

[Attached Material] (Tentative Translation)

This material has been prepared for two purposes. First, the presentation of specific texts will deepen understanding and highlight the issues in an examination of the “ideal legal system” described in this contribution. Second, this hypothetical legislation process makes my argument better organized and performs a checking function to help the author polish or correct this thesis. The author hopes that the draft bill will serve as a reference model throughout this feedback process.

In view of these objectives, the attached material has been prepared by the author without knowledge of or experience in legislation, solely for the purpose of more active discussion, and from a legal expert’s standpoint it may thus contain simple misunderstandings, careless use of terms and points requiring revision.

I welcome remarks and advice on any technical flaws but it would be far from the intention of the author, who drafted this text despite his inexperience, if any reader were to consider this contribution to represent a weak argument for an ideal system simply because of the faults. Your understanding and comments with respect to this literature as a material for the main thesis on an ideal system, setting technical matters aside, would be highly appreciated.

An Act Guaranteeing the Freedom of the Electronic Public Transmission Business and Prescribing the Minimum Regulations (abbreviated as the Electronic Public Transmission Act) (draft)

Chapter 1 General Provisions

Article 1 (Purpose) The purposes of this Act are to guarantee the freedom of the electronic public transmission business and the freedom of transmission content, to ensure smooth provision of services reflecting the public nature of the business and to provide an environment to protect the interest of users and improve public welfare, including the prohibition of illegal access.

* Developed by the author with reference to Article 1 of the existing Telecommunications Business Law (hereinafter referred to as TBL) and Article 1 of the Unauthorized Computer Access Prohibition Law (UCAL).

Article 2 (Definitions) In this Act, with respect to the meaning of the terms given in the following items, the definition set out in each item shall apply:

1. “Electronic public transmission” means the transmission of, conveyance of, or acceptance of access to codes, sounds and images intended for reception by the public using wired, wireless or other electromagnetic methods.

* Based on Article 2 of the Copyright Law (CL) and Article 2 of TBL, except for an addition of “electronic,” a change from “direct reception” to “reception,” the omission of “reception” from “transmission, conveyance and reception” and the addition of “acceptance of access to.”

2. “Automatic public transmission” means electronic public transmission automatically performed in response to a request from the public.

* Based on Article 2 of the CL, except for the addition of “electronic.”

3. “Specific transmission” means electronic public transmission directed to one or a small number of recipients specified in advance.

* The author’s own definition, which allows the Act to be applied to person-to-person communications.

4. “Essential transmission” means electronic public transmission, the content of which is necessary for the prevention of or relief from calamitous situations, for the securing of transportation, communications or electric power supply or for the maintenance of public order when a natural disaster, accident or any other emergency occurs or threatens to occur.

* Based on Article 8 of TBL. Further study required as to the difference from “broadcasting in the event of disaster”, prescribed in Article 6-2 of the Broadcasting Law (BL).

5. “Public” in the Act includes a large number of specific persons. In terms of specific transmission, it

includes a specific individual or legal person.

* The concept in Paragraph 5, Article 2 of CL expanded, though it generally refers to “a large number of unspecified persons excluding those concerned.”

6. “Electric public transmission facilities” means machines, apparatuses, wires and cables or other electronic facilities for the operation of electronic public transmission.

* Based on Article 2 of TBL, despite some changes of terms involved.

7. “Electronic public transmission service” means long-term, regular and continuous service that corresponds to electronic public transmission.

8. “Electronic public transmission operator” means a person who provides an electronic public transmission service as an occupation or as a job, regardless of being paid or unpaid.

9. “Electronic public transmission business operator” means an electronic public transmission operator that provides the service as a business.

* Items 7 to 9 proposed by the author.

10. “Access administrator” means a person who administers the operations of a computer which is connected to electronic public transmission facilities (hereinafter referred to as a “specific computer”), with respect to its use (limited to such use as is conducted through the electronic public transmission facilities concerned; hereafter referred to as “specific use”).

