

# Mediation and Arbitration in Copyright Disputes

**Tatsuhiro UENO**

Professor of Law  
Deputy Director of RCLIP  
Waseda University (Tokyo, Japan)

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***Copyright in Action: Int. Perspectives of Remedies  
ALAI Montreal***



# Outline

## I. Introduction

## II. ADR and its benefits

## III. Copyright mediation system in Copyright Act

1. Japan (Chapter VI of Japanese Copyright Act)
2. South Korea (Chapter VIII of Korean Copyright Act)
3. Why is there a big difference in practice?

## IV. Conclusion



# ADR AND ITS BENEFITS

# Main Types of ADR

***Mediation:*** A neutral intermediary, the mediator, helps the parties to reach a mutually satisfactory settlement of their dispute.

***Arbitration:*** A procedure in which a dispute is submitted, by agreement of the parties, to arbitrators who make a binding decision on the dispute.

Ref. WIPO Arbitration and Mediation Center Website

# Benefits of ADR

## (1) A single procedure

- International disputes among overseas parties
- Fragmentation of law (e.g. Applied arts, TV formats, parody)

## (2) Party autonomy

## (3) Neutrality

## (4) Confidentiality

## (5) Finality of awards

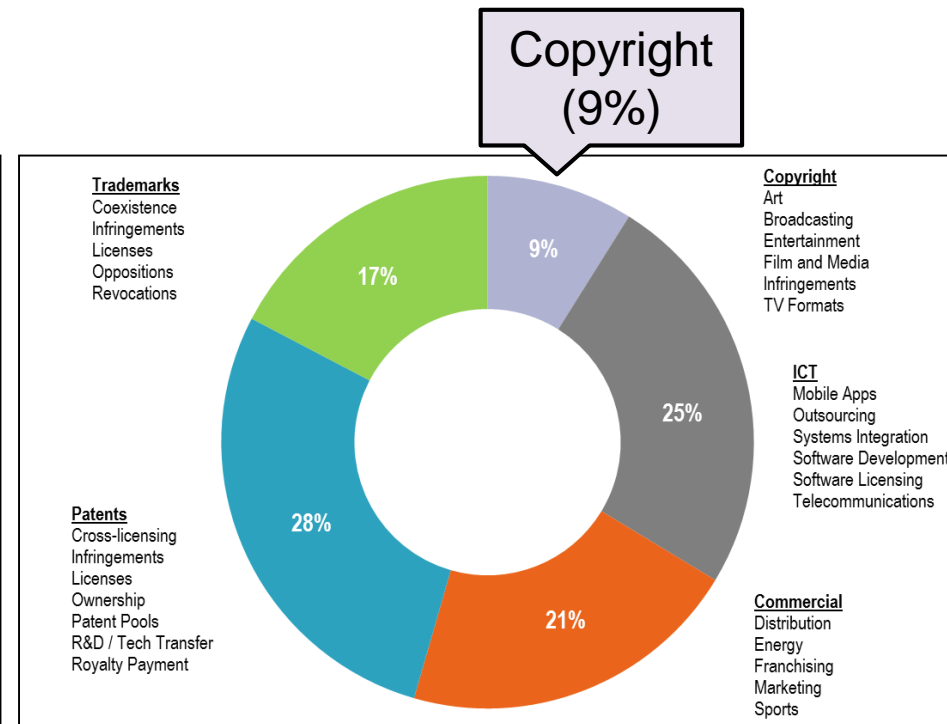
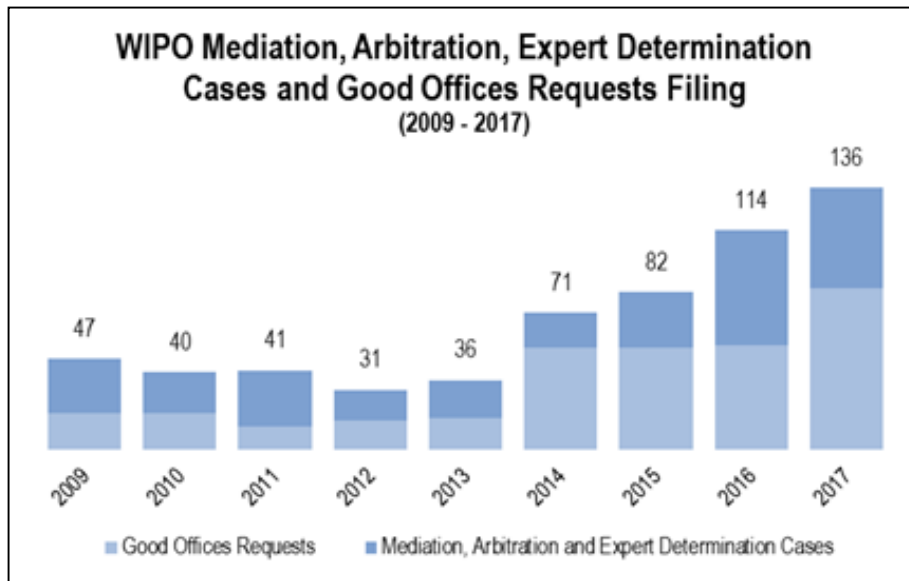
## (6) Enforceability of awards & agreements

