



## AMENDMENTS TO JAPAN METI GUIDELINES ON ELECTRONIC COMMERCE AND INFORMATION PROPERTY TRADING

The Ministry of Economy, Trade and Industry of Japan (**METI**) recently revised the Interpretative Guidelines on Electronic Commerce and Information Property Trading (**Guidelines**), which apply to all online business operations in Japan and clarify how the Civil Code, which governs Japanese commercial contracts, and other relevant laws, such as, the Act on Special Provisions to the Civil Code Concerning Electronic Consumer Contracts and Electronic Acceptance Notices (Act No. 95 of 2001) (**Electronic Contract Act**) and the Act on Specified Commercial Transactions (Act No. 57 of 1976), are applied to various legal issues relating to electronic commerce (e.g., online shopping) and information property trading (e.g., the broadcasting and the distribution of software and other digital content).

Existing sections of the Guidelines have been amended to provide detailed guidance on certain issues surrounding electronic publications. The following existing sections of the Guidelines have been amended in line with revisions to the Copyright Act (Act No. 48 of 1970) and recent judicial decisions:

- Section II-1: Liability of Business Entities Providing Consumer-generated Media (**CGM**) Service for Mediating Transmission of Illegal Information
- Section II-2: Legal Matters Involved in Setting up a Link to Another Person's Website
- Section III-12-3: Obligation to Redistribute Electronic Publications

### Section II-1: Liability of Business Entities Providing CGM Service for Mediating Transmission of Illegal Information

Articles 709 and 719 of the Civil Code (Act No. 89 of 1896) apply to cases where an internet user posts or uploads information that infringes third-party rights. Regardless of whether there is any request for removal, if it is easy to prevent the transmission of such information (for example, by deleting such information from the website), and if the business entity or the website operator providing the CGM services, such as, blogging or video-sharing services, fails to remove such information, such business entity or website operator may be held liable for tort to the person whose right is violated by the illegal transmission of such information.



According to Article 3(1)(i) and (ii) of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (Act No. 137 of 2001) (**Provider Liability Limitation Act**), CGM service providers are only liable for not taking steps independently to delete information under certain circumstances, such as, situations where the CGM service providers have actual or constructive knowledge that the distribution of the relevant information is an infringement of third-party rights.

In a judgment of Sapporo District Court dated 4 September 2014, the court considered the situation where a user posted defamatory information about a restaurant. The restaurant requested the website operator to delete the defamatory information, but the website operator took an unreasonably long time to delete the defamatory information. The court held that the website operator was not required to remove the defamatory information because setting up a website for users to contribute word-of-mouth information of restaurants did not infringe the personal rights (*jinkaku-ken*) of the restaurants and was therefore lawful.

## **Section II-2: Legal Matters Involved in Setting up a Link to Another Person's Website**

Where a link to a website with copyrighted contents is configured so that a viewer of the linked website and/or copyrighted contents may mistake the linked materials for those belonging to the link, such link may constitute an infringement of the copyright holder's moral rights and public transmission rights under the Copyright Act.

Moral rights under the Copyright Act include: (i) the right of the author to make his or her work available to the public, (ii) the right of the author to determine whether and how his or her identity as author of the work is presented (for example, whether under his or her real name or under his or her pseudonym), and (iii) the right of the author to maintain the integrity and the title of his or her work (no modification to any work is to be made without the consent of the author of the work).

A judgment of Tokyo District Court dated 17 January 2014 dealt with infringement of copyright by a person setting up a link to another's content under the Provider Liability Limitation Act. The court held that the act of the person who set up a link to an illegally uploaded comic was equivalent to the act of those who performed the uploading of the electronic file of the comic and that the person who set up the link infringed both copyright and public transmission rights.



### **Section III-12-3: Obligation to Redistribute Electronic Publications**

Prior to the revision of the Copyright Act, publishers (e.g., e-book agents) who had publishing rights but were not the copyright holders (e.g., authors) could not act as an intermediary in public broadcasting of digital content or public transmission of electronic publications to third-party distributors. On 1 January 2015, revisions of the Copyright Act came into force so that electronic publication distributors can now obtain broadcasting and publishing licenses directly from publishers (e.g., e-book agents), who have been granted rights to sub-distribute such materials by the relevant copyright holders (e.g., authors).

### **Earlier Amendments in Relation to Electronic Commerce**

In addition to the 2015 amendments discussed above, below is an overview of the 2014 amendments to the Guidelines, which helped to clarify certain issues surrounding electronic commerce:

- Mistakes caused by consumers' erroneous operations (see Point 1 below for further discussion)
- Expressions of intentions by underage and mentally impaired persons (see Point 2 below for further discussion)

The following new sections have been added to the Guidelines in order to settle some of the confusion surrounding end-user license agreements between e-commerce site operators and internet users in relation to the distribution and streaming of digital content (including electronic publications, music, online games, videos, etc.) on the internet:

- Definition of "digital content" (see Point 3 below for further discussion)
- Legal issues concerning the provision of digital content on the internet (see Point 4 below for further discussion)
- Use of digital content after termination of a digital content end-user license agreement (see Point 5 below for further discussion)
- Obligation of operators to redistribute electronic publications (see Point 6 below for further discussion)
- Rights in relation to cybernetic items used in online games (see Point 7 below for further discussion)



### **Point 1: Issues with B-to-C Electronic Contracts in Relation to Mistakes Caused by Consumers' Erroneous Operations**

The Guidelines have been amended in relation to the requirements of “confirmation-seeking measures” under Article 3 of the Electronic Contract Act for B-to-C electronic contracts. Although e-commerce site operators are not required to display any final confirmation page, they are required to show all the information that has been entered by each user and indicate that, by clicking on a button, the user will give his or her final expression of intention to confirm the transaction.

