

[Introduction]

A private research association, Digital Contents Law Intellectual Forum (Representative: Tatsuo Hatta, President of 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 presented below. The Forum believes that this law will lead to the speedy realization of the Japanese governmental policy (such as “Intellectual Property Strategic Program 2007”) of making Japan the most advanced content superpower in the world, where users and creators of content as well as the business persons involved in these areas will benefit in a win-win situation. The Forum hereby announces the framework of the Net Law advocating for its early establishment with the support and understanding of the Legislature, the government administration, industry-related parties, etc., with hope for the development of Japan as the advanced content superpower.

March 2008

I. Current Issues and Necessity of a Special Law

1. Obstacles to digital content distribution services in Japan

(1) Burden of rights handling works (largest issue)

- (i) Under the current law, for example, in order to distribute existing cinematographic works and TV programs 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, 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. Obtaining all of these rights is not only very cumbersome and costly, but there may also be instances where the right-holders are unknown, for example, due to inheritances or instances where the right-holders refuse without reasonable grounds to give their authorization, such that there is never any guarantee that the authorizations can be obtained from all of the right-holders.
- (ii) Moreover, under the current law, the treatment of relevant rights such as portrait rights is not clear in the case of images taken of the general public, such as passers-by that end up on screen as a part of the background when shooting dramas or documentaries on public roads (the so-called ‘taken-in’ or ‘*utsurikomi*’ issue). Similar issues may be applicable if trademark rights, design rights or character rights are owned by other persons.

(2) Insufficiency in the measures for the prevention of unauthorized uses such as illegal copies

As the controls against unauthorized uses, such as digital piracy and the circumvention of technological protection measures, are generally

insufficient, there is concern that unauthorized uses discourage authorization by right-holders and prevents companies from entering into the digital content distribution business.

2. Necessity of a special law

Why is the enactment of a special law, the Net Law, required to address these issues, and not merely an amendment to the Copyright Act?

Reason (1): The subject matter of the current Copyright Act includes not only digital content distributed via the Internet, but also other 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 and ambiguity.
- Addressing these issues within the framework of the Copyright Act runs the risk of creating confusion regarding legal relationships and the practices that have been built up over the years under the regime of the current Copyright Act.

Reason (2): Because the rights at issue in the case of the 'taken-in' issue include portrait rights, trademark rights, design rights and publicity rights, it would be difficult to address all of these questions by amending only the Copyright Act.



Therefore, there is an urgent need for legislation of a law that governs **only** the distribution of digital content on the Internet, giving full consideration to the characteristics of the digital content as **economic goods** while at the same time reasonably harmonized with previously recognized rights. In other words, this law, while directed only at regulating the distribution of the digital content on the Internet, should nonetheless be **comprehensive** and **cross-cutting** in its reach, that is to say, not be limited to solving the issues that fall within the ambit of the Copyright Act.

II. Framework of the Net Law

1. Scope of application and summary of the Net Law

(1) Scope of application of the Net Law

The scope of application of the law **shall be limited to the distribution of digital content on the Internet**. The Net Law will not have any effect on any other legal relationships (such as the treatment of existing traditional works distributed by means other than the Internet) given that the Net Law would be legislated as a special law to other relevant laws, including the Copyright Act. In areas covered by the Net Law, the Copyright Act and other laws will not apply.

(2) Three (3) pillars of the Net Law

The following three items will be the core of legislation of the Net Law:

- (i) Establishment of “Net Rights”
- (ii) Requiring the fair distribution of income
- (iii) Prescribing a provision for fair use

The Net Law (i) grants to certain persons the rights concerning distribution of certain digital content on the Internet (“Net Rights”), (ii) prescribes a legal obligation of such persons 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.

2. Creation of “Net Rights”

(1) Limitations on the persons to be entitled with Net Rights

For the purpose of fair distribution of the income earned from the exploitation of digital content among all the stakeholders concerned, including the right-holders, many preparatory acts must be performed in relation to the digital content exploited, such as determining the persons to whom the income should be distributed, determining the distribution ratio of the income and elaborating the appropriate payment mechanisms.

It is recognized that such fair distribution of income, including such preparatory acts, may not be easily accomplished by any individual. For that reason, if the rights concerning the distribution of digital content on the Internet are to be granted to everyone, the purpose of the legislation of the Net Law, to protect the economic interests of the content creators by fair distribution of income, will not be realized.

Hence, under the Net Law, **the rights concerning the distribution of digital content on the Internet shall be granted only to persons who are considered to have the ability to make a fair distribution of income** as stated above. In that way, a Net Right Holder may use the digital content to which it owns the Net Right, if the use is on the Internet, without incurring the significant burden of handling rights previously described, if the authorization for exploitation is obtained within the scope necessary for its business.

