

**“Task Force on Industrial Competitiveness and
Intellectual Property Policy”
Report**

June 5, 2002

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Examination Process

First Meeting (October 19, 2001)

Agenda: Status and Problems of Industrial Competitiveness and Intellectual Property

Second Meeting (November 30, 2001)

Agenda: Problem of Chinese-Made Counterfeit Two-Wheeled Vehicles

Interim Summary of Discussion (Draft)

Enhanced Strategies to Combat Counterfeit Products and Other Products that Infringe Intellectual Property Rights (Draft) (Special Report)

Third Meeting (December 14, 2001)

Agenda: Preparation of “Interim Summary of Discussions”

Preparation of “Enhanced Strategies to Combat Counterfeit Products and Other Products that Infringe Intellectual Property Rights” (Special Report)

Fourth Meeting (March 13, 2002)

Agenda: Working Group Report (Draft)

Fifth Meeting (May 17, 2002)

Agenda: Final Report (Draft)

Sixth Meeting (June 5, 2002)

Agenda: Preparation of the Final Report

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I. Introduction

Amidst a backdrop of evolving worldwide competition, as developing countries such as China gain economic power, Japanese industry has been promoting structural reforms such as improvement in technological development ability and product competitiveness, further cost reduction and the concentrated input of resources into core competencies in order to survive. In terms of policy, the Japanese Government has been carrying out disposal of bad loans, promotion of strategic technical development policies, reduction of infrastructure costs by deregulation, review of the corporate legal system, tax system and employment system, etc. from the standpoint of reinforcing Japanese industrial competitiveness and ensuring domestic employment.

With low cost and drastic improvement in technological capability in developing countries, it will be indispensable to accelerate changing of the nature of Japanese industry from a “catch-up” type, where basic technology introduced from the U.S. or European countries is improved and used efficiently, to a “pioneering” type, where industry develops centering on highly-creative technology. The Government and industry must therefore consider intellectual property to be the source of industrial competitiveness and establish an intellectual property based strategy immediately.

Based on such approaches, the following are indispensable from the domestic standpoint: i) establishment of a system that properly protects created technology, etc. as intellectual property and utilizes it effectively from the standpoint of intellectual property policy so as to improve Japanese industrial competitiveness based on the technology, and ii) to design a user-friendly system that contributes to the start-up and development of venture enterprises and small and medium-sized enterprises based on newly emerging technology created through research at universities. From the international viewpoint, it is necessary iii) to properly deal with infringement against Japanese intellectual property in foreign countries, such as by counterfeits, so as to secure industrial competitiveness overseas as well as to promote the international harmonization of intellectual property systems, aiming to reduce the burden on corporations arising from the rapid increase in international patent applications. Moreover, iv) it is indispensable in today’s network society to establish proper protection and distribution of digital contents.

Considering such conditions, in order to examine issues from urgent issues to medium and long-term issues from the standpoint of strategic utilization of the Japanese intellectual property system by Japanese corporations, the “Task Force on Industrial Competitiveness and Intellectual Property Policy” was set up as a private consulting group to the Director-General of the Economic and Industrial Policy Bureau of the Ministry of Economy, Trade and Industry and the Commissioner of the Japan Patent Office. At the first meeting held on October 19, 2001, three separate Working Groups were set up, to examine respectively the details of one of the following three issues: i) the “strategic maximization of IP value to strengthen industrial competitiveness,” ii) an “IP system user-friendly for universities, venture enterprises and small and medium-sized enterprises” and iii) “strengthening competitiveness overseas.” In addition, regarding the “establishment of an intellectual property system corresponding to the network society,” the Task Force shall accordingly receive information on the progress of work based on the “e-Japan Plan.”

The Task Force has met six times, and the Working Groups have met nine times, discussing wide-ranging issues in a concentrated manner. On December 14, 2001, the Task Force prepared “Interim Summary of Discussions” and clarified the achievement of the Task Force and issues requiring further examination. In addition, since it is urgently necessary to strengthen measures against counterfeits, the Task Force prepared and published a Special Report titled “Enhanced Strategies to Combat Counterfeit Products and Other Products that Infringe Intellectual Property Rights” prior to this Final Report.

With movement toward establishing intellectual property strategies enhancing since entering the new year, “the Strategic Council on Intellectual Property” hosted by Prime Minister Junichiro Koizumi has been established. The Task Force held discussion on remaining issues with the aim of contributing to the Council and has just finalized this report. Based on various discussions, this report rearranges the above mentioned four issues into the following: i) “establishment of a human foundation for the Era of intellectual creation,” ii) “creation and accumulation of globally superior intellectual property through national research and development investment,” iii) “developing an environment to implement intellectual property based business strategies” and iv) “strengthening protection of intellectual property overseas.” This report arrives at conclusions when possible for each issue or arranges issues to be discussed and conflicting opinions for issues difficult to conclude. In addition, in order to request the organizations concerned, including the Ministry of Economy, Trade and Industry, to steadily implement the proposals as a whole, this report sets a time limit for the implementation of proposals.

II. Recognition of the Present Situation

1. International Competitiveness of Japan and Japanese Industry

The international competitiveness of Japan and Japanese industry is in serious condition. The following are some related indices.

- (a) The real growth rate of Japanese GDP (gross national product) declined from an average of 3.8% in the 1980s to 1.4% on average between 1995 and 2000. On the other hand, for OECD countries as a whole, the rate increased from 2.8% to 3.1%. The U.S. maintained a high growth rate. It increased from 2.8% to 3.9%¹.
- (b) The rate of increase in the labor productivity of Japan rapidly decreased from an average of 3.3% in the 1980s to 1.6% on average between 1995 and 1998. On the other hand, that of the U.S. increased from 1.3% to 2.2%².
- (c) When comparing the technological competitiveness of Japan with that of the U.S., business executives evaluate Japan as leading the U.S. in some fields of technology such as intelligent home appliances and manufacturing/material technology in a questionnaire. Respondents point out, however, the advantage the U.S. holds in many fields overall³. In particular a questionnaire for engineers points out that the U.S. enjoys an overwhelming advantage in many cutting-edge fields such as information technology and biotechnology.⁴
- (d) The wage of general factory workers in the Japanese manufacturing industry is extremely high compared to that of other Asian countries. It is approximately 25 times that of China⁵. In addition, costs are remarkably high in terms of social infrastructure such as electricity, transportation and communication⁶.
- (e) The overseas production ratio of the Japanese manufacturing industry has been increasing since the 1990s. The rate increased from 17.0% in 1990 to 29.9% in 1999. Looking at the ratio by type of business, the ratio was 33.2% for transport machinery, 25.2% for electrical machinery, 13.7% for general machinery and 9.2% for textiles in 2000⁷.

¹ Prepared based on the “Economic Outlook” of the OECD (Organization for Economic Cooperation and Development).

² Prepared based on the “Economic Outlook” of the OECD.

³ Questionnaire survey by the Japan Techno-Economics Society (March 1999).

⁴ “Survey on Long-term Energy Technology Strategy, etc.” by NEDO (March 2001)

⁵ Regarding labor cost per worker in manufacturing industries in Asia, it is \$3,288 in Japan, \$848 in Korea, \$726 in Taiwan, \$518 in Singapore and \$131 in China (September 20, 2001, New Growth Policy Committee, Industrial Structure Council. Prepared based on “JETRO Sensor, April 2001” by JETRO.)

⁶ For example, when setting wholesale charges for electricity, transport services for industry and telecommunication services for industry in Japan at an index of 100, charges in Korea are 33, 29 and 24, those in Taiwan are 57, 57 and 40, those in Singapore are 47, 37 and 35, and those in China are 29, 25 and 22 respectively (September 20, 2001, document of the New Growth Policy Committee of the Industrial Structure Council. Calculated based on the “Survey on Foreign and Domestic Price Differentials for Industrial Intermediate Input” by the Ministry of Economy, Trade and Industry. Figures are for the year 2000.)

⁷ “Basic Survey of Overseas Business Activities: Fiscal 2000” by the Ministry of Economy, Trade and Industry, et al.

(f) Regarding items exported from China, in 1988 textile products occupied the number one spot, followed by machine products. In 1998, machine products exceeded textile. Moreover, China has been increasing its industrial competitiveness, having become the third largest producer of personal computers and other related equipment. China produces more than 50% of the world total of copying machines, printers and desktop personal computers.

2. Success of the U.S. in Strengthening Industrial Competitiveness and Pro-Patent Policy from the 1980s Onward

The US promoted a policy of strengthening industrial competitiveness and “Pro-Patent” Policy nationwide from the end of the 1970s through to the 1980s due to the sense of crisis concerning its declining international competitiveness. In 1979, President Carter announced his “Industrial Innovation Initiatives.” In this regard, various measures to promote technology transfer were taken in order to strengthen industrial competitiveness such as the enactment of the “Stevenson-Wydler Technology Innovation Act” (1980), “Bayh-Dole Act” (1980), “Small Business Innovation Development Act” (1982) and the “Federal Technology Transfer Act” (1986). In addition, the “Young Report” was prepared in 1985, and it became a source of momentum toward the enactment of the “Omnibus Trade and Competitiveness Act” in 1988 and the promotion of negotiations on the TRIPS Agreement in the Uruguay Round.

There have been three trends in U.S. Pro-Patent Policy. Specifically, these are (i) activities of the Department of Justice and the courts that started from the OIAJ (Office for Improvement in the Administration of Justice) set up within the Department of Justice in 1978, the director of which was Professor Daniel J. Meador, such as establishment of the CAFC (Court of Appeals for the Federal Circuit) and expansion of the subject matter of patent protection, (ii) the activities of the United States Patent and Trademark Office (USPTO) initiated by President Carter’s message, such as reinforcement of USPTO and amendment of the Patent Law and (iii) the activities of the USTR that initiated by the Young Report, such as creating a link between intellectual property policy and trade policy. These policies are considered to have been based on the strong support of U.S. industry and patent attorneys.

3. Present Situation of Intellectual Property in Japan

(1) Development of Political Efforts in Japan

Japan also has been implementing its own Pro-Patent Policy in terms of judicial, administrative and foreign policy.

(a) From the judicial standpoint, improvement in the technical settlement system for intellectual property suits has recently seen: increases in the number of divisions specializing in intellectual property, judges in charge of intellectual property and *chosakan*(court investigators) at the Tokyo High Court, the Tokyo District Court and Osaka District Court.⁸ As a result, the processing period for intellectual property-related lawsuits

⁸ Changes from 1997 to 2002

	Judges	<i>Chosakan</i> (Court investigators)
Tokyo High Court	10 in 3 divisions → 16 in 4 divisions	9 → 11
Tokyo District Court	8 in 1 division → 15 in 3 divisions	5 → 7

shortened from 31.9 months in 1993 to 18.3 months in 2001. In addition, since the amendment of the Patent Law in 1998 and 1999 made it easier for plaintiffs to prove infringing acts and the amount of damages in patent infringement lawsuits, the amount of compensation for damages has increased in recent years. Moreover, in 1998 the Tokyo District Court and the Osaka District Court were allowed concurrent jurisdiction over lawsuits for patent rights, utility model rights, rights to use circuit layout and rights for program works, which are intellectual property-related disputes requiring special technical judgement. This promoted the concentration of proceedings in the two courts that have technical settlement capability, thus speeding up proceedings and enhancing the predictability of judgements.

