

# Japan's Intellectual Property Strategy Program 2006: A Commons-Inspired Critique (draft)

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## 1. Introduction: restrictions galore

In a 2002 article about copyright and comics in Japan, Salil Mehra explains how the Japanese manga community's flexible attitude towards copyright infringement has “created numerous innovations and fostered the emergence of talented artists,” among which many *dōjinshi* authors. *Dōjinshi* are self-published comics that often borrow characters from other, more famous manga, and remix them to something new—all without the formal agreement of the original author. While the reasons for this let-go approach are varied, the main idea behind it is simple: having their works remixed and sampled by other artists means more exposure for the original authors, which in a lot of cases also translates into additional revenue. In other words: why sue if there is no real harm?

According to Mehra, this practice relates to Japan's “relatively weak legal regime”—a statement we believe should be nuanced a bit. It is indeed so that a substantial part of Japan's manga community favors a moderate approach towards copyright enforcement within their own community, thereby creating room for a wide range of derivative works. However, transposing this phenomenon to the Japanese society as a whole—or, for that matter, its legal regime—is maybe too much of a generalization. In reality, Japan's copyright framework is becoming increasingly stricter and this at a very fast pace. In the last couple of years, the Japanese copyright law was amended several times, resulting in a significant expansion of the bundle of rights authors enjoy while the user side of the copyright story was generally ignored.

On the technological level we can distinguish a similar restrictive approach to content management and manipulation: mobile phones and most other advanced media devices ship with very restrictive Digital Rights Management (DRM) on board, often forcing users to buy their media over and over again if they switch providers or buy a new model.<sup>1</sup> And just to underpin the argument that Japan's content industry is as interested in defending its copyright as its American and European counterparts: the biggest takedown request YouTube has received so far (affecting 30,000 videos) was sent out by the Japanese Society for Rights of Composers, Authors and Publishers (JASRAC) in November 2006, soon to be followed by a request for proactive filtering in order to prevent future infringement of its members' copyrights.<sup>2</sup> It is worth noting here that JASRAC's filtering proposal, besides being symptomatic of a rather old-school vision on content distribution, is very different from the deal-seeking approach favored by e.g. CBS and the National Hockey League, who both have agreed to start distributing clips of their programming through YouTube.

In this paper, we look at how Japan's increasingly strict copyright system frames and values “commons” related concepts. In the next section, we explain how we want to approach this topic.

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1 See for instance <http://akira.arts.kuleuven.ac.be/andreas/blog/archives/2006/04/mobile-drm-in-japan-another-close-look.html> for a detailed overview of the various DRM mechanisms inside Japanese mobile phones.

2 A copy of JASRAC's letter can be found on [http://www.jasrac.or.jp/release/06/12\\_2.html](http://www.jasrac.or.jp/release/06/12_2.html).

## 2. Promoting the commons

A recurring theme in copyright related discussions is the “balance” concept, which refers to the rather complex equilibrium between creators and users. Simply said, copyright law provides authors with incentives in the form of a set of monopolistic rights, but it also imposes certain limits upon those rights. Copyright expires, for instance, and certain reproductive activities, such as quoting, or copying for research purposes are allowed without asking permission to the original author. Of course, these limitations on the scope and duration of copyright are there for a reason. In fact, they directly connect to the underlying goal of the copyright system: the promotion of culture. Needless to say, this noble goal makes it clear that copyright law has a strong “public” orientation—it is more than just a handy system for rewarding authors for their efforts. It is in this context that we have to understand Michael Geist's “key principles for balance” (2004). Among other things, Geist points out that ideally, “the balance objective must help shape every [copyright related] policy decision.” This is an important point, and one that is way too often forgotten or ignored.

In a recent paper on public domain issues (2006), Rufus Pollock touches similar ground: “When formulating policy the key variable to consider should be social value, which is the sum of commercial value and user value, rather than commercial value alone (in economists’ terminology: welfare rather than national income). The examples in this paper, as well as associated research, demonstrate that the value of the public domain, both actually and potentially is high.” It is worth noting here that, besides doing an excellent job emphasizing the importance of the public dimension in copyright policy, Pollock uses the term “public domain” in a very wide sense. In fact, his definition for “public domain” comprises not only of works for which the copyright has expired, but also includes “open source software and work released under (some) Creative Commons licenses.” For reasons of clarity, we refer to the whole package of out-of-copyright materials, open source software and Creative Commons licensed content with the term “commons” instead.

