

[Translation]

## **Response to Opinions and Questions**

### **1. Points on Basic Concept of the Net Law**

Q1. Is secondary use without authorization of rights holders abuse and desecration of culture?

A1. **<“Leeway” is necessary for the development of culture.>**

Suppose a work for which 100 rights holders exist. If consent to a secondary use of the work is withheld by only one rights holder in spite of 99 rights holders’ explicit agreement to the secondary use, it may be said that the spreading of culture that is desired by the 99 rights holders is inhibited.

In addition, the above consequence encroaches on the economic freedom of the 99 rights holders.

Of course, there have been very few great geniuses who produced masterpieces in poverty. However, economic freedom is necessary for the creation of culture.

Our proposal will significantly increase the size of the pie for the content industry. Net Rights Holders are bound by a legal obligation to make fair distributions of income and other gains to creators and producers. Therefore, it is naturally expected that returns to creators will definitely be increased.

Our proposal aims to refine and improve the creative environment, by way of promoting secondary use, so that creators may have freedom, in order to further develop our excellent Japanese culture.

Q2. Will content distribution in a manner not desired by the rights holders discourage their motivation for creation?

A2. **<Under the current legal system, it is even impossible to realize content distribution desired by many rights holders.>**

For many creators, if the content of their creation is widely publicized and meets many people’s eyes, and if creators can earn profits through the payment of consideration, they will be more strongly motivated to produce future creations than if their content does not meet people’s eyes without being paid.

However, the current Copyright Act cannot accommodate cases where many interested parties are involved, and stands on the premise that consent should be obtained from each and every rights holder. As a result, the inability to obtain the consent of only one of the rights holders will prevent the delivery of the relevant digital content, or even wide publication of such content.

Where many rights holders desire the distribution of content, if the desired distribution is to be precluded by the lack of consent of a few other remaining rights holders, it would discourage the motivation for creation by the many rights holders who desire the distribution of content.

Thus, looking at the rights holders in their entirety, placing too heavy a weight on the wishes of a small number of rights holders would be undesirable for the development of culture.

Q3. Will distribution of digital content on the Internet encourage unlawful delivery of such content?

A3. **<Promotion of lawful delivery will reduce unlawful delivery.>**

The distribution of digital content on the Internet is slow in its rate of growth. One of the reasons is the insufficiency of the countermeasures against unlawful delivery (*see* Page 1 of the Proposal). An imaginable response to this situation would be timely amendments of laws, such as strengthening criminal penalties against illegal acts and appropriately making unjust or unfair acts illegal, as well as deploying technical measures, such as though the “development of a technology to easily identify persons who conduct illegal acts.”

It is certainly important to deter unlawful delivery and other misconduct by aggressively deploying the above-mentioned measures. However, the reasons for the persistence of unlawful delivery should be considered here. Presumably, unlawful delivery is flourishing because of the current environment where consumers have a strong demand to view particular content, but it is not easy to view such content. In other words, in spite of such demands, the content is not available by way of lawful delivery, or if available, it is very expensive. The present circumstances are considered to be a factor encouraging unlawful delivery.

In contrast, if there is a system enabling lawful and economical content delivery, sensible consumers will choose lawful delivery. As a result, the demand for and incidents of unlawful delivery are expected to be reduced. One of the purposes of our proposal is to create a situation where unlawful delivery or the use of unlawful delivery will not pay, by promoting lawful delivery together with legal system reforms, such as strengthening criminal penalties, as well as technical measures.

No matter how seriously arguing about the concern that lawfully delivered digital content may be unlawfully copied and delivered, actually existing unlawful acts will never cease. If, rather, we hesitate to promote the distribution of digital content on the Internet, using as an excuse the concern of unlawful delivery, our people will be deprived of the opportunity to enjoy culture. This consequence is undesirable for the growth and development of our culture.

For the growth and development of our culture, it should be desirable to reduce the demand for unlawful delivery by promoting lawful delivery, and to afford our people the opportunity to enjoy our culture through the Internet.