* Based on Article 2 of UCAL

11. “Identification code” means a code that is granted to a person who has been authorized by the access administrator governing a specific use of a specific computer to perform that specific use (hereafter referred to as an “authorized user”), or to that access administrator (hereafter authorized user and access administrator are referred to as “authorized user, etc.”) to enable that access administrator to identify that authorized user, etc., distinguishing the latter from another authorized user, etc.; and that falls under any of the following items or that is a combination of a code which falls under any of the following items and any other code:

- a. A code the content of which the access administrator concerned is required not to make known to a third party wantonly;
- b. A code that is compiled in such ways as are defined by the access administrator concerned using an image of the body, in whole or in part, of the authorized user, etc., concerned, or his or her voice;
- c. A code that is compiled in such ways as are defined by the access administrator concerned using the signature of the authorized user, etc., concerned.

* Based on Article 2 of UCAL

12. “Access control function” means a function that is added, by the access administrator governing a specific use, to a specific computer or to another specific computer which is connected to that specific computer through a telecommunication line in order to automatically control the specific use concerned of that specific computer, and that removes all or part of the restrictions on that specific use after confirming that a code input into a specific computer having that function by a person who is going to conduct that specific use is the identification code (to include a code which is a combination of a code compiled in such ways as are defined by the access administrator concerned using an identification code and part of that identification code; the same shall apply in Items (1) and (2), Paragraph 2, Article 6) for that specific use.

* Based on Article 2 of UCAL

Chapter 2 Rules on Electronic Public Transmission Services

Article 3 (Freedom of speech and prohibition of censorship)

(1) No person shall interfere with or regulate any content of electronic public transmission, excepting in the case where it is done through vested powers provided by law.

(2) No content of electronic public transmission shall be censored.

* Based on Article 3 of BL and on Article 3 of TBL.

Article 4 (Protection of secrecy in specific transmission)

- (1) The secrecy of the content in specific transmission shall not be violated.
- (2) Requirements, procedures and other necessary matters for wiretaps of specific transmission for investigation of an organized and serious crime shall be prescribed based on the basis of law even for an event in which elucidation of the truth of the case is extremely difficult without wiretaps.
- (3) Any person engaged in specific transmission as an electronic public transmission operator shall maintain the secrets of others that have come to be known with respect to the content of electronic public transmission being handled. The same shall apply until ten years have lapsed since this person's retirement from office.

* Paragraphs 1 and 3 based on Article 4 of TBL though the period in Paragraph 3 has been limited to ten years. Paragraph 2 based on Article 1 of the Law on the Interception of Communications in Criminal Investigation (Wiretapping Law).

Article 5 (Freedom of reception)

- (1) No one shall be forced to receive electronic public transmission (excluding essential transmission) against his or her will.
- (2) An electronic public transmission operator shall take necessary measures to secure the freedom of reception of receivers.

* Proposed by the author on the assumption of annoying emails. The right granted to no legal person.

Article 6 (Prohibition of unauthorized access)

- (1) No person shall conduct any unauthorized computer access.
- (2) The unauthorized computer access mentioned in the preceding paragraph means an act that falls under one of the following items:
 1. An act of making available a specific use which is restricted by an access control function by placing in operation a specific computer having that access control function by inputting into that specific computer, via electronic public transmission facilities, another person's identification code for that access control function (to exclude such acts conducted by the access administrator who has added the access control function concerned, or conducted with the approval of the access administrator concerned or of the authorized user for that identification code);
 2. An act of making available a restricted specific use by placing in operation a specific computer having that access control function through inputting into it, via electronic public transmission facilities, any information (excluding an identification code) or command that can evade the restrictions placed by that access control function on that specific use (to exclude such acts conducted by the access administrator who has added the access control function concerned, or conducted with the approval of the access administrator concerned; the same shall apply in the following item);
 3. An act of making available a restricted specific use by placing in operation a specific computer, whose specific use is restricted by an access control function installed into another specific computer which is connected, via electronic public transmission facilities, to that specific computer, by inputting into it, via a telecommunication line, any information or command that can evade the restrictions concerned.