- New York Convention on Arbitral Awards (1958)
- EC Mediation Directive (2008/52/EC)
- Singapore Convention on Mediation (2018)

## (\*) Cost / Time saving

Ref. WIPO Guide on ADR Options (2018)

# WIPO Arbitration & Mediation Center



Dispute Areas in WIPO ADR Cases (April 2018)

Ref. WIPO Arbitration and Mediation Center Website



# Copyright Mediation in Japan

## *Chapter VI (Settlement of Disputes)* of Japanese Copyright Act (JCA)

Art. 105 (Mediators for the settlement of copyright disputes)

Art. 106 (Application for mediation)

Art. 107 (Application fee)

Art. 108 (Submission to mediation)

Art. 109 (Mediation)

Art. 110 (Report, etc.)

Art. 111 (Mandate to Cabinet Order)

Mediation for the settlement of copyright disputes  
at the Agency for Cultural Affairs (**Chapter VI** of JCA) since 1970

# MEDIATION SYSTEMS SPECIALIZED FOR COPYRIGHT DISPUTES





# Copyright Mediation in Japan



Bun(文)-chan

Mediation for the settlement of copyright disputes  
at the Agency for Cultural Affairs (**Chapter VI** of JCA) since 1970



# Copyright Mediation in Japan



## Chapter VI (Settlement of Disputes) of JCA

### Art.105 of JCA

(1) In order to settle, through mediation, disputes concerning the rights provided for in this Law, the Agency for Cultural Affairs shall provide mediators for the settlement of disputes concerning copyright (hereinafter in this Chapter referred to as "mediators").

(2) Whenever an affair may arise, mediators not exceeding three in number shall be appointed by the Commissioner of the Agency for Cultural Affairs from among persons of learning and experience in the field of copyright or neighboring rights.





# Copyright Mediation in Japan



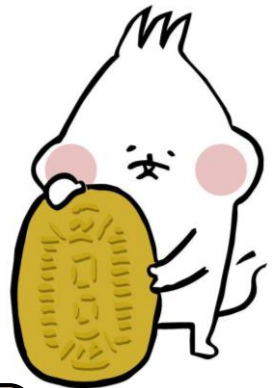
## Chapter VI (Settlement of Disputes) of JCA

### Art.106 of JCA

When a dispute may arise in connection with the rights provided for in this Law, the parties concerned may apply for mediation to the Commissioner of the Agency for Cultural Affairs.

### Art.107 of JCA

- (1) Applicants shall pay application fee, the amount of which shall be fixed by Cabinet Order, taking into account actual cost.
- (2) The provision of the preceding paragraph shall not apply in the case where a person who shall pay an application fee in accordance with the provision of that paragraph is the State, etc.