Q4. Will the proposed new law under which creators who are already in a weak position unable to complain about unauthorized use further undermine the protection of creators? Should creator protection be reinforced?

A4. **<Weakness of the creators’ position is a matter of being strong or weak with respect to their social and economic position.>**

Japanese creators are granted by the current Copyright Act very strong rights, in particular including the moral rights that are said to be the strongest in the world (*see* Nobuhiro Nakayama, *Chosakuken-ho* [Copyright Act] (Yuhikaku, 2007), pp. 360 to 361). If the present creators’ position is nevertheless considered to be weak, the reason is presumably that their socioeconomic position is weak. These creators are unable to exercise their own rights as they like towards companies and others that are in stronger socioeconomic positions. As a result, creators are forced to conduct their creative activities under unfavorable conditions.

In the situation where creators are unable to fully exercise their rights, if creators’ rights are formally strengthened, their social and economic position will not be improved. In order to improve the creators’ position, it would be effective to ensure fair income distributions to

creators so that they may become economically affluent. Under the framework of the proposed Net Law, it is expected that by establishing rules on “fair income distributions,” economic benefits will be brought to creators who suffer from having low income. As a result, their motivation for creation will be increased, and this will eventually lead to the development of culture.

The present rights are “wax fruits,” so to speak. By ensuring the appropriate distribution of economic income, the actual protection of creators will become possible. This is an aim of the Net Law.

Q5. If users of secondary use increase through the promotion of the secondary use of existing content, will the demand to use newly released content be reduced?

A5. **<Promotion of secondary use will not necessarily lead to decline of primary use.>**

There is no defined framework as to how people will choose and how much time people will spend for hobbies or entertainment. Therefore, increasing the time to enjoy existing content will not necessarily reduce the time to enjoy new content. It is imaginable that by enjoying preceding works, more people would want to view newly released content as sequels thereto, by enjoying preceding works, or that more people would become intrigued with new objects of interest and seek various new fields’ new content, by enjoying existing content. As a result, it is plausible that the promotion of secondary use will promote the primary use of newly released content.

Actually, for example, in visual industries such as the film industry, film box-office earnings did not decline in Japan during the past 30 years as video cassettes and DVDs have become popular. An historical fact is that secondary use by means of video cassettes and DVDs has not reduced box-office earnings from primary use, and has rather expanded the demand for all types of visual content in general.

Thus, facilitating the secondary use of existing content will promote primary use and contribute to the overall development of culture.

Q6. Will the proposal deprive the rights of existing rights holders? It is likely that those rights holders will disagree.

A6. **<If the purposes of the proposal are fully understood, it is thought that consent of rights holders will be obtained.>**

As discussed above, this forum believes that the promotion, by way of the legislation of the Net Law, of the distribution of digital content on the Internet, which is currently inhibited by overly strong rights of rights holders, will enable the distribution of economic income to all of the rights holders and contribute to the promotion, growth and development of culture. If it is understood that the Net Law will greatly benefit not only business operators and consumers, but also rights holders, rights holders’ consent will also be attained, as we believe.

Of course, it is important in the legislative process to further study the proposal, taking into consideration the opinions of distribution service providers, consumers and other interested parties, in addition to rights holders. It is hoped that discussions on the proposal will be invigorated and opinions will be exchanged in a straightforward manner.

## 2. Points on Resolution by Legislation

Q7. Under the current law, distribution is enabled with the consent of the rights holders. Is it nevertheless necessary to make a new legislation?

A7. **<The biggest factor inhibiting content distribution on the Internet is the burden of rights processing efforts.>**

Under the current law, in cases where a previously produced film or television program is to be delivered on the Internet, it is necessary to obtain the consent for such use from all of the rights holders with respect to the content. If the content is delivered without such consent, it is possible that the delivery will become subject to not only a civil claim for damages or an injunction, but also criminal penalties, as an infringement of copyrights and related rights. However, rights processing efforts in this respect are extremely burdensome and costly. Moreover, there is no assurance that the consent will be obtained from all of the rights holders. (See page 1 of the Proposal).

