



**COMMENTS OF THE
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
Submitted November 17, 2008**

The International Intellectual Property Alliance (IIPA) has reviewed an unofficial summary in English translation of the report of the Expert Committee on Intellectual Property (IP) legislation in the digital net era (“Report”). We appreciate the opportunity to submit these brief comments. Because we have not had the chance to review the full Report, we hope to be able to supplement these comments in the future.

About IIPA

IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries — business software, films, videos, music, sound recordings, books and journals, and interactive entertainment software — in achieving stronger copyright laws and enforcement worldwide. IIPA is comprised of seven trade associations, listed below, each representing a significant segment of the copyright community.

Comments

The first issue addressed in the summary of the Report is whether “general regulations on limitations of rights,” or what can be called a “Japanese fair use” approach, should be adopted as part of the Copyright Act. Fair use is an approach to limitations and exceptions to exclusive rights that is associated primarily with common law legal systems, and particularly with the U.S. legal system, rather than with civil law systems such as in Japan. IIPA member associations do business in many jurisdictions around the globe. Our experience is that either system — a common law system that employs the fair use doctrine, or a civil law system that relies on more specific exceptions and limitations — can be successful in keeping the rights of copyright owners sufficiently strong while accommodating the legitimate interests of copyright users. Employing both approaches simultaneously, as the Report proposes that Japan do, is much less common, and therefore its impact is much less predictable. Such unpredictability would serve neither copyright owners nor users of copyrighted works. In addition, an integral feature of the U.S. fair use system is that many decades of court decisions, which form part of the common law, may be relied upon as authoritative interpretations of the boundaries of fair use. It may be much more difficult for a civil law system to accommodate this critical feature. If Japan chooses to pursue this path, we urge it to do so cautiously, and to ensure that the practical impacts of introducing a fair use exception do not exceed the permissible bounds of exceptions and limitations under applicable international treaties.

Second, IIPA commends the Report for highlighting certain shortcomings of the current Japanese legal regime against the circumvention of technological measures. In today's e-commerce marketplace, copyright owners increasingly rely on technological means to control access to and use of copyrighted works, as an essential tool for making more works available to more users in more ways than ever before. To discourage disruption of this marketplace, comprehensive legal prohibitions are needed to protect such technological means. There must be effective criminal and civil remedies against both the act of circumvention of technological measures that control access to works, and against the trafficking in devices or services to circumvent either access controls or "copy controls," i.e., technological measures that control the exercise of exclusive rights in copyrighted materials. Japanese law currently lacks these comprehensive prohibitions. Access controls are protected under the Unfair Competition Law, but without criminal remedies; copy controls are protected under the Copyright Act, but without civil remedies. When compared with the regimes of many other countries that, like Japan, have implemented their obligations under the WIPO Internet Treaties (WCT and WPPT), this legal structure falls far short. IIPA strongly supports making Japanese law stronger and more comprehensive in this area.

Third, the Report addresses the issue of ISP liability. IIPA agrees that the 2001 Act on Limitation of Liability of Providers must be re-examined in light of technological and market changes, including but not limited to the growth of new means of infringement through peer-to-peer (p2p) services. The underlying liability rules that apply to ISPs and other intermediaries should be clarified, and stronger incentives provided for intermediaries to cooperate with right holders in identifying and remedying online infringements. Expedited and simplified procedures for identifying ISP subscribers who engage in infringement, and meaningful sanctions against subscribers who repeatedly infringe, are essential. IIPA also strongly supports inter-industry approaches to the problem of online piracy. Because this problem is detrimental both to right holders and to legitimate ISPs that seek to build a strong e-commerce marketplace, voluntary agreements between right holders and ISP's are preferable, and legal impediments to them should be minimized to the greatest extent possible. We also encourage the Government of Japan to actively participate in such inter-industry discussions to ensure that the results advance the goal of effectively addressing online infringement through enhanced cooperation of ISPs, and to determine whether legislative and/or regulatory acts are necessary in order to achieve the desired goals and to prevent free-riding by ISPs not party to such agreements. Courts should also retain clear authority to order appropriate steps to be taken to remedy infringements that have been found to have occurred, and to prevent their recurrence.

We also support the proposal to examine requirements for some intermediaries "to implement standard technological measures that aim to prevent infringement to a reasonable extent." This issue must be approached cautiously and in a balanced fashion, but with a recognition that technologies for preventing infringement have progressed substantially in recent years. Among other factors that must be considered are the cost, scalability and effectiveness of such technologies; their inadvertent impacts on legitimate uses of networks and on overall network performance; and whether providers have a realistic choice of competitive technology solutions to achieve the preventive goal.

Conclusion

IIPA appreciates this opportunity to express its views, and would be glad to provide further information or to respond to questions.

Respectfully submitted,



Steven J. Metalitz
on behalf of IIPA

met@msk.com

direct dial: (+1) 202-355-7902

Member Organizations of the IIPA:

- Association of American Publishers (AAP)
- Business Software Alliance (BSA)
- Entertainment Software Association (ESA)
- Independent Film & Television Alliance (IFTA)
- Motion Picture Association of America (MPAA)
- National Music Publishers' Association (NMPA)
- Recording Industry Association of America (RIAA)

11/17/2008