

[Translation]

Supplementary Explanation to the Policy Proposal on the Net Law

[Introduction]

A private research association, Digital Contents Law Intellectual Forum (Representative: Tatsuo Hatta, President of the National Graduate Institute for Policy Studies) considers it to be a pressing concern to provide special legislation promoting the distribution of content, such as video and music, on the Internet, and has thus compiled a framework for a “Net Law” (provisional title), a special law, in March 2008.

Fortunately, the Policy Proposal on the Net Law received much attention from the press, blogs and other media. We announced the response of this forum in April 2008 to the opinions and questions that we received in the above media or directly through, among others, the website of this forum (“Response to Opinions and Questions”).

Subsequently, the government established the “Expert Examination Committee on Intellectual Property Systems in the Digital and Net Era” of the Intellectual Property Strategy Headquarters, and the Research Commission on Intellectual Property Strategy of the Policy Research Council of the Liberal Democratic Party established the “Sub-committee on Copyrights in the Digital and Net Era.” Discussions related to the Net Law have commenced in both of the above panel and sub-committee, and various opinions have been expressed over the Internet and other media. In these discussions, some inaccurate statements were expressed, which necessitated additional explanations of the substance of the framework and the response, which were announced in March and April 2008, respectively by this forum.

Accordingly, this forum provides the following supplementary explanation to the Policy Proposal on the Net Law. We hope that this will help facilitate a better understanding of the purpose of the proposal by a wide spectrum of the public.

July 2008

I. Necessity of Introduction of New Legislation

1. Issues regarding distribution of digital content on the Internet

(1) Lack of substantial protection of rights holders

(i) Issues under the Copyright Act

As indicated in the material submitted by an expert Diet member at the 2007 Fourth Meeting of the Council on Economic and Fiscal Policy, we currently face the situation where “most precious digital content is kept as dead storage without being used.”

→ For many content rights holders, it is essential that content be exposed to users, and produce returns. Nevertheless, there have been many missed opportunities for exposing content to users by lawful distribution, and this has resulted in no returns for the content rights holders.

In other words, in order to result in returns to content rights holders, it is necessary that the content be legally distributed, the users be charged, etc. for their use of the content. In addition, promotion of such legal content distribution meets the needs of many rights holders who wish to spread their content to the wider public. In particular, in the modern world of the highly developed Internet, there is a high demand for promoting distribution of digital content on the Internet.

However, under the current law, for example, in order to use existing content, such as cinematographic works and TV programs, for distribution via the Internet, it is necessary in principle to obtain authorization for all of the various rights involved, including the right of reproduction, the right of public transmission or the right to make transmittable, (if involving modification or any other alteration,) the moral rights of the author and the moral rights of the performer from all of the copyright holders and the holders of neighboring rights of such contents. If the content is used without such authorization, 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.

Yet rights holders may have different views regarding distribution of such content on the Internet, or conditions and other relevant matters for such distribution. In addition, because copyrights need not be registered under the current Copyright Act, in some cases rights holders are unknown, for example, due to inheritances or other instances. Accordingly, there is never any guarantee that the authorizations can be obtained from all of the rights holders.

Even if authorizations were to be obtained from all rights holders, those who intend to use the content must suffer an extremely burdensome ordeal of locating all rights holders and making individual negotiations, which has a withering effect on such prospective users, considering the costly and time consuming but unremunerative toil.

→ As a result of the above situation, “most precious digital content is kept as dead storage without being used” and there is a lack of substantial protection of the rights holders.

(i) Concentration of rights and management of copyrights and neighboring rights

Some indicate that although a large number of people are ordinarily involved in the production of a cinematographic work, TV program or music content, therefore resulting in a large number of copyright holders and holders of neighboring rights, the above-mentioned issue would not arise for those for whom measures for a certain level of concentration of rights are taken under the Copyright Act and other laws.

In cases of “cinematographic works”, for example, the Copyright Act does indeed simplify the rights handling by concentrating the copyright in the maker of a cinematographic work, and adopting the so-called one chance principle with respect to the neighboring rights of the performers.

