Contract Guidelines on Utilization of AI and Data

June 2018
Ministry of Economy, Trade and Industry
Contract Guidelines on Utilization of AI and Data:
AI Section

June 2018
Ministry of Economy, Trade and Industry
Contract Guidelines on Utilization of AI and Data:
AI Section

Table of Contents

I Introduction ...................................................................................................................... 1
  1 Purpose .................................................................................................................. 1
  2 Identifying issues and solutions ............................................................................. 2
     (1) Identifying issues ......................................................................................... 2
     (2) Solutions .................................................................................................... 4
  3 Applicability .......................................................................................................... 6
     (1) Applicable contracting parties .................................................................... 6
     (2) Applicable software .................................................................................... 6
     (3) Relationship with Model Contract 2007, etc. ............................................ 7
  4 Overall structure .................................................................................................... 7
  5 Relationship with the Data Section of these Guidelines ..................................... 7

II Description of AI Technology ..................................................................................... 9
  1 Explanation of basic concepts ............................................................................. 9
     (1) AI (artificial intelligence) ......................................................................... 9
     (2) AI technology ............................................................................................ 9
     (3) Machine learning ...................................................................................... 9
  2 Applicable AI technology ..................................................................................... 10
     (1) Differences from Conventional Software Development .......................... 10
     (2) Positioning of machine learning ................................................................. 10
  3 Anticipated process for practical application of AI technology ....................... 11
     (1) Process for practical application ............................................................... 11
     (2) Elements of the Training Phase ................................................................. 12
     (3) Elements of the Utilization Phase .............................................................. 15
     (4) Participants in the Training Phase and the Utilization Phase ................. 16
  4 Characteristics of development of AI-based software ...................................... 16
     (1) Characteristics in contrast to Conventional Software Development .......... 16
     (2) The importance of understanding the characteristics of trained models .... 20

III Fundamental Approach .......................................................................................... 21
  1 Current state of contracts related to development and utilization of AI-based software 21
  2 Perspectives when reviewing contracts .............................................................. 21
(1) Differences in positions and attitudes between parties .......................... 21
(2) Matters that could cause problems between parties .......................... 22
3 Establishing ownership of rights and terms of use .................................. 23
   (1) Summary of intellectual property rights, etc. .................................. 23
   (2) Establishing ownership of rights and terms of use .......................... 25
4 Distribution of liability ........................................................................... 29
   (1) Summary of liability ................................................................. 29
   (2) Generation of trained models ................................................... 30
   (3) Utilization of trained models .................................................... 31
5 Problems under the Antimonopoly Act .................................................. 33
   (1) Abuse of dominant bargaining position ....................................... 33
   (2) Exclusive dealing and restrictive trading, etc. .............................. 34
   (3) Subcontractors Act .................................................................. 35
IV Development Agreements for AI-based Software ................................... 35
1 Development of AI-based software .......................................................... 35
2 Developmental categories for trained models ......................................... 36
   (1) Classification of developmental categories ................................. 36
   (2) Applicable developmental categories ........................................... 39
3 Development processes ......................................................................... 39
   (1) General development process for software .................................. 39
   (2) Development processes suited to generation of trained models ...... 40
   (3) Explanation of the phases ........................................................... 42
   (4) Roles of Users and Vendors ........................................................ 44
4 Considerations for contracts .................................................................. 45
   (1) Legal nature of contracts ............................................................ 45
   (2) Points to note when negotiating contracts .................................... 46
V Utilization Agreements for AI Technology ............................................... 53
1 Utilization of AI technology ..................................................................... 53
2 Services for utilizing trained models ...................................................... 54
   (1) Outline ....................................................................................... 54
   (2) Utilization method and mode of provision for services ................ 55
   (3) Contract formats ...................................................................... 55
3 Considerations for contracts .................................................................. 55
   (1) Customization of trained models .................................................. 55
   (2) Input data .................................................................................. 56
Reused models ................................................................. 56
(4) AI products ........................................................................ 57
VI Perspectives on International Transactions ............................................. 58
1 General points to note ......................................................................... 58
   (1) Fundamental perspectives .......................................................... 58
   (2) Determination of applicable law .................................................. 58
   (3) Selection of dispute resolution methods ...................................... 59
2 Potential issues in generation and utilization of trained models ................. 60
   (1) Acquisition and generation of data .............................................. 60
   (2) Generation of trained models ..................................................... 62
   (3) Utilization of trained models ..................................................... 66
VII Model Contracts .............................................................................. 68
1 Role ............................................................................................... 68
2 Characteristics .................................................................................. 68
3 Premises and points to note for each Model Contract .............................. 69
   (1) Assessment phase: non-disclosure agreement ............................ 69
   (2) PoC phase: operations test agreement ....................................... 69
   (3) Development phase: software development agreement .............. 70
   (4) Retraining phase .................................................................... 70
4 Non-disclosure agreement at the assessment phase (model contract) ......... 71
5 Operations test agreement at the PoC phase (model contract) ................ 77
6 Software development agreement at the development phase (model contract) 98
VIII Summary ..................................................................................... 135
I Introduction

These Guidelines (AI Section) explain a fundamental approach to contracts regarding the development and utilization of AI-based software, from the viewpoint of promoting the development and utilization of software using “AI technology (a series of software technologies that enable computer software to perform intellectual activities that can be performed by humans)”.

1 Purpose

At present, AI technology that primarily utilizes machine learning has advanced to the stage of practical application, and many companies have become involved in the development and utilization of AI-based software. It is anticipated that AI technology will spread widely throughout society in the future, and AI technology is expected to enable improvements in convenience and productivity, as well as measures to deal with social and structural challenges that society has not been able to adequately contend with in the past, such as falling birthrates and an aging population.

However, many legal issues regarding the development and utilization of AI-based software, including how to deal with the relationship of rights and who bears liability that might arise in connection to that development and utilization, remain unclarified because these are new issues, and existing legislation is insufficient.

In light of these circumstances, there is a pressing need to determine the relationship of rights, attribution of liability, and other similar matters that arise when parties execute contracts. However, the basic technological concept of AI technology is an inductive one, involving the drawing of conclusions from data, which differs fundamentally from the basic technological concept underpinning conventional forms of deductive software.

Characteristics that emerge in the development of AI-based software, which typically entails the generation of trained models, include the following when contrasted against Conventional Software Development (as defined below): (1) the contents and performance of trained models are often unclear when a contract is executed; (2) those contents and that performance rely on a training dataset; (3) the importance of know-how is particularly high when a trained model is generated; and (4) there is demand for further re-use of each type of product.

Turning attention to the parties involved, development of AI-based software commonly requires data, and from the perspective of the person requesting that development (a “User”), provision of data and know-how raises concerns regarding degradation in value of that data and know-how, the leaking of information, and other matters; on the other hand, from the perspective of the person conducting development of AI-based software (a “Vendor”), concerns arise regarding the loss of a degree of the Vendor’s freedom to conduct business due to the transfer of intellectual property to the User, the leaking of information, and other matters.

However, it is difficult to claim that an understanding of these characteristics of AI technology, the viewpoints of other parties, and other related matters has broadly permeated society. As a result, parties in contract negotiations insist on protecting their own rights and make unrealistic demands of the other party that overlook the characteristics of AI technology and the value of data and know-how, meaning that negotiations flounder and contracts fall through, which in turn raises risks that innovation will be impeded as parties’ freedom to conduct business will become unduly restricted and that costs will soar in terms of parties’ labor and time when executing contracts.
I  Introduction

If such risks materialize, development and utilization of AI technology will be hampered, resulting in Japan losing some of its industrial competitive edge, the emergence of difficulties when seeking solutions for social and structural challenges, and other similar outcomes.

These Guidelines (AI Section) present a fundamental approach to considerations, means of avoiding trouble, and other aspects that takes into account the characteristics of AI-based software when preparing development and utilization agreements related to that software. In doing so, the purpose of these Guidelines (AI Section) is to promote development and utilization of AI-based software by providing information for the execution of reasonable agreements that are agreeable to all parties and by serving as an aid in the establishment of contract practices.

It is also noted here for clarity that these Guidelines (AI Section) present nothing more than the aforementioned fundamental approach to contracts; these Guidelines (AI Section) have no binding legal force and do not constitute any restriction on freedoms enjoyed by parties in relation to executing contracts.

2  Identifying issues and solutions

Details regarding identifying legal issues related to development of AI-based software and how to seek resolutions to those issues using these Guidelines (AI Section) are provided below.

(1)  Identifying issues

(i)  Parties do not understand the characteristics of AI technology

Shared understanding and awareness of what AI technology is and what characteristics it possesses have yet to take shape, and as this is the case, differences in opinion and misunderstandings between parties arise and problems readily materialize.

Specifically, as described in II-4 below, development of AI-based and Conventional Software Development differ in that, for example, the precision of deliverables (the trained models described later) depends heavily on the data used for training, so in the initial phase of development, it is difficult in theory to predict what type of deliverable will be produced.

Because these characteristics of AI technology are not well understood, it becomes more likely that indeterminable disputes will arise between the parties in relation to performance assurances for deliverables and other matters.

(ii)  Legal relationships related to AI-based software, including the relationship of rights, attribution of liability, and other similar matters, are unclear

Legislation has not kept up with the rapid expansion and dissemination of AI technology, so a number of matters related to the relationship of rights, attribution of liability, and the like remain unclarified by law.

In terms of the relationship of rights, this is exemplified in there being no definitive interpretation regarding whether copyright arises in relation to the trained parameters that compose trained models.

In terms of attribution of liability, if, for example, AI-based software developed by a Vendor after provision of data from a User causes damage to a third party, it cannot be readily determined whether the data is at fault or the program is at fault, and it is unclear under the
I Introduction

Civil Code and the provisions of other laws how liability for damages should be attributed between the User and the Vendor.

When legal relationships are not clearly defined under law in this way, the risk arises that parties will become passive towards development and utilization, because predictability is not guaranteed. In addition, in contract execution negotiations, it is conceivable that negotiations would fall through and contracts would be left unexecuted as a result of each party attempting to force liability on to the other. Further, if any issue did arise, it would be difficult to resolve it because no guidelines for settling the matter would exist.

(iii) Data provided by Users to Vendors may have high levels of economic value or confidentiality

Generally, large volumes of high-quality data for training are required in order to develop highly accurate and competitive AI-based software. Time and effort is often committed to acquiring and processing data in the first half of the development period when developing AI-based software. In this way, it is necessary to perceive data as being intrinsically linked to the development of AI-based software, and, in general, the data required for development is provided to a Vendor by a User.

In some cases, the data provided to a Vendor by a User is economically valuable or confidential data that is a source of a corporation’s competitive edge, such as when the data is acquired by the User through enormous commitment of labor and expense or when that data is client data, production management data, or data embodying know-how.

Users are often concerned that provision of such data will lead to external leakage of data or know-how, loss of competitive edge as a corporation, breaches of confidentiality obligations, or problems related to protection of personal information. Additionally, Users tend to perceive that deliverables resulting from development of trained models and the like generated from the data they provide exist because of the data they provide.

On the other hand, Vendors tend to perceive no cause for concern regarding data leakage as, for example, it is generally difficult to ascertain provided raw data from the trained parameters contained within a trained model. Additionally, from the perspective of making use of trained models, Vendors desire to be able to provide trained models trained using the data of Users to third parties other than those Users.

Accordingly, aligning the needs of Users with respect to their data and the needs of Vendors with respect to making use of deliverables is a problem. Although this problem is not necessarily unique to AI-based software, it can be argued that this problem readily becomes acute in the generation of trained models, which heavily relies on the characteristics of training datasets.

(iv) Contract practices have not been established for the development and utilization of AI-based software

Understanding and awareness of contracts related to the development and utilization of AI-based software have not adequately taken shape among contracting parties, and it is not uncommon that contracts are negotiated without an adequate understanding of the characteristics of AI-based software, the value of data and know-how, and the other party’s perspective.
I Introduction

Under these circumstances, it is conceivable that parties would fail to reach agreement through discussion and that contracts would remain unexecuted between the parties as a result of each party becoming excessively defensive and pushing unrealistic demands on the other with respect to the relationship of rights and attribution of liability. If this became the case, development and utilization of AI technology would be hampered and the scope of AI technology development and utilization would become limited. Additionally, because misunderstandings and oversights regarding contract provisions would exist when contracts are executed, there would also be the risk that resolving issues that arose as a result would be costly.

In fact, means of reconciling interests needed to overcome these circumstances are not widely known. Consequently, providers of data, such as Users, become concerned that data or know-how will lower in value or will be leaked externally, and so they become hesitant to provide data externally. On the other hand, recipients of data, such as Vendors, become concerned that intellectual property rights and know-how related to AI technology will be taken by data providers or that the Vendors will bear excessive liability if trouble arises, and so they take a passive stance with respect to development or provision of services.

There is a risk that if such circumstances persist, development and utilization of AI technology will be hampered and that society will not be able to enjoy the various benefits afforded by AI technology.

(2) Solutions

These Guidelines (AI Section) aim to resolve the issues described above by the following means.

(i) Parties do not understand the characteristics of AI technology

These Guidelines (AI Section) summarize and discuss fundamental concepts of AI technology. They also explain problems caused by characteristics of AI-based software, specifically that it is difficult at the initial phase of development to predict what deliverables will be produced and it is difficult to make performance assurances with respect to unknown inputs. By explaining these matters, it is hoped that parties will approach contract negotiations based on the premise of shared awareness.

The characteristics of AI technology do not directly determine the burden of risk among parties in an agreement; rather, they constitute ultimately nothing more than one factor in risk evaluation. On this point, contracts related to AI technology are in no way different from pre-existing contracts.

As an example, from a business perspective, it would be conceivable to use a method whereby a balance between a Vendor and a User is struck in relation to payment of consideration for generation of trained models or for a service using such a trained model by making payment dependent on certain results, achievement of KPIs, or any other similar variation of payment terms and conditions.

In addition, it is conceivable to adjust consideration by factoring in the risk entailed by the uncertainty of AI technology, and if such an adjustment were difficult, then forgoing execution of a contract would also naturally be a potential option.

Therefore, even though the characteristics of AI technology are an important factor when executing a contract, they are not a decisive factor. Needless to say, it is vital to make composed and realistic business judgments based on an adequate understanding of AI and in a manner that is not swayed by use of the term “AI” as some kind of magic word.
I Introduction

(ii) Legal relationships related to AI-based software, including the relationship of rights, attribution of liability, and other similar matters, are unclear

These Guidelines (AI Section) and the appended model contracts (the “Model Contracts”) present a fundamental approach to development agreements for trained models, and approaches that offer means of breaking through impasses are presented for matters that tend to produce disagreement and to impede negotiations because the perspectives of the parties differ.

With respect to the relationship of rights with regard to AI-based software, not only is ownership of rights provided for in the contracts, but a flexible framework that enables parties to achieve their respective purposes is also presented by establishing detailed terms of use for deliverables and data.

(iii) Data provided by Users to Vendors may have high levels of economic value or confidentiality

To deal with the issue of User concerns and rights claims arising from that fact that in some cases data provided to a Vendor by a User is economically valuable or confidential, these Guidelines (AI Section) and the Model Contracts present, as described above, a framework that establishes detailed terms of use for deliverables and data, and by establishing terms and conditions that reflect the circumstances of the parties and the characteristics of the provided data in the terms of use, these Guidelines (AI Section) and the Model Contracts present an approach that seeks harmony between the data-handling needs of Users and the needs of Vendors in relation to making effective use of deliverables.

(iv) Contract practices have not been established for the development and utilization of AI-based software

To deal with the issue that contract practices have not been established for the development and utilization of AI-based software, an “exploratory multi-phased” AI development process is proposed and, based on that process, Model Contracts are provided for each phase.

Specifically, taking into account that a characteristic of the development of AI-based software is that the contents and performance of trained models are often unclear when a contract is executed and those contents and that performance rely on the training dataset, these Guidelines (AI Section) propose the adoption of a process (referred to as an “exploratory multi-phased” AI development process) wherein the following phases are established and whereby development progresses on a step-by-step basis while matters including whether each party is able to achieve its purposes through AI technology and whether the parties will progress to subsequent phases are explored at each phase and verification of those matters and confirmation between the parties is attained at each phase: (i) an assessment phase for reviewing the feasibility of a trained model; (ii) a PoC\(^1\) phase; (iii) a development phase; and (iv) a retraining phase. This “exploratory multi-phased” AI development process permits a trial-and-error model of development, which differs from the waterfall model where requirement definitions are fixed at the start.

\(^1\) PoC (Proof of Concept) means partial realization of a new concept or idea in order to demonstrate its feasibility.
I  Introduction

In contrast to Conventional Software Development in which deductive reasoning is conducted, it is difficult to definitively predict deliverables in the initial phase of development of AI-based software that is carried out using inductive reasoning, and discrepancies in awareness readily arise between Users and Vendors. Accordingly, by adopting an “exploratory multi-phased” AI development process that splits development into multiple phases, it becomes possible for the parties to reconcile specific details of the deliverables in the process of progressing with development and to prevent as much as possible any differences in awareness between Users and Vendors arising in relation to the deliverables, including with respect to the suitability of performance assurances.

If in the “exploratory multi-phased” process it becomes clear as development progresses that it will not be possible to produce deliverables with the necessary characteristics, then it is possible to forgo proceeding to the next phase. By adopting this “exploratory multi-phased” AI development process, it becomes possible to limit the risk that trouble will arise or development will fail due to differences in awareness between the parties in relation to deliverables.

A fundamental approach to contracts that incorporate an “exploratory multi-phased” process is explained in the main text of these Guidelines (AI), and Model Contracts have been appended.

If these Guidelines (AI Section) serve as an aid in enabling contract practices regarding development and utilization of AI-based software to take shape through the broad provision of information such as this to society, then these Guidelines (AI Section) will promote resolution to the issue that contract practices have not been established.

3  Applicability

(1)  Applicable contracting parties

The contracting parties on which these Guidelines (AI Section) are premised are all corporations, from large corporation to medium-sized and small corporations.

Users in the development and utilization of AI-based software are envisaged to be a variety of corporations, from large to medium-sized and small. On the other hand, vendors developing AI-based software consist not only of major IT vendors but also venture corporations and other types of corporations.

In some cases, medium-sized and small corporations do not possess adequate personnel with legal knowledge and the items they develop do not involve large-scale system development, so the Model Contracts are intended to be simple contracts.

(2)  Applicable software

Software that falls under the scope of these Guidelines (AI Section) is envisaged to be AI-based software for the purpose of realizing certain objectives in relation to operations or business, and particularly trained models.

In terms of the overall structure of these Guidelines (AI Section), in many instances explanation is focused on machine learning using statistical properties for which research and development has progressed in recent years (statistical machine learning), and particularly development of software using deep learning. However, this is only for ease and comprehensibility of explanation and does not intend to imply that means of machine learning researched and developed in practice are limited to deep learning. This point is explained in II-2-(2) below.
I Introduction

(3) Relationship with Model Contract 2007, etc.

The Model Transaction and Contract (First Edition) published by the Ministry of Economic, Trade and Industry in 2007 (the “Model Contract 2007”) is based on the premise that the contracting parties are Users and Vendors who are major companies and have equal negotiating power with each other and that applicable systems are the contracted development and the maintenance and operation of critical infrastructure and companies’ core systems.

The assumptions made in these Guidelines (AI Section) differ from those made in the Model Contract 2007 and the like. The differences arise from taking into consideration the current circumstances surrounding the development and utilization of AI-based software.

4 Overall structure

The structure of these Guidelines (AI Section) is as follows.

I Introduction

This chapter describes the purpose and applicability of these Guidelines (AI Section).

II Description of AI Technology

This chapter explains basic concepts concerning AI technology and characteristics of the development of AI-based software.

III Fundamental Approach

This chapter describes a fundamental approach to development and utilization agreements for AI-based software.

IV Development Agreements for AI-based Software

This chapter describes an approach to contracts and considerations when executing contracts with respect to development agreements for trained models.

V Utilization Agreements for AI Technology

This chapter describes an approach to, and considerations for, utilization agreements for AI technology services.

VI Perspectives on International Transactions

This chapter describes considerations when executing development agreements or utilization agreements for trained models with foreign companies.

VII Model Contracts

This chapter describes a fundamental approach to the Model Contracts with respect to the generation of trained models and presents the Model Contracts.

VIII Summary

This chapter summarizes these Guidelines (AI Section).

5 Relationship with the Data Section of these Guidelines
I Introduction

As previously stated, data is vital when developing AI-based software. The training datasets used for AI-based software training and trained parameters included in trained models constitute that very data.

Legal issues and interest reconciliation processes related to the provision and utilization of data are dealt with squarely and examined in detail in the Data Section of these Guidelines. See the Data Section of these Guidelines for a fundamental approach to, and examples of contractual provisions for, the general handling of data.
II Description of AI Technology

1 Explanation of basic concepts

(1) AI (artificial intelligence)

“AI” is an abbreviation for “artificial intelligence.” There is no established definition of “AI” at present, but it can be roughly classified into (i) general-purpose AI based on the concept of creating machines that possess human intelligence itself (“Strong AI”) and (ii) AI based on the concept of causing machines to perform activities that humans use their intelligence to perform (“Weak AI”).

These Guidelines (AI Section) recognize that Weak AI has currently reached the stage of practical application and use the term “AI” to mean “Weak AI” and, in particular, the academic discipline (research topic) related to machine learning.

However, it should be noted that these definitions are used merely for convenience in these Guidelines (AI Section).

(2) AI technology

“AI technology” is a generic term for a series of software technologies that enable computers to perform intellectual activities that can be performed by humans. In these Guidelines (AI Section), for the sake of convenience, the term “AI technology” means either “machine learning” as described below or a series of software technologies related to machine learning.

(3) Machine learning

“Machine learning” is a type of training method for finding particular rules in certain data and making inferences or predictions regarding unknown data based on those rules.

The term “machine learning” is used ambiguously, and no established definition seems to exist. However, if we focus on the development process, it seems a common factor in almost all definitions of “machine learning” is that technological development using machine learning is conducted inductively. That is, it is considered a common element among means of software development using machine learning that the software (e.g., that falling under a trained model) is developed inductively based on actually observed events (data) rather than using a deductive approach as in Conventional Software Development (as defined below).

These Guidelines (AI Section) outline approaches named (i) “supervised learning,” (ii) “unsupervised learning,” and (iii) “deep learning.”

(i) Supervised learning

This is a type of machine learning method that is used to derive generalized rules from a dataset (training dataset) in relation to which a desirable data output (ground truth data) has been stipulated in advance for a certain data input.

This approach is often used in cases where it is easy to stipulate ground truth data; for example, in the field of image recognition.

(ii) Unsupervised learning
II Description of AI Technology

This is a type of machine learning method that is used to derive generalized rules from a training dataset for which no ground truth data is stipulated.

For example, clustering falls under this approach.

(iii) Deep learning

Deep learning is a training method that has recently attracted attention. This is a method that aims to draw more accurate inferences by running a neural network (a machine learning method developed by imitating the human brain’s information processing system) in multiple layers. Compared to other machine learning methods, deep learning needs a large quantity of data for training, but increased use of this method is expected in the future due to recent technological developments (e.g., improvements in processing speeds of computers (CPU, GPU, etc.), facilitation of data collection by the Internet, and declining costs of resource utilization and data storage through use of cloud computing). In particular, deep learning is widely used in image recognition, natural language processing, and other fields.

Although deep learning is sometimes classified as a supervised learning method, a deep learning method that does not require stipulation of ground truth data has been developed in recent years, and, therefore, deep learning is also used as an unsupervised learning method.

2 Applicable AI technology

(1) Differences from Conventional Software Development

As described in II-1-(3) above, in these Guidelines (AI Section), AI technology, or “machine learning,” is defined as “a type of training method for finding particular rules in certain data and making inferences or prediction regarding unknown data based on those rules.”

In Conventional Software Development (as defined below), a deductive development method is employed in which software specifications are defined in detail and then implementation processes are gradually refined based on already known rules and knowledge (hereinafter, software development that employs such a deductive development method is referred to as “Conventional Software Development”).

On the other hand, since inductive development methods using actually observed events (data) are employed in software development that incorporates machine learning methods, in some cases methodology differing from that of Conventional Software Development is employed in methods for definition of specifications, implementation, and evaluation.

(2) Positioning of machine learning

As described in I-3 above, these Guidelines (AI Section) have been prepared focusing on machine learning using statistical properties that has advanced through research and development in recent years (statistical machine learning), especially deep learning. This is because technological development using deep learning specifically differs from Conventional Software Development in certain ways, in addition to the fact that there has been increasing interest in deep learning in recent years.

In practice, there are many cases in which system development is conducted not only by using deep learning but also by combining multiple machine learning methods or by combining machine learning methods with existing software developed by a deductive approach. In such
II  Description of AI Technology

cases, it is anticipated that utilization of contract practices proposed in these Guidelines (AI Section), in combination with the methods for executing contracts that have been employed when conducting Conventional Software Development, will help resolve disputes between the relevant parties.

3  Anticipated process for practical application of AI technology

(1)  Process for practical application

These Guidelines (AI Section) assume that the process for practical application of AI-based software, which typically entails trained models, involves, firstly, (i) a trained model generation phase (the “Training Phase”), and secondly, (ii) a utilization phase for generated trained models (the “Utilization Phase”). An outline of these phases is described in the diagram below (the meanings of terms for elements in these phases used in these Guidelines (AI Section) are set out in II-3-(2) to II-3-(4) below).

Diagram 1: Flow of the Training Phase and the Utilization Phase

(i)  Training Phase

The Training Phase aims to generate “trained models” as final deliverables from “raw data” that has been collected and accumulated sensors, cameras, or any other means. The process can be divided into the following two phases.

a  Training dataset generation phase

In many cases, raw data by itself is unsuited to the purpose of training because it may contain missing values or outliers or for other reasons. If this is the case, the raw data needs to be processed in some way.

Furthermore, particularly when a supervised learning approach is employed, it is necessary to prepare so-called “ground truth data” that is created by defining the ground truth for a certain data input by means of, for example, affixing certain label information to image data.
II Description of AI Technology

As described above, when conducting training by a machine learning method, it is necessary to undertake a process of generating from raw data some training datasets suited to training as a first step for generating trained models from raw data.

b Trained model generation phase

It is necessary to prepare “training programs” that execute algorithms for finding certain rules from training datasets and generating models that express those rules.

By using training datasets generated from raw data as inputs for training programs, it is possible to obtain models containing “trained parameters” that have been mechanically adjusted for a certain purpose. Implementing those models in programs enables “trained models” to be obtained as software.

(ii) Utilization Phase

The Utilization Phase aims to obtain certain results (“AI products”) as outputs from entering “input data” into trained models.

In practice, even having once completed training and moving from the Training Phase to the Utilization Phase, the process of practical application will sometimes move back to the Training Phase from the Utilization Phase. This is because, for example, if desirable results cannot be obtained from a trained model in the Utilization Phase or an event occurs that could not be anticipated in the Training Phase, in some case accuracy is improved by generating a new trained model through further training using the data sequentially collected and accumulated in the Utilization Phase.

(2) Elements of the Training Phase

These Guidelines (AI Section) envisage the following five elements for the Training Phase: “raw data,” “training datasets,” “training programs,” “trained models,” and “know-how.”

(i) Raw data

“Raw data” means data primarily acquired by Users or Vendors or any other business operator or research institution, which has been converted and processed so that it can be loaded into databases.

In many cases, raw data by itself is unsuited to the purpose of training because it may contain missing values or outliers or for other reasons. In addition, raw data has a significant impact on the contents and quality of the trained model to be generated.

(ii) Training datasets

“Training dataset” means secondarily processed data that has been generated to facilitate analysis by applicable training methods through conversion and processing of raw data, including the following: removal of missing values and outliers and other preprocessing of raw data; affixing of separate data, such as label information (ground truth data), to raw data; or a combination of these means.
II Description of AI Technology

If data separate from raw data (“Additional Data”) is affixed to the raw data (this act of affixing Additional Data is also referred to as “annotation” in some cases), the property of that Additional Data is such that, like raw data, it has a significant impact on the contents and quality of the trained models to be generated, while, on the other hand, it is of no use when in a form independent from the raw data to which it is affixed. Therefore, we believe it appropriate to consider, as it were, the combination of raw data and its corresponding Additional Data to constitute training datasets.

In some cases, training datasets also contain so-called “augmented” data that has been generated by implementing certain conversions in the raw data (in some cases this technique is also referred to as data augmentation (data extension)).

(iii) Training programs

“Training programs” mean programs that execute algorithms for finding certain rules from training datasets and generating models that express those rules.

In some cases, a Vendor will already possess a training program, but in other cases, a certain feature is added to a training program or a training program is created from scratch. In addition, in many cases involving training program development, source codes called “OSS” (open-source software) are open to the public and software is used that has been licensed for certain uses by the author.

(iv) Trained models

“Trained models” mean “inference programs” incorporating “trained parameters.”

a Trained model diversity

In practice, the term “trained model” is sometimes used ambiguously to mean not only inference programs incorporating trained parameters but also to mean concepts including “raw data,” “training datasets,” “training programs,” “inference programs,” “trained parameters,” and “any other secondary deliverables” depending on who uses the term. In fact, there is no established definition of the term.

However, in discussing the various issues described in III-3 and III-4 below (establishing the ownership of rights and terms of use, distribution of liability, etc.), it is extremely important to consider specifically what meaning for the term “trained model” is being used and what specific scope (deliverables) is meant by the term “trained models.” Therefore, as described in IV-4-(2)-(iv) below, it is desirable that the contracting parties determine in advance the contents (specific definition and scope) of trained models based on thorough discussion.

Considering that programs are subject to protection under the Copyright Act, and also considering the actual state of transactions relating to trained models between Vendors and Users, “inference programs” incorporating “trained parameters” are collectively referred to as “trained models” for the sake of convenience in these Guidelines (AI Section).

b Trained parameters

“Trained parameter” means a parameter (coefficient) obtained as a result of training using training datasets.
II  Description of AI Technology

By entering training datasets into training programs, trained parameters are generated through mechanical adjustment for a certain purpose. Although trained parameters are adjusted in accordance with the purpose of training, they are merely parameters (information, such as numerical values), and they can only serve as trained models when they are incorporated into inference programs.

