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THE TECHNOLOGY,  
MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

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THIRD EDITION

EDITOR  
JOHN P JANKA

LAW BUSINESS RESEARCH

# THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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THIRD EDITION

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Editor  
JOHN P JANKA

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## EDITOR'S PREFACE

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The digital revolution continues to alter both local culture and the world in ways that few could have imagined when the seeds of the Internet were sown more than 40 years ago. The Internet allows ideas, news and other information to flow more freely than ever before, making it increasingly difficult for nations to control this flow at their geographical borders. Moreover, the Internet is forcing changes in many long-standing business models. It now serves for many as the preferred means of communication and media delivery, displacing or supplementing other means, such as traditional copper phone service, print media, subscription TV services and broadcast networks, in the process. The Internet now also serves as a new marketplace for goods and services, as well as a primary research tool for many.

New technologies place into our hands more computing power than was used by astronauts when the Internet was in its infancy. The proliferation of these mobile devices – smartphones and tablet computers – leads many to employ texting, e-mail and blogging instead of communicating by the spoken word. We expect to have constant access to the networks that we use in this manner to stay in contact with our social circles and the rest of the world. And our most intimate thoughts are often now memorialised for the long term, in ways that can be potentially used by third parties for purposes we have not truly anticipated.

The legal frameworks in many jurisdictions are now straining under these disruptive changes. The old adage that technology outpaces the law is more true today than ever. No doubt, the ‘hands-off’ approach to the Internet that many lawmakers and regulators once took has facilitated many of these developments. At the same time, policymakers are now struggling with new types of concerns, as broadband Internet access service becomes more and more essential to our lives. Is the marketplace responding to the needs of consumers? Are broadband networks being deployed everywhere that they are needed? Are the capabilities of those networks adequate? If not, how should government ensure that none of its citizens is left behind? Is it appropriate for government to invest in broadband infrastructure in a manner similar to its historical investment in roads,

bridges, and other critical infrastructure? Is it fair to liken broadband service to a utility, or does the state of competition make that an unfair analogy? Can government provide the best overall solution, or should it just fill in any infrastructure 'gaps' not closed by commercial providers? Should government establish 'ground rules' upfront, or should it intervene when it perceives that abuses of market power exist? How does government avoid skewing the competitive marketplace by (inadvertently or otherwise) preferring one type of technology over another and thus effectively picking the winners and losers who otherwise might emerge in the marketplace, and challenge the incumbents? Who are the new 'gatekeepers' in the Internet broadband distribution chain, and is it enough to focus on regulating the network operators when others further up the chain, such as application service and equipment providers, have more influence than ever before on what information we access and how we access it?

This expectation of instant and continuous mobile connectivity, and the development of bandwidth-intensive 'apps', create an increasing demand on the limited radio frequency spectrum asset. While digital technologies allow more efficient use of spectrum than ever before, the laws of physics still render some spectrum bands more valuable than others for mobile communications. The demand for wireless spectrum outstrips the supply in many markets, and regulators are increasingly being forced to 'refarm' spectrum bands that were designated for other purposes before the mobile broadband revolution was a glimmer in anyone's eye.

This third edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern these types of issues in 29 jurisdictions around the world. Although the authors cannot fully address each of these topics in the following articles, we hope this book provides a helpful framework for starting your analysis.

**John P Janka**

Latham & Watkins LLP

Washington, DC

September 2012

# LIST OF ABBREVIATIONS

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3G	Third-generation (technology)
4G	Fourth-generation (technology)
ADSL	Asymmetric digital subscriber line
ARPU	Average revenue per user
BIAP	Broadband Internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services
FTTC	Fibre to the curb
FTTH	Fibre to the home
FTTN	Fibre to the node

*List of Abbreviations*

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FTT <sub>x</sub>	Fibre to the <i>x</i>
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD-PCOs	Subscriber trunk dialling-public call offices
UAS	Unified access services
UASL	Unified access services licence
UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation

*List of Abbreviations*

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UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over Internet protocol
WiMAX	Worldwide interoperability for microwave access

## Chapter 12

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# JAPAN

*Hiroki Kobayashi, Richard Fleming, Saori Kawakami and Chiyo Toda<sup>1</sup>*

### I OVERVIEW

2012 has marked significant expansion of Japan's media and telecommunication infrastructure. Developments were seen in areas of telecommunications and Internet access, broadcast spectrum policy and finalisation of the switchover from analogue to digital television broadcasting. However certain challenges have impeded progress, such as the lack of a fair and transparent auction system for new digital broadcast bandwidth. Japan has now instituted policies and procedures designed to overcome these challenges and allow for smoother and faster expansion and integration of new technologies.

The conversion from analogue television to digital broadcast that began in 2011 has opened up large segments of the broadcast spectrum for other media, including wireless broadcast such as the Mobacas mobile phone broadcast system, which began broadcasting digital content on mobile phones in the past year. In addition, Japan's Ministry of Internal Affairs and Communications ('MIC') held auctions in 2011 for some of this newly available bandwidth. Japan's largest mobile broadcasters took part and the winning bidders are now building new technologies and services on these new resources. The criteria used to award the winning bid under the auctions was not, however, made clear to the bidders in advance and was criticised as being opaque and based on factors determined at MIC's own discretion. An amendment to the relevant regulations, scheduled to go into effect next year, is expected to bring more transparency to the auction system starting next year, where bids will be determined primarily on the highest bid price.