(b) From an administrative standpoint, firstly, protection under intellectual property laws has been expanding and strengthening in response to the digitization and networking of economy and society. Specifically, in April 1997 the Examination Guidelines of the Japan Patent Office were revised to protect programs stored on storage media and were revised again to protect programs themselves in January 2001. Moreover, bills to amend the Patent Law and the Trademark Law were enacted in April 2002 to strengthen protection under the Patent Law of intangible items, such as computer programs circulated on networks as well as to properly protect trademarks used for business activities on the Internet. In advance of this development, the Unfair Competition Prevention Law was amended in June 2001, thereby establishing rules for protecting domain names.

Second, establishment of systems that encourage technology transfer from universities and research institutes has been promoted. Three laws were enacted relating to TLOs (Technology Licensing Organizations), which are intermediary organizations for the smooth transfer of research results created by universities and public research institutes: i) the Law to Promote Technology Transfer from Universities to Industries (1998), ii) the Law on Special Measures for Industrial Revitalization (1999) and iii) the Law to Increase Industrial Technology (2000). These laws promoted establishment of TLOs, support for their activities, obtainment of patents by universities and research institutes and technology transfer to industry.

There have also been developments such as the promotion of utilization of dormant patents by implementing patent licensing promotion operations from 1997, preparation of an environment for the provision of specialized intellectual property services by amending the Patent Attorney (*Benrishi*) Law in 2000, and the dissemination of intellectual property education as typified by the preparation and free distribution of intellectual property-related educational materials that started in 1998.

(c) From the standpoint of foreign policy, the Trilateral Patent Offices have been strengthening their cooperation since the Trilateral Conference in Kyoto in 1997. The World Intellectual Property Organization (WIPO) also has been developing discussion aiming at worldwide cost reduction for obtaining patents and international harmonization of patent systems when discussing reform of the Patent Cooperation Treaty (PCT reform) and the Substantive Patent Law Treaty (SPLT). Japan has been actively participating in the discussions.

Moreover, Japan has been approaching countries and regions where counterfeit

Osaka District Court	3 in 1 division	→	5 in 1 division	3	→	3
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infringement is grave by asking them to improve the situation. Japan has helped developing countries to enrich their intellectual property systems by such means as cooperation in training for intellectual property-related human resources (examiners, customs officers, law-enforcement officials, legal professionals, researchers, etc.).⁹ Furthermore, information has been collected through surveys on actual damages from counterfeits and provided to domestic corporations.

(2) Present Situation in Universities, Research Institutes, Corporations, and Overseas Markets and Study Approaches

The intellectual property right system has been improved through political measures in the past. However, as mentioned below, further measures are considered necessary in consideration of the actual present situation of universities, research institutes, corporations and overseas markets.

(a) Present Situation in Universities and Research Institutes

Although universities and research institutes are full of technological seeds, they are not always sufficiently utilized in Japan to strengthen industrial competitiveness.

- i) Comparing the number of scientific papers cited in an average U.S. patent by country, Japan is behind the U.S., Germany, France and UK. On average, 3.0 U.S. papers are cited in one U.S. patent while only 0.6 Japanese papers are cited in the same document.¹⁰
- ii) Looking at the share of research expenses and researchers by organization (research institutes, universities, corporations, etc.), the share of research expenses in the year 2000 at research institutes and universities stood at 13.6% and 19.7% respectively, and 6.5% and 35.7% respectively for the number of researchers in 2001. These institutes should therefore have the potential to develop advanced technology and file patent applications.¹¹
- iii) Comparing US patent applications filed by US universities and Japanese patent applications filed by Japanese universities, the numbers for the top three Japanese universities are 44 for Tokai University, 27 for Nagoya University and 20 for Ritsumeikan University (based on the number of unexamined patent application publications in 2000), while the numbers for the three top U.S. universities are 633 for the University of California, 372 for the Massachusetts Institute of Technology and 234 for Stanford University (based on the number of fiscal 1998 U.S. applications). This appears to indicate that Japanese universities are less active than U.S. universities in filing patent applications.¹² However, it is necessary to take into consideration the fact that the majority

⁹ A total of 1,447 trainees were accepted from 43 countries/regions between 1996 and 2001. Of these, 64 trainees took the enforcement course (specializing in counterfeit measures), which was newly established in 1998.

¹⁰ "Science and Technology Indicators: 2000" by the National Institute of Science and Technology Policy

¹¹ "Survey Report on Scientific and Technical Research in 2001" by the Ministry of Public Management, Home Affairs, Posts and Telecommunications.

¹² U.S. data source: "AUTM Licensing Survey 1998." Japanese data sources: "Japan Patent Office Annual Report (2001)." It takes one and half years from filing of an application to publication; the time Japanese patent applications published in 2000 were filed coincides with the time U.S. patent applications filed in U.S. fiscal 1998 were filed. The comparison was therefore conducted based on figures of these times.

of patents created at Japanese universities end up in the hands of individuals.

- iv) Although the record of technology transfers by TLOs has been steadily increasing in Japan, the scale is far smaller than that of the U.S. (technology transfers in 2000: 213 in Japan, 3,606 in the U.S.). This is partly due to the fact that TLOs are a recent phenomenon in Japan.¹³
- v) Regarding university-based venture enterprises established on the basis of university developed technology, 2,624 existed in the U.S. at the end of FY 2000, while there were 263 in Japan at the end of FY 2001.¹⁴ Present major problems of university-based venture enterprises are securing of staff (28.5%) and financing (28.1%).¹⁵ These problems must be addressed.
- vi) There are a mere 48 technology transfer agents in Japan. There are approximately 1,000 in the U.S. and 280 in Europe.¹⁶

(b) Status of Corporations

- i) U.S. corporations position intellectual property as a source of competitiveness and incorporate it in their business strategy. For example, a U.S. chemical company classifies its own patents into three categories: i) those necessary for present business, ii) those potentially necessary and iii) those unprofitable in terms of business, and disposes of some of the unprofitable patents. Although the company had 12,000 patents in 1993, it reduced the number of patents to 8,500 by 1999, thereby cutting \$40 million in patent maintenance costs.
- ii) Considering applications filed by Japanese corporations in terms of advanced technology fields, it is noticeable that Japanese corporations file fewer international applications than the U.S. and Europe in advanced fields such as biotechnology, medical products/appliances and telecommunications. In consideration of the fact that technological development has extended over a longer period and become interdisciplinary, business strategies based on “selection and concentration” are indispensable. It is urgently necessary to construct a system to obtain and manage intellectual property from an international standpoint.
- iii) A report states that more than 70% of patents created by Japanese corporations are evaluated as improvement patents.¹⁷ Another survey reports nearly 50% of corporations replying that the most necessary patents are “patents related to principles such as basic patents.” It is necessary for Japanese corporations to take intellectual property strategies conforming to research and development strategies as pointed out in ii). Although the total number of patents obtained by Japanese corporations overseas is not inferior to that of the U.S. or Europe, the ratio of applications filed overseas among all applications is much

¹³ The date of approval of the first TLO is December 4, 1998.

¹⁴ Japan: Surveyed by the Ministry of Economy, Trade and Industry, U.S.: AUTM Licensing Survey

¹⁵ “Research and Study on the Actual Conditions of Venture Enterprises Based on Universities, etc. and Promotion Measures” by the Center for Tsukuba Advanced Research Alliance, the University of Tsukuba (March 2002).

¹⁶ Surveyed by the Japan Patent Office (Japan: April 2002, U.S.: March 1997, Europe: March 1998)

¹⁷ “Unused Patent Survey ” by the Japan Techno-Mart Foundation (1996)

lower than that of the U.S. or Europe since the number of domestic applications has been increasing at a higher rate in Japan.

(c) Status of Overseas Markets

<Damages from counterfeits and other products that infringe intellectual property rights>

- i) There is data showing that the amount of damage caused by counterfeits globally accounts for approximately 5 to 7% of the amount of world trade.¹⁸ The most common countries/regions manufacturing products infringing Japanese corporations' rights are China (33%), Taiwan (18%) and Korea (18%), accounting for about two-thirds of the total.¹⁹
- ii) Japanese corporations suffer damage from counterfeits in a wide range of industrial fields, such as miscellaneous goods (19%), general/industrial machinery (19%), electronics (14%), transport machinery (10%), textiles (7%), food products (5%) precision machinery (5%), chemical products (3%), medical supplies/cosmetics (3%) and so on.
- iii) There have been no reports to date concerning counterfeit damages for products requiring an extremely high level of technology (for example, electronic printers). However, the technological level of counterfeits has been progressing. It is estimated that it may now be difficult for the general public to distinguish counterfeit power tools from the original article. Moreover, the form of counterfeiting is expanding from trademark right infringement to design/patent right infringement.
- iv) In countries where Japan suffers grave counterfeit damages, such as China, the central government is strengthening anti-counterfeit measures by positioning them as key issues. There are, however, some cases where local governments overlook the manufacturing of counterfeits based on "local protectionism" that attaches importance to the local economy.
- v) Measures taken by Japanese corporations against such damages from counterfeits are considered insufficient compared to European and U.S. corporations. In general, since Japanese corporations take measures without transferring funds and authority to local branches, they have difficulty in taking flexible measures. On the other hand, European and U.S. corporations consider issues concerning products infringing intellectual property rights as issues directly connected to corporate profits and take stronger measures, such that local branches have taken measures through concluding contracts with large law firms or establishing cooperative organizations of corporations.

<Draining of technology>

- i) Technology has been unintentionally draining overseas. The competitiveness of Japanese corporations has been damaged in the following cases: i) design drawings, etc. containing a great deal of know-how, were misappropriated without permission, and the exact same parts as those produced by the Japanese company were supplied from a Chinese manufacturer (part manufacturer), ii) a Japanese company showed a manufacturing method to a client also from the Asian region in the process of product development consultation, and the client filed a patent application for the technology (semiconductor device manufacturer). There is concern about this worsening situation in the future.

¹⁸ "Countering Counterfeiting (1997)" by ICC (International Chamber of Commerce)

¹⁹ Based on the number of cases. "Survey on Damages from Counterfeits in FY 2001" by the Japan Institute of Invention and Innovation.

<Obtainment of rights overseas>

i) In response to economic globalization, applications for a singular invention are filed in many countries, causing an increase in international applications. (In 1998, approximately 180 thousand applications were filed in this manner, resulting in approximately 5.1 million applications in total.) There is therefore a growing need for a “worldwide patent granting system,” under which patents can be obtained worldwide by filing one application. There are demands for international harmonization of patent systems toward establishment of this system.

Considering the above situations, a further upgrade of intellectual property-focused policies is urgently needed in order to make intellectual property the source of economic vitalization and strengthening of industrial competitiveness. Intellectual property-related issues are wide-ranging. This Task Force classified the issues into the following four categories and examined them individually and specifically: i) establishment of a human foundation for the era of intellectual creation, ii) creation and accumulation of globally superior intellectual property through national research and development investment, iii) developing an environment to implement intellectual property based business strategies and iv) strengthening protection of intellectual property overseas.