On the other hand, the training rate, the number of times (epochs) training is conducted, and the like, differ in nature from these trained parameters and are sometimes referred to as “hyper parameters,” because they are parameters used for defining the framework of training and are artificially determined in most cases.

c  Inference programs

“Inference programs” mean programs that enable output of certain results from inputs through application of incorporated trained parameters.

d  Secondary trained models

As described in II-4-(1)-(iv) below, there is demand for reuse of trained models, but in practice, problems often emerge in the handling of secondary trained models, including reused models and distilled models in particular. Because the definition used for trained model is ambiguous, the definition used for secondary trained models is also necessarily ambiguous. For the sake of convenience, secondary trained models are defined as follows in these Guidelines (AI Section).

First, “retraining” means to generate new trained parameters through further training by applying different training datasets to existing trained models. “Reused model” means an inference program incorporating trained parameters that have been newly generated by retraining.

Secondly, “distillation” means to generate new trained parameters by utilizing the input and output results of existing trained models as training datasets for new trained models. “Distilled model” means an inference program incorporating trained parameters that have been newly generated by distillation.

(v)  Know-how

Know-how itself is an ambiguous term, but in these Guidelines (AI Section) “know-how” means knowledge, technology, information, or the like possessed by Vendors or Users in the course of research, development, and utilization of AI technology. Specifically, the following is assumed to fall under know-how. Such know-how may fall under an invention under the Patent Act.

a  Acquisition and selection of raw data

In principle, know-how relating to acquisition of raw data is possessed by the source of the raw data (in many cases, the User providing the data). However, when AI technology is applied, Vendors sometimes acquire or select (or advise on the acquisition or selection of) raw data, and knowledge related to such acquisition or selection of data can also be know-how.
II Description of AI Technology

b Processing into training datasets
Generally, know-how for processing of raw data suited to training is possessed by the Vendor side. For example, when conducting training for image processing, Vendors experienced in such training are sometimes able to infer to some extent what labeling should be conducted on images in order to facilitate training.

On the other hand, it is also envisaged that Users possess know-how for the processing of raw data. For example, when label information (ground truth data) is affixed to raw data, sometimes Users’ business know-how is required.

c Training using training programs
The know-how of Vendors is often used in training using training programs.

When conducting training, it is often difficult to generate highly accurate trained models using only an existing (single) training method (or software), and sometimes Vendors will combine multiple training methods (or software) to generate final trained models. For example, when Vendors conduct training in such a case, the following knowledge can constitute know-how because these items of knowledge often incorporate a Vendor’s own ingenuity: the kind of training methods employed, the order in which the employed training methods are processed, and the like.

If such ingenuity is apparent, then in some cases such a combination of training methods or algorithms, including processing orders, will also be directly or indirectly subject to patent acquisition.

d Adjustments for trained models
In order to use trained models in the production environment, adjustments are necessary, and the know-how of Users and Vendors is used for these adjustments. For example, in the case of an AI-mounted security camera possessing image recognition functions, in some cases adjustments are made so that images of recognition targets can be easily acquired, such as adjustments of the installation location or angle of the camera.

(3) Elements of the Utilization Phase
These Guidelines (AI Section) envisage the following elements for the Utilization Phase: “input data,” “trained models,” “AI products,” and “know-how.” The elements “trained models” and “know-how” are described above.

(i) Input data
“Input data” means data entered into trained models in order to output AI products. It takes various forms, such as voice, images, video, characters, and numerical values, in accordance with the utilization purposes of trained models.

(ii) AI products
II Description of AI Technology

“AI product” means data output by entering input data into trained models. It takes various forms, such as voice, images, video, characters, and numerical values, in accordance with the utilization purposes of trained models.

(4) Participants in the Training Phase and the Utilization Phase

These Guidelines (AI Section) envisage “Vendors” and “Users” as the participants in the Training Phase and the Utilization Phase.

(i) Vendors

In these Guidelines (AI Section), “Vendor” means a person who develops AI-based software, including trained models, or provides services using such software. Vendors often have specialist expertise in AI-based software, and in such a case, Vendors create and provide programs and know-how related to AI-based software.

These Guidelines (AI Section) envisage various companies, from systems integrators to venture corporations, to be “Vendors.”

(ii) Users

In these Guidelines (AI Section), “User” means a person who, in order to achieve a certain purpose in business, etc., pays consideration to Vendors and requests them to conduct research on, development of, or provision of, services related to AI-based software.

Since the development of AI-based software is conducted with the intention of applying the software to a User’s business, it is common for Users to provide data used for training, such as raw data and training datasets, and Users often play a significant role in the generation of such data (a User’s know-how is sometimes reflected in such data).

4 Characteristics of development of AI-based software

(1) Characteristics in contrast to Conventional Software Development

Characteristics that emerge in the development of AI-based software, which typically entails the generation of trained models, include the following when contrasted against Conventional Software Development: (i) the contents and performance of trained models are often unclear when a contract is executed; (ii) the contents and performance of trained models depend on training datasets; (iii) the importance of know-how is particularly high; and (iv) there is demand for further reuse of products. Accordingly, special attention should be given to these matters in contracts. The following is a brief explanation.

(i) Contents and performance of trained models are often unclear when a contract is executed

In Conventional Software Development, the basic task is generally deductive: “to describe the processing procedures for input values as a certain set of rules and to encode the description.” In many cases, objects of development are identified in advance and their operating principles are easy to intuitively ascertain.
II Description of AI Technology

On the other hand, because the generation of trained models involves inferring rules in various unknown situations from only limited data, such as training datasets, it is extremely difficult, even for an engineer skilled in AI technology who is generating a trained model, to predict all unknown events to be inferred when conducting training.

Accordingly, when executing a contract involving the development of AI-based software, it is necessary to consider the burden of risk between the relevant parties in light of the following characteristics.

a It is intrinsically difficult to offer performance assurance in advance

In Conventional Software Development, if a User and a Vendor consult appropriately and adequately when conducting planning and fixing requirement definitions in the initial development phase, it is unlikely that either of the parties involved would not have an understanding of the kind of software to be developed. In addition, the behavior of the developed software would be relatively easy to predict because its internal calculation and processing methods would be clear. Therefore, it is possible to offer a certain level of performance assurance in advance even for the processing of unknown input (data) that has not been handled in the development phase.

On the other hand, when generating a trained model, it is difficult to predict in advance whether it will be possible to generate from a training dataset prepared in advance by a Vendor, etc. a trained model that possesses the behavior and accuracy, and satisfies the preconditions, required by the User or the Vendor (i.e., there is difficulty in determining the objects of development).

Therefore, as a matter of course, it is difficult for the relevant parties to share a notion of how the generated trained model will perform when executing that contract. Furthermore, the behavior of a trained model with respect to unknown input (data) other than the training dataset is unclear, and in this regard, it can be said that offering performance assurance when contracts are executed is difficult (i.e., there is difficulty in determining and assuring performance).

As described above, the generation of a trained model often entails many problems, including “difficulty in determining objects of development” and “difficulty in determining and assuring performance,” and therefore contracting parties need to sufficiently heed these characteristics when executing contracts.

b It is difficult to conduct ex-post verification, etc.

In Conventional Software Development, if software that possesses the performance expected when the contract was executed is not obtained, the cause can often be identified by repeating verification and modification of the processing method for the software. In this case, it is often possible in the end to develop software that possesses satisfactory performance by taking appropriate measures with respect to the identified cause.

On the other hand, when generating a trained model, it is often difficult for humans to intuitively understand the generation process and the nature of the trained model. Therefore, if inference results from a trained model do not achieve the expected accuracy, then based on current levels of technology, it may be difficult to differentiate the cause between whether the quality (nature) of the training dataset is a problem, whether the artificially set parameters (hyper parameters) are a problem, or whether there is a bug in the executed program. This characteristic is a property common to all methods of statistical machine learning and is particularly prominent in deep learning.
II Description of AI Technology

In other words, it can be said that the generation of a trained model differs from Conventional Software Development in that it is difficult to select a method for generating a trained model that possesses satisfactory performance based on ex-post verification.

c Exploratory approaches are desirable

As described above, when generating a trained model, it is impossible to predict in advance what kind of trained model will be generated, and it is difficult to conduct ex-post verification of the behavior of the generated trained model.

In addition, when generating a trained model, a very large amount of the workload actually borne by a Vendor is often allocated to processing or adjusting data (generation of training datasets) that is conducted in the phase preceding training, while training itself is semi-automatically conducted by training programs. Therefore, if a satisfactory result is not obtained as a result of training, then in many cases it is relatively easy to conduct training again using new datasets.

In view of these circumstances, a characteristic of generating trained models is that using the exploratory approach of repeated trial and error is an easily employable method of generating trained models that possess levels of performance satisfactory to Users.

(ii) Contents and performance of trained models depend on training datasets

Generation of trained models is considered to have the following theoretical limitations because generation is conducted utilizing the statistical properties of training datasets.

- It is assumed that probability distributions at the time of training and at the time of inference (trained models) are identical, and there may be cases where trained models do not function when the probability distributions at the time of training and at the time of inference significantly vary.
- Inference may not extend to “rare events,” whose nature is not ordinarily reflected in training datasets.
- It is impossible to eliminate statistical biases from training datasets, and generated trained models intrinsically contain errors when they are applied to unknown data.

Therefore, the performance of a trained model depends on the quality of the training dataset. That is, since a trained model is generated reflecting the statistical properties of a training dataset, it is amply conceivable that generating a trained model possessing performance that satisfies a User might not be possible even when there is no problem in the specifications of a training program.

For example, if data that does not reflect the intrinsic statistical properties (i.e., an outlier) is mixed into data included in a training dataset, or if the data in a training dataset contains a large statistical bias, it often becomes impossible to generate a highly accurate trained model, and therefore both Users and Vendors need to fully understand such characteristics.

(iii) The importance of know-how is particularly high

Various types of know-how possessed by Users and Vendors are used in the process of generating and utilizing trained models and have a significant effect on the performance of the trained models ultimately generated.
II Description of AI Technology

Needless to say, the general importance of know-how has been recognized in Conventional Software Development as well. However, a characteristic of the generation of trained models is that there are many situations in which new types of know-how not anticipated in the case of conventional software can be generated, such as processing methods for training datasets and setting of hyper parameters when executing training programs.

In addition, in the generation of trained models, which uses an inductive approach, repetition of trial and error is relatively more likely to occur when contrasted against a deductive development method. In such processes of trial and error, know-how is likely to be accumulated as implicit knowledge, and such know-how is often applicable to similar training. These circumstances also increase the importance of know-how in the generation of trained models.

Know-how relating to training can also arise not only for Vendors but also for Users. For example, it can be said that, with respect to processing a training dataset, whether to incorporate in the training dataset a “rare event,” whose nature is not ordinarily reflected in a training dataset, or to remove the rare event as “noise” is precisely the type of know-how possessed by a Vendor who generates a trained model. On the other hand, if a User handles such data on a daily basis, the User may possess know-how with respect to that data and that know-how may have a particular significance in the generation and utilization of trained models.

As described above, it is believed that, when generating a trained model, there are many situations in which the importance of know-how is high when contrasted against Conventional Software Development. Even so, various types of know-how exist, some of which are highly valuable, and others of which can be easily conceived by anyone in the same industry. Therefore, it is necessary to keep in mind that not all types of know-how are necessarily important.

Furthermore, since there is no established valuation method for know-how in the first place, a party’s believed value of know-how (its subjective value) and the actual value of know-how (its objective value) often differ from each other. Accordingly, in most instances it is beneficial to recognize that such conflicts could occur, to make calm judgments, and to establish terms of use in order to prevent unnecessary trouble between the parties.

(iv) There is demand for further reutilization of products

When trained models are generated, training datasets and trained models generated in the Training Phase are produced, in addition to the products (programs) generated by Conventional Software Development.

The generation of these training datasets and trained models itself entails vast costs and extended periods of time, and as it is possible to improve the accuracy of these trained models or to use them for other purposes by changing trained parameters, the trained models can be more readily reused for research and development or commercial purposes than conventional programs.

The following methods can be anticipated as specific methods of reuse:

- generation of reused models through retraining or the like;

---

2 It is believed that some of these types of know-how may be subject to intellectual property rights, including inventions, under the Patent Act. In addition, if they are managed in a secret manner, they may be protected as trade secrets under the Unfair Competition Prevention Act.
II Description of AI Technology

- generation of distilled models; and
- improvement in the accuracy of trained models by combining the output results of multiple trained models (ensemble training).

As described above, products that cannot be anticipated in the case of Conventional Software Development are generated when generating trained models. While Vendors desire to reuse these products as a basis for new technology development and business development, Users generally have an incentive to restrict the reuse of these products generated as a result of the significant amount of expense and labor required. Therefore, interest reconciliation becomes necessary.

(2) The importance of understanding the characteristics of trained models

The characteristics of trained models described above have particular significance not only for Vendors but also for Users. Specifically, it is possible to produce high levels of accuracy in trained models only by understanding conditions of application and inference targets as well as the data used for training, and, inevitably, output results from trained models intrinsically contain errors. This nature of trained models must be heeded in particular when, for example, discussing ownership of rights, terms of use, and the attribution of liability between Users and Vendors. This point is elucidated further in III-4 below.

Nevertheless, this type of inductive approach is often effective in order to make inferences (obtain solutions) about complex challenges that cannot be tackled with conventional deductive approaches. Therefore, in order to ensure competitive advantage in the market when a User develops a new business, that User may focus on the usefulness of trained models and make a business decision to use trained models even in light of the fact that trained models contain errors.

In such a case, it is important for Users and Vendors to understand both the nature of software generated by conventional deductive approaches and the nature of software generated by inductive approaches (e.g., trained models) and to use the two types of software differently depending on the required accuracy or conditions.
III  Fundamental Approach

1  Current state of contracts related to development and utilization of AI-based software

Main categories of businesses using AI-based software are envisaged to be (i) the “development” category, involving generation of trained models by Vendors at the request of Users and (ii) the “service utilization” category, involving provision of services that use AI technology.

Generally, in many cases involving trained model generation, a User provides data to a Vendor, and the Vendor causes a training program to learn the provided data (however, in some cases, the Vendor will provide data). In addition, even in the case of a service using AI technology, a User will often provide data to a Vendor.

With respect to elements produced in the generation of trained models or by services that use AI technology, the interests of the Vendor, who generates the trained model, and of the User, who provide the raw data or input data, often conflict in a variety of aspects, including, for example, ownership of intellectual property rights and terms of use for the trained model or data. Furthermore, in some cases, the interests of parties conflict with respect to the quality of trained models or services that use AI technology.

As a result, unilateral contract provisions—“all-or-nothing” provisions, as it were—are sometimes imposed on one side, based on which party has a dominant position in the business relationship, disparities in knowledge, and other matters.

However, it is believed that even if, at first glance, the interests of the parties seem to conflict, the parties can sometimes reach agreement regarding reasonable provisions by understanding the characteristics of trained models and the content of legal rules.

2  Perspectives when reviewing contracts

When reviewing the specific contents of a contract for the generation and utilization of a trained model, it is important to confirm, based on the characteristics of AI technology explained in II-4 above, what each party needs to protect and where risk factors lie when proceeding with business; that is, it is important to determine the matters that should be subject to the parties’ agreement in the contract.

On that basis, with respect to those matters subject to agreement in the contract, parties should consider what type of legal relationship would be acknowledged if there were no contract and should consider and discuss the contents of contracts necessary to achieve their respective business purposes.

1) Differences in positions and attitudes between parties

It is not uncommon for positions and attitudes between Users and Vendors to differ when trained models are generated. These differences are described below.

User side  -  Users want to own all of the rights related to trained models because they have paid development costs and have provided valuable data and know-how used for training to generate trained models.
III Fundamental Approach

- Users do not want business competitors to use trained models.
- Users do not want their own data and know-how to be divulged.
- Users want Vendors to complete and deliver trained models, and systems using those models, that attain a certain level of quality.
- Users want to further improve the accuracy of trained models through retraining using their own data.

Vendor side
- Vendors want to ensure business flexibility in their research and development.
- The rights related to programs and systems should be owned by the Vendors who develop those programs and systems.
- Vendors want to deploy trained models horizontally, meaning to provide them to other companies within a certain scope.
- Vendors want to generate trained models whose accuracy is improved through retraining.
- Essentially, a Vendor does not know whether it can generate a trained model that conforms to the purpose required by a User until the Vendor tries.
- It is impossible to offer performance assurance with respect to completion of trained models and to unknown inputs (data).

(2) Matters that could cause problems between parties

As described in III-2-(1) above, positions and attitudes between parties with respect to the development or utilization of AI technology differ, so various problems can arise when a contract is executed. Examples of such problems are as follows:

(i) problems unique to raw data (whether raw data exists, propriety of or delays in provision, quality and sufficiency, and the like);
(ii) problems unique to AI-based software (whether completion is possible and whether an obligation to complete the software exists, the quality of the developed software, and the like);
(iii) problems regarding ownership of intellectual property rights and terms of use (deliverables, intellectual property produced in the course of development\(^\text{3}\), and AI products (outputs));
(iv) problems regarding liability; and

---

\(^3\) In these Guidelines (AI Section), this means any invention, device, design, copyrighted work, and other property that is produced through creative activities by human beings, as well as trade secrets and other technical or business information that is useful for business activities. The operations test agreement and the software development agreement included in the Model Contracts define this point.
III  Fundamental Approach

(v)  other problems caused by inconsistencies and the like between the purpose of development and utilization (business needs) on the User side and technical knowledge on the Vendor side.

In some cases, many of these problems can be resolved by rigorously reconciling the perceptions of Users and Vendors and reaching agreement in contracts.

When executing a contract regarding AI-based software, especially in relation to the generation and utilization of a trained model, it is important to establish ownership of rights and terms of use and to clearly define attribution of liability.

3  Establishing ownership of rights and terms of use

(1)  Summary of intellectual property rights, etc.

When generating and utilizing trained models, various factors can constitute the source of business value, meaning those factors are matters in which parties claim rights and interests. Specifically, ownership of rights and terms of use often become an issue with respect to the following matters. Therefore, legal relationships regarding the following matters should be summarized in advance.

<table>
<thead>
<tr>
<th>Training Phase</th>
<th>- Raw data</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Training datasets</td>
</tr>
<tr>
<td></td>
<td>- Training programs</td>
</tr>
<tr>
<td></td>
<td>- Trained models (trained parameters and inference programs)</td>
</tr>
<tr>
<td></td>
<td>- Know-how</td>
</tr>
<tr>
<td>Utilization Phase</td>
<td>- Input data</td>
</tr>
<tr>
<td></td>
<td>- Trained models (trained parameters and inference programs)</td>
</tr>
<tr>
<td></td>
<td>- AI products (outputs)</td>
</tr>
<tr>
<td></td>
<td>- Know-how</td>
</tr>
</tbody>
</table>

From the standpoint of law, these matters can be roughly categorized as (i) data, (ii) programs, or (iii) know-how, as follows.

(i)  Data

Each of raw data, training datasets, trained parameters, input data, AI products, and the like is “data” that exists in a form that can be loaded into a computer.

Since data is intangible (it is information), it cannot be subject to ownership (see Article 206 of the Civil Code and Article 85 of the Civil Code). In addition, data can fall under a copyrighted work, a trade secret, or personal information, and it can be protected under the Copyright Act, the Unfair Competition Prevention Act, and the Act on the Protection of Personal Information. For example, if raw data is a photograph, a voice, an image, a novel, or the like, it could fall under a copyrighted work in of itself, and if a training dataset possesses creative characteristics
III Fundamental Approach

by reason of the “selection or systematic construction of information,” it could fall under a “database work” (Article 12-2 of the Copyright Act).

However, unless protected under intellectual property legislation and personal information protection legislation, there are no clear legal stipulations regarding the utilization of data. Unless otherwise prescribed in a contract, data can be used at the discretion of any person who is actually able to access the data, including a person who has received the data. Accordingly, if restriction on utilization by such a person is desired, it is necessary to expressly prohibit such utilization in a contract.

In practice, the “ownership” of data often becomes a subject of discussion, but in light of the legal nature of data described above, it is important to specifically discuss, and stipulate in a contract, the appropriateness and details of restricting data utilization by persons who are actually able to access the data or by persons who desire to access the data, rather than merely discuss the “ownership” of data in an abstract manner.

(ii) Programs

It is possible for the source code portion of “programs,” including training programs and inference programs, to be protected under the Copyright Act as a copyrighted work of computer programming under the Copyright Act (the same applies even if the source code is converted into object code; Article 10(1)(ix) of the Copyright Act).

In addition, an algorithm portion can be protected under the Patent Act as an “invention of a product (program)” if requirements under the Patent Act are satisfied.

In principle, it is an author (creator) who obtains a copyright, and it is an inventor (creator) who obtains a right to acquire a patent.

Therefore, if a program developed by a Vendor is protected under the Copyright Act or the Patent Act, the copyright and the right to acquire a patent will often belong primarily to the Vendor through systems such as work for hire (Article 15 of the Copyright Act) and employee inventions (Article 35 of the Patent Act). If the User in question needs to succeed to these rights held by the Vendor or to obtain the license for these rights, it must be stipulated to that effect in a contract between the Vendor and the User.

(iii) Know-how

Terms of use for “know-how” regarding the development and utilization of AI technology also become an issue. As described in II-3-(2)-(v) above, know-how related to the development of AI technology involves several types of know-how.

As with data, know-how required to generate training datasets and trained models is intangible (it is information) and is not subject to ownership. However, some of the know-how under control may be protected as a trade secret under the Unfair Competition Prevention Act or may fall under an invention under the Patent Act.

Except in cases where know-how is subject to protection under these laws and regulations, the terms of use of know-how enable, in principle, know-how to be used at the discretion of any

---

4 A patentable “invention” means a highly advanced creation of technical ideas utilizing the laws of nature (Article 2(1) of the Patent Act). In order to obtain a patent, it is necessary to satisfy requirements that include those related to novelty and an inventive step (Article 29(1) and (2) of the Patent Act).
III Fundamental Approach

person who is actually able to access the know-how, unless otherwise agreed upon in a contract. However, the development of AI technology also entails collaborative work between Vendors and Users, and both parties often claim rights in the know-how generated in the development process. Therefore, it is important to expressly agree on terms of use in a contract.

(2) Establishing ownership of rights and terms of use

(i) Determining that which is subject to intellectual property rights

As described in II-3-(2) above, deliverables (trained models, etc.) that have been agreed upon as objects of development, as well as training datasets and trained parameters, etc. that are generated in the development process (those deliverables and intermediate products, collectively, “Derivative Products”), are produced in the development of AI technology. Some Derivative Products are subject to intellectual property rights (patents and copyrights, etc.), and others are not.

a When subject to intellectual property rights

Since default rules are stipulated under law with respect to whom, and what kind of, rights originally arise in relation to Derivative Products that are subject to intellectual property rights (for example, Article 29(1) of the Patent Act and Article 17(1) of the Copyright Act), it is necessary, premised on such default rules, to prescribe in contracts (i) “ownership of rights” and (ii) “terms of use” in relation to intellectual property rights.

For example, if a training program or an inference program or the like falls under a computer programming work, the person who created that program becomes the “author” under the Copyright Act (Article 2(1)(ii) of the Copyright Act) and owns the copyright. Therefore, if a Vendor develops an inference program, then, in general, the Vendor generally becomes the author of that inference program and owns the copyright in the program under the default rules under law (Article 15 of the Copyright Act). On that basis, in a contract, there would be either an acknowledgement that the copyright in the program belongs to the Vendor, or a stipulation that the copyright is transferred (assigned) from the Vendor to the User. This is the issue of (i) “ownership of rights” in relation to intellectual property rights.

Furthermore, since the terms of use of intellectual property rights may be established by agreement between parties (Article 78(1) of the Patent Act and Article 63(1) of the Copyright Act, etc.), such (ii) “terms of use” should be established as necessary in contracts.

b When not subject to intellectual property rights

In contrast to the foregoing, some Derivative Products may not be subject to intellectual property rights. For example, a trained parameter is a large amount of numerical data and, ordinarily, is considered likely not to be subject to intellectual property rights (copyright, etc.) because it is not acknowledged to entail creativity, etc. As for know-how, if the requirements for confidentiality management, usefulness, and non-publicity are satisfied, then it is merely a possibility that know-how would be protected as a trade secret to a certain extent.

There are no clear default rules under law in relation to the utilization, etc. of these Derivative Products that are not subject to intellectual property rights.

Consequently, in principle, such Derivative Products can be used at the discretion of any party that is actually able to access those Derivative Products, and if restriction on utilization is
required, it is necessary to establish “terms of use” directly by agreement of the parties. It is important to agree on specific modes of utilization of these Derivative Products that are not subject to intellectual property rights, because no mode of utilization, such as “working” under the Patent Act or “reproduction” under the Copyright Act, etc., is stipulated in laws and regulations.

(ii) Considerations for arrangements

a General considerations

As described above, it is important to discuss the ownership of rights if Derivative Products are subject to intellectual property rights. In theory, however, determining who constitutes the right holder (author, inventor, etc.) is a problem. Even so, regardless of who is the original acquirer of the intellectual property rights, in light of the fact that the parties can make a choice about who owns intellectual property rights through agreement, it can be argued that the matters to be considered in such a case are similar to those apparent when establishing terms of use that are determined through the agreement of the parties.

In addition, even in cases where Derivative Products are not subject to intellectual property rights, it is often necessary to establish terms of use in contracts.

Making determinations regarding the following, among other factors, as main criteria when establishing “ownership of rights” and “terms of use” is considered common practice (see V-2-(4) of the Data Section of these Guidelines): the degree to which parties have contributed to the generation and creation of the applicable data and programs (degree of contribution); the amount of labor required for such generation and creation; the significance of the necessary specialist expertise; and the risks to parties from the utilization of the data and programs.

Specifically, factors influencing the degree of contribution include the following:

- value of the data, know-how, and originality and ingenuity provided by each party;
- technical capabilities of each party;
- personnel and physical costs incurred in generating and creating data and programs;
- distinctiveness of products, uniqueness of products, and effectiveness and usefulness for each party of those products; and
- amount of consideration to be paid, terms of payment, etc.

Taking into consideration these factors, it is necessary to clearly determine the following matters: whether or not ownership of, or permission to use, any part (all or any portion) of the subject matter of a contract will be vested in, or granted to, either party; and the conditions (exclusivity or non-exclusivity; existence and amount of consideration) under which ownership of, or permission to use, that part of the subject matter will be vested in, or granted to, either party.

b “Ownership of rights”

In practice, contract-related consultations and negotiations sometimes reach deadlock due to arguments over the “ownership of rights” in deliverables, intellectual properties, etc.

In particular, with regard to contracts aimed at generating and utilizing trained models, in some cases there is insufficient accumulation of practical knowledge and experience, leading to the
III Fundamental Approach

belief that “it is safest to obtain all the rights for the time being in order to avoid any potential problems.”

Specifically, if a trained model is generated using only the data provided by a User, then in many cases the User will perceive it should be acknowledged that “ownership of rights” belong to it in relation to the trained model generated using the data, because in addition to paying consideration to the Vendor, the User has made a considerable investment in acquiring and generating the data and the User’s know-how is reflected in the data.

On the other hand, the Vendor will also claim “ownership of rights” in the trained model because of the fear that if all of the rights in the trained model are transferred to the User, the Vendor will not be able to generate trained models at its discretion, significantly restricting its business flexibility in the future.

However, it is not always necessary to squander significant expense on such discussions about the “ownership of rights.” In fact, doing so may lead to delays in the development of AI technology, which could result in the relevant parties lagging behind business competitors. Accordingly, in some cases, it is possible for contracting parties to reach appropriate agreement by fully understanding the demands of the other party and establishing detailed terms of use.

For example, in light of the extremely rapid progress of AI technology, sometimes it is possible to execute a contract that meets the interests of both parties by, among other means, vesting in the Vendor the rights in a trained model and, after the development of the trained model, prohibiting the Vendor from using the trained model for unintended purposes or competitive purposes for a certain period of time. Conversely, it is also conceivable to vest in the User the rights in the trained model and to allow the Vendor to use the trained model to the extent necessary for the Vendor’s business.

As described above, parties sometimes can seek a reasonable solution by turning attention to terms of use, rather than fixating on the ownership of rights. Stumbling into an unnecessary deadlock in consultations and negotiations itself can become a factor that hinders achievement of business purposes and should be avoided to the extent possible.

c “Terms of use”

It is believed possible to establish the terms of use shown in the table below for each of the applicable elements described in II-3-(2) and II-3-(3) above. However, not all of these elements need to be determined, and reaching a determination may not always be possible for some elements.

In establishing terms of use, each party should clarify and negotiate the interests it wishes to secure by establishing terms of use for applicable programs, data, and know-how with reference to the table below. Key negotiation points for terms of use include the following:

- purpose of use (whether use is limited to the development purpose specified in the contract);
- period of use;
- mode of use (whether or not copying, modification, and reverse engineering are permitted);
- propriety and scope of licensing or assignment to third parties (whether provision to other companies (“horizontal deployment”) is permitted, or whether provision to business competitors is prohibited); and

27
III  Fundamental Approach

- profit allocation (license fee, profit sharing).

In practice, Users often express the concern that permitting the diversion of trained models for other purposes will cause an outflow of the data and know-how they provide.

In such a case, a User may be able to allay that concern by stipulating detailed provisions regarding disclosure, licensing, provision to third parties, and the like in relation to the use of trained models on the Vendor’s side (see (ii) in the “Vendors” table below). In addition, it is, for example, also conceivable to show the data provider the trained model to be provided to a third party in order for the data provider to confirm that the trained model does not contain any confidential information or know-how.

In this way, if the User’s concern hinges on the loss of the confidentiality of raw data and original know-how and if it is possible to reach agreement or conduct consultation that takes that concern into account, then it is believed that more often than not the User’s concern will be allayed.

