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Japan: AI governance, IP protections, Data Free Flow with Trust (DFFT)

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Japan's AI regulations (until 2022)

Risk-based and Soft-law approach

- Japan has no cross-sectoral regulations that generally constrain use of AI
- **Social Principles of Human-Centric AI (2019)**
 - **3 basis philosophies:** (1) human dignity; (2) diversity and inclusion; (3) sustainability
 - **7 principles:** (1) human centric; (2) education/literacy; (3) privacy protection; (4) ensuring security; (5) fair competition; (6) fairness, accountability, and transparency; (7) innovation
- **Non-binding guidelines**
 - **Regulation on AI:** Japan has taken the approach of **respecting voluntary AI governance and providing non-binding guidelines**, while imposing transparency obligations on some large digital platforms
 - METI's Governance Guidelines for Implementation of AI Principles
 - MIC's guidelines for AI developers and users
 - METI's Contract Guidelines on Utilization of AI and Data
 - **Regulation for AI:** Regulatory reforms to promote the use of AI
 - e.g., allowing Level 3 automated driving

Japan's AI regulations (in 2023)

Further discussions facilitated by the emergence of generative AI

- **Liberal Democratic Party: “AI White Paper” (April, 2023)**
 - The government should examine specific areas that may require legal and regulatory measures, such as (1) **serious human rights violations**; (2) **national security**; and (3) **interference with the democratic process**.
 - The government should consider formulating guidelines for the interpretation of **IP laws** regarding generative AI.
- **AI Strategy Council: “Tentative Discussion Paper on AI” (May, 2023)**
 - Summarizes issues related to AI risks, utilization and development capabilities
 - Guardrails are necessary. In particular, the risk of: (i) leakage of confidential information and inappropriate use of personal information; (ii) increased sophistication and the facilitation of crimes; (iii) social instability and confusion due to the dissemination of disinformation; (iv) more sophisticated cyber-attacks; (v) handling of generative AI for education; (vi) copyright infringement; (vii) increased unemployment due to AI.
 - The existing guidelines should be revised in light of the spread of generative AI.

Current approach

- **Japan continues to take a soft law based approach (at least for now)**
 - Will revise and integrate existing guidelines of METI and MIC.
 - Various issues remain for future discussion:
 - Difficulties in monitoring compliance (How to secure trust from users and society)
 - How to ensure incentives to comply with the guidelines
 - Third-party certification and audit system?
 - The government should consider formulating guidelines for the interpretation of IP laws regarding generative AI.
- **Hiroshima AI Process**
 - G7 leaders agreed to discuss under the framework of the “Hiroshima AI Process” at the G7 Hiroshima Summit held in May 2023
 - Different approaches taken by G7 countries
 - EU: hard-law-based approach (e.g., high-risk AI) under the draft AI Act
 - Canada: proposing AIDA
 - US: voluntary commitments from major AI developers
 - UK: pro-innovation approach

AI and Copyright

- **The Japanese Copyright Act aims to achieve an optimal balance between clarity and flexibility via Article 30-4, as introduced by the 2018 amendment.**
 - Different from the fair use provision in the US.

AI Development / Learning Stage

e.g., Creating data set for learning /
Developing AI by using data set

- Generally permitted under Article 30-4, subject to exceptions.
 - Flexible rights restriction provisions to cover acts that do not aim at the enjoyment of thoughts or sentiments expressed in the copyrighted work for information analysis
 - Exception: If the utilization exceeds the “limit deemed necessary” or if the usage “unfairly damages the interests of the copyright holder”

Generation / Utilization Stage

e.g., Generating outputs using AI /
Uploading and making public AI-
generated outputs

- No special provision: Liable for infringement if AI-generated outputs have similarity with and dependence on copyrighted works.
- “Dependence” in the context of AI-generated work is a controversial issue.

Article 30-4 of the Copyright Act

Article 30-4 It is permissible to exploit a work, in any way and to the extent considered necessary, in any of the following cases, or in any other case in which **it is not a person's purpose to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in that work**; provided, however, that this does not apply if the action would unfairly damage the interests of the copyright owner in light of the nature or purpose of the work or the circumstances of its exploitation:

(ii) if it is done for use in **data analysis** (meaning the extraction, comparison, classification, or other statistical analysis of the constituent language, sounds, images, or other elemental data from a large number of works or a large volume of other such data)

- **Broad Application**

- Not limited to scientific research or other non-commercial purposes
- Not limited to computer
- It is permissible to use illegally distributed contents.

- **Scope of Exception**

- If the usage “unfairly damages the interests of the copyright holder”

Future discussions re AI and IP

- **IP Strategy Headquarters: “IP Promotion Plan 2023” (June 9)**

- It is desirable to organize issues such as the following in line with specific cases and clarify the concept:
 - user's **creative contribution** for an AI product to be recognized as a copyrighted work
 - **copyright infringement** when an AI product similar to the original work used as training data is used.
 - the concept of cases where the usage “unfairly damages the interests of the copyright holder” as stipulated in Article 30-4 when a copyrighted work is used to create an AI (learned model).