In the conclusion of his paper, Pollock states that “promoting and expanding the [commons] in several key areas would yield large benefits for society in the form of increased access, greater development of complementary goods and services, and the ability to decentralise and widen the innovation process”—three points so important that we decided to test them against Japan's current copyright policy. In the following sections, we have a close look at the Japanese government's recently released *Intellectual Property Strategy Program 2006*,<sup>3</sup> a +200 page document that gives an good overview of the issues<sup>4</sup> currently at stake, and investigate whether the policy direction it proposes is likely to result in the three benefits Pollock describes. We start our analysis with the document's introductory chapter (3.), and subsequently look at how its copyright policy proposals relate to increased access (4.), complementary goods/service development (5.) and innovation process decentralization (6.).

## 3. A false start

The *Intellectual Property Strategy Program 2006* starts with explaining what the Japanese government understands under “intellectual property policy.” A quote (p 18):<sup>5</sup>

Intellectual property policy [...] collectively refers to measures to increase national wealth through the creation, protection, and exploitation of valuable information. More specifically, it is a national

3 The complete document can be downloaded from [http://www.kantei.go.jp/jp/singi/titeki2/keikaku2006\\_e.pdf](http://www.kantei.go.jp/jp/singi/titeki2/keikaku2006_e.pdf).

4 In fact, the *Strategy Program* covers more than only copyright related issues. There are also extensive sections on patents, standardization issues, branding, etc.

5 As we quote extensively from the *Strategy Program*, we indicate the relevant page numbers in grey.

policy to demonstrate the national orientation toward a respect for inventions and creative works and to emphasize the creation of “information” of value or intangible assets, including technologies, designs, brands, and media contents (e.g. music, movies), in addition to the manufacturing of tangible goods, as the foundation for business activities, thereby promoting the development of the Japanese economy and society.

As this short snippet shows, one of the key goals of Japan's intellectual property policy is apparently to demonstrate the country's “respect for inventions and creative works.” Furthermore, by creating a “strong socioeconomic foundation underpinned by respect for individuality and creativity,” the Japanese government wants to “[ensure] that people around the world will appreciate our efforts and have a deep trust in Japan” (p 18). Besides sounding rather naive—not to mention its counter-productive potential—, this unfortunate formulation is a fine illustration of how the Japanese government's look on cultural development in general and intellectual property issues in specific misses an important part of the equation. Indeed, it is *not* only about the “creation, protection, and exploitation of valuable information,” as we see stated in the quote above or in the figure accompanying the introductory chapter (p 20); sufficient commons valuation is an equally important part—and even a prerequisite—of a vibrant cultural sphere. Unfortunately enough, this is something the authors of the *Intellectual Property Strategy Program 2006* apparently haven't seriously considered—an unfortunate oversight that triggered this paper and critique.

#### **4. The increased access angle**

The *Strategy Program's* “Make Japan a World-Class Content Superpower” section boasts that “[t]he GOJ [= Government of Japan] will aim to make Japan a content-user superpower in which citizens will be free to use content and choose from a wide variety of types and prices” (p 131). It also points out that “we should have a basic stance of regarding content users as playing a leading role and treat creators and performers appropriately” (p 131). Although these statements have a promising ring to them, the measures and amendments proposed are absolutely disappointing. Commons promotion or expansion is not mentioned once, and increased access related measures focus mainly on the NHK Archives<sup>6</sup> of previously broadcast programs. These archives are still way behind e.g. the BBC's Creative Archive<sup>7</sup> efforts though: at this point, only around 5000 items (= less than 1% of the total collection) are publicly accessible, and they can only be viewed in selected NHK Archives buildings—an online interface is non-existent, mainly because of apparently unresolvable copyright clearance issues.<sup>8</sup>

The other measures that are part of the plan to turn Japan into a “content-user superpower” include:

Promoting IP Multicast, which is a technique for many-to-many communication over IP (as in “internet protocol”) (p 131). IP Multicast is not yet widespread, but already extensively debated in copyright circles as it blends the boundaries between transmitting and broadcasting (for which different legal regimes apply).<sup>9</sup>

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6 NHK, which is short for Japan Broadcasting Corporation, is Japan's public broadcaster.

