

# **“Electronic Public Transmission Act of 2002” as the Minimum Regulations on the Internet (Tentative Translation)**

Koichiro Hayashi ( Professor, Keio University )

## **1. Introduction**

In this new era of convergence between telecommunications and broadcasting, we often hear calls for a legislative system that covers in a combined or comprehensive way both services. But there has been no attempt to propose radical revisions of the law, although several laws have been enacted to supplement the existing legislation.

Having conducted a basic study on this issue with several other interested scholars since as early as the fall of 1996, I reached an idea in the spring of 1999 based on the “horizontal separation” or “up/down separation” (Hayashi, [1998]) found in industrial organization theories, and in the fall of 1999, I made a contribution entitled “A Proposal for the Comprehensive Media Industry Act” (Hayashi, [2000a]) to this bulletin to provide an overview of the new legislative system.

[Note] Whether the separation is vertical or horizontal depends on the standpoint. Proposing a classification free of the traditional industrial nomenclature for Internet policies, Werbach [2000] named the layered model that copies the structure of the computer software “vertical model.” In Japan, in light of criticism of the vertical administrative system or the conventional individual industrial model, which has been compared to rope curtains, the expression “horizontal separation” will be easier to understand.

Thereafter, the adequacy of the idea has been examined at presentations in academic conferences and through discussions with companies in the media industry. Through this process, I realized that merely debating the principles would not lead to mutual understanding and that discussions would not deepen without an actual bill with individual article texts.

In response to the remarks (and expectations) shown in these meetings, I have tried drafting the “Electronic Public Transmission Act” as attached, and I present you its basic principle in this literature. It corresponds to the middle layer of the three layers that I have already proposed, namely the “Right of Way Law,” the “General Media Law” and the “General Message Law” layers

Readers are asked to note that 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.

## **2. Perspectives for Analysis**

The analysis starts with an examination of the current situation surrounding general regulations on the media-related industry and their adequacy. What are called regulations in the media business can be roughly classified into two types: regulations related to “conduits,” hereinafter notated “Cd,” which provide a means of conveying information (mainly economic regulations) and regulations related to “content,” hereinafter notated “Ct” (mainly social restrictions). The first

type of rules are government regulations on economic factors such as the procedures required in starting or terminating certain businesses (market entry/withdrawal regulations), government interference in price setting (pricing regulations) and prior restrictions on cross-industrial capital relationships in addition to retrospective ones based on the Antitrust Law (principle of decentralization and prohibition of cross-ownership). The second type of rules are designed to ensure that no program content contravenes any law, public decency or political neutrality and that content incorporates the “fairness doctrine” in broadcasting (in Paragraph 2.1, Article 3 of the Broadcast Law) and the “harmony doctrine”(in Paragraph 2 of the same article).

The division into the two types produces four possibilities: one with regulations in both Cd and Ct aspects, another with regulations in neither, and the two others with regulations in either domain, as portrayed in Figure 1. Here, “with regulations” means being bound not only by the principles in general laws such as antitrust law but also by individual regulations prescribed in their respective business laws.

When this categorization is applied to existing media businesses, there are three typical examples, as follows:

Type P (Publishers model): There is no restriction on the entry into or withdrawal from the media industry or on the content of information provided. In other words, businesses are free unless they violate other interests of greater priority under law.

Type C (Common carriers model): Businesses of this type are subject to government regulations on entry, withdrawal and rates. They are not allowed to have an interest in the content they carry. Conversely, they are not responsible for the content.

Type B (Broadcasters model): The players in this category are bound by government regulations on entry and withdrawal. They also have an obligation to make a fair introduction of views of all society and to allow different views to be also presented.

Among the three types, no type is called “Type I (Internet model),” rather it would be basically categorized into Type P as the computer sector is free from Cd and from Ct regulations. In this sense, the term “electronic publication” may get to the point. But while the Internet is subject to no Cd restrictions, there seem to exist two camps in terms of Ct restrictions in the United States, one advocating freedom (“First Amendmeters”) and the other calling for initiatives to prevent deleterious effects on the juvenile (“Paternalists”). The situation is even more complicated, because there is another issue concerning the so-called “responsibility of service providers,” as to whether or not responsibility for Ct should be shared by Cd operators as insiders.

Figure 1: Media businesses and regulation types

|                |             |              |
|----------------|-------------|--------------|
| Ct regulations | Involved    | Not involved |
| Cd regulations |             |              |
| Involved       | Type B      | Type C       |
| Not involved   | ?? (Type I) | Type P       |

### 3. Concepts of the Comprehensive Media Industry Act

Four plans are conceivable, described below as Plans A to D, for comprehensive legislation to respond to the integration of media.

Here, Plan A (subsumption under Internet-type communications) proposes an idea that only the subsumption of conventional telecommunications and broadcasting as part of telecommunications in a broad sense under the non-regulated Internet is to be legally confirmed and that no active measures are to be (or cannot be) taken. The point here is that existing Japanese laws define “broadcasting” as “wireless transmission intended to be directly received by the

public” (Item 1, Article 2 of the Broadcast Law and Item 4, Article 5 of the Radio Law) and therefore that it is part of the “telecommunications” defined as “sending, conveying or receiving codes, sounds or images through a wired, wireless or any other electromagnetic method” (Item 1, Article 2 of the Telecommunications Business Law). (In light of this extremely narrow definition of the Japanese concept of “broadcasting,” this literature uses the expression of “broadcasting-type services” for broadcasting in a broader sense.)

