

COURSE OF DISCUSSIONS

IN INTERNATIONAL SUBCOMMITTEE (January, 2003)

I. Subject Matters of Considerations

The International Subcommittee was established to consider how to deal with international issues.

Such international issues are described as follows in “Intellectual Property Strategic Framework” and “Basic Law on Intellectual Property”:

Intellectual Property Strategic Framework

Issues Relating to Pirated Copies of Copyrighted Works

Foreign products that infringe intellectual property rights owned by Japanese persons, including but not limited to imitations or pirated copies of intellectual property, have caused significant losses to the Japanese economy. If such infringements remain unchallenged, such losses will become more serious. Imitation of technology, designs, or brands or illegal reproduction (or piracy) of musical or cinematographic works, TV or radio programs or game software that may committed in any international market cannot be overlooked to ensure the future growth of Japan based upon intellectual property. Effective countermeasures against such infringements should be devised, taking into consideration the characteristics of each infringing product, such as imitation requiring large-scale and systematized process or pirated copies that can be produced even by any individual if he or she has a personal computer.

Taking the said facts into consideration, the Japanese Government ought to work vigorously with central and local governments of any foreign country where the said infringements are committed, by fully exercising the Japanese Government’s rights granted under relevant international treaties, conventions, and agreements including Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), which took effect upon the establishment of World Trade Organization (“WTO”).

If a large number of imitations or pirated copies of intellectual property of Japanese

persons are manufactured and/or distributed in any member country of WTO, the Japanese Government should make efforts to keep its eye on such member country's intellectual property-related systems and their operation, making the most of WTO's review system. At the same time, the Japanese Government should urge any non-member countries of WTO to further protect intellectual property, through, for example but not limited to, bilateral negotiations.

In addition, the Japanese Government should make efforts to ensure that international measures against imitations and pirated copies of intellectual property will be strengthened, by actively participating in discussions in World Intellectual Property Organization ("WIPO") on enforcement of intellectual property rights.

In these efforts, the Government ought to make use of governmental or quasi-governmental organs such as Japanese embassies and consulates in foreign countries and Japan External Trade Organization (JETRO) and take up and retain a dauntless attitude in bilateral negotiations and multilateral discussions, in order to protect interests of the Japanese industries and nationals.

Development of International Rules: Assistance to Developing Countries

Optimization of international levels of protection of intellectual property and harmonization among intellectual property-related systems has been being desired as a result of increase of global competition and progress of information transmission technology. Therefore, development of new international rules through bilateral or multilateral frameworks and assistance given to developing countries in building up intellectual property protection systems should be promoted.

(Headings are added by the Subcommittee.)

Basic Law on Intellectual Property

Article 16. Measures against Infringement of Rights

16.1 The State shall take necessary measures against infringements of intellectual property rights in the domestic market and against importation of products that infringe intellectual property rights, including but not limited to controlling such

infringements and forfeiting infringing products, in a close cooperation and collaboration with business enterprises, business associations and other associations concerned.

16.2 Where intellectual property owned by juridical persons and other entities that are established under Japanese laws or individuals who have Japanese nationality (collectively referred to in this Article 16 and Article 17 below as “Japanese persons”) is not properly protected in any foreign country, the State shall take necessary measures, including but not limited to ensuring proper enforcement of rights under intellectual property-related treaties, in cooperation with the government of such foreign country, international organizations and associations concerned, according to the situation.

Article 17. Establishment of International Systems

The State shall make efforts to establish intellectual property-related systems that are internationally consistent in collaboration with governments of other countries by cooperating with intellectual property-related international organizations and other international frameworks, and shall take necessary measures to develop an environment in which Japanese persons can promptly and certainly obtain or enforce intellectual property rights in countries or regions where an intellectual property protection system has not yet been sufficiently developed.