III. Study Results

1. Establishment of a Human Foundation for the Era of Intellectual Creation

〈Points〉

- (a) *In order for Japan to become an advanced-science-and-technology-oriented nation, it is indispensable to raise creativity nationwide. It is also important to foster national awareness of protection and utilization of intellectual property obtained as the results of creative activities. Intellectual property education support measures should therefore be further enriched from FY 2002, aiming to establish a social and cultural environment nurturing national awareness of the importance of free ideas and ingenuity and respecting originality and individuality.*
- (b) *In terms of an ideal employees' invention system, it is important that the system prevent capable researchers from "draining" overseas, secure investor incentive, reduce corporate patent management costs and risks and increase the freedom and predictability of corporate management. It is therefore necessary to further deepen examination of the ideal employees' invention system taking into account changes in the social environment. During FY 2002, surveys on actual status of corporations, opinions of employees engaged in R & D and the systems and status of foreign countries should be completed and the propriety of amendment to the Patent Law and the direction of the amendment if necessary should be examined. Conclusion should be reached by the end of FY 2003.*
- (c) *In order to fundamentally enlarge the scale of intellectual property-related legal service providers well-versed both in technology and law, it is necessary to establish a legal profession development system. Specifically, the following are strongly desired: establishment of standards by which law schools, which will accept students in and after April 2004, can set up a curriculum based on independent decision, and offering of business law elective subjects at the National Bar Examination while relieving overemphasis on the compendium of laws in the examination. Moreover, from the standpoint of recruiting capable staff in response to new social needs, law schools should open their doors widely. In addition to intellectual property-related legal service providers, it is necessary to develop service providers in activities related to intellectual property utilization such as evaluation of the value of intellectual property.*
- (d) *While the manner in which venture enterprises and small and medium-sized enterprises secure capable experts that develop intellectual property such as newly emerging technology is an important issue, it has been pointed out that technical experts retired from large corporations have few opportunities to play an active role. It is considered effective to promote creation of new intellectual property through promising technical experts retired from large corporations transferring technical know-how to venture enterprises and small and medium-sized enterprises as advisors. It is therefore necessary to examine immediately measures to match needs of venture enterprises and small and medium-sized enterprises with supplies of technical experts retired from large corporations.*

(1) Raising National Awareness of Intellectual Property

On March 30, 2001, “the Science and Technology Basic Plan (2001-2005)” was adopted by the Cabinet of the Japanese Government. This plan, a foundation for building a country for the 21st century, aims to realize Japan as an advanced-science-and-technology-oriented nation. The plan indicated the following as the ideal image of a nation: a nation that contributes to the world by creating and using scientific knowledge, an internationally competitive nation capable of sustainable development, and a nation where people enjoy a safe, secure and high-quality life.

In order to realize these ideas, it is indispensable to raise creativity nationwide as well as to further emphasize individuality. It is also important to raise national awareness of the protection and utilization of intellectual property obtained as the results of creative activity. It is therefore important to provide education nurturing awareness of the importance of free ideas and ingenuity at the early stage of elementary school, as well as to establish a cultural environment respecting originality and individuality through intellectual property education tailored to age group. It is necessary to enrich measures currently implemented by the Japan Patent Office such as provision of educational materials and holding of seminars in order to improve national awareness of intellectual property from FY 2002 onward. As for enriching measures, provisions regarding the new course of study and the trends of educational reform should be seriously taken into consideration, collaborating well with the Ministry of Education, Culture, Sports, Science and Technology. Especially, various measures should be promoted in the future, including measures to support improving educators’ knowledge on the intellectual property system such as study on methods for intellectual property education.

(2) Ideal Employees’ Invention System

Under the current Patent Law, original ownership of the right to obtain a patent based on an invention made by an employee in the course of his/her duties belongs to the employee. The corporation can succeed the right according to workplace regulations or other stipulations on the condition that the corporation pay “reasonable remuneration.” Recently, there have been disputes over the amount of “reasonable remuneration” between employees and corporations against the background of changes in employment practices, etc. A Tokyo High Court’s decision stated that if remuneration paid is less than a reasonable amount, the employee concerned can demand the difference. The case concerned is now under appeal in the Supreme Court. Consideration of the employees’ invention system will become necessary and will hinge upon judgement of the Supreme Court.

The Task Force discussed the following: i) the total deletion of Section 35 of the Patent Law, ii) the legal system that handles succession of an employees’ invention based on a contract only allowing the employer a non-exclusive right (deletion of Sections 3 and 4 of the Patent Law), and iii) a legal system that approves succession based on not only a contract but also workplace regulations or other stipulations (unilateral declaration of intention by the employer) and enables stipulation of conditions for succession by workplace regulations or other stipulations.

Regarding i) and ii), it was pointed out that there remains the possibility of dispute over the effectiveness of contracts from the standpoint of public order and morality under the

Civil Code. These items were therefore considered problematic from the standpoint of legal stability of succession of a right. In addition, it was pointed out that the employer must conclude contracts with all employees, which may be problematic, especially for small and medium-sized enterprises.

Industrial groups strongly requested ii) and iii), while those in academia pointed out that these proposals are too advantageous to corporations. There was another opinion that if ii) or iii) were introduced, through the sufficient disclosure of internal rules for employees' inventions, etc., corporations would be able to reduce the risk of being sued by their employees and it would possibly become easier to win the understanding of the market on conditions for succession of employees' inventions.

Other than the above three, the following were proposed: iv) a legal system confirming that original ownership of an invention made by an employee belongs to the corporation and granting the inventor the right to claim compensation only for prominent inventions and v) a legal system that enables alternatives other than money, such as promotion, as a compensation to the inventor. Moreover, while the direction of legal revision was proposed, there was the opinion that it was too early to determine a certain direction for Section 35 of the Patent Law at a stage where the Supreme Court decision has yet to become final. There was another opinion that one scheme would be to formulate guidelines without amending laws. However, some Task Force members belonging to private corporations presented objections insisting there had been many suits in Germany in which detailed guidelines were provided. There was the opinion that one should be careful that public institution rules regarding payment of remuneration to inventors can not be applied to private corporations without modification due to differing circumstances between universities and other public institutes and private corporations.

In order to contribute to strengthening Japanese industrial competitiveness in the future, it is important to secure inventors' incentive that will prevent capable researchers from "draining" overseas and attract such personnel from overseas as well as to increase the freedom and predictability of corporate business judgement by reducing risks of legal instability and thereby reducing costs for patent administration. It is therefore necessary to deepen examination on the ideal employees' invention system based on changes in the social environment. During FY 2002, surveys should be completed on the actual status of corporations, opinions of research and development-related employees and the systems and actual status of foreign countries, including Germany that are examining institutional reforms, and the propriety of amendment to the Patent Law and the direction of the amendment if necessary should be examined at the Intellectual Property Committee of the Industrial Structure Council, etc. Conclusion should be reached by the end of FY 2003.

(3) Development of Intellectual Property Service Specialists

(a) Development of Intellectual Property Legal Service Providers

In order for Japan to become an advanced-science-and-technology-oriented nation, it is necessary to establish an environment sufficient to promote the utilization of intellectual property rights and to effectively settle disputes. There are therefore requests for the upgrade of specialized intellectual property services, including legal services, related to technology and intellectual property as well as an increase in the number of such service providers. At present, intellectual property-related legal service providers (lawyers and patent attorneys(*benrishi*)) number only approximately 5,000. A dramatic increase in this

number is necessary.

At present, the establishment of a new legal profession development system is under deliberation as part of judicial system reform. The Law School Committee, the Subdivision on University of the Central Council for Education is conducting examination on the law school system. The Legal Profession Development Committee of the Judicial Reform Promotion Headquarters is conducting examination on a new National Bar Examination as well as a third party law school evaluation system.

Establishment of a system under which each law school may develop lawyers to immediately play an active role in the fields of business law and intellectual property law through preparation of curriculum and teaching materials based on appropriate understanding of social needs and independent decision is expected.

More specifically, it is strongly desirable to set the degree of difficulty to pass the new National Bar Examination at an appropriate level to prevent students from intensively studying only the compendium of laws to pass the new National Bar Examination.

In addition, it is desirable to establish relaxed standards for law schools which will start accepting students from April 2004 to enable the law schools to formulate curricula freely as well as to enable students to select the subject of business law, including intellectual property law, as elective subjects in the new National Bar Examination with the aim of allowing students to study eagerly to acquire knowledge in this area.

The following also should be examined as alternatives: positioning business law, especially intellectual property law, as an elective subject at law schools and making the completion of studying business law, including intellectual property law, a requirement for taking the new National Bar Examination. In addition, from the standpoint of recruiting capable staff in response to new social needs, law schools should accept a wide range of students regardless of their undergraduate major, and widely open their doors to company employees, etc. for the purpose of developing intellectual property service providers well-versed both in technology and law.

(b) Development of Intellectual Property Utilization Specialists

It is extremely important in strengthening Japanese industrial competitiveness to promote the effective utilization of intellectual property by corporations, universities and public research institutes. It is therefore necessary to develop intellectual property utilization specialists in addition to intellectual property legal service providers.

Specifically, it is necessary to strengthen development of specialists in the following activities: i) management of technology (MOT) to form technological strategies of corporations and universities, ii) preparation of business & marketing plans based on intellectual property, iii) evaluation of intellectual property, iv) financing and fund procurement based on intellectual property, v) prior art search and the preparation of patent maps for technological development, and vi) mediation regarding transaction and licensing of intellectual property.

Intellectual property service providers should be developed from the viewpoint that venture enterprises, small and medium-sized enterprises, universities and research institutes have difficulty securing such specialists internally.

(4) Utilization in Small and Medium-Sized Enterprises, etc of Technical Experts Retired from Large Corporations.

In order to change the Japanese economy and society from a “catch-up” nature to “pioneering” one, venture enterprises and small and medium-sized enterprises willing to take challenges and be flexible are expected to play a more active role. The manner in which venture enterprises and small and medium-sized enterprises secure excellent experts that create intellectual property such as newly emerging technology is an important issue. At the same time, it is pointed out that technical experts retired from large corporations have few opportunities to play an active role in this regard. It is therefore considered effective to promote the creation of new intellectual property through capable technical experts retired from large corporations transferring technological know-how to venture enterprises and small and medium-sized enterprises, etc, as advisors. It is therefore necessary to examine immediately measures to match the needs of venture enterprises and small and medium-sized enterprises and supplies of technical experts retired from large corporations.

