

Report of Discussions in International **Sub-committee (January, 2004)**

I Matters to be Discussed

1 Results of Discussions in 2002

At the International Sub-committee held in 2002, discussions were held on anti-piracy measures, international jurisdiction, governing law, and response to copyright-related treaties under Intellectual Property Strategy Outline and Basic Law on Intellectual Property.

For anti-piracy measures, based on the recognition that it is important for public and private sectors to coordinate strategically, the Sub-committee reached the conclusion that the following seven policies should preponderantly be implemented.

Reinforcement of comprehension of the reality of piracy

Implementation of bilateral consultations

Active use of international organizations

Strategic coordination with foreign countries that have implemented anti-piracy measures.

Raising consciousness of copyrights of people concerned in the countries where violations have been occurring.

Support to right holders through Contents Overseas Distribution

Promotion Organization

Active Use of overseas establishments

With respect to international jurisdiction and governing laws, ideas were reorganized on international jurisdiction and governing laws in the case of copyright infringement on the Internet. As for governing laws, it was emphasized that international actions, such as clarification of principle of law of protecting state under the Berne Convention will be actively promoted. As for court jurisdiction, we will continue discussions while taking practical measures such as providing for jurisdiction in agreement clauses when executing agreements.

With respect to copyright-related treaties, the Sub-committee formed the conclusion that it is necessary to continue diplomatic efforts toward early execution of a new treaty on audio-visual performance (AV Treaty) and a new treaty on broadcasting organizations (Broadcasting Treaty), which are now under consideration at WIPO. Regarding the AV Treaty, the Sub-committee reached the conclusion that it is necessary for Japan to play active roles in coordinating between the United States and EC.

2 Matters to be Discussed this Year

The International Sub-committee this year will discuss the necessary measures with regard to the overall policy of the government that was presented in the promotion plan based on the results of discussions in the last year. Specifically, the Sub-committee discussed the following matters.

How to respond to copyright-related treaties

How to take anti-piracy measures

How international jurisdiction and governing laws should be in relation to copyright infringement through the Internet.

How folklore should be protected.

II Results of Discussion

The first meeting of the International Sub-committee was held on June 2, 2003, and was held seven times thereafter. The results of discussions in 2003 were as follows.

1 How to respond to copyright-related treaties

(1) The circumstance of international examination

WIPO is aiming to develop new treaties on copyright and neighboring rights corresponding to digitization and networking in recent years. A treaty concerning the rights of authors, “WIPO Copyright Treaty (WCT)” was adopted in 1996 and became effective in March 2002. “WIPO Performers and Phonograms Treaty (WPPT),” which concerns phonogram producers and music performers, was adopted in 1996, and took in effect as of May 2002. Further, the Broadcasting Treaty and AV Treaty have been considered at WIPO.

The Broadcasting Treaty has been deliberated by the WIPO Standing Committee for Copyright (SCCR) since 1998. Japan has positively contributed to the discussions by making a proposal in treaty form at the fifth session held in May 2001, and submitting a document concerning web-casting at the ninth session, which was held in June 2003.

Based on the proposal of the SCCR Chairperson, discussions underway for the treaty to take effect in 2005. Discussions will be held on the subject of protection, specific rights to be granted, and future proceedings of the new treaty in the near future. Japan is required to develop its policy, based on the reality of domestic broadcasters and the present legal system, and actively participate in the discussions.

Regarding the AV Treaty, a diplomatic conference was held in Geneva in December 2000. While tentative agreement was reached on 19 out of 20 Articles of the substantive provisions, EC and the United States could not reach an agreement on the issue of the transfer of rights to film producers from performers. As a result, adoption of the treaty was postponed. At the general conference held in September 2003, discussions were held on the matter and it will also be discussed with regard to holding a diplomatic conference on the matter at the general conference to be held this year. In November 2003, at a WIPO unofficial meeting, discussions were held on the present conditions of the rights of performers in each country. As for this matter, to secure a balance between right holders, early adoption of the treaty is desirable, thus Japan is required to play an active role, including resolving unsettled matters.

The results of discussions of the Sub-committee to develop the

policies of Japan for Broadcasting Treaty were as follows.

