

IMPACT OF TECHNOLOGICAL ADVANCEMENTS AND SOCIAL CHANGE ON INTELLECTUAL PROPERTY RIGHTS

— NEED FOR A COMPREHENSIVE PERSPECTIVE THAT STRIKES A GOOD BALANCE BETWEEN LAW AND EMOTION—

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SUMMARY

- **Impact of technological advancements and social changes on intellectual property rights:** The influence of social media and the emergence of novel technologies are creating new ethical challenges for intellectual property rights. The situation calls for understanding the reasons behind public outcries and considering the importance of an approach that goes beyond the legal framework by taking into account social perceptions and public sentiment.
- **Multifaceted perspective on intellectual property rights:** Achieving a balance between the protection and use of intellectual property rights requires the cooperation of a variety of stakeholders, such as lawyers, companies, and creators. It is necessary to take a balanced approach to respecting intellectual property rights, considering not only legal aspects, but also social, cultural, and technological factors.

1. BEYOND THE LAW, THE EMOTIONAL CLAMOR OVER INTELLECTUAL PROPERTY

Social media platforms have made it possible for anyone to disseminate information, and there have been occasions now and then of intellectual property-related information inciting a buzz, and growing into an explosive topic. Given that intellectual property laws have yet to become adequately understood by the general public, in some cases, the content of a message on social media can have the effect of eliciting a public outcry beyond legal aspects, fueled by a barrage of criticisms based on emotions, and the message spreads in an unintended, uncontrolled way.

1-1. Private ownership of “something that belongs to everyone”: Yukkuri Chabangeki trademark issue

Perhaps the biggest public outcry in recent years has been over the Yukkuri Chabangeki trademark registration issue, which led to the holding of a press conference by the company involved and questions posed to Japan’s Chief Cabinet Secretary. Yukkuri Chabangeki is a type of video content for conversational-style entertainment featuring Yukkuri characters (see Figure 1) combined with synthesized voices, and many videos of this style have been posted and viewed online, mainly on Niconico and YouTube. Since the Yukkuri characters are characters from the game series “Touhou Project,” videos using the characters are considered derivative works of Touhou Project.

In May 2022, a third party unrelated to Touhou Project acquired the trademark for Yukkuri Chabangeki¹ and announced that a licensing fee (¥100,000 annual royalty fee) was required to use the trademark. The third party

¹ J-PlatPat trademark database, registration 6518338

came under fire for trying to make money off of someone else's property and for privatizing internet culture. Ultimately, the Yukkuri Chabangeki trademark was abandoned and never enforced.

Why was the third party able to register the trademark?

Touhou Project had not obtained trademark rights for Yukkuri Chabangeki and had a policy of allowing fans to freely produce content just as long as certain guidelines were observed. As a result, Yukkuri Chabangeki developed into a shared property on the internet, and it was under these circumstances that an unrelated third party was able to obtain rights to the trademark. Japan's trademark system is based on a first-to-file system, where the first applicant can obtain trademark rights, provided that he or she meets the requirements for registration². However, if the Japan Patent Office had determined in its examination that the term Yukkuri Chabangeki was recognized by contributors and viewers as representing one of a number of video genres, the registration would not have been granted because it would not be appropriate to allow exclusive use by a specific person³. When it comes to internet memes (text, images, and videos copied and spread rapidly on the internet), such as those related to Yukkuri Chabangeki, it is not easy to obtain sufficient information for examination, making it difficult for the Japan Patent Office to make a judgment.

To avoid provoking a public outcry

As mentioned above, it is assumed that because Yukkuri Chabangeki has grown as a common property on the internet, the parties involved, including Touhou Project, have chosen not to acquire trademark rights in order to avoid monopolizing the property. However, the result was the acquisition of trademark rights by an unrelated third party, and that made Yukkuri Chabangeki no longer openly available for use by others. The best way to avoid such a situation is for the parties concerned to quickly acquire trademark rights and state a clear policy that allows everyone to freely use the property.