Over recent years, regulators and corporations have built momentum in the development and expansion of digital media. Although the introduction of new

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<sup>1</sup> Hiroki Kobayashi is a corporate partner, and Richard Fleming, Saori Kawakami and Chiyo Toda are transactional associates at Latham & Watkins Gaikokuho Joint Enterprise.

technology has brought with it some challenges and criticism, significant progress has been made and the pace seems to be quickening. The next few years will show whether the regulatory and corporate framework that is now in place will continue to adapt in order to further develop and deliver new technology and content to the Japanese public.

## **II REGULATION**

### **i The regulators**

MIC's broad authority to regulate telecommunications and broadcasting derives from statutes, which are the ultimate source of law in the telecommunications and media sectors in Japan. The core statutes are:

- a* the Wire Telecommunications Act, which governs facilities for wired signal transmission, such as wired telephony, wired broadband networks and cable television;
- b* the Radio Act, which governs facilities for wireless signal transmission, such as mobile phones, terrestrial and satellite television broadcast infrastructure and high-powered Wi-Fi networks;
- c* the Telecommunications Business Act, which regulates telecommunications and media businesses; and
- d* the Broadcast Act, which regulates the content that telecommunications and media businesses carry or provide.

The Broadcast Act and the Radio Act were amended in November 2010 to provide for a streamlined broadcast licence regime, including the separation of broadcasting licences from transmission licences.

Prior to the amendment, general broadcasting licences, cable radio broadcasting licences, CATV broadcasting licences and licences to broadcast through third-party facilities were granted by MIC under different statutes using different procedures. Under the amended Acts, the statutory licensing provisions for these activities are consolidated into the Broadcast Act and the Radio Act, and broadcasting is divided into two major licensing categories: Main Broadcasting, consisting of terrestrial broadcasting, and broadcasting through broadcasting and communication satellites located over 110 east longitude and Regular Broadcasting, consisting of broadcasting through other satellites, CATV and IPTV.

Also, prior to the amendment, terrestrial broadcasting licences were granted only to broadcasters that provided their own broadcast content and operated the wireless transmission facilities used to distribute it. Under the amended Acts, broadcasters are now able to distribute their programming through third-party terrestrial wireless transmission facilities, just as they already were permitted to distribute their programming through third-party satellites and third-party cable television providers.

The reforms are expected to lessen the regulatory burdens on telecommunications and broadcasting companies, to provide flexibility to the management of those companies and to open up competition by decoupling the ownership of broadcasting facilities from the production of broadcasting content.

**ii Regulated activities**

MIC exercises its regulatory power in numerous ways. MIC has the authority to grant broadcasting licences (for facilities such as television and radio stations that produce or broadcast media content), wireless transmission licences (for mobile phones and facilities such as mobile phone base stations and satellites) and telecommunication business licences (for traditional wired communications as well as mobile phone providers and ISPs), and monitors the businesses conducted with such licences.

MIC also allocates radio spectrum and has adopted detailed regulations to monitor and establish technical standards applicable to spectrum users and their licensed facilities and businesses. MIC's decision-making process in exercising this authority has often been criticised as opaque and arbitrary. For example, the allocation of radio spectrum to private sector users is based on the 'overall judgement' of MIC, not on any clear set of factors, leaving applicants unsure of what is required and opening MIC to accusations of favouritism or political manipulation.

Taking these criticisms into consideration, in March 2011 MIC organised a study group to discuss the implementation of a radio spectrum auction system. In March 2012, a bill on radio spectrum auctions was submitted to the Japanese legislative body and is currently under deliberation (further discussed in Section IV, *infra*).

**iii Ownership and market access restrictions**

Foreign ownership and management of broadcasting licence holders, wireless transmission licence holders and Nippon Telecommunication and Telegraph Corporation ('NTT'), the semi-privatised national telecommunications service provider, is restricted by statute.

As discussed in Section II.i, *supra*, the Broadcast Act and the Radio Act, each amended in 2010, now divide broadcasting into two categories: Main Broadcasting and Regular Broadcasting. Under the Acts, no licence for Main Broadcasting may be held by or granted to a foreign national, a foreign entity, or a Japanese entity that has either a non-Japanese director or 20 per cent or more of its voting shares directly owned by foreign nationals or entities. Further, indirect foreign ownership of 20 per cent or more through a subsidiary or affiliate is not permitted for terrestrial (non-satellite) Main Broadcasting licences. If foreign nationals or entities acquire 20 per cent or more of the voting shares of a Main Broadcasting licence holder, the licence will be cancelled. To avoid cancellation, any Main Broadcasting licence holder whose shares are traded on a stock exchange is permitted by statute to refuse to recognise the transfer of its shares if the transfer would cause it to violate foreign ownership restrictions. In contrast, foreign investment in Regular Broadcasting licence holders is not restricted. As a result, several foreign-owned broadcasters now broadcast into Japan through cable television and third-party satellites.

