Report of "Study Group on Digital Content and Competition Policy" (Outline)

- For Developing an Environment for Fair and Free Competition on the Digital Content Market

Chapter 1. The Present State of Digital Content Transactions and the Study Group's Viewpoint

1. Environmental development owing to spread of digital networks

Developing an environment for using digital content through quantitative and qualitative expansion of the internet access environment.
⇒ Lifestyle of acquiring necessary information by connecting to the network from any place.

Rapid spread of Internet access using PCs and cell phones

- In addition to Internet access from computers, access from cellular phones has increased rapidly (as of December 2001, Internet users numbered approx. 56 million, and had spread to approx. 60% of all households).

Progress of Broadband Internet Access

- Internet access services based on xDSL technology using conventional metal telephone lines offer communication speeds of 1.5 Mbps to 12 Mbps.
- In terms of charges, Internet access services using xDSL technology offer a flat rate system unrelated to the time used. The monthly fee has fallen to about 3,000 yen, among the lowest internationally (in 2001, xDSL service subscribers numbered about 1.5 million, and increased by about 4 million in 2002).
- Internet access by fiber optic networks offers communication speeds as fast as 100 Mbps, far higher than xDSL, and is now being provided at a monthly fee of about 5,000 yen. Users are forecast to exceed the number of xDSL users by FY2005.

2. The present state of the digital content distribution market

The network-based distribution market of digital content provided by streaming and downloading via the Internet is gradually expanding.
⇒ However, the market scale is still small, compared to that of package content such as books, record albums and video tapes. Particularly, the digital contents market for images and music is small.

3. Scope of examination of the Study Group

Basic standpoint:
In the digital contents market which is gradually expanding as broadband spreads, it will become necessary to build and maintain an environment in which businesses can introduce their original ideas and creativities and freely do business.

Issues related to the Antimonopoly Act and competition policy for developing an environment for fair and free competition in the digital content market

(1) Production of content

- It is important to create an environment where secondary use of visual content such as TV programs is actively carried out. However, problems related to fair trade are often pointed out concerning such content, and especially concerning ground-wave TV stations entrusting the production of programs to production companies.

⇒ Clarification of the views of the Antimonopoly Act concerning the abuse of dominant bargaining positions over the treatment of copyrights and secondary use of programs in cases where TV stations entrust program production to production companies.

(2) Distribution of content through networks

- In order to boost the distribution of content through networks, in addition to developing high-speed and large-capacity access networks, it is necessary to ensure smooth distribution of content.

⇒ Clarification of the views of the Antimonopoly Act related to the distribution of content via networks

(3) Management of copyrights related to content

- With the increasing importance of transactions relating to licensing such as involving copyrights at each stage of production, distribution and use of content, the function of "copyrights management business" to integrally manage copyrights has been attracting attention.

⇒ Clarification of views of the Antimonopoly Act for ensuring fair and free competition in the copyrights management business which has been deregulated.

(4) Protection of content and competition policy

1) Technological measures for protecting content

Regarding digital content, their use can be controlled by technological measures. This can ensure effective protection without having to rely on claims based on the intellectual property rights law or controls by contracts with users.

2) Strengthening of legal protection of content

The basic structure of intellectual property rights laws such as the Copyright Law, which is the main law protecting content, is being reviewed in view of the digitization and networking of environments for the production, distribution and use of content.

⇒ How to balance the protection and use of contents in relation to competition policies

Chapter 2. Production of Contents

1. Present state

(1) Content in the broadband era

As broadband Internet access expands, some consider that there is a shortage of large-capacity, attractive content such as images and music that utilize high-speed connections. In particular, while TV programs are considered powerful contents, they are rarely re-used such as by distribution via the Internet after the program has been broadcast.

(2) Factors hampering the secondary use of TV programs

- It was pointed out that there are two factors hampering the secondary use of TV programs: the treatment of copyrights associated with TV programs and problems concerning which entity should handle operations related to secondary use.

2. Issues and views related to the Antimonopoly Act and competition policy

(1) Issues related to competition policy

- As for TV programs, there are expected to be new means of secondary use such as distribution via the internet, in addition to broadcasting in other regions, overseas sales, release on video, and production of character goods. It is desirable to develop an environment that facilitates these secondary uses of content.
- As the means of distributing content diversify, one important issue for content producers is the location of copyrights related to the produced content and the allocation of profits from secondary use.