(2) Subject of Protection of Broadcasting Treaty (Treatment of Web-casting)

Japan took the stance, during discussions on the Broadcasting Treaty, that cable-broadcasting companies should be included among beneficiaries, in addition to (traditional) broadcasting companies, which are the subject of protection under the Rome Convention. On the other hand, some countries proposed that web-casting (transmission to the public through the Internet) should be included in the Broadcasting Treaty, and its treatment became a major issue.

With respect to web-casting, in some countries (USA, South Korea, etc.), there is a business presence but in other countries, including Japan, there is not. For web casters to be placed as beneficiaries of the Broadcasting Treaty, the following problems must be considered.

Regarding transmission mode, there is the difference that while (traditional) broadcasting transmits the same contents at the same time to the public, web-casting involves automatic transmission at the request of customers. How shall we deal with this?

With respect to the category of web-casting, shall we restrict it to real-time streaming or also include on-demand transmission?

Not only companies but also individuals can be web casters. Should

the same copyright neighboring rights granted to (traditional) broadcaster be granted, in terms of quasi-creativity, protection of investment, and transparency?

How should we treat temporary fixation for broadcasting or use of records in web-casting?

Under an environment of digitization and networking, early conclusion of the Broadcasting Treaty, which is a new international framework, is desired. Based on the said problems, in the discussions on the Broadcasting Treaty this time, it is appropriate to discuss web-casting in a different treaty, separating its protection from the Broadcasting Treaty. If it is discussed in a separate treaty, to prepare for future international arguments, it is required to comprehend the reality of web-casting and its organization in the copyright system.

(3) Treatment of Various Issues Related to Broadcasting Treaty

Treatment of Signals before Broadcasting

There has been the problem in which signals for live sports coverage before broadcast being intercepted and transmitted through cable broadcasts and the Internet. If the contents of transmission are the same as the contents broadcast, substantially the same damage arises as there

would be if the broadcast were reproduced and transmitted without authorization, and the effectiveness of protection of broadcasting by copyright neighboring rights might be lost. Further, if re-transmission of signals before broadcast is done at the same time as or prior to the broadcast, incentives might be diminished for broadcasters to broadcast, making large investments for broadcasting rights and live coverage costs.

As measures for this matter, protection of copyright neighboring rights and protection of telecommunication legal system can be perceived. Under the present telecommunication legal system, interception of signals before broadcasting is illegal but as an injunction for violation is impossible, some argue that it is desirable to grant protection under copyright neighboring rights in that an injunction can be petitioned. Others argue that if we grant copyright neighboring rights, focusing on the broadcasting act, however, protected contents shall be the same signals as those that were broadcast, and the signals before broadcast that were not broadcast should be excluded. Right holders and the starting point for reckoning are also required to be subject to further consideration.

(Reference) Provisions in Radio Law and Telecommunications Business Law

Under Radio Law, Article 58, prohibition of interception and under

Telecommunications Business Law, Article 4, obligation of confidentiality acquired by communications are provided.

Treatment of Decryption

Encryption of broadcasting programs have been used in satellite pay-broadcasting, and in the future will also be used in free surface wave digital broadcasting, which will be begin across the nation from 2006. On the other hand, devices that decode the code attached to a broadcast have been distributed and pirate intercepting of pay-broadcasting committed using the said devices. This might lead to the illegitimate reproduction of surface wave digital broadcasting by decryption in the future.

The main purposes of encrypting broadcast programs are customer management in pay-broadcast and preventing the copying of a digital broadcast. But, as the act of broadcasting by broadcasters might be violated by the act of decrypting, it is necessary to take some measures for the act of decrypting.

In such an event, as a specific means, regulation under the present Unfair Competition Prevention Law or measures under Copyright Law are conceivable. Under the present Unfair Competition Prevention Law, the sale of devices that destroy the access management function is regulated,

but the Law provides for necessary regulations with a view to mainly preventing unfair competition among enterprises. It is necessary to consider whether the present laws will produce the expected results. On the other hand, in the case of a response under Copyright Law, taking technical protective measures or granting a decryption right are conceivable, but it is necessary to consider the balance between other neighboring rights holders and its legal rationale.

(Reference 2) Outline of Unfair Competition Prevention Law

- Definition of Unfair Competition

Under Article 2, paragraph 1, item 10 (for general public) and item 11 (for specified person), it defines the act of transferring devices that destroy access and copy management function as Unfair Competition.