Plan B (supplementation of a multimedia law) originates from the plan for “Chapter 7 of the Telecommunications Act of 1934,” an aspiration of former US Vice President Al Gore in 1993. It proposes adding a new law to be applied to the new field, while keeping existing laws intact. In other words, it suggested making new provisions for “multimedia” as a new Chapter 7 while moving the existing Chapter 7 (miscellaneous provisions) to a new Chapter 8 in the Telecommunications Act enacted in 1934. The suggestion envisioned that if the new Chapter 7 is provided as the least regulated “Telecom Haven,” it would attract ambitious companies such as ventures while the other chapters would die out.

This idea, not actively adopted in the 1996 Telecommunications Act, consequently took shape as “Unregulation of the Internet,” the concept of which is explained in 4.2. However, its achievement in the market seems to have been far from Mr. Gore’s expectations. Despite the emergence of many ventures, the reality was that the traditional “five lanes” of the information superhighway (fixed phone networks, mobile phone networks, terrestrial broadcasts, CATV and satellites) had tremendous vested interests that overwhelmed the power of deregulation.

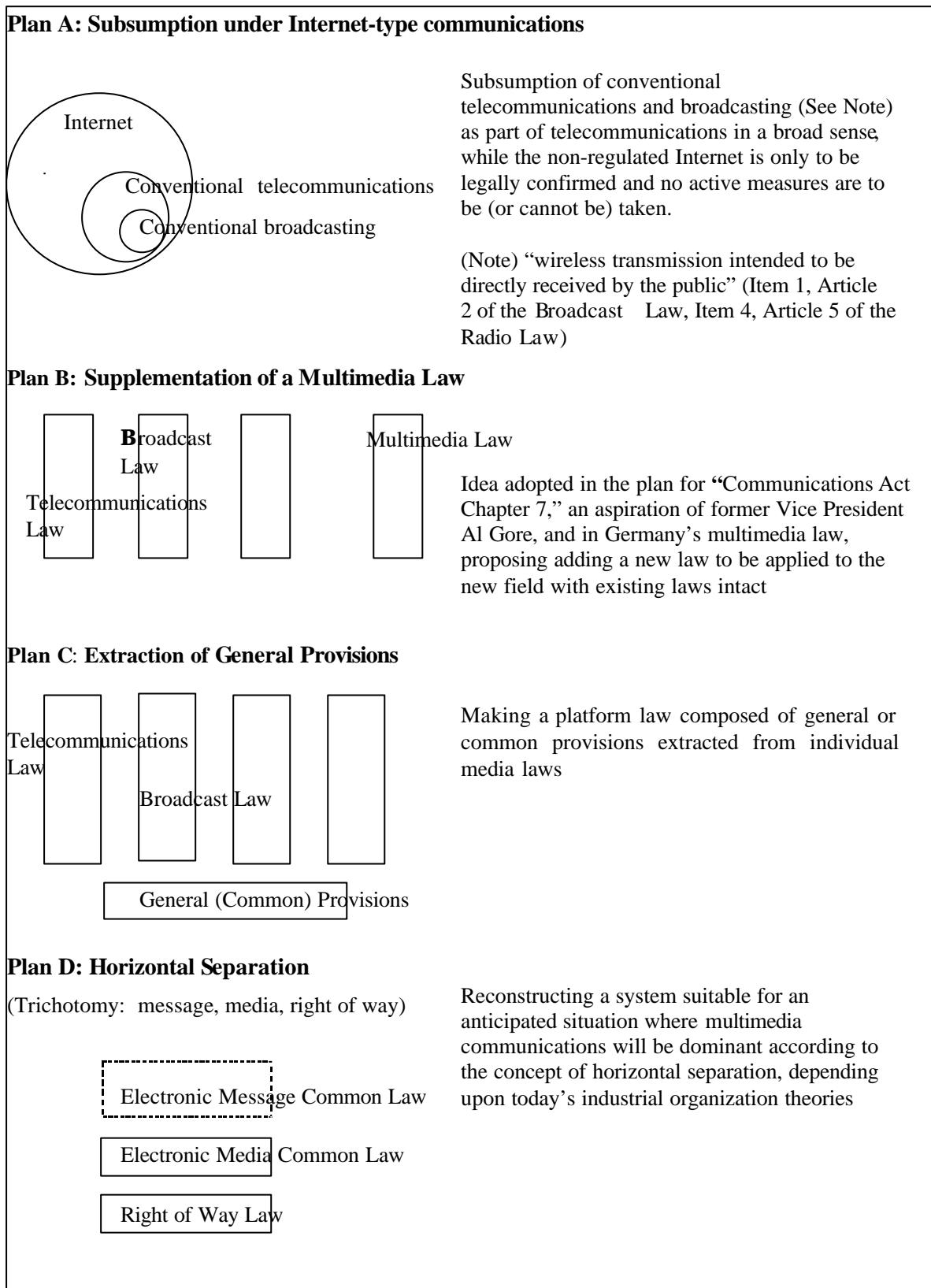
Plan C (extraction of general provisions) is for the purpose of making a general law consisting of general or common provisions extracted from individual media laws. When media are integrated, it is the laxness of principles that causes trouble with the application to the integrated field. If the principles are definite, responding to individual cases will be easier. Nevertheless, as long as the principles are only built on case studies, rapid changes in technologies or in the market will generate unstable doctrines. Another point is that this approach requires consensus building in the process of extracting general provisions, which means that a failure to coordinate interests will lead to a failure in making a new law.