2. Creation and Accumulation of Globally Superior Intellectual Property through National Research and Development Investment

<Points>

- (a) *Although industry-academia cooperation measures are being taken and the TLO system has been established in Japan, Japan is far behind the U.S. in terms of patenting and promoting the transfer of university created technology. The following should therefore be aimed for: i) promoting smooth transfer of university created patented technology by changing ownership of invention after succession from “researcher/ the Japanese Government” to “university/TLO,” ii) promoting support for universities in establishing an intellectual property management system, iii) increasing allowances for costs for patent attorneys (benrishi), etc., which are a burden for universities and venture enterprises, iv) making efforts to foster contract practices that establish the proper form of joint ownership for patents jointly owned by universities and corporations.*
- (b) *It is necessary to establish a mechanism under which strategic research and development, including that in the four priority fields of advanced technology (life science, information and communication technology, environmental technology, nano-technology/materials), steadily yield results as patent rights leading to industrial development in these fields. Specifically, the following measures should be taken: a) preparation and publication of a collection of examination examples for protein 3D structure related inventions by the end of FY 2002 as well as examination of the necessity of legal amendment and revision of the Examination Guidelines, arriving at a conclusion by the end of FY 2002 in order to clarify the handling of inventions concerning cell processing methods that are used for regeneration medicine and gene therapy and b) beginning publication of the number of registrations in the U.S. and Europe from FY 2002 to enable the timely analysis of patent information for advanced technology.*
- (c) *Since only some ministries and agencies of the Japanese Government implement the Japanese version of the Bayh-Dole Provision, the Provision should in principle be applied to all possible contract research sponsored by ministries and agencies. Moreover, there is discussion that the U.S. Bayh-Dole system under which the grant of exclusive license for import/sales in the U.S. to a third party is examined should be referred to in relation to intellectual property obtained by application of the Japanese version of the Bayh-Dole Provision. It is necessary to examine this idea keeping the basic standpoint of securing wide-ranging national interests, such as the promotion of science and technology and the reinforcement of industrial competitiveness. In doing so, it should also be taken into consideration that it is possible to request the contractor to consult with the government in relation to the grant of an exclusive license based on the consignment contract.*
- (d) *In some cases the early obtainment of patents for inventions and their commercialization are extremely important for corporations lacking funds, such as start-ups and small and medium-sized enterprises. Efforts should therefore be made to promulgate the accelerated examination system.*

(1) Promotion of Patenting and Transferring of University Created Technology

(a) Organizational Management of Intellectual Assets at Universities

In terms of the handling of the right to obtain a patent for an invention created by a national university, a notice of the former Ministry of Education, Science, Sports and Culture (Notice dated on March 25, 1978 by the Director-General of the Science and International Affairs Bureau of the Budget and Accounts Division of the Ministry of Education, Science, Sports and Culture: Bun-Gaku-Jutsu No. 117 “The Handling of Intellectual Property, such as Patents, for Inventions Created By Instructors at National Universities”) states that the ownership of a right is attributed to the Japanese Government when the research concerned is for the specific development of an application and the ownership of a right is attributed to the individual researcher otherwise. For private universities, ownership of a right is attributed to the individual researcher in many cases pursuant to the Notice. With ownership of a right being attributed to the individual researcher, the researcher generally has difficulty in individually obtaining a right for the invention due to the heavy burden of maintaining and managing the right. On the other hand, if the ownership of a right is attributed to the Japanese Government, the effective utilization thereof is not always possible due to problems concerning procedures for the disposition of national property.

To promote patents for university created inventions and the effective utilization thereof in the future, it is desired to change the ownership of intellectual property, including patents, after the succession of rights from the current “individual researchers or the Japanese Government” to “universities/TLOs” when national universities are incorporated. For this purpose, it is necessary to promote the establishment of rules, such as regulations on inventions, which stipulate the handling of rights at universities as well as regulations for the allocation of licensing fees, and to construct at an early stage a system by which universities systematically file and manage patent applications. In particular, national universities should promote specific examination based on the past experience of TLOs in terms of considering organizational ownership based on the succession of rights as a principle, aiming to establish internal patent policy effective after incorporation. Moreover, the Ministry of Economy, Trade and Industry and the Ministry of Education, Culture, Sports, Science and Technology need to collaborate from the standpoint of promoting TLO activities and technology transfer to private businesses.

(b) Human Resource Support for Universities to Manage Intellectual Property

In order to create new industry through proper obtainment and utilization of intellectual property rights based on the technology of universities, the following is necessary: the strengthening of patent minds for universities to strategically obtain patents, the establishment of systems to manage intellectual property and the establishment of internal rules such as patent policy. Toward this end a project of dispatching to universities specialists with high-level intellectual property administrative and general managerial abilities through business experience at corporations, etc. (Intellectual Property Management Advisors) should be implemented in early FY 2002.

Furthermore, it is necessary to develop an environment for technology transfer to smoothly pass on to society the results of research and development at universities.

Therefore, it is necessary to provide human resource support such as the dispatch of patent licensing advisors and to establish university-industry cooperation divisions such as incubators (venture enterprise fostering facilities) at universities.

It is desirable to implement the transfer of university created technology to industry by organically combining incubation activities in addition to obtainment and licensing of rights and intellectual property management. There was the opinion that in consideration of the current research management system at national universities, the universities had difficulty in constructing an internal management system with highly specialized practices only through incorporation. Utilization of experience and know-how held by authorized TLOs now operating as external organizations is therefore beneficial.

(c) Allowance for Intellectual Property Obtainment Expenses at Universities, etc.

Regarding expenses for the obtainment, maintenance and management of rights for research results, an exemption measure, which reduces by half the fee for request for examination and patent annual fees for the first to third years, has already been taken for TLOs of universities, small and medium-sized enterprises and venture enterprises. However, when filing patent applications, charges for patent attorneys(*benrishi*) and translation for applications overseas are expensive. The burden of filing patent applications is therefore heavy for these organizations.

Government research and development investment, approximately ¥24 trillion for the five years from FY 2001, will also be spent on these organizations. It is crucial to properly obtain rights for the results of this research and development. Allowances for expenses for the obtainment of intellectual property rights, such as patent application costs, patent attorney(*benrishi*) charges and translation charges for applications overseas should be increased in this regard.

(d) Jointly Owned Patents

The other joint owners' consent is necessary for transferring jointly owned patents to third parties or granting a license thereof to third parties (Section 73 of the Patent Law). There is therefore the opinion that even if one joint owner, a university, desires to grant a license for technology, the technology may be not worked if the other joint owner, a company, does not give consent.

Regarding this problem, the National Institute of Advanced Industrial Science and Technology provides that if one joint owner notifies the other joint owner of its desire to grant a non-exclusive license to a third party, the said other joint owner shall give consent to the grant of the non-exclusive license in writing so long as there are no reasonable grounds for disapproval. It also provides that joint owners shall stipulate in joint research contracts that the license fee from a third party shall be allocated according to their share in the right.

In addition, the Ministry of Education, Culture, Sports, Science and Technology distributed new model examples for joint research contracts (Notice dated on March 29, 2002 by the General Manager of the Technology Transfer Promotion Office, Research Environment and Industrial Cooperation Division, Research Promotion Bureau and the General Manager of the General Affairs Section, Budget and Accounts Division, Minister's

Secretariat, the Ministry of Education, Culture, Sports, Science and Technology: Shin-Kan-San No. 59 “Handling of Joint Research Contracts and Entrusted Research Contracts) to national universities in 2002. The examples include a provision stating that when a university and a company conclude a contract, if the company does not work the invention after a certain specific period of time, the other party concerned, a university, can grant a license to a third party (The specific period shall be determined between the parties concerned when concluding the contract).

These measures enable flexible responses based on a contract without legal amendment, and they encourage corporations to change their consciousness of joint research results as well as give universities and TLOs an incentive to conduct joint development. The wide dissemination of such contract practices is desired from the standpoint of effective utilization of research results, and future development thereof requires careful observation.

(e) Facilitating Patent Applications Based on Academic Papers

Since the preparation of a specification for a patent application requires not only expert knowledge but also time, some university instructors would like to promptly file patent applications based for their research results by using their academic papers in replacement of specifications (provisional application).

On the other hand, if the provisional application system based on academic papers is introduced, the scope of rights obtained by universities may become narrower due to the specialized character of academic papers. This would likely result in disincentive to both sides of industry-academia cooperation. It is therefore strongly requested to carefully examine the introduction of the provisional application system.

Since applications can be filed to the Japan Patent Office on-line using on-line personal computer application software, it is not very difficult to file substantial paper-based patent applications utilizing electronic data on academic papers for the purpose of securing an early filing date. Therefore, such a method should be used while responding carefully to the introduction of the provisional application system. In order to meet such requests, the Japan Patent Office should not only familiarize universities with the ease of electronic applications but also promote the free provision of on-line application software.

Incidentally, since university instructors write papers in English in many cases, they ask for extension of the period for submitting translations of original-language applications (applications within English specifications) from the current two months to about 12 months for applications first filed with Japan. This extension of the period for submitting translations should be positively examined separately.

(f) Grace Period

A patent right shall not be granted for a publicly known invention. As an exception, however, even if an invention becomes publicly known in a presentation at a study meeting by a designated scientific body, if a patent application is filed for the invention within six months, the patent application shall not be refused due to the presentation (grace period system, Section 30 of the Patent Law). Concerning the current grace period system, the Task Force pointed out in the Interim Summary of Discussions in December 2001 that universities should be included in scientific bodies to which Section 30 of the Patent Law is

applicable. Based on this, the Japan Patent Office revised the “Standards for Scientific Bodies Designated by the Commissioner of the Japan Patent Office” in the same month, familiarized universities with the revision through the Ministry of Education, Culture, Sports, Science and Technology and promptly started implementing the standards. As of April 1, 2002, 45 organizations such as the High Energy Accelerator Research Organization (organization shared by universities) and the Tokyo Institute of Technology have been designated.

The system based on Section 30 of the Patent Law only means that papers presented by the principal before filing application are not considered a reason for refusal as a publicly known example. Therefore, the following points should be noted: if another person has already filed an application before the principal files an application, the principal cannot obtain a patent, and patent applications are handled as lacking novelty due to the presentation of a paper by the principal and falling under a reason for refusal in a country or at an organization that does not have a similar grace period system, including the European Patent Office. It is necessary to familiarize the public with these matters.

Incidentally, this case is a focus of the discussion on the international harmonization of patent systems. Japan should also make active contributions to reaching agreement in this regard.

(2) Protection of Intellectual Property in Advanced Technology including the Four Priority Fields

(a) Updating Examination Guidelines, etc. to Promote Inventions in the Four Priority Fields of Advanced Technology

There is the possibility that inventions of a new form will be created in advanced technology fields. In such cases, it is not always clear how the results of research and development are protected as patent rights. In order to properly protect these results, it is necessary to clarify Examination Guidelines based on the actual conditions of industry by such means as increasing examination case examples. For this purpose, the Japan Patent Office needs to fully understand the latest conditions and trends of research and development and industry, so universities, research institutes, industry and the Japan Patent Office should strengthen their cooperation toward information sharing.

In particular, clarification of Examination Guidelines is urgently necessary in life science. In other words, the analysis of human genes has dramatically progressed due to international projects headed by the U.S., and research after the analysis of genes (post-genome research) such as research on the relation between diseases and protein generated based on genetic information and the development of medical supplies (genome-based medicine creation) from new dimensions based on protein 3D structure information are now proceeding. However, it is not always clear how the results of research and development are protected as patents in advanced research fields, such as the analysis of protein 3D structures and applied technology thereof. Regarding this problem, it is necessary to pay attention to the balance between the protection of inventions for industrial development and the use of analytical information for the development of life science.

A collection of examination case examples for protein 3D structure related inventions should be prepared and published based on research trends of protein 3D structure analysis and other related research by the end of FY 2002.