### Users

<table>
<thead>
<tr>
<th>Scope of use</th>
<th>Propriety and terms of use</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Use to the extent necessary to conduct User’s own business (excluding the use set out in (ii) below)</td>
<td>- Target for, mode of, and region of use</td>
</tr>
<tr>
<td></td>
<td>- Exclusivity or non-exclusivity</td>
</tr>
<tr>
<td></td>
<td>- Period</td>
</tr>
<tr>
<td></td>
<td>- Region</td>
</tr>
<tr>
<td></td>
<td>- Existence and details of license fee payment</td>
</tr>
<tr>
<td></td>
<td>- Other terms of use</td>
</tr>
<tr>
<td></td>
<td>- Purpose and mode of reused model generation (e.g., retraining using new data)</td>
</tr>
<tr>
<td></td>
<td>- Exclusivity or non-exclusivity</td>
</tr>
<tr>
<td>(ii) Generation of reused models</td>
<td>- Period</td>
</tr>
<tr>
<td></td>
<td>- Region</td>
</tr>
<tr>
<td></td>
<td>- Existence and details of license fee payment</td>
</tr>
<tr>
<td></td>
<td>- Other terms of use (grant-back of reused models to the other party, etc.)</td>
</tr>
<tr>
<td></td>
<td>- Exclusivity or non-exclusivity</td>
</tr>
<tr>
<td>(iii) Disclosure, licensing, and provision, etc. to third parties</td>
<td>- Period</td>
</tr>
<tr>
<td></td>
<td>- Region</td>
</tr>
<tr>
<td></td>
<td>- Existence of right to license reuse</td>
</tr>
<tr>
<td></td>
<td>- Propriety of licensing to certain third parties (Vendor’s business competitors, etc.)</td>
</tr>
<tr>
<td></td>
<td>- Existence and details of license fee payment</td>
</tr>
</tbody>
</table>
III  Fundamental Approach

- Other terms of use

Vendors

<table>
<thead>
<tr>
<th>Scope of use</th>
<th>Propriety and terms of use</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Use for any purpose other than the purpose of development (generation of reused models, etc.)</td>
<td>- Purpose of use</td>
</tr>
<tr>
<td></td>
<td>- Mode of use (e.g., retraining using new data)</td>
</tr>
<tr>
<td></td>
<td>- Exclusivity or non-exclusivity</td>
</tr>
<tr>
<td></td>
<td>- Period</td>
</tr>
<tr>
<td></td>
<td>- Region</td>
</tr>
<tr>
<td></td>
<td>- Existence and details of license fee payment</td>
</tr>
<tr>
<td></td>
<td>- Other terms of use (grant-back of reused models to the other party, etc.)</td>
</tr>
<tr>
<td></td>
<td>- Exclusivity or non-exclusivity</td>
</tr>
<tr>
<td></td>
<td>- Period</td>
</tr>
<tr>
<td></td>
<td>- Region</td>
</tr>
<tr>
<td>(ii) Disclosure, licensing, and provision, etc. to third parties</td>
<td>- Existence of right to license reuse</td>
</tr>
<tr>
<td></td>
<td>- Propriety of licensing to certain third parties (User’s business competitors, etc.)</td>
</tr>
<tr>
<td></td>
<td>- Existence and details of license fee payment</td>
</tr>
<tr>
<td></td>
<td>- Other terms of use</td>
</tr>
</tbody>
</table>

4  Distribution of liability

(1)  Summary of liability

With respect to the generation and utilization of trained models, the distribution of liability under a contract between parties in the event of, for example, a developmental impasse or an error in trained models can be divided into two issues: (i) the existence of default (whether the obligations agreed upon in a contract have been performed) and (ii) the existence of attributability and causal relations (whether the resulting consequences are attributable to either party).

(i)  Existence of default

If the attribution of liability between parties is clearly specified in a contract, it is sufficient to deal with individual issues in accordance with the relevant provisions.

On the other hand, in the absence of any such provision in a contract between parties, it is considered that the existence of default is generally determined depending on the level of services that each party has promised to provide to the other party (the contents of implied
III Fundamental Approach

agreement), comprehensively taking into account the purpose of creating, or services for, trained models, the technical capabilities of the parties, the amount and payment terms of consideration to be paid, and the like.

However, in general, in light of the characteristics of AI technology described in II-4-(1) above, in many cases it is considered difficult to interpret that a Vendor had promised or guaranteed a certain result for an unknown input (data) (or had promised or guaranteed that no unexpected behavior would occur), and in such a case, it is possible that any error caused by a trained model would not be regarded as default.

(ii) Existence of attributability or causal relations

In addition, if there is an instance of default, whether one of the relevant parties can be considered to have contributed to the occurrence of damage is taken into account when determining the existence of attributability or causal relations. However, it is conceivable that the existence of attributability or causal relations, such as intent or negligence, would be unclear.

If this is the case, attributing the resulting consequences to a Vendor would entail difficulties.

As described above, it is desirable for parties to specify in contracts the distribution of liability as necessary after fully understanding what is possible and impossible in the distribution of liability through ample consultation with each other about what kind of development will be conducted or services will be provided in the development or utilization of services.

(2) Generation of trained models

Of the perspectives raised above, the main issue in the development phase is often (i) the existence of default.

(i) Risk of developmental impasse

As described in II-4-(1) above, generation of trained models differs from Conventional Software Development, etc. in that generation of trained models has a statistical nature, and a trial-and-error process is essential in the generation of trained models (that is, the generation of trained models is inductive), and, as a result, a Vendor is sometimes unable to complete a trained model. Therefore, there is significant risk that a Vendor will be forced to discontinue development of a trained model at the initial phase. In such a case, problems arise as to which party bears the risk of developmental impasse.

However, in many cases, it is considered desirable for both Users and Vendors to prevent such conflicts over the liability for developmental impasse from arising.

In order to achieve this, as development progresses, it is necessary for parties to deepen their mutual understanding and form a consensus on (1) the amount and payment method of consideration and (2) the standard of trained model required on the User side, among other factors, while taking into consideration that it is not easy from a technical standpoint to guarantee the completion of AI technology, including trained models, in the initial phase of development. Specifically, as described in IV-2-(2) below, adoption of an “exploratory multi-phased” AI development process that splits a contract into multiple phases, from the assessment phase to the development phase (to the retraining phase as necessary), seems worthy of consideration.
III Fundamental Approach

(ii) Problems in quality or performance of trained models

In addition, the quality and performance of developed trained models often become a problem. As described in IV-3-(1) below, contract-for-work, quasi-delegation, and other similar contract types are conceivable in terms of the legal nature of a contract at each phase of development, but these ultimately constitute nothing more than default rules in the absence of agreement between parties.

It can be argued that it is an utmost necessity that Users and Vendors clearly prescribe in contracts the purpose of development, the method of evaluating deliverables, and the basis for payment of remuneration and the like.

(iii) Integration

Furthermore, since integration with external systems can also become a problem in relation to the generation of trained models, it is desirable to execute a contract in acknowledgement of this point as well.

(3) Utilization of trained models

Among the perspectives raised above, both (i) the existence of default and (ii) the existence of attributability or causal relations often become problems in the Utilization Phase for trained models.

(i) Characteristics of liability that arises in relation to utilization of trained models

In the Utilization Phase for trained models, problems arise as to which party is liable, and what liability that party bears, for any errors in the operation of trained models or for any results that parties do not expect or are not satisfied with, and consequently for any damage to Users or third parties.

In this respect as well, it can be argued that a person who has contributed to the damage that arises is generally liable under the Civil Code and other laws and ordinances. However, as described in II-4-(1) above, it is necessary to take into account the following matters when examining attribution of liability with regard to trained models, and it tends to be difficult to ascertain attribution of liability.

- It is difficult from a technical standpoint to make performance assurances for trained models in advance with respect to unknown inputs (data).
- It is difficult from a technical standpoint to conduct ex-post verification, etc. for causal relations and the like.
- The performance, etc. of trained models relies on training datasets.
- The characteristics, etc. of AI products rely on the quality of input data at the Utilization Phase.

Furthermore, in light of the current level of AI technology, most of the services using trained models intrinsically involve statistical and sophisticated business support, and it is considered that the acceptability of the results output from trained models, etc. is basically left to the judgment of the User. From this perspective, it cannot be denied that it is difficult to cause Vendors to bear liability for the resulting consequences.
III  Fundamental Approach

With respect to the liability entailed in the utilization of trained models that possess such characteristics, it is difficult to draw a definite conclusion under tort law to the effect that a person who has contributed to the damage that arises bears liability, and it is not necessarily clear which of the User and the Vendor bears liability and to what extent the party bears that liability. Accordingly, it is common and desirable for parties to distribute liability in accordance with the rules provided for in a contract between them.

In addition, with respect to relationships with third parties, the attribution of liability is basically dealt with under tort law, but, as is the case with the relationship between the User and the Vendor, it is generally difficult to clarify which person bears liability.

(ii) Relationship between contracting parties

As described in II-4-(1) above, with regard to services using trained models, in many cases it is considered that, in light of the characteristics of AI technology, it is not in line with actual practice or it is difficult for Vendors to promise or guarantee a certain result for unknown inputs (data).

It is thought that for this reason, in current practice, the only measures taken when executing contracts are the establishment of provisions that limit the liability of the Vendor side to a certain extent. Both Vendors and Users need to understand these characteristics of AI technology and to conduct necessary negotiations before entering a contractual relationship with each other.

(iii) Relationship with third parties

Whether a Vendor is liable for any damage to a third party caused by the provision of trained models or services that use trained models can be summarized as follows.

- If there is willful misconduct or negligence with respect to that damage, then it is possible that the Vendor will bear tort liability. However, in light of the characteristics of AI technology, there may be cases where the damage is considered unforeseeable and the Vendor is considered not negligent or where a causal relation between the Vendor and the damage is not recognized.

- Since trained models themselves are intangible, they do not constitute products under the Product Liability Act (Act No. 85 of 1994; the “PL Act”).

- However, if a trained model is incorporated into hardware (a hardware product), then it is possible that the manufacturer, etc. of the product will be liable under the PL Act. Further, the manufacturer, etc. can make against the Vendor who has provided trained models to the manufacturer, etc. a compensation claim for any damage incurred by a third party.

(iv) Arrangements in contracts

Taking into account the circumstances described above, it can be argued that each Vendor who provides trained models or services that use trained models needs to arrange for appropriate distribution of liability with any party with which the Vendor directly executes a contract.

Nevertheless, with regard to the distribution of liability, it should be noted that, as is the case with the development phase, it is often difficult for the Vendor side to bear liability for any errors in trained models due to the characteristics of AI technology, including, that (i) the
III  Fundamental Approach

contents and performance of trained models are often unclear when a contract is executed and (ii) those contents and that performance rely on a training dataset. In particular, in the Utilization Phase, it sometimes may be more difficult for a Vendor to bear liability for the behavior of trained models because the data entered into a trained model by the User is beyond the Vendor’s control.

However, the terms and conditions of contracts are not derived directly from these characteristics of AI technology. It would be conceivable to use a method whereby a balance between a Vendor and a User is struck in relation to payment of consideration for generation of trained models or for a service using such a trained model by making payment dependent on certain results, achievement of KPIs, or any other similar variation of payment terms and conditions.

In any case, it is desirable to clearly specify the distribution of liability in a contract to the extent possible through agreement between the contracting parties in accordance with their business models. In addition, it is believed that the amount and payment terms of consideration, etc. are often key negotiation tools in negotiations for the distribution of liability.

5 Problems under the Antimonopoly Act

In addition to the foregoing, it should be noted that potential problems under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the “Antimonopoly Act”) can emerge in cases where unilateral contract provisions, etc. are imposed against a backdrop of what amounts to a position of dominance in the negotiation of contracts between large corporations and medium-sized, small, and venture corporations, or in cases where exclusive dealing and restrictive trading, etc. are conducted.

(I) Abuse of dominant bargaining position

Abuse of a dominant bargaining position under the Antimonopoly Act (Article 2(9)(v) of the Antimonopoly Act) can become a problem if there is a relationship of relative dominance between contracting parties. In this regard, the “Guidelines Concerning Abuse of a Dominant Bargaining Position in Service Transactions under the Antimonopoly Act”5 published by the Japan Fair Trade Commission state the following views.

(i) In a service transaction, if a service delegator with a dominant bargaining position unilaterally causes a service provider to assign (including through licensing) the service provider’s rights in deliverables to the service delegator, or restricts the use of deliverables, technologies, etc. for other purposes (i.e., secondary use) to an extent not contrary to the purpose of the service transaction, on the basis that the deliverables, etc. have been obtained in the course of the service transaction with the service delegator or have been created at the expense of the service delegator, then the service provider tends to suffer undue disadvantage, and abuse of a superior bargaining position tends to become a problem in such service transactions.

(ii) However, in such a case, abuse of a dominant bargaining position does not become a problem if it is recognized that consideration for assignment of such rights pertaining to, or for restriction on secondary use of, Derivative Products is paid.

III Fundamental Approach

separately or that negotiations for consideration are conducted in a manner that includes the consideration for such assignment or restriction.

(iii) However, even under such circumstances, abuse of a dominant bargaining position does become a problem in service transactions that are unreasonably disadvantageous to the service provider, such as cases where consideration for the assignment, etc. of the rights pertaining to Derivative Products is unreasonably low or where the assignment, etc. of the rights pertaining to Derivative Products is essentially forced.

Accordingly, in contracts regarding the development of AI-based software between Vendors and Users that are subject to these Guidelines (AI Section), while terms and conditions for transactions are basically entrusted to the independent judgment of each party, abuse of a dominant bargaining position can become a problem if either party exploits a dominant bargaining position over the other party unjustly in light of ordinary business practices in order to delay the payment of the price, to reduce the price, to conduct a transaction or do-over for significantly lower consideration, or to unilaterally handle rights, etc. pertaining to raw data, a training dataset, a training program, or a trained model for the use of AI technology (e.g., assignment of such rights and restriction on secondary use). However, abuse of a dominant bargaining position does not become a problem in cases where appropriate consideration is paid separately for the assignment of such rights or restriction on secondary use or where negotiations for consideration are conducted in an appropriate manner that includes the consideration for such assignment or restriction (including conditions for income sharing in secondary use).

(2) Exclusive dealing and restrictive trading, etc.

In establishing terms of use for AI-based software and stipulating contractual provisions for restriction on the use of such software in contracts regarding AI-based software, unfair trade practices under Article 19 of the Antimonopoly Act, such as exclusive dealing and restrictive trading, etc., can also become a problem.

As an example from among the situations envisaged in these Guidelines (AI Section), in a licensing contract, the following act is, in principle, deemed to fall under an unfair trade practice: the act of imposing an obligation to vest in the licensor or a business operator designated by the licensor the rights in improved technology developed by the licensee, or the obligation to grant an exclusive license to the licensor with respect to that improved technology. Even if such rights were shared, that act would fall under an unfair trade practice if it constituted an impediment to fair competition ((12) of the Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of 1982)).

On the other hand, the act of imposing an obligation to license the licensee’s improved technology in a non-exclusive manner to the licensor does not, in principle, fall under an unfair trade practice if the licensee has the discretion to use the improved technology developed by the licensee. In addition, if the improved technology developed by the licensee cannot be used without the technology licensed by the licensor, it is generally understood that the act of imposing an obligation to assign the rights pertaining to the improved technology to the licensor for reasonable consideration is not deemed to constitute an impediment to fair competition. Furthermore, the act of imposing an obligation to report to the licensor any knowledge or experience obtained in the course of using the licensed technology does not, in principle, fall
III Fundamental Approach

under an unfair trade practice unless, in effect, that obligation requires the licensee to license the know-how acquired by it to the licensor\(^6\).

(3) Subcontractors Act\(^7\)

Outsourcing the creation of programs falls under an “information-based product creation contract” under the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (the “Subcontractors Act”) (Article 2(3) and (6) of the Subcontractors Act)\(^8\). Therefore, when a prime contractor of a certain size or larger outsources all or part of the development of programs to a subcontractor of a certain size or smaller, such outsourcing is subject to the Subcontractors Act. In other words, the Subcontractors Act does not apply to general transactions between Users and Vendors; rather, it applies to cases where major systems development companies outsource part of their development to other small and medium-sized systems development companies.

When subject to the Subcontractors Act, then, as in the case when subject to regulations on abuse of a dominant bargaining position under the Antimonopoly Act, a business operator that places an order (the main subcontracting entrepreneur) is prohibited from delaying payment, reducing subcontract proceeds, and engaging in transactions, etc. at significantly low subcontract proceeds.

In addition, a main subcontracting entrepreneur must (i) determine the payment date for consideration no later than 60 days, and within the shortest possible period, after receipt of the work from the subcontractor and (ii) deliver a document stating the amount, payment date, and payment method for subcontract proceeds; in the event of delay in payment, the main subcontracting entrepreneur will be (iii) obligated to pay interest for the delay at a rate of 14.6% per annum for the period commencing on the day on which 60 days have elapsed from the day on which the work is received from the subcontractor and ending on the day on which the payment is made and (iv) obligated to prepare and retain certain documents (Articles 2-2, 3, 4-2, and 5 of the Subcontractors Act).

IV Development Agreements for AI-based Software

1 Development of AI-based software

AI-based software is considered to be composed of training programs, trained models, and the like. In practice, categories that involve Vendors earning revenue by developing trained models and delivering those trained models to service delegators, such as Users, are considered particularly versatile. Therefore, this chapter explains an approach to, and considerations when executing contracts with respect to, the development (generation) of trained models.

---


\(^7\) Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (Act No. 120 of 1956)

\(^8\) The term “information-based product creation contract” is defined as “an entrepreneur’s contract with another entrepreneur of all or part of the creation of information-based products which are the object of provision conducted as a regular business or creation contracted as a regular business; or an entrepreneur’s contract with another entrepreneur of all or part of the creation of those information-based products when the entrepreneur is engaging in the creation of those information-based products which he himself uses as a regular business.” (Article 2(3) of the Subcontractors Act).

35
IV Development Agreements for AI-based Software

2 Developmental categories for trained models

(1) Classification of developmental categories

Three categories of use cases, etc. were discerned through interviews conducted by the Working Group: (i) categories involving generation of trained models only, (ii) categories involving development of systems incorporating trained models, and (iii) categories involving subcontracting the generation of trained models.

Diagram 2: Developmental categories

(i) Categories involving generation of trained models only

Case 1: When a User provides data and a Vendor individually generates a trained model only

Example: A casualty insurance company (Company Y) requests a data analysis company (Company X) to analyze the data of Company Y. Company X performs machine learning on the data and delivers to Company Y a trained model that possesses the functions requested by Company Y.
IV Development Agreements for AI-based Software

Case 2: When a User and a Vendor jointly provide data and the Vendor individually generates a trained model only

Example: An equipment manufacturer (Company X) considers installation of a trained model in monitoring equipment that is provided to Company Y in order to enable detection of a specific object. The trained model is generated through training using combined image data provided by both Company X and Company Y.

(ii) Categories involving development of systems incorporating trained models

Case 3: When a User provides data and a Vendor individually develops a system incorporating a trained model

Example: A trading company (Company Y) provides a training dataset, and a machine learning developer (Company X) that accepts delegation from Company Y develops a system incorporating a trained model by using that training dataset and delivers that system to Company Y.
IV  Development Agreements for AI-based Software

Case 4: When a Vendor prepares data by itself and individually generates a trained model, and another business operator develops an entire system based on the trained model

Example: Company Y outsources the development of an identification system to a Vendor (Company X1) and a systems developer (Company X2). Company X1 generates a trained model using data prepared by itself, and Company X2 incorporates that trained model into an identification system and delivers that system to Company Y.

(iii)  Categories involving subcontracting the generation of trained models

Case 5: When a systems integrator, etc. that has accepted from a User the delegation of the development of an entire system subcontracts to a Vendor the generation of a trained model only

Example: Company Y, which is a systems integrator, accepts delegation from a logistics firm (end user) of the development of a system that automatically calculates cargo loads. Company Y develops a system incorporating the trained model generated by a Vendor (Company X) and delivers that system to the end user.
IV Development Agreements for AI-based Software

(2) Applicable developmental categories

This chapter explains development agreements for trained models based on the premise of the “(i) categories involving generation of trained models only” described above. In the categories described in (ii) above, a Vendor accepts delegation of the development of a system that contains a trained model as a so-called “module,” and in the categories described in (iii) above, a systems integrator does so. Discussions on the categories described in (i) above apply equally to the development of the module portion in the categories described in each of (ii) and (iii).

With respect to deliverables and intellectual property produced in the course of development, the relevant intellectual property rights, etc. are vested in the Vendor in some cases and in the User in other cases. It should be noted that the status of being developmental does not necessarily mean that the intellectual property rights are automatically vested in one party rather than the other.

3 Development processes

In order to determine the framework of a contract regarding the generation of a trained model, it is necessary to consider, first of all, how the trained model will be generated. Accordingly, the general development process for software is presented below and then development processes suited to the generation of trained models are explained.

(1) General development process for software

Generally, development processes for software are categorized as (i) the waterfall model or (ii) the non-waterfall model (including the prototype model, the scrum model, and the agile model).

(i) Waterfall model

This model is a development method that splits the development process for software into multiple processes, including, “requirement definition,” “system design,” “system architectural design,” “software design, programming, and software testing,” “system integration,” “system testing,” “operations testing,” and “operation and evaluation,” each of which is defined in detail by the preceding process. While moving back from any one process to the preceding process is not completely ruled out, the specifications, etc. of software are determined at the initial phase.
IV Development Agreements for AI-based Software

of development, and development progresses based on the specifications, etc. Accordingly, changing such specifications, etc. afterwards often entails difficulties.

Diagram 3: Waterfall model development process

(ii) Non-waterfall model

This model broadly refers to development methods that are not categorized as the waterfall model. For example, agile model development, which is considered a typical example of the non-waterfall model, is a method for building operable software through repetition of the requirement, development, test, and release processes for high-priority functions over a short span in accordance with requests from customers. An advocated method for agile model development is execution of a basic agreement by the parties involved that specifies matters common to the whole development project and then the sequential execution of individual agreements for each of the individual parts of the project whose objects of development are determined⁹.

(2) Development processes suited to generation of trained models

As described in II-4-(1) above, when generating trained models only, it is difficult to predict in advance what deliverables will be produced when a contract is executed, and it is also difficult to conduct ex-post verification of the performance, etc. of products that have been produced in the generation process. Accordingly, the development process for trained models is necessarily an exploratory one, and it requires repeated trial and error. Since moving back from one process to the preceding process is unavoidable under these circumstances, it is

thought that waterfall model development, in which the development processes are gradually refined based on the requirement definitions determined in advance, does not necessarily conform to actual conditions and that non-waterfall model development is suited to the generation of trained models in most instances.

Even so, while agile model development, which is a typical method for non-waterfall model development, is considered suited to the development of a large-scale system possessing multiple functions, generating a relatively small-scale trained model to achieve particular purposes can lead to some cases where, for example, the contract management costs incurred due to the combination of a basic agreement and an individual agreement are unacceptable.

Accordingly, these Guidelines (AI Section) propose the adoption of an “exploratory multi-phased” AI development process that splits the development process into independent multiple phases and conducts exploratory development. Specifically, an “exploratory multi-phased” AI development process consists of the following four phases: (i) an assessment phase, (ii) a PoC phase, (iii) a development phase, and (iv) a retraining phase.

**Diagram 4: “Exploratory multi-phased” AI development process**

- Establishment of challenges
- Establishment of KPIs
- Determination of necessary data
- Review of feasibility of generating models

- Review of feasibility of achieving KPIs
- Review of feasibility of moving to the development phase
- Determination of ownership of trained models (if any)

- Determination of ownership and terms of use for trained models
- Assessment of KPI achievement
- Embodiment to use trained models for business purposes

The idea of splitting the development process into multiple phases is common to both waterfall model development and agile model development, and is not necessarily a new idea. However, the “exploratory multi-phased” AI development process proposed by these Guidelines (AI Section) differs from waterfall model development in that deliverables are not determined at the initial phase of development, and it also differs from agile model development in that it does not adopt a framework in which one basic agreement regulates the whole development.

There are two benefits of adopting such an “exploratory multi-phased” AI development process. Firstly, as described in II-4-(1)-(i) above, since the generation of trained models entails uncertainties that differ from those entailed in Conventional Software Development, it is difficult to predict in advance what objects of development and performance will be produced, and it is not uncommon for discrepancies to arise between the understandings of Users and Vendors. Accordingly, splitting development into multiple phases and clarifying goals and objectives at each phase facilitates discussions between Users and Vendors and enables them to reconcile their notions of trained models as final deliverables.

Secondly, due to these uncertainties entailed in the generation of trained models, it is also sufficiently conceivable that in the course of development it would prove impossible to deliver
the performance expected of a trained model in spite of enormous investment and that development would consequently cease. Accordingly, splitting development into multiple phases and ceasing development at the phase where it is found that generating a trained model possessing sufficient performance would be difficult prevents further expansion of loss and enables hedging of risk.

(3) Explanation of the phases

The phases of the “exploratory multi-phased” AI development process recommended by these Guidelines (AI Section) are explained below. An outline of the phases is shown in the following table.

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Assessment</th>
<th>PoC</th>
<th>Development</th>
<th>Retraining</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>To review the feasibility of generating trained models using a certain quantity of data</td>
<td>To review the feasibility of generating trained models that possess levels of accuracy required by Users using training datasets</td>
<td>To generate trained models</td>
<td>To conduct training using additional training datasets with respect to the trained models delivered by Vendors</td>
</tr>
<tr>
<td>Deliverables</td>
<td>Report, etc.</td>
<td>Report/trained model (pilot version), etc.</td>
<td>Trained model, etc.</td>
<td>Reused model, etc.</td>
</tr>
<tr>
<td>Contract</td>
<td>Non-disclosure agreement, etc.</td>
<td>Operations test agreement, etc.</td>
<td>Software development agreement, etc.</td>
<td>*Note^10</td>
</tr>
</tbody>
</table>

Each phase of development is not necessarily clearly distinguished, and some or all of the phases sometimes proceed without pause between each other. In this regard, these distinctions are merely relative. Each of these phases might not be completed in one attempt, and it is also conceivable to execute a contract in several stages at each phase.

(i) Assessment phase

The “assessment phase” is a phase in which a Vendor executes a non-disclosure agreement with a User and receives from the User a certain quantity of data (e.g., data that can be provided without much effort on the User side) to review in advance the feasibility of generating a trained model possessing sufficient performance.
IV Development Agreements for AI-based Software

model. This phase may involve provision of deliverables, such as a report, but it rarely involves provision of a trained model as a deliverable because it is a very preliminary phase.

Various matters are reviewed in advance, but it is key from the outset for a User to explore what it wishes to resolve by introducing AI technology, or in other words, to identify challenges. In practice, there are many cases where a User outsources the generation of a trained model while being only vaguely aware of challenges it wishes to resolve, based on the notion of “just wanting to try introducing AI technology,” due to the User having a lack of understanding of AI technology and having excessive expectations for AI technology. However, AI technology is ultimately nothing more than a tool, and maintaining perspective about what business challenges are to be resolved using AI technology is key.

In addition, it is also important to clarify evaluation criteria regarding overcoming those business challenges, meaning the clarification of KPIs if KPIs can be established.

Since identification of those business challenges and establishment of KPIs depends on the business that a User engages in, it is in line with actual circumstances to divide roles between the User and the Vendor, such that the User conducts that identification and establishment at its own responsibility and the Vendor offers support to the User. Only after these challenges are identified can Users and Vendors review matters in advance, such as what data needs to be provided to Vendors by Users, whether the required data is sufficient, and whether any lacking data can be collected. Subsequently, further consultations are conducted on the specifications, etc. of the data.

In this regard, the active involvement of Users is essential in the generation of trained models. Since discussions regarding and verification of data involve close communication between Users and Vendors, it is not unusual for a fee-based contract to be executed and for discussions and verification to be conducted over many months depending on the circumstances.

If it is determined at the assessment phase that development lacks feasibility, development may cease at that phase.

In addition, there are cases where development starts at the “PoC phase” without passing through the assessment phase or where all the processes in the assessment phase and the PoC phase are performed collectively.

(ii) PoC phase

The “PoC phase” in the generation of trained models is often deemed a phase for reviewing the feasibility of proceeding with generation of trained models based on the data possessed by Users or Vendors.

This phase differs from the assessment phase in that, basically, trained models are generated and their accuracy is improved using a certain quantity of data possessed by Users (or if new data is generated, using the generated data) and the propriety and appropriateness of subsequent development are reviewed. The results of that review are generally summarized in a report.

The processes of the PoC phase may also include a pilot test for a trained model. If this is the case, then in the PoC phase, part of the existing system is replaced with a module using a trained model, and the performance of that trained model is evaluated after conducting integration. If it is confirmed that the KPIs are attainable, the parties involved proceed to the development phase. Such a pilot test might be conducted in the Vendor’s environment in some cases, and in other cases, it might be conducted in a virtual environment simulating an actual environment or in an actual environment. In particular, if a PoC is conducted in a virtual or actual
IV Development Agreements for AI-based Software

environment, trained models are sometimes generated as deliverables. In such a case, ownership of rights and terms of use regarding trained models will require consultation between the parties.

As described above, the PoC phase can involve various tasks, and, accordingly, it is important in practice to agree on the applicable scope and period in a contract executed at the PoC phase. In addition, since the generation of trained models in the PoC phase unavoidably involves repetition of trial and error, it is common that the PoC phase is not completed in one attempt and is repeated multiple times.

In the PoC phase, it is assumed that the process will advance to the succeeding development phase, and therefore it is also necessary to determine whether there are any matters that need to be handled in a consistent way in these phases and whether there are matters that need to be handled separately in these phases. For example, it is desirable to consider in advance how to handle in each of these phases the ownership of rights and terms of use for the data provided for review and for deliverables (in particular, trained models). It is conceivable that, as a result of such consideration, intellectual property rights, etc. in deliverables produced in the PoC phase would be vested in the Vendor and such rights, etc. in deliverables produced in the development phase would be vested in the User.

