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## **Internet blocking in Japan**

### **Blocking as a means of averting present danger**

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On 13 April 2018, the Japanese government issued an official decision on domain name system (DNS) blocking. There are various opinions both for and against DNS blocking in such a case because interested parties evaluate it from their own perspective. Many Internet service providers and scholars take a negative attitude towards the government's policy, because the secrecy of communications is guaranteed by the Constitution of Japan. In this paper, I introduce the current discussion in Japan about DNS blocking of pirated digital contents and so-called leech sites on the Internet.

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## 1. Introduction

[Rz 1] On 13 April 2018, the Japanese government issued an official decision on domain name system (DNS) blocking. The government *urged* Internet service providers (ISPs) to block three websites regarded as especially pernicious. The websites were «Manga-mura» (in Japanese: ), «Anitube», and «Miomio». They enabled users to read comics or to watch movies for free. The government regarded these sites as illegal; however, the government officials responsible for addressing this matter chose their words carefully. They emphasised that this decision was *not an order*, and that ISPs should apply DNS blocking *according to their own judgement*. The Japan Internet Providers Association (JAIPA, in Japanese: ) made a quick response, which the government did not expect. JAIPA refused to do DNS blocking because they thought it violated the law. In this paper, I introduce the current discussion in Japan about DNS blocking of pirated digital contents and so-called leech sites on the Internet.

## 2. Background of the decision

### 2.1. Early history

[Rz 2] In 2005, the Cabinet of Japan established the Intellectual Property Strategy Headquarters (in Japanese: ) as its lower branch. The headquarters made a plan for each year to promote the creation, strengthen the protection and encourage the utilisation of intellectual property in Japan. In the plan for 2017, the opinion was expressed by Cabinet members that it would be necessary to take measures against pirated digital contents, malicious leech sites and Internet advertisements making use of the first two.<sup>1</sup>

[Rz 3] On 16 February 2018, referring to 42 countries that had already introduced DNS blocking through legal measures, the headquarters reported that Internet blocking would be one such potential measure, and that Japan should refer to the 42 countries that had introduced DNS blocking through legal means.<sup>2</sup> Two points were made in the report. First, it is necessary, for applying DNS blocking as a means of averting present danger, that warrants can take no other countermeasures

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<sup>1</sup> Intellectual Property Strategy Headquarters (2017, May 16), 2017, Retrieved August 1, 2018, from [www.kantei.go.jp/jp/singi/titeki2/kettei/chizaikeikaku20170516.pdf](http://www.kantei.go.jp/jp/singi/titeki2/kettei/chizaikeikaku20170516.pdf), p. 65.

<sup>2</sup> Intellectual Property Strategy Headquarters (2018, February 16), , Retrieved August 1, 2018, from [www.kantei.go.jp/jp/singi/titeki2/tyousakai/kensho\\_hyoka\\_kikaku/2018/contents/dai3/siryou1.pdf](http://www.kantei.go.jp/jp/singi/titeki2/tyousakai/kensho_hyoka_kikaku/2018/contents/dai3/siryou1.pdf), p. 7.

than the DNS blocking, to protect intellectual property rights. Second, a distinction has to be made between a violation of intellectual property and a violation of personal rights (in Japanese: , in German: *Persönlichkeitsrecht*). The report did not explain what the latter might be; however, it is easy to guess that a violation of personal rights in this case means child pornography, against which Japan had already applied DNS blocking in 2010. On 30 March 2010, the Japan Internet Safety Promotion Association (JISPA, in Japanese: ) agreed to the blocking of child porn on the Internet and stated, «Child porn should be treated as a special case among illegal and malicious data, and DNS blocking of child porn would be legal as averting a present danger in the current legal system of Japan when the arrest [of criminals] or the deletion [of digital pictures] is very difficult and DNS blocking is applied, in a moderate way, only to contents that seriously violate children's rights».<sup>3</sup> And yet, in response to the opinion of JISPA, JAIPA admonished, «It is not acceptable to apply DNS blocking to regular illegal data or to infringement of copyright, which is fundamentally different from child porn that may provoke the fear of children that their own pictures will be distributed [on the Internet]».<sup>4</sup> JAIPA was concerned that the government would try to extend DNS blocking to other digital contents in the future.

