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BSA COMMENTS ON THE AMENDED DRAFT PRINCIPLE-CODE FOR THE PROTECTION OF INTELLECTUAL PROPERTY AND TRANSPARENCY FOR THE APPROPRIATE USE OF GENERATIVE AI

The Business Software Alliance (BSA)¹ appreciates the Intellectual Property (IP) Strategy Headquarters (HQ) engaging with various stakeholders to discuss the proposed Draft Principle-Code for Protection of Intellectual Property and Transparency for the Appropriate Use of Generative AI (Code).² BSA has provided comments to the initial draft and has also elaborated our recommendations during the Study Group on Intellectual Property Rights in the AI Era³. As stated earlier, BSA supports intellectual property policies that promote responsible use of AI while protecting the rights of the creative community, including software developers. At the same time, such policies should avoid unnecessarily constraining Japan's AI-driven productivity, innovation, and global competitiveness.

In this sense, we were encouraged to see that the amended Code has taken our recommendations into consideration, including clarifying that the Code is a legally non-binding document, which does not require the forcible disclosure of trade secrets or safety and security information. We also welcome the scope of entities subject to the Code being significantly narrowed, with some enterprise-only and contractor activities now being excluded from the scope.

While these are positive changes shifting from broad application to focus on certain scenarios that may pose risks to intellectual property rights, we also see the need to make additional improvements, including removing Principles 2 and 3 from the Code.

¹ The Business Software Alliance (www.bsa.org) is the global trade association of the enterprise software industry, representing companies that are leaders in artificial intelligence, cybersecurity, cloud computing, quantum, and other breakthrough technologies. We work in over 20 markets in the US, Europe, and Asia, advocating for policies that build trust in technology so that every industry sector and the public can benefit from innovation.

BSA's members include: Adobe, Alteryx, Amadeus, Amazon Web Services, Asana, Atlassian, Autodesk, Avalara, Bentley Systems, Box, Cisco, Cloudflare, Cohere, Cohesity, Dassault Systemes, Databricks, Datadog, Docusign, Dropbox, Elastic, EY, Graphisoft, HubSpot, IBM, Kyndryl, MathWorks, Microsoft, Morisawa, Notion, Okta, OpenAI, Oracle, PagerDuty, Palo Alto Networks, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., TrendAI, TriNet, Veeam, Workday, Zendesk, and Zoom Communications Inc.

² <https://www.kantei.go.jp/jp/singi/titeki2/pdf/shiryo3.pdf>

³ https://www.cas.go.jp/jp/seisakukaigi/titeki2/ai_kentoukai/gijisidai/dai11/index.html

Recommendations

Preserving Legal Certainty for AI Development and Training

BSA member companies are strongly committed to advancing innovation and protecting intellectual property, and we recognize the importance of promoting transparency. However, as we stated in our earlier submission, it is important that the Code reflect that Article 30-4 of the Japanese Copyright Act explicitly permits the reproduction and other uses of works to the extent necessary for information analysis, provided that the purpose is not for enjoying the expressive content.

Principle 1, (2), item 2 (page 8) of the amended Code states *“When utilizing data, including for the development and training of generative AI, these businesses shall not infringe on the intellectual property rights of others.”* We recommend that this language be amended or deleted, as the current framing could lead to avoidable legal misunderstandings. Specifically, as currently drafted, this principle could lead to the incorrect legal interpretation that lawful training activities constitute copyright infringement. Such an interpretation would be contrary to the clear and unambiguous text of Article 30-4. To promote a coherent legal framework and to ensure that innovation in fields such as AI, machine learning, and data science is not impeded by legal uncertainty, we recommend that the Code explicitly state that the presented guidance⁴ from the Agency for Cultural Affairs remains unchanged or to delete *“including for the development and training of generative AI”* from this sentence.

Avoid Introducing Disproportionate and Unworkable Commitment

We also note that Principles 2 and 3 continue to remain in the amended Code. The amended Code notes that if a Generative AI Business is able to provide “necessary grounds” that the specified disclosure is technically impossible, this will be deemed as an adequate explanation under the “comply or explain” approach of the Code. However, it is not clear what would constitute “necessary grounds.”