(2) Contents subject to Net Rights

Various works, such as cinematographic works, TV programs, music, photography, game software, computer programs and databases could be used as digital content on the Internet. However, there is digital content which is difficult to classify into such categories, and it is anticipated that many new categories will appear in the future. Therefore, for the time being, **with a view toward promoting the secondary use of existing content on the Internet, digital content subject to the Net Law shall be video and music, etc. and in that way, such digital content will not be**

significantly different from the structure of the current Copyright Act system.

With respect to this digital content, from the view of the ability to conduct a fair distribution of income, **“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 (definitions of these terms to be examined further).**

- * In the above, cinematographic works, TV programs and music works are listed because these are considered to be especially significant in the demands for the promotion of the distribution on the Internet. However, this does not prevent the stipulation of Net Rights for other digital contents. Other digital contents will also require further examination.

(3) Specific contents of Net Rights

In the event right-holders of the above mentioned content give their consent to the making of the cinematographic works, broadcasts or recordings of the phonograms, respectively, Net Right Holders shall have the exclusive right (i) **to reproduce, transfer and make other use** of such specific digital contents for the distribution of such digital content (only) via the Internet, and (ii) **to authorize other persons to make** use of (i) above. (Refer to next paragraph for the aspects of the obligation.)

- * Even if consent has been obtained in the process of the making of the cinematographic works, etc., there may be events where unknown right-holders exist (for example, events where works used infringed upon other copyrights, etc.). In such cases, the issue could be addressed, for instance, by limiting the exercise of the rights by the copyright holders unknown to the Net Right Holders to seeking an injunction (restricting the use on the Internet); however, this still requires further examination.

3. Obliging the fair distribution of income

(1) Obligation of Net Right Holders

With the grant of the Net Rights, **it shall be a legal obligation under this law for the Net Right Holders to make fair distribution of the income obtained from the use of the digital content on the Internet** to the right-holders, such as content creators, whose exercise of rights will be limited. It is expected that the appropriate economic benefit will thereby be brought to the content creators.

(2) Measures for ensuring appropriate compensation

In principle, appropriate compensation shall be determined by mutual consultation among the parties. However, as a practical and specific rule, it is being considered whether to establish two or three entities, like JASRAC, as entities responsible for managing copyrights and other relevant rights, and coordinating and aggregating the opinions of each party through

preparation and proposal of guidelines and rules (as JASRAC has done in the past). (It is expected that after sufficient discussion by the relevant parties based on the type of content or distribution measures, etc., some realistic standards of practice will soon be devised on the compensation.)

4. Prescribing a provision regarding fair use

(1) Reasonable limitation of rights

With respect to the use of digital content on the Internet, even though there are currently no provisions under the Japanese law that specifically stipulate the circumstances where the exercise of the rights by the right-holders are limited, reasonable limits to the exercise of such rights shall be established. In other words, even if the use of digital content on the Internet does not fall under the any exception under Japanese law (such as in Articles 30 and below of the current Copyright Act), if such use is considered to be fair in light of the purpose of use or the characteristics of the content and other factors (i.e. **in the event of** so-called “**fair use**” (*kousei-na-shiyou*)), the Net Law will set forth explicitly that such use shall be permissible. In that way, it would be possible to appropriately respond to unreasonable claims, such as infringement based on the moral rights of authors and the moral rights of performers. Under such fair use provisions, the protection of personal rights, including portrait rights, would be fully maintained to a reasonable extent.

With respect to the exceptions based on social necessity, additional exception provisions permitting “fair use” are being considered even if the use of the digital content does not fall under specific enumerated provisions, rather than the limited listing provided for in the current Copyright Act. Also, it has been recognized that the limited listing method may be ill-suited to future uses made possible by the progress of Internet technology.

(2) Lessons from history

It must be emphasized that the fair use provisions described above are not established for the purpose of limiting the rights of right-holders. Fair use limitations are intended to weigh public interest and social necessity. The fair use provisions only set forth that the exercise of the rights may be limited, without waiting for a specific amendment to the laws in cases that do not fall within the categories expressly enumerated, but where limits are appropriate in light of, among other things, the public interest.

