

Court Rulings on the legality of Internet-Based TV Recording Service and Time/Place-Shifting Device Hosting Service - Korea, Japan, Singapore and the U.S.

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There exist growing needs for consumers to watch TV broadcasting from any places and by any ways they want. In response to these needs, and thanks to the new technology, several innovative business models have come into; for example, an Internet TV recording and/or streaming service, RS-DVR, SlingBox and any other place/time-shifting devices hosting services. But the problem is that copyright holders, the TV broadcasting companies, are fiercely objecting to these new business models contending they are infringing their copyrights. This kind of tension arising out of new technology can be found in various countries and it is quite interesting for an IP lawyer to see how the courts from various countries have found the answer to this legal issue.

Lets' start with the situation in **South Korea**, where I'm practicing the law. Actually there have been two cases related to this issue; ***Ental TV case*** and ***MyTV case***. ***Ental TV*** was an Internet-based TV recording service. The registered users paid some amount of fees to the service provider and the service provider recorded TV broadcasting on its server at the request of the individual users with its automated software program, then converted it into the PC file format and sent the file to the user via Internet. On April 30, 2009, the Seoul High Court ruled this ***Ental TV*** service infringed copyright of the TV broadcasters. The court found that it was the service provider, not an individual user, who recorded and copied the TV program, because the service provider *owned* and *managed* all the facilities used in recording the TV program. Also the Court added that even though the court assumed it was the individual user who copied the TV program, the very act of copying could not be defended as a fair use under Korean Copyright Act. The service provider appealed, but on September 24, 2009, the Supreme Court of Korea refused to reconsider the case.

Once again on September 2010, in the case of ***MyTV***, the Seoul Central District Court ruled the Internet TV streaming/recording service was illegal. ***MyTV*** service had something different from the ***Ental TV***. It used a third-party hardware device called UTV HUBB, a Korean version of SlingBox. Basically it hosted and managed 940 UTV HUBBs for the current and prospective registered users. The users paid some amount of service fees and used one of UTV HUBBs. Also ***MyTV*** provided a recording service by connecting a personal video recorder (PVR) to each of UTV HUBBs. Thanks to this combination of UTV HUBB and PVR, the user could watch and record TV programs from anywhere an Internet connection is available. The broadcasting companies filed a lawsuit contending that ***MyTV*** service infringed their copyrights. The Seoul Central District Court sided with the broadcasters. The court found that, as every facility including UTV HUBB and PVR was *owned* and *managed* by the service provider, it was the service provider, not the individual user, who broadcasted and recorded the TV program without consents from broadcasting companies, which constitutes a copyright infringement under Korean Copyright Act. The court acknowledged that if the party who copied and transmitted the TV contents was the individual users, the service could be legal on the ground that the service provider's role was just supporting and facilitating the user's private fair use, legitimate copying and broadcasting. However, looking at the its own service structure, especially the ownership of the facilities, the court ruled that the users were not the party who made the copy and the transmission because they did nothing but subscribe to the service and everything, including the ownership and management of the facilities, was done by the service provider, which made the court declare the service was illegal.

In the center of these disputes lies a legal question: "*Who makes the copy and transmission?*" If it is the individual user, not the service provider, then the service shall be legal in terms of copyright law as the service itself just does help individual user's fair use-watching and

copying the broadcast for personal purpose only. I think it is hard to find the right answer to this question considering there exist various types of service model, which means some services can be legal and some can be illegal based on its own service structures. I think, however, we should be cautious in judging the legality of service solely based on the element of who owns and manages the facilities and devices. As we know well, people have changed their style of IT consumption from buying and owning an IT device to renting a device or using a service. And even traditionally the Korean Supreme Court has regarded the party who owns and provides a service platform through which the 3rd parties, individual users, can copy and transmit copyrighted works via Internet connection NOT as a direct party who copies and transmits the copyrighted work BUT as subordinated to the individual user's act of copying and transmitting. I think we should not overlook this basic rule when deciding the legality of Internet TV streaming/recording service, RS-DVR service and SlingBox and any other similar time/place-shifting device hosting service.

Then, let's move to **Japan**. There have been numerous cases on Internet TV broadcasting and RS-DVR in Japan. Among them, the most famous cases might be *Maneki TV case* and *Roku-Raku case*. Both services are Internet TV streaming/recording service using an IT device such as Sony's Location Free (*Maneki TV*) and *Roku-Raku* (*Roku-Raku* service). Basically the Location Free and *Roku-Raku* have the same function as SlingBox. The users buy the Location Free or *Roku-Raku*, and the service provider hosts the device and transmits TV contents to the individual user who owns the device via Internet connection.

To state the conclusions first, the Highest Court of Japan ruled both services were illegal on January 2011. It was a big overturning of the lower courts' decision which hold that it was the individual users of both services who copied and transmitted the TV contents so that the service provider had no liability in a sense that it just facilitated and contributed to the legal act (fair use) of individual users. But the Highest Court found that as the service provider *managed* the facilities and *made it available* for the users to receive the broadcasting signal at any time, the service provider was the party who copied and transmitted the broadcasting signal so the service provider could not be protected by the fair use doctrine.

Now let's turn to **the United States**. There is a famous leading case of RS-DVR, *Cablevision case* where the U.S. court of appeal for the 2nd circuit found Cablevision's remote-storage DVR service was not a copyright infringement, because it was not the Cablevision but the individual subscriber who made the copy through RS-DVR. The copyright holder appealed but the Supreme Court declined to hear the appeal. I understand that the basic concept of the U.S. court in *Cablevision* case was that whether a user bought a DVR and made a copy of TV contents at home *or* a user rent a server in cable TV provider and made a copy remotely was basically the same in a sense that *the user* made the copy. The court found the RS-DVR was simply a digital version of the traditional VCR/DVR, which is totally legal. I think this is very intuitive and straightforward reasoning.

Lastly I'd like to mention a case in **Singapore**, called *RecordTV case*. *RecordTV* was an Internet-based TV recording service which allowed the users to request the recording of broadcaster's programs through a rs-dvr device called iDVR. The TV broadcasters alleged *RecordTV* infringed their copyrights, but the Court of Appeal of the Republic of Singapore court did not buy that argument this year. The court ruled that *RecordTV* did not copy the TV programs; instead, it was the registered users who did so by requesting the recording of the TV programs using *RecordTV's* iDVR. The court said that *RecordTV's* iDVR not only served the same purpose as the traditional DVR/VCR, but was also a significant technological improvement with tangible benefits to the public, in a sense that *RecordTV's* iDVR was more convenient and user-friendly than the traditional DVR/VCR. Also the court found that as the broadcasters provided the TV program on a free-to-air basis, the broadcasters suffered no loss from *RecordTV's* provision of additional and better time-shifting service to the users who were licensed to view the TV shows.

It is quite interesting that even in cases which look similar courts of various jurisdictions have handed out divergent opinions. Should we understand that this demonstrates how hard it is to strike a fair balance between the private rights of the copyright holder and the public's general interest in using a more convenient and efficient new technology? Some might say that current copyright law is unable to catch up with the improvement and innovation of new technology which benefits the public. But we all know that the aim of copyright law is to promote creativity and innovation. So what should we do if the law is not clear as to whether the new technology is infringing the copyright or not? Which party should the court interpret the copyright law to favor; the copyright holder or the public's general interest? Different positions over this question can be said as one of the causes which had made the cases in various courts result in different conclusions.

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