In addition, while medicines and medical equipment have been conventionally considered to be patentable, medical acts such as therapy have not been considered to be industrially applicable inventions and their patentability has been denied. However, some new technology, such as gene therapy and regenerative medicine, are based on a process in which a doctor removes cells from a patient's body and restores them to the patient's body after processing. The above cell processing may be conducted by a person other than a doctor. However, since the current Examination Guidelines do not assume such new technology, a patent application for the above cell processing method might be refused based on the understanding that the method is a medical act. The results of development may therefore not be sufficiently protected. There is the opinion that such cell processing methods should be considered not as medical acts but as industrially applicable inventions in terms of the proper protection of medical technology-related inventions and the promotion of the development of new medical technology.

The Japan Patent Office should examine the necessity of legal amendment and the revision of the Examination Guidelines in terms of the handling of cell processing method-related inventions used for regeneration medicine and gene therapy and arrive at a conclusion by the end of FY 2002.

(b) Timely Analysis and Provision of Advanced Technology Patent Information

The Science and Technology Basic Plan (2001-2005) decided in March 2001 gives priority in allocating research and investment funds to the four fields of advanced technology (life science, information and communication technology, environmental technology and nano-technology/materials). Since it is not always easy to fully understand technological trends in such fields, information that enables the conducting of effective and efficient research and development in these fields and the proper filing of patent applications for the results thereof are desired.

It is important to further enrich technological trend surveys so that research results properly bring about the obtainment of intellectual property rights and lead industrial development in the related field. In addition, since the timely provision of information is requested for the eight important fields (life science, information and communication technology, environmental technology, nano-technology/materials plus energy, manufacturing technology, social infrastructure and frontiers) in the Science and Technology Basic Plan (2001-2005), the Japan Patent Office should continue to publish patent application status for the above eight important fields (number of publications/registrations) first published on its Website in February 2002, as well as transmit more enriched information, including the number of registrations in the U.S. and Europe.

(3) Handling of Intellectual Property under the "Japanese-Version of the Bayh-Dole Provision"

Section 30 of the Law on Special Measures for Industrial Revitalization (commonly called the Japanese-version of the Bayh-Dole Provision), which enables attribution of research result ownership to the contractor in contract research based on government funds, entered into force in October 1999. It has been highly evaluated by industry.

However, only some ministries and agencies, including the Ministry of Economy, Trade and Industry, apply the Japanese-version of the Bayh-Dole Provision. The Provision should in principle be applied to any contract research sponsored by ministries and agencies in the future.

In addition, there is the opinion that the U.S. Bayh-Dole system should be referred to concerning intellectual property obtained by applying the Japanese-version of the Bayh-Dole Provision. The U.S. Bayh-Dole system examines the grant of an exclusive license for import and sales in the U.S. to a third party. It is necessary to examine this opinion keeping the basic standpoint of securing wide-ranging national interests, such as the promotion of science and technology and the reinforcement of industrial competitiveness. In doing so, it should also be taken into consideration that it is possible in Japan to request a contractor to consult with the government as a entrustor in relation to the grant of exclusive license for import and sales to a third party based on the entrust contract.

(4) Establishment and Utilization of Systems for the Effective Obtainment of Patent Rights by Universities, Venture Enterprises, Small and Medium-Sized Enterprises, etc.

(a) Support for Early Obtainment of Patent Rights

In some cases the early obtainment of a patent for an invention is effective in promoting the return of research results by universities and public research institutes to society and is effective for corporations lacking funds such as venture enterprises and small and medium-sized enterprises in establishing competitiveness at an early stage. Based on this, the accelerated examination system, in which the results of first examination are dispatched, in principle, within one year of request for examination, was fundamentally improved in July 2000. The scope of accelerated examination was expanded to applications filed by universities, venture enterprises, small and medium-sized enterprises, and procedures were dramatically simplified. Approximately 3,000 requests for accelerated examination were filed in 2001.

The accelerated examination system should be disseminated through the following measures for the purpose of wide use among universities, venture enterprises and small and medium-sized enterprises.

- i) Enrich the content of information on the Website concerning the accelerated examination system
- ii) Introduce the system to universities, venture enterprises and small and medium-sized enterprises through Industrial Property Right Explanatory Meetings (for beginners and practitioners) and circuit interview examination of patents.
- iii) Hold explanatory meetings on the utilization of the accelerated examination system and distribute materials on such occasions as the Venture Fair Japan and Small and Medium Enterprises Business Fair

(b) Effective Utilization of Patent Information

The effective utilization of patent information is important for universities, public research institutes, small and medium-sized enterprises and venture enterprises in conducting research and development, obtaining rights, introducing technology, etc. However, these organizations do not have sufficient search capability at present. The improvement of such capability is necessary.

In this regard, the following should be carried out: dissemination of patent information databases such as IPDL, the utilization of specialists for instruction on database utilization and, the development of an environment for patent information search.

In addition, slower searches have resulted from increased IPDL use. The Japan Patent Office should therefore reinforce and improve accessibility to the system by the end of FY 2003 in line with the replacement of IPDL equipment.

3. Developing an Environment to Implement Intellectual Property Based Business Strategy

〈Points〉

- (a) *In order for Japanese corporations to keep up with international competition, it is urgently necessary to take strategic measures regarding the obtainment of intellectual property, such as patents, as well as the management of trade secrets and technology leakage. Corporations are in this regard encouraged to establish in-house strategic programs, and the Government should consider preparing informative guidelines within FY 2002.*
- (b) *Sufficient disclosure of information useful to evaluate corporate intellectual property to enable investors to judge profitability and corporate value will increase financing capacity and stabilize the status of key executives, thus reinforcing the corporation's industrial competitiveness. It is therefore necessary to establish informative guidelines on desirable information disclosure concerning intellectual property within FY 2003, taking the advantage of the management of secrets by corporations into consideration.*
- (c) *With the fluidization of employment and the spread of information technology, corporate trade secrets easily drain to domestic and foreign competitors. This is liable to inhibit corporate competitiveness. The Industrial Structure Council should promote active consideration regarding strengthening of civil remedies regarding trade secrets. Moreover, related ministries and agencies need to accelerate discussion on the introduction of criminal punishment, including the propriety thereof. The Industrial Structure Council also needs to discuss it, taking problems liable to occur by the strengthening of protection, such as the effect of restraining the fluidization of employment, into consideration. Regarding these problems, it is necessary to take necessary measures as well as to consider submission of an Unfair Competition Prevention Law amendment bill to the 2003 ordinary Diet session.*
- (d) *There is concern about lengthening of the examination period due to an unanticipated large increase in the number of requests for examination over the coming six to seven years. This problem should be solved from medium and long-term standpoints. Improvement of the examination capability should be based on a Ten Year Plan by improving the accelerated examination system, widely strengthening the interactive search outsourcing system and conducting examination based on users' needs, such as the establishment of a system to cooperatively examine related applications for core competency applications, so that the examination process is completed within two years of filing a request for examination while the quality thereof is maintained. In addition, from the standpoint of effective utilization of limited examination capacity, reform of the application/request for examination structure should be examined.*
- (e) *Recently there have been an increasing number of intellectual property right-related disputes due to intensifying domestic and international competition. A system to promptly settle these disputes and reduce settlement costs should therefore be established. In this regard, it is necessary to submit amendment bills to the 2003 ordinary Diet session based on examination of such elements as the relation between the opposition system and the trial for invalidation system, the ideal trial for correction*

system and the relation between trials and lawsuits for annulment of a trial decision. Moreover, related organizations should promote examination of the relation between a decision to invalidate a patent in an infringement lawsuit and a trial for invalidation and take medium and long-term necessary measures by FY 2005. In addition, METI should examine the improvement of civil procedures for collecting evidence from comprehensive viewpoints and take necessary measures by FY 2005.

- (f) In order to create highly-creative venture enterprises and small and medium-sized enterprises, a system to enable the utilization of intellectual property as an asset should be established in addition to the existing promotion measures. Regarding the improvement of financing means by utilizing intellectual property, the following shall be conducted: acceleration of the patent licensing market, construction of a fluidization scheme by implementing a model project concerning the securitization of patent rights in FY 2002 and improvement of the system and its operation in FY 2003. Moreover, it is also necessary to examine such elements as favorable taxation and trust systems in order to promote technology transfer. In addition, regarding the protection of license contracts when the licensor has gone into bankruptcy, the Bankruptcy Law should be amended in 2003 so as to protect licensees who have fulfilled the requirements to oppose a third person. Specific requirements against a third person which licensees can easily use should be examined and necessary measures should be taken regarding a more desirable system of requirements for opposing a third person concerning intellectual property rights.*
- (g) With Internet-based corporate activities increasing, in order to ensure smooth progress in such activities it is necessary to secure a mechanism by which intellectual property is properly protected on digital networks. Toward this end the Patent Law and the Trademark Law were amended in FY 2002 based on the e-Japan Plan. Smooth implementation of the amended law is desirable. In addition, necessary measures should be taken regarding distribution promotion measures for digital content from FY 2002 onward to confirm progress of consideration in this regard.*
- (h) In order to develop timely policies that correspond to various intellectual property activities on the part of users, it is necessary to begin establishing intellectual property-related statistics to form the foundation of intellectual property policy planning by the end of FY 2002.*

(1) Intellectual Property-Focused Management

(a) Establishing Strategic Measures for Intellectual Property

There is concern that fewer Japanese corporations obtain and manage intellectual property in a strategic manner than U.S. and European corporations. In other words, although the number of patent applications filed by Japanese applicants is the world's highest, Japanese applicants tend to focus on domestic applications more than those in the U.S. and Europe. Internationally obtained patents in advanced technology such as life science, which are a source of international competitiveness, are not sufficient in quality and quantity. Moreover, some U.S. corporations review patents which do not bring about necessary business expansion or earnings from licensing. Even though similar measures are also taken by Japanese corporations, it is not generally clear in what manner such measures are taken.

Since it is considered that strategic measures in consideration of global competition will become more important in the future, corporations are encouraged to manage their in-house patents in a unified way as a portfolio and to establish strategic programs with the aim of promoting "selection and concentration" of patents from the standpoint of improvement in profitability and business strategy. In addition, the strategic obtainment and management of intellectual property by Japanese corporations should be promoted, including examination of the preparation of informative guidelines for establishment of programs in consideration of the actual conditions of corporations by the end of FY 2002.

(b) Information Disclosure Concerning Intellectual Property

Only a few Japanese corporations disclose to investors information regarding intellectual property-related activities and subsequently created intellectual property. Investors therefore cannot utilize information concerning intellectual property to properly judge the profitability and value of corporations.

Sufficient disclosure of intellectual property-related information enabling use of its evaluation to judge the profitability and the value of a company will establish the intellectual property strategies of the company, bringing about an increase in financing capacity, the stabilization of the status of key executives, countermeasures against hostile takeover, employment stabilization and the reinforcement of corporate competitiveness. It is for this reason necessary by the end of FY 2003 to formulate informative guidelines for desirable disclosure concerning intellectual property (information to be used for evaluating intellectual property such as the amount of cash flow created, the technological advantage of the intellectual property, the business strategies utilizing the intellectual property concerned and disclosing method thereof, etc.) in consideration of the management of secrets by corporations while surveying the conditions of U.S. and other overseas corporations that are improving disclosure concerning intellectual property rights.

(2) Strengthening Protection of Trade Secrets

While trade secrets are becoming more important in the activities of Japanese corporations, draining of corporate trade secrets to domestic and foreign competitors is raising concern about damages to the competitiveness of these corporations. There is therefore the question of whether the government should strengthen the protection of trade secrets from civil and criminal standpoints through amendment of the Unfair Competition Prevention Law while corporations are further reinforcing the management of trade secrets.