- Measures for Act of Unfair Competition

As measures for act of unfair competition, it provides a claim for injunction (claim for suspension, prevention and elimination), measures concerning damages, and claim for recovery of credibility.

Granting Transfer Right

Currently, it seems that pirated versions of Japanese TV programs

have been distributed mainly in Asia. It is also expected that video-tapes of the received programs will be distributed in connection with the digitization of broadcasting. Under such circumstances, broadcasters request the granting of transfer rights.

Rights may be exercised through reproduction rights, but it is difficult to prove infringement of rights. In terms of effectively protecting broadcasting, it is recognized that granting a transfer right is necessary.

Taking into consideration that under Copyright Law, copyright holders, record producers, and performers are granted a transfer right and no problems are expected by granting the same to broadcasters, granting the same can be allowed.

In this connection, with respect to international wasting of a transfer right, it is necessary to keep in mind that consistency should be maintained with the realities in foreign countries and arguments about so-called "importing right."

On Granting Utilizable Right and Simultaneous Re-transmission

Right through the Internet

As a result of the dissemination of the Internet, transmission of broadcasting programs has become easier. On the other hand, as it is

extremely difficult to prove the fact of receiving of content even if the broadcast was transmitted without authorization, so it is desirable to grant a utilizable right so that the right may be exercised at the time of unauthorized publication of broadcasting. In such an event as storing in the memories of a server (mode accompanying fixation) or mode transmitting without storing (mode not accompanying fixation) as modes of utilization, it is necessary to make both fixed and non-fixed material the subjects of granting a utilizable right.

In this connection, countries in Europe and the United States argue for “granting the simultaneous re-transmission right through the Internet.” But the same right can be included in the utilizable right, and other neighboring rights are secured. It is desirable to grant a “utilizable right” instead of a “simultaneous re-transmission right through the Internet.” Japan is required to encourage the WIPO to internationally recognize the necessity for a utilizable right.

Granting Asynchronous Broadcasting Right

Under the Rome Convention, as the main mode of broadcasting was live broadcasting at the time of enactment, it only grants the right to simultaneous re-broadcasting. Therefore, if another broadcaster has carried

out asynchronous re-broadcasting without authorization with the fixation of programs that are generally broadcast, the right under Rome Convention does not extend to it.

Based on such circumstances, under the Broadcasting Treaty, it is also required to grant an asynchronous broadcasting right. In this connection, in terms of securing consistency, asynchronous broadcasting shall also be included in re-transmission through cable broadcasting.

Technical Protective Means and Obligation of Right Management

Information

Regarding the prohibition of circumvention of technical protective means, the current Copyright Law has already prescribed such and it is understood that there might be no problem placing it in the Treaty. In placement, it is necessary to exempt the portion that technically has to be circumvented, such as transforming digital broadcast into analogue broadcast. If the sale of non-responsive devices is prohibited, this means to requiring the manufacture of devices that respond to different technical protective means worldwide, which might hamper economic activities. Therefore, it is necessary to prudentially respond to the regulation of non-responsive devices.

Retroactive Effect

It is desirable to apply *mutatis mutandis* Article 18 of Berne Convention in terms of consistency with WPPT. But, broadcasts to be protected only concerned those at the time of broadcast, and as it is rarely imaginable that there might be cases where only a retroactive effect can respond to programs already broadcast, it seems that a non-retroactive effect will not cause any particular problem.

Others

“Other rights to be granted to broadcasters” now under discussions at WIPPO have already been provided for in the present Copyright Law.

Rights proposed by Chairperson	Provisions in Copyright Law
Fixation right	Article 98, Article 100-2
Reproduction right of fixation	Article 98, Article 100-2
Simultaneous re-broadcasting right, cable broadcasting right	Article 99
Simultaneous re-broadcasting right of cable broadcasting	Article 100-3
Public communication right	Article 100, Article 100-4

2 How Anti-piracy Measures should be Taken

(1) Basic Direction

As it is perceived that the majority of pirated goods of Japanese works have been distributed mainly in Asia, it is necessary to continue our efforts for reinforcing countermeasures.

In the report last year, we summarized seven important fields for strategic responses to pirated goods. It is necessary for us to make efforts in the future to implement the following measures through coordination of public and private sectors based on the promotion plan.

