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Subject: Comments on the Interim Report Issued by the Subcommittee Concerning Audio and Video Home Recording

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5. Relevant Pages and the Titles of Relevant Sections
5-1. Chapter VII, Section 2, Revision of the Scope of Article 30 of the Copyright Act (p.100-)
[Comment]

In general, we agree to review the scope of application of Article 30 of the Copyright Act (hereinafter simply referred to as “Article 30”) in connection with the study on the possible revision of the system of remuneration for audio and video home recording as long as the revision is made “with due consideration for users’ needs and smooth use of the system” and for “copyright protection technology and new developments in music and video business including distribution services” (p.99). However, it would be too simplistic to conclude that a certain type of act should not be subject to Article 30 without specifying the requirements that such act should meet. While understanding that arguments on the revision of said Article tend to be simplistic because the modification of the scope of application of said Article has been under discussion as the groundwork for the revision of the remuneration system, we hope to hear discussions on specific requirements for each manner of use in consideration of the

overall design of Article 30 itself.

Our comments on specific issues are as follows. First, regarding illegal audio and video recordings and audio and video home recording from illegal websites (p.104-), we agree to some extent that, in light of the three-step test of the Berne Convention, Article 30 should not apply to a case where a work, etc., is used in such a way that prevents ordinary use thereof and causes a great financial disadvantage to the right holder. In reality, however, even if such requirement as “knowingly” has been imposed, it would still be extremely difficult for an ordinary user to fully recognize the illegality. Since one of the purposes of the Copyright Act is to promote the smooth use of works (Article 1), it is necessary to set clearer requirements so that users do not receive an unexpected accusation of infringement from the right holder or any other party. In particular, we are concerned that the users’ risk of receiving such accusation would naturally increase if a revision currently under discussion in the subcommittee on legal issues to make an infringement on a copyright or any other right indictable without a complaint from the infringed party a copyright, etc., is made into a law.

Regarding the idea of not applying Article 30 to audio and video home recording (p.106) of legally distributed contents because the issue of audio and video home recording may be “solved by a contract model,” we commend the effort to pursue the principle of private autonomy in the private space whenever a copyright holder, etc., is capable of exercising the right to some extent by using recent copyright protection technology and so on. Such effort seems reasonable in consideration of the fact that Article 30 was established because copyright holders were practically incapable of exercising their rights against any audio and video home recording carried out within a certain type of closed space such as homes. In the meantime, this approach is feasible only if a contract is permitted to prevail over Article 30. For this reason, further study needs to be conducted on “contract models applicable to cases other than the case of a recording of legally distributed contents” because this is the issue of Article 30 itself. The interim report clearly states that it is “up to the parties concerned” to determine whether a rental fee paid by a person who has rented a music CD from a rental shop and made an audio home recording (p.108) includes a remuneration for such recording. The report also states that “there is no evidence that allows the parties concerned to believe that the rental fee includes a remuneration for such recording (p.102).” We are not sure whether it is appropriate to interpret that the rental fee paid under the contract concerning CD rental does not include such a remuneration. We are also concerned that such interpretation may be inconsistent with users’ understanding. Therefore, it would be necessary to discuss this issue from the viewpoint of the overall design of a system

established under Article 30 in consideration of the application of the provision not only to users who have made audio and video home recordings of legally distributed contents but also to users who have concluded contracts under various business models.

5-2. Chapter VII, Section 3, Necessity for Remuneration (p.110-)
[Comment]

We have the impression that the fundamental issue of whether it is necessary to give remuneration to copyright holders has not been sufficiently discussed yet. Since a revision of the remuneration system is impossible without such discussion, a consensus on this issue should be built in consideration of public comments. In order to assess the necessity of the remuneration system (or the maintenance or reduction of the scale thereof), one needs to take into account the fact that the progress in digitization and Internet connectivity has significantly promoted the use of copyright protection technology and the use of various contract models to solve the issue of remuneration since the introduction of the remuneration system.

5-3. Chapter VII, Section 4, Remuneration System (p.123-)
[Comment]

This section of the interim report started with the statement “On the assumption that remuneration is necessary,” followed by discussions based on this assumption. While having found this assumption debatable, we would like to present our comments on the contents as follows.

The section entitled “2. Solution by the conclusion of a contract between a supplier of the source of audio and video recordings and the right holders” (p.124-) presents a negative view on the idea of solving the issue of remuneration by the conclusion of a contract. While considering it rather extreme to rely entirely on contracts, we think it possible to create a system that solves the issue of remuneration by the conclusion of a contract when possible and, when it is not possible, by the payment of remuneration. In the world of business, it is often more practical to solve an issue by the conclusion of a contract. For this reason, we find it difficult to agree to the preference expressed in the report for the remuneration system with a negative view on the solution by use of contracts.

5-4. Chapter VII, Section 5, Remuneration System for Audio and Video Home Recording (p.126-)
[Comment]

This section of the interim report states “On the assumption that remuneration is necessary” and present discussions based on this assumption. While having found this assumption debatable, we would like to present our comments on the contents as follows.

Regarding “1. The Scope of Devices and Recording Media Subject to the System” (p.126-), we basically think that, in order to have the remuneration system serve the function of keeping a balance between the protection of copyright holders, etc., and the fair use of works, etc., which is the ultimate purpose of the Copyright Act, the remuneration system should be applicable only to devices and recording media specifically designed for audio and video home recording. Since multi-function devices and recording media are inherently incompatible with the remuneration system, we do not support the idea of expanding the scope of application of the system to multi-function products. However, it is still debatable how to define the term “multi-function.” To define the term clearly, reasonable criteria that are agreeable to both right holders and users should be established. The need for such criteria would even increase if it is decided to introduce the system mentioned in the subsequent section in order to have third parties, “evaluation organizations,” determine whether the remuneration system is applicable or not.

The section entitled “2. Method to Determine the Scope of Devices and Recording Media Subject to the Remuneration System” (p.133-) states the basic approach that the “Commissioner for Cultural Affairs is in a position to determine whether the remuneration system is applicable in light of the criteria specified in laws and ordinances in consideration of the examination results submitted by a public ‘evaluation organization.’” While we agree to this approach in principle, the decision to maintain the cabinet-order-designated system would have no substance unless evaluation organizations are appointed and given a set of criteria to use in evaluation. To prevent such loss of substance, we hope to see the establishment of more detailed criteria and requirements.