TECH, IP AND TELECOMS LAW UPDATES

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We are pleased to present the July issue (Vol.4) of "Tech, IP and Telecoms Law Updates", a collection of the latest information about Japanese technology, intellectual property, and telecommunications law. We hope that you will find it useful to your business.

1. Passage of the Revised Next Generation Medical Infrastructure Act

On May 17, 2023, the Revised Next Generation Medical Infrastructure Act (specifically, the Act for Partial Revision of the Act on Anonymized Medical Data for the Purpose of Contributing to Research and Development in the Medical Field) was enacted, and on May 26, 2023, it was promulgated as the Revised Next Generation Medical Infrastructure Act of 2023.

The Next Generation Medical Infrastructure Act is a law that establishes a mechanism for the large-scale collection and utilization of diverse digital data from the medical field as a foundation for realizing next-generation medical research, medical systems, and medical administration. The revised items include: (i) the establishment of a mechanism for the utilization of pseudonymized medical data, (ii) linkage with public databases such as the National Database used by the Ministry of Health, Labour, and Welfare, and (iii) cooperation with policies for the promotion of the utilization of medical information. Pseudonymized medical data was established and defined by the revised law and is information that has been processed in such a way that individuals cannot be identified unless it is cross-checked with other information. It requires the deletion of names, IDs, etc. from personal information. For medical information handlers, authorized business operators, and users to whom the law applies, the establishment of this mechanism is expected to be particularly impactful. Unlike the existing system of anonymized medical data, the users of pseudonymized medical data are limited to business operators authorized by the government and are also subject to obligations such as restrictions on the provision of data to third parties (except when the data must be provided to the Pharmaceuticals and Medical Devices Agency or other approval bodies to obtain pharmaceutical approval, etc.).

In principle, the law will be enforced within one year of its promulgation, and it is expected that government ordinances, the ordinances of the competent ministries, basic policies, and guidelines and other instruments for the Next Generation Medical Infrastructure Act will variously be revised by the enforcement date. Market participants may wish to keep a close eye on these developments.

2. Draft Commentary for Guidelines for the *"External Data Transmission Rule"* and the *"Handling of Specified User Information"* Amended

On May 18, 2023, the Ministry of Internal Affairs and Communications ("**MIC**") announced the results of public comments on the revised draft of the "Guidelines for Protection of Personal Information etc. in Telecommunications Business" and its commentary, and the amended guidelines and the commentary thereof based on these results. These amendments are to deal with the revised Telecommunications Business Act, which was implemented on June 16, 2023, introducing the External Data Transmission Rule and the Rules for the Proper Handling of Specified User information. Vol. 1 of the January 2023 issue of this Newsletter previously covered the draft amendments, and while there have been no significant revisions since then, several important interpretations have been developed through the public comment process and

results and a subsequently updated External Data Transmission Rules FAQ. Of the clarifications found in them, several remove (through interpretation) services and parties that might otherwise have been argued to fall within the rule's application.

Regarding the External Data Transmission Rule

- The External Data Transmission Rule does not apply to third parties such as advertisers and demand-side platforms who do not provide telecommunications services directly to users.
- Even if a website has review or comment functions, if the website provides telecommunications services for its own needs, such as an online shopping site for its own products, it does not fall under the category of Telecommunications Business and, therefore, the External Data Transmission Rule does not apply.
- Even if a certain service falls under the scope of the External Data Transmission Rule, if the service's information page is for the service provider's own needs and does not qualify as a Telecommunications Business, the External Data Transmission Rule does not apply. On the other hand, user support pages and user portals associated with a service that falls under the scope of the External Data Transmission Rule are subject to the Rule.
- It is permissible to divide the required information into multiple web pages for announcement, and in the case of Apps, a reasonably flexible method of announcement in accordance with the App's specifications is also allowed.

Regarding the Rules for Appropriate Handling of Specific User Information

- If it is difficult to calculate the monthly active user count that should be reported, for example, it is permissible to report the contract or registered user count (by calculating the average of the contract or registered user count at the end of each month in the previous fiscal year), which represents the maximum value of the monthly active user count.
- When submitting existing internal rules of information handling to the MIC, it is acceptable to omit (for example, by redaction) items other than those required by the law.
- Regarding government access, taking into consideration that there may be involvement by the police or courts in individual cases, not all foreign systems uniformly fall into "foreign systems that may affect the appropriate handling of specified user information."