Furthermore, in some cases the obligation to use efforts to execute a development agreement is provided for in order to confirm perceptions shared between a User and a Vendor to the effect that they will move to the development phase if processes conducted in the PoC phase are successful.

(iii) Development phase

The “development phase” involves actually generating trained models using training datasets. An outline of this phase is described in II-3-(1) above.

(iv) Retraining phase

The “retraining phase” involves conducting training using additional training datasets for the trained models delivered by Vendors. In some cases, the Vendor who has generated the relevant trained model offers support for retraining, and in other cases, another Vendor does so. It is also conceivable that retraining would be accompanied by maintenance and operation.

(4) Roles of Users and Vendors

The generation of trained models requires more active involvement of both Users and Vendors than that required by Conventional Software Development.

(i) Role of Users

As described above, since trained models are generated by an inductive approach using data, the performance of trained models heavily depends on the training datasets used for training. In general, the raw data required to generate a trained model is under the control of the User, and essentially, the Vendor will not know in advance what data the User possesses. Therefore, it is difficult in principle for the Vendor to start generating a trained model when the User merely
IV Development Agreements for AI-based Software

conveys in an abstract manner the functions that it desires to develop. The Vendor can proceed with development only after receiving raw data or a training dataset provided by the User.

In this way, how Users prepare training datasets or raw data from which the training datasets are generated is one of the most important processes in the generation of trained models, and is one of the areas in which Users play a larger role when contrasted against Conventional Software Development.

In order for a User to prepare necessary data, it must (1) clearly identify what it aims to achieve in its business by generating a trained model, or, in other words, its business challenges and KPIs, (2) understand what data is to be generated in the environment under its control, and moreover, (3) select data suited to training or evaluation.

There may be some cases where a User can receive support from a Vendor with respect to these processes, but ultimately it is the User who plays the key role in those processes. It can be argued that it is difficult to proceed with generation of trained models without the active and independent involvement of Users.

(ii) Role of Vendors

Turning attention to Vendors, as described above, it is not necessarily easy from a technical standpoint to offer completion assurances or performance assurances for unknown inputs (data) in relation to trained models. This does not automatically mean that a Vendor would bear no liability for completion of a trained model under a contract. This is because the scope of the Vendor’s obligations is ultimately determined by the burden of risk among the parties.

Accordingly, it can be envisaged that, for example, a Vendor would promise in a contract to complete deliverables that possess a certain level of performance with respect to a limited amount of data for evaluation at the development phase. In such a case, the Vendor would be required to achieve the goals desired by the User. Furthermore, even if the Vendor were not obligated to complete a trained model, the Vendor would be required to proceed with development at a level generally required of professionals.

In addition, the key when proceeding with development in this way is to closely communicate with the User. Taking into consideration that, in particular, AI technology is a new technology, information disparities or discrepancies in knowledge in relation to technology between Users and Vendors are thought not to be uncommon. Therefore, in any event, the Vendor must use its best efforts to explain adequately and carefully to the User the uncertainties entailed in the generation of a trained model and how the process differs from Conventional Software Development, as well as to develop a shared technical knowledge.

In this sense, it can be argued that it is difficult to proceed with generation of trained models without the active and independent involvement of both Users and Vendors.

4 Considerations for contracts

(1) Legal nature of contracts

In principle, details of a contract can be determined individually and concretely through agreement between parties. However, it is also important when consulting and determining details of a contract to understand default rules that would apply in the absence of explicit agreement on certain matters between a Vendor and a User.
IV Development Agreements for AI-based Software

The legal nature of contract types that are compatible with each phase for the generation of trained models are examined below by contrast with cases of Conventional Software Development, focusing particularly on whether it is appropriate to consider a contract’s purpose the provision of services (i.e., quasi-delegation type) or the provision of results of services (i.e., contract-for-work type).

(i) In the case of Conventional Software Development

In Conventional Software Development, it is common to consider different factors according to the characteristics of each process.

First, when conducting planning and fixing requirement definitions in Conventional Software Development, the specific contents of the software that is the object of development for both a User and a Vendor will not have been sufficiently determined at that time, and it is generally believed that quasi-delegation type contracts conform to the actual conditions. On the other hand, when conducting design and development after passing through the phase of planning and requirement definitions, specific contents of the software that is the object of development will have been already sufficiently determined, and therefore it is believed that a contract-for-work type contract, whose purpose is the completion of specific software, is often compatible with such a phase.

(ii) In the case of generation of trained models

Unlike in the case of Conventional Software Development, a quasi-delegation type contract is compatible with all the phases for the generation of trained models.

Firstly, the purpose of the assessment phase is to review the feasibility of generating trained models, and the purpose of the PoC phase is to review the feasibility and appropriateness of further proceeding with generation of trained models; however, essentially, the purpose of these phases is not completion of trained models.

In addition, the purpose of the development phase is to generate trained models using training datasets, but in light of the characteristics of trained models described in II-4-(1) above, it is often difficult to determine the specifications and acceptance inspection basis for a trained model before executing a contract, and it is also difficult to guarantee that behavior unexpected by both a User and a Vendor will not occur in a trained model with respect to an unknown input (data). Accordingly, it is difficult for a contract-for-work type contract, whose purpose is the completion of specific works and which involves certain liability against defects, to conform to a development phase.

Furthermore, the purpose of the retraining phase is to conduct training using additional training datasets based on the trained models delivered by Vendors and is not to complete certain trained models.

As described above, a quasi-delegation type contract whose purpose is the provision of services, including conducting verification or development to a certain extent, conforms more easily to the actual conditions of each phase for the generation of trained models, rather than a contract-for-work type contract that promises the completion of a specific trained model.

(2) Points to note when negotiating contracts
IV Development Agreements for AI-based Software

It is important for both Vendors and Users to conduct negotiations at each phase for the generation of trained models by taking into consideration the handling of “raw data,” “training datasets,” “training programs,” and “trained models,” as well as, if required, “trained parameters” and “inference programs” that constitute trained models. In addition, it is desirable in some cases to make the handling of “know-how” a subject of negotiations. Points to note with respect to each of these matters particularly when negotiating contracts are provided below.

(i) Raw data

Some raw data is collected and accumulated through a certain commitment of labor by Vendors and Users, and other raw data is so-called open data that is published under a utilization rule that permits secondary use. With respect to the latter, it is unlikely that problems regarding the utilization method of raw data would arise in negotiations.

If a party that discloses raw data to the other party needs to prevent raw data from being disclosed to, or copied by, third parties beyond the minimum scope required for that disclosure, the disclosing party must execute with the other party a contract that expressly prohibits such disclosure to, or copying by, third parties. In addition, if a party that receives the disclosure of raw data desires to utilize the data for any purpose other than the direct purpose of that disclosure, it is desirable for the Vendor and the User to consult with each other after fully considering, from their respective perspectives, the purpose of, the timing of, the scope of, the consideration for, and other terms for the utilization of such raw data.

Practical issues regarding raw data include the issue of dealing with rights in raw data. For example, some raw data incorporates copyrighted works and personal data (including, but not limited to, personal information), and the necessity and propriety of dealing with rights in raw data become a problem in the following cases: when it is difficult in terms of time and expense to obtain detailed consent from the author of a copyrighted work or the owner of personal data that is included in big raw data, which is often required in machine learning methods; or when it is difficult to identify that author or owner in the first place.

(ii) Training datasets

a Importance of definitions

A training dataset is not itself raw data but rather secondarily processed data that has been generated through affixing, etc. of ground truth data to raw data that has been preprocessed. However, as described in II-3-(2)-(ii) above, there are no obvious borders between raw data and training datasets, and therefore questions about the handling of raw data and training datasets could arise. Accordingly, when using these terms, it is desirable to clarify their respective meanings under a contract in terms of preventing conflicts.

b Division of roles

The generation of training datasets is closely related to, but not necessarily accompanied by, the generation of trained models. Accordingly, the entity that generates training datasets should be determined through agreement between the parties. However, taking into consideration that the contents and quality of trained models substantially depend on the contents and quality of the underlying training datasets, it is appropriate in most instances to
entrust the generation of training datasets as well as trained models to Vendors, with cooperation from Users.

If “annotation,” which means affixing related information as notes to raw data, is conducted in order to generate training datasets, then some “annotation” work that is simple but requires a lot of labor may be outsourced to third parties. If a User enters a contractual relationship with particular expectations regarding the development capability of a Vendor, then in general the User’s consent is contractually required for subcontracting to a third party the service delegated (or quasi-delegated) to the Vendor. In such a case, when the Vendor who generates a training dataset outsources any annotation work to a third party, the Vendor must obtain the consent of the User.

c Ownership of rights and terms of use

The generation of trained models generally requires raw data that has been collected and accumulated as well as a certain level of conversion and processing of raw data. Considerable expenses and labor are often invested in the collection and accumulation of raw data as well as in the conversion and processing of raw data, and most of the labor required for generation of a series of trained models is sometimes invested in the conversion and processing of raw data. Therefore, independently from the handling of trained models, ownership of rights and terms of use in relation to training datasets under a contract sometimes become a key issue in negotiations.

When providing for ownership of rights in, terms of use for, and other handling of, a training dataset in a contract, how to evaluate the contribution of each party to the generation of that training dataset as well as the characteristics of the underlying raw data is often a subject of discussion in contract negotiations. The following table summarizes points to consider in contract negotiations.

| Contribution of party | - Expenses and labor invested in the collection and accumulation of raw data  
|                       | - Expenses and labor invested in the conversion and processing of raw data  
|                       | - Scarcity of the know-how required for generation of training datasets  
| Characteristics of data | - Value of raw data itself (trade secrecy and scarcity)  
|                       | - Potential for diversion of training datasets  
|                       | - Potential for restoring training datasets to raw data  

The handling of a training dataset should be ultimately determined by striking a balance between the Vendor’s and the User’s interests. Generally speaking, however, the more pressing the need to use particularly scarce know-how for preprocessing raw data and producing ground truth data, and the greater the value expected to be created by that know-how, then the

11 In theory, the act of processing data can be acknowledged to entail creativity. In such a case, the party that processes the raw data would be the author of that raw data (depending on whether the raw data is acknowledged to entail the property of a copyrighted work, that party is either the original author or the secondary author).
IV  Development Agreements for AI-based Software

more likely it will be that the party that has generated the training dataset will be recognized as having a negotiation advantage. In addition, in light of business purposes, it is conceivable that no unintended use of training datasets containing raw data that has an elevated level of trade secrecy would be permitted under a contract; instead, expenses and labor invested in the generation of such training datasets would probably be separately considered in the calculation of consideration.

As described in IV-4-(2)-(iv)-b below, a trained model is often provided from a Vendor to a User in a form that is difficult to decipher or secondarily use, such as in a binary file form, in order to prevent secondary use of that trained model or to keep confidential the know-how used for generation of the trained model. Because there is also the risk that the know-how for generating a trained model could be revealed by analysis of the training dataset generated by a Vendor rather than by analysis of the trained model itself, it is necessary in some cases to consider excluding training datasets from that which is provided under a contract in order to avoid this risk.

The following is one of the problems that can arise particularly when a User discloses to a Vendor the raw data that has been collected and accumulated by the User and the underlying training datasets: whether the Vendor’s use of raw data, etc. disclosed under a non-disclosure agreement or the like by the User and the Vendor’s generation of any trained model other than that required under the contract with the User falls under unintended use prohibited under that non-disclosure agreement or the like. It can only be argued that this issue depends on the details agreed between the parties, and it is important to determine in advance the purpose and scope of the use of raw data, etc. in order to prevent future conflicts.

(iii) Training programs

The purpose of training programs is the generation of trained parameters using training datasets as inputs for training programs. As a matter of course, it is possible to create a training program from scratch for a specific development purpose, but a variety of machine learning libraries (frameworks) have been provided and disseminated as OSS to date, and these libraries are widely used in the creation of training programs. Therefore, ownership of rights in training programs rarely becomes a negotiation issue, and, in many cases, no particular reference is made to rights pertaining to the portion developed by Vendors.

However, this does not mean that allowing Users to use training programs and permitting disclosure of source codes to Users is without problem. Although machine learning libraries certainly reduce the expenses and labor required for creation of training programs, high levels of know-how are required for selection of specific methods and other processes in order to generate trained models suited to specific purposes, regardless of whether such libraries are adopted. The propriety of vesting in a User the copyright, etc. in a training program created by a Vendor or of enabling that training program to be used at the discretion of the User should be determined by giving due consideration to whether the terms of use for the User are not detrimental to the balance of interests among the parties.

It is also important to keep in mind that, when determining ownership of rights and terms of use regarding training programs, it might be necessary for business purposes to generate a new trained model based on, or independently from, the trained model that has been generated as the object of development. For example, a User that, for business purposes, needs to generate by itself a trained model by adding new data to a training dataset must, at the least, obtain a license for use of the relevant training program. On the other hand, a Vendor whose business
IV Development Agreements for AI-based Software

model involves retraining in that manner as part of a repairs and maintenance service would choose not to authorize Users to use training programs.

(iv) Trained models

a Importance of definitions

In practice, handling of trained models is one of the core negotiation issues for contracts whose purpose is the development of AI-based software. However, the legal definition of a trained model has never been unambiguously specified, and it is therefore desirable in terms of preventing conflicts to obtain a common understanding in this regard among the parties when negotiating the handling of trained models.

Specifically, there appears to be cases where negotiations are conducted and a contract is executed without fully considering (i) whether a trained model contains a training dataset, (ii) whether the trained model contains a training program, or (iii) whether the trained model contains an inference program in addition to a trained parameter. In order to avoid unnecessary disruption in discussions and to productively promote negotiations, it is often useful to consider and determine these matters between the parties.

b Provision methods

The method of providing a trained model from a Vendor to a User can be a negotiation issue in terms of the propriety of provision in a manner that enables deciphering or secondary use of that trained model, such as by disclosure of source codes. Since it is sometimes possible to interpret the know-how of a Vendor from a trained model that is provided in a form that can be deciphered, it is common to provide trained models in a form that is difficult to decipher or secondarily use, such as in a binary file form, unless extraordinary circumstances where the User side needs a trained model in a form that can be deciphered or secondarily used are acknowledged. It is important to determine the method of providing trained models after fully considering the advisability of providing them in a form that is difficult to decipher or secondarily use.

c Ownership of rights and terms of use

Ownership of intellectual property rights and terms of use regarding trained models are key negotiation issues between Vendors and Users.

In connection with the fact that no clear rules yet exist in relation to what intellectual property rights are established in which part of a trained model that consists of a trained parameter and an inference program, ownership of intellectual property rights regarding a trained model tends to become a problem particularly when the party that has provided a training dataset or the underlying raw data is different from the party that has created and executed a training program and has generated that trained model.

In such a case, it is important to determine terms of use, etc. after fully considering the details described in (v) and (vi) below.

d Handling of reused models

50
As described in II-4-(1)-(iv) above, it is theoretically possible to reuse a developed trained model and generate a reused model that is a trained model containing a trained parameter and the like that differ from those included in the initially developed trained model. In such a case, it is not necessarily clear whether the trained model before the reuse and the reused model are identical from a legal perspective. Therefore, if a User or a Vendor desires to limit the purpose or scope of the other party’s use of a trained model, the acceptability of generating, and details of, the corresponding reused models should be also specified in a contract.

However, even when restrictions on the reuse of trained models are stipulated, it is difficult to ascertain the operation of software from the outside of a computer, and it is not always easy to identify breaches of those restrictions. Even if such breaches could be identified, there would also be difficulties in proving that a trained model had been reused. For this reason, in terms of preventing conflicts, it is sometimes necessary to consider imposing certain restrictions on the manner of transactions, such as limiting the timing and scope of certain transactions in which the interests of parties are likely to conflict.

(v) Trained parameters

Trained parameters are parameters that have been mechanically adjusted for a certain purpose using training datasets as inputs for training programs. Trained parameters are expressed with data, such as numerical values, but it is difficult to claim that their numerical arrangement itself is a “production in which thoughts or sentiments are expressed in a creative way” by humans (Article 2(1)(i) of the Copyright Act). For this reason, it is generally believed that trained parameters are less likely to fall under a copyrighted work subject to protection under the Copyright Act.

Therefore, based on the premise that a Vendor who is actually able to access a generated trained parameter is, in principle, in a position where it can use and manage that trained parameter at its discretion, the Vendor and the User must negotiate and stipulate in a contract the terms of use for the trained parameter.

On the other hand, if a contract involving provision of a trained model by a Vendor has been already executed without any reservations regarding the utilization method for that trained model, and a trained parameter is provided to the User in a decipherable form by the Vendor, then it can be interpreted that the Vendor allows the User to use that trained parameter. If a Vendor desires to impose certain restrictions on the purpose and scope of use of the trained parameter when, for example, a trained model is provided for the purpose of performance evaluation as a deliverable obtained in the PoC phase, then such restrictions should be expressly stipulated in a contract.

(vi) Inference programs

Inference programs are programs that incorporate trained parameters and enable output of certain results from inputs, and they are subject to protection under the Copyright Act or the Patent Act to the extent that certain requirements are satisfied. Generalizations regarding programs described in III-3-(1)-(ii) above also apply to inference programs.

If the trained parameter falls under a copyrighted work, the right holder will primarily have authorization to establish the terms of use for the trained parameter.
IV Development Agreements for AI-based Software

Inference programs are necessary to obtain output results from trained models that are objects of development. Accordingly, if provision of a trained model by a Vendor is stipulated in a contract, it is often understood that the Vendor and the User have reached agreement based on the premise that inference programs can be used at the discretion of the User, unless the possibility of inference program use by the User is expressly excluded in the contract.

Special attention is required when a contract stipulates that rights regarding a “trained model” are vested in both a Vendor and a User. The inference program portion of the elements constituting a trained model can be subject to protection under the Copyright Act and the Patent Act, and, accordingly, the possibility of inference program use by the Vendor or the User as well as the propriety of licensing and transferring inference programs to a third party should be negotiated and stipulated in a contract in acknowledgement of the provisions of these laws.

(vii) Know-how

In practice, the handling of know-how, especially know-how for generating training datasets and trained models, is subject to contract-related negotiations in some cases. However, particularly for a Vendor, it is reasonable to take care when disclosing know-how if that disclosure might impair the Vendor’s competitiveness, because the Vendor’s accumulated know-how is often the real source of its competitiveness. When a contract stipulates to the effect that the Vendor will disclose such know-how, it is important to fully consider whether a balance between the interests of the parties has been struck.

On the other hand, when a Vendor generates a training dataset using raw data that has been collected and accumulated by a User and further generates a trained model, the raw data may contain information that should be regarded know-how of the User, or processing suited to the purpose of development sometimes requires such information. For this reason, the User will sometimes claim that it has made a certain contribution to the generation of the trained model. In such a case, the propriety of the use (or reuse) of the trained model by the Vendor tends to become a problem, and the option of appropriately reconciling the terms of use depending on circumstances should also be considered.
Chapter IV above discusses contracts regarding the generation of trained models. Business models related to AI technology include, aside from (or in addition to) those involving development of AI technology, business models in which a User utilizes AI technology (such as a trained model) that has been developed and provided by a Vendor (such a business model is referred to as a “Service for Utilizing AI Technology”).

At present, there are various types of services that are considered Services for Utilizing AI Technology, and they cannot be definitively categorized. The following are examples of Services for Utilizing AI Technology:

(i) services through which a User utilizes a trained model provided by a Vendor (i.e., services through which a User inputs its own data into a trained model provided by a Vendor and utilizes AI products that are output results); and

(ii) services through which a User utilizes a training program provided by a Vendor (i.e., services through which a User generates a trained model by loading its own training dataset into a training program provided by a Vendor and then utilizes that trained model and AI products that are output results).

Services for Utilizing AI Technology may also include the following cases:

- when AI technology possessed by a Vendor is provided to a User after customization to meet the particular requests of the User;
- when a service is provided in combination with any other related service (for example, a data collection service, a data processing service, etc.); and
- when a Vendor otherwise provides a consulting service, etc. based on the results obtained by analysis of a User’s data using AI technology.

As described above, there are various types of Services for Utilizing AI Technology. The type of services listed in (i) above (i.e., services for utilizing trained models) is explained below.
V Utilization Agreements for AI Technology

2 Services for utilizing trained models

(1) Outline

Conceivable examples of services for utilizing trained models include the following.

Case 1: Services through which a User inputs its own data via the Internet into a trained model located in a Vendor’s server and utilizes AI products (outputs)

Example: A service through which Company X (the User), which is a manufacturer, (i) transmits via the Internet to the server of Company Y (the Vendor) equipment operation data obtained from sensors installed in the machinery of the User’s factory, (ii) inputs the operation data into the Vendor’s trained model that has been developed for machine control purposes, and (iii) utilizes output AI products via the Internet.

Case 2: Services through which a User inputs its own data via the Internet into a trained model located in a Vendor’s server and utilizes a report that has been prepared by the Vendor based on AI products that are output results

Example: A service through which Company X (the User), which is a retailer, (i) transmits via the Internet to the server of Company Y (the Vendor) sales data obtained from the User’s stores, (ii) inputs the sales data into the Vendor’s trained model that has been developed for buying behavior analysis purposes, and (iii) receives an analysis report that has been prepared by the Vendor based on output AI products.
V Utilization Agreements for AI Technology

(2) Utilization method and mode of provision for services

The most common type of service for utilizing trained models is believed to be, as described in the cases above, a service through which a User accesses and utilizes via the Internet a trained model located in a Vendor’s environment (“Cloud-Service Type”). However, in addition to the Cloud-Service Type, there is also a type of service through which a User utilizes a trained model by installing it in the User’s environment (“On-Premises Type”). Even in cases of the On-Premises Type, trained models are ordinarily provided in a form that is difficult to reuse, such as in a binary file form.

With respect to modes of provision for services, in addition to cases where a User receives an AI product that is an output result obtained by loading input data into a trained model as described in Case 1 above, there are other cases where a User does not obtain an actual AI product, but receives a product that a Vendor has produced by combining an AI product with another technology, such as reports, that the Vendor has prepared based on an AI product. While various modes of provision for services exist as just described, since trained models can theoretically be reused using an AI product that is an output result as explained in II-4-(1)-(iv), it is not uncommon in services for utilizing trained models that results, etc. obtained by processing an AI product or by combining an AI product with another technology are provided, rather than merely an AI product, in order to prevent the reuse of trained models without authorization.

(3) Contract formats

In services for utilizing an existing trained model, rights pertaining to that trained model are vested in the Vendor who provides the trained model, and the User obtains a certain right to utilize the trained model in accordance with the contents of a contract executed with the Vendor. As described above, the contents of services vary, and contract formats also vary depending on the contents of services. However, the contract format for services for utilizing trained models is basically the same as (a) that for a general cloud service agreement in the case of a Cloud-Service Type service or (b) that for a general software license agreement in the case of an On-Premises Type service.

Many services for utilizing trained models are premised on ongoing utilization, and, in these cases, the contents of those services may include operation and maintenance (depending on the circumstances, further training for improving the accuracy of trained models can also constitute the contents of a service).

However, if a Vendor provides a trained model that has been customized by the Vendor according to a particular request of a User, problems similar to those that arise in the case of the generation of trained models may materialize. Accordingly, if a trained model is customized, then, as in the case of the development of trained models, it is desirable to establish an assessment phase and a PoC phase in order to prevent trouble between the User and the Vendor.

3 Considerations for contracts

Points to note in negotiations as well as elements that require consultation and consideration with respect to service utilization agreements for trained models are examined below.

(1) Customization of trained models
V Utilization Agreements for AI Technology

In services for utilizing trained models involving customization, if a trained model is customized using the User’s data, then, as in the case of the development of trained models, problems can emerge in the ownership of rights and terms of use regarding the raw data and training dataset used for customization, the trained model (or the trained parameter or inference program) that has been customized, and related know-how. Therefore, it is necessary to make arrangements regarding ownership of rights and terms of use for these items in service utilization agreements that involve customization. A fundamental approach to, and considerations for, arrangements are similar to those in the case of development agreements described in Chapter IV above and should basically be determined upon consideration of the contribution of the parties and the characteristics of data, including the level of customization.

(2) Input data

Cloud-Service Type services for utilizing trained models enable a Vendor to access input data that a User has transmitted to the Vendor’s server. Input data may contain trade secrets and know-how of the User, but means of handling that input data under law are not necessarily clear, and accordingly it is desirable to make arrangements for the handling of, and terms of use for, the input data in a service utilization agreement.

The handling of input data can become an issue particularly when a Vendor desires to utilize input data for any purpose other than provision of services to a User. In such a case, the User and the Vendor should consult with each other to make arrangements regarding the handling of the input data upon considering mainly the burden of costs incurred for collection and accumulation of the input data, the confidentiality of the input data, the scope of use for purposes other than the intended purpose, the burden of costs incurred for provision of services, the attribution of liability, and the like.

Basically, the scope of use of data for purposes other than the intended purpose is ultimately determined by balancing the interests of a User and a Vendor. Therefore, it would be unlikely that use for purposes other than the intended purpose would be permitted with respect to input data possessing high levels of confidentiality and data that the User has collected through enormous commitment of expense\(^\text{13}\).

However, in some cases, concerns of the User side can be resolved to a certain extent by establishing conditions, such as by limiting the kind of input data available for purposes other than the intended purpose of use (for example, limitation to processed data in a form that cannot be identified by a User, or excluding certain data possessing particularly high levels of confidentiality) and by limiting the scope of use for purposes other than the intended purpose (for example, limitation to use for research and development purposes, or prohibiting use for services that are provided to specific business competitors of the User during a certain period). In addition, it is also recommended for the purpose of reconciling interests between a User and a Vendor that the Vendor side consider providing a benefit (e.g., bargain pricing) to the User if the User permits use of input data for purposes other than the intended purpose. It is desirable for Users and Vendors to make arrangements for terms of use for input data upon considering the matters described above.

(3) Reused models

\(^{13}\) For handling of data containing personal information, see IV-2-(6) of the Data Section of these Guidelines.
V Utilization Agreements for AI Technology

In services for utilizing trained models, it is also conceivable to conduct retraining using input data in order to maintain or increase the accuracy of the relevant trained models (the advisability of retraining depends on arrangements for terms of use for input data or contents of services described in (2) above). If a reused model is generated through retraining, then the handling of that reused model could become a problem, and it is therefore desirable to make arrangements for the ownership of rights and terms of use regarding the reused model in a service utilization agreement.

In determining the handling of reused models, problems particularly tend to arise in cases where a reused model generated through retraining is utilized by a Vendor for services provided to a third party other than the User. In such a case as well, in principle, arrangements regarding the propriety of, and conditions for, providing services to third parties should be made based on the contribution of both parties and the balance of interests between the parties. Specifically, the following elements should be considered: the party that has provided the data newly used for training, the sensitivity of the data and the risk of data leaks, the burden of labor and costs incurred for retraining, the scarcity of know-how, the scope of utilization, the attribution of liability, and other elements.

It is desirable for a User and a Vendor to fully consult with each other to make arrangements regarding the handling of reused models after considering the matters listed above.

(4) AI products

In the services for utilizing trained models described in Case 1 above, a User obtains an AI product that has been output using a trained model, and it is desirable to make arrangements for the handling of that AI product as well in a service utilization agreement. Depending on the service in question, a User might not necessarily obtain an actual AI product as described above; nonetheless, it is necessary in that case as well to decide in the service utilization agreement matters regarding the handling of deliverables that a User would obtain as a result of use of a service for utilizing a trained model.

As a general premise, it is believed that AI products are not recognized as copyrighted works under the existing Copyright Act unless human beings have contributed in a creative way to the process of generating those AI products. Even so, it is difficult to determine from the appearance of an AI product whether human beings have contributed in a creative way to the process of generating the AI product, and in the first place, the definition of “contribution in a creative way” is unclear at present. Accordingly, it is desirable to make arrangements for ownership of rights and terms of use regarding AI products in a contract.

In this case as well, arrangements for specific terms of use should be made after considering the following elements among others: the characteristics of the AI product, the purpose of use, the party that has provided data, the burden of costs, and the attribution of liability. The characteristics of an AI product should be considered in particular when determining the handling of that AI product. If the AI product possesses the same appearance as copyrighted works (e.g., music, paintings, or novels), then, as in the case of a copyrighted work, the AI product itself might be acknowledged to possess considerable market value. Therefore, in such a case, particularly careful consideration is required in determining ownership of rights and terms of use regarding AI products, based on the contribution of the parties and the characteristics of data.
VI Perspectives on International Transactions

Chapters II through V above explain the generation of trained models and contracts regarding services that use AI technology, premised on the application of the laws of Japan. However, generation of trained models and the like is not always completed within Japan, and in many cases contracts are executed with foreign companies. Even in the case where an international contract is executed, most of explanations provided in Chapters II through V above will apply; however, in some cases, consideration specific to an international contract is required.

Therefore, this chapter outlines (i) general points to note in the execution of an international contract, and explains (ii) potential issues in the generation and utilization of trained models with reference to relevant laws and regulations of the U.S., Europe, and China where appropriate and necessary.

1 General points to note

(1) Fundamental perspectives

As is the case with a contract executed between Japanese parties within Japan, it is also necessary in the case of an international contract to ascertain what rules will apply to matters not specifically agreed on between the parties in the contract; in the other words, it is necessary to determine and study the applicable laws.

Upon doing so, the parties (i) discuss changing rules that are not suited to the circumstances of the transaction in the contract and (ii) adjust consideration or take other steps in order to allocate between the parties any risk that remains after such changes are provided for in the contract.

It should be noted, however, that since execution of international contracts involves negotiations between parties whose languages, cultures, and legal systems differ, it is often necessary in the case of an international contract to determine the scope of rights and obligations between the parties more precisely than when executing a contract between Japanese parties within Japan, in order to avoid trouble later.

(2) Determination of applicable law

(i) Selection of governing law

In a transaction with a foreign company, it is generally preferable to reach agreement to the effect that the transactions are to be governed by the laws of Japan, because doing so offers the advantage of making it relatively straightforward to gather information from Japanese professionals and easier to forecast the result of disputes.