It would be necessary to limit the rights of the right-holders and maintain appropriate balance with the rights of the users and general consumers for the development of certain industry and the enjoyment of the profits derived therefrom by all persons involved in such industry, including the right-holders, users and consumers. A good example is the Sony Betamax case, in which the US Supreme Court, based on the theory of fair use, denied a claim of copyright infringement. As a result, home visual recording and replay equipment spread, and movie companies, including the plaintiffs, were able to develop new markets for the sale of cinematographic works and obtain immense profits. The consumers were also able to enjoy the benefits. The result, therefore, was a “win-win-win”. The effectiveness of this theory may be easily grasped by imagining what our lives would be like now if there

had been no theory of fair use in the US at that time and the claim for the infringement of the copyrights by home recording and replay equipment had been granted. Additional support for this theory may be found in the successive emergence of new services that create significant benefits to users and general consumers which would otherwise arguably infringe copyrights, such as Google's full text cache retrieval (a retrieval system which may be used even in the event of temporary unavailability of the original site's servers by maintaining the web page as cache and pasting links thereon on the server by Google) and internet archives.

III. Merits of the Net Law

Meeting the demands for distribution of digital content

The aim of the Net Law proposed by the private research association, Digital Contents Law Intellectual Forum, is the creation, protection and exploitation of content on the Internet.

Creation area: Personal computers have spread rapidly throughout Japan, and in 2008, the number of personal computers is expected to reach 100 million. We have entered an era in which users will simultaneously be content creators. Nevertheless, the current Copyright Act is a law "for professionals" mainly structured based on traditional works, and does not provide an incentive for the creation of works by these newer copyright holders, particularly creation activities on the Internet.

Protection area: In Japan, currently, it is widely understood to be a significant issue that the protection of copyright holders is insufficient. While serious users pay large amounts of content royalties, there are many users who hide behind the wall of anonymity, and the compensation owed to the right-holders is not paid. At the minimum, there is an urgent need to build a system to collect content royalties on the Internet in a fair, cheap and comprehensive manner.

Exploitation area: Regrettably, there is no worldwide IT company based in Japan. In addition to this risk factor, there is another one in that the leading companies are concentrated in the US (Microsoft, Yahoo, Google, etc.). It is a pressing demand for Japan to develop an environment from which world-wide IT companies can emerge.

We believe that the Japanese government adopted its policy to "develop the leading legal systems, etc. to promote the distribution of digital content within two years" described in "Intellectual Property Strategic Program 2007" in order to address the situation described above. Digital Contents Law Intellectual Forum agrees with this policy in all respects, and announces this "Net Law," in order to achieve this objective promptly.

With the realization of the Net Law,

- (i) Right-holders will profit, consumers will benefit and the national wealth will increase: Win-Win-Win for the three parties

Consumers will be able to retrieve, purchase and enjoy content, such as existing cinematographic works and TV programs and the newly produced

music and videos via the Internet on their own personal computers at any time and place.

The Business world will be able to profit through a distribution service. By legally requiring the payment of fair compensation and royalties to the right-holders by the distributors, the **right-holders** on the creation side will profit as well, and the incentive for the creation of new works will be ensured.

With the development of an environment in which consumers can use digital content and the business world can profit, the foundation for nurturing worldwide IT companies and related industries will be established (**exploitation area**). Also, with the development of a structure in which the payment of appropriate compensation and royalties is ensured, the right-holders will be protected (**protection area**), and current and future content creators will also be encouraged (**creation area**).

(ii) **Development of Japanese culture and industry**

With the promotion of content distribution through the Net Law, younger generations will have an opportunity to learn of past masterpieces that are otherwise not well known, and there may be cinematographic works or TV programs that become popular on account of distribution via Internet that had not had mass-appeal at the time of their original broadcast or distribution. This would also lead to the introduction and transmission of the excellent content of Japan all over the world via the Internet.

Through this, not only will the content transmitted from Japan spread throughout the world and contribute to the dissemination of Japanese culture, it would also enhance the competitiveness of the Japanese economy by further developing the digital content industry and the related communication and equipment industries.

The Forum, therefore, makes this urgent proposal for the development of the Net Law as a “policy under which right-holders will profit, consumers will benefit and the national wealth will be increased.”

IV. Digital Contents Law Intellectual Forum

Members (as of March 2008)

Hidetaka Aizawa	Professor of Hitotsubashi University, Graduate School
Takashige Ichise	Movie Producer
Masakazu Iwakura	Partner of Nishimura & Asahi
Tsuguhiko Kadokawa	Chairman of Kadokawa Group Holdings, Inc.
Masatoshi Kumagai	CEO & Representative Director of GMO Internet, Inc.
Nobuyoshi Tanaka	Senior Managing Director of Canon, Inc.
Hirofumi Doi	Representative Director of Japan Digital Contents Trust, Inc.
Tatsuo Hatta (Representative)	President of National Graduate Institute for Policy Studies
Lee Bong-Ou	President of CINEQUANON

and One (1) other person

(Established in January 29, 2007)