In entrusting the production of TV programs, the entrustors, particularly ground-wave TV stations, are often in a dominant bargaining position relative to the program production company. Under the Antimonopoly Act, it is important to properly deal with abuses of dominant bargaining positions, as doing so increases the incentives for entrustees such as program production companies to produce.

(2) Views on transfer of copyrights

- In the transactions to entrust the production of contents such as TV and other broadcast programs, and in cases where the copyrights to the contents primarily belong to the entrustee, whether to transfer the entrustee's copyrights to the entrustor, or the conditions for such transfer, in principle should be agreed between the parties concerned.
- However, if the entrustor is in a dominant bargaining position relative to the entrustee, and the entrustor disadvantages the entrustee in the terms of the transaction such as transfer of copyrights, this would constitute an abuse of dominant bargaining position.

A. Making the transfer of the copyright a term of the production entrustment transaction

- In some cases the entrustor requires the entrustee to transfer the copyrights associated with the produced contents to the entrustor. However, if it is deemed that the two are negotiating the prices or charges including those for the transfer of the copyright, such a form of transaction does not immediately constitute a problem.
- Where the transfer of copyright is made a term of the transaction, both parties must clearly agree on this point, and in carrying out the negotiations, it must be clear that the entrustment fee includes the transfer of the copyright.
- If the entrustor who is in a dominant bargaining position does not previously stipulate such a condition and divulges it after the entrustee has essentially started to produce the content and so is forced to accept the condition, this would constitute an abuse of dominant bargaining position.

B. Clarity of the terms of the production entrustment transactions

The fact that the terms of the transaction have been made clear beforehand is important, not just in relation to copyright issues but also in relation to other terms of the transaction such as allocation of profits from secondary use. Such terms must also be stipulated at an early stage so as not to disadvantage the entrustee.

C. Cases in which the terms of the production entrustment transactions are unfair

Even if the terms of the production entrustment transaction including transfer of the copyright have been stipulated beforehand, if the contents of the transaction overall and terms are considered to disadvantage the entrustee, such a transaction constitutes a problem.

- Whether the terms of the transaction are unfair or not is judged by comprehensively taking account of the various transaction conditions.
- Particularly important is the relationship between the price paid by the entrustor and the costs borne by the entrustee. If the entrustment fee is unfairly lower than the production cost including the management cost, this is judged to constitute imposition of unfair transaction conditions.

(3) Handling of operations related to secondary use

A. Determination of the party to handle the operations related to secondary use

- Whether the entrustor or entrustee is to handle the operations related to secondary use shall be determined by the parties concerned.
- In cases where there is no previous agreement as to who should handle the operations, if the entrustor uses its dominant bargaining position to handle the operations, this could constitute an abuse of dominant bargaining

position. It is necessary to previously determine who is to handle such operations.

B. Cases in which the entrustor who handles the operations does not comply with secondary use

This concerns cases in which the entrustee decides whether to produce the contents or not, based on possible profits from the secondary use, in addition to the fees received from the entrustor in producing the contents. If the entrustor, who is in a dominant bargaining position and handles the operations related to secondary use, disadvantages the entrustee by not complying with its requests or propositions for secondary use without good reason, this could constitute an abuse of dominant bargaining position.

(4) Necessity to clarify the Guidelines on Service Commissioning Transaction

The Guidelines concerning Abuse of Dominant Bargaining Position in Service Commissioning Transaction published by the FTC in 1998 needs to be clarified based on the ideas given in this Report.

Chapter 3. Distribution of Content Through Networks

1. The present state

- The spread of high-speed, always-on connections such as ADSL and fiber optic networks has enabled users enjoy various contents such as broadcast programs, cartoons and music via the Internet and other networks.
- However, distribution through such networks of content that users want, even by paying, is making almost no progress.
- Content provision through networks generally involves many layers of transactions and types of business, such as copyrights holders, content providers, platform providers and channel providers. For the content providers, the key is to use

the services of the platform providers that have the power to secure customers, authenticate users, and charge and collect charges.