Thus, the biggest target of the proposal of the Net Law is to make a breakthrough into the current situation where it is very difficult to obtain the consents of rights holders, which inhibits the distribution of digital content on the Internet.

Q8. Should problem solving be achieved by revision of the Copyright Act, rather than by new legislation? The current Copyright Act has fallen behind the times, and its fundamental reformation is required, such as by transforming overly strong rights such as moral rights and neighboring rights into rights to claim compensation.

A8. **<Revision of the Copyright Act is insufficient to solve the problems.>**

As has been pointed out by many commentators, the regime under the current Copyright Act includes clearly inappropriate aspects from the perspective of content distribution on the Internet. However, it should be noted that the scope of the current Copyright Act covers not only digital content delivered on the Internet, but also copyrighted works delivered in conventional forms, such as printed works and CDs. It is our position that prudent discussions are required before modifying the existing transaction order thus far developed for conventional works.

Moreover, rights pertaining to digital content are not limited to the rights under the Copyright Act, but relate to trademark rights and design rights, as well as portrait rights and rights of publicity that are not prescribed by any statute. Revision of the Copyright Act cannot address all of the relevant issues. (See page 2 of the Proposal).

We are aware that the very paradigm of the Copyright Act that treats rights to information as being similar to a right to tangible property is problematic, and therefore, that comments are made on the limitation of the Copyright Act. Although discussions have been repeated on fundamental reforms of the Copyright Act, no noticeable achievement has been made. At present, the promotion of content distribution on the Internet particularly is a country-level task of pressing urgency, and we have no time to lose from the perspective of industrial and cultural development in Japan. With this risk awareness, we have made a proposal that we should pass legislation focused only on content distribution on the Internet.

Q9. Will the Net Law violate international treaties?

A9. **<The Net Law will not violate any international treaties.>**

It is contemplated that the Net Law includes provisions to the effect that some rules of the current Copyright Act shall not apply to the distribution of digital content on the Internet. In this sense, there may be a concern about the relationship between the proposed law and relevant international treaties, such as the Berne Convention and WIPO treaties, which provide for copyrights and related matters. It is generally thought, however, that an international treaty only intrinsically provides minimal foundations so as to be shared by the party nations, and that each member nation is free to build up its own legal systems subject to such foundations. The Net Law will make more flexible the overreaching rules previously added by the Copyright Act to the treaties solely for the context of digital content distribution on the Internet. It is our position that we are able to formulate the legislation in a manner that does not violate any international treaties.

Q10. Will the new legislation constitute a double regulation with the Copyright Act? Will it result in a tightened regulatory regime?

A10. **<Because the proposed legislation is to become a special law, it will not constitute a double regulation.>**

The Net Law is contemplated to be enacted as a special law for all related laws (not only for the Copyright Act). Therefore, the new legislation will not affect any other legal relationships in any manner. There will be no change in the handling of existing conventional copyrighted works, such as the distribution of copyrighted works outside of the Internet. On the other hand, with respect to the distribution of digital content on the Internet to which the Net Law applies, the application of the Copyright Act and other related acts will be excluded. It is our position that no issue of double regulation will arise. (See page 2 of the Proposal).

Thus, it is our position that the Net Law will not give rise to any problem of double regulation, and therefore, it is unlikely that the regulatory regime will be complicated or that digital content distribution on the Internet will be inhibited.

Q11. In Japan, services such as “Nico Nico Douga” (Smile Video)<sup>1</sup> have already started. Will these services increase in numbers, without new legislation, in the future?