- **ACA:**

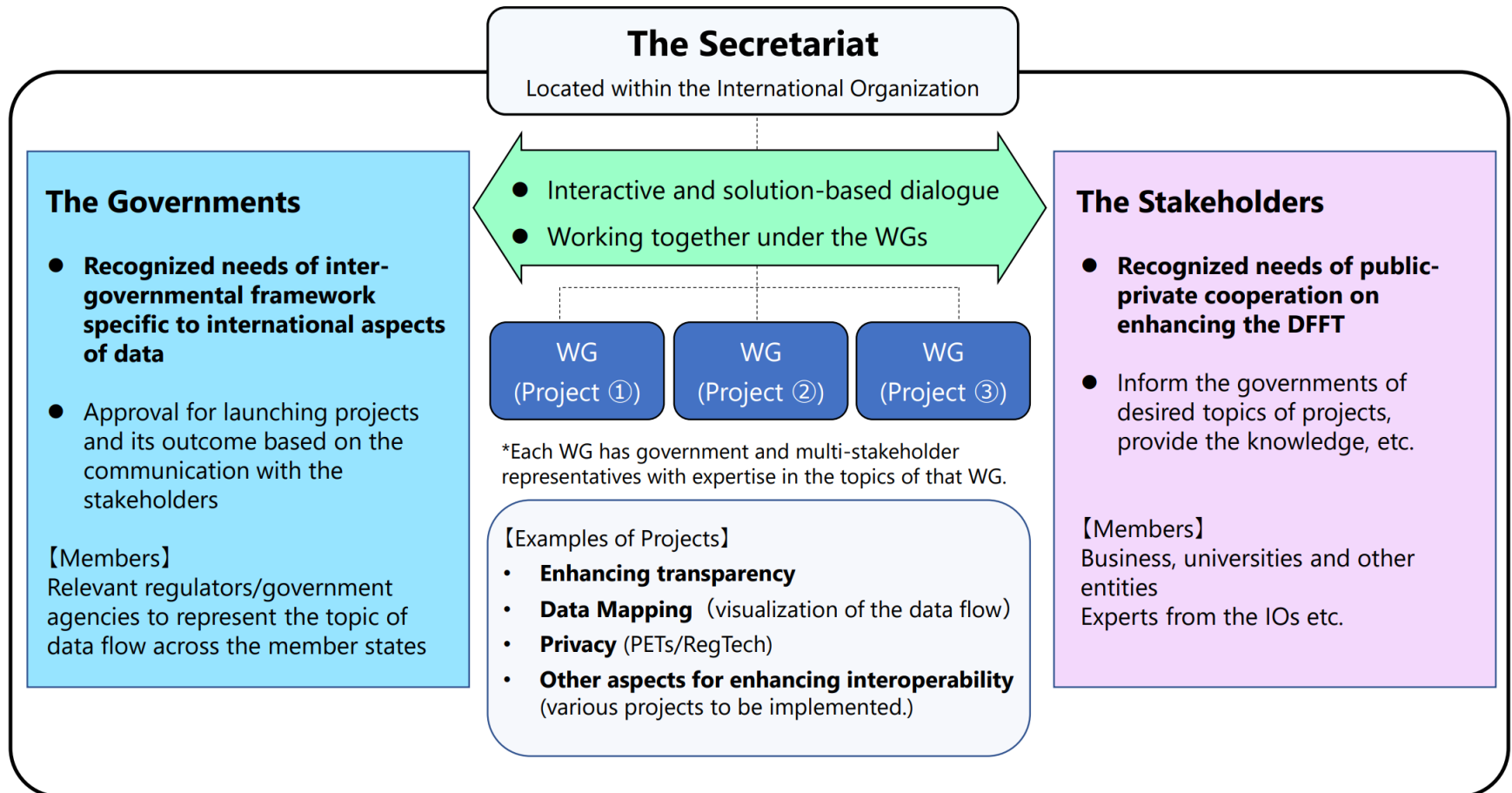
- Together with IP law scholars and attorneys, the Agency for Cultural Affairs (ACA) is discussing the issues regarding the development of AI and the utilization of AI-generated works
- Aim to issue guidelines on the interpretation of the relevant clauses of the Copyright Act?

Data Free Flow with Trust (DFFT)

- **What is DFFT?**

- **Aims to promote the free flow of data while ensuring trust in privacy, security, and intellectual property rights.**
- Barriers on the cross-border flow of data:
 - Multi-layered nature of regulatory requirements
 - Legal stability
 - Research costs
 - Lack of a clear definition of cross-border transfers, personal data, etc.
- **G20 OSAKA Summit in 2019**
 - DFFT was mentioned for the first time among G20 leaders.
- **G7 Hiroshima in 2023**
 - The establishment of the **Institutional Arrangement for Partnership (IAP)** was endorsed among G7 leaders for operationalizing DFFT.
 - IAP brings governments and varied stakeholders together for solutions-oriented cooperation on cross-border flow of data.

IAP Structure Chart (under consideration)



<https://www.digital.go.jp/en/dfft-iap-en>