2. Issues and views in relation to the Antimonopoly Act and competition policies

(1) Issues related to competition policies

At present, the market for distributing content through networks is still immature. However, to ensure smooth distribution of content through networks, it will be necessary to eliminate any competition-restricting acts so that the people can fully enjoy the benefits of IT.

(2) Restrictive acts in relation to contents distribution by contents providers, etc.

A. Restricting the content distributors

- Both content and user preferences are diverse. Therefore, in general, even if a content provider or platform provider decides to distribute certain popular content only through certain distributors, this is not usually a problem under the Antimonopoly Act.
- However, if powerful businesses sign restrictive distribution contracts concerning "killer content" to monopolize distribution and acquire many customers, or if powerful firms merge and so cause exclusionary effects and hamper competition, this could constitute a problem under the Antimonopoly Act. Therefore, full surveillance regarding competition policies is necessary.

B. Exclusive content transactions

- If a powerful contents provider restricts the conten distributed by a platform provider only to its content, or a powerful platform provider restricts a content provider to provide the content only to itself, and as a result competitors suffer as they cannot find other platforms or content providers, or the situation hampers new entries, this could constitute a problem under the Antimonopoly Act.

C. Restricting charges for using content

- If a content distributor pays charges and distributes the contents as agreed by the content provider and at its own risk, for the content provider to impose restrictions on the charges levied by the distributor constitutes a problem under the Antimonopoly Act.
- Musicalworks, electronic books, etc., distributed via the network are not covered by the system for exempting resale price maintenance contracts of copyrighted works.

(3) Collaboration by content providers and platform providers to exclude competitors

- If content providers and platform providers collaborate to discourage or prevent competitors from entering the market, this could constitute a problem under the Antimonopoly Act.

(4) Competition-restrictive acts by businesses that have monopolistic positions in other fields

- If businesses that have monopolistic positions in other fields enter the platform business by leveraging their monopoly power and so restrict competition, this could constitute a problem under the Antimonopoly Act.

Chapter 4. Management of Copyrights Related to Content

1. Present state

- If copyrights are centrally managed such that one organization can grant permission to use many copyrighted works, this may reduce transaction costs for both copyright holders and users, thus facilitating the use of copyrighted works.
- Concerning the four types of copyrighted works (novels, scripts, lyrics accompanied by music, and music), under the Law on Intermediary Business concerning Copyrights (Intermediary Business Law), an agency business involving copyrights used to require approval from the Director-General of the Agency for

Cultural Affairs. In principle, only one organization was permitted for each type of copyrighted work.

- The Law on Management Business of Copyright and Neighboring Rights (Copyright Management Business Law) was enforced in October 2001. As a result, those wishing to conduct a copyrights management business need only register as such with the Agency for Cultural Affairs.

2. Issues and views under the Antimonopoly Act and competition policies

(1) Issues related to competition policies

- The enforcement of the Copyright Management Business Law has created the institutional environment for many firms to enter the business of managing copyrights in the four fields that had been controlled by the Intermediary Business Law. This is expected to benefit users of copyrighted works.

- **The copyrights management organizations that have been in this field since the Intermediary Business Law are monopolistic businesses in their fields.**
- **In view of the objective of the Copyright Management Business Law which is to promote fair and free competition among rights management businesses, it will be necessary to properly deal with acts by such businesses that could constitute problems under the Antimonopoly Act.**

(2) Exclusion of new entrants

- The following acts by powerful incumbent companies that may hamper new entries or essentially restrict competition could constitute a problem under the Antimonopoly Act.

1) In cases where a copyrights management business signs a management entrustment contract with a rights holder, and stipulates conditions in the contract to cover all of the rights under the Copyright Law that the relevant right holder currently has or will have in the future.

2) In cases where the incumbent copyrights management business is in a monopolistic position in a certain field, for such a business to reduce the management

fee only in fields where it will be competing with new entrants, or to preferentially treat those that give business to it both in the fields where it has a monopolistic position and those where it has competitors.

3) For an incumbent copyrights management business to deny rights holders who entrusted all or a part of the management to a management business that newly entered from signing contracts with itself for a later period.

