

Comments on Development of the Intellectual Property Strategic
Program 2017

Name of Company/ Organization:	Japan and International Motion Picture Copyright Association, Inc.
<p>We, the Japan and International Motion Picture Copyright Association, Inc. (“JIMCA”), are the Japanese subsidiary of Motion Picture Association (“MPA”) which represents six world-renowned filmmakers and film distributors (Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.).</p> <p>We greatly appreciate this valuable opportunity to submit our views on several issues pertinent to the development of the “Intellectual Property Strategic Program 2017.”</p> <p>In this submission, JIMCA will discuss the following four priority areas of discussion regarding the Intellectual Property Strategic Program (May 2016):¹</p> <ol style="list-style-type: none">1. JIMCA strongly supports IPSH’s agreement to further examine the need in Japan for website blocking, and recommends that the Japanese Government adopt site blocking as soon as practicable;2. JIMCA supports IPSH’s agreement to address the problem of linking sites (“reach” sites), and recommends that the Japanese Government adopt an amendment to prohibit reach sites as soon as practicable;3. JIMCA supports IPSH’s agreement to explore measures to address online advertising on IP infringing websites, and recommends that an “infringing website list” be adopted in Japan such that infringing websites will be deprived of advertising revenues; and	

¹ Intellectual Property Strategy Headquarters, *Intellectual Property Strategic Program 2016*, (May 2016), http://www.kantei.go.jp/jp/singi/titeki2/kettei/chizaikeikaku20160509_e.pdf [hereinafter IPSH Strategic Program].

4. JIMCA recognizes IPSH's interest in reviewing copyright exceptions and limitations, and opposes adoption of US-style fair use and cautions against any broadening of Japan's current text and data mining exception.

1. Further examination of the need for website blocking in Japan

The IPSH agreed to “[e]ngage in ongoing discussion which includes the effects and impacts of website blocking efforts in other countries aimed at on-line IP infringement,” and “[r]esearch and study what sorts of IP protections are appropriate in cases of cross-border infringement of network-related inventions by services targeting users in Japan but which are operating on overseas servers.”²

We appreciate IPSH's recognition that “creative content industries, including animation, comics, films and music, are already being significantly impacted by an increasing amount of on-line, cross-border IP infringement.”³ We also appreciate IPSH's understanding that “in recent years on-line IP infringement is becoming increasingly sophisticated, complex and profit-driven, and due to such factors as overseas servers being used to distribute the infringed content, it is highlighting the growing inability of traditional, country-based IP systems to deal with this problem.”⁴ As IPSH notes, “website operators make money by disseminating infringing content into the Japanese market from overseas servers, or make money from ad revenues on websites which lead consumers to infringing content, and this malicious behavior is having a tremendous impact on the creative content industries.”⁵ Finally, we are in full agreement with IPSH's general recommendations that “[s]tronger remedies are needed in order to combat these sorts of malicious IP infringement,” and “[s]pecifically, legal measures need to be developed to address the major role that reach sites play in facilitating the illegal distribution of infringing content by enticing consumers to visit websites providing such content, as well as to address the on-line

² IPSH Strategic Program, pp 16-17.

³ IPSH Strategic Program, p 12.

⁴ IPSH Strategic Program, p 12.

⁵ IPSH Strategic Program, p 12.

advertising that funds the operation of websites distributing infringing content.”⁶

JIMCA has also noted in a prior submission that recent studies have shown that accessing primarily infringing sites also often leads to users unintentionally downloading malware or being exposed to high-risk advertising.⁷ Recent statistics provided by ComScore also demonstrate the extreme harm caused by piracy in Japan, demonstrating that 31% of Japan’s Internet audience are users of piracy websites and applications, amounting to 22.3 million monthly users (on average) of online piracy sites/applications in Japan in 2015. A previous study from several years back also indicated the impact from film-related copyright infringement alone on the Japanese economy totaled 56.4 billion yen, costing the Japanese economy thousands of jobs.⁸

In order to protect the film industry as a whole from such serious economic loss and to establish a sound modernized copyright system, an enhanced approach is necessary. In other words, although civil liability and criminal liability for copyright infringing acts are set forth under the Japanese Copyright Act, due to rapid developments in the ways copyright works are misused over the Internet, there are issues that need to be addressed with urgency. For example: (i) once an illegal file is uploaded, it is circulated in an exponential way online; (ii) anonymity makes identification of the infringer or infringing website difficult; and (iii) when piracy occurs through a foreign server, identification of the infringer becomes extremely difficult and because of jurisdictional issues, traditional enforcement may not be available.