3. The AI Strategy Council Releases its *"Tentative Discussion Paper on AI"* and the IP Strategy Headquarters Releases its *"Intellectual Property Promotion Plan 2023"*

The AI Strategy Council, established on May 11, 2023 as the government's expert panel responsible for the command post function of Japan's policy on artificial intelligence ("**AI**"), released its *"Tentative Discussion Paper on AI"* on May 26, 2023. This discussion paper summarizes issues related to AI risks, particularly with regard to generative AI, as well as the improvement of AI utilization and development capabilities. Among these risks, specific examples include: (i) the risk of leakage of confidential information and inappropriate use of personal information; (ii) the risk of increased sophistication and the facilitation of crimes; (iii) the risk of social instability and confusion due to the dissemination of disinformation; (iv) the risk of more sophisticated cyber-attacks; (v) the handling of generative AI for education; (vi) the risk of copyright infringement; and (vii) the risk of increased unemployment due to AI. The discussion paper suggests that those risks that can be addressed under existing legal systems and guidelines should be addressed promptly and, in cases where existing legal systems may not be fit for purpose, a response should be considered with reference to studies in other countries.

Subsequently, the government has been discussing potential policies on AI in various fields. For example, in the field of intellectual property rights, the government's Intellectual Property Strategy Headquarters released its *"Intellectual Property Promotion Plan 2023"* on June 9, 2023. The plan states that, with regard to the relationship between AI and copyright, the government will identify and analyze specific cases, organize legal perspectives, and consider necessary measures, while paying attention to the promotion of AI technology and the protection of creators' rights. Further discussions toward the formulation of guidelines are anticipated.

In parallel and from an international perspective, the G7 leaders agreed to discuss generative AI under the framework of the "Hiroshima AI Process" at the G7 Hiroshima Summit held in May 2023, and concrete discussions are underway in the subsequent multilateral working groups.

4. Patent Infringement Judgment Concerning Cross-Border Networked System (May 26, 2023, Intellectual Property High Court)

On May 26, 2023, the Special Division of the Intellectual Property High Court (the "IPHC") held that a server, which was part of a networked system, located outside Japan, and transmitting files from the server to terminals in Japan constituted "production" (being

here an act of working a patented networked system), and thus found patent infringement (Case No. Reiwa 4 (ne)-10046).

In this case, “X”, who holds patent rights to the invention of a “comment distribution system,” alleged that the system for a video distribution service with comments on the Internet, operated by U.S. corporation “Y”, belongs to the technical scope of X’s invention, and that Y’s act of distributing files related to Y’s service from servers in the U.S. to user terminals in Japan constitutes “production” of the Y system (Article 2, Paragraph 3, Item 1 of the Patent Act) and infringes X’s patent, and claimed an injunction and damages (the claim was dismissed in the district court).

The judgement, considering the impact both on the economic interests of the patentee and the economic activities of other parties, concluded that “even if a server, which is a part of the elements constituting a network ... system, is located outside of Japan, it should be interpreted that the act constitutes “production” under Article 2, Paragraph 3, Item 1 of the Patent Act if the act can be deemed to have been carried out in the territory of Japan in consideration of the following factors: (i) the specific mode of the act, (ii) the function or role played in the invention by the elements of the system that exist in Japan, (iii) the place where the effect of the invention can be obtained by using the system, and (iv) the effect of the use of the system on the economic interest of the patentee of the invention.”

Japanese courts have in the past tended to rigidly and formally apply the principle of territoriality, which states that the patent system is determined by the laws of each country and that the patent right is recognized only within the territory of that country. The court of first instance in this case also took this position and dismissed the claim. This judgement is an important case in that it regarded the “production” of the system as taking place in Japan, even though the server, which is an important part of the system, was located outside of Japan. In another case involving the same parties in this case, where Y’s program was transmitted not only in Japan, the IPHC regarded the transmission as an act of “provision,” which is an act of working the invention, and found infringement of the patent (IPHC Judgement July 20, 2022). Consequently, it appears that the IPHC has now formulated a flexible and substantive view of the principle of territoriality. A decision by the Supreme Court appears likely and discussions in academia and practice are expected to follow.

This case was also noteworthy in that it was the first case in which the third-party opinion solicitation system (the so-called Japanese Amicus Brief system) introduced by

the 2021 Patent Act amendment was adopted. Some of the submitted opinions were referred to in Y's argument again, for the first time.

5. PPC Issues Administrative Guidance regarding the Use of Generative AI Services

On June 2, 2023, the Personal Information Protection Commission ("**PPC**") issued a document titled "Alert Regarding the Use of Generative AI Services". This document provides important insights into complying with the Act on the Protection of Personal Information when utilizing generative AI services and it is particularly helpful for companies contemplating the adoption of such services.