Ownership of multiple broadcast outlets is also restricted by the Broadcast Act and related regulations. This restriction on the concentration of ownership is intended to support press freedom and diversity of speech in broadcasting. The restriction includes limits on ownership of shares in, and board seats of, multiple broadcasting licence holders, as well as upper limits on the use of satellite transponder capacity. However, in response to worsening business conditions for radio broadcasters, MIC amended its regulations in 2011 to relax cross-ownership restrictions on radio broadcasting licence

holders, allowing entities to control up to four licence holders. Cross-ownership of newspapers and broadcasters has not been restricted in Japan. Newspaper companies often hold large ownership stakes in broadcast companies – in fact, each major private Japanese television broadcast network is affiliated with a major newspaper.

#### iv Transfers of control and assignments

In addition to foreign ownership and management, and cross-ownership limits, MIC approval is required for mergers and acquisitions that result in a new entity holding Main Broadcasting or wire transmission licences. Therefore, a statutory merger involving a licence holder or the divestiture of a business conducted under a licence generally requires MIC approval. The MIC review is primarily to determine whether the transferee of a licence would be eligible to independently qualify as a new licensee.

Further, pursuant to Japan's Foreign Exchange and Foreign Trade Act, certain acquisitions of shares in broadcasting licence, wireless transmission licence and telecommunication business licence holders by non-Japanese parties are subject to prior filing and waiting periods.<sup>2</sup> Ordinarily, this is a *pro forma* requirement where no national security concerns are present.

### III TELECOMMUNICATIONS AND INTERNET ACCESS

#### i Internet and Internet protocol regulation

In Japan, MIC regulates Internet and IP-based services (such as high-speed Internet and VoIP), along with wired telephony and mobile phones, under the Telecommunications Business Act.

The Act and the regulations thereunder emphasise protection of the secrecy of communications, and the reliable and non-discriminatory provision of telecommunication services.

The Telecommunication Business Act not only regulates service providers that operate their own network facilities but also regulates service providers that provide services to facilitate telecommunication between users, but do not operate their own network facilities, such as dedicated hosting services on which clients can operate an email server. Internet-based services that are not designed to facilitate telecommunication, such as Internet banking and Internet-based newsletter and media subscriptions, are not considered to be 'telecommunication' and therefore are not regulated under such Act.

Telecommunication regulations, in combination with antitrust law, also facilitate competition among telecommunication service providers. Because providers can become dominant to the exclusion of new entrants once their network or technology standard has been adopted by a critical mass of users, MIC and the Japan Fair Trade Commission have jointly adopted guidelines to regulate unfair competitive practices by providers that

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2 Regulated transactions include (1) an acquisition of 10 per cent or more shares in such licence holder whose shares are traded on a stock exchange or over-the-counter market and (2) an acquisition from a Japanese party of any shares in such licence holder whose shares are not traded on a stock exchange or over-the-counter market.

have high market shares. For example, such guidelines state that it would raise antitrust issues if a telecommunications service provider, such as a mobile phone carrier, with a high market share contractually restricts its customers from switching to another service provider or charges an excessive cancellation fee.

Japan's mobile phone carriers, such as NTT DOCOMO, KDDI and SoftBank, each has its own optional basic fee discount service, which imposes a cancellation fee on customers other than during a one-month termination period that occurs every two years. In 2010 and 2011, a consumer group filed a claim against these mobile phone carriers, alleging that such cancellation fee violates the Consumer Contracts Act and is thus void on the ground that the termination fee abusively harms consumers' interests, and is a penalty exceeding reasonable damages arising from the termination. In March 2012, the Kyoto District Court rejected the claim against NTT DOCOMO, and the consumer group has appealed. In July 2012, however, the court upheld the claim against KDDI determining that the termination fee imposed during the final two months of the contract term exceeded the damages estimated by the court to have been incurred by KDDI during such term, and required KDDI to refund the excess amount. KDDI appealed, and both cases are pending at an appellate court.

MIC does not regulate technical standards for Internet protocol, but part of its mandate is to enhance Japan's information and technology infrastructure. In 2003, MIC established a study group to facilitate the transition from Internet Protocol version 4 ('IPv4') to Internet Protocol version 6 ('IPv6') and in 2007, MIC issued guidelines to encourage governmental entities to prepare for IPv6 within one year.

In April 2011, the Asia Pacific Network Information Centre, which is responsible for Internet resource allocation and registration services within the Asia-Pacific region, announced that the pool of IPv4 addresses was nearly exhausted and encouraged the deployment of IPv6. Since then, NTT East and NTT West (Japan's fibre-optic network providers), ISPs and virtual network enablers ('VNEs') have been taking full-scale measures to adopt IPv6. As of March 2012, approximately 41 per cent of the ISPs are either providing or testing IPv6, up from 10 per cent the previous year, but a problem arose in 2012 due to NTT East's and NTT West's allocation of IPv6 address to end users for intra-network services but excluded Internet access. End-user attempts to access IPv6 websites failed and systems automatically executed fallback operations to re-access the websites through IPv4 addresses. This caused access latency, lower throughput and termination of TCP connections.

In order to cope with this issue, NTT East and NTT West disconnected all connections using IPv6 addresses by having ISPs utilise authentication, authorisation, accounting, and routing filters (AAAA filters), so end users only access IPv4 addresses. This has substantially improved the access latency, but since the goal is to facilitate the transition to IPv6, the only viable long-term solution is for end users to either subscribe to VNE's service bridging NTT's network and Internet through IPv6, or purchase a router that enables tunnelling of IPv6 through NTT's IPv4 network.