However, merely stipulating governing law is not sufficient for the purpose of selecting rules applicable to dispute resolution. Depending on the method selected for dispute resolution, it is possible that the governing law option agreed to between the parties would be invalidated or restricted. For example, if litigation is selected as a means for dispute resolution, the applicable law, in principle, would be determined in accordance with the provisions of the private international law of the country where the court was located. Moreover, in some countries, the parties are not allowed to select the governing law. In such cases, it is worth considering the selection of proceedings other than litigation (e.g., international commercial arbitration or international mediation proceedings) in order to enable the application of desired laws.
VI Perspectives on International Transactions

In addition to the points stated above, it should be noted that the Vienna Convention (“CISG\textsuperscript{14}”) may be applied in addition to the governing law agreed to between the parties if a product equipped with a trained model (movable property) is to be sold overseas. If it is possible to apply an international rule that is more advantageous than the governing law the other party wishes to apply, then it is worth considering use of CISG in such a situation as well. On the other hand, if it is desirable to exclude the application of CISG, it is necessary to stipulate that exclusion in the contract.

(ii) Study of applicable laws

Although it is believed that the principle of freedom of contract is acknowledged under private international law and arbitration laws and regulations in many countries, it is necessary to understand the default rules of applicable laws, including the governing law, because in some cases the legal effect of contents agreed to between parties is not ultimately acknowledged due to the existence of mandatory provisions.

As a specific scope for investigation, it is important to confirm not only contract law but also intellectual property related laws and regulations, competition laws and regulations, laws and regulations related to controls on exports and imports, as well as administrative regulations, and it is desirable to obtain opinions from local professionals on particularly important matters.

In addition to the matters stated in relation to contracts executed between Japanese parties within Japan, consideration of the following matters is believed generally necessary in relation to international contracts.

- Obligation standards for the parties (e.g. “best efforts,” “reasonable care,” etc.)
- Validity and scope of penalty clauses
- Scope of exemption and limitation of liability
- Scope of force majeure and circumstantial change
- Scope of warranty (especially implied warranty)
- Availability and scope of indemnification for infringement of rights by a third party or infringement of a third party’s rights
- Requirements for termination and effect thereof
- Ability to assign rights and obligation

(3) Selection of dispute resolution methods

The effectiveness of dispute resolution depends heavily on the proceedings involved as well as on the applicable substantive law. In this respect, litigation in Japanese courts offers an advantage in that the course of proceedings and the burden of those proceedings can be more readily predicted. In addition, Japanese attorneys would represent parties in such proceedings, so communication would be less burdensome. Therefore, it is believed generally desirable to stipulate that a court in Japan will have exclusive jurisdiction.

\textsuperscript{14} United Nations Convention on Contracts for the International Sale of Goods
http://www.mofa.go.jp/mofaj/gaiko/treaty/treaty169_5.html

59
VI Perspectives on International Transactions

However, even if litigation is instigated against a foreign company in a Japanese court and a judgment is obtained, it is often difficult to enforce the judgment due to issues of mutual recognition and the like. Also it is not uncommon for the foreign company to express disapproval with respect to the instigation of litigation in Japan. On the other hand, it is conceivable that the use of court proceedings in foreign countries would entail physical, temporal, and cost-related difficulties.

In such a case, it is conceivable to use international commercial arbitration in a third country as a dispute resolution method rather than litigation. International commercial arbitration is advantageous in that foreign arbitral awards are more readily recognized and enforceable than judgments reached in foreign countries because most major powers have ratified the New York Convention. Furthermore, in contrast to litigation, general acknowledgement of the confidentiality (private nature) of these proceedings and the flexibility offered by these proceedings can also be advantageous in some cases. On the other hand, incurring of fees for arbitrators and management fees for the arbitration body may be disadvantageous when weighed against a lawsuit.

When using international commercial arbitration, it is advisable to confirm the arbitration laws and regulations of the place of arbitration and the rules of arbitration of the arbitration body to be used before drafting an arbitration agreement. Generally, it is important to state in the arbitration agreement that both parties consent to submit disputes to arbitration, the name of arbitration body, the number of arbitrators, the place of arbitration and the language of the arbitration, among other matters. In many cases, it is sufficient to adopt the model provisions of the arbitration body in question, but it should be noted that there may be cases where the abovementioned elements are not clearly specified in those model provisions.

2 Potential issues in generation and utilization of trained models

(1) Acquisition and generation of data

(i) Perspectives for consideration

When acquiring raw data or generating training datasets overseas, it should be noted that the handling of that data may be subject to regulations that differ from those in Japan. As stated in IV-4-(2)-(i) above, when the data handled includes a copyrighted work or personal information, dealing with rights in particular often becomes an issue. If a right holder or the like is located in a foreign country, it is even more difficult to investigate and eventually deal with the rights in question.

Therefore, it is even more vital to confirm in which cases this data can be utilized without the consent of the right holders, etc., and to agree on which party will bear the cost incurred in dealing with the rights in question.

(ii) When copyrighted works are included

For copyrighted works, it is common to adopt the principle that protection is governed exclusively by the laws of the country where protection is claimed, in accordance with Article 5-2 of the Berne Convention. Although a court or the like decides specifically which

---


16 Berne Convention for the Protection of Literary and Artistic Works
country’s law applies, it is not uncommon for the act of using copyrighted works and the act of infringement of copyright to be regulated by the laws of the place where such acts are performed.

When raw data and the like are stored on overseas servers or data is processed overseas in order to generate trained models and to use trained models for services, it should be noted that reproduction or adaptation conducted in that process may violate the copyright law of the place where the servers are located or the data is processed. In this regard, while it is a prevalent view in practice in Japan that Article 47-7\(^1\) of the Copyright Act permits recording and adaptation of copyrighted works for use in machine learning, similar exceptions might not necessarily be permitted in other countries.

For example, the US Federal Copyright Law provides for a fair use rule that stipulates that reproductions for the purpose of criticism, commentary, news reporting, teaching, scholarship, or research (whether for profit or not for profit) are not charged with any breach of the Copyright Law (Section 107 of the US Copyright Law). In judicial precedent, transformative use has tended to be permitted since the expression in the copyrighted work itself is not used in transformative use. For example, in recent judicial precedent\(^2\) the display of snippets by Google, Inc. (USA) was judged fair use. However, there is debate over whether reproduction and other processing for machine learning constitute fair use in the first place, and, if they do, under what conditions they are permitted as fair use.

In Europe, there is no unified copyright law, and matters related to copyrighted works are dealt with under each country’s legal system. For example, while the UK Copyright Act provides for fair dealing rules that permit reproduction of a copyrighted work, those rules apply only to reproduction for non-profit-based purposes (Sections 29, 30, 32, etc. of the UK Copyright Act).

On the other hand, the Copyright Law of the People’s Republic of China does not employ fair use, despite providing for restrictions on copyright (Article 22 of the Chinese Copyright Law).

In this way, use of copyrighted works for machine learning is not always permitted under the law in some countries overseas, so it is important to reach contractual agreement on which party should deal with rights.

(iii) When personal information is included

Dealing with and transfer of personal information is generally subject to regulations based on the personal information protection laws of the country in question. In particular, caution is required when transferring data outside an applicable jurisdiction even if that transfer is between group companies, because transfer may be subject to regulation under personal information protection laws, etc.\(^3\)

In the United States, for example, the federal government does not provide uniform protection for personal information in general, except for certain fields, such as medical information (Health Insurance Portability and Accountability Act; HIPAA). In other fields, state laws are left to decide how to deal with personal information.

In Europe, the EU General Data Protection Regulation enforced on May 25, 2018 (the GDPR) stipulates that one of the following conditions must be met if “personal data” is transferred from

\(^{17}\) After the enforcement of the revised Copyright Act in 2018, application of Article 30-4 of the Copyright Act will become an issue.

\(^{18}\) Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015)

\(^{19}\) For details, please see IV-2-(5) of the Data Section of these Guidelines.
the EU region to a third country outside the EU region: (i) the data is transferred to a third country that is assessed to be adequate by the European Commission (Article 45 of the GDPR); or (ii) if the data is transferred to a third country not assessed to be adequate by the European Commission, then (a) such transfer is conducted under appropriate safeguards (which do not require individual approval from the competent supervisory authority; Article 46-1 of the GDPR) or (b) conditions for an exception, such as the requirement for explicit consent from the data subject, are met (Article 49 of the GDPR).

In China, the Cybersecurity Law and other laws regulate the transfer of personal information and important data outside China (Article 37 of the Cybersecurity Law).

From the outset, it is important to confirm whether or not the intended process or transfer is subject to these laws and regulations. After that confirmation, it is desirable to deliberate the possibility of whether there is scope to exempt that process or transfer from applicable regulations by anonymizing the data or altering data so that it cannot be used to identify individual, and then to reach agreement in the contract on necessary roles and how to share risks.

(iv) Making use of representation and warranty provisions

It is conceivable to use representation and warranty provisions as a contractual mechanism to allocate risk related to unexpected barriers that hinder the use of raw data and training datasets.

When generating trained models or using trained models for a service, if, for example, one party receives data provided by the other party, then sometimes, in practice, representation and warranty provisions are established to the effect that the acquisition and use of that data will pose no problem, such as infringement of copyright or any other rights or interests of another person. Representations and warranties regarding the accuracy, completeness, validity, usefulness, safety, and the like of data can also be a source of problems.

While it is predictable that the party providing data would wish to avoid making a warranty wherever possible and that the party receiving data would desire a warranty, it is desirable for both parties to clearly specify in the contract how risk is shared between the parties to avoid subsequent trouble.

Furthermore, representation and warranty provisions are a concept originally derived from Anglo-American law, but depending on applicable law it is possible for the requisites and effect of those provisions to transform in a way that differs from their original connotations. Therefore, it is also important to agree in the contract on how to deal with a breach of representations and warranties, including whether or not to permit termination and penalties.

(2) Generation of trained models

The explanations presented in Chapters III and IV above also generally apply as points to note when executing with a foreign company a contract involving the development of AI-based software, including a trained model.

In other words, firstly, it is important to agree on (i) the means of proceeding with development itself. It is also important to agree on (ii) ownership of rights and (iii) terms of use, upon clearly specifying what is the object of the contract, including, for example, the raw data provided or generated in the course of machine learning, a training dataset, or a trained model.
VI Perspectives on International Transactions

(i) Proceeding with development

As described in IV-3-(2) above, these Guidelines (AI) propose the adoption of an “exploratory multi-phased” process in the generation of trained models. This still applies even when executing a contract with a foreign company.

In Japan, it is common to design contracts understanding each stage of development through the dichotomy of contract-for-work or quasi-delegation, based on the legal nature of each of those stages. However, this categorization is merely typology premised on the application of the Japanese Civil Code, and there is no warranty that such categorization would be valid under the applicable laws of foreign countries. Therefore, it is important for the parties to discuss matters in details without being constrained by contractual typology. The following are conceivable examples of matters for discussion.

- Requirements specification
- Details and procedures of various tests
- Requirements for acceptance inspection and performance confirmation
- Necessity of maintenance and operation after delivery
- Response in the event of non-conformity with the contract (propriety of damages, termination, demands for reduction of price, or demands for subsequent completion)

(ii) Ownership of rights

At the time of writing these Guidelines (AI), there appear to be no laws regulating ownership of rights or terms of use of rights in relation to trained models in the United States, Europe, China, and other countries. Therefore, when executing a contract with a foreign company, it is important to investigate and consider what protections or regulations are applied to trained models in the existing legal system under the applicable law. As is the case in Japan, copyright laws, patent right laws, and trade secret legislation often become an issue in practice. In particular, the protection of computer programs as copyrighted works or inventions, etc., is often thought to be an issue for trained models, so copyright laws and patent laws are explained here.

a Handling of copyrights

It is believed that the inference programs of trained models are commonly protected as copyrighted works, and, unlike patent rights, registration is not generally required for these rights to arise.

However, in some cases, registration may be required under the applicable law when exercising a copyright. In the United States, for example, registration of the copyright is a requirement when filing a lawsuit (Section 411 of the US Copyright Law). In addition, although in principle it is only possible to claim a statutory compensation amount for damage incurred after registration, it is also possible to claim the statutory compensation amount incurred before the registration if the damage is incurred within three months after the right arises (Section 412 of the US Copyright Law).

In Europe, on the other hand, registration is generally not required when filing a lawsuit, although it depends on the legal system of the country in question. In China, registration is not a requirement for filing a lawsuit; however, it provides prima facie evidence of authorship in a lawsuit.
Therefore in some cases it is desirable to give due consideration not only to the ownership of copyright, but also to the necessity of registration, and to handle copyright issues by, for example, providing for a contractual obligation to cooperate.

b  Handling of patent rights, etc.

With regard to patent rights and other rights that become effective upon registration, the competent authority determines whether or not the right can be actually acquired even if it is contractually agreed that ownership of the right belongs to a specific party. In particular, applications are sometimes made to register trained models as computer software (CS) related inventions, and doing so often gives rise to issues regarding patent eligibility or the fulfillment of patent requirements.

In the United States, for example, the decision made by the Supreme Court in the Alice case\(^{20}\) has made acknowledging the patentability of computer software more difficult. In Europe, a computer software related invention is regarded patentable if it has a technical nature, but depending on the contents of the application, it is not always easy to fulfill patent requirements since it is understood that non-technical elements that do not contribute to the technical nature of the software are not considered in determining the presence of an inventive step.

Consequently, even if the right, etc. to obtain a patent is acquired through negotiation requiring much time and energy, there is no guarantee that the patent right will be granted, and it is conceivable that in some cases there would be little practical benefit. It is desirable to consider in advance, among other matters, whether the acquisition of these rights is truly important in light of the purpose of the contract or whether merely being granted only an exploitation right (license) would be sufficient.

If the right to obtain a patent is vested in a Japanese company, it may be difficult for the Japanese company on its own to conduct registration in accordance with local legislation, and so it is useful to establish with the other party an obligation to cooperate.

(iii)  Terms of use

It is preferable for both parties to consult with each other on the terms of use for trained models after ascertaining in advance how the trained models can be used when there is no agreement on such use in the contract.

Although specific methods of use depend heavily on the technical details of the trained model, if, for example, the trained model is subject to copyright or patent rights, it is conceivable to consider the permitted method of use under applicable law as a basis and then to further deliberate whether additional matters need to be determined between the parties. On the other hand, for data and other items that, in principle, may be used at will, the terms for use would be set based on those who can actually access that object.

Prohibition of reverse engineering and competition are matters commonly stipulated in practice. It is also necessary to determine the terms of use for the parties in the event that intellectual property rights related to the trained models are co-owned.

a  No reverse engineering

VI Perspectives on International Transactions

Even if, as described in IV-4-(2)-(vi) above, a Vendor were to provide a trained model in a form that is difficult to decipher or secondarily use, such as in a binary file form, with the intention of concealing the know-how and data contained therein, such provision would be ineffective if the data could be analyzed by reverse engineering or the like. For this reason, the establishment of provisions prohibiting reverse engineering is conceivable as a practical measure. However, caution is required because the validity of those provisions is dealt with differently in each country.

For example, there is judicial precedent\textsuperscript{21} in the United States that permits reverse engineering as fair use under the US Copyright Law. Even so, restricting reverse engineering in a contract between parties is considered an effective measure\textsuperscript{22}.

In Europe, the European Union Directive on the protection of trade secrets (Directive (EU) 2016/943) expressly states that reverse engineering of lawfully acquired products can be prohibited by mutual agreement between the parties; however, it also states that each country is allowed to enact laws invalidating such agreement (Preamble 16). Therefore, when expanding business into Europe, it is necessary to keep in mind that in some countries it might not be possible to eliminate the risk of a trained model being analyzed through reverse engineering.

In China, reverse engineering is not, in principle, considered an infringement of trade secrets\textsuperscript{23}. Even so, it is possible to restrict reverse engineering under a contract, so it is desirable to specify prohibition of reverse engineering in contracts when necessary.

b Restriction on competition

When a User outsources development of a trained model to a Vendor in order to use that trained model in the User’s business, it is conceivable in many cases that the User will desire that the Vendor not use the trained model in a way that competes with the User.

It is not uncommon for these restrictions on competition to be provided for in a contract as confidentiality obligations after the end of the service or as non-competition obligations. However, it should be noted that, even though it depends on the specific contents of the restrictions, these restrictions on competition may be null and void if judged by courts, etc. to excessively restrict the other party on the grounds that the restrictions violate competition laws and regulations or public policy under applicable laws.

For example, in the United States, the validity of non-compete clauses in the state of New York is determined taking into account the existence of legitimate business interests protection, the reasonableness of the geographical scope and period, and the degree of difficulty that the contracting party may suffer, and in recent judicial precedent regarding a license agreement for a camouflage pattern, a contractual article that prohibits the manufacture of products using a

---

\textsuperscript{21} Atari Games Corp. v. Nintendo of America Inc., 975 F.2d 832 (Fed. Cir. 1992), Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992)

\textsuperscript{22} Bowers v. Baystate Technologies (320 F.3d 1317)


65
“similar” pattern without specifying a time limit after the termination of that license agreement was invalidated\textsuperscript{24}.

c  **Relationships with other co-owners**

If a trained model is co-owned between a Vendor and a User, it is necessary to review whether the intellectual property right legislation in each country requires consent from the other co-owner when a co-owner uses the trained model for itself, licenses the trained model to a third party, or transfers the trained model to a third party. If consent is not required under the applicable laws, it is necessary for the parties to reach separate agreement with each other regarding the imposition of restrictions in order to prevent unexpected use.

For example, in the United States, although distribution of profits is required when copyright in a computer program is co-owned and one co-owner uses that program\textsuperscript{25}, consent from the other co-owners is not necessary (Section 106 of the US Copyright Law). Granting of a non-exclusive license to a third party without the consent of the other co-owners is also permitted\textsuperscript{26}. Since consent is, in principle, not required for use of copyright in the manner mentioned above, it is believed vital in some cases to impose contractual restrictions on such use in advance.

(3)  **Utilization of trained models**

Points to note for contracts regarding the utilization of AI technology, especially services based on trained models, are as explained in Chapters III and V above. On top of these, the following are also believed to be factors to consider when executing an international contract: (i) provisions for limitation of liability and (ii) compliance with various regulations.

(i)  **Provisions for limitation of liability**

The inference process used by trained models is not always readily understood by humans, and consequently, it is possible that a trained model will behave in a manner that is unintended by the parties and cause damage to a third party. In such a case, while questions regarding whether the user of the trained model bears liability for default, liability for a warranty against defects, or tort liability (including product liability) are based initially on applicable laws, it is important to note that the provider and the user of the trained models or the services based on the trained models consult with each other regarding the allocation of risk by, for example, clearly specifying in the contract means of handling for the parties to implement using limitation or exemption of liability clauses or indemnification clauses.

However, in some countries, for example, some or all of the exemption or limitation of liability clauses in the contract between the parties may be invalidated. In that case, it is necessary to consider measures to reduce risk, including the use of insurance or other methods.

(ii)  **Compliance with various regulations**

\textsuperscript{25} Erickson v. Trinity Theatre, Inc. 13 F.3d 1061 (7th Cir. 1994)
\textsuperscript{26} Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137 (9th Cir. 2008)
If one party lets the other party use trained models or uses trained models overseas, it is also necessary to design contract provisions that focus on compliance with administrative regulations applicable to such use, such as export controls, etc.

**a Foreign Exchange Act and regulations on import and export of technology**

If a trained model is developed in Japan and provided overseas, it is possible that regulations on export and import of the country in question would apply to that provision, in addition to it being necessary to comply with regulations under the Foreign Exchange Act.

For example, if a Japanese company licenses a trained model to a Chinese company, the Regulations on Technology Import and Export Administration, which are compulsory provisions, apply. As a result, if the Chinese company that is the transeree of the technology infringes legitimate interests of a third party by using the trained model, the Japanese company that is the transferor of the technology is liable for that infringement (Article 24 of the Regulations on Technology Import and Export Administration) and is obligated to guarantee the completeness, effectiveness, and capability to achieve the agreed technical object (Article 25 of the Regulations on Technology Import and Export Administration). In such a case, it is conceivable that if the Japanese company were to have a subsidiary in China or Hong Kong, transactions would be conducted through that subsidiary as a practical measure and, therefore, it is believed it would be necessary to clearly specify in the contract to the effect that such handling is possible.

Equally, it is necessary to examine the regulations on export and import of the country in question when trained models developed overseas are exported from a country overseas and imported into Japan. It should be noted that in the United States, for example, disclosure of source codes for technology and software is subject to the Export Administration Regulations (EAR) and that registration with the EAR or permission under the EAR may be required.

**b Personal information protection legislation**

When providing services based on trained models for individuals, it is necessary to pay attention to regulations on the protection of personal information, as explained in reference to the process of raw data and the like above.

For example, if a company expands its business into Europe, there is a risk that the processing of data, etc. input into a trained model would be judged a violation of the GDPR. In the GDPR, the data subject “shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her” (Article 22 of the GDPR), so, as a result, if decisions about service users are made based solely on the processing results of the trained model, those decisions may be considered a decision made based solely on automated processing that produces the effect or impact described above.

For this reason, when providing services based on trained models in cooperation with local companies in Europe, it is considered desirable to execute a contract after establishing in advance a business model that heeds these regulations.
VII Model Contracts

1 Role

In these Guidelines (AI Section), the Model Contracts are presented as model contracts for the development of AI-based software that have been prepared based on the fundamental concepts stated above. The Model Contracts apply to transactions in which a User outsources the development of a trained model or other AI-based software to a Vendor and the Vendor provides the User with, or allows the User to utilize, the software as a deliverable. At the same time, no model contracts for contracts relating to transactions in which a Vendor provides a User with a trained model or other AI technology developed by the Vendor and the User utilizes that AI technology (contracts for the use of Services for Utilizing AI Technology) are presented in these Guidelines (AI Section) because there is a diversity of modes of provision for services, and provisions regarding AI technology are basically the same as those for software development agreements.

From the standpoint of continuity with conventional practices, the Model Contracts have been prepared by basically following the approach taken with the Model Contract 2007, which is widely used as a reference in preparing system development agreements, while taking into consideration the features of AI-based software as well as differences in the assumed conditions precedent.

Contracts are established by agreement between contracting parties and, apart from exceptions where a contract becomes void because it contradicts an enforced law or regulation or the like, basically the contracting parties are able to stipulate terms and conditions at their own discretion. The Model Contracts are presented merely for the purpose of reference in order to promote understanding of contracts regarding the development and utilization of AI-based software based on the features of AI technology and, needless to say, parties may, at their discretion, execute contracts that differ from the Model Contracts and make amendments to the Model Contracts.

The Model Contracts have been prepared based on certain premises and by abstracting specific situations in which parties might be placed, and so the Model Contracts are more likely to encompass circumstances commonly shared by prospective parties. Please note that the contents of contracts will differ if they are prepared based on different premises and that it is necessary to reflect in the contracts specific situations in which the parties are placed or other circumstances. In addition, it is envisaged that amendments will be necessary in accordance with the rapidly-advancing development of AI technology and its actual practices. The Model Contracts are mainly composed of provisions regarding AI-based software. Although the Model Contracts contain relatively detailed provisions regarding the handling of data, if parties desire to provide for more detailed arrangements regarding the handling of data in the development of AI-based software, it is conceivable that the parties would separately execute a contract for handling of data or incorporate into the Model Contracts more detailed provisions regarding data by, for example, referring to the examples of contract provisions described in the Data Section of these Guidelines.

2 Characteristics

The following are the characteristics of the Model Contracts based on the features of AI technology described in these Guidelines (AI Section).
VII Model Contracts

(i) Contracts are presented based on each phase of exploratory multi-phased development (a non-disclosure agreement, an operations test agreement, and a software development agreement).

(ii) A variety of provisions regarding the handling of data are included for the purpose of protecting and making use of data provided by Users.

(iii) The Model Contracts present a framework for reconciling interests between Users and Vendors by establishing detailed terms of use with respect to the handling of Derivative Products.

(iv) Draft provisions are presented that forgo (a) obligating Vendors to complete deliverables or (b) any assurance by Vendors regarding the performance of deliverables.

3 Premises and points to note for each Model Contract

The following agreements have been prepared as model contracts for the development of AI-based software. Premises, points to note, and other details with respect to each model contract are as follows.

(1) Assessment phase: non-disclosure agreement

In this case, it is assumed that a non-disclosure agreement is being executed at the assessment phase. The model contract for the non-disclosure agreement is based on the premise that limited sample data will be received from the User and that the Vendor will conduct short-term verification of whether it is possible to introduce AI technology. It is assumed that a simple report containing the results of the verification will be provided.

(2) PoC phase: operations test agreement

In this case, it is assumed that an operations test agreement is being executed at the PoC phase. Actions to be performed during the PoC phase differ depending on each case as described in these Guidelines (AI Section). The model contract for the operations test agreement is based on the following premises.

- Contracting parties: A User and a Vendor (regardless of the technology level or corporate scale of the User or the Vendor)
- Legal nature of the agreement: Quasi-delegation
- Timing: Initial phase of PoC
- Details of services: The Vendor conducts verification of the feasibility and reasonableness of development after producing a trained model by using certain sample data and working to improve the accuracy of the trained model, and then prepares a report of the results of the verification as an outcome.

For example, if, in the late stages of the PoC, verification including a pilot test of a trained model is conducted using actual data and the trained model is generated as an outcome, it is conceivable that the parties would incorporate into the operations test agreement the same provisions as those contained in the development agreement (mainly regarding the ownership of rights and terms of use) because this phase is close to the development phase.
(3) Development phase: software development agreement

In this case, it is assumed that a software development agreement is being executed at the development phase. The model contract for the software development agreement is based on the following premises.

- Contracting parties: A User and a Vendor (regardless of the technology level or corporate scale of the User or the Vendor)
- Development model: Non-waterfall model
- Applicable system: Development of a program with specific functions utilizing machine learning
- Legal nature of the agreement: Quasi-delegation (including both outcome-achievement type and performance-proportion type)
- Timing: Development phase
- Details of services: For a trained model that goes through the PoC phase and whose development is determined possible, the Vendor generates the trained model after producing a training dataset based on the data provided by the User and then provides the User with the trained model.

The Model Contract in question is a simple contract based on the assumption that only a trained model will be developed. Accordingly, it is not split into a basic agreement and an individual agreement. If a trained model is generated as part of a system that is of, or greater than, a certain scale, it is conceivable that the parties would use, as appropriate, provisions that are required for general system development agreements (see the Model Contract 2007 and the Model Contract 2008) by, for example, executing a basic agreement and an individual agreement separately or executing a system development agreement as a separate agreement.

(4) Retraining phase

It is conceivable that a model contract at the retraining phase would stipulate terms of use contained in the software development agreement at the development phase or contain provisions identical to those regarding the relationship of rights and attribution of liability in relation to a reused model that has been generated at the development phase. However, because it is assumed that these provisions are almost identical to provisions regarding the relationship of rights and attribution of liability that are contained in the model agreement for the software development agreement, no model contract has been prepared for the retraining phase.
VII  Model Contracts

4  Non-disclosure agreement at the assessment phase (model contract)

Applicable Cases and Premises
- Contracting parties: A User and a Vendor (regardless of the technology level or corporate scale of the User or the Vendor)
- Outline: It is assumed that the Model Contract would be executed at the assessment phase, which occurs before the development of AI technology and the operations test phase (PoC phase). Although whether an assessment phase is to be established, and the actions to be performed during such an assessment phase, depend on each case, the Model Contract is based on the premise that a Vendor will receive limited sample data from the User and will conduct, without any payment of consideration, short-term verification of whether it is possible to introduce AI technology. It is assumed that a simple report containing the results of the verification will be provided in this case.

Non-disclosure Agreement

●● (the “User”) and ●● (the “Vendor”) hereby execute this agreement as follows (this “Agreement”) regarding the handling of Confidential Information (as defined below) disclosed to each other in connection with the review of the feasibility of ●● (the “Review”).

Article 1  Definition of Confidential Information

1. In this Agreement, “Confidential Information” means any of the following types of technical, operational, or other business information that is provided by the other party in relation to the Review:
   (1) information that the other party discloses in writing (including electronic or magnetic means; the same applies hereinafter) upon designating it confidential;
   (2) information that the other party discloses after orally indicating that it is confidential and then specifying its contents in writing no later than ● days after disclosure; such information will be handled as Confidential Information until the day when ● days will have passed since the date when the other party discloses the information after orally indicating that it is confidential or the date when the other party notifies in writing that it does not treat the information as Confidential Information, whichever is earlier; or
   (3) data stated in the Schedule and that is subject to the Review (the “Applicable Data”).

2. Notwithstanding the provisions of the preceding paragraph, information that falls under any of the following items is excluded from Confidential Information:
(1) information that is already publicly available at the time it is disclosed by the disclosing party;

(2) information that, after it is disclosed by the disclosing party, becomes publicly available through no fault of the receiving party;

(3) information that is lawfully disclosed by a duly authorized third party without being subject to any confidentiality obligations;

(4) information that, at the time of disclosure by the disclosing party, is already lawfully held by the receiving party; and

(5) information developed independently by the receiving party without using information disclosed by the disclosing party.

Article 2 Confidentiality obligations

1. The receiving party shall keep Confidential Information secret and shall not disclose, provide, or divulge Confidential Information to a third party without obtaining the prior written approval of the disclosing party.

2. The receiving party shall disclose Confidential Information only to its officers and employees who need to know that Confidential Information in order to perform the Review.

3. Notwithstanding the provisions of the preceding two paragraphs, the Vendor may disclose Confidential Information to a third party that needs to know that Confidential Information in order to perform the Review (a “Subcontractor”) if the Vendor obtains the prior written approval of the User (however, the User may not refuse that approval without reasonable grounds for doing so). In this case, the Vendor shall cause the Subcontractor to bear obligations equivalent to those borne by the Vendor under this Agreement and will be fully liable for the management of the Confidential Information by the Subcontractor.

