

Submitted to the person in charge of laws and regulations, Subdivision on Copyright, Agency for Cultural Affairs (November 10, 2008)

Subject: Opinions on the Interim Report for 2008 Issued by the Commission on Legal Affairs

1. Organization
2. Name of Organization: Japan Intellectual Property Association
Digital Contents Committee
Chairperson: Tanekazu Taisa
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Asahi Seimei Otemachi Building, 18F
4. Contact Point (Phone No.): 03-5205-3321
5. Relevant Pages and Subject: Section 2. Review of the Issue of Reproduction for Private Use (Page 11 -)
6. Opinion

The issue of private copying should not be exclusively interpreted as an issue of sound and visual recordings. In view of the current magnitude of damage caused by private copying, we basically support the proposal to include copyrighted computer programs to the subjects of discussion concerning the scope of exclusion from application of Article 30 of the Copyright Act.

However, as we commented in response to the interim report issued by the Private Sound and Visual Recording Subcommittee (The proposal to make Article 30 of the Copyright Act inapplicable to illegal copies and private sound and visual recordings made from illegal websites), we request your special consideration for the convenience of users. Even if a decision is made to make Article 30 of said Act inapplicable to certain private reproduction, it is necessary to clarify the concrete criteria for such reproduction in order to prevent copyright holders from exercising rights against users who are unaware of their copyright violation. Excessive exercise of copyrights would have a significant negative effect on users. For this reason, an expansion of the scope of exclusion from application of Article 30 of said Act shall be discussed with great care.

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4. Contact Point (Phone No.): 03-5205-3321
5. Relevant Pages and Subject: Section 3. Legal Issues Related to Reverse Engineering (Page 21 -)
6. Opinion

We support the proposal made in this interim report that, in the case of an act of reverse engineering conducted for (i) maintenance of mutual interoperability or (ii) discovery of a fault (discovery of a fault, evaluation of vulnerability, investigation of right infringement), the exercise of a right should be restricted if the reverse engineering meets certain criteria.

The criteria should be set in consideration of the interests of the holders of rights to the programs subject to analysis. Regarding an act of reverse engineering conducted for maintenance of mutual interoperability mentioned in (i) above, the interim report proposes that the criteria should be set in consideration of the interests of the right holders (p.27). However, the report does not propose any specific criteria applicable to an act of reverse engineering conducted for discovery of a fault as mentioned in (ii) above. In a case where a program is analyzed for the purpose of discovering a fault, if a third party is permitted to create a modified program and distribute it to the public without any restrictions, the holder of a right to the program might suffer damage. The report neither proposes any measures to prevent such damage nor clarifies the relationships between new provisions concerning reverse engineering and the existing provisions of the Copyright Act (e.g., Article 47-2). The criteria for restrictions of rights should be set for each type of reverse engineering in consideration of the purpose of restriction of the rights.

If specific provisions are considered insufficient to handle all types of reverse engineering, the establishment of general provisions should be considered as well.

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5. Relevant Pages and Subject: Section 4. More Effective Use of Information for the Purpose of Research and Development Activities (Page 40 -)
6. Opinion

We basically agree to the proposal that “The exercise of rights should be restricted under certain criteria when a copyrighted work is used for the purpose of research and development activities in the field of information analysis technology (p.46)”. In order to increase predictability, the field should be defined by clearly designating the scope of technology subject to the restrictions. While understanding the necessity to put a higher priority on a certain field where this issue of restricting the exercise of rights against the use of copyrighted works for the purpose of research and development activities should be discussed and settled as soon as possible, we consider that this issue should be discussed in consideration of all technical fields. As mentioned in the interim report, the establishment of general provisions should also be discussed in order to cover all fields (p.46-47).

Regarding the issue of differentiation between for-profit activities and non-profit activities, such a differentiation seems meaningless in view of the recent style of research and development activities such as research projects jointly conducted between companies and universities. Therefore, we support the proposal that the activities subject to the restrictions of rights should not be limited to “non-profit” activities as described in Section 3 (2) (ii) (a) entitled “Differentiation between for-profit activities and non-profit activities” (p.44).