⁶ IPSH Strategic Program, p 12.

⁷ Digital Citizens Alliance, *Digital Bait: How Content Theft Site and Malware are Exploited by Cybercriminals to Hack into Internet Users’ Computers and Personal Data*, (Dec. 10, 2015), <https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/0f03d298-aedf-49a5-84dc-9bf6a27d91ff.pdf>. This recently concluded study found that one out of every three content theft sites exposed users to malware and Internet users who visited content theft sites were 28 times more likely to get malware from these sites than from mainstream websites or licensed content providers.

⁸ Ipsos Research and Oxford Economics, *Economic Consequences of Movie Piracy*, (Jan. 2011), http://www.jimca.co.jp/research_statistics/ecr_japan_2011_en.html.

Further, the Act on Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (“Act on Limitation of Liability for Providers”) is inadequate to address increasingly rampant online piracy. Under that Act, Internet service providers (“ISPs”) are not liable for damages in certain situations as long as they take measures to prevent information from being sent through specified telecommunications service (i.e., if the right owner requests deletion of the infringing information, ISPs voluntarily delete it on a case-by-case basis). However, large-scale infringement still occurs online and there are limits to performing individual actions pursuant to the Act on Limitation of Liability for Providers, and thus the current legal system is inadequate. Accordingly, adoption of a narrowly-tailored website blocking remedy is necessary in order to effectively protect the rights and interests of copyright owners.

Most countries, including Japan, already have some mechanisms in place to remove access in cases of specific societal harms (for example, to halt access to child pornography), and an increasing number of countries in the Asia-Pacific region and around the world have adopted a website blocking remedy. Currently, to our knowledge, at least forty-two countries, including the UK, France, Germany, Italy, Portugal, Spain and Russia, have instituted website blocking for copyright infringement. Even in the Asia-Pacific region, seven countries, namely Korea, India, Singapore, Australia, Malaysia, Indonesia, and Thailand have adopted website blocking for copyright infringement. Several jurisdictions, including South Korea, the UK, Italy, Portugal, and Indonesia have each blocked over 100 websites. Moreover, importantly, in late 2015, the German Supreme Court explicitly ruled for the first time that an ISP can be made subject to a website blocking order.⁹ While each of these countries have implemented website blocking in a slightly different manner, the goal remains the same: ensuring that the Internet is open for legitimate creative businesses, and that the marketplace is not flooded with websites whose business models

⁹ Bundesgerichtshof [BGH], *Federal Court of Justice on the Liability of Access Providers for Third-Party Copyright Infringements: I ZR 3/14 and I ZR 174/14*, (Nov. 26, 2015), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2015&Sort=3&nr=72928&pos=0&anz=195>.

are built on infringing the rights of creators.

Effects and Impacts of Website Blocking in Other Countries

Reviewing the impacts of website blocking efforts in other countries aimed at online IP infringement reveals its practicality and effectiveness. For instance, according to an investigation independently carried out by Carnegie Mellon University, researchers found that blocking 53 piracy websites in the UK in November 2014 caused a 90% drop in visits to the blocked piracy sites while causing no increase in usage of unblocked piracy sites.¹⁰ This led to a 22% decrease in total piracy for all users affected by the blocks.¹¹ Significantly, these blocks also caused a 10% increase in videos viewed on legal ad-supported streaming sites like the BBC and Channel 5.¹²

These results are consistent with findings in other jurisdictions. For example, in Portugal, researchers studied the effects of website blocking for two sets of websites (Group A and Group B).¹³ Site blocking in Portugal resulted in a 75.5% drop in usage three months after implementation of blocks for the sites in Group A, and those in Group B showed a total usage decrease of 60.1% after two months. In addition, overall usage of the top 250 piracy websites decreased by 23.4% in Portugal during the same period, even while it increased by 4.9% globally.

In the Asia-Pacific region specifically, the research results compiled by the MPA examining the effects and impacts on site blocking in South Korea are also extremely positive.¹⁴ In particular, this study found that visits to blocked sites had declined by an average of 90% as of three months after a block, and that

¹⁰ Brett Danaher et al., *Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior*, (April 2016), <http://ssrn.com/abstract=2766795>.