## 2.2. Secrecy of communications in Japan

[Rz 4] Why did JAIPA firmly believe that DNS blocking cannot be extended to regular data on the Internet even if the data is illegal? The answer has to do with the legal system of Japan. Article 21(2) of the *Constitution of Japan* provides that «no censorship shall be maintained, nor shall the secrecy of any means of communication be violated». In order to guarantee the secrecy of communications, Article 4(1) of the *Telecommunications Business Act* provides that «the secrecy of communications being handled by a telecommunications carrier shall not be violated», and Article 179(1) punishes any such violation: «Any person who has violated the secrecy of communications being handled by a telecommunications carrier (including communications set forth in Article 164 paragraph 3) shall be punished by imprisonment with work of not more than two years or a fine of not more than one million yen». Article 179(2) increases the punishment when a criminal is a person engaging in a telecommunications business: «Any person engaging in a telecommunications business who has committed the act set forth in the preceding paragraph shall be punished by imprisonment with work of not more than three years or a fine of not more than two million yen». Clearly, then, DNS blocking is normally illegal because the secrecy of private communications is guaranteed in Japan, and ISPs may be punished if they know which website a user is trying to access at a particular time.

## 2.3. Averting present danger as emergency measure

[Rz 5] Why did the Japanese government hesitate to order ISPs to apply DNS blocking? The answer is that there is no special law which directly justifies blocking websites that infringe copy-

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<sup>3</sup> Japan Internet Safety Promotion Association (2010, March 30), , Retrieved August 1, 2018, from [www.good-net.jp/files/original/201711012219018083684.pdf](http://www.good-net.jp/files/original/201711012219018083684.pdf), p. 22.

<sup>4</sup> Japan Internet Providers Association (2010, May 18), , Retrieved August 1, 2018, from [www.jaipa.or.jp/comment/pdf/100518\\_jipo.pdf](http://www.jaipa.or.jp/comment/pdf/100518_jipo.pdf), p. 2.

right in the world of the Internet. The government needed another argument and thus referred to the concept «averting present danger» (in Japanese: , in German: *Notstand*). Article 37(1) of the Japanese Penal Code provides that «an act unavoidably performed to avert a present danger to the life, body, liberty or property of oneself or any other person is not punishable only when the harm produced by such act does not exceed the harm to be averted; provided, however, that an act causing excessive harm may lead to the punishment being reduced or may exculpate the offender in light of the circumstances». According to the government's interpretation, ISPs may use DNS blocking to avert a present danger in order to protect interested persons from the infringement of intellectual property rights.

[Rz 6] However, this argument was not welcomed by jurists. Averting a present danger as an exception may be admitted only when the following three requirements are satisfied: (1) the danger is present and emergent; (2) there is no alternative way to achieve protection of rights being violated; (3) a countermeasure taken by victims or third parties will inflict no more damage upon wrongdoers than the losses that the victims are suffering. SATOSHI NARIHARA commented on each requirement and regarded only the first as satisfactory in the case of the government's decision this time.<sup>5</sup> He remarked of the second requirement that «it is not clear whether all of the countermeasures taken by copyrighters or other interested persons have actually no effect», and regarding the third requirement stated that, «where man compares the violation of the secrecy of communications or the privacy of a great many Internet users in Japan with the protection of a certain number copyrighters or the like, then it is doubtful that the former interest cannot exceed the latter even if the damage of the copyrighters or the like is enormous».<sup>6</sup> This means that averting present danger, as referred to by the government, cannot relieve ISPs of their concern that DNS blocking by them would be punishable.