Section 3 (2) (ii) (b) entitled “Effect on the interests of copyright holders, etc.” gives an example where the “for-profit provision of database service necessary for research and development activities” “damages the interests of copyright holders, etc.” However, the use of such a database for the purpose of research activities, etc. does not necessarily mean the use of expressions contained in the copyrighted works. The use of

information contained in the database on a piece-by-piece basis (each piece of information per se is not protected in most cases) solely for the purpose of analysis does not necessarily “damage the interests of copyright holders, etc.” For these reasons, we do not support the idea of exempting database from the restrictions of right just because the database service is for-profit (p.45).

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4. Contact Point (Phone No.): 03-5205-3321
5. Relevant Pages and Subject: Section 5. Copying Conducted in the Course of Using a Device or in Telecommunication (Page 50 -)
6. Opinion

We basically agree to the proposal that the exercise of a copyright should be prohibited when a copyrighted work is temporarily copied in the course of using a device if the temporary copying meets the criteria presented as the final conclusion in the report (p.54). According to the report of 2006, one of the criteria for the restriction of rights was “within a reasonable length of time.” Such a quantitative criterion was reviewed by the Commission on Legal Affairs and excluded from the criteria stated in this report. This deletion suggests that the reasonable criteria change in tandem with the technical progress. Therefore, when a new provision is established, the provision should be worded in such a way that allows some degree of flexible interpretation to cope with developing technologies.

Regarding the issue of temporary copying of copyrighted works conducted in the course of telecommunication, we basically agree to the proposal that the exercise of a copyright should be prohibited as long as temporary copying of the copyrighted work is conducted in the course of telecommunication or as a part of telecommunication for the purpose of (i) improvement in the efficiency and effectiveness of telecommunication, (ii) enhancement in telecommunications network reliability, or (iii) fulfillment of social needs. This is because such temporary copying would not necessarily unreasonably damage the interests of the copyright holders and would benefit the public to some extent. Most of the statements in the interim report about the temporary copying conducted in the course of telecommunication are unclear (In particular, the criteria for judging which act should be regarded as an act conducted for the purpose of fulfilling social needs). Therefore, in establishing a clear provision, specific criteria should be specified in the provision in order not to unreasonably

damage the interests of right holders. Similarly to the case of temporary copying conducted in the course of using a device, the provision should be designed in such a way that allows some degree of flexible interpretation to cope with developing technologies.

Regarding the issue of illegal distribution of copyrighted works mentioned in connection with the issue of temporary copying conducted in the course of telecommunication (p.59, 60), it would be unrealistic to impose excessive burdens on a person who conducts such temporary copying. Therefore, we agree to the proposal that the exercise of rights should be prohibited in principle, while necessary action may be taken in line with the Provider Liability Act if “the person was aware of the illegality or if there has been sufficient evidence to believe that the person was aware of the illegality” in order to protect the interests of right holders. Such action should be taken without violating the neutrality of telecommunications networks and the secrecy of telecommunications.

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5. Relevant Pages and Subject: Section 6. Other Issues (Page 63 -)
6. Opinion

A revision of the copyright system is one of the important tasks indispensable for establishing a comprehensive legal system that covers telecommunications and broadcasting. We support the proposal to “continue discussions to make decisions in a timely manner.”

We also support the proposal to hold discussions, if necessary, in response to the results of study conducted by the Intellectual Property Policy Headquarters and the Expert Panel on Intellectual Property Systems in the Digital/Internet Age el.

The currently effective provisions designed to restrict the exercise of rights by specifying the cases subject to restriction are no longer able to keep up with the speed of technological innovation and the development of digital/Internet society. In order to cope with this rapid change and enhance the competitiveness of Japanese industry, the establishment of general provisions designed to restrict the exercise of rights (so-called Japanese-version fair use provisions) would be indispensable. While the criteria (scope of application) should be specified in these Japanese-version fair use provisions after thorough study, these provisions should be established as soon as possible.

While it is not mentioned in the interim report of this year, the interim report of the preceding year (2007) proposed that the exercise of rights should be restricted in some fields (e.g., the field of pharmaceuticals). This issue also requires further discussion and prompt action.