¹¹ *Id.*, p 17.

¹² *Id.*, p 17. The blocks also caused a 6% increase in visits to *paid* legal streaming sites like Netflix.

¹³ Incopro, *Site Blocking Efficacy in Portugal: September 2015 to February 2016*, (May 2016). This article is on file with JIMCA.

¹⁴ Motion Picture Association, *MPA Study on Site Blocking Impact in South Korea*, (2016). This article is on file with JIMCA.

there was a 15% decrease in total piracy visits after three rounds of website blocking. As website blocking in South Korea was heavily concentrated on P2P sites, it is noteworthy that overall visits to P2P sites (not just those sites blocked) showed a 51% decline as of three months after the three rounds of website blocking.

An additional early study conducted by the MPA found very similar results in terms of effectiveness with respect to reduction in traffic to blocked sites in the UK, Belgium, Italy, Malaysia, and the Netherlands.¹⁵ More such studies are forthcoming. These results clearly demonstrate that website blocking greatly contributes to: 1) reduced usage of the illegal websites subject to the blocks; 2) reduced usage of piracy websites on the whole; and 3) increased traffic to sites with legitimate offerings.

Website Blocking in Japan without Impinging on Secrecy of Communications of Users

We recognize that blocking a website is a serious action, and some opponents view this remedy as raising issues regarding privacy of communications. Over the years, one objection to site blocking in Japan has been that it may violate the Japanese Constitution (Article 21(1) and (2)) guarantees of the “freedom of ... all ... forms of expression” and that “[t]he secrecy of communications shall not be violated,” and Telecommunications Business Act (TBA) Article 4 on “Protection of Secrecy,” providing in relevant part, “[t]he secrecy of communications being handled by a telecommunications carrier shall not be violated.” However, the view espoused by some that website blocking may violate the TBA or Japanese Constitution is incorrect and demonstrates a misunderstanding about the way the Internet functions. ISPs do not automatically acquire any information about communications they handle, whether website blocking occurs or not. An explanation may help clear up this misunderstanding.

- When a user keys in a domain name (e.g., www.abc123xyz.com) or exact

¹⁵ Motion Picture Association, *Impact of Third Party Orders on Traffic to Infringing Sites: MPA Analysis of Alexa and comScore Data*, (August 2014). This article is on file with JIMCA.

Internet location (e.g., www.abc123xyz.com/exactlocation, called a URL) on an Internet browser, usually, the browser asks something called the Domain Name Server of an ISP (which contains a database that maps the domain name to its corresponding IP address) to go to that domain or URL.

- Once the Domain Name Server finds the IP address for the website, the ISP will then return the IP address to the user's computer or browser, upon which the browser will use the IP address to establish a connection with the website, enabling the user to access the content.

- If an ISP disables access to a domain, the ISP will automate the disablement from its end, like setting up a roadblock, and the user, when requesting the desired domain name or URL, will receive nothing back (or, like the roadblock, will reach the roadblock, and not be able to travel further). The sequence is that the ISP will already have effectuated the action disabling the domain (or in the case of the roadblock, it will already be in place but no one is watching or gathering information about the kind of car, who drives it, the license plate number, etc.), so the ISP has no knowledge of the user's action. The ISP neither has knowledge of user information, such as what content they are seeking, the date or time of their request, nor any personally identifiable information in the case of a blocked site nor an unblocked site.

It is useful to note here that Domain Name System information, which would include users' requests for specific domains or IP addresses, is by its nature public. This is why there are hundreds if not thousands of services available, including website traffic services like Alexa and SimilarWeb, that are able to obtain statistical traffic data on all Internet websites. Anyone is capable of knowing information about Internet communications, and it makes no difference whether website blocking has occurred or not. As long as an ISP does not take active steps to learn such information, it will not run afoul of the TBA. Thus, it is erroneous to conclude that site blocking per se violates the TBA.