Application fee: ¥46,000 (= \$400)  
(Art.59 of Cabinet Order)



# Copyright Mediation in Japan



Mediators



Applicant



Respondent



Mediation for the settlement of copyright disputes  
at the Agency for Cultural Affairs (**Chapter VI** of JCA) since 1970



# Copyright Mediation in Japan



## Chapter VI (Settlement of Disputes) of JCA

### Art.108 of JCA

- (1) Upon receipt of an application under the provision of Article 106 of both parties concerned or that of one party to which the other party consented, the Commissioner of the Agency for Cultural Affairs shall submit the matter to the mediators.
- (2) The Commissioner of the Agency for Cultural Affairs may desist from submitting a matter to the mediators, when he deems it inappropriate in nature for submission to mediation or when he deems that the parties concerned applied for mediation for improper purposes.





# Copyright Mediation in Japan



## Chapter VI (Settlement of Disputes) of JCA

### Art.109 of JCA

- (1) The mediators shall mediate between the parties concerned in order to settle the dispute in conformity with actual circumstances and in consideration of the points in dispute.
- (2) The mediators may stop the mediation when they deem that the likelihood of settlement of the dispute no longer exists.





# Copyright Mediation in Japan



## Chapter VI (Settlement of Disputes) of JCA

### Art.110 of JCA

- (1) Upon completion of the mediation, the mediators shall report thereon to the Commissioner of the Agency for Cultural Affairs.
- (2) When stopping mediation, they shall inform the parties concerned thereof and indicate the reasons therefor, which shall also be reported to the Commissioner of the Agency for Cultural Affairs.







# Copyright Mediation in Japan

Case 1

1972

Book publication in breach  
of contract



(1) Payment for damages  
(2) Delivery of an **apology** letter

Case 2

1976

Unauthorized use of  
picture book for pachinko



Payment for damages

Case 3

1980

Copyright ownership of  
marionette and theater



(1) Shelving the ownership issue  
(2) Setting the condition of use



6 cases of completed mediations

Ref. Guidance for mediation



# Demand for apology



## *Chapter VI (Settlement of Disputes)* of Japanese Copyright Act (JCA)

### Art.115 of JCA

The author or the performer may demand the person who has infringed his moral rights intentionally or negligently **to take measures necessary** to identify him as the author or the performer, to correct distortions, mutilations, or modifications or **to recover his honour or reputation** either in place of or together with indemnification of damages.

Demand for publication of an  
***apology*** in newspapers



Art.127 of Korean Copyright Act



Art.47/48 of Chinese Copyright Act



# Demand for apology

## Publication of an apology in newspapers

### Apology

To: Ms. Kimiko Tanaka

The TV drama "A", which we produced and broadcasted between 9:00 pm and 9:54 pm on February 9, 1987, was unauthorized copy of the first episode "C" of the book "B" written by you and modified your work without your authorization. I hereby apologize for infringing your moral rights and for causing a tremendous inconvenience.

(month)(date) (year)

Susumu Kondo (producer & screenwriter)

IVS TV Production

TV Tokyo Corporation

Tokyo High Court, 16 April, 1996

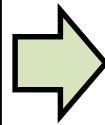


# Copyright Mediation in Japan

Case 4

1988

Restoration of war-damaged statue by town

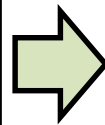


Promising to obtain prior permit from author in the future restoration

Case 5

2004

Unauthorized sublicense of translation



Requesting for cessation of publication to publisher

Case 6

2006

Copyright infringement of books on "Budo"



(1) Apologizing  
(2) Cessation of distribute books



I was one of mediators.