International Subcommittee were to consider necessary measures to be taken in line with the Japanese Government’s general policies shown in these documents. Particularly, the Subcommittee considered the following issues:

Issues Considered

Anti-Piracy Measures:

- Comprehension of the actual state of distribution of pirated copies;
- Selection of foreign countries copyright infringements committed in which should be intensively tackled;
- Identification of and dealing with problems which will be encountered in enforcing rights; and
- Development of an international strategy (such as utilization of international forums and cooperation with advanced countries).

International Jurisdiction and Governing Law:

International jurisdiction and governing law precisely responding to the Internet age.

Copyright-Related Treaties:

Proper comprehension of international trends; and

A role to be played by Japan in order to ensure early development of new treaties.

II. Results of Considerations

International Subcommittee held its first meeting on July 2, 2002, and since then had six sessions. The Subcommittee reached the following conclusions as a result of its discussions/considerations in the year 2002.

1. Anti-Piracy Measures

(1) Comprehension of the Actual State of Distribution of Pirated Copies:

Pirated copies of Japanese copyrighted works are widely distributed in foreign countries including especially Asian countries. It has been pointed out that, for fear of such piracy, many owners of copyright in Japanese works hesitate to make inroads into foreign markets. It is difficult to comprehend the actual state of distribution of pirated copies because acts of manufacturing, marketing and/or selling such copies are illegal and hence done stealthily. However, for the purpose of taking effective anti-piracy measures, it is essential to comprehend the actual state of infringements by any means even if such comprehension is not general. Efforts to this end should be made continuously, in cooperation with persons concerned.

(2) Selection of Foreign Countries Copyright Infringements Committed in Which should be Intensively Tackled

PRC, Taiwan, the Republic of Korea and other Asian countries, where pirated copies of Japanese copyrighted works are widely distributed, should be selected as countries countermeasures against copyright infringements committed in which should be intensively taken. It will be advisable to extend a territorial scope of such countermeasures to other regions if it is necessary to do so.

(3) Issues to be Attended to When Taking Anti-Piracy Measures

Some of Japanese copyright owners do not actively conduct business in Asian countries because they make profit mainly in Japan. This situation is one of factors which cause pirated copies of Japanese copyrighted works to be distributed in such countries. We think that presently such copyright owners are not active players in tackling such pirated copies from a cost-effectiveness viewpoint, and as a result do not take aggressive countermeasures. However, for many copyright owners, Asian countries are a promising and potential market for Japanese copyrighted works, and therefore it is desirable for such copyright owners to change their thinking: they should be prepared to take anti-piracy measures by themselves in anticipation of their conduct of business in said countries.

On the other hand, for copyright owners who have been already actively conducting business in Asian countries, distribution of pirated copies of works copyright in which is owned by them is an issue affecting their profit. As a result, there exist cases where such owners make efforts to comprehend the actual state of infringement of copyright, trademark rights and other intellectual property rights and also enforce their own rights through their local subsidiaries and/or agents. Authorities concerned should effectively support such corporate or other copyright owners in such efforts. In addition to making such efforts, copyright owners need to execute clear license agreements and introduce technical means, both in order to protect their own copyrighted works.

It has been pointed out that owners of intellectual property rights will encounter with problems in respect of intellectual property-related systems themselves and operation thereof, when such owners enforce their own intellectual property rights. For example, any such owner will be required to identify a person or persons who infringe(s) such owner's right and to prove an amount of loss and/or damage suffered by such owner as a result of such infringement; investigating authorities are often ethically unreliable; fees payable by such right owners to attorneys and research firms are enormous; and a lot of copies of works need to be promptly inspected in order to determine whether or not such copies were produced through piracy. Additionally right owners' enforcement of their intellectual property rights involves a cost vs. effectiveness problem. Measures need to be adopted which take into consideration these aspects.