The purpose of Plan D (horizontal separation) is to set up regulations for each domain defined in a trichotomy: electronic messaging, electronic media and right of way. Here, the term “electronic” is inserted to the article by Hayashi [2000a] to clarify the position of the plan and to prevent the comprehensive media law from infringing on freedom of speech, given that Type P as described above is ideal for ensuring it.

In Figure 2, the solid lines denote the expected establishment of new act and the dotted lines indicate that no positive law is needed, with complete deregulation expected depending on future considerations. The plan is designed to enable the reconstruction of a system suitable for an anticipated situation where multimedia communications will be dominant, according to the concept of horizontal separation, in today’s industrial organization theories.

Table 1 shows a comparison of the four plans, looking at their pros and cons. Plan A is the easiest but without any legal policy it is unlikely to respond to contingencies. As the most orthodox approach, Plan B is likely to win many supporters from among legal experts, but its disadvantages are as described above. Plan C is unrealistic. Consequently, the present conclusion in the context of this article is that promoting Plan D is the only solution, albeit a difficult one.

**Figure 2: Four proposed formulations of the integrated law**



**Table 1: Comparison of the four plans**

| Plan  | Advantages  | Disadvantages   | Comprehensive Evaluation |
|---|---|---|--------------------------|
| Plan A:<br>Subsumption under Internet-type communications | No special actions required   | Without a policy orientation, it may be overwhelmed by trends and have unexpected negative repercussions  | ×                        |
| Plan B:<br>Supplementation of a multimedia law            | An orthodox way of enacting a new act<br>Legislation relatively easy  | Based the example in the United States, its effect is limited unless vested interests are weakened.   |                          |
| Plan C:<br>Extraction of general provisions               | Appropriate as a process of gaining consensus in related industries   | Feasibility questioned given that the Radio Law and the Broadcasting Law were not coordinated for 50 years<br>No bill is possible without a coordination of interests | ×                        |
| Plan D:<br>Horizontal separation                          | Appropriate approach for the multimedia era<br>A new system surpassing other developed countries in terms of the activation of the media industry | An unorthodox approach<br>Wisdom needs to be accumulated  |                          |

#### 4. Three Motives

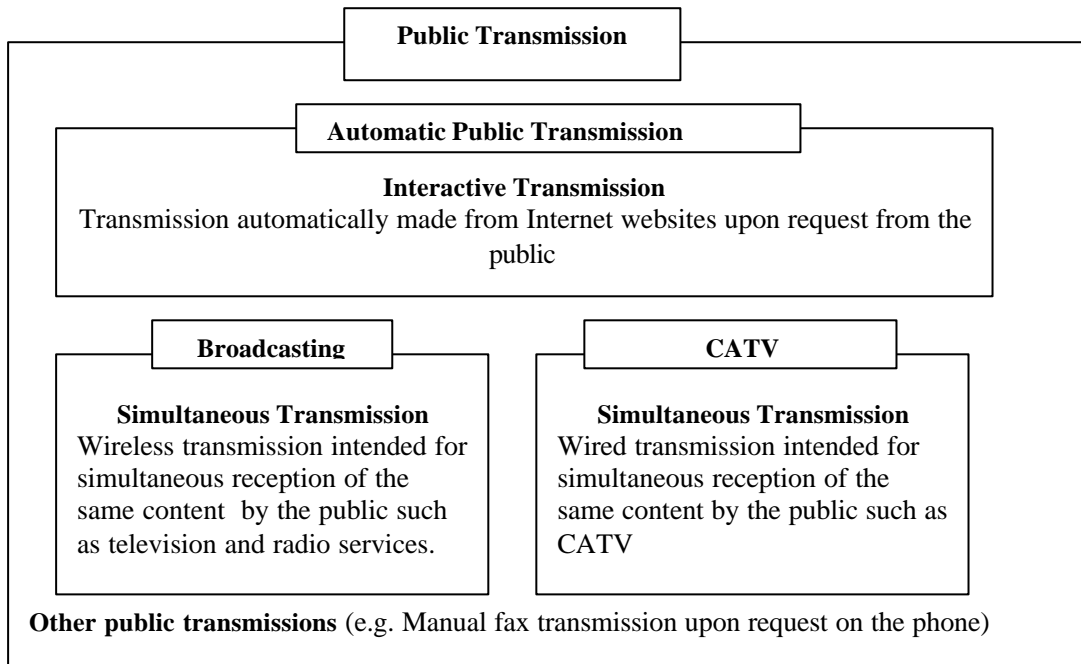
##### 4.1 Introduction of the Concept of “Public Transmission” to the Copyright Law

After the completion of “A Proposal for the Comprehensive Media Industry Act” (Hayashi [2002a]) I was not able to see the next step. It was a revision of the copyright law that gave me the first suggestion. It sounds remote to the readers but it is only because we take the legal system in the materialist world for granted. Those who think about “information rights” (Kumon[1988]) or “information basic rights” (Firestone and Schement[1995]) consider copyright, especially the moral right, as well as the right to use the media to be part of basic human rights.

In any case, in the world of copyrights, there has been concern about the spread of unauthorized copies through the Internet. Legislators cannot help but take the situation so seriously that they in fact made an attempt to adequately position it in the legal system as “interactive transmission.”

Consequently, the new concept of “public transmission” was introduced as a comprehensive concept, ranging from conventional “broadcasting” or ‘CATV” to “transmission through a person” which has existed but not explicitly (7a in Paragraph 1, Article 2 of the Copyright Law). Thus, “interactive transmission” is renamed “automatic public transmission” (9c in the same paragraph), and “making-transmittable right” (or the down-to-earth “uploading to servers” in 9.4 in the same paragraph) as a step before public transmission right is given to the copyright owner to maintain the basic principle of copyright law, namely the prohibition of duplications (as in Figure 2 or in Article 23 of the same Law).