(2) Specific Measures

Reinforcement of Countermeasures in Countries where Infringements Occur

Japan has encouraged the governments concerned to improve their copyright systems and reinforce enforcement on the occasions of bilateral consultations with the governments of countries where infringements occur. Specifically, the Japanese government has requested the governments concerned to reinforce anti-piracy measures using the occasions of Japan and China Copyright Regular Consultation, Japan and China Economic

Partnership Consultation, and Japan and Korea Cultural Exchange Bureau Directors Consultation, etc., which started in 2002. Using the occasions of trade and economy conferences at a private level, consultations on anti-piracy measures have been conducted with Taiwan. To make these activities more effective and also to include other Asian countries, requesting reinforcement of anti-piracy measures is required when holding bilateral consultations mainly dealing with copyright issues, as appropriate.

Along with European nations and the United States, we have worked with the governments of countries where infringements occur to reinforce regulations on piracy, through bilateral consultations, etc. In the future, to share experience and expertise on anti-piracy measures, it would be effective to establish a forum for substantive information exchanges with European nations and the United States, such as public and private workshops.

Further, at forums for multilateral consultations, efforts have been made for protecting intellectual property right. Among these, at APEC, at the intellectual property experts' meeting, discussions on anti-piracy measures were held. It is required to continue to encourage the governments of the countries where infringements occur to reinforce anti-piracy measures using multilateral consultations.

The foundation for improving the conditions for preventing the infringing

of rights is to raise the consciousness of copyright protection among the general public in countries where infringements have been occurring. For that purpose, it is required for Japan to take the initiative to prepare and distribute copyright materials that describe the significance of copyright and the necessity of its protection, as well as to hold seminars on copyright education, using the said materials.

Supporting Active Exercising of Rights by Japanese Right Holders

For anti-piracy measures, as we said before, it is important to make requests to the governments of other countries through intergovernmental consultations, but it is required before that for the right holders to exercise their rights in accordance with legal procedures. However, it has been rare for Japanese right holders to exercise their rights in foreign countries. This is because the information of copyright system, operation situation, and procedures for enforcement of rights is insufficient, and cost effectiveness is low.

For Japanese right holders to properly deal with copyright infringements in foreign countries, it is necessary to prepare a manual of legal systems, infringement cases, specific procedures for enforcement of rights, etc. In particular, it is desirable to take up individual Asian countries

where the infringement ratio of the Japanese content is high, and prepare manuals that are suitable for the reality in each country.

Reinforcement of Further Coordination between Public and Private Sectors

To implement effective anti-piracy measures, close coordination between public and private sectors is essential. The Japanese government has positively supported anti-piracy measures of the private sector, such as Contents Overseas Distribution Advancement Organization (CODA). In September 2003, Japan External Trade Organization, which has local offices in Asia, including those in Beijing and Shanghai, started to assume the duties of CODA secretariat to reinforce collection and provision of information on copyright violations and as the conduit for consultations related to overseas business development and copyright infringement litigation.

It is also required in the future to reinforce coordination between public and private sectors by actively conducting information exchanges between public and private sectors, and dispatching joint missions etc.

3 International Jurisdiction and Governing Laws concerning Copyright Infringement through the Internet

(1) Discussions at the Hague Private International Law Conference

The Hague Private International Law Conference worked on the “Treaty concerning Court Jurisdiction over Civil and Commercial Affairs and Foreign Judgments” to adopt the treaty in 2000, on the basis of a US proposal made in 1992. At the initial stage, it aimed at developing a comprehensive treaty that would provide for international jurisdiction and acknowledgment of foreign judgments, and enforcement rules. But as there was a big difference between the United States and Europe on the basic idea of court jurisdiction, it reached the conclusion that it would be difficult to incorporate various rules for jurisdiction. As a result, it was determined to develop a treaty, limited to agreement on the selection of court, and in December 2003, a meeting of a special committee was held.

Matters discussed related to copyright in “Draft Treaty of Agreement on Exclusive Selection of Court.”

In the “Draft,” it is almost agreed that litigation on the effectiveness of an intellectual property right that requires registration such as patent and trademark shall be excluded from application. With respect to copyright, it is

expected to specify that it shall be exempted, under Article 1, paragraph 1, item 1, also in countries where registration is made.