Chapter 5. Protection of Content and Competition Policies

1. Technological measures of protecting contents

(1) Present state

Weaknesses of digital content and technological protection

- Digital content can easily be reproduced or altered. Without proper measures, rights holders could lose the opportunity to acquire rightful gains.
- For this reason, in recent years, various measures to prevent illegal use have been taken, such as 1) technological measures to prevent illegal reproduction of digital content by users when distributing package content such as DVDs and music CDs, and 2) for digital content distributed via the Internet, a technology called "Digital Rights Management System" (DRMs) restricts or prevents reproduction, or restricts the number of times or period that the content can be used.

(2) Issues and views related to the Antimonopoly Act and competition policies

- The technological measures to protect content ensure the protection of copyrights and other rights associated with digital content. This ensures the opportunities for contents producers and distributors to acquire profits through the production and sale of digital content. This gives them incentives for producing and distributing new content, and encourages the distribution of digital content as well as competition in the market.

- However, this technology can be applied to any kind of digital information. It can control the duplication of or access to content that do not have exclusive rights under the Copyright Law, and can also technologically restrict uses that are permitted under the rights-limitation provisions under the Copyright Law.
- If such technological measures of restriction are excessively used, they could even restrict legitimate uses. In addition, the impacts of technological measures on content users and others are far greater than restrictions solely based on contracts.

As the balance between protection and use in relation to intellectual property struck by the Intellectual Property Rights Laws could be overridden by contracts and technological measures, it is necessary to monitor the actual state of transactions in the market to ensure that fair and free competition in the digital content market is not restricted. It is also necessary to further examine the impacts on competition in the market of the excessive use of technological measures to protect content.

For instance, music disks with copy control technology (so-called "Copy-Controlled CD") cannot be played on certain types of CD players. In such cases where the technological measures of protection imposes restrictions on the usage environment, information for consumers regarding such restrictions must be properly indicated.

2. Strengthening of legal protection of content

(1) Present state

Promotion of "pro-patent" policy

- Greater protection of intellectual property rights is a basic policy of the Japanese government. In July 2002, it adopted the "Intellectual Property Policy Outline".
- The Basic Law on Intellectual Property was enforced in March 2003, and the government established the " Intellectual Property Headquarters" in the Cabinet.

(2) Issues and views related to the Antimonopoly Act and competition policies

Issues related to the competition policies

- Given the granting of new types of intellectual property rights and expansion of the scope covered by the rights, lack of proper consideration of the fair use of intellectual property could disturb the balance between protection and use of intellectual property, hampering fair and free competition on the market.

Points suggested in the Intellectual Property Policy Outline

1) Strengthening the rights could cause competition problems due to monopolization or abuse of dominant bargaining position.

2) The competition laws based on the Antimonopoly Act are crucial for eliminating competition problems, and must be strengthened if necessary.

Article 10, Basic Law on Intellectual Property

" In promoting measures for the creation, protection and exploitation of intellectual property, attention shall be paid to secure the fair use of intellectual property and public interests and to promote fair and free competition."

Roles of competition policy in the "pro-patent" era

- Section 21 of the Antimonopoly Act* is construed as follows. "Even if an act is, on its face, considered to be an exercise of rights under the Intellectual Property Rights Law, etc., if the said act is conducted under the pretext of exercising rights but in reality is considered to be employed as part of a series of acts that constitute an unreasonable restraint of trade or private monopolization, the act is considered to deviate from or to run counter to the purposes of the IPR system, the act is no longer deemed an 'act recognizable as the exercise of rights' under the Intellectual Property Rights, and is subject to the Antimonopoly Act."

*Section 21, Antimonopoly Act:

[Acts under intellectual property rights]

The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act or the Trademark Act.

It is important to promote fair and free competition while assuring a proper balance between the protection of rights and smooth use of intellectual property. The Fair Trade Commission must conduct broad-ranging examinations such as by collaborating with the government's Intellectual Property Headquarters and actively exchanging opinions with the related ministries and agencies.

The Fair Trade Commission needs to monitor the actual conditions to prevent acts that hamper competition in the digital content market which is expected to rapidly expand in the broadband era. It must also actively expose and strictly deal with competition-restrictive acts that could not recognizable as the exercising of intellectual property rights.