However, copyrights held by classical authors, such as novelists, playwrights, lyricists, and music composers, in cases of the originals of cinematographic work or movie soundtracks, are

outside the scope of concentration of rights. Authors' moral rights, as well as performers' rights, are not concentrated, and there are no legal provisions restricting or otherwise regulating the exercise of these rights.

In addition, with respect to certain copyrighted works, such as musical works or performances of a performer, the rights of rights holders are sometimes managed by entities providing management services for copyrights and other relevant rights. However, not all rights holders entrust the management of their rights to such an entity. For example, as much as approximately 30% of all performers currently do not entrust their rights to such entities.

→ Thus, the degree of concentration of rights and concentrated management under the current legal system is considered to be far from sufficient (see (iii) for additional issues regarding the contractual handling of the rights which are within the scope of the object of concentration).

(ii) So-called 'taken-in' or '*utsurikomi*' issue

Under the current law, the treatment of relevant rights is not clear in the case of images taken of the general public, such as publicity rights, trademark rights, design rights or character rights of objects or passers-by, in addition to portrait rights, for example, passers-by that end up on screen as a part of the background when shooting dramas or documentaries on public roads.

With respect to this point, some indicate that it would suffice to solve the issue through the interpretation of the required elements of rights infringement (for example, interpretation of the element "without cause" with respect to infringement of a portrait right). However, leaving the matter to a judicial decision without invoking the required elements under the applicable legal provisions will result in excessive uncertainty about the lawfulness of secondary use, and thus involve a risk that use of works may be diminished. From the perspective of promoting distribution of content on the Internet, a fundamental resolution, i.e., a legislative measure, is a pressing need.

(iii) Efforts of the private sector (e.g., formulation of contractual rules)

In recent years, the private sector has made various attempts at facilitating distribution of content on the Internet, such as by formulating guidelines for performance agreements for broadcast programs, or executing a license agreement between a video posting (sharing) service provider and a music copyrights management entity. These efforts surely deserve high praise.

However, contractual rules, such as guidelines, have no coercive force. Accordingly, promotion of contractual use will not relieve the burden of rights handling and the risk of failure to obtain authorization, and is far from a sufficient resolution.

In addition, it is impossible to handle the rights by an agreement with respect to all of the content for which promoting distribution on the Internet is desired, and even for eligible content, it remains unclear when the contractual process is completed.

In light of the situation where nations are furiously competing with each other in carrying out distribution promotion measures for digital content, and promoting distribution of content on the Internet, in particular, is a pressing concern for the growth and development of Japan's content industry, there is no time to spare for handling by agreements, and resolution by special legislation, the Net Law, is called for.

→ In the area of content distribution, such as the iPod and YouTube, it is extremely important to be equipped with as much content as possible and to secure a de facto standard position as a platform (business infrastructure). In doing so, particular attention should be paid to the proposition that **our legal system must not allow the repetition of the same mistake as when Japanese industry was deprived of its position as the pioneer in the platform for portable music players by Apple with its iPod.** All agree that, in order to become a true major power in the content business by making the most of our advantage of holding a broad array of excellent content, it is an urgent necessity to arrange the content, including existing content, into libraries, and make available a large amount of content for lawful use. **In light of the current situation, as mentioned above, it is essential immediately to alter the premise under the current legal system that any content cannot be used lawfully for distribution on the Internet unless the rights holders' authorization is obtained for each instance of use, and to establish a legal system under which use of digital content for distribution on the Internet is lawful as a general rule. This will result in returns to the rights holders of content which is currently kept as dead storage, thereby substantially protecting their rights.**

(2) Issue of pirated works (unauthorized use)

Unauthorized use, such as production of pirated works and unlawful downloads of digital content, is a social issue. Some believe that in an environment where users can view and listen to content free of charge through unauthorized use, the number of users who will pay may be limited.

The importance of measures against unauthorized use to protect rights holders is self-evident. Yet unauthorized use is considered to have been encouraged because, despite viewing and listening needs, the content is not available by lawful delivery, or if available, it is very expensive.

In contrast, if there is a system enabling lawful and economical content use, a large number of sensible consumers will choose lawful delivery. As a result, incidents of unauthorized use are expected to be reduced. Actual data demonstrate that unauthorized use of certain video content was significantly reduced as a result of an official delivery service (for example, delivery of cartoon videos by GDH K.K. on certain video delivery websites).