NTT East, NTT West, ISPs and VNEs are continuing to work together to facilitate the transition to IPv6 by streamlining the subscription of VNEs service and lowering the cost to purchase and install routers. These IPv6 promotions are supported by MIC by tax deductions, but, despite such efforts to facilitate IPv6, its adoption has been slower than anticipated.

**ii Universal service**

Under the Telecommunications Business Act and the NTT Act, NTT group must provide wired telephony service (analogue or IP over optical fibre) in all areas in Japan. There is no similar law requiring universal broadband service.

To encourage private companies to construct broadband infrastructure, in 2004, MIC announced its u-Japan strategy ('u' for 'ubiquitous'). One goal of the initiative is the construction of nationwide broadband infrastructure, wired and wireless as appropriate, with a target date of March 2011 for 100 per cent coverage. In 2006, the government began to subsidise capital expenditure by private companies for the development of broadband infrastructure, and to provide tax benefits and low-interest financing for such projects. The u-Japan strategy has been quite successful in facilitating the extension of broadband access to Japan's population centres. Even with subsidies, however, private companies have been hesitant to build the infrastructure required to provide broadband service to Japan's isolated islands and mountainous areas. The government estimates that for 110,000 households, satellite is the sole practical means of providing broadband services. In 2009, local governments launched programmes to subsidise the purchase of equipment to receive satellite broadband service in such areas. With such direct governmental assistance for the 'last mile' of broadband coverage, MIC announced that 99.5 per cent broadband coverage had been achieved as of September of 2011. High-speed broadband (optic and 30Mb/s or faster cable (download)) coverage is expected to reach 95.1 per cent for over 50.74 million households by September 2012.

Despite these infrastructure improvements, many Japanese have not taken advantage of improved broadband access. In 2011, the number of broadband service subscribers grew by 13.1 per cent to 39.5 million subscribers. Still, approximately half of all Japanese households have not yet subscribed to broadband Internet service. The Japanese government estimates that if all households were to adopt broadband Internet, annual consumption would increase by as much as ¥8.7 trillion, or 1.5 per cent of GDP. The Japanese government has instituted a policy to enrich broadband applications and services in order to expand the demographic profile of Japan's Internet users.

**iii Restriction on the provision of service**

Under the Telecommunications Business Act, prices charged to end users by NTT East and NTT West (together, 'NTT') for wired telephony services and pay-phone services are subject to a cap determined by MIC. This is to prevent these companies from abusing their near monopoly power over these fundamental services and encourage them to improve efficiency. Prices charged by NTT for certain services including optic data services are subject to prior notification obligations to MIC. If MIC finds the pricing scheme inappropriate because it is anti-competitive or otherwise significantly unreasonable, MIC may require the carrier to change the pricing scheme. Otherwise, prices charged to end users of telecommunications services and other terms of service are not regulated.

As a general rule, all telecommunication business licence holders must provide access to any other carrier that seeks to interconnect with their network. However, prices for, and methods of, interconnection are areas of public controversy and regulatory scrutiny. Telecommunications companies, including SoftBank, have pressed for greater

access to NTT's infrastructure, including its optical fibre network. NTT only provides access to its fibre-optic network on a bulk basis, for what they describe as technical and economic efficiency reasons. SoftBank has argued that it is technically possible for NTT to provide third-party access for smaller volumes without unreasonable expense, and that such access would increase efficiency and promote competition. In early 2011, NTT proposed, and MIC approved, plans to reduce the prices to be charged for interconnection with its respective fibre-optic lines by 30 per cent over the next three years in response to pressure from SoftBank and other private telecommunications providers. In May 2011, access to SoftBank's own network became an issue when NTT DOCOMO made a filing for governmental mediation for the first time, alleging lack of transparency of SoftBank's pricing for interconnection to its mobile networks.

In connection with expansion of the nation's fibre-optic network in the future, SoftBank has proposed that NTT spin off their copper and optic networks that reach end-users to a new joint venture formed by the government and major carriers including NTT and Softbank, so as to make the networks available equally to all carriers and accelerate the replacement of the copper wire network with fibre-optic networks. However, the government's task force turned down this proposal and recommended to the government a less drastic approach to segregate NTT's copper and fibre-optic operations with operational firewalls. On 30 November 2011, the amended Telecommunication Business Act became effective, which imposes regulations requiring such operational firewalls. In exchange, the NTT Act was also amended in a manner that streamlines NTT's ability to expand its telecommunication services. Rather than requiring a licence to expand beyond regional services, the amended NTT Act now only requires NTT to file before such expansion.

#### **iv Security**

In keeping with Japan's constitutional protection of the freedom of speech and the secrecy of communication, the Telecommunication Business Act prohibits ISPs from censoring or infringing on the privacy of communications passing through their networks.

As a general matter, the Law Concerning the Protection of Personal Information ('the Privacy Act') protects personal information or data that can be used to identify specific living persons, and generally applies to any entity that gathers the personal information of 5,000 or more individuals. Under the Privacy Act, such entities are required to publish a 'purpose of utilisation' regarding their use of personal information. Personal information incorporated into a database must be kept accurately, and necessary and proper measures to maintain its security must be instituted. Any person about whom personal data is kept in a database for more than six months has a right to request access to the data, and add to, modify or delete it.