6 cases of completed mediations

Ref. Guidance for mediation



# Copyright Mediation in Japan



	Date of application	End date	Completion
1	1972/06/12	1972/08/14	Yes
2	1976/10/15	1977/03/22	Yes
3	1979/10/17	1980/03/01	No
4	1979/11/19	1980/06/03	No
5	1980/06/12	1981/12/04	Yes
6	1988/03/10	1989/02/14	Yes
7	2004/02/11	2004/06/29	Yes
8	2006/09/25	2008/?/?	Yes
9	2018/02/01	2018/06/12	No





# Copyright Mediation in Japan



## Chapter VI (Settlement of Disputes) of JCA

Number of application for mediation	Not consented by other party	Consented by other party	Cessation of mediation	Completion of mediation
35	26	9	3	6

Very rare..



Number of mediations  
(1971-present)

Ref. Guidance for mediation



# Copyright Mediation in Korea

## *Chapter VIII (Korea Copyright Commission)* of Korean Copyright Act (KCA)

Art. 113-2 (Mediation)

Art. 114 (Conciliation Division)

Art. 114-2 (Application, etc. for Conciliation)

Art. 115 (Non-Disclosure)

Art. 116 (Limitation on Use of Statement)

Art. 117 (Conclusion of Conciliation)

Art. 118 (Conciliation Expense, etc.)

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Art. 122 (Subsidy, etc.)



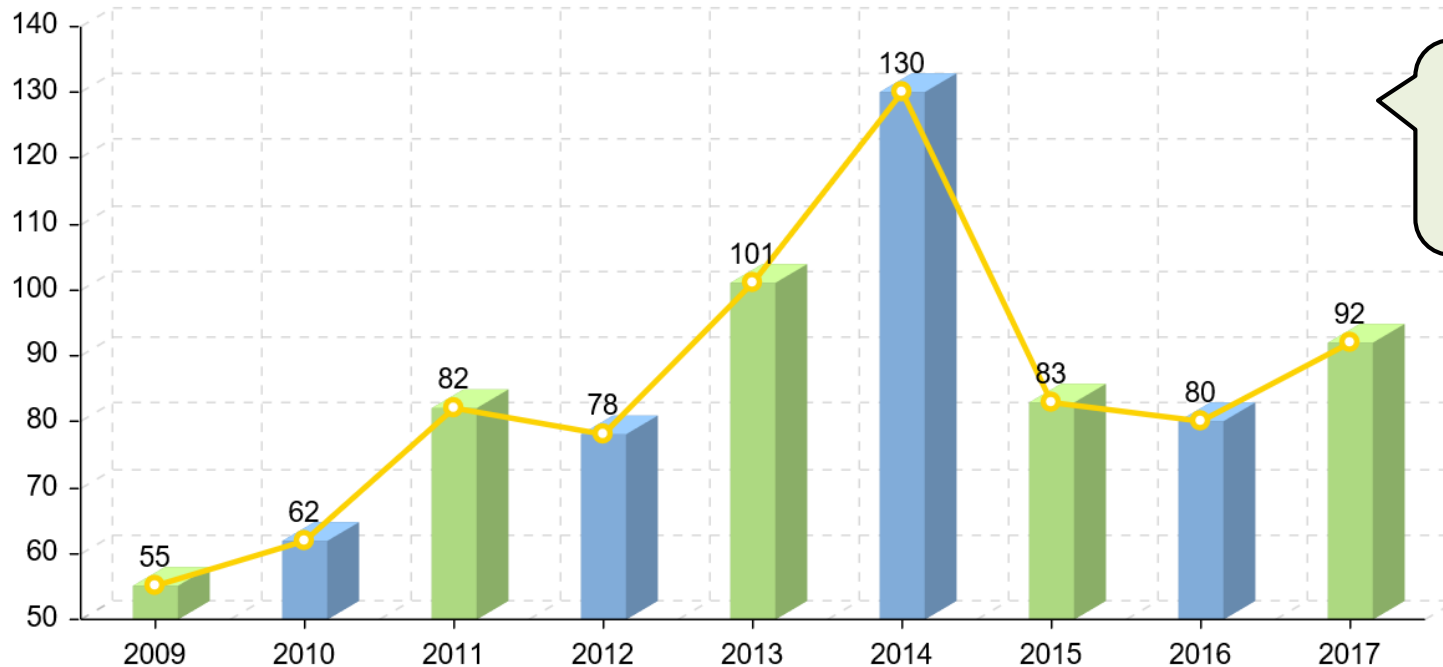
**KOREA COPYRIGHT  
COMMISSION**

Mediation for the settlement of copyright disputes  
at the Korea Copyright Commission (**Chapter VIII** of KCA) since 1988