Regarding copyright, is there any problem making it subject of the Treaty and having selection of court by the parties being effected?

(a) Through application of the Treaty, the judgment of the court, for which exclusive jurisdiction has been agreed, shall generally be acknowledged and enforced in the member states, but will there be any disadvantageous conditions to Japanese right holders and users?

(b) If it was not exempted, and excessive relief on the defendant, such as punitive damages, has been rendered, the prevailing party would be able to enforce the judgment to the extent that acknowledgement (enforcement decision) is sought under the Treaty. Will this not be a problem?

(Reference 3) Draft Article 1

1. This Treaty shall apply to the agreement on selection of exclusive court of jurisdiction executed for civil or commercial affairs.

2. (Omitted)

3. This Treaty shall not apply to the procedures that have the following purposes.

- a) ~ j) (Omitted)
 - k) Effectiveness of patent, trademark, protected industrial design, and circuit arrangement of integrated circuit
 - l) [Other intellectual property rights, the effectiveness of which is dependent on registration or arising from registration (excluding copyright).]
 - m) (Omitted)
4. ~ 7 (Omitted)

(Reference 4) “Draft” Article 7 Acknowledgement and Enforcement

1. Judgment rendered by the court of member states that has been designated by the agreement on the exclusive court of jurisdiction shall be acknowledged and enforced in the courts of other member states pursuant to this Chapter. Acknowledgement and enforcement may be denied only in accordance with the following.

- a) ~ d) (Omitted)
- e) In the event that acknowledgement or enforcement is clearly in violation of the public order of the country that was requested thereof. In particular, the procedures for judgment are against the basic principle of procedures related to it in the pertinent country.

2. ~ 4 (Omitted)

(Reference 5) “Draft” Article 10 Damages

1. Judgment that orders non-compensational damages (including punitive damages) shall be acknowledged and enforced to the extent that in the countries, where acknowledgment or enforcement is requested, courts would have ordered similar or equivalent damages. This provision shall not prevent acknowledgement and enforcement under own national laws with respect to an amount up to the total amount of damages ordered by the court that requested acknowledgement or enforcement.

2. ~ 3 (Omitted)

(2) Recent Precedents concerning International Jurisdiction

With regard to international jurisdiction, there exist no international rules, and there is no legal provision that directly provides for the matter in Japan. On the other hand, there are established case laws in Japan as follows.

It is reasonable to decide in accordance with on the of the philosophy to ensure fairness between the parties and appropriateness and expeditiousness of litigation.

If any of the venues are provided for in the Code of Civil Procedures

in Japan, it is reasonable to accept international jurisdiction of Japan over litigation unless there are “special circumstances” that the proceedings in Japan are against the philosophy of fairness between the parties or the appropriateness and the expeditiousness of litigation.

In this connection, with regard to the international jurisdiction of copyright, there are the judgment of the Supreme Court on the “Tsuburaya Production Case,” in June 2001 and the judgment of the Tokyo District Court on the “Tetsujin (Iron Man) No. 28 Case,” in November 2002.

(Reference 6) Judgment of the Supreme Court, dated June 8, 2001

[Summary of the Case]

The defendant, a Thai who is residing in Thailand, has committed the act of sending warnings to a third party who is separately licensed by the plaintiff and its clients to the effect that the defendant is granted exclusive license of TV films, including “Ultra-man” by the plaintiff, a Japanese corporation. Thus the plaintiff instituted litigation before the Japanese court, seeking that the plaintiff, who is the copyright holder of the works, and has the copyright receives compensation for damages from defendant.

[Gist of Judgment]

The judgment affirmed the international jurisdiction of Japan as

there are no “special circumstances.”

While the petition of the defendant varies, the judgment reached the conclusion that affirmed Japanese jurisdiction over every petition made by the plaintiff. The court determined that with respect confirming non-existence of copyright of the defendant concerning the works in Japan, “as the object of petition exists in Japan, it is evident that the venue for property location under the Japanese Code of Civil Procedures is in Japan” and with respect to claim for damages under tort caused by the defendant sending warnings, under the provisions for the venue of the place of tort concerning the civil litigation instituted against the defendant, who does not have an address in Japan, the judgment first determined, “in general, it is reasonable to determine that it is sufficient to prove the objective facts that the injury was caused to the plaintiff due to the act of the defendant committed in Japan” and then in this case, the court stated that the objective fact is evident that the defendant hampered the business of the plaintiff by delivering warnings to recipient companies in Japan.

