video or audio content, such as movies and music, and downloading of content such as comics, magazines, and papers is not restricted.

In this regard, an amendment is scheduled to expand the scope of restrictions on downloading Illegal Content to all copyrighted works in the main session of the Diet (the 201st session of the Diet; under consideration as of April 29, 2020). If such revisions are made, intentional downloading for private use of content other than recorded video or audio shall be also prohibited (Article 30, Paragraph 1, Item 4 of the Amendment to the Copyright Act).

However, in order to prevent overly restricting the collection of information by the public, the following will not be subject to the proposed restrictions for private use: (i) "minor acts" such as a few frames of comic strips; (ii) derivative works and parody; and (iii) "where there are special circumstances in

which it is found that the interests of the copyright holder will not be unreasonably harmed." Criminal punishment is also applicable only to continuous or repeated misconduct (Article 119, Paragraph 3, Item 2 of the Amendment to the Copyright Act).

Although there is some debate as to whether streaming of Illegal Content constitutes reproduction, there have been cases where it has been denied (Tokyo District Court, judgment of April 21, 2016; *Hanji* (Hanrei Jiho) No. 2316, p. 97). However, it should be noted that streaming of Illegal Content to the public separately infringes the stage performance right and musical performance right (Article 22 of the Copyright Act), as well as the right of on-screen presentation (Article 22, Paragraph 2 of the Copyright Act), of copyright holders.

[Reference]
"Use of Music on Video Hosting Website" by JASRAC
https://www.jasrac.or.jp/info/network/pickup/movie.html (Japanese)

"List of UGC Services under Licensing Agreement" by JASRAC
https://www.jasrac.or.jp/info/network/ugc.html (Japanese)

"Proposal of Amendment to the Copyright Act in the Regular Diet Session 2020" by the Agency for Cultural Affairs
https://www.bunka.go.jp/seisaku/chosakuken/hokaisei/r02_hokaisei/ (Japanese)

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