# Copyright Mediation in Korea

View year  Views (Unit: case) [Download the Excel chart Copyright](#)



Mediation for the settlement of copyright disputes  
at the Korea Copyright Commission (**Chapter VIII** of KCA) since 1988



# Copyright Mediation in Korea

(Unit: case)

Kinds	year								
	2009	2010	2011	2012	2013	2014	2015	2016	2017
Linguistic	10	18	26	17	23	19	12	28	66
music	3	6	One	13	4	One	6	9	7
theater	One	0	0	0	One	0	0	0	0
Art	7	12	11	One	6	8	18	11	2
construct	0	0	0	0	0	0	0	0	0
Photo	11	7	7	4	5	73	One	9	5
video	0	2	5	0	5	0	3	One	0
Figure	0	One	2	0	One	0	0	0	0
edit	2	One	0	0	One	One	2	2	2
Secondary	One	0	0	0	0	0	0	One	0
Computer program	16	8	19	33	33	20	30	19	9
Adjacent work	4	7	11	10	22	8	11	0	0
Database	0	0	0	0	0	0	0	0	One
<b>sum</b>	55	62	82	78	101	130	83	80	92

Total:  
**1,949** requests  
/30years!

Numbers of Copyright Dispute Conciliation Cases  
by Year and Subject Matter (1988-2017)



# Some points

- Japan and South Korea have a mediation system specialized for copyright disputes in copyright act.
- But, there is a big difference in practice despite being in the same Asia.
- ADR is common in South Korea, while court litigation is preferred in Japan.
- Why?



# WIPO-KCC Mediation Seminar

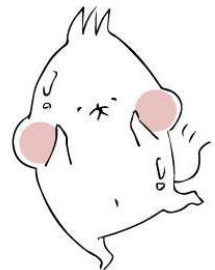


T. UENO: ADR System and Trends  
in Copyright Disputes in Japan

WIPO-KCC Copyright Mediation Seminar  
(2 November 2017, Seoul)

# Why is ADR not preferred in Japan?

- In Japan, court judges are generally respected, while mediators/arbitrators are not respected?
- Most experienced lawyers are reluctant to work as mediators/arbitrators due to inadequately low mediator's fee?
- There's not enough budget for ADR on copyright dispute.