The document also includes an attachment titled "Summary of Alert to OpenAI," which outlines the administrative guidance issued by the PPC to OpenAI, L.L.C. and OpenAI OpCo, LLC—the developers and providers of ChatGPT. The key points of the guidance to OpenAI, L.L.C. and OpenAI OpCo, LLC are twofold: first, they must not obtain sensitive personal information without obtaining the prior consent of the individual, and second, they are required to notify the individual of the purpose of use of the information. In particular, when dealing with sensitive personal information, the company must: (i) take necessary measures to ensure that the information it collects does not include sensitive personal information, (ii) take prompt actions to minimize the inclusion of sensitive personal information in the collected data as much as possible, and despite adopting the above-mentioned measures, if it nevertheless is discovered that the collected information contains any sensitive personal information, (iii) take measures to delete such sensitive personal information or to make it impossible to identify specific individuals, as soon as possible and in any event before processing the information into a data set for learning purposes, and (iv) if the individual or PPC requests or instructs the company not to collect such information from a specific site or third party, comply with such request or instruction unless there is a legally cognizable reason for refusal.

When using a generative AI service such as ChatGPT, businesses must individually assess their compliance with the Act on the Protection of Personal Information, in particular ensuring that the use of generative AI services aligns with the purpose of use and complies with regulations on sharing data with third parties or transferring it to across borders by confirming that input data is not used for machine learning by generative AI service providers.

6. Enactment of the Act for Partial Revision of the Unfair Competition Prevention Act.

Following submission to the 211th Ordinary Diet session on March 10, on June 7, 2023, the Act for Partial Revision of the Unfair Competition Prevention Act, was enacted and then promulgated on June 14, 2023, and as reported in the March 2023 issue (Vol.2) of this Newsletter.

This law revises the Unfair Competition Prevention Law, the Trademark Law, the Design Law, the Patent Law, the Utility Model Law, and the Industrial Property Special Provisions Law all at once, with the three pillars of (i) strengthening the protection of brands, designs, etc. in light of the diversification of business activities accompanying digitalization, (ii) improving intellectual property procedures, etc. to accommodate corona disaster and digitalization, and (iii) improving systems related to international business development. The first pillar mainly includes the prevention of acts of imitation in the digital space, the strengthening of the protection of trade secrets, and the information available for sharing with others under defined conditions.

Part of this law (specifically, [i] the making of it possible to restrict access to documents submitted in adjudication procedures when they contain trade secrets and [ii] improving the service system by *inter alia* deeming documents such as assessment results sent by publication to have been served, when they cannot be mailed to overseas residents) came into effect on July 3 of this year, and the other amendments will also, in principle, come into effect within one year from the date of promulgation.

7. The Digital Markets Competition Council releases its *"Competition Assessment of the Mobile Ecosystem Final Report"* and solicits comments

On June 16, 2023, the Digital Market Competition Council (Secretariat: Digital Market Competition Division of the Cabinet Secretariat) compiled its "*Final Report on Competition Assessment of Mobile Ecosystems*" and began soliciting public comments on June 19, 2023.

This report is based on the "Competition Assessment of the Mobile Ecosystem Interim Report" released in April 2022, and was compiled after further review and consideration of opinions from various domestic and international stakeholders, including security experts and consumer groups.

The report states that there are competition concerns due to oligopoly in the main layers of the mobile ecosystem (mobile OS, app stores, browsers, and search services) by a small number of platform operators, and that regulations should be imposed mainly on operators that provide mobile OS. The report recommends that regulations should be applied to mobile OS providers, mainly with regard to (i) changes to OS and browser specifications, (ii) app stores (payment and billing systems, alternative distribution channels for apps), (iii) browser functionality restrictions, (iv) pre-installation and default settings, (v) data acquisition and utilization, (vi) access to OS functions, and (vii) voice assistants and wearable device. The report summarizes the facts, competitive assessment, and direction of response for each of the concerns related to these 8 topics.

In addressing competition concerns, the report presents two policy directions: (i) a regulatory framework in which the government sets the general framework of discipline while respecting the voluntary efforts of operators (co-regulation), and (ii) a regulatory framework in which certain actions are prohibited or mandated (*ex-ante* regulation). Since amendment of laws will be required to implement these policies, market participants will benefit from closely monitoring what laws are scheduled to be, and ultimately are, amended in the future.