Figure 3: Concept of “Public Transmission”



Source: Agency for Cultural Affairs and Ministry of International Trade and Industry [1999] partly revised

Moreover, the concept of “public” has been revised not only to cover “general public, or an unspecified large number of persons excluding those concerned with specific legal relationships” as in general use but also to “include a specific and a large number of persons” (Paragraph 5, Article 2 of the Copyright Law) as well. This change has attracted my attention. If it is extended, “telecommunications” and “broadcasting,” which were thought to be at opposite poles, could be covered with a single concept.

#### 4.2 “Unregulation” Policy on the Economic Aspects of the Internet in the United States

In tracing back the history of the development of the Internet from the perspective of regulation policies, I looked back on the history since the start of Computer Inquiry in the late 1960s and eventually assessed the “Unregulation” policy that was unique to the United States. The main points are as follows: (Refer to Hayashi ([2000a], [2000b] and [2002]) for details.)

- (1) The US Government, especially the Federal Communications Commission (FCC), abolished or eased facility-based regulations and focused on service regulation, since the emergence of computer communications.
- (2) The policy of “Unregulation” that the FCC had taken had the positive effect of freeing entry into the market and price setting along with its “Forbearance” policy for telephone services.
- (3) It was particularly significant to exempt Internet Service Providers (ISPs) from obligations to ensure interconnection and to contribute to the universal service fund. It allowed ISPs to compete in a free market without FCC regulations, as in the computer business.

On the contrary, it has been considered difficult to design a system focusing on the Internet using conventional approaches in Japan, where regulations mainly depend upon facilities rather than services. However, based on the differences between the United States and Japan in the active application of information technologies, it is thought that those measures listed below are to be

promptly taken, given that Internet traffic will surpass that of the phone networks.

- (1) The swift development of related legislation based on a declaration to be made by the IT Strategy Headquarters setting itself to “abolish or withhold regulations on the Internet” as the number one target of deregulation
- (2) The immediate abolishing of regulations concerning Type-2 operators
- (3) Confirmation that the regulations in NTT Law do not include the Internet
- (4) The abolishing of the related parts of the regulations on dominant operators that contradicts the principles set out above. Internet-related services such as i-mode of NTT DoCoMo and L-mode of NTT East/West are to be subject to “Unregulation.”

The above remarks suggest that the Internet should, in principle, be free from regulations, switching the world of telecommunications from a telephone-oriented mindset to an Internet-centered one.

#### 4.3 Background to Considerations for “Chapter 7” of the US Communications Act of 1934

Plan B described in the previous paragraph is nothing more or less than the idea for a “Chapter 7 of the Communication Act,” which was promoted at the initiative of (the then) US Vice President Al Gore. Although it ultimately ended in deadlock, it was so innovative to see if anything useful could be extracted. As a result of reviewing the version dated November 15, 1995, (National Computer Board[1995]) as material, the following points became clear:

- (1) It is quite understandable that Chapter 7 was meant to integrate the regulations only in broadband interactive services (i.e. “common carrier regulations” in Title 2 and “CATV regulations” in Title 6) and to ease the regulations.
- (2) However, the United States still had a problem with dual jurisdiction for regulations between the federal and state governments. As a result, regulations could not be lifted.
- (3) The regulations were still directed at operators (specified in proposal Title 7). (The services specified in Title 7 were also under control but they were basically the broadband interactive services offered by the operators specified in Title 7.)
- (4) In view of this, it is inevitably deemed inconsistent with the policy of “Unregulation” sustained since “Computer Inquiry.”
- (5) A majority of the prescriptions in Title 7 were common carrier regulations (“Type C” according to my own classification) formulated based on Title 2.

To sum, it tells us that (1) it is difficult to make an integrated law only based on Plan B, that (2) it is believed to be possible for Japan to have more intensive “Unregulation,” as Japan does not have the problem with dual jurisdiction that the United States has, and that (3) the only possible solution is to create a legal system focused on common carrier regulations (Type C).

## 5. The Need for “Telecommunications-Broadcasting Integrated Act”

### 5.1 Limitations of Patchwork

As for the trends towards integration, the Ministry of Public Management, Home Affairs, Posts and Telecommunications (former MPT) assumes that the differentiation between telecommunications and broadcasting is possible with the concepts of “telecommunications to a large audience” and “broadcasting with specificity” (narrowcasting) and that the differentiation itself is inevitable based on the existing law system. However, this dualism is likely to reach a dead end, just as the introduction of “hybrid services” following the first Computer Inquiry ended up breaking down (Hayashi[1998]). In cases brought before the courts in Japan, the division is blurred (Makino[2000]).

Some specific examples are listed below:

- (1) A “packaged service” of telecommunications and broadcasting cannot be smoothly offered as is under the control of compartmentalized legislation in each sector.
- (2) With terminals for TV and for the Internet integrated and broadband communications available on the network, it is impossible to differentiate TV services from Internet services at the point of transmission of information and integration is practically unavoidable. (For instance, a mobile terminal is used to receive terrestrial digital TV broadcasts.)
- (3) Concerning Ct regulations unique to broadcasting, satellite broadcasting, CATV and broadband Internet services will need to be exempted, even if terrestrial broadcasting is kept under regulations.
- (4) Similarly, concerning the principles of decentralization of mass media and foreign capital restrictions peculiar to broadcasting, those in the new fields excluding terrestrial broadcasting need to be lifted or relaxed in order to promote global business development.