Further, MIC has issued Privacy Act guidelines that are specific to telecommunications businesses. Since MIC guidelines also take into account the obligations of telecommunication business licence holders to preserve the secrecy of communications, they provide for a more stringent data protection regime than would apply under the Privacy Act alone. MIC guidelines generally prohibit telecommunication businesses from collecting information related to race, religion, disability or other attributes that may form a basis for discrimination. The guidelines also require such licence

holders to specify what length of time they intend to retain personal information and to delete any personal information after the expiry of such period. Under MIC's Privacy Act guidelines, information related to persons making or receiving communications, such as usage history, identity, and user location, may only be disclosed to third parties in very limited circumstances, such as pursuant to a search warrant. In addition, MIC's Privacy Act guidelines were amended on 2 November 2011, allowing telecommunications business providers to (1) provide users' locational information to third parties only if they have the user's consent, a search warrant or any other justification, and (2) obtain a user's locational information pursuant to law enforcement agencies' requests only if a warrant is issued and the user is put on notice.

ISPs are not currently required to proactively delete content that infringes upon the intellectual property rights or privacy of others. However, the Internet Provider Liability Limitation Act, enacted in 2001, provides a safe harbour for ISPs that delete such content. Under the Act, no ISP may be held liable for the deletion of content on its network if the ISP reasonably believes that such content infringes the intellectual property rights or privacy of others, or a third party alleges such infringement and the sender of the content does not respond to the ISP's inquiry within seven days. ISPs are further protected by the Internet Provider Liability Limitation Act, which shields ISPs from tortious liability for failing to delete infringing content. In reliance on this statutory defence to liability, ISPs generally do not take steps to monitor the content passing through their networks. The Act does, however, authorise persons whose rights are infringed by content delivered over the Internet to demand information regarding the sender of the content from ISPs, so that legal action may be taken against the sender. However, as a practical matter, it is often not possible to identify the original sender of such infringing content where content passes through multiple networks.

A statute for the protection of children from harmful Internet content, known as the Youth Internet Environment Act, became effective in April of 2009. The statute directs governmental bodies to improve Internet safety for juveniles (under the age of 18) by encouraging ISPs to use technologies that limit juvenile access to harmful content. The statute targets content glorifying crime or suicide, obscene sexual content, and other depictions of extreme violence or cruelty. The statute further exhorts parents to monitor their children's Internet use, and to limit access to inappropriate content by using filtering software and other measures. The statute requires mobile network service providers to filter Internet content for customers that are juveniles, except where a parent has expressly requested that filtering not be used. Also under the Act, from April 2010, manufacturers of devices with Internet connectivity (other than mobile phones) are required to pre-install filtering software or otherwise facilitate the use of third-party filtering software or services. In Japan, cyber crime has long been an area of public concern. In recent years, law enforcement has focused efforts to combat cyber crime on (1) computer hacking through the unauthorised use of IDs and passwords, and other attacks on security holes, (2) the distribution of computer viruses, and the input of data and unauthorised commands that can cause damage to computers and data, and (3) other types of crimes facilitated through the Internet, such as drug trafficking, prostitution, fraudulent Internet auctions and child pornography.

Combating the distribution of child pornography has been an area of particular scrutiny and public interest. The Act on Punishment of Activities Relating to Child

Prostitution and Child Pornography and the Protection of Children (‘the Child Pornography Prohibition Act’), originally passed in 1999, prohibits the distribution of child pornography. This Act was amended in 2004 to outlaw the uploading and distribution of child pornography over the Internet. Lawmakers have proposed further amendments to the Act to criminalise the possession of child pornography images and to require ISPs to block child pornography. The amendment has not yet passed due to concerns that it could lead to broader censorship of Internet content. Even without the passage of the amendment, major ISPs began to voluntarily block access to child pornography sites in April 2011, following a recommendation by the an interagency working group of the Japanese government. Although the Child Pornography Prohibition Act requires ISPs to block the URLs of child pornography sites, child pornography users bypass the URL blocks by directly inputting IP addresses. In July 2012, a Japanese pornography provider, using servers in the United States that users accessed by inputting the IP address, was arrested by both the US Department of Homeland Security and Japanese police.

The National Police Agency is responsible for Japan’s information security. It established a cybersecurity department in 1997, and issued a comprehensive information security policy in 2000. In 2001, the National Police Agency also established a cyber terrorism department, known as the Cyber Force Centre, which monitors network information flows from nine offices around Japan. In 2005, the Cyber Force Centre became a member of the Forum of Incident Response and Security Teams, an international information sharing network for computer incident response organisations.

Beyond the authorisation of day-to-day monitoring and information gathering carried out by the National Police Agency, Japan has no laws directly addressing issues of national security in cyberspace. However, a white paper published in August 2011 by the Ministry of Defence prominently addressed the importance of cybersecurity, stating: ‘Cyber attacks on the information and communications networks of governments and militaries as well as on important infrastructure significantly affect national security. Japan must continue to pay attention to developments in cyberspace threats.’ The Ministry of Defence has also established a systems command within the self-defence forces and this year created a new high-level post to formulate responses to the threat of cyber attack. The Ministry of Defence also reports that it is taking additional steps with respect to training and personnel in order to increase readiness for computer attacks that threaten Japan’s national security. Despite its efforts, in June 2012, the Supreme Court and several other government offices were attacked by the international hacking group Anonymous in protest of the enactment of a bill to impose criminal penalties on unauthorised downloading. The Cyber Incident Mobile Assistant Team (‘CYMAT’) was established under the National Information Security Center. CYMAT is the first organisation to gather personnel from every Japanese ministry to support governmental organisations to address information security incidents.