(4) Strategic Dealing with Pirated Copies – 7 Measures of High Priority -

The Japanese public and private sectors has been making concerted efforts to tackle pirated copies, including establishment of Organization for Promotion of Overseas Distribution of Content in August, 2002. Hereafter, it will be important to

strategically take measures depending on a level of development and implementation of copyright-related legal systems in each foreign country where Japanese copyrighted works are infringed, in collaboration with, among others, copyright owners who are willing to aggressively tackle such infringement. In doing so, the following measures should be taken on a high priority basis by the united efforts of the public and private sectors.

(i) Further Efforts to Comprehend the Actual State of Distribution of Pirated Copies

To comprehend the actual state of distribution of pirated copies of copyrighted works is a precondition for taking countermeasures against such copies. Although it is not easy to comprehend the actual state of such distribution because of its nature, further efforts should be made to determine loss and damages caused by such distribution (including but not limited to dispatch of overseas delegation for research purposes), with the aid of the relevant governmental authorities of foreign countries where Japanese copyrighted works are infringed and by making use of knowledge held by (x) research firms which are familiar to local situations and/or (y) foreign organizations which have conducted related researches. Especially in PRC and Taiwan, there may have occurred or occur any change in domestic distribution of pirated copies, because these countries participated in WTO in the years 2001 – 2002 and as a result they become obligated to comply with Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”). Researches also in this regard should be intensified.

(ii) Bilateral Discussions

It will be effective to persuade governments of any foreign countries in which pirated copies of Japanese copyrighted works are distributed to establish copyright protection systems and to ensure increased enforceability of copyright, by having bilateral discussions directly with each of such governments. To this end, it is necessary to arrange bilateral discussions with the Government of PRC, among others, in which pirated copies of Japanese copyrighted works are especially widely distributed and to persuade such government, by making the most of information provided by authorities concerned or other persons, to properly protect Japanese copyrighted works.

(iii) Vigorous Utilization of International Organizations

Presently international organizations including World Trade Organization (“WTO”) and World Intellectual Property Organization (“WIPO”) are discussing enforcement of copyright. WTO is reviewing PRC’s compliance with TRIPS laws, rules and

regulations. When the Japanese Government requires governments of any countries in which pirated copies of Japanese copyrighted works are distributed to establish copyright protection systems and to ensure increased enforceability of copyright, the Japanese Government should make the most of these international frameworks.

(iv) Strategic Cooperation with Foreign Governments Which Take Anti-Piracy Measures

Governments of some foreign countries including the USA have already commenced bilateral discussions with the government of each of Asian countries where pirated copies are distributed, and in such bilateral discussions persuaded the latter government to strengthen its regulation of and control over piracy. Overseas associations of owners of copyright and/or related rights such as International Federation of the Phonographic Industry (IFPI), Business Software Alliance (BSA), International Confederation of Societies of Authors and Composers (CISAC) and Bureau International des Societes Gerant les Droits d'Enregistrement et de Reproduction Mecanique (BIEM) also take aggressive anti-piracy measures, including establishing and maintaining local offices in countries where such rights are infringed and enforcing their own rights by making use of lawyers and research firms. Experiences and know-how of these overseas governments and associations will be very useful for the Japanese Government's taking measures in any countries where infringements of Japanese copyright are committed. Therefore, the Japanese Government and any Japanese persons who own copyright and/or related rights should take anti-piracy measures in cooperation with such overseas governments and associations.

(v) Raising of Copyright Awareness of Persons Concerned in Countries Where Copyright Infringements are Committed

In order to cope with piracy, it is important to raise copyright awareness of the public in any countries where copyright infringements are committed. We think that governmental authorities of such countries which are responsible for establishing copyright-related systems and for ensuring enforceability of copyright play an important role in this connection. Accordingly it is important to raise copyright awareness of administrative, judicial and police officers and other persons concerned of such countries before the public. Efforts should be made to this end by, among other means, offering seminars and symposiums to such officers and persons in cooperation with governmental organs of such countries.