Figure 1: Image of Yukkuri Chabangeki; disembodied characters on the left and right are Yukkuris



Source: [Results Announced! Yukkuri Chabangeki Content Contest & Yukkuri Video Festival, niconico info \(nicovideo.jp\)](https://www.nicovideo.jp/news/2024/03/22/0001) (accessed March 22, 2024)

1-2. Trying to prevent a monopoly: “Amabie” trademark case

During the Covid-19 pandemic in Japan, images of “Amabie”(a legendary Japanese mermaid-bird creature, said to be a seer and believed to drive away plague) were extensively depicted as a symbol of hope (see Figure 2). It was discovered that Dentsu had applied to register the Japanese written characters for Amabie as a trademark,

² In contrast to Japan’s first-to-file system, the US, for example, has adopted the first-to-use principle, which protects those who use a trademark first.

³ The Japan Patent Office later invalidated the Yukkuri Chabangeki trademark for this reason (invalidation 2022-890065).

and the company came under attack for trying to monopolize use of the name. Eventually, Dentsu withdrew the application.

To avoid provoking a public outcry

Dentsu commented that the trademark application was not filed for the purpose of exclusivity, but rather to prevent a third party from acquiring the trademark and preventing others from freely using the name of Amabie. In light of the Yukkuri Chabangeki case, Dentsu's comment is justifiable. However, it should be fully recognized that there is a risk of exposure to reputational risk from public backlash and negative publicity when filing for rights to internet memes and other buzzwords, even if there are no legal restrictions. In this case, Dentsu could have created a positive impression by stating in advance that it had no intention of monopolizing the Amabie name and explaining it was taking the action in light of the threat of trademark acquisition by a third party.

Figure 2: Amabie, a mythical creature said to protect people from plague; used by the Ministry of Health, Labour and Welfare to promote awareness



Source: [Regarding COVID-19 Infections \(in Japanese\), Ministry of Health, Labour and Welfare \(mhlw.go.jp\)](https://www.mhlw.go.jp) (accessed March 22, 2024)

1-3. No tolerance for bullying of the weak: “AFURI” trademark case

The case of the ramen chain AFURI suing sake maker Kikkawa Jozo for trademark infringement was a standard case of infringement (see Figure 3), but when the sake maker announced that AFURI's demands included a call for the disposal of all of its products (sake), the case drew a great deal of criticism, such as “How come AFURI, a company involved in the food and beverage industry, can require disposal of all sake that has no quality problems?”

To avoid provoking a public outcry

A claimant's demand for total disposal and destruction of infringing goods⁴ is normal in trademark infringement litigation, and AFURI's actions are in line with the law. While the sake brewer succeeded in gaining support in the midst of the uproar, its argument can be seen as a disregard for the law. In a lawsuit, it is the court that determines whether or not there has been an infringement, and this decision cannot be reliably predicted even by the parties involved. Whichever side you are on, it is important to stress that the best option is to avoid emotional communication and to resolve the issue in accordance with legal procedures with the help of experts.

⁴ The expression “total disposal and destruction” of sake is misleading, as such situations can usually be handled by removing the trademark, e.g., by replacing the label.

Figure 3: Photo on left shows “AFURI” Japanese sake sold by ramen company AFURI; photo on right shows AFURI (Amefuri) Japanese sake sold by sake brewer Kikkawa Jozo



Source: Photo on left: [Afuri Sake Cup Is The Future of On The Go Beverages, Dieline - Design, Branding & Packaging Inspiration \(thedieline.com\)](#), (accessed March 22, 2024); photo on right: [“Kanagawa Prefecture’s AFURI Yamahai-shikomi Junmai Sake is a sake with a rich, sweet and sour taste produced from a unique set of specifications” \[in Japanese\]](#), ([hatenablog.jp](#)) (accessed March 22, 2024)

2. SHEIN INFRINGING ON OTHER RETAILERS’ RIGHTS BUT NOT CAUSING AN UPROAR

While there may be cases in which even the legitimate exercise of rights can provoke public outcry, SHEIN, an online fast fashion, D2C retailer from China, is disregarding intellectual property rights and has been accused of infringement of many brands in various countries. Yet, the company does not appear to be facing public criticism. In December 2023, Uniqlo filed a lawsuit against SHEIN in the Tokyo District Court for selling a counterfeit version of its popular “Round Mini Shoulder Bag” product (see Figure 4). Although the news was widely reported in Japan, no firestorm erupted.