## **v Cloud computing**

After the 2011 earthquake, more Japanese companies are seeking data centre services and cloud computing to protect business continuity during disasters. The percentage of companies using cloud computing increased to 21.6 per cent from 14.1 per cent in 2010; however, permanent data loss caused by First Server, a subsidiary of Yahoo! Japan,

has revealed vulnerabilities in cloud computing. The data loss incurred by some of First Server's clients has made it difficult for some of them to stay in business. To make matters worse, First Server's terms of service cap data loss compensation, even in the case of gross negligence, at the price paid by the customer, and includes a disclaimer for damage caused by failure of the client to back up its own data.

## **IV SPECTRUM POLICY**

### **i Development**

The need for spectrum has steadily increased with the proliferation of new technologies utilising wireless data transmission. The number of licensed wireless stations and devices increased from 3.8 million in 1985 (a majority of which were for amateur radio stations and handheld two-way radios), to 134 million in March 2012 (over 98 per cent for mobile devices).

MIC describes its decision-making process on spectrum policy and allocation as open and collaborative – including consultations with the public, scholars and industry experts. However, MIC decision-making has been criticised by some as arbitrary and opaque. This has led to some calls for spectrum auctions as a fairer method of allocation.

### **ii Flexible spectrum use**

When MIC grants a wireless transmission licence, the authorised use of the transmission station or device and the spectrum that is allocated for its operation are specified. The term of the licence is in most cases five years, during which MIC does not generally permit a change of the specified use. MIC's rationale for this approach has been that licences are granted only after a finding that the specified use is consistent with public policy. Therefore, any change to the licence requires MIC's *de novo* review.

Such inflexibility by MIC during a time of rapid change in wireless technology has had the effect of hindering the efficient use of allocated spectrum by licence holders who, for example, may wish to use a satellite for both broadcasting and telecommunications, or use a terrestrial broadcast station for television broadcasts instead of radio. To address this concern, the amendments to the Broadcast Act in 2010 authorise MIC to grant licences that allow for multiple uses (i.e., different types of broadcasts or both broadcasting and telecommunications) from a single facility.

### **iii Broadband and next-generation mobile spectrum use**

Following the general discontinuation of analogue television broadcasts in 2011, the digital television broadcasts that replaced them occupy a much narrower spectrum band. The remaining spectrum will be reallocated to wireless broadband to meet the recent explosion of demand, including Mobacas, a next-generation platform for multimedia broadcasting exclusively to mobile devices, as well as independent transmission for police, fire departments and local governments and 'intelligent transport systems' where the spectrum will be used for communication among vehicles or between vehicles and roads to prevent traffic accidents.

The Radio Act was amended in 2011 to accelerate spectrum reallocation. Under the amended Radio Act, a wireless transmission spectrum licence applicant is required

to provide a plan to cover costs of implementing the reallocation of that spectrum, including reconfiguring wireless stations currently utilising such spectrum for a different spectrum. In December 2011, MIC announced the licence requirements for the 900MHz band, which is known as the 'platinum band' for its ideal mobile telephone propagation properties and indoor coverage quality. All four major Japanese mobile telephone companies, eAccess, NTT DOCOMO, KDDI and SoftBank, applied, and each committed to cover the reallocation cost within the ¥12 billion and ¥21 billion cost range specified by MIC. Each applicant committed to the highest level of that cost range and so MIC awarded the 900MHz licence based on other criteria. SoftBank won the licence because it had the highest customer density within its existing spectrum. SoftBank initiated services under this spectrum in July 2012, adopting the name 'Platinum Band' from the name it was known by in the industry. Although SoftBank was the sole winner of the 900MHz band, as a concession, MIC designated the 700MHz band for mobile device use and allocated that band equally among NTT DOCOMO, KDDI and a third carrier. The three carriers have announced they will start commercial services using the bandwidth in 2015.

Another valuable spectrum previously used for analogue television broadcasts between 207.5MHz and 222MHz reallocated by MIC to mobile broadcasting was the subject of a vigorous competition between two consortiums led by NTT DOCOMO and KDDI (Japan's two largest wireless carriers). Each consortium was vying for the licence to utilise the spectrum. In September 2010, MIC decided to award the licence to the consortium led by NTT DOCOMO, partnered with Fuji TV and other major television stations. The decision backed a format based on Japan's current digital television standard 'ISDB-T', over the adoption of Qualcomm's MediaFLO technology proposed by the consortium led by KDDI. The consortium aired Japan's first broadcast, NOTTV, on 1 April 2012 on the 207.5MHz to 222MHz spectrum using their newly created Mobacas platform. The number of mobile devices compatible with NOTTV is increasing, and in July 2012 NOTTV announced it had reached 100,000 subscribers. NOTTV aims to have more than 1 million subscribers by the end of 2012.

The spectrum band between 90MHz and 108MHz, also formerly used for analogue television broadcasts, will be allocated by MIC for local multimedia broadcasting. In a January 2010 survey conducted by MIC, over 100 entities, including local radio stations and television stations, expressed their desire to be content providers for this proposed local multimedia broadcasting platform.