### **Point 2: Underage and Mentally Impaired Persons**

There have been frequent breaches of Japanese laws in cases where underage persons attempt to play certain online games by entering a false age in order to gain access to digital content. Under the Civil Code, (i) any contracts entered into by mentally impaired persons are void ab initio, and (ii) any contracts entered into by underage persons without the approval of their legal guardians can be cancelled by the underage persons or their legal guardians. The amended Guidelines clarify that if any underage person attempts to deceive the operator by declaring a false age, the contract will not be automatically cancelled on the ground that the contracting party is underage. There remains a risk to the operator if the operator has not exercised reasonable care in assessing the person's age. Reasonable care will be judged by a number of factors, including the input data, the age of the person in question, the nature of the goods or services to be provided, the target users of the goods or services, and the design of the age confirmation page on the website. This will obviously create some challenges for online gaming services targeting young players.

### **Point 3: Definition of "Digital Content"**

There are many types of media with digital content, and the Guidelines do not address them all. The Guidelines define “digital content” as content distributed via the internet, such as, online games, e-books, music streaming and video streaming. Content provided in hard media format, such as, compact discs and digital video discs, are out of the scope of the Guidelines.

### **Point 4: Legal Issues Concerning Provision of Digital Content on the Internet**

Unless an exception under the Copyright Act (e.g., copying for private use, copying for educational use, and for purposes of quoting the original text) applies, uploading onto the internet any work of others (including legally obtained digital content) and providing the work



to the public (such as, the act of uploading music or videos to sharing sites) without specific permission of the owners of the copyright (and the neighboring rights, which are typically held by broadcasters, performers and producers) constitute infringement of the right of reproduction, which includes the right to broadcast, under the Copyright Act.

Downloading work (such as, downloading music or videos from sharing sites) while knowing that the right holder has not consented to making his or her work available on such sharing sites also constitutes infringement of the right of reproduction. Infringement of copyright and neighboring rights occurs even if such work is made available to the public at large without charge.

#### **Point 5: Use of Digital Content after Termination of End-user License Agreement in Relation to the Use of Digital Content**

In situations where it is expected that the streaming-type digital content will be accessible by the user only when his or her device is connected to the servers of the operator, the user is not permitted to use the digital content after termination of the end-user license agreement even if any electronic data of the digital content is stored and will remain on the user's hard drive. On the other hand, where the nature of the format is downloadable contents (where, for example, reproduced copies of electronic data are expected to be transferred from the operator to the user and the electronic data is expected to remain with the users after termination of data communication between users and operators), the user may continue to use the downloaded electronic data after termination of the relevant end-user license agreement. The Guidelines provide various scenarios to illustrate the rights to use digital content for different types of termination. These are summarized below.

#### **Scenario 1: Termination of an End-user License Agreement by the Operator Due to Default by the User**

If an end-user license agreement is terminated due to default by the user, such user will lose his or her rights to use the relevant digital content. Accordingly, the user must stop using such digital content after termination. The operator may require the defaulting user to delete or return all relevant digital content.

#### **Scenario 2: Expiration or Termination of an End-user License Agreement by the Operator Due to Termination of Digital Content Providing Services**

In principle, the digital content should be handled in accordance with the relevant provisions of the end-user license agreement, if there are specific provisions in such agreement, unless



such agreement has become invalid or is revoked. If there is no post-termination provision in the end-user license agreement, the operator's obligations to provide digital content covered by such agreement will expire, and the non-delivery of digital content by the operator will not be considered as a default on the part of the operator. In relation to downloadable digital content, the user's right to request the operator to provide digital content will lapse upon expiration or termination. In this case, however, the user will not be required to erase or return the digital content.

### **Scenario 3: Invalidity and Revocation of an End-user License Agreement in Relation to the Use of Digital Content**

If an end-user license agreement in relation to the use of digital content becomes invalid or is revoked, both the user and the operator will have the obligations to return any unjust enrichments. This could mean that the operator has to return the purchase price to the user, and the user has to erase or return the purchased digital content to the operator.

#### **Point 6: Obligation of Operators to Redeliver Electronic Publications**

Digital content, especially electronic publications, is usually available only on platforms of electronic publication distributors. It may be technically difficult for users to create copies of electronic publications on his or her own. If a digital terminal fails and a replacement of the digital terminal is required, or if an electronic publication is erased from a digital terminal because, for example, there is a lack of storage capacity, electronic publication distributors may be required to redeliver electronic publications to the users.

If there is a contract between a user and an electronic publication distributor, the existence of any obligation of redelivery and its scope will be governed by the terms in such contract. If such provisions do not exist in the agreed terms of use, whether there is any implied obligation of redelivery will depend on the circumstances and the reasonable interpretation of such terms of use.

#### **Point 7: In-game Items of Online Games**

Users often purchase in-game items (such as, weapons in war games, and stickers in messaging applications) for use with his or her online games. In-game items are legally regarded as proprietary information expressed in the form of asset data and/or source code. When a user purchases an in-game item, what he or she is purchasing is the *right to use* the specific arrangement of proprietary information that manifests itself as the specific in-game item. The user does not actually "own" the in-game item.



A gaming operator can potentially be liable for any interruption or termination of online game services that occur shortly following the purchase of any in-game item. This is so even if the operator has issued a prior notice that the in-game items are being replaced or updated. Many users become very attached to their in-game items. To avoid potential claims, game operators should be cautious of sudden updates or replacement of in-game items and consider keeping old in-game items available for a period of time.

Even if an end-user license agreement includes a waiver of, or limitation to, damages, an operator may still be liable for damages for the disappearance or loss of any purchased item as a matter of Japanese law, particularly, if caused by the willful or grossly negligent act of the operator.

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