→ We must sufficiently enhance the deterrent power against unauthorized use, by, for example, tightening controls against unauthorized use, and at the same time, promote lawful distribution and other forms of use of contents through the Net Law this forum proposes. This will bring about substantial protection of rights holders through returns to them as well as re-creation of content, which will in turn encourage creators of the next generation of content and development of our content industry.

2. Necessity of a special law and points which require special attention in designing a new legal system

(1) Necessity of a special law

This forum proposes legislation of the Net Law as a law that governs **only** the distribution of digital content on the Internet. In other words, this law should be **comprehensive** and **cross-cutting** in its reach, that is to say, should not be limited to solving the issues that fall within the ambit of the Copyright Act.

Opinions against such proposal indicate that despite the need for a new legal system, revision of the Copyright Act will suffice, or that a new legislation would potentially constitute double regulation.

However, such suggestions are incorrect. (i) First of all, with respect to the suggestion that revision of the Copyright Act will suffice, because rights involving the issue of ‘taken-in’ or ‘*utsurikomi*’ include certain rights, such as portrait rights, which are outside the scope of the Copyright Act, it is difficult to address the issue by merely revising the Copyright Act. In addition, the current Copyright Act covers cultural works distributed through traditional methods, such as publications and CDs. In terms of legal technique, even though in theory it may be possible in the framework of the Copyright Act to divide traditional works and digital content into separate categories, in practice this will give rise to significant difficulties. In addition, in the case of revision of the Copyright Act, there is a potential that the then-existing interpretations of the Act would affect the revised portions (even if unintended by the legislators at the time of the revision). It is our position that a special law is required in order to limit such possibilities as much as possible.

(ii) Then, the suggestion that new legislation would potentially constitute double regulation has been considered. 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.

(2) Points which require special attention in designing a new legal system

In designing a new legal system, in order to overcome the various issues mentioned in section 1 above, and in order to allow all rights holders, content users and business concerns to benefit in a win-win-win situation, a system should be designed to: (i) sufficiently respect the rights of rights holders and realize their “substantial” protection; (ii) fulfill the needs of users; and in turn (iii) develop the content industry, reinforce competitiveness of Japan’s economy and contribute to further the cultural development of Japan.

In light of the fact that this legal system will cover only digital content distributed on the Internet, it is considered possible to design a legal system which achieves the aforementioned goals (i) through (iii) by sufficiently taking into consideration the **characteristics peculiar to the Internet**.

Specifically, because use on the Internet always leaves behind logs, the new system should be designed in a manner such that content would be registered, so that content use on the Internet would be supplemented by the log records, every use will be charged (“one copy = one payment”), and thereby the rights holders will receive distributions (returns) in a reliable manner.

This would lead to returns to the rights holders in proportion to the degree of use, instead of the current disposition by comprehensive agreement (so-called “donburi-kanjo (roughly estimated calculation)”), thereby “substantially” protecting their rights. In addition, the system would enable reasonably fixing the compensation for each use, and as a consequence, would accurately satisfy the demands of the users and at the same time contribute to the development of the content industry involving designing systems for registration and charging and other related industries. (The specific method of distribution naturally could be arranged in various ways, such as initially fixing a large amount to be paid to the rights holders and allowing users to use the content for such amount up to a certain period or number of times, and then having users pay an additional payment to the rights holders after exceeding such period or number of times.)

→ If the infrastructure for distributing digital contents is put in place, opportunities for unheralded or small-scale creators to spread their content creations to the world and to users would increase, meeting the expectations of the “era of all 100 million Japanese creators” and greatly providing incentives to young creators of the next generation.

II. Framework of the Net Law — Three (3) pillars of the Net Law

The Net Law will provide a “mechanism” under which (i) it would be ensured that rights holders would receive due compensation, (ii) users would be able lawfully to use content, and (iii) the business industry would be able to conduct content business lawfully and without being inhibited by tremendously expensive rights handling costs.

In particular, the Net Law (i) grants to certain persons (the “Net Rights Holders”) the rights to use and license concerning distribution of certain digital content on the Internet (“Net Rights”), (ii) prescribes a legal obligation of such persons, that is, the Net Rights Holders, to distribute fairly the income from the distribution of the digital content, and (iii) provides for the fair use of said digital content such that the distribution of content will not be unduly impeded by abusive claims of rights over the distributed content.