Regarding reinforcement of the management of trade secrets by corporations, the target is to propose desirable management of trade secrets in (the above mentioned) informative guidelines for the establishment of corporate strategic programs by the end of FY 2002.

As Regards strengthening of trade secret protection through amendment of the Unfair Competition Prevention Law, the Intellectual Property Committee of the Industrial Structure Council should actively discuss reinforcement of civil remedies with the aim of facilitating proof of infringing acts and the amount of damages by the plaintiff. Moreover, related ministries and agencies should accelerate discussion on the propriety of the introduction of criminal punishment for infringement against trade secrets. The Intellectual Property Committee of the Industrial Structure Council also must discuss this issue in consideration of problems created due to the strengthening of protection, such as restraints on fluidization of employment.

Necessary measures should be taken as regards these issues, while examining them with an eye to submitting an Unfair Competition Prevention Law amendment bill to the 2003 ordinary Diet session.

(3) Ensuring Examination for Timely and High Quality Patents: Examination Based on User Needs

In order to timely and properly protect important technology, including advanced technology, it is needless to say necessary that the Japan Patent Office have a firm examination capacity.

The Japan Patent Office examination period is internationally competitive due to the high-performance of examiners in spite of their small number.

Looking at recent application and examination conditions, the number of applications and requests for examination is by far higher than that of the U.S. and Europe from the viewpoint of Japan's market size and the amount of research and development investment, but the ratio of patented applications and foreign applications are low. In Japan, operational divisions and intellectual property divisions of corporations are in closer relationship than in the U.S. and Europe, forming effective patent networks which in turn form part of Japanese corporate competitiveness. On the other hand, since there is no choice but to invest considerable examination resource in a great deal of applications that lack patentability, the examination of important applications that establish Japan's industrial competitiveness may be obstructed.

There is rising concern about the lengthening of examination. The number of patent applications to be examined has been rapidly increasing in recent years due to the shortening of the period for request for examination to three years as well as the increasing number of applications, the increase in the average number of claims per application and

the increase in the ratio of filing of requests for examination. Based on the expectation that the number of requests for examination will continue to increase over the next six to seven years due to shorter period for request for examination, the problem must be drastically solved from a medium and long-term perspective.

Toward this end, the following measures should be taken: i) establishment of a system to handle increasing requests for accelerated examination for applications filed by venture enterprises, small and medium-sized enterprises, universities, applications of which foreign patent family exists and working-related applications while widely disseminating the revision of the accelerated examination system by the end of FY 2002, ii) considerable reinforcement of the interactive search outsourcing system and a large increase in the number of examiners by FY 2005, when the number of requests for examination will temporarily increase due to institutional changes, iii) examination that meets user needs such as through the establishment of a system to cooperatively examine related applications for core competency applications, and iv) establishment of an examination system that can handle more requests for examination than the number anticipated from FY 2006 onward in consideration of the period necessary to train assistant examiners, aiming to establish a system to complete examination within two years of filing a request for examination based on a Ten Year Plan.

In addition, from the standpoint of effective utilization of limited examination capacity, reform of structure of application and examination request should be examined.

(4) Prompt Settlement of Intellectual Property Right-Related Disputes and Reduction of Related Costs

(a) *Shinpan* System(Trial System), Infringement Lawsuits and Lawsuits for Annulment of a Trial Decision

i) Review of the *Shinpan* System(Trial System)

At present, the opposition system and the trial for invalidation system coexist as post-grant review systems. However, resulting complications have been pointed out such as cases simultaneously pending under both systems and cases concerning a request for trial for invalidation if opposition fails. In addition, the meaning of the coexistence of the two systems needs to be reviewed due to the fact that the Supreme Court admitted in its decision on the Kilby patent case that infringement suit handling courts judge the validity of industrial property such as patents within a certain limit and that utilization of this judgement by infringement suit handling courts is expanding.

Moreover, when a lawsuit for annulment of a trial decision of invalidation is pending in the Tokyo High Court, if the Japan Patent Office is requested to conduct a trial for correction and the request for correction is accepted and becomes final, the trial decision of invalidation will be almost automatically discarded at the lawsuit for annulment of a trial decision of invalidation, and the case will be remanded from the Tokyo High Court to the Japan Patent Office (remand of a decision arising from the correction of the patent for which a lawsuit for annulment of a trial decision is pending). In response to demands for the settlement of disputes through one process, it is necessary to prevent such developments in a case.

As regards the coexistence of the opposition system and the trial for invalidation system, it is necessary to examine enhancement of *shinpan* functions by streamlining them into a

new *shinpan* system that includes elements of the opposition system and the trial for invalidation system while maintaining the meaning of administrative procedure, which is that judgement effective for third parties as well as parties concerned is obtainable through low-cost, simple ex officio procedure without strict requirements for requesters as a preventive measure before an infringement dispute occurs.

In order to reduce the come-and-go of cases between the Tokyo High Court and the Department of Appeals in the JPO, it is necessary to prevent right holders from requesting a trial for correction when a lawsuit for annulment of a trial decision concerned is pending as well as to take measures such as enabling right holders to take necessary and sufficient offensive and defensive steps in proceedings of a trial for invalidation.

The Intellectual Property Committee of the Industrial Structure Council should further discuss these problems in order to submit a necessary Patent Law amendment bill to the 2003 ordinary Diet session.

ii) Reinforcement of the Courts' Capacity to Handle Specialized Suits

“The Recommendations of the Justice System Reform Council” emphasize the further reinforcement of the technical settlement system for intellectual property-related suits. Granting of exclusive jurisdiction to the Tokyo District Court and Osaka District Court respectively and introduction of the *senmon-iin* system (expert commission system) are under examination as part of judicial system reform.

Regarding granting of exclusive jurisdiction to the Tokyo and Osaka District Courts and the Tokyo High Court and the introduction of *senmon-iin* system for infringement lawsuits, METI should continue to participate in examination conducted by the Subcommittee on Civil and Family Procedure Codes of the Legislative Council as well as actively examine the realization of these two items based on discussion at the Strategic Council on Intellectual Property.

iii) Arrangement of Roles between Judgement of Validity of Patents in Infringement Suits and Trials for Invalidation

The Supreme Court stated in its decision on the Kilby patent case that “When it is clear that there are grounds for invalidation of the patent, demands for injunction or compensation for damages are not allowed because these amount to abuse of the right,” and admitted that the court in charge of the infringement suit makes a judgement on the validity of patent only when “it is clear that there are grounds for invalidation.”

Some Task Force members from influential Industrial groups strongly requested the court being enabled to judge the validity of a patent in an infringement lawsuit even if there are not clear grounds for invalidation on the assumption that a technical settlement system, including the grant of exclusive jurisdiction to the Tokyo and Osaka District Courts respectively and the utilization of *senmon-iin* and *chosakan* (court investigators), is established at infringement suit handling courts, aiming to settle disputes over patent infringement and validity together (i.e. settlement of dispute through one process).

On the other hand, there were opinions against such requests to the effect that the requirement of “clearness” is necessary as a safety valve to prevent inconsistency between judgement at a trial for invalidation at the Japan Patent Office and the judgement of invalidation made by the court handling the infringement suit as long as the existence of the

trial for invalidation system is assumed and cases where the court can judge validity should not be expanded. Moreover, there was also the opinion that even if cases where the court can judge validity in infringement suits are expanded, patent holders could not settle disputes through one process as long as third parties not concerned in the infringement suit can request a trial for invalidation.

Moreover, there was concern that the mere expansion of cases where the court can judge validity or the expansion together with the fact that a trial for invalidation would not be proceeded in parallel would cause the substantial prolongation of the trial period for infringement suits and patent holders would suffer increased disadvantage. In this regard, there were the following opinions: i) prolongation of the trial is unavoidable, but will not be substantial, and ii) even if the trial is partially lengthened, priority should be given to shortening of the total period until the final settlement of disputes through one process.

From the standpoint of venture and small and medium-sized enterprises, there was the opinion that the settlement of disputes through one process should be promoted for the effective use of management resources, while another opinion that since the necessity of return on investment is higher for them than for large corporations, highest priority should be given to the early settlement of disputes.

In addition, there was yet another opinion that the relation between judgement of validity in an infringement suit and a trial for invalidation at the Japan Patent Office should be sorted out from the standpoint of the reduction of burden of the patent holder, who has to deal with both procedures in court and the Japan Patent Office, and avoidance of inconsistency between their judgements. In particular, there was an opinion that even if cases where the court can judge validity in infringement suits are expanded, if a trial for invalidation is independently instituted at the same time or after an infringement suit, the ultimate settlement of a dispute through one process cannot be achieved. Therefore, measures such as abolishing the trial for invalidation system or setting a limit to the period for requesting a trial for invalidation should also be taken.

Incidentally, it was pointed out that when examining the expansion of cases where the court can judge validity in infringement suits, legal issues such as the following also need to be sorted out: i) how to interpret the validity of an administrative measure granting a patent, ii) the possibility of preventing future disputes over the validity of the same patent based on a decision in an infringement suit which is effective only to parties concerned, differing from a decision in trial for invalidation which also effects third parties, iii) how to consider the relation between *shinpan*(trial) procedures based on the *ex officio* principle and civil procedure based on the *inter partes* system, and iv) how to handle patent corrections when an infringement suit is pending.

As mentioned above, there are not only requests for expanding cases where the court can judge validity in infringement suits but also opinions against the expansion. Agreement was not reached in this regard. In the future, related ministries and agencies, courts, etc. need to cooperate toward active consideration of the desirable relation between infringement suits and trials for invalidation based on analysis of the usage conditions of argument against the abuse of rights and related problems, the research and analysis of user needs and the arrangement of legal issues, and take necessary medium and long-term measures by FY 2005.

(b) Improvement of Civil Procedures for Collecting Evidence

Evidence is predominantly distributed to the defendant in many intellectual property infringement suits. The plaintiff therefore has difficulty in proving infringement. As a result the necessity of improving civil procedures for collecting evidence has become an issue.

On the other hand, since trade secrets are involved in many intellectual property suits, substantial solution of the problem cannot be expected unless the interest of a party holding evidence concerning trade secrets is properly protected in reviewing the procedures for collecting evidence.

Based on such viewpoints, industry requested the following measures: i) along with admission of the plaintiff's procedural representatives to participate in the *in camera* proceedings for judging reasons for refusal to submit documents, such as the documents being trade secrets, imposing severe sanctions against the leak of obtained secrets, ii) clarification that correspondence documents between the procedural representatives and parties concerned are exempt from the order to submit documents, iii) along with making it a principle that if documents subject to an order to submit include trade secrets, the trial will be conducted only by the judge, representatives and other permitted persons, establishment of a procedure that strictly prohibits leaking secrets obtained in the trial.

In order to facilitate the exercise of rights by legitimate right holders and to properly protect the interests of a party holding evidence concerning trade secrets, METI should actively present suggestions concerning the improvement of the procedures for collecting evidence to the Subcommittee on Civil and Family Codes of the Legislative Council and energetically examine issues from a comprehensive standpoint based on discussion at the Strategic Council on Intellectual Property toward taking necessary measures by FY 2005.