In the first place, the Japanese Constitution was enacted approximately 70 years ago and the Telecommunications Business Act was enacted approximately

30 years ago; and both presuppose traditional methods of communication such as personal letters and telegrams. Accordingly, in the modern age when information distribution using the Internet has become mainstream, application of the original interpretation of these regulations is not appropriate. As explained above, information on the Domain Name System may be accessed by the public, and connection to public websites on the Internet is by its nature considered as a “*publicly open communication*.” There is indeed an opinion claiming that information posted on online bulletin boards and websites with a purpose to be shown to unspecified users shall be understood as information in which the sender has no intention of maintaining confidence, and therefore understood to be excluded from consideration as a private communication.¹⁶ Also, the basic mindset that a certain level of content restriction shall be imposed on “*publicly open communication*” are in accordance with the policy which used to be advocated by the Ministry of Internal Affairs and Communications.¹⁷

Further, there are opinions that the scope of protection for a confidential communication should be limited to its contents, and points such as which site was accessed and who contacted who should be considered beyond the scope of “confidential” information under the Constitution and the TBA.¹⁸ Based on the above premise, site-blocking in which ISPs mechanically determine whether the access to the contents is allowed based only on the information on the Domain Name Server that is available to the public (and in which the ISP does not take active steps to be aware of identifiable information of the user) can be considered as not a violation of the prohibition on interference with a confidential communication.

It is useful here to look at how other countries employing a website blocking remedy deal with the issue of privacy. Germany is an excellent illustrative

¹⁶ Kazuteru Tagaya, 電気通信事業法逐条解説 38 (2008).

¹⁷ Ministry of Internal Affairs and Communications, *Report of Study Group on Comprehensive Legal System of Communication and Broadcasting*, (December 6, 2007), http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Releases/NewsLetter/Vol18/Vol18_21/Vol18_21.html.

¹⁸ Joji Shishido, *Confidence of Communication* 24.

example. Germany's Federal Constitutional Court (BGH) in late 2015, confirmed in the case of *GEMA v Deutsche Telekom*¹⁹ that site blocking does not breach privacy rights under German or EU law.

In analyzing whether site blocking can be consistent with Article 10 (1) of the German Constitution (right of privacy of telecommunications), the Court noted, “[t]he starting point for the protection in Art. 10 (1) ... is always the non-public exchange of specific communications of participants; in contrast, communications addressed to the general public are not covered by this provision.” The Court then found that “a site providing links to downloads on the internet directed at an unspecific number of addressees does not constitute confidential individual communication rather it is, as a public offering, not covered by the scope of protection of Art. 10 (1)” The Court also concluded that DNS blocking “does not affect the confidentiality of communication protected under Art. 10 (1)” The Court was emphatic about DNS blocking's conformity with the German Constitution, noting DNS blocks are inherently unproblematic as the establishment of connections is simply prevented – without access to IP addresses of users.

According to the Court, offering files for public download and accessing those files does not constitute an individual communication protected by Article 10 of the German Constitution. The Court further reasoned:

“[t]he fact that access to a public offer of a download occurs in each case through means of individual technical communications connections does not justify a classification as communication within the meaning of Art. 10 (1) German Constitution, because a mere technical communication does not exhibit the specific risks for the privacy of the communication which that provision protects Such access actually constitutes a public form of communication

¹⁹ BGH, *supra* note 9. The landmark decision held for the first time in Germany that Internet access providers such as Deutsche Telekom can be obliged to block infringing websites if infringement cannot be otherwise stopped and if the website operators and hosts are unidentifiable; however, in the instant case, the German collecting society GEMA was found not to have taken sufficient steps to prevent or impede copyright violations of their works to trigger the obligation.

comparable to the use of mass media”

Importantly, addressing one of the key objections raised in respect of site blocking in Japan, the Court further concluded, “the (automated) obtaining of knowledge, on the part of the provider, of the circumstances of communication is limited to that necessary to interrupt the communication.” This is consistent with prior rulings that there is no interference with the fundamental right to privacy “in the case of the recording of telecommunications events, provided they are recorded purely using technical means, anonymously and without trace and are immediately filtered out without any interests of the authorities in gaining knowledge thereof.”

The German Court also found that site blocking does not breach Article 7 of the EU Charter of Fundamental Rights, since the purpose of the right – protecting “the confidentiality of communication which is directed at particular addressees and not at the public” – is not affected by the blocking of public offerings of downloads or access to them.”

The reasoning in the German decision is consistent with decisions throughout the European Union, since the same considerations apply to balancing the rights of authors (and their enforcement needs) against the fundamental right of privacy, ensuring that there is proportionality. Interestingly, no other court has felt the need to examine in detail these questions, viewing website blocking as an appropriate remedy that is not inconsistent with privacy rights.