For raising copyright awareness of the public in countries where copyright

infringements are committed, it will also be effective for copyright owners in such countries to receive fair compensation for use of their copyrighted works by enforcing their own rights. Collective copyright administration organizations which have been authorized by copyright owners to exercise their copyright play an important role in ensuring that copyright owners receive such compensation. Therefore, the Japanese Government should provide cooperation for establishment, fostering and growth of such collective copyright administration organizations in any such countries.

(vi) Support to Copyright Owners through Organization for Promotion of Overseas Distribution of Content

Organization for Promotion of Overseas Distribution of Content (“OPODC”), which was established in August, 2002, are taking aggressive anti-piracy measures, including dispatch of missions to PRC and carrying out of survey of distribution of pirated copies. Such activities will be fruitless unless they are done continuously over an extended period of time. The Japanese Government should closely exchange opinions with OPODC and should, based upon results of such opinion exchange, provide full cooperation to OPODC in its long-term and continuous efforts through, for example but not limited to, carrying out of necessary surveys in order to enable copyright owners to institute lawsuit for infringements of their copyright or otherwise enforce their copyright in foreign countries.

(vii) Vigorous Utilization of Diplomatic Establishments Abroad and Other Overseas Organs

In order to take anti-piracy measures, the Japanese Government must closely cooperate with organs which have a thorough knowledge of and an intimate association with any countries in which Japanese copyrighted works are infringed, including Japanese embassies and Japan External Trade Organization (“JETRO”). In view of protection of owners of copyright and other intellectual property rights, measures should be taken which address not only piracy but also imitation.

On the part of such owners, it is desirable for them to aggressively enforce their own rights by, for example, instituting lawsuits for infringements of such rights through their local agents or offices, if any. Corporations which actively conduct business overseas but each of which is not financially able to independently establish an overseas office are expected to cooperate with each other to jointly establish local offices and/or jointly retain local lawyers and/or survey firms.

2. International Jurisdiction over and Governing Law Applicable to Copyright

Infringements via Internet

(1) Incidental Issues:

Today, as a result of spread of Internet, works are distributed easily, instantly, globally and in large quantities, resulting in increase of copyright infringements via Internet. If any intellectual property right is infringed internationally, issues of international jurisdiction (i.e., courts in what country have jurisdiction ?) and of governing law (i.e., what laws should be applied ?) arise. Traditionally, such international jurisdiction and governing law are determined on the basis of “a place of misconduct” or “a place of injury”. However, such places are not always clear in cases of copyright infringements via Internet, and especially, “place[s] of injury” may lie scattered all over the world. The issues of international jurisdiction and governing law with respect to copyright infringements via Internet were discussed by the Subcommittee with due regard to this observation.

(2) International Jurisdiction:

Members of the Subcommittee expressed the following opinions with respect to international jurisdiction over copyright infringements via internet:

- **Determinants of Jurisdiction**

A view was expressed that “a country in which an infringed right exists, universal jurisdiction and/or forum prorogatum/agreed upon jurisdiction” should be determinants of jurisdiction. Although members of the Subcommittee generally accepted that agreed upon jurisdiction is an appropriate determinant of jurisdiction, some members feared that either party to any agreement or contract may be in a unfavorable position with respect to jurisdiction agreed upon in such agreement or contract if such party is not on an equal footing with the other party or parties to the agreement/contract.

- **Consistency with Cases of Defamation via Internet**

No fundamental differences in determinants of jurisdiction can be seen between any case of copyright infringement via Internet and any case of more common international tort such as defamation or invasion of privacy. Therefore, it is necessary to ensure consistency in legal treatment between these two types of cases.

- **Importance of Consideration Given from a long-term Viewpoint**

So far, the issue of international jurisdiction has not yet been sufficiently argued in international forums. Therefore, the Japanese Government should carefully proceed with its consideration of this issue keeping close watch over development in Hague Conference on Private International Law and other international forums.