4. Notwithstanding the provisions of each of the preceding paragraphs, the receiving party may disclose Confidential Information that must be disclosed in accordance with the provisions of laws and regulations to the recipient of disclosure in question under those provisions of laws and regulations upon notifying the other party in advance to the extent possible.

Article 3 Prohibition of use, etc. for other purposes

The receiving party shall not use, reproduce, or alter Confidential Information for any purpose other than performing the Review and may use, reproduce, and alter Confidential Information only to the extent reasonably necessary for the purpose of performing the Review.

Article 4 Return or destruction of Confidential Information

72
1. The receiving party shall promptly return Confidential Information that is disclosed or provided by the disclosing party or shall destroy that Confidential Information at its own liability (the same applies to reproductions and alterations of Confidential Information) if this Agreement ends or if the receiving party is requested in writing to do so by the disclosing party. The disclosing party may request the receiving party to submit documents that prove such destruction.

2. Notwithstanding the provisions of the preceding paragraph, if the Vendor’s Confidential Information includes any written report prepared by the Vendor that states the results of the Review (a “Written Report”), the User may use the Written Report even after this Agreement ends. However, the User may use, reproduce, and alter the Written Report only to the extent necessary for its internal use and shall not disclose, provide, or divulge the Written Report to a third party.

**Points to Note:**
Article 4 provides for return or destruction of Confidential Information.

**Commentary:**
Regarding Paragraph 2 of Article 4, please note that a Written Report must be designated confidential in accordance with Paragraph 1 of Article 1 if the Written Report is to be protected as Confidential Information.

**Article 5  Limitation of warranties regarding Confidential Information**

The disclosing party does not make any warranty to the receiving party with respect to disclosed Confidential Information. However, the disclosing party warrants to the receiving party that the disclosing party is duly authorized to disclose Confidential Information to the receiving party.

**Article 6  Intellectual property rights**

[Version A] In the case where the handling of intellectual property rights is determined through consultation

1. The receiving party does not obtain or receive licensing of any rights in the disclosing party’s Confidential Information as a result of the disclosure of that Confidential Information under this Agreement, except with respect to details that are expressly acknowledged under this Agreement.

2. If any new invention or other intellectual property (collectively, an “Invention, Etc.”) is created based on the disclosing party’s Confidential Information, the receiving party shall promptly notify the disclosing party, and handling of patent
rights and other intellectual property rights in the Invention, Etc. must be decided through mutual consultation.

[Version B] In the case where intellectual property rights belong to the inventor

1. The receiving party does not obtain or receive licensing of any rights in the disclosing party’s Confidential Information as a result of the disclosure of that Confidential Information under this Agreement, except with respect to details that are expressly acknowledged under this Agreement.

2. Each patent right and other intellectual property right in each invention or other intellectual property created in the course of the Review (collectively, an “Invention, Etc.”; such a patent right or other intellectual property right collectively, a “Patent Right, Etc.”) belongs to the party to which the person who creates the Invention, Etc. belongs.

3. A Patent Right, Etc. in an Invention, Etc. jointly created by the User and the Vendor is jointly owned by the User and the Vendor (ownership interest is decided according to the degree of contribution). In this case, each of the User and the Vendor may practice or exercise the jointly owned Patent Right, Etc. without obtaining the consent of the other party and without being obligated to pay consideration to the other party.

4. Each of the User and the Vendor shall implement necessary employee invention obtainment procedures (appropriate operation of employee invention systems, including development of employee invention rules, and assignment procedures for employee inventions and the like) with respect to each Patent Right, Etc. jointly owned with the other party under the preceding paragraph.

Points to Note:
- Article 6 provides for the handling of intellectual property rights in cases where any patent right, copyright, or other intellectual property right is created in the course of the Review.

Commentary:
1 Paragraph 2 and the subsequent paragraphs of Article 6 provide for the handling of intellectual property rights in preparation for cases where any patent right, copyright, or other intellectual property right is created in the course of the Review. In order to make the provisions as simple as possible, no detailed definition of intellectual property rights is stipulated and, unlike the operations test agreement (model contract) at the PoC phase and the software development agreement (model contract) at the development phase, there are no separate provisions for copyright and other intellectual property rights.

2 However, because the Review is based on the premise that a simple verification will be conducted, it is envisaged that, in most cases, there will be no creation of any intellectual
property for which ownership of rights would become an issue. In addition, it is extremely difficult to predict before entering the assessment phase what kind of intellectual properties will be created. In such circumstances, it is often more reasonable for the parties to hold consultations when intellectual property is created, rather than spending time negotiating arrangements for intellectual property rights in advance. Therefore, it is stipulated in [Version A] that, if any intellectual property is created, the parties shall consult with each other to decide the handling of intellectual property rights with respect to the intellectual property.

On the other hand, [Version B] stipulates that intellectual property rights are to be handled in accordance with the principle that intellectual property rights belong to the inventor, and any Invention, Etc. jointly created by the User and the Vendor is jointly owned by the User and the Vendor according to the degree of contribution. If a copyright is jointly owned, it is not possible in principle to exercise the copyright without the unanimous agreement of the co-owners (including cases where a co-owner uses the copyright by himself or herself; Article 65(2) of the Copyright Act) and, for this reason, Paragraph 3 stipulates that each party may exercise any jointly owned right by itself. Because no specific provisions are stipulated regarding licensing of rights to third parties, the consent of other co-owners is required in accordance with legal principles (Article 73(3) of the Patent Act; Article 65(2) of the Copyright Act).

The Model Contract is based on the assumption that the Vendor will prepare a simple report (a Written Report) containing the results of the Review and provide the report to the User (Paragraph 2 of Article 4). However, if the report is determined to be copyrightable, the copyright in the report will belong to the Vendor as the party that prepared the report (Article 15(1) of the Copyright Act). Paragraph 2 of Article 4 provides for licensing to the User and the terms of use of the report.

Art 7 Effective period

1. This Agreement will be effective for ● months from [TBD]. However, the provisions of Article 4 through Article 8 will remain effective even after that period ends.
2. The provisions of Article 2 and Article 3 will remain effective for ● years from the execution date of this Agreement.

Points to Note:
- Article 7 provides for the confidentiality period.

Commentary:
Paragraph 2 of Article 7 provides for the confidentiality period. It is conceivable that different confidentiality periods would be set for each of the Applicable Data and other Confidential Information. In this case, the following sentence may be added to the end of Paragraph 2.
2. …However, to the extent that the provisions of Article 2 and Article 3 apply to the Applicable Data, those provisions of Article 2 and Article 3 will remain effective for ● years from the execution date of this Agreement.

Article 8  Jurisdiction

All disputes regarding this Agreement will be dealt with by the ● District Court, which has exclusive jurisdiction as the court of first instance.

Article 9  Consultation

The parties to this Agreement shall consult with each other to amicably resolve all doubts regarding the performance of this Agreement and all matters not provided for in this Agreement.

This Agreement is executed in two originals, to each of which the User and the Vendor have affixed their respective names and seals, and each party retains one original.

[TBD]

User

Vendor

[Schedule] Details of Applicable Data
Applicable Cases and Premises
- Contracting parties: A User and a Vendor (regardless of the technology level or corporate scale of the User or the Vendor)
- Characteristics: Quasi-delegation
- Outline: It is assumed that the Model Contract would be executed at the operations test phase (PoC phase) before the development of AI technology. As described in these Guidelines (AI Section), actions to be performed during the PoC phase differ depending on each case. The Model Contract is an agreement that has a relatively simple structure based on the assumption that it is executed in the initial stages of the PoC phase. Due to the proximity of the latter stages of the PoC phase (such as when verification including a pilot test of a trained model is conducted using actual data and the trained model is generated as an outcome) to the development phase, sometimes it is necessary to incorporate into the agreement at the PoC phase the same provisions as those contained in the proposed model contract for a software development agreement at the development phase (mainly regarding the ownership of rights and terms of use; that agreement, the “Development Model Contract”).

Cases Anticipated by the Model Contract

In this case, it is assumed that the Vendor will generate a trained model using certain sample data and work to improve the accuracy of the trained model, while conducting verification of the feasibility and reasonableness of development, and then will prepare a report of the results of the verification as an outcome.

Operations Test Agreement

●● (the “User”) and ●● (the “Vendor”) hereby execute this agreement (this “Agreement”) as of ●● regarding verification of introduction and application of [Name of the Vendor’s AI technology that is subject to verification] to the User.

Article 1 Purpose

The purpose of this Agreement is to set forth the rights and obligations of the User and the Vendor in performing verification regarding introduction and application of ●● to the User.
VII  Model Contracts

Article 2  Definitions

1. Verification
   The term “Verification” means the verification of introduction and application of ●● to the User by the Vendor, and details of the Verification are set forth in the Schedule.

2. Applicable Data
   The term “Applicable Data” means the data subject to the Verification stated in the Schedule.

3. Intellectual Property
   The term “Intellectual Property” means any invention, device, design, copyrighted work, and other property that is produced through creative activities by human beings (including discovered or solved laws of nature or natural phenomena that are industrially applicable), and trade secrets and other technical or business information that is useful for business activities.

4. Intellectual Property Right
   The term “Intellectual Property Right” means a patent right, a utility model right, a design right, a copyright, and any other right provided for in laws and regulations with respect to Intellectual Property (including the right to obtain a patent, the right to register a utility model registration, and the right to register a design).

5. Vendor’s Product
   The term “Vendor’s Product” means a written report or other materials that, as stated in the Schedule, the Vendor will provide to the User.

Points to Note:
- Article 2 stipulates definitions for the terms used in the Model Contract.
- The Schedule is used to identify specific details regarding the Verification and to identify Applicable Data.

Commentary:
1 “Vendor’s Product” means a deliverable of the Verification, and it is specifically assumed that this will be a report or other materials. If a pilot “trained model” or “trained parameter” or the like is envisaged as a deliverable, it is necessary to add these terms to the definition of “Vendor’s Product.” Please refer to the definitions in the Development Model Contract for the definitions of these terms.

2 Because the Model Contract is based on the premise that the term “Intellectual Property Right” does not include any rights in know-how, except for know-how protected by Intellectual Property Rights, the definition of “Intellectual Property Right” in the Intellectual Property Basic Act is partially modified in the above definition of “Intellectual Property Right.”
Article 3  Details of services

1. The User requests the Vendor to provide the services for the Verification stated in the Schedule, and the Vendor accepts that request.
2. If in the Schedule there are any provisions contrary to those stated in this Agreement, the provisions in the Schedule will prevail.

Points to Note:
- Article 3 stipulates specific details of services to be performed by the Vendor in the Verification.

Commentary:
1 In the Model Contract, it is assumed that verification means verification of the feasibility and reasonableness of development by the generation of a trained model using certain sample data and working to improve the accuracy of the trained model, and because that verification is not for the purpose of completing a certain deliverable (contract-for-work type) but rather for the purpose of performing services for verification (quasi-delegation), the Model Contract stipulates specific details of those services.
2 In order to make the provisions of the Model Contract simple, the Model Contract is based on the premise that the details of services and other matters will be set out in the Schedule. In addition, in light of the fact that there are a variety of services to be performed during the PoC phase, there is a high degree of flexibility with respect to the contents of, and items set out in, the Schedule. Therefore, it is stipulated that if there are any conflicts between the provisions set forth in the Model Contract and those set forth in the Schedule, the provisions in the Schedule will prevail.

Article 4  Service fee and payment date and method

1. The service fee for the Verification is set forth in the Schedule.
2. The User shall pay the Vendor the service fee set forth in the Schedule by the date and method set forth in the Schedule.

Points to Note:
- Article 4 stipulates the amount of the service fee as consideration for services under the Model Contract, and the payment date and method for the service fee.

Commentary:
1 It is conceivable to stipulate that the service fee be paid as a fixed amount, and other conceivable provisions include stipulating only to the effect that the method of calculation
be based on a man-month or on workload and then calculating the monthly service fee for each month based on that calculation method.

2 There are a variety of methods of payment for the service fee, including (i) payment by lump sum during a certain period, (ii) payment in installments at the time of the commencement and completion of the services or the like, and (iii) payment of the amount of consideration corresponding to the amount of time used for services when a predetermined amount of time has been used.

3 The Subcontractors Act may apply if the Vendor is a medium-sized or small corporation, and it is necessary to note that there are regulations regarding the payment date of the service fee and the like (see III-5-(3) of these Guidelines (AI Section)).

**Article 5 Verification period**

The period of the Verification (the “Verification Period”) is set forth in the Schedule.

**Points to Note:**
- Article 5 provides for the period of the Verification. Please take into account the fact that, in the initial stages of the PoC phase, during which the feasibility of introduction of AI technology is unclear, it is sometimes possible to prevent disputes between the parties by conducting verification for a certain period multiple times, rather than conduct verification for an extensive period under a single agreement (see IV-3-(2) of these Guidelines (AI Section)).

**Article 6 Cooperation and work allocation**

1. The User and the Vendor shall cooperate with each other in the performance of the Verification.

2. Work allocation between the User and the Vendor in relation to the Verification is set forth in the Schedule, and each of the User and the Vendor is responsible for work allocated to it.

**Points to Note:**
- Article 6 provides for the obligation to cooperate and the allocation of roles between the parties in the performance of the Verification.

**Article 7 Obligations of the Vendor**

The Vendor is obligated to perform the Verification with the due care of a good manager. The Vendor is not obligated to complete the Verification and does not make
Points to Note:
- Article 7 provides for the legal obligations of the Vendor and stipulates that the Vendor makes no warranty regarding achievement of results in the performance of the Verification.

Commentary:
Because the legal nature of the Model Contract is quasi-delegation, the Vendor acknowledges that it has the obligation to perform services with the due care of a good manager. Also, the provisions clarify that in light of the fact that the contract is executed at the verification phase, the Vendor is not obligated to complete the Verification.

Article 8 Appointment of persons in charge; the liaison committee

1. Each of the User and the Vendor shall appoint a person in charge of the Verification promptly after the execution of this Agreement and notify the other party of the person in charge in writing (which includes electronic or magnetic means; the same applies hereinafter) in order to smoothly perform the Verification. If the person in charge is changed, the other party must be promptly notified of that change in writing.

2. Acceptance of requests, instructions, and the like and requests to the other party in relation to the performance of the Verification must be conducted between the User and the Vendor through the persons in charge.

3. The persons in charge shall hold liaison committee meetings on a regular basis and consult on necessary matters, including ascertaining status of progress and consultation on and resolution of issues, in order to smoothly perform the Verification. The frequency of those meetings is set forth in the Schedule; however, the User or the Vendor may, if necessary, make a request to the other party to hold a liaison committee meeting as necessary after clarifying the grounds for doing so.

Points to Note:
- Each of the User and the Vendor appoints a person in charge of contacting and receiving contact from the other party for smooth communication between the User and the Vendor.

- The persons in charge hold meetings on a regular basis where a report on the status of progress, etc. is made and information on issues and other matters are shared. It is possible to hold emergency meetings as necessary.
VII Model Contracts

1 From the perspective of preventing trouble, it is important for the parties to consult with each other at liaison committee meetings and share each party’s awareness as appropriate if any circumstances occur that differ from those that had initially been expected or other problems occur in the course of the performance of the Verification.

2 From the perspective of preventing subsequent disputes, it is important to prepare minutes and clarify the details of consultation with respect to the subject matter of liaison committee meetings.

3 If it becomes necessary to amend the terms and conditions of the agreement (such as the Verification Period, service fee, and details of services) because, as the Verification progresses, circumstances change significantly from those initially expected, the parties shall follow the provisions regarding amendment consultation in Article 10.

Article 9 Subcontract

1. The Vendor may subcontract a part of the Verification to a third party (a “Subcontractor”) if the User approves the subcontracting in writing in advance. Reasonable grounds are required for the User’s refusal of the above-mentioned approval.

2. When subcontracting the performance of the Verification to the Subcontractor in accordance with the provisions of the preceding paragraph, the Vendor shall cause the Subcontractor to bear obligations equivalent to those borne by the Vendor under this Agreement.

3. The Vendor bears liability for the performance of services by the Subcontractor equivalent to that the Vendor would bear in the case the Vendor itself had performed the services, unless there is a reason attributable to the User for that liability arising. However, the Vendor will not be liable for the performance of services by a Subcontractor designated by the User, unless there is willful misconduct or gross negligence on the part of the Vendor.

Points to Note:
- Article 9 provides for the propriety of subcontracting in the performance of the Verification and stipulates the liability borne by the Vendor if the Verification is subcontracted.

Commentary:
1 The propriety of subcontracting may be provided for in the following two conceivable ways: (i) requiring the Vendor to obtain prior approval from the User regarding subcontracting; or (ii) allowing the Vendor, as a general rule, to select the Subcontractor at the Vendor’s own discretion.

2 In light of the fact that, during the verification of introduction of AI technology, an agreement is executed with a focus on the technological capabilities of the Vendor and that the User exercises controlling influence on the handling of the Applicable Data, the Model Contract stipulates that the Vendor must obtain consent from the User.
Article 10 Amendment to this Agreement

1. If it becomes necessary to amend the terms and conditions of this Agreement, such as the Verification Period or the service fee, due to circumstances whereby, depending on the status of progress of the Verification or the like, the scope of the Verification is expanded beyond expectation or something similar occurs, then the User or the Vendor shall make a proposal to the other party in writing that states to that effect. If such a request is made, the User and the Vendor shall promptly consult on whether an amendment to the terms and conditions of this Agreement is necessary.

2. If the contents of this Agreement are partially amended based on consultation provided for in the preceding paragraph, the User and the Vendor shall execute an amendment agreement in which the details of that amendment are stated.

Points to Note:
- Article 10 provides for procedures to amend the agreement if any amendment is to be made to the contents of the agreement.

Commentary:
Article 10 sets forth arrangements for the procedures to be followed if it becomes necessary to amend the terms and conditions of the agreement, such as the Verification Period and service fee, when a significant change occurs in relation to the Verification or in other similar circumstances.

Article 11 Provision of Vendor’s Product and confirmation of service completion

1. The Vendor shall provide the User with the Vendor’s Product by the period stated in the Schedule.

2. No later than ● days after the date when the User receives the Vendor’s Product (the “Confirmation Period”), the User shall confirm receipt of provision of the Vendor’s Product, affix the User’s name and seal or signature to a letter of confirmation prescribed by the Vendor, and deliver that letter to the Vendor.

3. The User’s confirmation is considered completed when the User delivers a letter of confirmation to the Vendor in accordance with the provisions of the preceding paragraph. However, if the User does not make an objection in writing that clearly indicates specific reasons during the Confirmation Period, the confirmation will be deemed completed at the time of expiration of that period even if a letter of confirmation is not delivered.

Points to Note:
VII  Model Contracts

- Article 11 provides for the Vendor’s provision of the Vendor’s Product and the method by which the User confirms the provision thereof upon receipt.

[Optional provision: Reservation provision]

Article  ●  Deliberation regarding the execution of a development agreement

If as a result of the Verification a reasonable outcome can be anticipated by introducing ●● to the User, the User and the Vendor shall use their best efforts to progress to the development phase of the technology and to execute a development agreement.

Points to Note:

- This optional provision stipulates the obligation to use efforts to progress to a development agreement.

Commentary:

Because the PoC phase has the nature of being a verification phase for progressing to a development agreement, it is conceivable that the parties would establish provisions that set forth the parties’ obligation to use efforts to execute a development agreement if there is the prospect of possibly progressing to the development phase during verification at the PoC phase.

Article 12  Data and materials, etc. provided to the Vendor by the User

1. The User shall provide the Vendor with the Applicable Data stated in the Schedule.

2. The User shall, with respect to the Vendor, conduct provision, disclosure, lending, and the like (“Provision, Etc.”) of the materials, devices, facilities, and the like that the Vendor requests as items reasonably necessary for the Verification and that are agreed to by the User (the “Materials, Etc.”).

3. The User warrants to the Vendor that the User is duly authorized to conduct Provision, Etc. of the Applicable Data and the Materials, Etc. (collectively, the “User-Provided Data, Etc.”) to the Vendor and that Provision, Etc. does not violate any laws or regulations.

4. The User does not warrant the accuracy, completeness, effectiveness, usefulness, safety, or the like of the User-Provided Data, Etc., unless otherwise provided for in this Agreement.

5. If there is any error in the contents of the User-Provided Data, Etc. subject to Provision, Etc. to the Vendor by the User, or if the Provision, Etc. is delayed, then the Vendor will not be liable for any delay in the Verification, any defect in the Vendor’s Product (including defect under law), or any other similar outcome arising from that error or delay.
6. The Vendor does not bear any obligation or other liability to confirm or verify the accuracy, completeness, effectiveness, usefulness, safety, or the like of the User-Provided Data, Etc.

**Points to Note:**
- Article 12 provides for arrangements regarding liability resulting from the provision of data and the Materials, Etc. by the User to the Vendor in the Verification and from the Applicable Data and the Materials, Etc. that are provided in the Verification.

**Commentary:**
1. In the verification of introduction of AI technology, ordinarily the User provides the Vendor with data and other necessary materials because the verification is generally conducted using the User’s data. Therefore, Paragraph 1 and Paragraph 2 provide for the provision of data and materials. If there is any change or addition to the necessary data and materials, it is possible to make an addition, etc. as appropriate upon consultation and agreement between the parties at a liaison committee meeting under Article 8 or by other means. Because the existence of the authority to disclose the data, etc. and the legality of the data, etc. are preconditions for the disclosure and the User itself is able to ascertain these matters, Paragraph 3 provides for the User’s representation and warranty regarding data, etc.

2. If the volume of the Applicable Data, which the User agrees to provide the Vendor with under Paragraph 1, is insufficient and, for that reason, there is a delay in the Verification or a defect, etc. in the Vendor’s Product, then Paragraph 5 applies due to the fact that the agreed Applicable Data has not been submitted as of the time it is required for the verification, which constitutes a delay in the provision of the Applicable Data. On the other hand, the handling of data other than the Applicable Data is to be determined through consultation between the parties.

3. It is conceivable that the parties would incorporate into Paragraph 2 a provision to the effect that the Vendor may request the User to present materials and data. A possible wording of the provision in this case is, for example, “the Vendor may request the User to disclose or provide any documents, drawings, software, data, and other materials (regardless of the type of recorded media and including electronic records) held by the User that are necessary for the performance of the Verification.”

**Article 13 Management of Applicable Data**

1. The Vendor shall manage and keep the Applicable Data with the due care of a good manager and shall not disclose, provide, or divulge the Applicable Data to a third party (excluding any Subcontractor under Article 9 of this Agreement) without obtaining the User’s prior written approval.

2. The Vendor shall not, without obtaining the User’s prior written approval, use, reproduce, or alter the Applicable Data for any purpose other than performance
of the Verification and may use, reproduce, and alter the Applicable Data only to the extent reasonably necessary for performance of the Verification.

3. The Vendor shall disclose the Applicable Data only to its officers and employees who need to know that Applicable Data in order to perform the Verification. In this case, the Vendor shall cause its officers and employees who receive the disclosure to bear, even after their retirement, obligations equivalent to those borne by the Vendor under this Article 13.

4. The Vendor may disclose the Applicable Data that must be disclosed in accordance with the provisions of laws and regulations to the recipient of disclosure in question under those provisions of laws and regulations, upon notifying the User in advance to the extent possible.

5. The Vendor shall, in accordance with instructions of the User, destroy any media in which the Applicable Data (including reproductions and alterations of the Applicable Data) is recorded or return that media to the User and delete the Applicable Data from any electronic or magnetic recording media managed by the Vendor if the Verification is completed, this Agreement ends, or the Vendor receives instructions by the User to do so. The User may request the Vendor to submit documents that prove such destruction or deletion of the Applicable Data.

6. The Vendor confirms that Provision, Etc. of the Applicable Data does not constitute assignment, transfer, or licensing of any of the User’s Intellectual Property Rights, except as otherwise provided for in this Agreement.

7. The provisions of this Article 13, excluding the preceding paragraph, will remain effective for ● years from the date when this Agreement ends.

Points to Note:
- Article 13 provides for the handling of the Applicable Data provided by the User to the Vendor for the Verification.

Commentary:
1 It is believed that, in many cases, considerations that are separate and different from those necessary for general Confidential Information are necessary for the Applicable Data provided by the User to the Vendor for the Verification, and thus Article 13 contains provisions that are different from the provisions regarding general Confidential Information (Article 14). For example, it is considered often inappropriate to establish, in relation to Applicable Data, the exceptions provided for in Paragraph 2 of Article 14.

2 Article 13 only applies to “Applicable Data” and not to “User-Provided Data, Etc.,” and “Materials, Etc.” (Paragraph 2 of Article 12) that are not included in the Applicable Data are to be protected by Article 14, which provides for the handling of Confidential Information.

3 The PoC phase anticipated by the Model Contract is based on the premise that certain sample data will be received for the purpose of verification, and therefore unlike the Development Model Contract, no model provisions are contained that permit the use of data for unintended purposes. However, this does not deny the possibility of the use of
VII Model Contracts

data for any purpose other than the performance of the Verification and, if necessary, it is conceivable that the parties would clearly provide for the use of data for purposes other than the performance of the Verification by stipulating to that effect in the Schedule or other means (see the proviso of Paragraph 2 of Article 13 of the Development Model Contract).

4 If the confidentiality of the Applicable Data is especially strict and requires more sophisticated management, it is conceivable that the parties would additionally specify in the Schedule matters the parties agree to in relation to a specific method of management and then to refer to the additional provisions.

5 Article 13 will continue to be effective after the Model Agreement ends because it is stipulated to be a surviving provision (under Article 23). Even so, the period during which it remains effective will be for ● years in accordance with Paragraph 7. However, because Paragraph 7 contains the wording “excluding the preceding paragraph,” the provisions of Paragraph 6 will remain effective without any prescribed period by reverting to the principle of unrestricted survival.

Article 14 Handling of confidential information

1. Each of the User and the Vendor shall keep each of the following types of technical, operational, or other business information that is provided by the other party for the performance of the Verification (excluding the Applicable Data; “Confidential Information”) secret and shall not, disclose, provide, or divulge Confidential Information to a third party (excluding any Subcontractor under Article 9 of this Agreement) without obtaining the prior written approval of the party disclosing Confidential Information:

   (1) information that the disclosing party discloses in writing upon designating it confidential;

   (2) information that the disclosing party discloses after orally indicating that it is confidential and then specifying its contents in writing no later than ● days after disclosure; such information will be handled as Confidential Information until the day when ● days will have passed since the date when the disclosing party discloses the information after orally indicating that it is confidential or the date when the disclosing party notifies in writing that it does not treat the information as Confidential Information, whichever is earlier; or

   [[(3) the Vendor’s Product ].

2. Notwithstanding the provisions of the preceding paragraph, information that falls under any of the following items will not constitute Confidential Information:

   (1) information that is already publicly available at the time it is disclosed by the disclosing party;

   (2) information that, after it is disclosed by the disclosing party, becomes publicly available through no fault of the receiving party;

   (3) information that is lawfully disclosed by a duly authorized third party without being subject to any confidentiality obligations;
VII Model Contracts

(4) information that, at the time of disclosure by the disclosing party, is already lawfully held by the receiving party; and

(5) information developed independently by the receiving party without using information disclosed by the disclosing party.

3. The provisions of Paragraph 2 through Paragraph 6 of the preceding Article will apply mutatis mutandis to the handling of Confidential Information. In this case, the term “Applicable Data” in the preceding Article will be read as “Confidential Information”, “the Vendor” will be read as “the party receiving Confidential Information”, and “the User” will be read as “the disclosing party.”

4. The provisions of this Article 14 will remain effective for ● years from the date when this Agreement ends.

Points to Note:
- Article 14 stipulates the method of management for Confidential Information provided by the other party.

Commentary:
1 Management of confidentiality and the like for the Applicable Data provided by the User to the Vendor is provided for in Article 13, and therefore the Applicable Data is excluded from the scope of Confidential Information under Paragraph 1.

2 If the Vendor’s Product is to be considered Confidential Information, it is conceivable that the parties would designate it as confidential in accordance with the provisions of items (1) and (2) of Paragraph 1, but simply stipulating expressly in Paragraph 1 that the Vendor’s Product is Confidential Information is also conceivable.

3 Paragraph 3 stipulates that the provisions of Article 13 regarding the handling of Applicable Data apply mutatis mutandis to the handling of Confidential Information. Even so, the provisions regarding the effective period of the provisions of Article 13 do not apply mutatis mutandis because it is assumed that different effective periods are set for the Applicable Data and Confidential Information. However, it is possible to apply the provisions regarding the effective period mutatis mutandis if the same effective period is set for each of the Applicable Data and Confidential Information.

Article 15 Handling of personal information

1. When the Verification is performed, if the User provides to the Vendor any data that includes personal information or anonymously processed information set forth in the Act on the Protection of Personal Information (the “Act” in this Article; both of those types of information collectively, “Personal Information, Etc.”), the User must clearly indicate to that effect in advance.
VII  Model Contracts

2. When the Verification is performed, if the User provides to the Vendor any data that includes Personal Information, Etc., the User will warrant to the Vendor that the User has implemented procedures required by the Act.

3. When receiving the provision of Personal Information, Etc. in accordance with Paragraph 1, the Vendor shall comply with the Act and take measures necessary for the management of the Personal Information, Etc.

Points to Note:
- Article 15 provides for matters relating to cases where the Applicable Data provided by the User to the Vendor includes personal information or anonymously processed information.

Article 16  Copyright in the Vendor’s Product

1. Copyright related to the Vendor’s Product and the Intellectual Property that arises in connection with performance of the Verification (including rights provided for in Article 27 and Article 28 of the Copyright Act) belong to the Vendor, except for copyright held by the User or a third party before the Verification.

2. The Vendor permits the User to use, reproduce, and alter the Vendor’s Product only to the extent necessary for the User to deliberate the results of the Verification. The User shall not use the Vendor’s Product beyond that permitted scope and shall not disclose or provide the Vendor’s Product to a third party.