The Way Forward

We sincerely hope IPSH will find the information provided above helpful and illustrative on the positive effects and impacts of website blocking on reducing access to piracy in other jurisdictions, and is convinced that website blocking does not interfere with privacy rights or violate Japanese law. As IPSH formulates its Intellectual Property Strategic Program 2017, we urge the Japanese Government to consider the adoption of website blocking to fully protect the rights and interests of copyright owners, including film companies. Website blocking can, as in other countries, comprise a “no fault” approach

whereby Internet service providers are instructed to disable access to a website but are not held liable themselves for the site's infringement of copyright. This "no fault" approach is similar to that adopted in Europe. As shown in the evidence above, the laws of the United Kingdom and an increasing number of jurisdictions (including Portugal, South Korea, Belgium, Italy, Malaysia, and the Netherlands) are instructive of how such a remedy can be employed to effectively reduce online infringement.

We believe that, in addition to consideration of codifying a narrowly-tailored website blocking law, building a cooperative framework between the rights owners and ISPs would be a desirable step including defining the operating body and specific operating methods for such voluntary cooperation. In relation to this, JIMCA would be happy to and is prepared to exchange opinions with the competent agencies and relevant parties to build an appropriate and effective structural framework.

2. IPSH's agreement to address linking sites ("reach" sites)

In its Strategic Program 2016, the IPSH agreed to "[p]romote concrete discussion about how to address the role that [linking] reach sites play in facilitating the illegal distribution of infringing content by enticing consumers to visit websites providing such content ..."²⁰ IPSH recognizes in its report that the nature of piracy is shifting such that "it is becoming harder for authorities to locate the infringing content itself, websites exist which post collected links leading consumers to infringing content (hereafter, 'reach sites'), and under existing copyright law, it is ambiguous whether or not these websites are infringing on copyright."²¹ This has created enormous problems in Japan since, as IPSH notes, "the operators of reach sites ignore requests to delete links to infringing content, and nothing can be done to force them to comply."²²

JIMCA supports the goal of seeking to clarify liability of linking or "reach" sites. While the law codifies indirect liability (under principles of Japanese

²⁰ IPSH Strategic Program, p 16.

²¹ IPSH Strategic Program, p 13.

²² IPSH Strategic Program, p 13.

Civil Code, e.g., under Section 719(2) of the Civil Code), the dominant position in Japan appears to be that the law must specifically provide for accessory or joint tortfeasor liability under copyright infringement or no liability will result. This leaves a gap in the law, or at least a great deal of uncertainty, so that today Japanese operators of sites providing massive numbers of links to infringing materials, including films, operate without any fear of being held accountable for their actions.

An additional problem exists which IPSH has identified, namely, that “many of these reach sites are hosted on overseas servers, which makes it even harder to take action against them.”²³ JIMCA is supportive of seeking to clarify the law in these areas. JIMCA notes that in the website blocking context, the foreign location of the operator or the host server should not preclude relief, since: 1) the ISP is being asked to disable access to the site, like setting up a roadblock, precisely because the website is enabling infringement in the home jurisdiction (Japan), but regardless of the location of the website and/or its operator; and 2) the relief sought by the copyright owner is “no fault,” with the ISP being in the best position technically and geographically (because it stands as the gateway between the website and the would-be user) to effectuate the relief.

3. IPSH’s agreement to explore measures to address online advertising on IP infringing websites

In its Strategic Program 2016, the IPSH has further agreed that it will “[c]onduct a survey with regard to on-line advertising measures and, in light of this, promote concrete discussion about measures to be taken to address on-line advertising on websites engaging in malicious IP infringement.”²⁴ JIMCA is very supportive of this initiative. Advertising is the “oxygen” of content theft. The top piracy websites earn hundreds of millions of US\$ in ad revenues each year. Several years ago, the UK’s Police Intellectual Property Crime Unit (PIPCU) established an “infringing website list” (IWL) which now contains thousands of infringing websites. Key brands and advertisers have agreed not

²³ IPSH Strategic Program, p 13.