A11. **<In order to encourage world-level IT business operators from Japan, the Net Law is necessary.>**

As discussed above, an infringement on a copyright or related right is subject to, under the Copyright Act, not only civil claims for damages and/or an injunction, but also criminal penalties. In Japan, no legal system has been established under which a copyright infringement, upon occurrence, is subsequently addressed, such as the notice and takedown system under the U.S. Digital Millennium Copyright Act. Under these circumstances, it is practically impossible for most business operators to embark on a content service taking the risk of being subject to criminal penalties. On the other hand, due to the burden of rights processing efforts, we are also in a situation where it is extremely difficult to obtain the consent of all of the relevant rights holders. In fact, the Internet services are mainly from the United States, such as Google and

---

<sup>1</sup> Translation Note: *Nico Nico Douga* is a highly popular video hosting service in Japan managed by Niiwango. URL: <http://www.nicovideo.jp/>

YouTube, as well as Chinese services, such as Baidu. The growth of services in Japan has been unfavorable.

It is the position of this forum that unless we can make a breakthrough into the current stagnant situation, it is unlikely that world-class IT business operators, which are developing in other countries, will be fostered in Japan, and therefore, the Net Law is necessary.

### 3. Points on Creation of “Net Rights”

Q12. The Net Law will grant Net Rights to content distribution business operators, such as makers of cinematographic works, broadcasting organizations and producers of phonograms. Is a purpose of this to protect the vested interests held by these business operators under the conventional forms of content distribution?

A12. **<The Purpose is not to protect the vested interests of makers of cinematographic works, broadcasting organizations and producers of phonograms.>**

In distributing content, the production of which many related parties have participated, an important task is to efficiently earn income through the distribution and to distribute the earned income to many such participants. In our proposal, it is contemplated that makers of cinematographic works, broadcasting organizations and producers of phonograms will be Net Rights Holders because such entities are capable of making fair distributions of income earned through the actual distribution of the content on the Internet.

Those business operators will be bound by a legal obligation to make fair income distributions, and will not merely acquire the right to deliver their content on the Internet. The Net Law will not protect the vested interests of these business operators.

Q13. In the content delivery through the Internet, creators are able to deliver their content directly to consumers without distributors, and there already exist many creators who publicly distribute their works on the Internet. Will granting Net Rights to only some business operators inhibit the development of that form of distribution?

A13. **<The Net Law is also necessary for the benefit of small-sized Internet creators.>**

As a practical matter, small-sized creators are afforded a few opportunities to market their content to consumers, and consumers are afforded scant means to access such obscure content. This is the present situation. In addition, in order to gain income from content delivery, technical measures for copy protection, development of a fee charge system and the like will be required. However, small-sized creators do not have resources to do this.

It is not practical for each creator to cope with these challenges, and the existence of distributors who manage the content distribution on the Internet is indispensable. In order to encourage these distributors, it is necessary, first of all, to promote content distribution on the Internet. If such distributors are fostered, there will be increased opportunities for small-sized creators to publicize their content and deliver it directly to consumers.

Q14. If makers of cinematographic works, broadcasting organizations and producers of phonograms monopolize the rights for digital content distribution on the Internet, will it result in an obstacle

for reasonable use by others, and thus inhibit the promotion of content distribution? Is it also worried that interests of other rights holders will not be protected?

**A14. <The Net Law will not allow arbitrary exercise of rights by Net Rights Holders.>**

This forum also believes that while Net Rights Holders are to be granted with rights to use and license for the purpose of digital content distribution on the Internet, any arbitrary exercise of rights by Net Rights Holders should not be allowed. For measures to ensure a fair licensing process, we consider it imaginable, for example, (in reference to Article 16 of Law on Management Business of Copyright and Neighboring Rights [*Chosakuken-to kanrijigyo-ho*]), for the Net Law to provide that a Net Rights Holder must grant a license to an application for use on reasonable conditions. Further consideration would be necessary in order to work out the specific means.

In addition, the Net Law will obligate Net Rights Holders to make fair income distributions to other rights holders, with consideration for avoiding any harmful effects on the other rights holders to be brought by the concentration of rights upon Net Rights Holders. It is thus our position that impairing economic interests of other rights holders will constitute a breach of such obligation. On the other hand, in respect of the protection of non-economic interests (for example, the desire of performers not to allow the distribution of visual works from earlier in their careers) of the rights holders, further consideration would be necessary. It would be desirable to establish rules that may restrict the abusive exercise of rights for both Net Rights Holders and other rights holders.