(1) Net Rights (net licensing right = net licensing obligation)

First of all, it should be emphasized that the Net Rights do not merely protect and reinforce the interests of the Net Rights Holders, but substantially protect the rights of the rights holders.

That is to say, the Net Rights Holders will have a “legal” obligation to distribute fairly to the rights holders, such as copyright holders, the income, as much as they hold rights. In addition, the use of digital content for distribution on the Internet will not be monopolized by the Net Rights Holder. Parties other than the Net Rights Holder may use the content with a “license” from the Net Rights Holder. In granting a license, each Net Rights Holder may not arbitrarily refuse to grant a license, and will owe an obligation to grant a license under certain circumstances.

Although further consideration would be necessary in order to work out the specific means of securing fair licensing, a viable example would be, (in reference to Article 16 of the 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.

In addition, the Net Law envisages the rights holder's right to present an object if use, etc. of the Net Rights Holder or a license holder is prejudicial to the honor or reputation of the rights holder (in addition to economic "income distribution").

→ **As described above, the Net Rights are to be established to substantially protect the rights of the rights holders, and do not in any way aim to protect and reinforce the interests of only a part of the involved businesses and other parties.**

(2) Scope of content and Net Rights Holders covered

Our proposal has suggested, for the time being, that the **content items subject to Net Rights** shall be **video and music, etc.** which are expected to have the most demands for promoting distribution on the Internet, and that "**Net Right Holders**" shall be defined as **(i) makers of cinematographic works for cinematographic works, (ii) broadcasting organizations for broadcasted works, and (iii) producers of phonograms for music works (as described in the "Framework"), but these matters are by no means definite.**

Some question why the "scope of the Net Rights Holders" is limited to such parties. They are limited to the aforementioned parties for the time being because of the following reason. A Net Rights Holder owes an obligation to distribute fairly the income from the distribution. Enabling such fair distribution would require numerous preparatory activities for each item of digital content to be used, such as identifying parties to whom income should be distributed, fixing the distribution ratio of the income and establishing a settlement system. The proposal has merely listed the foregoing parties as the Net Rights Holders explicitly as they have the ability to appropriately conduct such activities.

→ In light of the above, **it is sufficiently plausible to expand the scope of the "Net Rights Holders" within the extent of the object of the "Net Law" of facilitating rights handling, so long as such party is capable of performing the above fair distribution obligation.**

(3) Obligation to pay fair compensation and means to secure such payment

The Net Rights Holders owe a "legal" obligation under the Net Law to make fair distribution of the income obtained from the use of digital content on the Internet. It is expected that the appropriate economic benefit will thereby be brought to the content creators (rights holders) in proportion to the use of their content, and add incentive to the creative activity of the rights holders, thereby contributing to fostering young creators of the next generation. In addition, as the Internet business may grow at an accelerated pace, the rights holders are expected to gain a significant income.

With respect to “appropriate compensation”, in light of encouraging users to switch from use of pirated works (unauthorized use) to lawful use, it is necessary to keep the charge per use by a user reasonable. As a general rule, the necessary matters, including the distribution rate, shall be determined through mutual consultations among the relevant parties based on fair practice and social common sense.

Some question whether it is possible to determine fair compensation. **If the “Net Law” is legislated, a situation would be created where, as a precondition to mutual consultations, the Net Rights Holder will hold the right to use the relevant digital content for distribution on the Internet and actually distribute the same accordingly under the law. As a result, compared to the current situation where such parties are unable to distribute any content without license, the new situation is expected to advance a more practical consultation, and efficiently formulate practical and reasonable rules on the distribution rate and other relevant matters.**

→ In order to achieve the above, it is vital sufficiently to exploit the role that JASRAC played previously in connection with music copyrights, as well as the experience and wisdom of entities providing management services for copyrights and other relevant rights, including right holders JASRAC, and various other organizations of rights holders, and introduce a market (competition) mechanism. In particular, as a more practical and specific rule, it would be worth considering establishing multiple organizations similar to JASRAC as entities providing management services for copyrights and other relevant rights, and introduce to such organizations the previous experiences and wisdom of the rights holders and various organizations.