(c) Proper Determination of the Damage Amount of Infringement and the "Treble Damages System"

Many people think that the amount of compensation for damages found in intellectual property right-related disputes is small and that there are circumstances in which infringers profit. In this regard, Japan should introduce a "treble damages system" under which the court can establish compensation three times the amount of damages.

However, the treble damages system was not introduced in the past due to the fact that : i) the system conflicts with the basic principle of the Japanese damage compensation system under which compensation that exceeds the amount of damages incurred by the right holder cannot be approved concerning a demand for compensation for damages from illegal acts, ii) there is public sentiment that compensation exceeding actual damages should not be ordered, and iii) introduction should be carefully examined based on its relation with other legal areas, such as pollution and state compensation. Introduction of this system is therefore considered difficult. On the other hand, due to the recent improvement of remedies concerning infringement, the average amount of compensation for damages in patent infringement suits is dramatically rising (While the average amount of compensation for damages found in patent/utility model infringement suits was approximately ¥46 million between 1990 and 1994, the average amount between 1998 and 2001 increased to approximately ¥181.25 million).

Although introduction of the "treble damages system" is difficult at present, other preventive measures against infringement should be continuously and specifically examined

in consideration of the opinion that demand for compensation exceeding monetary damages is necessary to secure prevention against infringement. For example, it is necessary to comprehensively examine non-monetary damages under the civil procedure (Article 710 of the Civil Code) in terms of the feasibility thereof as well as legal theory and judicial practices based on discussion at the Strategic Council on Intellectual Property.

In addition, it is necessary to further examine measures, such as exclusion corporations that have been found guilty of infringing a patent right from designated competitive bidding for central or local government procurement (suspension of designation).

(d) Granting *Benrishi* (Patent Attorneys) the Authority to Serve as Representatives in Patent Infringement Lawsuits

The Patent Attorney(*benrishi*) Law amendment bill to the effect that the authority to represent clients in infringement suits shall be granted to patent attorneys(*benrishi*) after taking measures to secure their ability was enacted at the 2002 ordinary Diet session. For smooth implementation of training by the Japan Patent Attorneys Association, which is a requirement for the obtainment of the right to represent, cooperation from courts and the Japan Federation of Bar Associations is indispensable. The Japan Patent Office also must provide as much support as possible.

(5) Establishment of Systems Enabling Utilization of Intellectual Property as Assets

(a) Promotion Measures for Patent Licensing and Technology Transfer

Intellectual property is the fruit of creative activities such as technological development. Its active utilization is indispensable in vitalizing industry and the economy based on technical capability.

Especially under present circumstances such as shorter product life cycles and sharply increasing research and development expenses, the reduction of research and development costs and the establishment of an effective research and development system are requested and effective utilization of technology held by others is necessary. It is therefore an important task to establish an environment where “those who have exercised their ingenuity and obtained patents” and “those who intend to utilize the patents” are matched effectively, in other words, a “patent licensing market and technology transfer market” should be established.

Since FY 1997, the Japan Patent Office has been implementing a project to promote patent licensing with the aim of establishing a technology transfer market through patent licensing. The National Center for Industrial Property Information took over the major part of the project in FY 2001.

Through this project, there have been 1,478 technology transfers etc. in the past five years (as of the end of March 2002). The economic impact thereof (movement of money occurring as a result of the above project (excluding project costs)) reached approximately ¥26 billion (as of the end of December 2001). Returns were twice the initial investment.

At the beginning of this project, the rate of patent licensing/technology transfer from large corporations to small and medium-sized corporations was high. At present, however,

there are many cases of patent licensing/technology transfer between small and medium-sized corporations. Patent licensing/technology transfer from small and medium-sized corporations or venture enterprises to large corporations, and from universities or TLOs to large corporations are also increasing.

In this manner, this project is contributing to enhancing the awareness of utilization of intellectual property rights among small and medium-sized corporations and vitalizing cooperation between industry and academia.

Based on such circumstances, the following should be future goals: i) promotion of the obtainment of high-quality patents through the improvement of patent management by small and medium-sized corporations, venture enterprises, universities and TLOs, ii) further improvement of the content of the project according to user needs concerning patent licensing and technology transfer, such as the improvement of human networks, including patent licensing advisors, the upgrading of information networks including patent licensing databases and the reinforcement of human development functions including improvement of the content of training projects, and iii) an increase in cost effectiveness.

Moreover, it is also necessary to examine measures such as favorable taxation for the utilization and licensing of intellectual property rights and trust systems for intellectual property.

(b) Protection of License Contracts

There is the risk in intellectual property license contracts that a licensee will be put in an unstable position due to the transfer of a patent or the bankruptcy of a licensor. The necessity of certain legislative allowance to promote licensing through protecting the licensees' position is therefore becoming an issue.

The Ministry of Justice will submit a bill to amend the Bankruptcy Law in FY 2003 in order to protect a licensee who has fulfilled the required conditions to oppose a third person in cases of licensors having gone into bankruptcy. If the Bankruptcy Law is amended as such, the position of a licensee who has fulfilled the requirements to oppose a third person will be protected in both cases of intellectual property having been transferred and of a licensor having gone into bankruptcy. How to establish a user-friendly system of requirements to oppose a third person has therefore become an issue.

The ideal system of requirements to oppose a third person needs to be examined in terms of each right in consideration of requests from industry, the presence of the existing system and the conditions of use thereof as well as the characteristics of the right to be licensed.

Although a registration system for license for industrial property rights exists, it has been pointed out that the system is difficult to use due to the following reasons: i) pending patent applications are not covered, ii) the procedure for registering individual industrial property rights which are the subjects of a comprehensive cross license contract is complicated under the current system, and iii) there is no other choice but to disclose information on licensing to third parties.

Based on these, the following opinions were presented at the Task Force: i) a new system of requirements to oppose a third person should be established such as one using the notary public system, ii) a registration system for pending patent applications that are included in a comprehensive license contract should be established, and iii) a simple registration system should be established. There was another opinion stating that it is important to create options concerning the registration of non-exclusive licenses so as to enable corporations to

carry out selection of these options.

It is necessary in the future to further examine the ideal system of requirements to oppose a third person based on the above discussion at the Task Force, with proper understanding of the needs of industry and taking the problems of the existing system of requirements to oppose a third person (registration system) into consideration. The Intellectual Property Committee of the Industrial Structure Council should conduct specific examination to take necessary measures in this regard by FY 2005.

The Ministry of Economy, Trade and Industry should again request the Agency for Cultural Affairs to amend the Copyright Law so as to create a system of requirements to oppose a third person for license contracts.

(c) Improvement of Financing Means Utilizing Intellectual Property

In order for venture enterprises and small and medium-sized enterprises to commercialize patented technology, smooth financing is important. However, equity investment and the mortgage loan system have not been widely utilized. Moreover, there is greater need among large corporations for the effective utilization of their patents as assets. To solve these problems, there are methods of using the securitization or trust systems of intellectual property as financing means. However, although these methods have been utilized for copyrights, they have not been utilized for patent rights. It is therefore necessary to clarify problems in this regard.

For this purpose, feasible schemes should be examined through model projects that securitize the actual patent right utilizing a special purpose company. Specifically, examination should be conducted on the establishment of schemes such as a model of incentive-giving by which securities are sold to in-house researchers and developers, a model of right adjustment through securitization of jointly developed technology and standardized technology, and a model of fluidization through securitization of patents of venture enterprises or small and medium-sized enterprises or unused patents. Through that process, improvements of the system and its operation in FY 2003 should be targeted by extracting system-related problems, such as those in the Law concerning Liquidation of Assets and the Trust Business Law.

(6) Establishment of an Intellectual Property System Corresponding to the Network Society: Promotion of Distribution of Digital Content

As we are now entering the broadband age, the “e-Japan Plan” and “e-Japan 2002 Program” position the promotion of distribution of content as an important policy issue. The establishment of an environment where diversified, high-quality contents can be smoothly distributed and compensation smooth return to the right holder is an urgent necessity.

In order to confront such an issue, the “Council on the Promotion of Content Distribution” was set up within the Ministry of Economy, Trade and Industry, and is now studying the following: i) securing the safe distribution of contents (for example, a management system based on a common numbering system after creating a database on the information of rights for each item of content), ii) desired support for the content industry in overseas development (for example, measures against pirate products), iii) support in

activating the content industry (for example, measures for human resources development and financing measures), and iv) problems concerning the distribution of contents in terms of competition policy and handling thereof (for example, desirable contract practices between producing corporations and distributors). The Council will arrange the study results by around the middle of 2002. In addition, from FY 2002 onward, the Ministry of Economy, Trade and Industry, the Agency for Cultural Affairs and the Ministry of Public Management, Home Affairs, Posts and Telecommunications should cooperatively research, develop and disseminate the system to add information of related right holders and rights at the time of production, citing television programs, for which the relation between rights is most complicated, as an example. Through such activities, the distribution of digital contents is expected to be further promoted.

(7) Establishment of Intellectual Property-Related Statistics

In order to develop timely policies that correspond to various intellectual property activities conducted by diversified users such as Japanese corporations, universities and research institutes, it is important to obtain a wide range of statistical information related to intellectual property as basic information. However, at present, there are no comprehensive intellectual property-related statistics that cover all steps from research and development, application filing, registration and working.

Therefore, it is necessary to start establishing intellectual property-related statistics that are useful for planning intellectual property policies, such as those enabling evaluation of the relation between business activities and intellectual property rights, by the end of FY 2002.

4. Strengthening Protection of Intellectual Property Overseas

<Points>

- (a) Products that infringe intellectual property rights such as counterfeits of Japanese products are rapidly increasing overseas. The serious worsening of this problem has an extremely adverse effect on the industrial competitiveness of Japan. In this regard, the Task Force examined the issue of reinforcing measures and prepared a special report titled “Strengthening of Measures against Products Infringing Intellectual Property Right such as Counterfeits (December 2001).” Specific measures have been developed, such as the inauguration of the “International Intellectual Property Protection Forum” in April 2002. This was included in the Report. In the future, problems should be solved by putting measures into force in line with the seven proposals included in the Report. In addition, regarding the strengthening of border measures, related ministries and agencies should examine specific measures by the end of FY 2002 in order to take necessary measures by the end of FY 2003. Moreover, it is necessary to follow up on future efforts of the government and private sector in consideration of improvement of the system and its operation in infringing countries/regions by the end of FY 2002, to regularly conduct follow up after that and to review desired measures against infringing products.*
- (b) There is concern that the industrial technology of Japanese manufacturers is draining unilaterally in the process of transferring production bases to various locations in Asia. This adversely affects the competitiveness of Japanese corporations. It is therefore necessary to encourage private corporations to formulate (the above mentioned) strategic programs concerning desirable medium and long-term strategy for management/utilization of technology, including the establishment of an internal organization, from the standpoint of reinforcing industrial competitiveness as well as to formulate (the above mentioned) informative guidelines by the end of FY 2002. In addition, it is necessary to encourage and support developing countries in such efforts as the improvement of any Asian countries’ legal systems and operations which hinder the obtainment and exercise of intellectual property.*
- (c) Corporations are becoming more active in the obtainment of intellectual property rights overseas from the standpoint of ensuring overseas markets. There is a growing need for reduction of related expenses, such as those for procedures and translation. The following efforts should be therefore actively put forth: reform of the Patent Cooperation Treaty, harmonization of the patent law systems of all countries, mutual utilization of prior art search results and examination results, automatic translation, etc.*
- (d) The Hague Conference on Private International Law is discussing international jurisdiction in the intellectual property field. It is necessary to actively deal with this matter from FY 2002 onward based on the state of discussion overseas including the United States.*

(1) Strengthening Measures toward Counterfeits and other Products Infringing Intellectual Property Rights

Damages incurred by Japanese corporations from products infringing intellectual property rights such as counterfeits (hereinafter referred to as “infringing products”) made mainly in Asian countries, are becoming increasingly sophisticated from damages by infringements of trademark rights to damages by infringements of design and patents, as well as damages by pirated products using digital techniques, which are exact replicas of the legitimate products. The damages are also regionally expanding due to the export of infringing products to third countries. If the present situation is left as it is, Japanese corporations will incur serious damages, such as loss of markets in countries where infringing products were manufactured or distributed and the deterioration of brand image. It is therefore urgently necessary to fundamentally strengthen measures against infringing products. It is also important for countries that infringe rights to voluntarily strengthen measures since the flood of infringing products may erode the country’s trust on an international level, leading to a decline in foreign corporations’ motivation to invest.