²⁴ IPSH Strategic Program, p 16.

to place advertisements on the listed websites. This approach has been enormously successful in depriving these sites of revenues, as it is reported that there has been a 73% drop in advertising on such sites. In several countries in the Asia-Pacific region, there is active consideration or an approach being launched to address online advertising on piracy websites. Japan should join these countries and establish an IWL as a practical and effective way to foster greater awareness and responsibility on the part of ad networks and brands as to the effect their ad revenue has to fuel the piracy ecosystem.

4. IPSH's interest in reviewing copyright exceptions and limitations

In its Strategic Program 2016, the IPSH states, “[a]s a result of the development of digital networks, data (including copyrighted works) is being utilized in an increasingly diverse number of ways, such as with artificial intelligence, and it is essential that a new copyright system be sought which is focused on promoting innovation and which allows for flexible solutions while maintaining a balance between protection and utilization of intellectual property.”²⁵

There is longstanding recognition that a robust copyright framework for the creation and dissemination of movies, music, books, software, games, and other works advances society's interests in knowledge, culture, innovation, and economic activity. Around the world, copyright law provides for exclusive rights to incentivize authors to create, and, at the same time, certain flexibilities such as limited exceptions which allow certain uses of a copyrighted work without permission from the copyright owner.

Fair use

When considering new exceptions to copyright, the question sometimes arises if the flexible, open-ended US doctrine known as “fair use” should be considered as an alternative to countries that provide for narrowly-tailored and specific, enumerated exceptions. We strongly recommend that Japan reject any attempt to import fair use into its copyright system. Today, Japan has a legal

²⁵ IPSH Strategic Program. p 9.

system derived from the *civil law* tradition that spells out specific enumerated exceptions and does not rely on judicial precedent. Such exceptions allow for activities similar to those provided for in those other jurisdictions, but in an enumerated and proscribed way. We believe strongly that such a system works for Japan's creators, users, and other stakeholders.

Conversely, adopting more flexible exceptions in Japan will be difficult to interpret, create uncertainty, and will have no documented benefit to Japanese creators, users, and other stakeholders. Fair use is a unique exception under US copyright law to the normal rule that one must obtain permission from the copyright owner before exercising an exclusive right. It is a defense to copyright infringement, and a privilege, not a right. The US Supreme Court calls it "a privilege in others than the owner of the copyright to use copyrighted material in a reasonable manner without his consent."²⁶

The fair use defense dates back to case law (judge-made) doctrine that originated almost 200 years ago. Thousands of subsequent court opinions in the US have defined the contours around when fair use does or does not apply. The US Supreme Court has made clear that the doctrine is inherently fact-specific and that its application must be guided by the purposes of copyright and the US Constitution. In determining whether the fair use defense applies, courts must weigh four statutory factors – "a complex of variables determines whether other interests should override the rights of creators." As Japan is a civil law country, its system is particularly ill-suited for the *common law* based doctrine of fair use.

As such, adopting a unique and *sui generis* US system such as fair use will cause uncertainty, and is unsuitable and unnecessary. First, interpreting whether an act is "fair use" is not as simple as deciding whether the use seems "fair" or "just." Fair use is codified by the US statute and the thousands of cases in which it has been interpreted.²⁷ The US Supreme Court has noted that no precise definition of fair use is possible, and the US Copyright Office has

²⁶ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985).

²⁷ The common law doctrine of "fair use" was finally codified in the Copyright Act of 1976, but the courts still have the entire body of published fair use cases to guide the statute's interpretation.

deemed it necessary, because of the complexity and uncertainty, to catalogue the case decisions made under Section 107, an ongoing and lengthy process that will still not result in clear rules. Second, while the thrust of the US cases may promote a sound principle of copyright law – to allow unauthorized uses where the use promotes the purposes of copyright and does not unduly undermine the value of the copyrighted work – this principle is largely reliant on the limiting precedents from US courts.

There are other reasons to refrain from importing a foreign law concept such as fair use in Japan. The claim is sometimes voiced that having an open-ended exception like fair use is more conducive to “innovation.” First, there is little evidence that fair use makes a country friendlier to innovative companies or that innovative companies could not have started or cannot thrive in places not having fair use. Evidence suggests that for start-ups, there are other factors such as attitudes towards business risk and investor culture are far more significant than a country’s copyright exceptions (this was noted recently as a reason against adopting US-style fair use in a UK Government inquiry known as the Hargreaves Review).²⁸ Second, fair use does not provide more predictability for startups and users. The US fair use doctrine has been much criticized for its unpredictability and case-by-case nature, called by some “the right to hire a lawyer” since the final outcome of a fair use case can only be delivered post-hoc by a court. Under the US fair use doctrine, seemingly obvious questions such as: whether copying an entire work could be considered fair use; whether commercial uses of copyrighted materials are presumptively unfair; and whether uses of unpublished material weigh heavily against a finding of fair use, all have been heavily contested, requiring final resolution by the US Supreme Court. It is far from clear under US fair use that the doctrine is technology-friendly: just as fair use has been successfully asserted in numerous cases that do not involve any element of new technology, it has also been found inapplicable in cases involving the uses of innovative new technologies to disseminate copyrighted materials.