It goes without saying that certain matters, such as whether compensation is “reasonable,” are subject to the final determination of the court.

(4) Fair use clause

With respect to the use of digital content on the Internet, the Net Law is envisaged to contain a fair use clause which enables lawful use even when the use does not fall under any of the individually stipulated provisions, so long as the use is fair in light of the purpose of use, nature of the content, and other matters (in the case of so-called “**fair use**”).

The major “reason” for containing such a clause is as follows. Article 30 and the following articles of the current Copyright Act restrictively list the modes of use for which limitations on rights are possible and does not permit any other reasons for limitations on rights. Under such provisions, any new situation which arises in the future where rights should be limited for an unstipulated reason cannot be resolved until new legislation comes into force, which would take years to enact. This would mean that addressing areas where advancement in technology is exceedingly speedy, such as the Internet or digital content, is practically impossible.

The government’s recent “*Chiteki-zaisan-suishin-keikaku 2008* [Intellectual Property Strategic Program 2008]” clarifies that consideration will be made for the introduction of a fair use clause. However, an extremely important point here is that because Article 30 and the following articles of the Copyright Act that limit rights have been traditionally strictly interpreted, if, for example, **introduction of a fair use clause by the revision of the Copyright Act remains of a “small” or “narrow” scope, it is possible that the court will make a strict interpretation upon deciding whether a certain use falls under “fair use” (although it would depend on the provision regarding specific criteria for decision).**

→ **In light of the current circumstances**, wherein the U.S. has a “wide” fair use clause and companies such as Google provide mechanisms and services which give huge benefits to users based on such fair use clause, thereby becoming a world leader on the Internet, **a fair use clause at least as “wide” as, or wider than, the U.S. is crucial regarding use of digital content for distribution on the Internet** which is covered by the Net Law.

(5) Relationship with international treaties

It is contemplated that the Net Law shall include 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 sufficiently able to formulate the legislation in a manner that does not violate any international treaties.

III. Prompt Introduction of the Net Law

This forum completely supports the purpose of the government’s “*Chiteki-zaisan-suishin-keikaku 2007* [Intellectual Property Strategic Program 2007]” from last year which mandated that the government will “develop necessary legal system for the distribution of most advanced digital content within the next two years” in the world and announced the framework of the Net Law.

Contrarily, the “*Chiteki-zaisan-suishin-keikaku 2008* [Intellectual Property Strategic Program 2008]” merely states that development and establishment of an intellectual property system which meets the needs of the digital net era is “to come to a conclusion within the year 2008,” and is feared to be a “regression” from “*Chiteki-zaisan-suishin-keikaku 2007.*”

“I had meant to view the world without adherence, but I had been too preoccupied with the current status of Japan. The world is now progressing at a tremendous speed.” These are the words of Mr. Soichiro Honda cited in the first intellectual Property Strategic Program. This forum considers that the Internet is a technical innovation comparable to the Industrial Revolution. We adamantly hope that Japan will enact the Net Law, which would utilize this historically significant innovation to its maximum extent, and that this opportunity will be used to create a new business platform, in connection with which existing relevant companies and ventures will become leaders of the world, thereby contributing to the enhancement of international competitiveness of Japan’s economy. The digital net society is booming in its development, and we have not a moment to lose when nations of the world are engaging in fierce competition in measures for promoting distribution of digital content. If we are “Too little, too late,” Japan is at stake.

We hereby express our desire that, with the aim of promoting distribution of digital content, implementation of the “*Chiteki-zaisan-suishin-keikaku 2008* [Intellectual Property Strategic Program 2008]” be accelerated, and that, through understanding and support of the Legislature, the government administration, related business parties and others who are enthusiastic to realize Japan becoming a digital content superpower, the Net Law be promptly enacted as the

“most advanced legal system in the world” due to which the rights holders will thrive, consumers will be jubilant and the nation will prosper.

We sincerely hope that, toward such end, a wide range of opinions and comments regarding this “supplementary explanation” be gathered, and that additional in-depth discussions are made widely and promptly to the true satisfaction of the rights holders and other interested parties.

End of Supplementary Explanation.