3. Use, reproduction, or alteration by the User of the Vendor’s Product and use by the User of any reproduction or the like created from a reproduction or the like must be conducted at the User’s own expense and responsibility. The Vendor is not liable to the User for any damage incurred by the User resulting from the User’s use or the like of the Vendor’s Product, unless otherwise provided for in this Agreement or unless the cause of the damage is attributable to the Vendor.

4. The Vendor shall not exercise the moral right of the author against the User in relation to the use of the Vendor’s Product in accordance with this Agreement.

[Optional provision: Feedback provision]

5. If the User makes any proposal or gives any advice to the Vendor in relation to the Verification in the course of the performance of the Verification, the Vendor may, at no cost, use that proposal or advice for the future improvement of its services.

Points to Note:
- Article 16 arranges for the handling of copyright in, and the terms of use of, reports, etc. to be provided as the Vendor’s Product.
As an optional provision, it is conceivable that the parties would stipulate a provision regarding the use of proposals and advice (feedback) in relation to the Verification that are obtained from the User in the course of the Verification (Paragraph 5).

**Commentary:**

1. It is important to stipulate provisions in the agreement for the handling of reports to be provided as the Vendor’s Product and other Intellectual Property Rights that are created in the course of the Verification because disputes may arise between the User and the Vendor in relation to these matters. Therefore, the Model Contract contains provisions regarding copyright in Article 16 and Intellectual Property Rights other than copyright, such as patent rights, etc., in Article 17.

2. The PoC phase anticipated by the Model Contract is a verification phase using sample data, and the Model Contract is based on the premise that a report stating the results of the verification (the contents of which vary, but, for example, methods of analysis used during the verification, methods of data processing, the accuracy of the model that was produced by way of trial for the verification, and other similar matters are envisaged) will be provided to the User as a deliverable. Therefore, it is not assumed that a trained model that is generated using a multitude of data, that is expected to have a reasonable level of accuracy, and regarding which the ownership of Intellectual Property Rights (mainly copyright) could become an issue, will be generated or provided. On the other hand, because it is conceivable that, at the verification phase, the User will be able to achieve the objective of conducting examination of the feasibility of introduction of AI technology if a report becomes available and that the User should be restrained from using the Vendor’s Product and then replacing the Vendor without reasonable cause, the Model Contract stipulates that copyright in the Vendor’s Product and Intellectual Property created in the course of the Verification belong to the Vendor, which is the party that produced the product, etc. However, this does not deny the possibility of stipulating matters to the contrary, such as, for example, that copyright is to be jointly owned by the User and the Vendor. Please see Article 16 of the Model Contract for a software development agreement at the development phase (the “Development Model Contract”) in this case.

3. If the PoC phase contains a process during which a pilot test is conducted and a trained model is generated using the same data as those used in the development phase (effectively the initial phase of development), the necessity to make arrangements for ownership of rights in the trained model to be generated and for the terms of use of the trained model will be higher. Please see Article 16 to Article 18 of the Development Model Contract for arrangements to be made in this case. However, the use of a trained model by the User at the pilot test phase may generally be limited to a certain scope (for example, use for the purpose of verification) because it is, in nature, still a pre-development phase.

**Article 17 Patent rights, etc.**

[Version A] In the case where the ownership of a Patent Right, Etc. (defined below) in a jointly created Invention, Etc. is determined through consultation

1. Each patent right and other Intellectual Property Right (excluding copyright) in each invention or other Intellectual Property created in the course of the performance of the Verification (collectively, an “Invention, Etc.”); such a patent
right or other Intellectual Property Right collectively, a “Patent Right, Etc.”) belongs to the party to which the person who creates the Invention, Etc. belongs.

2. Ownership and other handling of a Patent Right, Etc. in an Invention, Etc. jointly created by the User and the Vendor must be decided upon mutual consultation.

3. Each of the User and the Vendor shall implement necessary employee invention obtainment procedures (appropriate operation of employee invention systems, including development of employee invention rules, and assignment procedures for employee inventions and the like) with respect to each Patent Right, Etc. jointly owned with the other party under the preceding paragraph.

[Version B] In the case of joint ownership of a Patent Right, Etc. in a jointly created Invention, Etc.

1. Each patent right and other Intellectual Property Right (excluding copyright) in each invention or other Intellectual Property created in the course of the performance of the Verification (collectively, an “Invention, Etc.”; such a patent right or other Intellectual Property Right collectively, a “Patent Right, Etc.”) belongs to the party to which the person who creates the Invention, Etc. belongs.

2. A Patent Right, Etc. in an Invention, Etc. jointly created by the User and the Vendor is jointly owned by the User and the Vendor (ownership interest is decided according to the degree of contribution). In this case, each of the User and the Vendor may practice the jointly owned Patent Right, Etc. without obtaining the consent of the other party and without being obligated to pay consideration to the other party.

3. Each of the User and the Vendor shall implement necessary employee invention obtainment procedures (appropriate operation of employee invention systems, including development of employee invention rules, and assignment procedures for employee inventions and the like) with respect to each Patent Right, Etc. jointly owned with the other party under the preceding paragraph.

Points to Note:
- Article 17 provides for ownership of rights in Patent Rights, Etc. (Intellectual Property Rights other than copyright) created in the course of the performance of the Verification.

Commentary:
1 The Model Contract adopts the principle that, if any matter in which an Intellectual Property Right other than copyright exists (such as an Invention, Etc.) is created in the course of the performance of the Verification, then the Patent Right, Etc. in the Invention, Etc. will belong to the inventor. Also, in the case of a jointly created Invention, Etc., the following two model provisions are proposed in Paragraph 2: [Version A] stipulates that a Patent Right, Etc. in a jointly created Invention, Etc. is determined through consultation between the parties; and [Version B] stipulates that such a Patent Right, Etc. is jointly
Model Contracts

owned by the User and the Vendor according to the degree of contribution. However, this does not deny the possibility of stipulating matters to the contrary with respect to the ownership of rights in Patent Rights, Etc.

It is considered that the terms and conditions of licensing to a third party may differ depending on each case when [Version B] is adopted and a Patent Right, Etc. is to be jointly owned, and therefore Paragraph 2 stipulates that each of the User and the Vendor may use the jointly owned Patent Right, Etc. without being obligated to pay consideration to the other party only if the Patent Right, Etc. is used by the party itself. Licensing to third parties requires the consent of other co-owners in accordance with legal principles (Article 73(3) of the Patent Act). Please see the commentary on Paragraph 2 of Article 16 of [Version C] of the Development Model Contract for provisions that permit licensing to third parties without the obligation to pay consideration to the other party.

As commented for Article 2, the Model Contract is based on the premise that the definition of “Intellectual Property Right” does not include any rights in know-how, except for know-how protected by Intellectual Property Rights. However, it is assumed that trade secrets and other know-how of the User will be provided to the Vendor as the “Applicable Data” or “Confidential Information” provided for in Article 13 and Article 14, respectively, and, in this case, the Vendor will not be able to use such information (the User’s know-how) at its own discretion even if Article 17 does not apply to any know-how, because the Vendor owes the confidentiality obligation and other obligations under Article 13 and Article 14.

Nevertheless, Article 17 merely presents certain examples of provisions, and it does not deny the possibility of making arrangements for detailed terms of use for Patent Rights, Etc. and know-how. However, in such case, it is advisable that the parties make arrangements after taking into consideration the following, among other matters: (i) the fact that it will be necessary to make arrangements for specific details because know-how is not clearly defined; and (ii) the degree of contribution in terms of technological capabilities, the burden of costs, and the like. Also, please see [Version A] of Article 18 of the Development Model Contract for provisions regarding the terms of use.

Article 18 No warranty regarding infringement of Intellectual Property Rights

The Vendor does not make any warranty to the User to the effect that use of the Vendor’s Product does not infringe any Intellectual Property Right of any third party.

Points to Note:
- Article 18 stipulates provisions regarding infringements of Intellectual Property Rights of third parties as a result of the use of the Vendor’s Product.

Commentary:
Article 18 stipulates that the Vendor does not make any warranty to the effect that use of the Vendor’s Product does not infringe any Intellectual Property Right of any third party. This provision takes into account the fact that warranting no infringement of Intellectual Property Rights will produce little benefit for the User because, in the Model Contract, it is assumed that the Vendor’s Product will be a report and its use will be limited to the User’s own use and it
VII Model Contracts

will not be used for any business purposes. However, this does not deny the possibility of stipulating other provisions to the contrary, and it is conceivable that the parties would stipulate provisions regarding the warranting of no infringement of Intellectual Property Rights, as in the case of [Version A] of Article 21 of the Development Model Contract. The parties would likely make arrangements in this regard by taking into account the contents of the Vendor’s Product, the burden of expenses, and other related matters.

Article 19 Compensation for damage, etc.

1. If the User or the Vendor incurs any damage due to any event attributable to the other party in relation to the performance of this Agreement, the party incurring damage may claim from the other party compensation (limited to any ordinary damage directly and actually incurred by the party incurring damage). However, such a claim may not be made after ● months have passed from the date when services are completed.

2. The amount of the compensation for damage owed by the Vendor to the User is limited to the service fee for this Agreement, irrespective of the grounds for the claim, including default, warranty against defect under law, infringement of any Intellectual Property Right, unjust enrichment, tortious act, or any other grounds.

3. The provisions of the preceding paragraph will not apply if the damage has been caused by the willful misconduct or gross negligence of the party owing compensation.

Points to Note:

- Article 19 provides for compensation for any damage incurred in relation to the performance of the agreement.

Commentary:

1 Article 19 stipulates provisions regarding liability for damage compensation in relation to the performance of the agreement. While the details of provisions regarding the scope and amount of liability for damage compensation and the period during which compensation may be claimed must be determined upon agreement between the User and the Vendor after taking into account the details of the Verification, burden of costs, amount of the service fee, and other related matters, the Model Contract contains the same provisions as those contained in the Model Contract 2007.

2 Paragraph 1 stipulates that each party will be liable for compensation for damage if the damage is caused by willful misconduct or gross negligence of that party, and it limits the scope of compensation to any ordinary damage directly and actually incurred.

3 Also, Paragraph 2 stipulates that the maximum amount of compensation for damage is limited to the service fee, irrespective of the grounds for the claim.

4 However, it is stipulated that the provisions regarding the limit of compensation will not apply if the damage has been caused by willful misconduct or gross negligence (Paragraph 3). This provision was established because judicial precedents indicate that courts take the view that provisions regarding exemption from liability and limitation of liability will become void if the relevant damage is caused by willful misconduct, and it is a predominant
VII Model Contracts

view that such provisions will also become void if the relevant damage is caused by gross negligence that corresponds to willful misconduct.

Article 20 No Assignment of rights and obligations

Neither the User nor the Vendor may, without the prior written consent of the other party, (a) cause any third party to succeed to any contractual status under this Agreement or (b) assign to any third party, cause any third party to succeed to or assume, or provide as security for the benefit of any third party, all or part of the rights and obligations arising from this Agreement.

Article 21 Termination

1. The User or the Vendor may immediately terminate all or a part of this Agreement without making any demand for remedy if the other party falls under any of the following:
   (1) the other party commits gross negligence or a breach of faith;
   (2) the other party suspends payments or is subject to a petition filed for provisional attachment, attachment, auction, commencement of bankruptcy proceedings, commencement of civil rehabilitation proceedings, commencement of corporate reorganization proceedings, or commencement of special liquidation;
   (3) the other party is subject to disposition for suspension of transactions with a clearing house;
   (4) the other party is subject to disposition for non-payment of taxes and public charges; or
   (5) any other material event equivalent to any of those set out in the items (1) through (4) above that makes it difficult to continue this Agreement occurs with respect to the other party.

2. The User or the Vendor may terminate all or a part of this Agreement if the other party breaches any of the provisions under this Agreement and fails to remedy the breach despite receiving a demand to remedy the breach that sets a reasonable period for that remedy.

3. If the User or the Vendor falls under any of the items set out in Paragraph 1 above or causes the grounds for termination in the case of termination as provided for in the preceding paragraph, then it (a) will automatically forfeit the benefit of time with respect to any and all monetary obligations that it owes to the terminating party without any notice or demand for remedy from the terminating party and (b) shall immediately pay those obligations.

Article 22 Effective period
This Agreement will be effective from the execution date of this Agreement to the date when the payment of the service fee set forth in Article 4 has been completed or the date when the confirmation set forth in Article 11 has been completed, whichever is later.

**Article 23  Surviving provisions**

The provisions of Article 7 (Obligations of the Vendor), Paragraph 3 through Paragraph 6 of Article 12 (Data and materials, etc. provided to the Vendor by the User), Article 13 (Management of Applicable Data) through Article 19 (Compensation for damage, etc.), this Article, and Article 24 (Jurisdiction) will remain effective after this Agreement ends.

**Article 24  Jurisdiction**

All disputes regarding this Agreement will be dealt with by the ● District Court, which has exclusive jurisdiction as the court of first instance.

**Article 25  Consultation**

The User and the Vendor shall consult with each other to endeavor to amicably resolve all matters not provided for in this Agreement or any doubts arising from this Agreement in accordance with the principle of good faith.
This Agreement is executed in two originals, to each of which the User and the Vendor have affixed their respective names and seals, and each party retains one original.

[TBD]

User

Vendor
1. Purpose of the Verification

2. Details of the Applicable Data (data provider, overview of data, data items, volume of data, form of data provision, etc.)

3. Work framework

4. Work details and division of roles

5. Expected frequency of liaison committee meetings and meeting location

6. Verification Period

7. Service fee and payment method

8. Details of the Vendor’s Product and due date for provision
6 Software development agreement at the development phase (model contract)

Applicable Cases and Premises

- Contracting parties: A User and a Vendor (regardless of the technology level or corporate scale of the User or the Vendor)
- Method of development: Non-waterproof model
- Object of development: A program with specific functions utilizing machine learning (trained model)
- Characteristics: Quasi-delegation (including both outcome-achievement type and performance-proportion type)
- Outline: The Model Contract is a simple contract composed of the minimum provisions necessary, based on the assumption that only a trained model will be generated. Accordingly, the Model Contract is not split into a basic agreement and an individual agreement. If a trained model is generated as part of a system that is of, or greater than, a certain scale, please add and use, as appropriate, provisions that are required for general system development agreements (see the Model Contract 2007 and the Model Contract 2008) by, for example, executing a basic agreement and an individual agreement separately or executing a system development agreement as a separate agreement.

Cases Anticipated in the Model Contract

The Model Contract applies to a case where a trained model that has gone through the PoC phase and whose generation is determined possible will be generated. Specifically, in this case, it is assumed that the Vendor will generate a trained model after generating a training dataset based on the data provided by the User.

Software Development Agreement

●● (the “User”) and ●● (the “Vendor”) hereby execute this agreement (this “Agreement”) as of ●● regarding development of computer software.

Article 1 Purpose

The purpose of this Agreement is to set forth the rights and obligations of the User and the Vendor for the development of computer software that is the “object of development” stated in the Schedule “Details of Services” (the “Development”).

27 While it is considered reasonable in most cases to adopt the outcome-achievement type because this phase follows the PoC phase, this fact does not preclude the possibility of adopting the performance-proportion type.
Article 2 Definitions

1. Data
The term “data” means any electronic or magnetic record that is produced by electronic, magnetic, or any other means and is used for information processing by a computer.

2. Agreed Data
The term “Agreed Data” means any data stated under “Details of the Agreed Data” in the Schedule “Details of Services.”

3. Training Dataset
The term “Training Dataset” means any Agreed Data shaped or processed for the Development.

4. Training Program
The term “Training Program” means any program for the generation of a Trained Model (defined below) using a Training Dataset.

5. Trained Model
The term “Trained Model” means any program incorporating a Trained Parameter (defined below) for performance of specific functions.

6. Target Trained Model
The term “Target Trained Model” means a Trained Model subject to the Development.

7. Reused Model
The term “Reused Model” means a new Trained Model generated using the Target Trained Model.

8. Trained Parameter
The term “Trained Parameter” means any parameter (coefficient) generated as a result of inputting a Training Dataset into a Training Program.

9. Intellectual Property
The term “Intellectual Property” means any invention, device, design, copyrighted work, and other property that is produced through creative activities by human beings (including discovered or solved laws of nature or natural phenomena that are industrially applicable), and trade secrets and other technical or business information that is useful for business activities.

10. Intellectual Property Right
The term “Intellectual Property Right” means a patent right, a utility model right, a design right, a copyright, and any other right provided for in laws and regulations with respect to Intellectual Property (including the right to obtain a patent, the right to register a utility model registration, and the right to register a design).
VII Model Contracts

11. Deliverables

The term “Deliverables” means deliverables stated under “Details of deliverables for which the Vendor conducts development support based on delegation by the User” of the Schedule “Details of Services.”

Points to Note:
- Article 2 stipulates definitions for the terms.

Commentary:
1. Because Article 3 and the subsequent provisions of the Model Contract are based on the premise that the above definitions apply, please keep in mind that if any definition or provision is changed when using the Model Contract, then that change must be made in a manner that maintains consistency between the relevant definition and the provisions.

2. A Trained Model is defined as “any program incorporating a Trained Parameter (defined below) for performance of specific functions” in the above definition; however, as stated in these Guidelines (AI Section), in practice, the term “trained model” is sometimes used ambiguously to mean concepts including “training datasets,” “training programs,” “inference programs,” “trained parameters,” and “any other secondary deliverables” depending on who uses the term.

3. Therefore, it is advisable for the contracting parties to fully discuss and clearly determine specifically how the term “trained model” is being used and what specific scope (deliverables) is meant by the term “trained model” because these matters are extremely important when discussing the various issues described below (such as the ownership of rights and allocation of liability).

4. In the Model Contract, “Reused Model” is defined to have a broader meaning than the definition explained in these Guidelines (AI Section) (II-4-(1)-(iv)).

5. In addition, because the Model Contract is based on the premise that the term “Intellectual Property Right” does not include any rights in know-how, except for know-how protected by Intellectual Property Rights, the definition of “Intellectual Property Right” in the Intellectual Property Basic Act is partially modified in the above definition of “Intellectual Property Right.”

Article 3 Details of services

The User requests the Vendor to provide the services stated under “Specific details of work” in the Schedule “Details of Services” (excluding the services that the User is in charge of; the “Services”), and the Vendor accepts that request.

Points to Note:
- Article 3 stipulates the details of services under the Model Contract.
VII  Model Contracts

Commentary:

1  The Services means the services required for the Development that are provided by the Vendor.

2  The details of services under the Model Contract are characterized as services for generation of a specific Trained Model (quasi-delegation) rather than completion of certain deliverables (contract-for-work type). Because it is necessary to clarify the specific details of services in a quasi-delegation contract, the specific details of the Services are specified in the Schedule.

Article 4  Service fee and payment date and method

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>The consideration for the Services is set forth under “Service fee” in the Schedule “Details of Services.”</td>
</tr>
<tr>
<td>2.</td>
<td>The User shall pay the Vendor the consideration for the Services by the date and method set forth under “Payment date and method for service fee” in the Schedule “Details of Services.”</td>
</tr>
</tbody>
</table>

Points to Note:
- Article 4 stipulates the amount of the service fee as consideration for the Services and the payment date and method for the service fee.

Commentary:

1  Although various terms of payment for the service fee under the contract type of quasi-delegation can be envisaged, it is conceivable to broadly divide them into the following two categories: outcome-achievement type, in which a fee is paid for certain outcomes; and performance-proportion type, in which a fee is paid in proportion to the services provided by the Vendor.

In the case of the outcome-achievement type, it is conceivable, for example, that the parties would agree on an arrangement whereby a fixed amount is paid for certain outcomes. On the other hand, in the case of the performance-proportion type, conceivable provisions include stipulating only to the effect that the method of calculation be based on a man-month or on workload and then calculating the monthly service fee for each month based on that calculation method.

2  The following are conceivable as methods of payment for the service fee with respect to the outcome-achievement type: (i) payment by lump sum during a certain period; and (ii) payment in installments at the time of the commencement and completion of the services or the like. With respect to the performance-proportion type, (iii) payment of the amount of consideration corresponding to the amount of time used for services when a predetermined amount of time has been used is also conceivable in addition to (i) and (ii) above. These methods are merely examples, and a variety of methods can be used in light of the circumstances faced by the User and the Vendor.
VII Model Contracts

3 In addition, if the User uses a Trained Model, etc. that the Vendor has owned since before the development or whose Intellectual Property Right will belong to the Vendor after the development, it is also conceivable to stipulate payment of license fees for the use of the Trained Model, etc., separately from payment of the service fee.

4 The Subcontractors Act may apply if the Vendor is a medium-sized or small corporation, and it is necessary to note that there are regulations regarding the payment date of the service fee and the like (see III-5-(3) of these Guidelines (AI Section)).

Article 5 Work period

The work period for the Development is set forth under “Work period and schedule” in the Schedule “Details of Services.”

Article 6 Cooperation and work allocation

1. The User and the Vendor shall cooperate with each other in the performance of this Agreement.
2. The details of work allocation between the User and the Vendor are set forth under “Work framework” and “Specific details of work” in the Schedule “Details of Services.”

Points to Note:
- Article 6 provides for the obligation to cooperate and the allocation of roles between the User and the Vendor in the performance of the agreement.

Commentary:
1 It is advisable for the agreement to stipulate the specific details of work that is to be performed by each of the User and the Vendor from the perspective of clarifying the allocation of roles between the User and the Vendor, because, in the development of AI-based software, the provision of data and know-how by the User sometimes determines the feasibility of development and, since the Vendor is not obligated to complete deliverables under the Model Contract, it is necessary to clarify the details of services of the Vendor.

2 Items under “Work framework” and “Specific details of work” in the Schedule “Details of Services” are only examples, and it is believed in some cases that merely stipulating “Specific details of work” is sufficient, depending on the scale of development.

Article 7 Obligations of the Vendor
1. The Vendor is obligated to perform the Services based on general expertise in the industry related to information processing technology and with the due care of a good manager.

2. The Vendor is not obligated to complete the Deliverables and does not make any warranty regarding Derivative Products (defined below) resolving work issues of the User, improving the User’s business performance, or achieving any other outcome, certain results, or the like.

**Points to Note:**
- Article 7 provides for the legal obligations of the Vendor in the performance of the Services and stipulates that the Vendor makes no warranty regarding the performance of the Deliverables.

**Commentary:**
1. Under a quasi-delegation contract, the party that accepts delegation must perform the delegated business with the due care of a good manager. Therefore, Paragraph 1 of Article 7 in the Model Contract confirms that the Vendor is obligated to perform the Services with the due care of a good manager.

2. Unlike a contract for work, the party that accepts delegation under a quasi-delegation contract is not obligated to complete deliverables. Therefore, Paragraph 2 clarifies that the Vendor is not obligated to complete the Deliverables. This applies to both the outcome-achievement type and the performance-proportion type.

3. However, in the case of the outcome-achievement type, because from the outset the parties will have reached an agreement to the effect that a fee will be paid for any outcome achieved by the performance of the business delegated on the basis of quasi-delegation, conditions for the payment of the fee will be left unsatisfied if no outcome is achieved, and therefore it is considered that, in most cases, in effect the completion of deliverables is required.

   In addition, in the case of the outcome-achievement type, it is necessary to set criteria for determining in what case deliverables are considered completed. On the other hand, if it were not possible to promise that such criteria would be met, it is conceivable that the parties would adopt the performance-proportion type.

4. Paragraph 2 was inserted based on the fact that (a) the User’s issues will be resolved through the decision-making of the User because that decision-making is deeply related to the User’s business and the existing internal rules, restrictions, and organizational units and (b) it is difficult for the Vendor to make a performance warranty with respect to the behavior of a Trained Model, etc. in response to unknown input (data) that is not under the control of the Vendor.

**Article 8  Appointment of persons in charge; the liaison committee**
1. Each of the User and the Vendor shall appoint a person in charge of the Development promptly after the execution of this Agreement and notify the other party of the person in charge in writing (which includes electronic or magnetic means; the same applies hereinafter) in order to smoothly perform the Development. If the person in charge is changed, the other party must be promptly notified of that change in writing.

2. Acceptance of requests, instructions, and the like and requests to the other party in relation to the performance of the Development must be conducted between the User and the Vendor through the persons in charge.

3. The persons in charge shall hold liaison committee meetings on a regular basis and consult on necessary matters, including ascertaining status of progress and consultation on and resolution of issues, in order to smoothly perform the Development. The details of the frequency of those meetings and the like are set forth under “Liaison committee meetings” in the Schedule “Details of Services.” However, the User or the Vendor may, if necessary, make a request to the other party to hold a liaison committee meeting as necessary after clarifying the grounds for doing so.

**Points to Note:**
- Each of the User and the Vendor appoints a person in charge of contacting and receiving contact from the other party for smooth communication between the User and the Vendor.
- The persons in charge hold meetings on a regular basis where a report on the status of progress, etc. is made and information on issues and other matters are shared. It is possible to hold emergency meetings as necessary.

**Commentary:**
1. In the development of AI-based software, sometimes circumstances occur that differ from those that had initially been expected and it becomes necessary to make a change from the method of analysis, matters to be verified, and the content, format, or the like of the data initially expected. From the perspective of preventing trouble, it is important for the parties to consult with each other at liaison committee meetings and to share each party’s awareness as appropriate if such circumstances occur.

2. From the perspective of preventing subsequent disputes, it is important to prepare minutes and clarify the details of consultation with respect to the subject matter of liaison committee meetings.

3. If it becomes necessary to amend the terms and conditions of the agreement (such as the development period, expenses, and details of work) because, as the development progresses, circumstances change significantly from those initially expected, the parties shall follow the provisions regarding amendment consultation in Article 10.
VII Model Contracts

Article 9 Subcontract

1. The Vendor may subcontract a part of the Services to a third party (a “Subcontractor”) if the User approves the subcontracting in writing in advance. Reasonable grounds are required for the User’s refusal of the above-mentioned approval.

2. When subcontracting the performance of the Services to the Subcontractor in accordance with the provisions of the preceding paragraph, the Vendor shall cause the Subcontractor to bear obligations equivalent to those borne by the Vendor under this Agreement.

3. The Vendor bears liability for the performance of services by the Subcontractor equivalent to that the Vendor would bear in the case the Vendor itself had performed the services, unless there is a reason attributable to the User for that liability arising. However, the Vendor will not be liable for the performance of services by a Subcontractor designated by the User, unless there is willful misconduct or gross negligence on the part of the Vendor.

Points to Note:
- Article 9 provides for the propriety of subcontracting in the performance of the Services and stipulates the liability borne by the Vendor if the Services are subcontracted.

Commentary:
1. In the Model Contract 2007, the propriety of subcontracting is presented in the following two conceivable ways: (i) “Version A: requiring the Vendor to obtain prior approval from the User regarding subcontracting”; and (ii) “Version B: allowing the Vendor, as a general rule, to select the Subcontractor at the Vendor’s own discretion.”

2. The Model Contract adopts Version A, which requires prior approval from the User, because, in the development of AI-based software, the development agreement is executed with a focus on the technological capabilities of the Vendor.

3. In addition, in the preparation of a Training Dataset, it is often the case that annotation work, for example, will require considerable labor, so it is conceivable that such work would be subcontracted to a third party. Sometimes confidential data is handled in such a case and, for this reason, too, the Model Contract adopts Version A, under which the consent of the User must be obtained.

Article 10 Amendment to this Agreement

1. This Agreement may be amended only by separately executing an amendment agreement in writing after mutual consultation on the amendment between the User and the Vendor in advance.

2. In light of the fact that matters on which both parties initially agree (including, but not limited to, the object of development, the development period, and the development expenses) might be amended after the fact in the Development, each of the User and the Vendor shall promptly respond to a request from the other
party for consultation regarding amendment to the contents of this Agreement if the other party makes such a request.

3. In consultations on amendment, both parties shall deliberate the object of amendment, appropriateness of amendment, the prospective amendment’s effect on costs and delivery timing, and other similar matters and sincerely consult on whether to make that amendment.

Points to Note:
- Article 10 provides for amendment procedures to be followed if it becomes necessary to amend the details of the Development, etc. in the course of development.

Commentary:
1. In the development of AI-based software, in many cases the expected performance cannot be achieved depending on the volume and quality of the Training Dataset used for the development; furthermore, sometimes it is necessary to change the terms and conditions of development that were initially agreed on between the parties in line with unintended circumstances, such as when it will not be possible to deliver the deliverables by the due date when training requires a certain amount of time and retraining will be conducted. Therefore, the Model Contract stipulates that the User and the Vendor shall promptly consult with each other regarding the possibility of amending the agreed matters if either party requests the other party to make such amendment.

2. Although the Model Contract does not require the parties to always document the results of an amendment consultation, it is necessary to document amendments (such as by executing an amendment agreement) if the amendments will have a significant impact on the contents of the agreement.

3. In addition, it is conceivable to stipulate provisions for termination in preparation for cases where the parties are not able to reach an agreement through an amendment consultation (see Article 38 of the Model Contract 2007).

Article 11 Provision of Deliverables and confirmation of service completion

1. The Vendor shall provide the User with the Deliverables by the due date for provision of deliverables stated under “Completion of services” in the Schedule “Details of Services.”

2. During the confirmation period stated under “Completion of services” in the Schedule “Details of Services” (the “Confirmation Period”), the User shall confirm receipt of provision of the Deliverables, affix the User’s name and seal or signature to a letter of confirmation prescribed by the Vendor, and deliver that letter to the Vendor.

3. The User’s confirmation is considered completed when the User delivers a letter of confirmation to the Vendor in accordance with the provisions of the preceding paragraph. However, if the User does not make an objection in writing that
clearly indicates specific reasons during the Confirmation Period, the confirmation will be deemed completed at the time of expiration of that period even if a letter of confirmation is not delivered.

Points to Note:
- Article 11 provides for the Vendor’s provision of the Deliverables and the method by which the User confirms the provision thereof upon receipt.