Apart from the additional spectrum made available by the digital switchover, mobile carriers are also establishing next-generation mobile services using spectrum bands that were already available. UQ Communications, an affiliate of KDDI, took the lead in next-generation mobile service by offering a mobile WiMAX service in February 2009 using the 2.5GHz band. In December 2010, NTT DOCOMO followed suit with its 3.9G LTE service named 'Xi' (pronounced as 'crossy') using the 2GHz band currently in use for 3G mobile service. SoftBank Mobile started its DC-HSDPA service named 'Ultra Speed' in February 2011, using the 1.5GHz band allocated in 2009.

#### **iv Spectrum auctions and fees**

MIC imposes spectrum usage fees on broadcasters, mobile phone carriers and other businesses that use radio spectrum, as provided for in the Radio Act. The formulae used to establish the usage fees have been criticised as unfairly favouring broadcasters at the expense of mobile service providers. Until 2005, the fees were determined, in the case of broadcasters, per broadcaster, and in the case of mobile phone carriers, by the number of base stations and subscriber handsets. Even after changes were made in 2005, the formulae still favour broadcasters, satellite operators and other 'vested' rights holders. The total amount of spectrum fees MIC received for the fiscal year ending March 2011 was approximately ¥67 billion, 82 per cent of which was paid by mobile phone carriers and only 5 per cent of which was paid by broadcasters, even though the bandwidth of spectrum occupied by mobile phone carriers is narrower than that occupied by broadcasters.

While spectrum fees are purportedly charged to cover spectrum administration costs, such as monitoring illegal spectrum use, MIC has been criticised for using the fees to pay for 'miscellaneous' expenses that appear to have little connection to spectrum administration. In August 2010, MIC's committee to explore reform of spectrum usage fees announced a policy to strengthen links between the amount of spectrum usage fees and the bandwidth of spectrum occupied by fee payers, and to use the spectrum usage fees more efficiently. In May 2011, a bill to amend the Radio Act to implement the revised spectrum usage fee scheme was passed.

An action plan published in November 2010 by MIC's study group on spectrum allocation recommended that MIC consider the introduction of spectrum auctions as a way to allocate spectrum licences more efficiently and transparently. However, the plan also warned that the transition would raise questions of fairness such as those between existing licensees who did not pay for their licences at auction, and future licensees who would bear this additional cost, and a related concern for consumers that the cost of auction fees would be ultimately passed on to the public in increased fees for services. MIC has held a series of meetings led by scholars since March 2011 to consider the implementation of spectrum auctions and in March 2012 submitted a bill to amend the Radio Act to include spectrum auctions. The amended act will establish a mechanism in which MIC will conduct an auction to grant the licence to the applicant with the highest bid price. The spectrum auction is envisaged to be first used for the licensing of the 3.4GHz to 3.6GHz band, which is planned to be used for 4G mobile phones from 2014.

## **V MEDIA**

### **i Restrictions on broadcast content**

While the general rule of the Broadcast Act is freedom of broadcasting, the Act provides a variety of content restrictions. Examples include (1) an obligation to be politically impartial, (2) a prohibition on reporting 'manipulated facts', (3) an obligation to show diverse opinions on controversial issues, (4) an obligation to provide closed captioning or other aids for the visually impaired where possible and (5) an obligation to disseminate emergency broadcasts. Each of these restrictions is applicable to all Main Broadcasting licence holders, while only some of them apply to Regular Broadcasting licence holders, depending upon the restriction and the type of Regular Broadcasting licence.

## ii Digital switchover

In Japan, satellite digital television broadcasts began in 2000, and terrestrial digital television broadcasts began in 2003. The nationwide switch-off of both analogue terrestrial and satellite broadcasts was completed on 31 March 2012, after a grace period given to Iwate, Miyagi and Fukushima prefectures, which were hardest hit by the March 2011 Tohoku earthquake and tsunami. Digital television broadcasts occupy less spectrum, which opens up the residual spectrum for other purposes, as discussed in Section IV.iii, *supra*. Although there have been trials for digital radio since 2003, there are no immediate plans to cancel or replace analogue radio. The future of radio broadcasting in Japan is currently being discussed by another MIC study group which is considering several approaches, including the eventual shift from traditional radio to digital broadcasts for mobile devices.

Upon the digital switchover, 279,000 households reported technical problems with DTTV broadcasting reception. As temporary relief, MIC is subsidising the simultaneous broadcast of terrestrial television programmes via satellite to those affected by the switchover until March 2015. Currently, 111,000 households benefit from such simultaneous broadcast. Further, during this time affected households may seek out other remedial measures, including accessing relay stations or community reception stations, subscribing to cable television service, or installing high-performance antennas. MIC has established a programme to subsidise such measures. In addition, MIC is also subsidising programmes by cable television companies that continue to provide analogue broadcasting by digital-to-analogue conversion for their subscribers.

As discussed in Section IV.iii, *supra*, the spectrum previously used for analogue terrestrial broadcasts is being reallocated to other purposes, including multimedia broadcasting for mobile devices, and for 'intelligent transport systems' in vehicles. The spectra previously used for analogue satellite broadcasts were allocated to several new digital satellite television channels, which launched in October 2011.