### 3. Responses of interested persons in the decision

#### 3.1. Internet service providers

[Rz 7] There are various opinions both for and against DNS blocking in such a case because interested parties evaluate it from their own perspective. As I mentioned above, JAIPA opposed DNS blocking as urged by the government. The answer to the question of why JAIPA has so rigidly rejected the official decision concerns two points. First, JAIPA thought previously, in the context of child porn, that it is not permitted to extend DNS blocking to regular data even if that material is illegal.<sup>7</sup> Second, there was another political issue in the background that incurred JAIPA's displeasure. The government *only urged* ISPs to apply DNS blocking to the three websites mentioned above, and requested they undertake this measure *according to their own judgement*. ISPs interpreted this request as meaning that the government would avoid any risks and force them to take responsibility if the court ruled that their DNS blocking was illegal. SOUMEI TATEISHI, vice president of JAIPA, complained, «Only we have the risk of being sued».<sup>8</sup> This problem was

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<sup>5</sup> SATOSHI NARIHARA, , *Hougaku Kyoshitsu*, 453 (2018) p. 47.

<sup>6</sup> Ibid.

<sup>7</sup> Japan Internet Providers Association (2010), op. cit., p. 2.

<sup>8</sup> Y. KATABUCHI, (2018, April 23), *ISP*, Retrieved August 1, 2018, from <http://www.itmedia.co.jp/news/articles/1804/23/news073.html>.

suggested by jurists, for example, NARIHARA. In other words, the government would avoid taking responsibility, and private business operators would be exposed to the dangers of the punishment set forth in the Telecommunications Business Act.<sup>9</sup>

[Rz 8] However, not all members of JAIPA supported its statement expressing opposition. On 23 April 2018, three companies of NTT Group, i.e. NTT Communications, NTT Docomo and NTT Plala announced that they would accept the decision of the government.<sup>10</sup> JAIPA reacted immediately to the announcement of the three members and reconfirmed that it would not change its first statement opposing the government in spite of the estrangement of these companies.<sup>11</sup> The impact of the three companies not falling in line with JAIPA's position cannot be ignored because the NTT Group is one of the biggest telecommunications carriers in Japan. Still, they are suspending DNS blocking for the time being.<sup>12</sup>

### 3.2. Publishers

[Rz 9] The Information Centre of Publishing (in Japanese: ), which is constituted of nine publishing associations in Japan, expressed approval of the government's decision: «We expect that this time the decision will lead to making leech sites unlawful and to the preparation of concrete effective legislation including DNS blocking».<sup>13</sup>

[Rz 10] Some publishers declared on their own websites that they welcomed the decision. Kodansha (in Japanese: ), which is one of the biggest publishers in Japan, stated, «Also the cooperation of ISPs and distribution companies is necessary to develop future contents business that Japan can be proud of».<sup>14</sup> Syueisha (in Japanese: ), which markets a large number of comics, novels and practical manuals, believed that the DNS blocking urged by the government was a big step towards controlling pirated digital contents on the Internet.<sup>15</sup>

[Rz 11] TAKUO MURASE, an experienced lawyer in publishing and the IT business, explained that Japanese publishers claimed to delete 40,000 contents each month on the basis of the Digital Millennium Copyright Act.<sup>16</sup> He commiserated with the publishers and identified with their discontent over having to file their lawsuits in American courts although such enormous damage was caused in Japan.<sup>17</sup>

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<sup>9</sup> NARIHARA, op. cit., pp. 48–49.

<sup>10</sup> NTT Group (2018, April 23), , Retrieved August 1, 2018, from [www.ntt.co.jp/news2018/1804/180423a.html](http://www.ntt.co.jp/news2018/1804/180423a.html).

<sup>11</sup> Japan Internet Providers Association (2018, April 23), *NTT*, Retrieved August 1, 2018, from [www.jaipa.or.jp/topics/2018/04/ntt412httpswwwjaipaorjpinformationdocs180412-1pdf.php](http://www.jaipa.or.jp/topics/2018/04/ntt412httpswwwjaipaorjpinformationdocs180412-1pdf.php).

<sup>12</sup> (2018, August 7), *NTT4*, Retrieved August 8, 2018, from [www.bengo4.com/internet/n\\_8345/](http://www.bengo4.com/internet/n_8345/).