Needless to say, not all patchwork is useless. The newly-born Law Concerning Broadcast via Telecommunication Services provides for rules on broadcasting services using facilities originally meant for telecommunications. In this sense it is designed to respond to the merger of telecommunications and broadcasting, but it also has some aspects that could be beneficial for the time being and obstructive in the long run like the concept of “entrusted broadcasting.” described in the next section.

What is in question here is the significance of patchwork on the premise of continued division between the Broadcast Law and the Telecommunications Business Law, when such a division has become virtually meaningless.

## 5.2 System Distorted by the Segmentation

The world of satellite services, in which convergence appeared earlier than in other sectors, still maintains the dichotomy despite the fact that there is no difference between transmission of programs using communications satellites and that using broadcast satellites. Transmission with communication satellites has a new differentiation between “entrusting broadcasters” (program supplier) and “trustee” (transponder vender), the latter being required to get approval on entry. It is mainly intended for imposing ‘fairness doctrine’ in Article 3-2 of the Broadcast Law on program-supplying broadcasters as well.

There is a case in which whether or not transmission of programs using communications satellites falls into the “broadcast services” prescribed in the Broadcast Law was contested, which is the “Star Digio” case. Star Digio “broadcast” a program consisting of tens of pieces of music from musical records of the plaintiff without any comments or speech six to twelve times a day for a week. The plaintiff insisted that, given that many listeners digitally recorded the “broadcast program” on mini-disks, the conduct of the defendant, which was wireless transmission to encourage record copying, should not be defined as “broadcasting.”

On the other hand, the defendant asserted that it was “broadcasting” prescribed in the Broadcast Law and in the Copyright Law, that a temporary recording of the plaintiff’s record was lawful private use without infringement of copyright and that the record producers should only hold a right to claim royalties for secondary transmissions and had no right of authorization (including a right of rejection). In the first trial, the court rejected the plaintiff’s claim and ruled that the act of the defendant was “broadcasting.” (The case is currently on trial on appeal.)

This case concerns the impact of “neighboring rights” given to broadcasters. Inherent to the neighboring rights are two controversies critical to the distribution of digital goods. One is on the root of the rights. The grounds for neighboring rights of mere “distributors” are questionable because they do not require creativity, unlike copyright granted to creators. (Although neighboring rights includes those granted to performers, this literature focuses on those of broadcasters.) The other is on the policy of whether or not the neighboring rights should cover the act of uploading to servers for Internet distribution (or the “right to making transmittable” in the



concept of Copyright Law).

In my opinion, neighboring rights granted to broadcasters were simply the result of an overestimation of the function of broadcasting, which was a new medium of the time, and should be abolished in the Internet era. Further expansion of the right to “making transmittable,” would constitute a legal discouragement of integration and should be avoided.

### 5.3 Responsibility of Information Intermediaries for Content

With respect to the debates on the responsibility of information intermediaries (ISPs and others) for content, the United States, as an advanced Internet country, has several precedents. The discussions mainly scrutinize three cores: (1) obscene materials are posted on a website (discussions on this case are further divided into those concerning a case in which the intermediaries are aware of the situation and those concerning a case in which they are not), (2) pirated materials, and (3) libelous materials.

Some specific rules will be required for content responsibility with reference to these discussions (Matsui[1999]). But this article does not go into further details as Hayashi [2000a] offers an in-depth analysis on this issue.

### 5.4 Pulling Away from the Convoy System with a Lockstep Mentality

In relation to the points discussed above, the ambiguity and complexity of the regulation system produces a strong chilling effect, which enhances the uncertainty of business activities and deactivates the economy. For instance, some restrictions are currently imposed on L-mode Internet services developed by NTT East/West and on the distribution of NHK programs through an affiliate company to simply maintain equilibrium with other competitors.

It is only for the purpose of industrial coordination based on a false egalitarianism to emphasize peace in the industry by attenuating the forces of the strong. It contains no guarantee that it will serve users' interests (Hayashi[2001]) and it has ultimately encouraged the survival of the NTT Law and the Broadcast Law, also known as the NHK Law.

When business operations in the conformist “convoy” system made every player happy to a certain extent and were of some benefit to users, this harm was not fully recognized. But in the recent dog years featuring the development of new businesses based on self-responsibility, the drawbacks are becoming remarkable.

## 6. Gist and Basic Perspectives of the Proposal

### 6.1 Gist and Premise of the Draft Bill

Based on the foregoing considerations, I tried making a draft “A Bill Guaranteeing the Freedom of the Electronic Public Transmission Business and Prescribing the Minimum Regulations (abbreviated as the Electronic Public Transmission Bill)” as in the attached material to provide a basis for further discussions. As stated at the beginning, it has 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.

Let us confirm the basic views behind the draft before reading it:

- (1) The draft is for an “General Internet Law” as suggested in Plan D in Figure 2, in which Cd and Ct are separate from each other even in “broadcasting-type services.”
- (2) No better option could be found than Type P, according to which even electronic media can

- be operated without restrictions either in Cd or in Ct, if it could stand.
- (3) But unfortunately, the policy for a regulation-free environment for paper media cannot be directly applied to electronic media as is, something that is clear from the problem of the responsibility of ISPs discussed earlier in the literature.
  - (4) Thus, the draft bill restrictively provides for minimum restrictions on electronic media and also sets out exclusion clauses to ensure freedom of speech and safety in transactions.