(3) Governing Law

With respect to law which governs cases of copyright infringements via Internet, members of the Subcommittee expressed the following opinions:

- Clarification of “Country-of-Origin Principle” Adopted by Berne Convention

It is unclear as to how the “country-of-origin principle” adopted by the Berne Convention as a rule of choice of laws applies to copyright infringements via Internet. An opinion was expressed that the Japanese Government should internationally emphasize the necessity to clarify whether or not and, if so, how said principle applies to such infringements.

- Law Governing Cases of Copyright Infringement via Internet

Some members of the Subcommittee said that, if any work is illegally transmitted to the public in two or more countries, such infringing act should be subject to legal treatment separately in each of such countries. Specifically, if any work is publicly transmitted from Country A to Country B, such transmission should be regarded, in Country A, as breach of copyright-related laws of Country A and, in Country B, as breach of copyright-related laws of Country B, and accordingly such infringement should be subject to legal treatment separately in each of these countries in accordance with the country’s laws .

On the other hand, other members of the Subcommittee said that an international uniform rule should be developed which determines governing law and under which any act of such transmission is to be regarded in any and all countries as a single act, and that relationship of rights between or among the parties should be determined in accordance with such uniform rule.

However, in some members’ opinion, if laws of a country other than the country in which a copyright infringement was committed are selected as governing law under such uniform rule, prevalence of laws of such other country over those of the country where the copyright infringement was committed is doubtful, because there exists a view that law which governs cases of copyright infringements should be determined in

accordance with the territorial principle.

- Consistency with Cases of Defamation via Internet

No fundamental differences in determinants of governing law can be seen between any case of copyright infringement via Internet and any case of more common international tort such as defamation or invasion of privacy. Therefore, it is necessary to ensure consistency in legal treatment between these two types of cases.

(4) Course to be Followed

With respect to an attitude to be assumed by the Japanese Government for the present, some members of the Subcommittee think that the Government should first determine a policy of Japan on the basis of its theoretical approach and then should seek for permeation of such policy into the international society. Other members think that a more practical course should be followed, including to consider governing law and jurisdiction with focus on infringers' acts.

Presently, governments of many countries including Japan determine jurisdiction over and governing law applicable to cases of copyright infringements via Internet, in accordance with the provisions of their respective existing national laws. As a result, legal predictability is low. Therefore, practically functioning legal systems should be promptly established. However, for the meantime the Japanese Government should actively propose to governments of foreign countries necessary actions to be done (including clarification of "country-of-origin principle" adopted by the Berne Convention), with regard to incidental issues.

With respect to the issue of jurisdiction, it is possible to determine in advance a court or courts which will have jurisdiction over any copyright infringements, if committed, by causing copyright license agreements or terms and conditions of licensing copyright to contain jurisdiction clauses. Such determination of jurisdiction based upon a mutual agreement between a copyright owner (licenser) and a licensee provides greater legal predictability than any rule under which factors other than such mutual agreement determine jurisdiction. Accordingly it will be effective from a viewpoint of removal of uncertainty as to jurisdiction if a copyright owner (licenser) and a licensee mutually provide for jurisdiction in advance in a license agreement executed by them.

When an owner of any copyright institutes a lawsuit for alleged infringement of such copyright, such owner has less restricted choice of jurisdiction, and as a result such lawsuit may impose excessively heavy burden on a respondent. It is well expected

that such situation may have an effect of discouraging prospective licensees from conducting international business. Continued consideration should be given in order to deal with this undesirable consequence.

3. Participation in Development of New Treaties

World Intellectual Property Organization (“WIPO”) is adapting rights granted under the Berne Convention and the International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations to authors of works and owners of neighboring rights so that the rights so granted conform to the recent digitalizing and networking trend.

As a part of such adapting efforts, the WIPO Copyright Treaty (“WCT”) was adopted in 1996 and took effect in March, 2002, and the WIPO Performers and Phonograms Treaty (“WPPT”) was adopted in 1996 and took effect in May, 2002. However, the proposed treaties concerning audio-visual performance and broadcasting organizations are not yet adopted and are being discussed in WIPO.