7 The BBC's Creative Archive website can be found on <http://creativearchive.bbc.co.uk/>.

8 More information about the NHK Archives' copyright clearance issues can be found on [http://www.soumu.go.jp/joho\\_tsusin/policyreports/chousa/tsushin\\_hosou/pdf/060411\\_3\\_03.pdf](http://www.soumu.go.jp/joho_tsusin/policyreports/chousa/tsushin_hosou/pdf/060411_3_03.pdf).

9 More info about how IP Multicast is different from traditional broadcasting can be found on [http://www.soumu.go.jp/joho\\_tsusin/policyreports/chousa/tsushin\\_hosou/pdf/060606\\_saisyuu.pdf](http://www.soumu.go.jp/joho_tsusin/policyreports/chousa/tsushin_hosou/pdf/060606_saisyuu.pdf).

Reviewing the copy-once broadcast flag system for terrestrial digital broadcasts so as to make it more “convenient” for users (p 132). Alas, there is no mention of abolishing it altogether (see also 6.).<sup>10</sup>

Encouraging flexible pricing for books, magazines and CDs (p 133).

Introducing a rating system to indicate age restrictions on video games (p 134).

It is clear that these measures are a far (and offtopic) cry from what the section's title boastfully suggests.

Unfortunately enough, things get even worse in the next section, which focuses on how Japan wants to become a “Content-Creator Superpower,” and hints at the introduction of additional restrictive measures.

The first of these measures is a possible extension of the term of protection for copyrighted works (p 141). Previously, the term of protection for cinematographic works was extended from 50 to 70 years after the work was made public; recently, rights groups have been asking for a similar term extension for other works, which are currently protected for life plus 50 years. Although it is not completely clear how this issue will be resolved, it is safe to say that there is considerable pressure on the government to extend the protection term. A recent Yomiuri article (2006) comments: “Observers have pointed out the government needs to extend the copyright protection period for intellectual property to include such items [as] literature and photographs [because] the government has advocated Japan be a nation strong in intellectual property rights.” In case the term of protection is effectively extended, the impact on the public domain is immense: for 20 years, no new works will enter the public domain, and most of them will remain inaccessible for the general public, and might even disappear forever.

Another restrictive measure the government is considering is the addition of an indirect infringement provision to the copyright law, “so that the act of providing an article that is used exclusively to commit copyright infringement shall also be deemed to be an infringement” (p 141). At this point, it is unclear what the exact target of this new rule would be, but it might very well be an attempt to regulate file-sharing (and possibly other) applications by holding developers responsible for what users do with the software they create.<sup>11</sup> Critical of course is the reach of the “used exclusively to commit copyright infringement” phrasing—in case the threshold is lowered to “used mainly to commit copyright infringement,” the negative impact on file-sharing software, and thus also on the P2P distribution of e.g. public domain materials and Creative Commons licensed works, will be considerable.

## **5. The complementary goods and services angle**

In his paper, Rufus Pollock describes how for instance the New York Times and The Guardian give free access to their online edition, but also sell a corresponding print edition, which is a complementary good. Lawrence Lessig's *Free Culture*<sup>12</sup> and Yochai Benkler's *The Wealth of Networks*<sup>13</sup> are even more radical

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<sup>10</sup> Recently, the Japan Electronics and Information Technology Industries Association (JEITA) has been pushing for a revision of the copy-once system, this much to the dismay of NHK and other broadcasters. For more info, see <http://akira.arts.kuleuven.ac.be/andreas/blog/archives/2006/07/copy-once-soon-to-be-retired.html>.

<sup>11</sup> The recent verdict in the Winny case, where the developer was found guilty of assisting in copyright violations, seems to connect with this line of thinking (although there are differences, of course). More info on <http://mdn.mainichi-msn.co.jp/national/news/20061213p2a00mona01100oc.html>.

<sup>12</sup> Lawrence Lessig's *Free Culture* can be downloaded from <http://www.free-culture.cc/>.

<sup>13</sup> Yochai Benkler's *The Wealth of Networks* can be downloaded from [http://www.benkler.org/wealth\\_of\\_networks/](http://www.benkler.org/wealth_of_networks/).

examples of this model: in both cases, the content of the book is available online under a liberal Creative Commons license, but one can also buy a printed version in an online or real-world book store. Pollock further makes the link with companies that provide services complementing their open source software offering: “IBM [...] supplies Linux (an open source operating system) for free, [but it] charges for the hardware on which it runs, as well as [for] support and a range of consultancy services.” In other words, giving something away for free doesn't mean you throw all its commercial potential out of the window. Quite the contrary: by contributing work to the commons, producers attract an audience to which they then can provide complementary services that enhance or build upon the initial freebee.