## 6.2 Structure of the Draft Bill

Leaving the details of the draft to the attached material, this paragraph takes a brief look at the overall structure, which can be seen from chapter formation.

The general provisions in Chapter 1 consist of the purpose (Article 1) and the definitions of terms (Article 2). Short though it is, it covers the purpose and main concepts of the bill. Chapter 2 (rules on electronic public transmission services) sets out general rules that must be observed by everyone such as freedom of speech and prohibition of censorship (Article 3), protection of confidentiality (Article 4), freedom of reception (Article 5), prohibition of unauthorized access and related acts (Articles 6 to 8). “Freedom of reception” may sound unfamiliar but it is the only provision on reception, even though the whole bill sets out rules on transmission. Reference should be made to the fact that some progressive researchers take the view that the regulations for the protection of human rights formulated after World War Two, such as the Bonn Basic Law and Universal Declaration on Human Rights prescribes the “freedom of reception (or choice)” (Kimura[1999]).

Chapter 3 for the “obligations of electronic public transmission operators and electronic public transmission business operators” has prescriptions with a three-layer structure. The first layer is on what must be observed by all those who perform electronic public transmission as an occupation or as a job, namely securing essential transmission (Article 9) and requisite services (Article 10). On the second layer is the obligation of operators providing their services as a business to protect personal information (Article 11). And on the third layer is the obligation of business operators larger than a certain scale to guarantee open access (Article 12) and to make interconnection (Article 13).

Chapter 4 for The Electronic Public Transmission Commission contains three articles (Articles 14 to 16) that prescribe the authority and the organization of an independent administrative commission to replace the related bureaus and departments of the former Ministry of Posts and Telecommunications in the present Ministry of Public Management, Home Affairs, Posts and Telecommunications. However, as is discussed below, this chapter will have to be reconstructed to cover the control of wireless telecommunications, since the draft is incomplete with a focus on wired transmission.

Chapter 5 for “indemnification and penalties” consists of two articles (Articles 17 and 18) that provide for the immunity of service providers from liability and three articles (Articles 19 to 21) that prescribe penalties, mainly for a violation of regulations in Chapter 2. Given that there is no demarcation of responsibility established in this field, the draft could cause intense controversy and this is also one intention of the author.

At the end, “miscellaneous provisions” in Chapter 6 prescribes the exemption of application (Article 22), repeal of related regulations (Article 23) and substitution of terms for *mutatis mutandis* application of related regulations (Article 24).

## 6.3 From a “Telecommunications-Broadcast Integration Act” to an “Act on Freedom and Minimum Regulations on the Internet”

I had an unexpected experience in the course of drafting the bill. I intended to put forth a draft for a future Act on the Integration of Telecommunications and Broadcasting, but when it was

complete the draft turned out to be sort of a “Act on Freedom and Minimum Regulations on the Internet.” Thinking about it rationally, it is only natural, because the Internet is being considered unique in that it is not merely a third network outside the frameworks of “telecommunications” and of “broadcasting services” but it is something that subsumes both of them as well as integrates with each of them individually.

At the same time, I realized that there is some time difference between the processes. Computers and telecommunications are so integrated that they are almost synonymous to each other, as more than thirty years have passed since the convergence of the two fields got underway. On the other hand, it was only a few years ago that broadcasting-type services, or broadband transmission, became possible on the Internet. The development of this industry is a challenge for the future.

This means that to establish a legal structure that can uniformly control the integration of telecommunications, a text on “broadcasting-type services and the Internet” must largely depend on future discussions, although it is possible to make an immediate presentation of a draft as to telecommunications and the Internet. My paper has explored specific texts in the second domain but ended up leaving the issues in the first field to future discussion. Specifically, such regulations as the Wired Communication Law, the Telecommunications Business Law and the NTT law has been uniformly restructured while the Radio Law and the Broadcast Law has been set to be left untouched until they are replaced by the unified law in the second phase.

However, it was a significance experience to focus my endeavor on the Internet to introduce its innovative features into the law system. Although it is still far from refined, my plan has two pioneering aspects that can be described as “paradigm shifting.” One is that it has been reorganized centered on broadcasting-type services rather than on telecommunications services. The other is that the bill is designed to apply the same rules to all parties that provide the services, without any distinction between business operators and non-business operators.

#### 6.4 Personal Media as Part of Mass Media

We will now look at the first point. Telecommunications services and broadcast-type services originally have antithetical intentions in two aspects: first, two-way communications versus one-way communications and, second, personal media versus mass media. In my tentative proposal, they have been redefined to become somewhat closer to broadcast-type services, since the nucleus of “electronic public transmission” is “transmission” to the “public,” which is totally contrary to the concept of “specific telecommunications” set out in the Law on Limited Liability and Transmitter Information Disclosure for Specific Telecommunications Service Providers” (commonly called the “Provider Liability Law”).

Nevertheless, no “reception” is logically feasible without “transmission.” A single person can be “public” depending on the definition of the term. It was the Copyright Law itself that was the first to stipulate, “As used in this Law, ‘the public’ includes a large number of specific persons” (in Paragraph 5, Article 2). If it is extended, the above provision will be possible. In my own bill draft, with “acceptance of access” listed in the definition of “transmission” (Article 2), it can be considered to include a mode of reception. The point is that it is vital to take communication media that is open to everyone, even when there is eventually only a single recipient and that allows transmission to anyone as a means of “public transmission.”

Interestingly, this definition generates a legal reversal. In Japan, broadcasting has traditionally been part of telecommunications, but in the future personal media including wired communications are a part of mass media, or in other words “specific transmissions” is part of electronic public transmission.