## iii Internet-delivered video content

Video content delivery utilising Internet protocols, both through dedicated networks and over the Internet, has been steadily on the rise. The methods of video delivery vary from free video-sharing sites (such as YouTube), membership-based video-sharing sites (such as Nikoniko Douga), and partially fee-based video delivery sites (such as Gya!). Traditional television stations (e.g., NHK, commercial television broadcasters) have introduced the video-on-demand service, 'Motto-TV' (coined from the Japanese word 'motto', meaning 'more'), and are streaming terrestrial broadcasting and video-on-demand content through compatible television and smart phones for a fee. Hulu, which originates in the United States and offers ad-supported on-demand streaming video of television shows and movies to personal computers, portable phones and tablet computers, started its services in Japan in September 2011.

For regulatory purposes, MIC has taken the view that video delivery over the Internet is not a 'broadcast' under the Broadcast Act, and consequently the content restrictions under the Act discussed in Section V.i, *supra*, do not apply. While 'broadcast' is defined in the Broadcast Act as 'transmission of telecommunication for the purpose of being directly received by the public', MIC's position is that video delivery over

the Internet does not fall within this definition because it requires a request to send, which results in receipt by a specific recipient, not the public. This interpretation allows Internet content providers to distribute multimedia offerings without being regulated as traditional broadcasters. However, the technological distinction that it relies on has been criticised as resting on shaky ground, and calls have been made for a clearer legislative statement that content restrictions will not be applied to broadcasting over the Internet.

The Internet and dedicated networks are widely used for delivery of video content. Internet television services available in Japan vary widely, from simultaneous transmission of terrestrial and satellite television broadcasts, to exclusive IPTV channels with programming from domestic and foreign third-party programme providers, to VOD services. However, two Supreme Court decisions in 2011 imposed limitations on transmission of video through the Internet. The Supreme Court ruled that services that record and forward Japanese television programmes, and provide real-time streaming of Japanese TV programmes via the internet, breach the originating television station's copyright.

As of November 2011, each second the download traffic from broadband networks in Japan averaged 1.70Tb, a 270 per cent increase in downloaded traffic over May 2007 traffic. In Japan, where flat fees for unlimited Internet usage are the norm for both household ISPs and for mobile networks, flat-fee Internet providers are now beginning to grapple with the question of whether their customers will accept a new pricing model that charges users based on the amount of data that they send and receive. The president of SoftBank, the mobile network service provider for iPhones and iPads in Japan, recently remarked that 2 per cent of users are responsible for 40 per cent of data traffic, and that revisions of the unlimited data plans will be necessary sooner or later to address this imbalance. SoftBank announced that it will apply a partial metered pricing model for its next-generation high-speed data transmission service FDD-LTE, starting in autumn of 2012.

#### iv Mobile services

Video broadcasting service for mobile devices began in 2006. The first service, which is still popular today, is known as 'One-Seg' because it uses one out of the 13 segments that constitute the spectrum bandwidth allocated to each terrestrial digital television broadcasting channel (the other 12 being used for traditional television broadcasts). Currently, One-Seg service is generally limited to the simultaneous delivery of DTTV broadcasts to mobile devices. As of March 2012, 81 per cent of the mobile phones sold in the Japanese market were able to receive One-Seg broadcasts.

People in Japan enjoy video delivery over the Internet on their mobile devices. In addition, VOD services provided by mobile networks to their subscribers are also widely available. Major mobile carriers offer VOD services free of charge or at a low price, mainly to attract subscribers to their network and not as a significant revenue source.

The next-generation multimedia broadcasting service 'Moba-Cas' described in Section IV.iii, *supra*, will provide viewers with higher-definition broadcasts than One-Seg, and will allow users to store content delivered through the dedicated spectrum band to their mobile devices.

Apart from services using dedicated spectrum bands such as One-Seg and Moba-Cas, high-speed mobile networks now provide the best support for mobile media

services. In Japan, 3G service has spread to over 99 per cent of wireless customers, and new networks with greater data capacity, such as 3.9G services, are becoming available. The maximum data transmission speed for mobile devices jumps from 7.2Mb/s using 3G service to 300Mb/s using 3.9G service.

## **VI YEAR IN REVIEW AND OUTLOOK**

The 2011 earthquake focused the attention of the Japanese telecommunications industry on the risks to telecommunications in a disaster, including physical damage to network infrastructure, damage caused by unstable electrical supply to data centres, and massive service disruptions due to user congestion. In particular, the concentration of network infrastructure and data centres in the greater Tokyo area has been identified as an important risk factor. As a result, the telecommunications industry is increasing its focus on disaster preparedness, enhancing earthquake protection of facilities, creating redundancy of key facilities, stockpiling of disaster recovery equipment, fuel and parts, setting up restoration programmes and providing additional training for employees. In addition, companies from all industries have expanded their use of cloud computing to better protect data.

Further expansion and development of Japan's media and telecommunications industry over the next few years is not expected to involve a slate of new legislation, but rather the implementation of the regulatory framework that has been put in place over recent years. Central to this will be the amendment to the Radio Act to be approved this year and scheduled to become effective next year, which is expected to lead to more transparency under the bandwidth auction system. More transparency could result in heightened competition and, ultimately, more innovation and better services for the Japanese public.

## Appendix 1

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