Q15. Content distributed on the Internet is not limited to cinematographic works, television programs and music content. Are there any problems with respect to other content, for example, academic papers and educational materials?

**A15. <The Net Law does not purport to limit the scope of subject content to cinematographic works, television programs and music content.>**

Our proposal refers to cinematographic works, television programs and music content because we believe that the said three types of content, for which the promotion of their distribution is generally recognized to be important, particularly from the viewpoint of content industries. We are not purporting to deny the coverage to any other content items. It is our position that further consideration should be made with respect to the scope of subject content covered by the Net Law. (*See* page 4 of the Proposal).

Q16. How will the scope of Net Rights Holders be defined? For example, will it be that only the broadcasting organization that first broadcasted the program shall acquire the Net Rights thereto, or will those which subsequently re-broadcast the program also be included? How will the "Internet" and other key terms be defined?

**A16. <The specific scope of Net Rights Holders will be further considered.>**

We assume that the scope of Net Rights Holders will be defined by the law. The specific scope should be defined within the range that can achieve the objective of the Net Law to simplify rights processing. For this purpose, further consideration would be required in light of the opinions of many commentators.

Also, in respect of the notion of the “Internet” when we refer to “distribution on the Internet,” further consideration would be required. We hope to appropriately define this concept so as to be able to be responsive to future technological developments.

#### 4. Point on Fair Income Distribution and Fair Use

Q17. How will the advocated fair income distributions be realized?

A17. **<Fair income distribution is a duty of Net Rights Holders.>**

The Net Law project contemplates that Net Rights Holders will be legally obligated to make fair income distributions. On that basis, specific rules governing the distribution of income (for example, including the point as to how the term “income” should be defined in cases where Net Rights Holders deliver their content free of charge for sales promotion purposes) should, in principle, be left to negotiation by the relevant parties. In this regard, it is our position that the enactment of the Net Law will bring about a situation where Net Rights Holders, as a starting point for negotiations, hold the right to use the relevant content in order to deliver it on the Internet and are legally permitted to deliver the same, and therefore, that negotiations will be more easily facilitated than at present.

We hope that under such situation, concerned parties will be able to proceed with their discussions over income distribution rules by exercising their knowledge and wisdom.

Q18. It is proposed that a fair use clause will be inserted. Is it unnecessary because the current Copyright Act already enumerates many clauses limiting rights? What specific clause will be established?

A18. **<Specific Substance of Fair Use Clause.>**

The reason for our proposal to introduce a fair use clause is mentioned here. The current Copyright Act enumerates the limitations of rights in a restrictive manner, and does not authorize any other reasons for rights limitations. If any new situation occurs requiring rights limitations, it would not be resolved until new legislation. In particular, where technological progress is very speedy, such as the Internet and digital content, it is difficult to appropriately anticipate new situations. (*See* pages 5 and 6 of the Proposal).

Further consideration is necessary to formulate specific determination criteria. However, presently, we believe that the law will not contain overly detailed provisions in order to allow greater flexibility, leaving leeway for final court determinations.



## 5. Other Points

Q19. What course will be taken toward the adoption of the proposal?

A19. **<It is expected that our proposal will trigger discussions in various sectors.>**

To realize the legislation, two methods are imaginable: government initiative (cabinet bill) or legislation proposed by Diet members (member bill). This forum contemplates encouraging Diet members to submit a member bill.

Q20. Will the Net Law constitute an infringement of property rights?

A20. **<Relationship with Property Rights.>**

Property rights should of course be respected. However, the scope of each property right should be prescribed by law from the perspective of its contribution to the public interest of the current times. (The inherent restrictions, from the consideration of the public welfare, on the fundamental human rights under the Constitution, as well as Article 1 of the Copyright Act, also have the same concept.)

Given the current environment surrounding digital content, some might suspect that the Net Law will restrict certain rights. On the other hand, a great deal of content is not distributed solely because only one of the 100 rights holders cannot be identified. Hopefully, the proposed Net Law would be evaluated from that perspective.

End of Q&A.