Of course, the adequacy of this definition must be examined from different standpoints. For instance, France has a strong orientation to content-based policies on telecommunications and broadcast-type services from a cultural viewpoint, regarding them as “audio-visual” in addition to

industrial regulations. However, having predicated my discussion on a distinction between Cd and Ct since my previous academic contributions, I will retain this position for the time being.

Sensible readers might have already found out that the Radio Law, the Broadcast Law and the Cable Television Law are not listed in the above-mentioned laws to be repealed. They have to be kept intact since no consensus has been sufficiently established on how to reform the radio wave allocation. The repeal of these laws will be a focus of future discussion.

Not all factors are negative. For example, if broadcasting-type services are divided into the Cd segment and the Ct segment, the Cd part of the services can be operated under this loose regulation. The remaining part is to be placed under circumstances entirely free from restrictions as “content business.” This is exactly what the United Kingdom did to restructure the regulations for broadcasting businesses in early 90’s.

If broadcast-type services which used to be only part of the telecommunications services, become central, a number of overlooked problems come to the fore, such as a question over the regulations of content (such as fairness doctrine) and the neighboring rights of broadcasters after the introduction of a new Electronic Public Transmission Law and the repeal of the Broadcast Law.

In my view, based on a rigid distinction between Cd and Ct, the broadcasting business model will be incorporated into electronic public transmission, and neighboring rights will die out in course of time. Yet the broadcasting business model does actually exist and is unlikely to disappear in several years, to say the least. Therefore, very careful consideration will be required in an elaboration of transitional measures.

#### 6.5 Tripartite Classification: “Business Operators,” “Operators” and “Users”

The focus of this paragraph is the second point, which is on the non-employment of the concept of “business operators” as a central means of rules. In traditional practice, “business operators” were designated and certain regulations were imposed on the designated “business operators” to ensure the reliability, safety and affordability of services, whether they are in telecommunications or in broadcasting. The Telecommunications Business Law is literally designed to regulate the business and business operators. The Broadcast Law is in effect a business law, though it is not called a “Broadcast Business Law.”

But in the Internet era, the validity of “operator-based regulations” like these laws is questionable. They will remain effective, provided that the services or facilities on which the services are based have some scarcity and certain factors that can only be achieved by the business operators. In contrast, the world of the Internet features astonishing price reduction and progress in interface technologies that allow anyone to construct and operate networks (which I metaphorically dub “buying optical fibers in Akihabara”). The rise of LANs proves this fact, and wireless LANs are expected to rapidly grow in future.

In this situation, we should think that any distinction between business operators and users is almost meaningless and that the significance of a network now depends on its scale. In other words, from a legal perspective, the Wired Telecommunications Law and the Radio Law are more important today than the Telecommunications Business Law (though these laws are over fifty years old and will have to be thoroughly revised, since partial revision cannot adapt them to the current situation). From a business perspective, it can be said that the construction and operation of networks can now be made on a do-it-yourself basis.

At any rate, networks are expected to evolve into “networks of networks” (from which the term of “Internet” derives), with a blending of various types: some are operated by business operators while others are operated by users, some are fee-based while others are free of charge, some are exclusive while others are open to the public, and some are owned while others are leased. I feel proud to present a bill draft that slightly foresees this transition.

Notwithstanding this, it also raises new questions. Although the attached material has a

classification into three types of operators: electronic public transmission operators that provide electronic public transmission services as an occupation or as a job, electronic public transmission business operators, which are electronic public transmission operators providing their services as a business, and users, the difference between them is less and less clear. In fact, the distinction between “as a business,” “as an occupation” and “as a job” is not necessarily definite, and the most basic concepts including “computer” and “access” are not defined in the legal world (see the “Unauthorized Computer Access Law.”)

But in legal terms, clear definitions are required if a distinction in categorization leads to differences in rights and obligations. Pondering how to solve this dilemma, I have yet to reach a conclusion. As an extension of the idea, it will be worth consideration the establishment of a new law based on the Wired Telecommunications Law (controlling wired communications facilities installed by users).

## **7. Self-Evaluation and Problems Left Unsolved**

If I may assess the bill draft on my own, I think that it substantially relaxes or abolishes regulations because, given that it has no added restrictions (apart from the argument that freedom of reception restricts rights of transmission), it relaxes the regulations on Cd regarding the Type B media, subject to tight restrictions both on Cd and on Ct, to the level of those for the Type C media or its variant Type C’ only if separation between Cd and Ct (or the “separation between hardware and software” as it is called in the broadcasting industry) is implemented.

The draft has only 24 articles, though it may need some more to prescribe the independent administrative commission. In comparison, the total number of articles in the laws to be repealed by the bill exceeds 150. The draft can be therefore considered to sufficiently respond to the trends towards simplification and deregulation. Rather, what must be assessed is whether the prescriptions will guarantee freedom or impose more than the minimum restrictions.

As stated above, I have designed the bill draft to protect freedom as a principle of the maximum development of the Internet and to prescribe the minimum required rules in order to prevent provisions for stricter regulations. Yet the constitution of law always involves a risk of inducing further regulations by prescribing regulations. The examples of the Communications Decency Act (CDA) and the Child On-line Protection Act (COPA) in the United States, both of which were confirmed as being partly unconstitutional, underpin my anxiety. My draft is not immune from this risk and therefore requires broader checking.