Against such a backdrop, the Task Force prepared Special Report titled “Enhanced Strategies to Combat Counterfeit Products and Other Products that Infringe Intellectual Property Rights” in December 2001, and arranged issues to be worked on in the future with the aim of strengthening measures against infringing products based on government-private sector cooperation. From around the time the Special Report was prepared, there has been in Japan a rapid increase in interest in the issue of infringing products, and various measures have been put into effect by the government and private sector. The Japanese government started taking actions toward the Chinese government such as presenting specific cases of damages and requesting crackdowns as well as requesting the strengthening of export regulations based on Japanese experience. The private sector has been taking the following measures: The Japan Automobile Manufacturers Association, Inc. dispatched a high-level mission to request the Chinese government to strengthen its crackdown of infringing products, concluded the “China-Japan Motorcycle Intellectual Property Rights Project” with the China Association of Automobile Manufacturers, and is planning to jointly hold an Intellectual Property Right Symposium and examine the establishment of an arbitration mechanism for disputes, the Japan Bearing Industrial Association also dispatched a mission to request the Chinese government, including local governments, to take measures based on specific evidence and is receiving specific answers. In addition, in April 2002, the “International Intellectual Property Protection Forum (hereinafter referred to as the “Forum”) was launched as a cross-industry organization to implement measures against infringing products in close cooperation between the government and private sector. Regarding the content industry, the government is calling for the establishment of the “Content Industry Overseas Development Promotion Consortium (tentatively named).” Its participation in the Forum is under examination.

The problem should be solved by putting measures against infringing products into force in line with the seven proposals included in the Special Report: i) enhancing bilateral negotiations with the governments of infringing economies, ii) support for policies to counteract infringing goods in Asia and other areas, iii) implementation of international border measures, iv) strengthened action on the part of the private sector, v) identification of the actual status of infringing products and implementing effective mechanisms for use, vi) broad-based industry coalition across the sector and combined strategies by the public

and private sector and vii) achieving more strategic implementation of programs to combat infringing products.

The Forum shall be positioned as a core organization for taking measures against infringing products taken by Japan in the future, and it is important that it takes measures together with the government. Specifically, the Forum is expected to examine such measures as the dispatch of missions to countries/regions that infringe rights, information exchange, research study activities and government-based contribution to human resource development support projects. The Forum is also expected to approach the Japanese government as well as countries/regions that infringe rights by preparing the Japanese industry proposals concerning the actual status of damages and measures against infringing products through these activities. The government should sufficiently utilize the results of the Forum's activities as well as try to realize government-private sector joint activities in cooperation with the Forum.

In addition, since it is important to promote activities concerning measures against infringing products after establishing strategies according to infringing country, it is necessary to prioritize and arrange requests for improvement concerning the intellectual property system and its operation as well as to select negotiation methods according to infringing country (for example, utilization of the WTO TRIPS Agreement for WTO member states and utilization of bilateral negotiation for cases not covered by the WTO TRIPS Agreement such as WTO nonmember states). It is also necessary to continue to examine policy mixed with support measures for increasing the enforcement ability of infringing countries, such as human resources development, as well as measures to strengthen negotiation ability.

In addition, although each ministry and agency has been strengthening measures against infringing products, cooperation between related ministries and agencies should be promoted in the future in relation to such issues as approaches to infringing countries, provision of support for infringing countries in strengthening border measures, and border measures against products infringing intellectual property that are flowing into Japan. Especially, regarding the strengthening of border measures, it is necessary to prepare specific measures by the end of FY 2002 to take necessary actions by the end of FY 2003.

For implementation of the above activities, the following are needed: follow-up by the end of FY 2002 in consideration of the improvement of the system and its operation in each infringing country/region, follow-up regularly after that and continuously review desirable measures against infringing products.

(2) Basic Principles of Technology Transfer

When Japanese corporations develop business overseas, they transfer technology and production management know-how. How to strengthen the mechanism to make profits overseas in a strategic way while ensuring the technological advantage is important from the standpoint of reinforcing the industrial competitiveness of Japanese industry.

In particular, core technology and production know-how of Japanese corporations are unintentionally draining overseas due to such conditions as joint ventures, the licensing of technology, reverse engineering, technology transfer through information in forms such as distribution of drawings of metal molds, sales of advanced production equipment and transfer of production technology through local employees or former employees. It is

therefore urgently necessary to take measures concerning desirable forms of corporate management and utilization of technology and intellectual property.

Also, through cooperation between the government and private sector, it is necessary to examine negotiations and requests by country as regards national regulations for licensing and intellectual property law systems and their operation, which might hinder strategic activities by Japanese corporations.

On the other hand, U.S. corporations are conducting strategic activities regarding technology management such as: i) manufacturing products based on innovative technology, which will cause serious risk and damages if they leak out, within the country or providing them keeping the technology secret, ii) carefully selecting joint venture partners and paying the closest attention to the contents of contracts, iii) conducting lobbying, information provision and education activities through local industrial associations, iv) utilizing corporations specializing in the protection of intellectual property, and v) ensuring the return of profits on licensed technology by appropriate royalties. Japanese corporations must also strengthen strategic activities.

It is therefore necessary not only to encourage private corporations to establish (the above mentioned) strategic programs for desirable medium and long-term strategies for technology management and utilization, including the establishment of an internal organization, from the standpoint of reinforcing their industrial competitiveness but also to prepare (the above mentioned) informative guidelines in consideration of the status of corporations by the end of FY 2002.

It is also necessary to encourage and support developing countries in such efforts as improvement of any Asian countries' legal systems and operations that hinder the obtainment and exercise of intellectual property rights.

Moreover, there exists the opinion that technology possessed by private corporations, etc. may leak out through government technological cooperation. It is recognized in the present circumstances that the government is carrying out technology transfer in accordance with the status of developing country industry while aiming at the industrial development of the developing country as well as providing support for Japanese corporations in developing business overseas. However, the government should offer cooperation in sufficient consideration of the content of technology transferred and the conditions of intellectual property protection in developing countries, taking into consideration the fact that developing countries have been rapidly increasing their level of technology in recent years.

(3) Promoting and Facilitating Obtainment of Rights Overseas

With the globalization of business activities due to the globalization of the market economy, there are demands to improve systems toward the establishment of a worldwide patent granting system. The reform of the Patent Cooperation Treaty (PCT) and the substantial harmonization of patent systems are under consideration as specific measures in this regard.

On the other hand, in terms of the obtainment of rights in developing countries, there is concern about the insufficient examination ability of developing country patent Offices. It is therefore important to examine measures to promote and facilitate the obtainment of rights by Japanese corporations overseas. Various measures to facilitate the obtainment of rights in developing countries are under examination.

Japan should continue to take the initiative in considering PCT reform, aiming to simplify and rationalize the PCT system. As for extension of the already modified time limit for entry into the national phase for PCT applications (30 months for all PCT applications), a bill to amend related laws was just enacted in the 2002 ordinary Diet session.

As regards substantial harmonization of patent systems, Japan should aim at the enactment of a treaty and regulations advantageous to both applicants and patent Offices through discussion in WIPO on the draft Substantive Patent Law Treaty (SPLT). Japan should continue to actively encourage the U.S. to convert its system from the first-to-invent system to the first-to-file system and adopt the early publication system for all patent applications. Japan should encourage European countries to expand the grace period.

Japan should continue to actively make efforts toward harmonization of operations, the establishment of a common search system as well as consideration of international harmonization of patent laws based on the SPLT of WIPO. On the other hand, since it is thought that consideration of the SPLT will take time, examination should be immediately conducted on the possibility of mutual use of prior art search results and examination results under current different patent laws. In particular, in 2002 Japan should start a pilot project concerning a scheme for mutual use of search and examination results with the U.S. The post 2004 plan should be determined between Japan and the U.S. by the end of 2003 at the latest. Moreover, from the standpoint of promoting the obtainment of patents overseas, translation cost is one factor pushing up costs for obtaining patents overseas. It is therefore necessary to examine cost reduction measures such as improvement of automatic translation.

As for developing countries, Japan should further strengthen activities in the intellectual property field through frameworks such as bilateral and multilateral meetings and, especially, the Meeting of the Intellectual Property Offices of ASEAN + 3 Countries which was established in 2001. In order to facilitate the obtainment of intellectual property rights, Japan should conduct the following: i) encourage Malaysia and Singapore to make the Japan Patent Office MSE qualified, ii) establish a system to provide examination information via the Internet (Asian Industrial Property Network (AIPN)), iii) reinforce patent Office human resource development, iv) encourage accession to the PCT and Madrid Protocol, v) encourage introduction of the accelerated examination system and vi) encourage introduction of dead copy regulation .

(4) International Jurisdiction in the Intellectual Property Field

The Hague Conference on Private International Law is now discussing formulation of the “Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Convention).”

The following problems have been pointed out concerning the intellectual property field: in lawsuits for infringement against intellectual property rights requiring registration such as patent registration, whether the courts in the contracting state where the right is registered have exclusive jurisdiction over the lawsuits, how to deal with jurisdiction over a lawsuit for infringement against intellectual property that has not been registered, such as trade secrets and copyrights, and how to deal with disputes that occur in cyberspace.

It is necessary to actively deal with these problems based on the status of discussion overseas including the U.S. from FY 2002 onward.

IV. Closing

As mentioned in the beginning, corporations in developing countries, using low cost as their greatest weapon, are steadily improving their technological capability. As a result, for Japanese industry to maintain and strengthen industrial competitiveness in the future, it is important to protect highly creative technology as intellectual property and strategically utilize it to strengthen business activities and improve profit making structure.

The Strategic Council on Intellectual Property hosted by Prime Minister Jun-ichiro Koizumi was established in February 2002. On July 3, 2002 the Council will formulate the “for Intellectual Property Policy Outline ,” including the basic direction of intellectual property policy and a specific action plan until FY 2005. The Task Force expects wide-ranging discussion based on the suggestions of this Report.