

TECH, IP AND TELECOMS LAW UPDATES

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Technology continues to change at a dizzying pace, and the wide variety of related regulatory and business fields involved can make it difficult for industry participants to grasp, at a glance, the big picture. In parallel, technology-related laws increasingly have cross-border or even global impacts, sometimes by accident and sometimes by design.

To assist our clients and to meet their need for bilingual and timely updates, we have decided to publish this “Tech, IP and Telecoms Law Updates” newsletter, which will provide high-level bilingual summaries of the latest updates in Japanese technology, intellectual property, and telecommunications law. We are pleased to publish this first issue of the newsletter, which covers newsworthy developments arising in December 2022, and we will release regular updates going forward.

We hope that you will find it useful to your business.

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1. Web 3.0 and the Metaverse Confront Regulators with New Challenges

The past few months have seen a flurry of activity as regulators seek to understand, address, and respond to the challenges posed by new and emerging digital technologies, including Web 3.0 and the metaverse. This activity extends across numerous ministries and different levels of government, as Japan's regulators attempt to identify gaps in existing regulations and assess any necessary new regulatory approaches. In 2022, various ministries established study groups to discuss these matters, including [the Digital Agency's Web 3.0 Study Group](#), [the Minister's Secretariat's Web 3.0 Policy Promotion Office](#), and [the Web 3.0 Era Study Group on the Use of Metaverse](#).

As a first step, regulators are grappling with how to define and understand these technologies and their potential impacts. For example, on 27 December 2022, the Digital Agency's Web 3.0 Study Group released [a Web 3.0 Research Report](#) summarizing discussions of issues, risks, and business environments related to Web 3.0, including increasingly mainstream digital assets and less well-known decentralized autonomous organizations ("DAOs"). While digital assets have gone increasingly mainstream, DAOs (being, in theory, member-controlled and blockchain encoded non-hierarchical organisations) remain less in the public eye. Moreover, while the definition of Web 3.0 does not generally include the Metaverse, the report noted that because the Metaverse is used to implement Web 3.0 and implicates similar legal issues, such as platform responsibility and difficulties in executing any potential regulations, it will be important to consider the issues in tandem going forward.

Similarly, regulators are engaging with the private sector to discuss legal issues presented by new technologies. For example, in November 2022, [a public-private partnership conference](#) was established to address legal issues surrounding metaverse content, such as avatar portrait rights. Going forward, the group intends to clarify the framework for legal regulation of the metaverse and whether a "soft law" approach will be necessary.

While (at the time of writing) these discussions are at a very early stage and have not yet reached the level of specific legal regulations, we expect that regulatory and policy developments will accelerate in 2023, demanding the attention of industry participants.

2. The Industrial Structure Council Releases Draft Report on Unfair Competition and Digitalisation

On 14 December 2022, the Industrial Structure Council (Intellectual Property

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Committee, Sub-Committee on Unfair Competition Prevention) published its "[Draft Report on the Unfair Competition Prevention Act in Light of the Diversification of Businesses Accompanying Digitalisation](#)". The predecessor report, the "[Interim Summary Report](#)," summarised deliberations held since 2021 on the challenges to and future issues arising from the Unfair Competition Prevention Act in a digital society. The Draft Report builds on the Interim Summary Report, summarizing the results of discussions concerning the need for, and specific direction of, amendments to the Unfair Competition Prevention Act. It outlines the policy direction with regard to seven items, including (i) the protection of designs in the digital age, (ii) revisiting the rules on limited data sharing, (iii) the rules on jurisdiction over international cases and the scope of extraterritorial application of the Unfair Competition Prevention Act, and (iv) amendments to the rules for calculating the amount of any damages.

Of these issues, in our view, the most noteworthy is the protection of designs in the digital age. On this point, the Draft Report proposes including the imitation of a product on a network (e.g., the Metaverse) in the scope of unfair competition, so that victims can take effective measures even when counterfeit products appear only in a digital space. It also bears noting that the Draft Report clarifies that the concept of "goods" in the Act includes intangible objects.

The draft report was open for comments between 14 December 2022 and 19 January 2023, and a final report is expected to be issued based on the results of this public consultation. We anticipate that the Unfair Competition Prevention Act will be amended after the final report is published.