I feel I have learned a lot from an in-depth examination, though at that same time, as an academic, I cannot help but feel anxious that my exploration should have gone no further than the philosophy of the law, keeping away from the legislation process. A typical regret of this kind can also be found in the position of the distinguished American scholar Professor Noam[1995) “Principles of the Communications Act of 2034.

In addition to the basic issues discussed above, there are many other questions left unanswered. They include the following:

- (1) Establishment of an independent administrative commission that deals with settlement of the conflicts described above, as well as “Right of Way,” such as radio wave administration and road occupation as its main coverage. My Plan D envisions establishment of an “Electronic Public Transmission Commission” as such a commission.
- (2) A problem similar to that mentioned in 6.5 over the distinction between Right of Way and Cd.
- (3) Ex-post facto treatment or transitional measures to respond to a situation in which public utility privileges are no longer guaranteed due to the disappearance of prescriptions on “Use of Land” in Chapter 3 (Article 73 and below) of the Business Law when it is repealed before enforcement of a Right of Way Law.
- (4) Whether the bypassing of the provision in Article 108 of the Radio Law regarding the

transmission of obscenities (based on the idea for application of the penal law as a general law) and the abolishing of provisions for attempted offenses in Articles 19 to 21 (while attempted offenses are prescribed only on “hindrance to electronic public transmission” and on a “breach of secrecy in specific transmission” in the existing law) with a view to integration of penal provisions is found to be appropriate from the viewpoint of the protection of human rights or inappropriate because of the increased public nature of electronic transmission services. This needs careful study.

- (5) The sequence with which the laws are repealed and transitional measures when it is inevitable that some of them are repealed simultaneously while others are repealed with a time lag.
- (6) Coordination or integration with recently enacted laws. The draft has the ‘Unauthorized Computer Access Law’ incorporated but there are some other laws to be studied, such as the “Entertainment and Amusement Business Moderation Law,” the “Law on Broadcasting using Telecommunications Services,” and the “Law on Limited Liabilities and Transmitter Information Disclosure for Specific Telecommunications Service Providers.”

Consequently, my draft is not entirely based on Plan D. Although it is centered on Plan D, it also has one feature from Plan A (adoption of a comprehensive concept of “public transmission” derived from the Internet) as well as an element of Plan B (enactment of the “electronic public transmission law” with loose regulations to cover business operators escaping from other regulations as in the Broadcast Law).

In relation to the above trichotomy of Types P, C and B, it can be said that it is mainly based on Type C, with some aspects of the mass media adopted. My study will continue.

#### (Acknowledgements)

Special thanks go to Professor Masao Horibe for his incentive to this contribution (especially to the bill draft) and to Mr. Jiro Makino, Attorney at Law; Professor Shigeki Matsui and Mr. Tomoki Tsubota, who hosted the panel, for their valuable comments at the Glocom Forum. I would also like to give my thanks to the members of Study Group for the Comprehensive Media Industry Act and of the Study Group on Telecommunications and Broadcasting for their remarks in the process of my elaboration. Of course, the ultimate responsibility for the content rests with me.

#### (Bibliography)

- Firestone, Charles, M. and Jorge Reina Schement [1995] “Toward an Information Bill of Rights and Responsibilities” The Aspen Institute
- Hayashi, Koichiro [1998] “Networking—the Economics for the Information Society” NTT Publishing (in Japanese)
- Hayashi, Koichiro [2000a] ‘A Proposal for the Comprehensive Media Industry Act’ “Media Communication” Keio University (in Japanese)
- Hayashi, Koichiro [2000b] ‘Comments regarding the competition policy in telecommunications to promote IT Revolution’ submitted to MPT on September 14, 2000  
<http://www.glocom.ac.jp/users/hayashi/comments.html> (in Japanese)
- Hayashi, Koichiro [2000c] ‘Comments on the first draft of the Telecommunications Council on competition policy in telecommunications’ submitted to MPT on November 29, 2000  
<http://www.glocom.ac.jp/users/hayashi/comments.html> (in Japanese)
- Hayashi, Koichiro [2001] ‘Comments on the points at issue regarding NHK’s subsidiary companies’ submitted to MPT on October 31, 2001  
<http://www.glocom.ac.jp/users/hayashi/comments.html> (in Japanese)
- Hayashi, Koichiro [2002] ‘Internet and Unregulation Policy’ in K.Hayashi and N.Ikeda(eds.)”Policy

Agenda toward the Broadband Era” Toyo-keizai (forthcoming) (in Japanese)  
Kimura, Jungo[1993]”Information Policy Law” Toyo-keizai (in Japanese)  
Kumon, Shumpei[1988]”Networked Society” Chuo-koron (in Japanese)  
Copyright Study Group at Agency of Culture and IPR Office at MITI[1999] ”An Introduction to the amended Copyright and Unfair Trade Law” Yuhikaku (in Japanese)  
Makino, Jiro[2000]’Content and Link Regulations in the Internet’ in K.Hayashi, J.Makino and J.Murai (eds.) “IT-2001: What are the Problems?” Iwanami-shoten (in Japanese)  
Matui, Shigenori[1999]’Expression in the Internet and Freedom of Speech’ in K.Takahashi and S.Matui(eds.) “Internet and Law” Yuhikaku (in Japanese)  
National Computer Board [1995] “Title ? :Communications Act Reform” iitf.doc.gov  
Noam,Eli M. [1995] “Principles for the Communications Act of 2034: The Superstructure of Infrastructure” Federal Communication Law Journal Vol. 47.2  
Werbach, Kevin [2000] “Layered Model for Internet Policy” Paper presented to TPRC (Telecom Policy Reseach Conference)