SHEIN has gained a large following in Japan, especially among Gen Z and Gen Alpha consumers, owing to the effectiveness of how it concentrates dissemination of product information on its e-commerce site and social media sites. It can be speculated that the reason SHEIN has not come under fire is that its target audience is less aware of intellectual property infringement and more concerned with economic benefits and fashion trends.

What happens if infringement is left unchecked?

Uniqlo is seeking approximately ¥160 million in damages from SHEIN. The amount of damages is believed to represent lost sales for Uniqlo, or in other words, the sales it would have obtained had the counterfeit products not been sold. In addition to such economic loss, the sale of knock-off products also results in a decrease in market value and damage to brand value.

The neglect of intellectual property rights has a negative impact on the innovativeness and competitiveness of individual brands and the market as a whole. Since consumers and the overall market will be affected, it is crucial to stress the importance of protecting rights and to raise awareness of intellectual property infringement among all segments of the population.

Figure 4: Photo on left shows Uniqlo's Round Mini Shoulder Bag ¥1,500, photo on right shows SHEIN's shoulder bag ¥684



Source: Photo on left: [Uniqlo's Round Mini Shoulder Bag, \(uniqlo.com\)](https://www.uniqlo.com) (accessed March 22, 2024); photo on right: [\[Shocking\] Comparison of UNIQLO and SHEIN shoulder bags → I don't need it even if it costs ¥399, Rocket News 24 \(rocketnews24.com\)](https://rocketnews24.com) [in Japanese] (accessed March 22, 2024)

3. GENERATIVE AI AS A POTENTIAL SEED OF FUTURE PUBLIC OUTCRIES: THE IMPACT OF TECHNOLOGICAL ADVANCEMENTS

Regarding the packaging of a bath salts product, *BABU: Afureru no wa Kitto, Oyu Dake Janai* (BABU: It's Not Just the Hot Water That Overflows), released to the market by Kao Corporation in September 2023, questions were raised as to whether the illustrations were created using generative AI images based on existing characters and illustrations (see Figure 5). In response to inquiries, Kao asserted that the illustrations were not created using image-generating AI, and that they were not modeled after other artists' works.

To avoid provoking a public outcry

Although there is no problem in using illustrations created with AI image generators for packaging and other purposes, it may become important from a risk management perspective for companies and creators to prove that they are not using generative AI as the use of such technologies becomes more common. Alternatively, if generative AI is used, transparency of the data and algorithms used and the ability to adequately explain the generative process may become important from a risk management perspective.

Generative AI images and copyright

Images generated autonomously by image-generating AI software are not considered to be copyrighted works. For example, an image generated by inputting a short prompt such as “cat” does not constitute a copyrighted work. Therefore, if the said image is used for a product package, etc., and another party appropriates and uses the image, there is no legal recourse for filing a claim of copyright infringement. On the other hand, if a creative element is added to the expression and content of the prompt, the generated image may be recognized as a copyrighted work.

Whether or not third-party use of an image created by image-generating AI constitutes copyright infringement is determined in the same way as for ordinary copyrighted works, such as when a person draws a picture without using AI. Therefore, it is essential to make sure that the generated images do not resemble the works of others.

Figure 5: Packaging of Kao’s bath salts product "BABU: It’s Not Just the Hot Water That Overflows”



Source: Kao Corporation, “BABU: It’s Not Just the Hot Water That Overflows” (kao.com) (accessed March 22, 2024)

4. COMPREHENSIVE PERSPECTIVE ON INTELLECTUAL PROPERTY (SUMMARY)

In addition to legal considerations, social, cultural, and technological factors play a significant role in intellectual property issues. It is therefore essential to respect intellectual property rights while maintaining a healthy balance between the influence of social media and technological advancements.

In applying and interpreting the legal framework, it is crucial for intellectual property professionals to consider the social impact of new cultural and technological trends, as well as public sentiment. The optimal course of action for companies acquiring or exercising intellectual property rights is to refrain from sending emotional messages in all situations and to resolve issues according to legal procedures with the assistance of experts. It is imperative that a collaborative approach be taken by a variety of stakeholders, including lawmakers, businesses and creators, to achieve a balance between the protection and use of intellectual property rights.

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