<sup>13</sup> (2018, April 13), , Retrieved August 1, 2018, from <https://shuppankoho.jp/doc/20180413.pdf>.

<sup>14</sup> (2018, April 13), , Retrieved August 1, 2018, from [www.kodansha.co.jp/upload/pr.kodansha.co.jp/files/180413\\_seimei\\_kaizokuban.pdf](http://www.kodansha.co.jp/upload/pr.kodansha.co.jp/files/180413_seimei_kaizokuban.pdf).

<sup>15</sup> (2018, April 13), , Retrieved August 1, 2018, from [www.shueisha.co.jp/info/180413.html](http://www.shueisha.co.jp/info/180413.html).

<sup>16</sup> YOSHINORI OSHIMA,, *NBL*, 1122 (2018) p. 86.

<sup>17</sup> *Ibid.*

### 3.3. Scholars

[Rz 12] As far as I know, scholars who specialise in constitutional, criminal or intellectual law take a negative attitude towards the government's policy. GEORGE SHISHIDO, professor of constitutional law at Tokyo University, has viewed DNS blocking for intellectual property rights as unconstitutional under the current legal system of Japan.<sup>18</sup> He suggested that the government should discuss legislation against pirated digital contents or leech sites: «The democratic legislative process is not all-purpose. However, following this procedure, all interested persons will reconsider their own interests and own thoughts, and they can achieve a collective decision that is reasonable, just and cannot be abused [by some of them]».<sup>19</sup>

[Rz 13] According to a report by YOSHINORI OSHIMA, a lawyer and guest associate professor at Hiroshima University Law School, GENTARO KAMEI, professor of criminal law at Keio University, identified three problems: (a) it is impossible to make ISPs safe from violating the Telecommunications Business Act because the interpretation of the government cannot bind courts to judge DNS blocking as always legal; (b) other countermeasures can be found against pirated digital contents or leech sites besides DNS blocking, although it is necessary, for applying Article 37(1) of the Japanese Penal Code, that a person is able to protect his/her own intellectual property rights only through the Internet blocking; (c) if the government's decision is justified this time, it might base future policies on the concept of averting present danger in other cases too.<sup>20</sup>

[Rz 14] MASAHIRO SOGABE, professor of constitutional law at Kyoto University, pointed out three issues from a neutral perspective:<sup>21</sup> (a) if the government obligates ISPs to block some websites, then it has to compensate for damage caused through the blocking because Article 29(3) of the Constitution of Japan provides that «private property may be taken for public use upon just compensation therefor»; (b) the censorship forbidden by Article 21(2) of the Constitution of Japan may come into question when not a court but an office of administration or a private organisation is delegated to decide about permitting DNS blocking; (c) the requirements that must be satisfied for DNS blocking may be similar to those that have been discussed about child porn blocking. Therefore, while Prof. SHISHIDO rejected the possibility of DNS blocking as averting present danger in the current legal system of Japan, Prof. SOGABE left room for it.

### 3.4. Private organisations

[Rz 15] In order to oppose the recommendation of the government, the Japan Institute of Law and Information Systems (JILIS, in Japanese: ), the Movement for Internet Active Users (MIAU, in Japanese: ), the National Federation of Regional Women's Organisations (NFRWO, in Japanese: ) and similar private organisations have coordinated with each other. Already on 11 April 2018, MIAU and NFRWO issued a joint statement that a better way of restricting pirated digital contents and leech sites would involve developing a new service capable of dealing with the various

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<sup>18</sup> (2018, April 6), , Retrieved August 1, 2018, from [www.bengo4.com/internet/n\\_7683/](http://www.bengo4.com/internet/n_7683/).

<sup>19</sup> Ibid.

<sup>20</sup> OSHIMA, *op. cit.*, p. 86.