A look at the *Strategy Program* reveals a single reference to flexible licensing and the reuse of public domain content: “GOJ will support creators who wish to have their works actively used by clearly indicating the terms of use on the works, and encourage creative activities through the use of existing works created by others and works for which the period of protection has expired” (p 136). Although this is definitely a positive (and even surprising) paragraph, it is absolutely not sure that this should be interpreted as if the government is going to embrace or promote the use of Creative Commons or other open content licenses. Instead, it might be an extension, or worse, a rehash, of the GOJ's own Free Use Label project that failed to attract adoption due to its limited scope and clunky design.<sup>14</sup> Furthermore, there is no mention in the *Strategy Program* of goods and services complementing free content or open source software offerings in the way we've described above. That is a pity, especially because of the increasing number of online “2.0”-type businesses that are strongly inspired by, and in some cases even actively deploy this type of innovative business model.

## **6. The decentralization of innovation angle**

Pollock's point about the importance of the commons for decentralizing and widening the innovation process nicely connects with Tim Wu's recently published “Intellectual Property, Innovation, and Decentralized Decisions” essay (2006). In it, Wu says that “we must weigh the benefits of intellectual property assignments, which include subsidizing or making possible desirable economic activity, against the costs of the centralization of economic decisionmaking and the creation of barriers to innovation and market entry.” He further argues that the question whether or when to grant intellectual property rights can be reframed as a “choice about the decision architecture for the industry in question.” In other words, if the government decides to extend the term of protection for copyrighted works with 20 years, it actually limits all marketing and innovation decisions concerning these works to the original author or his heirs—a centralization of investment decisionmaking, which Wu points out “may block the best or most innovative ideas from coming to market.” Chris Anderson (2005): “Many of those extracting new value from old content are not the original creators or rights-holders. [...] Either way, they typically aren't the original record label, film studio, publishing house, TV production company or any of the other names that might be on the copyright declaration. They are someone else, probably someone entirely unexpected. This is, after all, the dawn of Remix Culture.” Hence, an extension of Japan's copyright term will not only negatively affect people's access to works (cfr. 4.), but it will also have an impact on how these works are marketed and whether we see any derivatives appear or not.

In this context, it is also interesting to have a quick look at the Japanese government's take on digital rights

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<sup>14</sup> The Free Use Label project can be found on <http://www.bunka.go.jp/jiyuriyo/>. For a discussion about the project's scope and logo design, see [http://joi.ito.com/archives/2003/02/05/japanese\\_version\\_of\\_creative\\_commons.html](http://joi.ito.com/archives/2003/02/05/japanese_version_of_creative_commons.html).

management (DRM). Ed Felten (2006), Cory Doctorow (2005) and others already have extensively argued that DRM has not much to do with preventing piracy, but everything with creating barriers against disruptive innovations and controlling aftermarkets. It is thus possible to say that, just like copyright assignments, DRM implementations involve a centralization of economic decisionmaking—and it is this centralization that keeps a lot of interesting, disruptive products off the market. The *Strategy Program* however doesn't seem to have anything against DRM: the unpopular copy-once system for digital terrestrial broadcasts stays—it just has to become “more convenient” (see also supra) (p 132)—, and the document even mentions that the GOJ might introduce criminal penalties for those who try to circumvent DRM mechanisms (p 149).

In other words, the government's policy recommendations concerning digital rights management suggest it doesn't see centralization of decisionmaking as a very problematic issue. This also means that, in the debate about the upcoming term extension for copyrighted works, the decentralization argument outlined above will probably remain unheard.

## 7. Conclusion

In this paper, we have analyzed the various copyright related proposals embedded in the *Intellectual Property Strategy Program 2006* from three commons-flavored angles. With this maybe slightly unusual approach we have tried to point out problems with the direction in which Japan's copyright policy is heading. The *Strategy Program*'s biggest flaw however lies in what it doesn't say: the value of the public domain, the potential of open source licensing, the importance of a thriving remix culture are all topics one would expect to be part of a healthy intellectual property policy, but unfortunately enough remain undiscovered terrain. Here's hoping that the Japanese authorities get their act together and make the 2007 Strategy Program a document worthy of the “World-Class Content Superpower” Japan wants to be.

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