In this connection, the judgment determined that there are no “special circumstances” that deny the international jurisdiction of Japan. Because the contents are not the same in the litigation in Japan and in Thailand, and thus the subject matters differ, and it cannot be said that

making the defendant subject to Japanese jurisdiction is not against the philosophy of fairness between the parties, and the appropriateness and expeditiousness of litigation.

(Reference 7) Judgment of the Tokyo District Court, dated November 18, 2002

[Summary of the Case]

Plaintiff, a Japanese corporation has granted license to the defendant, a US corporation to publish “Iron Man No. 28” in the United States. But as the defendant granted a third party a license to reproduce and sell T-shirts of the works in the United States without the consent of the plaintiff, the plaintiff instituted litigation, seeking an injunction against the infringing act in the United States, and claiming damages before the Japanese court, which was based on the assertion that the act of the defendant infringes upon the US copyright of the plaintiff.

[Gist of Judgment]

The court ex officio dismissed the petition by denying international jurisdiction.

The judgment denied international jurisdiction of Japan for the following reasons. As the defendant is a foreign corporation organized

under the state law of the United States and the court cannot recognize that the defendant has its principal office of business or sales office in Japan or the representative of the defendant has an address in Japan, there is no ordinary venue of the defendant in Japan. As the place of tort is in the United States, the venue of the place of tort does not exist in Japan. As the defendant has not answered to the complaint, jurisdiction over the answer cannot be recognized. There might be a possibility that the venue for performing payment for damages is deemed to be in Japan, but taking into consideration the predictability of the defendant that litigation shall be instituted in Japan and the base of economic activities of the defendant, etc., “proceeding with litigation in Japan by acknowledging the international jurisdiction of Japan is significantly contrary to the philosophy of fairness between the parties and the appropriateness and expeditiousness of litigation.”

(3) Recent Trend on Governing Laws

In Japan “Rules concerning the Application of Laws” (Law No. 10, 1898) provides rules for determining the governing law. With regard to tort, in Article 11, paragraph 1, it shall be in accordance with “the laws of the place where causal facts occurred,” which adopts the “law of place of tort

principle.” In determining the place of tort, there are two theories, namely “theory of place of offending act” and “theory of place of accruing results (damages).”

The Legislative Council of the Ministry of Justice is currently considering modernizing the “Rules concerning the Application of Laws.” Specifically, as to tort in general, the following matters are being discussed.

whether the laws of place of accrual of results shall apply under certain requirements, whether ex post facto designation of the governing law by the parties shall be permitted, as for tort that violates the legal relations between the parties, whether the governing law of the said legal relations shall apply, if the parties have the same permanent residence, whether the law of the permanent residence shall apply, whether general exception clause (circumvention clause) shall be prescribed, whether special rule shall be provided, by typifying the acts of tort. The possibility of providing a special rule for the infringement of intellectual property right is also being discussed.

As for copyright, the “principle of protecting state” under Article 5, paragraph 2 of the Berne Convention shall apply. It is necessary to work internationally to clarify this “principle of protecting state” so that legal stability on a global scale is realized. It is also necessary to pay attention to

that the rules set forth in the private international law legislation of Japan shall not be inconsistent with this international covenant.

(Reference 8) Rules concerning the Application of Laws, Article 11, paragraph

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Effectuation and validity of claims arising from management of affairs, excessive profit, or act of tort shall be in accordance with the laws of the place where the causal facts occurred.

(Reference 9) Berne Convention , Article 5, paragraph 2

In enjoying and exercising the rights set forth in paragraph 1, no formal performance is required. Its enjoyment and exercise does not relate to the existence of protection in the original country of the works. Therefore, the scope of protection and the method of obtaining remedies secured to the authors to preserve the rights of authors shall be in accordance with the provisions herein and otherwise exclusively with the provisions of laws and regulations of the member states where protection is required.