3. The Ministry of Internal Communications and Telecommunications Releases Draft Commentary for Guidelines for the "External Data Transmission Rule"

Businesses offering online services through web browsers and apps should be aware of this new rule regarding the use of user information. In December 2022, the Ministry of Internal Communications and Telecommunications ("MIC") released [draft commentary on the guidelines for the "External Data Transmission Rule"](#) (the "Rule") introduced in the 2022 revised Telecommunications Business Act (the "TBA") (to be enforced beginning on 16 June 2023). The initial study of this draft guideline commentary has now been completed, and it will be submitted for public comment together with [another working group's](#) draft guideline commentary on the rules for the proper handling of specified user information (Articles 27-5 through 27-11 of the Revised Law).

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The External Data Transmission Rule partly shares fundamental ideas with the *ePrivacy Directive/Regulation*. In order to ensure transparency, the Rule, in essence, requires businesses to notify users (or to publicly announce) when the business is – in the course of offering telecommunications services specified in the applicable MIC ordinance – directing the transmitting of user information (e.g., cookies, browser history) recorded in the user’s device (e.g., PC, smartphone) to an external party.

The scope of the Rule is, in fact, very broad. Pursuant to the draft commentary, the specific telecommunications services subject to the Rule are, *inter alia*: (i) email services, direct messaging services, and closed online meeting services; (ii) social media services, online bulletin board services, video sharing services, online shopping malls, sharing services, and matching services; (iii) online searching services; and (iv) services offering various information, including news, weather forecasts, videos, and maps. We note that this Rule can also apply to telecommunication services not specified as needing to be registered or filed with the MIC under the TBA, and that the above fourth category in particular covers a wide range of online services. However, where a business simply posts information about itself on its website, or where a retailer sells its own products on its online shopping website, the business/retailer is considered to be simply providing telecommunications services for its own purposes and is therefore not engaged in a “telecommunications business” subject to the Rule.

When the External Data Transmission Rule applies, businesses are under twin obligations to provide certain information and to do so in a prescribed manner. Specifically, business must inform users of (i) the items of user information to be transmitted, (ii) which entity operates the destination (external) server, and (iii) the purpose for which the user information is to be transmitted. Businesses must provide this information in the prescribed manner, including writing the information in Japanese, avoiding the use of technical terms or complicated language, and either notifying the user using a pop-up, and/or to publicly announcing the above information on a webpage easily locatable by users.

Businesses offering online services through web browsers and apps should confirm whether the rule applies to their services, and consider whether existing policies, such as cookie policies (if any), fit this Rule, need to be amended, or need to be newly established.

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4. Cybersecurity Council releases Draft Guidance for the Sharing and Publication of Information on Cyber-Attack Damage

On 26 December 2022, the National Center of Incident Readiness and Strategy for Cybersecurity, National Police Agency, Ministry of Internal Affairs and Communications, and Ministry of Economy, Trade and Industry announced [a request for public comments on the "Draft Guidance for the Sharing and Publication of Information by Cyber-Attack Victims"](#). The draft guidance is open for public comment between 27 December 2022 and 30 January 2023. This draft guidance was prepared by the ["Study Group on Guidance for the Sharing and Publication of Information by Cyber-Attack Victims"](#), established in April 2022 by the Steering Committee of the Cyber Security Council, which was itself established under Article 17 of the Basic Act on Cybersecurity.

The background to the draft guidance is straightforward: there is no practical guidance available for victim organizations affected by cyber-attacks to share (or publicize) information about the damage. The guidance consequently addresses basic questions and outlines "for what purpose," "what information," "when," and "to which entities" such information should be shared and publicized.

In addition to general explanations of the significance and flow of information sharing and publication, specific points are organized in the form of FAQs; each FAQ is compactly organized into one page with each question and answer, and each answer is accompanied by a supplementary explanation.

5. MIC Solicits Public Comments How Online Platform Operators Should Respond to Illegal / Harmful Information

Will Japan introduce a new platform regulation like the EU Digital Services Act? The Ministry of Internal Communications and Telecommunications ("MIC") has been taking measures against illegal and harmful information (e.g., slander and libel) distributed through online platform services by, for example, simplifying the procedures required to request the disclosure of sender information and by monitoring online platform operators. As part of this initiative, the MIC set up a working group on measures against illegal or harmful information, which will more intensively tackle this issue. [The working group's first meeting](#) was held on 26 December 2022.