<sup>21</sup> OSHIMA, *op. cit.*, p. 87.

needs of consumers.<sup>22</sup> On 3 June 2018, JILIS addressed the complex issue of whether or not a judicially controlled process would solve all of problems of DNS blocking. JILIS pointed out that such a judicial process costs ISPs if they have to get permission for DNS blocking in each case.<sup>23</sup> Allocation of cost is one of the most difficult problems related to DNS blocking because regulators can thereby get a free ride to impose censorship.<sup>24</sup>

[Rz 16] Generally speaking, private organisations stand with Internet users and oppose the practice of DNS blocking; however, they also arm themselves with legal knowledge. MIAU mentions on its own website so-called karaoke logic (in Japanese: ), which is a famous precedent set by the Japanese Supreme Court on 15 March 1988.<sup>25</sup> In this case, the owner of a karaoke shop who lent a karaoke machine to guests was sued for infringement of music performing rights. He pleaded that he did not violate any music performing rights because his guests, not he, performed the music. The Supreme Court found that the owner should be regarded as a performer because he encouraged his guests to sing and charged them for using the karaoke machine. This precedent means that whoever proffers a tool for infringing intellectual property rights is neither an aider nor an abettor but a principal offender. MIAU is worried that all links on the Internet may be considered perilous if this karaoke logic is extended to leech sites, because nobody is assured that a link posted by him/her does not connect with pirated digital contents. MIAU criticised this logic as «too wide an extension of the concept of direct copyright infringement (in Japanese: )» and suggested that the concept of contributory copyright infringement (in Japanese: ) should be modified according to the circumstances surrounding the newest technology.<sup>26</sup>

#### 4. Conclusion

[Rz 17] Internet blocking in Japan can be summarised in two contexts. In the legal context, the secrecy of communications as guaranteed by the Constitution of Japan severely limits DNS blocking. There is no special law that may allow the blocking for protecting intellectual property rights. Some jurists have regarded blocking as unconstitutional under the current legal system of Japan and have suggested that interested persons should discuss ways of creating democratic legislation against pirated digital contents and leech sites. In the social context, Japanese Internet users show a tendency to think that publishers themselves should take countermeasures as much as possible. As I have explained in another paper,<sup>27</sup> the Japanese publishing culture introduced a so-called grey zone control, which stops police intervention before copyrighters make a complaint against offences. In line with this culture, Article 123(1) of the Japanese Copyright Act

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<sup>22</sup> Movement for Internet Active Users & National Federation of Regional Women's Organisations (2018, April 11), , Retrieved August 1, 2018, from <https://miau.jp/ja/845>.

<sup>23</sup> Japan Institute of Law and Information Systems (2018, June 3), , Retrieved August 1, 2018, from <https://jilis.org/proposal/data/2018-06-03.pdf>, p. 3.

<sup>24</sup> S. F. KREIMER, *Censorship by Proxy: the First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 *U. Pa. L. Rev.* 11 (2006) p. 27. «The strategy of recruiting proxy censors by targeting the weakest link in the chain of communication has obvious advantages for regulators. It provides a mechanism for the exercise of authority over otherwise ungovernable conduct. Moreover, it does so at a discount: the cost of monitoring and sanctioning disfavored communications is largely externalized onto the intermediaries who are the subjects of direct regulation. But these advantages come with substantial costs to the system of free expression.» .

<sup>25</sup> Movement for Internet Active Users (2018, July 2), , Retrieved August 1, 2018, from <https://miau.jp/ja/820>.

<sup>26</sup> Ibid.

<sup>27</sup> TAKASHI IZUMO, *Urheberrecht und Parodie in Japan*, in: Jusletter IT 11. Dezember 2014, Retrieved August 1, 2018.

provides that «prosecution may not be instituted for the offence referred to in Article 119; Article 120–2, item (iii) or (iv); Article 121–2; and paragraph (1) of the preceding Article, *unless an accusation is filed by the injured party*» (italics mine). The secrecy of communications is a fundamental right based on reflection regarding practices during World War II, where the Home Ministry of Japan checked private communications. The government at that time justified exercising censorship through special laws passed by the Diet. Through the Japanese people’s experience in that disastrous era, they learned that abridging privacy is dangerous to society in spite of a special law legislated through democratic means. Japan needs more time to deepen a correct mutual understanding among various interested persons.

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