* Based on Article 3 of UCAL

Article 7 (Prohibition of facilitating unauthorized computer access)

No person shall provide another person's identification code relating to an access control function to a person other than the access administrator for that access control function or the authorized user for that identification code, in indicating that it is the identification code for which specific computer's specific use, or at the request of a person who has such knowledge, excepting the case where such acts are conducted by that access administrator, or with the approval of that access administrator or of that authorized user.

* Based on Article 4 of UCAL, except for "a telecommunication line" replaced by "electronic public transmission facilities."

Article 8 (Protective measures by access administrators)

The access administrator who has added an access control function to a specific computer shall endeavor to properly manage identification codes relating to that access control function and codes used to confirm such identification codes through that access control function, and shall always verify the effectiveness of that access control function and, when he deems it necessary, shall endeavor to promptly take the necessary measures to protect that specific computer from acts of unauthorized computer access, including the upgrading of the access control function concerned.

* Based on Article 5 of the Unauthorized Computer Access Law

Chapter 3 Electronic Public Transmission Operators and Their Obligations

Article 9 (Securing of essential transmission)

- (1) An electronic public transmission operator shall give priority to essential transmissions.
- (2) For the cases cited in the preceding paragraph, an electronic public transmission operator may, if necessary, suspend part of its activities.
- (3) The Electronic Public Transmission Commission prescribed in Article 14 may issue an order for electronic public transmission operators to perform transmission, to allow others to use the electronic public transmission facilities of said electronic public transmission operators or to connect them to other electronic public transmission facilities when it acknowledges the need to do so to secure essential transmission.
- (4) Having issued an order mentioned in the preceding paragraph, the State shall reimburse the electronic public transmission operator for the actual costs of the transmission or of the connection.

* Based on Article 8 of the TBL and on Article 8 of the Wired Electric Telecommunications Law, except for a change from “communications” to “transmission” and a deletion of “No complaints can be filed based on the Administrative Appeal Law”.

Article 10 (Securing of requisite services)

- (1) An electronic public transmission operator shall endeavor to secure the services (hereinafter referred to as “requisite services”) separately defined as services the universal provision of which should be secured all over Japan since they are indispensable for national daily life.
- (2) No electronic public transmission operator shall make any unfair discriminatory treatment in provision of the requisite services.
- (3) The Electronic Public Transmission Commission prescribed in Article 14 may take the necessary measures to maintain universal provision of the requisite services all over the country unless they are in violation of the provisions of Article 5.

* Proposed by the author based on Article 72-5 of TBL. Paragraph 3 assumes donations from business operators to set up a fund or imposition of the must carry obligation.

Article 11 (Protection of personal information)

- (1) An electronic public transmission business operator shall be regarded as a “personal information handler” prescribed in Paragraph 3, Article 2 of the Bill for Protection of Personal Information (currently being debated in the House of Representatives), whether or not it owns a personal information database, etc.
- (2) The Electronic Public Transmission Commission provided in Article 14 of the Law shall act as a “competent minister” prescribed in Article 41 of the Bill for Protection of Personal Information for electronic public transmission business operators.

* Proposed by the author based on the Personal Information Protection Bill. Unlike the preceding two articles, it is applicable only to electronic public transmission business operators and not electronic public transmission operators in general.

Article 12 (Obligation to guarantee open access)

- (1) An electronic public transmission operator the scale of which exceeds that separately prescribed

shall agree to a request from a user of electronic public transmission for use of the facilities of said electronic public transmission operator pursuant to the technical standards broadly applied in the actual market, except in the cases listed below. (Exceptive clauses omitted)

(2) The procedures and the details on securing open access shall be prescribed in the regulations by the Electronic Public Transmission Commission set up under the provision of Article 14.

* Proposed by the author with reference to the following article, though the concept is founding in the study plan for Chapter 7 of the US Communications Act.

Article 13 (Obligation for interconnection)

(1) An electronic public transmission operator the scale of which exceeds that separately prescribed shall agree to a request from any other electronic public transmission operator for the interconnection of its electronic public transmission facilities with the electronic public transmission facilities of said other electronic public transmission operator pursuant to the technical standards broadly applied in the actual market, except in the cases given below. (Exceptive clauses omitted)

(2) The procedures and the details on interconnection shall be prescribed in the regulations by the Electronic Public Transmission Commission, set up under the provision of Article 14.