²⁸ Ian Hargreaves, *Hargreaves Review of Intellectual Property and Growth, or Digital Opportunity - A review of Intellectual Property and Growth*, (May 2011). This article is on file with JIMCA.

Exception for Text and Data Mining (TDM)

The IPSH identified important policy questions around text and data mining and the need to “[e]ngage in concrete discussion about data copyrights, data sharing-related agreements, incentive provisions and other topics relevant to the promotion of open disclosure and utilization of publicly funded research results and data.”²⁹ Text and data mining (the automated processing of large volumes of text and data for various purposes) exceptions under copyright have come into vogue presumably to respond to companies with direct and stated interests in commercializing the text and data of others in the digital age. These companies view the proprietary nature of others’ text and data as a hindrance to their commercial operations and have sought in certain key jurisdictions enactment of exceptions in the law that will allow them to avail themselves of text and data for commercial purposes.

Japan was one of the first countries to address the subject of text and data mining in its copyright law when it enacted Article 47septies in 2009.³⁰ The exception as drafted already appears somewhat ambiguous in its scope, and could be read in an overly broad way. To the extent Japan is considering revisiting Article 47septies, careful study should be undertaken with reference to the UK TDM provision to appropriately narrow the Japanese law on this subject.³¹ Furthermore, the IPSH should be wary of open attempts to broaden the existing exception to allow third party companies to monetize the text and data of others, particularly when such broadening would call into question international norms such as the well-worn Berne Convention and TRIPS Agreement three-step test.

<Summary>

1. JIMCA appreciates IPSH’s agreement to examine the “effects and impacts of

²⁹ IPSH Strategic Program, p 16.

³⁰ Japanese Copyright Act (as amended by Law No. 46 in 2015), Article 47septies.

³¹ UK Copyright, Designs and Patents Act 1988, s 29A.

website blocking efforts in other countries aimed at on-line IP infringement,” and to “[r]esearch and study what sorts of IP protections are appropriate in cases of cross-border infringement of network-related [creations] by services targeting users in Japan but which are operating on overseas servers.” The information provided in this submission roundly demonstrates that website blocking is quite effective in reducing piracy to blocked sites, reducing piracy overall, and increasing traffic to legitimate offerings of creators. In the website blocking context, the foreign location of the server and/or the operator has not precluded relief in other jurisdictions because lawmakers and courts have readily found that the websites in question avail themselves of, and indeed, enable infringement in, the jurisdiction in which the content can be accessed (i.e., Japan) and where the website block is sought.

2. JIMCA appreciates IPSH’s agreement to “[p]romote concrete discussion about how to address the role that reach sites play in facilitating the illegal distribution of infringing content by enticing consumers to visit websites providing such content ...,” and JIMCA supports the goal of seeking to clarify liability of reach sites.

3. JIMCA supports IPSH’s agreement to “[c]onduct a survey with regard to on-line advertising measures and, in light of this, promote concrete discussion about measures to be taken to address on-line advertising on websites engaging in malicious IP infringement,” as it views initiatives to choke infringing websites of advertising – the “oxygen” for their commercial theft – as an instrumental part of an overall program to reduce piracy.

4. With respect to exceptions and limitations in Japan:

- Japan should refrain from adopting more flexible exceptions such as importing US fair use. Adopting fair use will cause uncertainty, and is unsuitable and unnecessary.
- Japanese lawmakers should be wary of further expanding the country’s text and data mining exception; the current exception is already arguably overbroad, and should probably be narrowed to match other jurisdictions

such as the UK, so that Japan does not place itself out of sync with its international obligations.

Thank you for the opportunity to share our views. We are happy to provide further clarification and to share best practices on any of the above.