As we stated in our earlier submission, both Principle 2 and Principle 3 stem from an inappropriate linkage of training data (e.g., input) with the generated output from generative AI models and a consequent focus on “input-side” analysis rather than the appropriate focus on “output-side” analysis. The draft Code conflates output issues as being solved through input solutions when, in reality, the inputs are not relevant to the copyright liability framework. Instead, if there are concerns regarding infringing outputs, existing copyright law already provides appropriate avenues for recourse. Furthermore, Japan’s existing Code of Civil Procedure already provides mechanisms for obtaining relevant information in the context of litigation. Principles 2 and 3 bypass the procedure for disclosing evidence and impose unnecessary practical burden on AI developers and undermine their ability to mount a fair defense before even confirming whether a plaintiff has standing to sue or whether the plaintiff has a legally cognizable claim.

We continue to be concerned that Principles 2 and 3, with their focus on input-side disclosure requirements, will encourage damaging and costly frivolous litigation that will unnecessarily undermine

⁴ https://www.bunka.go.jp/english/policy/copyright/pdf/94055801_01.pdf

Japan's AI development goals with little actual benefit to rightsholders and their interests. We therefore request Principles 2 and 3 to be removed from the Code.

Further, we understand that the IP Strategy HQ Secretariat is monitoring legislative proposal in California known as Assembly Bill 412 which would have required measures including seeking AI developers to disclose copyrighted works used to train generative AI models upon request from copyright owners. As discussed in our recent meeting, AB412 was a highly controversial proposal across many sectors of the economy. Furthermore, California's legislature recently concluded that the bill was not suitable for passage because no analysis was performed of the potential economic impacts on the State of California. Accordingly, AB 412 will no longer advance in the California legislative process.

We respectfully believe that Japan should not rush the principal code into effect for many of the same reasons that apply in the case of AB412. We urge the IP Strategic HQ to adopt a more deliberative and cautious approach given that the Code is also highly controversial, and given that the potential unintended consequences for Japan's economic and AI ecosystem have not been thoroughly analyzed.

Clarifying the Scope Exclusion for Limited-Use Generative AI Services

While we welcome a number of AI-related businesses expressly being excluded from the scope, the Code can benefit from providing greater clarity on the exclusion. Specifically, the amended Code states under “(2) Subjects to which this document applies” that the following entity will be excluded: “B. When developing or providing a generative AI system or generative AI service intended for use solely by the data provider and a limited group of individuals designated by the data provider.” This exclusion is further elaborated under “Specific Examples,” presenting an example of chatbot service provided exclusively to Company C's own customers.

However, we wish to highlight that for certain services, in addition to customers, use by prospective customers is also anticipated. For example, in the case of city halls, not only residents but also people considering relocation; and in the case of hospitals, the families of patients and visitors, etc. These individuals cannot be specified by names and their attributes are limited. Given that these pose low risk of IP infringement, we recommend adding the underlined clarification below in the Code.

P3. [Specific Examples]

For example, the following cases are typical examples that do not fall as “Generative AI Developer” or “Generative AI Provider” as defined in this document.

(1) Corporation B, which has obtained a license from Corporation A that provides a general-purpose generative AI system or generative AI service to the public, receives data pertaining to Corporation C from Corporation C. Corporation B then uses the data provided by Corporation C to develop a generative AI system/service specialized solely for Corporation C's internal business operations, based on the aforementioned general-purpose generative AI system/service; and provides this system/service to Corporation C (provided, however, that said generative AI system/service is constructed to generate output based solely on the data received from Corporation C).

(2) In the case described in (1) above, where Corporation C provides the generative AI system/generative AI service (e.g., a chatbot) exclusively to its own customers **and other individuals with specific and identifiable attributes such as prospective customers, “Corporation B” and “Corporation C”**.

Maintaining Flexibility in Content Provenance Requirements and Review Period

The Code, under Principle 1, states that the use of digital watermarks, C2PA, etc. should be disclosed. While we support such efforts to verify the origin and provenance of content, we recommend changing from “wherever possible” to “to the extent reasonably feasible”. This is an important change given that there are not yet widely adopted internationally-recognized standards for content provenance.

The Code also states that principle for protection IP rights should be established and the system of responsibility be clarified, seeking for review once a year, with a summary to be made public. We recommend a more reasonable timeframe of “once every 5 years.”

Conclusion

We strongly encourage IP Strategy HQ to continue engaging with affected stakeholders and look forward to opportunities for continued collaboration with the Government to advance AI innovation while ensuring appropriate protections for users, rightsholders, and other interests.