* Based on Article 38 of TBL with an addition of “pursuant to the technical standards broadly applied in the actual market.”

Chapter 4 Electronic Public Transmission Commission

Article 14 (Establishment of the Electronic Public Transmission Commission)

(1) The Electronic Public Transmission Commission shall be established under the provision in Paragraph 3, Article 3 of the National Government Organization Law to perform the activities listed below.

1. Designation under Paragraph 3 and reimbursement under Paragraph 4 of Article 10

2. Designation of requisite services and necessary measures under Article 11

3. Designation of “operators the scale of which exceeds that separately prescribed” and establishment of detailed regulations under Article 12.

4. Designation of “operators the scale of which exceeds that separately prescribed” and establishment of detailed regulations under Article 13.

5. Settlement of disputes concerning Articles 12 and 13.

(2) The Electronic Public Transmission Commission shall be administratively attached to the Minister of Public Management, Home Affairs, Posts and Telecommunications.

* Based on the prescriptions in the Free Trade Commission in the Antitrust Law.

Article 15 (Independence of duties)

The chairperson and the commissioners of the Electronic Public Transmission Commission perform their duties independently.

* Based on the prescriptions in the Free Trade Commission in the Antitrust Law.

Article 16 (Organization and appointment of chairperson and commissioners)

(1) The Electronic Public Transmission Commission shall consist of a chairperson and four commissioners.

(2) The chairperson and the commissioners shall be appointed by the Prime Minister with the consent of both Houses of the Diet from among persons whose age is thirty five or more and who are experts in law, economics or technology.

(3) The chairperson and the commissioners shall be public service officials.

* Based on the prescriptions on the Free Trade Commission in the Antitrust Law, except the prescription on the attestation of the Emperor, which is to be put under consideration after its integration with other organizations such as the Radio Regulatory Council.

(Several articles that seemingly need to be provided on the organization of the Commission shall be

separately studied on the premise of integration with other organizations such as the Radio Regulatory Council.)

Chapter 5 Indemnification and Penalties

Article 17 (Indemnification for copyright infringement)

(1) An electronic public transmission operator shall not be liable for infringement of copyright by reason of the storage of material made by any user if the electronic public transmission operator is actually unaware that it constitutes the infringement of copyright or if the electronic public transmission operator acts expeditiously to remove or to disable access to the material upon obtaining such awareness.

(2) The removal or the disablement of access to material prescribed in the preceding paragraph shall be in compliance with the steps below.

1. A party complaining of the infringement shall present the electronic public transmission operator with a notice specifying the material concerned and the circumstances of the infringement.
2. Upon receipt of the notice described in the preceding item or upon obtaining the awareness of the fact of infringement on its own, the electronic public transmission operator shall act expeditiously and in good faith to remove or to disable access to the material.
3. After the measure described in the preceding item has been taken, the electronic public transmission operator shall give prompt notice of the removal or of the disablement of access to the user who has stored the material concerned.
4. If the user takes objection to the removal or disablement of access after receipt of the notice, said user shall give notice of the objection to the electronic public transmission operator.
5. Upon receipt of the counter notice described in Item 4, the electronic public transmission operator shall give notice with a copy of the counter notice attached to the complaining party that it will either replace the removed material or cease disabling access to it in ten business days.
6. The electronic public transmission operator shall replace the removed material or cease disabling access to it not less than 10, nor more than 14 business days following receipt of the counter notice, unless it receives a notice from the complaining party that it has filed an action seeking a court order to suspend the storage of said material in response to the notice described in Item 5.

* Based on Section 512 of the Digital Millennium Copyright Act (DMCA) of the United States. Prescriptions more detailed than the Law on Limited Liabilities and on Transmitter Information Disclosure for Special Telecommunications Service Providers” (better known as the Provider Liabilities Law)

Article 18 (Indemnification for defamation, etc.)