As a first step, [the working group solicited public comments](#) (with a deadline of 26 January 2023) on how online platform operators should respond to illegal and harmful information and how to ensure transparency and accountability in content moderation.

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The working group is expected to consider the issue further based on the public comments it receives, and it may decide to introduce new regulations imposing on platform operators a duty to address illegal or harmful information and to ensure transparency in a manner similar to the EU Digital Services Act.

6. The Agency for Cultural Affairs Releases Draft Report on Copyright System and Policies

On 27 December 2022, the Agency for Cultural Affairs published its "[Draft Report of the Legal System Subcommittee of the Copyright Subdivision of the Council for Cultural Affairs](#)", summarizing the Legal System Subcommittee's deliberations in response to, and legislative perspective on, the results of a consultation carried out in 2021 entitled "The Copyright System and Policies for the Digital Transformation (DX) Era".

The draft report includes two particularly interesting developments. First, the draft report proposes a new system that would temporarily allow the use of copyrighted works where it cannot be confirmed whether the copyright holder intends to permit use of the works and/or under what conditions, unless a request is otherwise made by the copyright holder. Under this system, the copyright holder can receive an amount equivalent to a royalty fee following certain procedures.

Second, the draft report proposes that the Copyright Act should be amended to specify that: (a) damages equivalent to royalties may be claimed for the portion of the quantity sold by the infringer that exceeds the sales capacity of the copyright holder; and (b) in calculating the amount of damages, it is possible to take into account the amount to which the parties would have agreed in negotiations based on the assumption that copyright infringement had taken place.

This draft report was open for public comment between 28 December 2022 and 18 January 2023, and a final report is expected to be based on the results of such public comments. Ultimately, the Copyright Act will likely be amended based on the final report.

7. Consumer Affairs Agency Releases "Report of the Study Group on Stealth Marketing"

As the Internet advertising market expands, the problem of "stealth marketing" is becoming more and more apparent. In Japan, however, the Act Against Unjustifiable Premiums and Misleading Representations cannot be used to regulate stealth marketing if such marketing does not contain a misrepresentation as to quality or advantage.

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In light of this situation, [the Consumer Affairs Agency's](#) 28 December 2022 "[Report of the Study Group on Stealth Marketing](#)" summarizes discussions held at a study group examining measures to encourage the sound development of the Internet advertising market through appropriate labeling. Specifically, the report noted that self-regulation was insufficient and recommended that stealth marketing, which conceals the fact that its content is, in fact, an advertisement, should be regulated as a new type of misleading representation under Article 5, Item 3 of the Act Against Unjustifiable Premiums and Misleading Representations.

The draft report proposes the following definition: "A representation made by a business operator in connection with transactions of goods or services supplied by the business operator, which is recognized to be difficult for general consumers to distinguish." The report also indicated general directions for the operation of the new recommended provision. It is expected that the new definition and operational standards will be drafted based on the draft report.

8. Ministry of Land, Infrastructure, Transport and Tourism Releases its Report on Ensuring Safety in Transport Using Automated Vehicles

In January 2023, [the Ministry of Land, Infrastructure, Transport and Tourism](#) released its "[Report of the Study Group on Ensuring Safety of Transportation in the Motor Transport Industry Using Automated Driving Vehicles](#)". The report was drafted in light of an April 2022 revision to the Road Traffic Law, which created a permit system for certain automated operation of motor vehicles without a driver. The report discusses how to revise certain rules to enable passenger/freight motor carriers to conduct business using automated vehicles while continuing to ensure the same level of transportation safety as before.

The report addresses two overarching themes: (i) ensuring the same level of transportation safety as when a driver is present, and (ii) the responsibility of the carrier in cases where remote monitoring operations are outsourced. The report provides some direction for the development of legislation, including requirements for "provisional vehicle operation employees," who are assigned to perform duties other than driving, and the securing of certain equipment and facilities. Notably, the report also left certain points and safety measures for individual operators to consider. We anticipate the report to be further revised in the future.

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