(4) Future Response

Regarding international jurisdiction, it has become difficult for the

Hague Private International Law Conference to prepare comprehensive jurisdiction rules and there is no specific rule in domestic laws, and further, there are few accumulated precedents. Therefore, it seems one of the problems is that predictability low as to which state has international jurisdiction in the case of an actual infringement of copyright on the Internet.

As copyright is considered to be a private right, which does not require administrative procedures, including registration, it is a general view that it is unnecessary for the registered state to be granted special treatment for acknowledging international jurisdiction, and that international jurisdiction shall be determined in the same manner as in general civil cases. Nevertheless, as copyright is an intangible property, the issue will be where we should find the “place” in the case of jurisdiction of place of tort and jurisdiction of place of property. Regarding this issue, as we stated in the report last year, we should make a deliberate consideration, while assessing the legal appreciation in terms of general tort and international trend.

On the other hand, regarding the laws governing copyright infringement, while there are such provisions as “Rules concerning the Application of Laws,” Article 11, paragraph 1 in domestic laws and Berne Convention, Article 5, paragraph 2 in treaties, it is not easy to identify the

“place of tort” or the “protecting state” in relation to copyright. In particular, as for a copyright infringement on the Internet, there is a problem in that predictability is low as to which national laws shall govern. It is necessary to continue to work within the international community to clarify the interpretation of Berne Convention, Article 5, paragraph 2.

4 How to Protect Folklore

Folklore means creations that belong to the cultural tradition of a nation, which have been created, preserved, and developed by unrecognized people for generations in local intrinsic communities. According to the “Model Provisions for Domestic Legislation to Protect Folklore Expressions from Illegal Use and Other Infringement Act (hereinafter referred to as “Model Provisions),” jointly prepared by WIPO and UESCO in 1982, the following matters are remunerated for illustration purposes: intangible folklore, folktale, folksong, folkdance, play and ritual, as tangible folklore, drawing, painting, carving, sculpture, and instrument.

Protecting folklore has been attracting more attention recently. It is expected that discussions at WIPO will proceed partly because of strong requests for treaty enactment by developing countries.

(1) On Discussions at WIPO Intergovernmental Committee

In April 2001, in Geneva, the first meeting of the WIPO Intergovernmental Committee (IGC) on Inherited Resources, Traditional Knowledge and Folklore was held. At IGC, there were discussions not only about folklore, but also about how to protect inherited resources and

traditional knowledge, urged by requests from developing countries. Japan argued, “regarding traditional knowledge, it is necessary to clarify the definitions of contents and owners, and collection of cases and consideration of applying an existing system should be predetermined. With respect to folklore, we expect professional discussions based on case collection in each country.” With regard to the action plan for folklore, Japan also asserted, “we should start from the extraction and the analysis of cases of performance, effect of protection, implementation problems in countries that adopted Model Provisions; and in so doing, recent trends in the protection of intangible cultural assets at UNESCO should also be considered.”

In December 2001, the 2nd IGC was held in Geneva. Information was provided mainly about the actions taken by developing countries and reports on folklore protection were prepared on the basis of field studies in each country.

At the 5th IGC, held in July 2003, discussions were made about the future development of IGC. IGC was unable to reach a conclusion as a result of differences between developing countries and developed countries. The former wanted to agree to that “the countries concerned shall consider, aiming at arrangements having legally binding force, including treaties” and the latter asserted, “this matter shall be discussed professionally and

substantially in terms of intellectual property and hasty rule-making (preparation of treaties, etc.) should not be agreed upon, which will lead to a lowering of the protection level of the existing intellectual property system.

At the general meeting of WIPO held in September 2003, discussions were held about the future development of IGC. Unofficial discussions were held between representatives of each group. Finally, they reached an agreement on future proceedings, that they “will continue research and studies. In so doing, the possibility of future international instruments shall not be excluded.”

(2) Future Response

With respect to protection of folklore, deliberate consideration shall be given to whether an international system formation is necessary after the basic organization of the subject of copyright protection and term of protection is made. In so doing, to maintain consistency with the purpose of previous copyright related treaties and systems, it is necessary to have professional and substantive discussions. At IGC, not only the issue of folklore, but also the issues of inherited resources and traditional knowledge have been discussed. With regard to folklore, it is necessary to proceed with studies on the subject of folklore protection and method of protection, using

this Sub-committee so that we can respond to future international discussions.