No electronic public transmission operator shall be treated as the editor or publisher of any information provided by another content provider.

* Based on Section 230(c)(1) of the Telecommunications Act of 1996 of the United States, in which the provision is simpler than that in the Provider Liabilities Law.

Article 19 (Penalty for hindrance to electronic public transmission)

Any person who destroys, causes any object to touch, or impairs the functions of electronic public transmission facilities to cause thereby any hindrance in the way of electronic public transmission shall be guilty of an offense and liable to imprisonment for a period not exceeding five years or to a fine not exceeding two million, five hundred thousand yen.

* Based on Article 13 of the Wired Electric Telecommunications Law Article 108-2 of the Radio Law has a similar prescription with slightly different constituent elements: “imprisonment for a period not exceeding five years or a fine not exceeding two million and five hundred thousand yen” plus a provision of attempted offenses. Abolishment of attempted offenses needs to be discussed.

Article 20 (Penalty for breach of secrecy in specific transmission)

(1) Any person who violates the provisions of Paragraph 1 of Article 4 shall be guilty of an offense and liable to imprisonment for a period not exceeding two years or to a fine not exceeding five hundred thousand yen.

(2) Any person who violates the provisions of Paragraph 2 of Article 4 shall be guilty of an offense and liable to imprisonment for a period not exceeding three years or to a fine not exceeding one million yen. The same shall apply until ten years have passed since the person's retirement from office.

* Based on Article 104 of TBL. Deliberation required on difference from Article 109 of the Radio Law as well as on abolishment of attempted offenses.

Article 21 (Penalty for unauthorized computer access, etc.)

(1) Any person who violates the provisions of Paragraph 1 of Article 6 shall be guilty of an offense and liable to imprisonment for a period not exceeding one year or to a fine not exceeding five hundred thousand yen.

(2) Any person who violates the provisions of Article 7 shall be guilty of an offense and liable to a fine not exceeding three hundred thousand yen.

* Based on Articles 8 and 9 of UCAL

Chapter 6 Miscellaneous Provisions

Article 22 (Exemption)

(1) The Law shall not apply to the electronic public transmission services set forth below:

1. Electronic public transmission services exclusively provided to a single person
2. Electronic public transmission services using electronic public transmission facilities, a part of which is to be established on the same premises (including areas regarded as the same premises) or in the same building where any other part thereof is also to be established

(2) Irrespective of the provisions of the preceding paragraph, the provisions of Articles 3 and 5 shall apply to electronic public transmission services set forth in the respective Articles.

* Based on Article 90 of TBL.

Article 23 (Repeal of related regulations, etc.)

(1) The laws listed below shall be repealed upon enforcement of this Act.

1. Wired Electric Telecommunications Law (Law No. 96 of 1953)
2. Telecommunication Business Law (Law No. 86 of 1984)
3. The Law Concerning Nippon Telegraph and Telephone Corporation, etc. (Law No. 85 of 1984)
4. Unauthorized Computer Access Law (Law No. 128 of 1999)

(2) The specified parts of the laws listed below shall be repealed upon enforcement of this Act.

1. Chapter 3-2 (facility-supplying broadcaster) and Chapter 3-3 (program-supplying broadcasters) of the Broadcasting Law (Law No. 132 of 1950)
2. Articles 108, 108-2 and 109 of the Radio Law (Law No. 131 of 1950)

Article 24 (Substitution of terms in related regulations)

(Following the enactment of the Act and the repeal of said laws, related laws need to be applied mutatis mutandis with some terms read differently. The article is to have a blanket prescription for it.)

Note 1: The Act is considered on the premise that the principle of unity between "Licensee for cable television broadcasting facilities" and "Cable television broadcaster" in the Cable Television Law (in Articles 3 and 12) is abolished (for separation of segregation of hardware and software).

Note 2: The issue on "disclosure of transmitter information" in the Provider Liabilities Law is left to be discussed in future, since the effect of the Law (Article 4) (comparison of the interests between the provider and the transmitter of the copyright infringing material, depending upon whether the information is disclosed or not) is unclear.