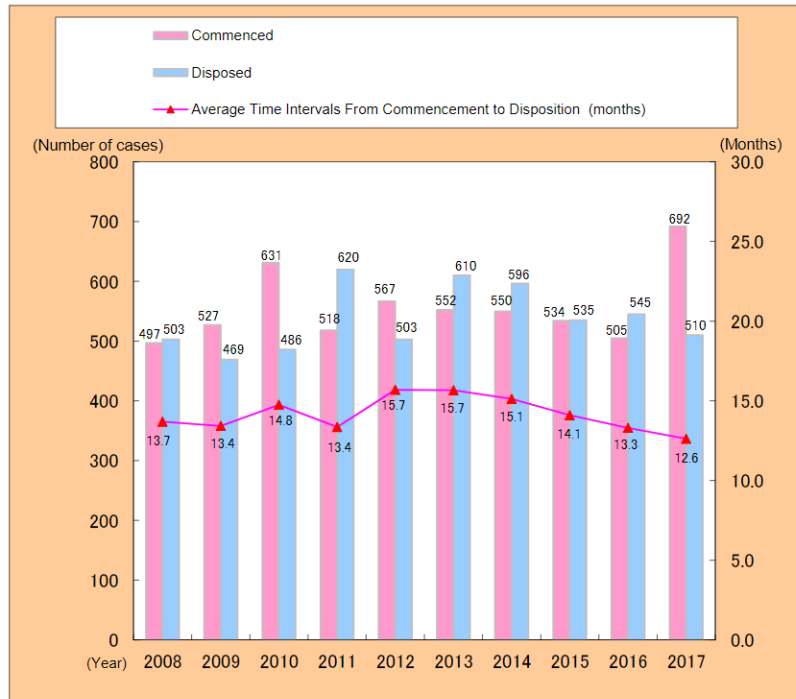


# Why is litigation preferred in Japan?

- IP litigation is relatively fast in Japan?
  - Average processing period: 13 months (first instance), 7 months (second instance)
- In court, enforceable settlement can be reached based on the provisional opinion of judges.
  - In about 40 % of IP-related court cases, judicial settlements are reached.

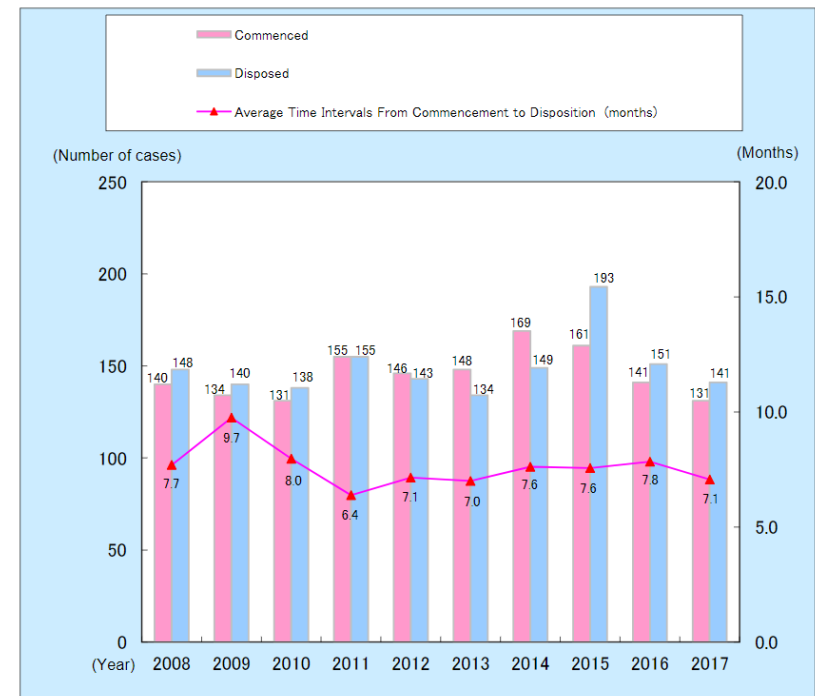


# IP court cases in Japan



First instance

About  
13 months



Second instance

About  
7 months

Average processing period

Ref. IP High Court

# IP court cases in Japan

Judicial settlement by judges  
showing their provisional opinion

	<u>Total</u>	Upholding	Dismissal	Decision/order	Judicial settlement	Withdrawal	Others
2016	545	110	142	13	198	67	15
2015	535	92	124	20	228	57	14

Number of IP court cases (First instance)

Ref. Hosojiho 16/17

# Why is litigation preferred in Japan?

- IP litigation is relatively fast in Japan?
  - Average processing period: 13 months (first instance), 7 months (second instance)
- In court, enforceable settlement can be reached based on the provisional opinion of judges.
  - In about 40 % of IP-related court cases, judicial settlements by judges themselves are reached.

Taboo?!



# Conclusion

- Japan and South Korea have a mediation system specialized for copyright disputes, although there is a big difference in practice.
- It might depend on the differences in the legal systems and culture.
- But, ADR can be basically suitable for copyright disputes beyond the legal, social and cultural differences.





# Thank you

**Tatsuhiro UENO**  
uenot@waseda.jp