(1) Progress of Discussion on Proposed Treaties

The following is the Subcommittee’s summarization of progress of international discussion on the proposed treaties for “protection of audio-visual performance” and “protection of broadcasting organizations”:

(i) Protection of Audio-Visual Performance

A diplomatic conference was held in December, 2000 in Geneva in order to discuss the proposed treaty for protection of audio-visual performance. In such conference, although a provisional agreement was reached as to the drafted text of 19 of 20 substantive articles of the treaty, an agreement was not reached between EU and the United States as to transfer of performers’ rights to producers of cinematographic works. As a result, the proposed treaty was not adopted in the conference. In addition, a new topic to be discussed has turned up in connection with “national treatment”: allocation of domestically collected compensation for personal sound or video recording to foreign performers. The issues of “transfer of rights” and “national treatment” will be central topics to be discussed hereafter.

(ii) Protection of Broadcasting Organizations

The proposed treaty for protection of broadcasting organizations has been being

discussed since 1998 in WIPO Standing Committee on Copyright and Related Rights. In the fifth session of the Standing Committee held in May, 2001, Japan made a proposal of a form of the treaty. Thereafter, EU and the United States made corresponding proposals at the sixth session held in November, 2001 and at the eighth session held in November, 2002 respectively. Thus proposals have been advanced by all of major members of WIPO. Principal topics which will be discussed in WIPO henceforth will be (x) whether or not so-called "broadcasting via Internet" should be added to a scope of protection, (y) protection of broadcasting signals before they are transmitted to the public and (z) protection of broadcasting from unauthorized decoding.

(2) Fundamental Course to be Followed

Diplomatic efforts should be continued for early execution of the treaties for protection of audio-visual performance and for protection of broadcasting organizations in recognition of the pressing requirement for Japan to adapt rights enjoyed by performers in connection with their audio-visual performance and by broadcasting organizations so that such rights conform to the recent digitalizing and networking trend. With respect to the proposed treaty for protection of audio-visual performance, Japan should play an active role in resolution of the present disagreement between EU and the United States, from a viewpoint which attaches more importance to early adoption of the treaty. With respect to the proposed treaty for protection of broadcasting organizations, national discussions should be done for the purpose of determining the Japanese Government's stand on the issues of "broadcasting via Internet", "broadcasting signals before they are transmitted" and "decoding". As a part of the Japanese Government's consideration of these proposed treaties, how the treaties should be nationally implemented as and when they are executed should be studied.

(3) Other International Rules

In addition to the above mentioned topics, WIPO is discussing protection of expressions of folklore and protection of database which is not a work of originality. It will be advisable for the Japanese Government to give consideration to these two topics as long-term issues in light of positions assumed from time to time by other member countries of WIPO, because explicit requirement or request for such protection is not observed domestically.

[To the top of the page](#)

ANTI-PIRACY MEASURES

<p>Tasks to be Done to Cope with Piracy</p>	<p>To request countries where copyright infringements are committed to establish copyright-related legal systems and strengthen such countries' regulations of and control over such infringements</p>
	<p>To support Japanese corporations in enforcing their rights in foreign countries</p>
	<p>To solidify cooperation between the public and private sectors</p>

Bilateral discussions	Periodical discussions (with PRC, Korea and Taiwan)
Cooperation with Europe and USA	Exchange of information with respect to anti-piracy measures
Surveillance through WTO and other international organizations	Aggressive use of the system of review of compliance with TRIPS laws
Cooperation provided to developing countries	Provision of training services and symposium programs, and dispatch of specialists
Offering of piracy-related seminars	Offering of seminars to governmental officials responsible for copyright-related affairs
Development of copyright-related training materials	Development of copyright-related training materials intended for Asian people
Support of copyright owner's enforcement of their rights	Preparation of manuals intended for Japanese owners of copyright; Support to Organization for Promotion of Overseas Distribution of Content
Establishment of structure of cooperation between the public and private sectors	Dispatch of public/private joint missions