Commentary:
1. The Deliverables to be provided by the Vendor to the User are specified in “Details of deliverables for which the Vendor conducts development support based on delegation by the User” in Schedule “Details of Services.” As an example, a Trained Model is envisaged to be a Deliverable. On the other hand, it is also conceivable that the Vendor would not provide a Trained Model to the User as a Deliverable and would only grant to the User a license to use the Trained Model (in this case, the terms of use of the Trained Model are to be stipulated in Article 18). In this case, there would be no Deliverables, and thus it would be necessary to modify the provisions of Article 11 that are based on the premise that Deliverables will be provided.
2. It is necessary to stipulate provisions regarding the time when the services are considered completed because it is necessary to clarify the time of completion of services in the Model Contract, which is a quasi-delegation contract. The purpose of Article 11 is the same as that of Article 5 of an individual agreement for the agile development model contract (quasi-delegation).

Article 12 Data and materials, etc. provided to the Vendor by the User

1. The User shall, in accordance with the terms and conditions in the Schedule, provide the Vendor with the data stated in the subparagraph “Details of data provided by the User” under “Details of the Agreed Data” in the Schedule “Details of Services” (that provided data, the “User-Provided Data”).
2. The User shall, with respect to the Vendor, conduct provision, disclosure, lending, and the like (“Provision, Etc.”) of the materials, devices, facilities, and the like that the Vendor requests as items reasonably necessary for the Development and that are agreed to by the User (the “Materials, Etc.”).
3. The User warrants to the Vendor that the User is duly authorized to conduct Provision, Etc. of the User-Provided Data and the Materials, Etc. (collectively, the “User-Provided Data, Etc.”) to the Vendor and that Provision, Etc. does not violate any laws or regulations.
4. The User does not warrant the accuracy, completeness, effectiveness, usefulness, safety, or the like of the User-Provided Data, Etc., unless otherwise provided for in this Agreement.
5. If there is any error in the contents of the User-Provided Data, Etc. subject to Provision, Etc. to the Vendor by the User, or if the Provision, Etc. is delayed, then the Vendor will not be liable for any delay in the estimated completion date, any defect (including defect under law), or any other similar outcome arising from that error or delay.

6. The Vendor does not bear any obligation or other liability to confirm or verify the accuracy, completeness, effectiveness, usefulness, safety, or the like of the User-Provided Data, Etc.

Points to Note:
- Article 12 stipulates provisions to the effect that the Vendor will not be liable for any delay in development, etc. as a result of the provision of data and the Materials, Etc. by the User to the Vendor in the Development or any error in or inadequacy of the data or the Materials, Etc. that are provided in the Development.

Commentary:
1. Although materials (the “Materials, Etc.”) are provided by the User in ordinary system development, generally in the development of AI-based software the User provides the Vendor with data for training (the “User-Provided Data”) in addition to the Materials, Etc. (Paragraph 1 and Paragraph 2).

2. Because the existence of the authority to disclose the Materials, Etc. and the User-Provided Data (the “User-Provided Data, Etc.”) and the legality thereof are preconditions for the disclosure and the User itself is able to ascertain these matters, the Model Contract provides for the User’s representation and warranty regarding the User-Provided Data, Etc. (Paragraph 3).

3. On the other hand, whether or not the User makes a representation and warranty regarding the accuracy of the content of the User-Provided Data, Etc. or the like largely depends on individual circumstances, such as whether or not the provision of such data, etc. is in effect determined to be exchangeable for consideration. Therefore, the Model Contract indicates that the User does not make any warranty as a general rule, but if there are any separate provisions in the agreement or Schedule, these provisions will prevail (Paragraph 4). If the use of the User-Provided Data, Etc. is permitted not only for the purpose of the Development but also for other purposes (when such use is provided for in the Schedule as set forth in the proviso of Paragraph 2 of Article 13), it is possible that the Derivative Products using the User-Provided Data would be provided to parties other than the User, and, therefore, it is conceivable that the parties would, as necessary, establish in this Agreement, the Schedule, or the like provisions for a warranty regarding the User-Provided Data, Etc. in relation to its use for other purposes.

4. If the volume of the User-Provided Data is insufficient and, for that reason, there is a delay in the completion of the Deliverables or a defect, etc. in the Deliverables, then Paragraph 5 applies due to the fact that the agreed data has not been submitted as of the time it is required for the development, which constitutes a delay in the provision of the data.

5. It is conceivable that the parties would incorporate into Paragraph 2, as an alternative, a provision to the effect that the Vendor may request the User to present materials and data.
VII  Model Contracts

A proposed wording of the provision in this case is, for example, “the Vendor may request the User to disclose or provide any documents, drawings, software, data, and other materials (regardless of the type of recorded media and including electronic records) held by the User that are necessary for the performance of the Development.”

Article 13  Use and management of User Provided Data

1. The Vendor shall manage and keep the User-Provided Data with the due care of a good manager and shall not disclose, provide, or divulge the User-Provided Data to a third party (excluding any Subcontractor under Article 9) without obtaining the User’s prior written approval.

2. The Vendor shall not, without obtaining the User’s prior written approval, use, reproduce, or alter the User-Provided Data for any purpose other than performance of the Development and may use, reproduce, and alter the User-Provided Data only to the extent reasonably necessary for performance of the Development, provided that the provisions of this paragraph will not apply if otherwise provided for in the Schedule.

3. The Vendor shall disclose the User-Provided Data only to its officers and employees who need to know that User-Provided Data in order to perform the Development. In this case, the Vendor shall cause its officers and employees who receive the disclosure to bear, even after their retirement, obligations equivalent to those borne by the Vendor under this Article 13.

4. The Vendor may disclose the User-Provided Data that must be disclosed in accordance with the provisions of laws and regulations to the recipient of disclosure in question under those provisions of laws and regulations, upon notifying the User in advance to the extent possible.

5. The Vendor shall, in accordance with instructions of the User, destroy any media in which the User-Provided Data (including reproductions and alterations of the User-Provided Data) is recorded or return that media to the User and delete the User-Provided Data from any electronic or magnetic recording media managed by the Vendor if the Services are completed, this Agreement ends, or the Vendor receives instructions by the User to do so. However, to the extent necessary for the use provided for in paragraph 2 of this Article 13, the Vendor may keep the User-Provided Data (including reproductions and alterations of the User-Provided Data). The User may request the Vendor to submit documents that prove such destruction or deletion of the User-Provided Data.

6. The Vendor confirms that Provision, Etc. of the User-Provided Data does not constitute assignment, transfer, or licensing of any of the User’s Intellectual Property Rights, except as otherwise provided for in this Agreement.

7. The provisions of this Article 13, excluding the preceding paragraph, will remain effective for ● years from the date when this Agreement ends.

Points to Note:
VII  Model Contracts

- Article 13 provides for the handling of the User-Provided Data provided by the User to the Vendor.

Commentary:

1 The Vendor is obligated to manage the User-Provided Data provided by the User to the Vendor for the Development with the due care of a good manager (Paragraph 1). Article 13 only applies to “User-Provided Data” and not to “User-Provided Data, Etc.,” and “Materials, Etc.” (Paragraph 2 of Article 12) that are not included in the User-Provided Data are to be protected by Article 14, which provides for the handling of Confidential Information.

2 Moreover, Article 13 expressly stipulates that the Vendor shall use the User-Provided Data to the extent necessary for the Development (Paragraph 2).

3 In addition, sometimes the Vendor might request that it use the User-Provided Data for purposes other than the Development (for example, in the development of separate services). (Please note that it is possible that the User would raise a question regarding whether the act of providing a third party with a generated Trained Model (Reused Model) constitutes the use of the User-Provided Data for other purposes.)

Because it is assumed that permitting such use for other purposes, subject to certain conditions, is reasonable, the Model Contract contains provisions that permit the use of the User-Provided Data for other purposes (the proviso of Paragraph 2), and sets forth the scope of use for other purposes as agreed between the User and the Vendor in the Schedule “Terms of use of User-Provided Data.” If the party (i.e., the User) expressly permits the provision of a Trained Model, etc. to third parties in this Agreement or the like, it is considered that preparation of and stipulation of matters in the Schedule with respect to such use as set forth in the proviso of Paragraph 2 would not be necessary.

4 Although Paragraph 5 stipulates provisions for the submission of proof of the destruction or deletion of the User-Provided Data (“Proof of Deletion”), sometimes it is possible that the submission of Proof of Deletion would require an extra expenditure or the submission of Proof of Deletion would not be permitted in the first place when, for example, the Vendor uses the cloud service of another company and stores the User-Provided Data in the server of that company. Please note that, in such a case, it is necessary to amend the provisions by stipulating to the effect that a document that proves the cloud vendor has been instructed to delete data must be submitted, rather than the submission of Proof of Deletion.

5 Article 13 stipulates provisions for the use and management of the User-Provided Data itself. Generally, Trained Models generated using the User-Provided Data, Training Datasets, or the like contain data derived from the User-Provided Data, but the use and management of these materials are provided for in Article 18.

6 Article 13 will continue to be effective after the Model Agreement ends because it is stipulated to be a surviving provision (under Article 27). Even so, the period during which it remains effective will be for ● years in accordance with Paragraph 7. However, because Paragraph 7 contains the wording “excluding the preceding paragraph,” the provisions of Paragraph 6 will remain effective without any prescribed period by reverting to the principle of unrestricted survival.

Article 14  Handling of confidential information

110
1. Each of the User and the Vendor shall keep each of the following types of technical, operational, or other business information that is provided by the other party for the performance of the Development (excluding the User-Provided Data; “Confidential Information”) secret and shall not, disclose, provide, or divulge Confidential Information to a third party (excluding any Subcontractor under Article 9 of this Agreement) without obtaining the prior written approval of the party disclosing Confidential Information:

(1) information that the disclosing party discloses in writing upon designating it confidential;

(2) information that the disclosing party discloses after orally indicating that it is confidential and then specifying its contents in writing no later than ● days after disclosure; such information will be handled as Confidential Information until the day when ● days will have passed since the date when the disclosing party discloses the information after orally indicating that it is confidential or the date when the disclosing party notifies in writing that it does not treat the information as Confidential Information, whichever is earlier;

[(3) a Training Dataset];

[(4) the Target Trained Model]; or

[(5) a Reused Model].

2. Notwithstanding the provisions of the preceding paragraph, information that falls under any of the following items will not constitute Confidential Information:

(1) information that is already publicly available at the time it is disclosed by the disclosing party;

(2) information that, after it is disclosed by the disclosing party, becomes publicly available through no fault of the receiving party;

(3) information that is lawfully disclosed by a duly authorized third party without being subject to any confidentiality obligations;

(4) information that, at the time of disclosure by the disclosing party, is already lawfully held by the receiving party; and

(5) information developed independently by the receiving party without using information disclosed by the disclosing party.

3. Each of the User and the Vendor shall not, without obtaining the disclosing party’s prior written approval, use, reproduce, or alter Confidential Information for any purpose other than performance of the Development and may use, reproduce, and alter Confidential Information only to the extent reasonably necessary for performance of the Development, unless otherwise provided for in this Agreement.

4. The provisions of Paragraph 3 through Paragraph 6 of the preceding Article will apply mutatis mutandis to the handling of Confidential Information. In this case, the term “User-Provided Data” in the preceding Article will be read as
“Confidential Information”, “the Vendor” will be read as “the party receiving Confidential Information”, and “the User” will be read as “the disclosing party.”

5. The provisions of this Article 14 will remain effective for ● years from the date when this Agreement ends.

Points to Note:
- Article 14 stipulates provisions regarding the management of Confidential Information provided by the other party.

Commentary:
1 The purpose of Article 14 is the same as that of Article 41 of the Model Contract 2007, Article 7 of the Model Contract 2008, and Article 9 of the master agreement for the agile development model contract.

However, management of confidentiality and the like for the User-Provided Data provided by the User to the Vendor is provided for in Article 13, and therefore the User-Provided Data is excluded from the scope of Confidential Information under Paragraph 1.

2 Also, in the case of the development of AI-based software, it can be assumed that, in some cases, a Training Dataset created in the course of development, the Target Trained Model provided as a deliverable, or a Reused Model generated based on the Target Trained Model will need to be treated as Confidential Information. In this case, it is conceivable that the parties would, as necessary, expressly designate the Training Dataset, the Target Trained Model, and the Reused Model as Confidential Information by including them as items (3), (4), and (5) of Paragraph 1. By treating these as Confidential Information, it would become easier to satisfy the requirement to be managed as confidential as trade secrets under the Unfair Competition Prevention Act. If the Training Dataset, the Target Trained Model, the Reused Model, and the like are to be considered Confidential Information, it would be necessary to stipulate, among other provisions, a provision that excludes the confidentiality obligation when a party that owns the right to grant of patent files an application for a patent.

3 It is also conceivable that the parties would handle a Training Dataset in the same manner as the User-Provided Data by establishing provisions to the effect that the provisions of Article 13 apply to the Training Dataset, rather than providing for the handling of the Training Dataset in item (3) of Paragraph 1 of Article 14 as set out above. For example, such provisions are considered more useful for a Training Dataset whose state is similar to the User-Provided Data because it is possible to provide for the handling of the User-Provided Data and the Training Dataset in the same provisions.

4 While Article 18 of the Model Contract is premised on the assumption that the Derivative Products will be used under different terms and conditions, it is possible that such use would be deemed to be use of Confidential Information for unintended purposes. Therefore, Paragraph 3 expressly stipulates that the use of Confidential Information for purposes other than the purpose of the Model Contract is permitted if it is “separately provided for” in the Model Contract.
VII Model Contracts

5 Paragraph 4 stipulates that the provisions of Article 13 regarding the handling of Applicable Data apply mutatis mutandis to the handling of Confidential Information. Even so, the provisions regarding the effective period of the provisions of Article 13 do not apply mutatis mutandis because it is assumed that different effective periods are set for the Applicable Data and Confidential Information. However, it is possible to apply the provisions regarding the effective period mutatis mutandis if the same effective period is set for each of the Applicable Data and Confidential Information.

Article 15 Handling of personal information

1. When the Development is performed, if the User provides to the Vendor any data that includes personal information or anonymously processed information set forth in the Act on the Protection of Personal Information (the “Act” in this Article; both of those types of information collectively, “Personal Information, Etc.”), the User must clearly indicate to that effect in advance.

2. When the Development is performed, if the User provides to the Vendor any data that includes Personal Information, Etc., the User will warrant that the User has implemented procedures required by the Act.

3. When receiving the provision of Personal Information, Etc. in accordance with Paragraph 1, the Vendor shall comply with the Act and take measures necessary for the management of the Personal Information, Etc.

Points to Note:
- Article 15 provides for matters relating to cases where the User-Provided Data, Etc. provided by the User to the Vendor includes personal information or anonymously processed information.

Commentary:
1 Unlike ordinary system development, the User provides a large volume of data to the Vendor in the development of AI-based software, and such data may include personal information. In this case, when providing such data, the User is required to implement procedures required under the Act on the Protection of Personal Information or to provide the data after processing it into a form by which the relevant person is not identifiable, and therefore Article 15 provides for the warranty of the User in this regard.

2 Although the same provisions exist in Article 42 the Model Contract 2007, the Model Contract additionally stipulates matters relating to anonymously processed information because the Model Contract 2007 is based on the former Act on the Protection of Personal Information, which does not contain the provisions regarding anonymously processed information stipulated in the revised Act of 2015.

3 Article 15 does not contain provisions regarding use within the scope of intended purposes and provisions regarding return under Paragraph 3 and Paragraph 4 of Article 42 of the Model Contract 2007 because personal information is ordinarily provided to the Vendor as
VII Model Contracts

User-Provided Data and therefore these provisions are covered by Paragraph 2 or Paragraph 5 of Article 13 of the Model Contract.

Article 16 Copyright in the Derivative Products

[Version A] In the case where the copyright is vested in the Vendor

1. Copyright (including rights provided for in Article 27 and Article 28 of the Copyright Act) related to the Deliverables and the Intellectual Property that arises in connection with performance of the Development (“Derivative Products”) belong to the Vendor, except for copyright in works held by the User or a third party before the Development.

2. Each of the User and the Vendor shall not, in relation to the use of the Derivative Products in accordance with this Agreement, exercise the moral right of the author against the other party or against any third party that duly acquires or succeeds to any right.

[Version B] In the case where the copyright is vested in the User

1. Upon completion of the payment of service fee to the Vendor by the User, copyright (including rights provided for in Article 27 and Article 28 of the Copyright Act) related to the Deliverables and the Intellectual Property that arises in connection with performance of the Development (“Derivative Products”) will belong to the User, except for copyright in works held by the Vendor or a third party before the Development. The consideration for transfer of copyright from the Vendor to the User is included in the service fee.

2. Each of the User and the Vendor shall not, in relation to the use of the Derivative Products in accordance with this Agreement, exercise the moral right of the author against the other party or against any third party that duly acquires or succeeds to any right.

[Version C] In the case of joint ownership between the User and the Vendor

1. Upon completion of the payment of service fee to the Vendor by the User, copyright (including rights provided for in Article 27 and Article 28 of the Copyright Act) related to the Deliverables and the Intellectual Property that arises in connection with performance of the Development (“Derivative Products”) will be jointly owned by the Vendor and the User (ownership interest is shared equally), except for copyright in works held by the User, the Vendor, or a third party before the Development. The consideration for transfer of copyright from the Vendor to the User is included in the service fee.

2. In the case of the preceding paragraph, each of the User and Vendor, in compliance with others provisions set forth in this Agreement, (a) is granted in
advance under this Agreement the other joint owner’s consent required by law in relation to exercise of the jointly owned copyright that is provided for in the preceding paragraph and (b) may, by itself, use the jointly owned copyright without obtaining the other party’s consent and without bearing any obligation to pay consideration to the other party.

3. Neither the User nor the Vendor may, without obtaining the other party’s consent, dispose of any shared ownership interest in the copyright provided for in Paragraph 1.

4. Each of the User and the Vendor shall not, in relation to the use of the Derivative Products in accordance with this Agreement, exercise the moral right of the author against the other party or against any third party that duly acquires or succeeds to any right.

Points to Note:
- Article 16 provides for the ownership of copyright in the Derivative Products “in which copyright exists.”

Commentary:

Article 16, Article 17, Article 18

1 In the development of AI-based software, “Deliverables” that the parties have agreed upon as the object of development (such as a Trained Model) and “Intellectual Property created in the course of development” (such as a Training Dataset, Trained Parameter, invention, and know-how) are created. These “Deliverables” and “Intellectual Property created in the course of development” (collectively defined as the “Derivative Products” in Article 16) include those in which “Intellectual Property Rights” (such as a patent right and copyright) exist and those in which “Intellectual Property Rights” do not exist.

Ownership of the Intellectual Property Rights relating to the Intellectual Property and the terms of use of the Intellectual Property must be clearly provided for in the agreement because the interests of the User and the Vendor tend to conflict in relation to these matters.

It must be noted that, with respect to AI-based software, there has been a relative increase in the importance of data, etc. in which, as a general rule, Intellectual Property Rights do not exist (or in which it is unclear whether Intellectual Property Rights exist). However, if Intellectual Property Rights were not to exist in such data, etc., then it would be impossible to provide for the ownership of the Intellectual Property Rights in the first place, so the terms of use of the data, etc. would be provided for in such a case.

2 The Model Contract classifies the Derivative Products into “those in which Intellectual Property Rights exist” and “those in which Intellectual Property Rights do not exist,” and establishes provisions regarding the “ownership of rights” and (if necessary) the “terms of use” for the former and the “terms of use” (if necessary) for the latter.

3 The Model Contract is structured as follows.

28 The meaning of “Intellectual Property Rights” is defined in Item (10) of Article 2 of the Model Contract.
VII  Model Contracts

(i) Ownership of rights in the Derivative Products “in which copyright exists”
   
   Article 16

(ii) Ownership of rights in the Derivative Products “in which Intellectual Property Rights other than copyright exist”
   
   Article 17

(iii) Terms of use
   
   Article 18

Derivative Products to which Article 16 applies

1  Article 16 provides for the ownership of rights in the Derivative Products “in which copyright exists.”

2  The Model Contract contains these provisions because it is believed the parties strongly need to clarify, at the time of the execution of the agreement, to which party (i.e., the User or the Vendor) the ownership of rights in the Derivative Products “in which copyright exists” belongs, and the Model Contract has been prepared with three types of draft provisions (Type A to Type C) with a view to striking a balance between effective utilization of derivative products and maintaining the User’s competitiveness, as in the case of the Model Contract 2007. [Version A] applies to cases where all rights are vested in the Vendor, [Version B] applies to cases where all rights are vested in the User, and [Version C] applies to cases where the rights are jointly owned by the User and the Vendor.

3  Article 16 stipulates that any rights held by the User or the Vendor before the Development are not subject to the provisions regarding the ownership of rights, and therefore the rights in question will be reserved by the User or the Vendor, as the case may be. If acquisition of such rights were desirable, then it would be necessary to modify Article 16 and, in this case, consideration for the acquisition of rights would be taken into account when determining the service fee.

4  Version C of Article 45 of the Model Contract 2007 stipulates that, if the copyright in the delivered products is jointly owned by the User and the Vendor, each party may exercise the jointly owned copyright, including conducting licensing to third parties, without the obligation to pay consideration to the other party. However, in the case of the development of AI-based software, there can be a variety of possible methods for licensing to third parties, so the Model Contract stipulates that only in the case that a party itself uses the jointly owned copyright will it not be obligated to pay consideration to the other party. Nevertheless, it is conceivable that licensing to third parties would be permitted and, in that case, the following provisions would be added to Paragraph 2 of [Version C].

[Version C]In the case of joint ownership between the User and the Vendor

2  In the case of the preceding paragraph, each of the User and the Vendor, in compliance with other provisions set forth in this Agreement, (a) is granted in advance under this Agreement the other joint owner’s consent required by law in relation to exercise of the jointly owned copyright that is provided for in the preceding paragraph and (b) may exercise the jointly owned copyright (including the licensing of the jointly owned
VII Model Contracts

5 If there were several Derivative Products, and copyright in each of the Derivative Products were to belong to different parties (for example, copyright in the Trained Model was vested in the Vendor, while copyright in the Training Dataset was vested in the User), then the parties would establish provisions regarding the ownership of rights under Paragraph 1 of Article 16 for each of the Trained Model and the Training Dataset.

Relationship with the Model Contract 2007

1 The Model Contract 2007 provides for “patent rights and other intellectual property rights (excluding copyright)” in relation to “inventions and other intellectual property created in the course of the performance of services” under “Patent Rights, Etc. in Delivered Products” (Article 44), and stipulates separate provisions regarding “copyright” in “delivered products” under “Copyright in Delivered Products” (Article 45). Further, there is no intention to establish detailed provisions regarding the terms of use of the deliverables.

2 It is believed this is because the main deliverable in a general system development agreement, whose execution is presupposed in the Model Contract 2007, would be a program, and in many cases a key point of negotiation is the ownership of rights in copyright in the program.

3 On the other hand, in the development of AI-based software, which is presupposed in the Model Contract, it is intended that, not only a program, but also a variety of materials (such as a Training Dataset and a Trained Parameter) will be created as an invention or other intellectual property created in the course of the performance of services. Therefore, the Model Contract classifies the Derivative Products into “those in which Intellectual Property Rights exist” and “those in which Intellectual Property Rights do not exist” as described above and provides for the handling of the former in terms of the issues of “ownership of rights” (Article 16 and Article 17) and the “terms of use” (Article 18), while providing for the handling of the latter solely in terms of the issue of “terms of use” (Article 18).

4 Also, the Model Contract 2007 provides for the transfer of the ownership of delivered products and the date of the transfer under “Ownership of Delivered Products” (Article 43). However, because a deliverable for software is in nature intangible, while it is possible to conceptualize the ownership of a recording medium, the recording medium itself is not the object of development, and taking the trouble to stipulate provisions regarding the ownership of the recording medium as terms and conditions of the agreement is considered to have little significance, because, based on the reasonable intention of the parties, ordinarily the ownership of the recording medium will transfer upon its delivery. For these reasons, the Model Contract does not stipulate provisions regarding the ownership of delivered products.

Article 17 Patent rights, etc. in Derivative Products
VII  Model Contracts

1. Each patent right and other Intellectual Property Right in a Derivative Product (excluding copyright; collectively, a “Patent Right, Etc.”) belongs to the party to which the person who creates the Derivative Product belongs.

2. A Patent Right, Etc. in a Derivative Product jointly created by the User and the Vendor is jointly owned by the User and the Vendor (ownership interest is decided according to the degree of contribution). In this case, each of the User and the Vendor may practice the jointly owned Patent Right, Etc. without obtaining the consent of the other party and without being obligated to pay consideration to the other party.

3. Each of the User and the Vendor shall implement necessary employee invention obtainment procedures (appropriate operation of employee invention systems, including development of employee invention rules, and assignment procedures for employee inventions and the like) with respect to each Patent Right, Etc. jointly owned with the other party under the preceding paragraph.

Points to Note:
- Article 17 provides for ownership of rights in Patent Rights, Etc. in the Derivative Products “in which Intellectual Property Rights other than copyright exist.”

Commentary:
1. The Model Contract adopts the principle that the ownership of the Patent Rights, Etc. in the Derivative Products “in which Intellectual Property Rights other than copyright exist” (for example, an Invention, Etc.) belongs to the inventor, as in the case of Article 44 of the Model Contract 2007. However, if the parties desire to provide for ownership of rights in Patent Rights, Etc. at the time of the execution of the agreement, it is conceivable that the parties would establish provisions to that effect in the same manner as the provisions for copyright. On the other hand, if it is difficult to provide for ownership of rights in Patent Rights, Etc. at the time of the execution of the agreement at the development phase, it is also conceivable that the parties would stipulate that the ownership of the rights in question be determined through mutual consultation, as in the case of [Version A] of Article 17 of the operations test agreement at the PoC phase.

2. The Model Contract stipulates that if the Patent Rights, Etc. are jointly owned by the User and the Vendor (Paragraph 2), then only in the case that a party itself uses the Patent Rights, Etc. will it not be obligated to pay consideration to the other party, for the same reasons as those described in Article 16.

Article 18  Terms of use for Derivative Products

[Version A]Default
Each of the User and the Vendor may use Derivative Products under the terms and conditions stated in the “List of terms of use” in the Schedule. If there is any
discrepancy between the contents of that Schedule and this Agreement, the contents of that Schedule will prevail.

[Version B] Simple provisions in the case where the copyright belongs to the Vendor (Article 16, Version A)
The Vendor may use Derivative Products, and the User may use Deliverables only for its own services.

[Version C] Simple provisions in the case where the copyright belongs to the User (Article 16, Version B)
The User may use Derivative Products, and the Vendor may use Derivative Products only for performance of the Development.

Points to Note:
- Article 18 stipulates the “terms of use” of the Derivative Products “in which Intellectual Property Rights exist” and the Derivative Products “in which Intellectual Property Rights do not exist.”

Commentary:
[Version A] Default
1 [Version A] presents provisions to be used if the agreement stipulates detailed terms of use by the User and the Vendor with respect to each item that falls under the Derivative Products (such as a Trained Model, Training Dataset, Trained Parameter, invention, and know-how).
2 In the Schedule “List of terms of use,” the following matters are to be stated for each applicable Derivative Product: (i) own use for the object of the Development (and the services of the User); (ii) own use for purposes other than (i) (such as for the purpose of generating a Reused Model); and (iii) whether disclosure, licensing, and provision to third parties are permitted and, if so, the detailed terms and conditions of the disclosure, licensing, and provision. Examples of matters to be stated in the Schedule “List of terms of use” in three different cases are attached at the end. Also, it is conceivable to stipulate the contents of the Schedule “List of terms of use” in the form of provisions in Article 18.
3 If the parties were to stipulate more complicated terms of use, it is conceivable that the parties would prepare a separate license agreement.
4 If [Version C] were adopted in Article 16, copyright would be jointly owned and the relationship of rights would become more complicated, so in this case it is assumed that the parties would use [Version A] in Article 18.
VII Model Contracts

[Version B] Simple provisions in the case where the copyright belongs to the Vendor (Article 16, Version A)

1 Although it is possible to stipulate detailed terms of use in [Version A], it is believed that, in practice, there are certain simple cases where “all Intellectual Property Rights in the Derivative Products produced in the Development are vested in the Vendor and the User only uses the ‘Deliverables,’ which are the object of the Development” (i.e., by doing so, it is possible to achieve the purpose of the User). In addition, sometimes it is difficult to stipulate or agree on detailed terms of use at the development phase.

2 In such a case, it is conceivable that the parties would adopt [Version A] in Article 16 and adopt [Version B] in Article 18. [Version B] presents simple provisions that enable the User to use the Deliverables for its own services. If the parties desire to stipulate different terms and conditions, the parties would adopt [Version A] or modify the provisions of [Version B].

3 [Version B] stipulates that the Vendor may use Derivative Products without being subject to any conditions and the User may use Deliverables only for its own services.

4 In addition, as it is clear from the fact that [Version B] stipulates that which are to be used by the User are “Deliverables,” and not “Derivative Products,” under [Version B], the User may only use “Deliverables” (meaning a Trained Model, which is the object of development under the Model Contract, but this may include a Training Dataset, etc. depending on the contents of the agreement) and may not use other Intellectual Property (such as a Training Dataset, Trained Parameter, invention, or know-how).

[Version C] Simple provisions in the case where the copyright belongs to the User (Article 16, Version B)

1 As opposed to [Version B], [Version C] applies in the case where “all of the Intellectual Property Rights in the Derivative Products produced in the Development are vested in the User and the Vendor only uses the Derivative Products.”

2 In this case, the parties would adopt [Version B] in Article 16 and [Version C] in Article 18. [Version C] seeks to make the provisions simple, as in the case of [Version B]. If the parties desire to stipulate different terms and conditions, the parties would adopt [Version A] or modify the provisions of [Version C].

3 Unlike [Version B], the reason why the Vendor would be entitled to use “Derivative Products” and not “Deliverables” is that there is a high degree of necessity for the Vendor to use know-how, etc. that are not included in the Deliverables for its own services and that such a stipulation would not cause any significant hindrance to the User because the purpose of use is limited to the “performance of the Development.”

Article 19 No reverse engineering and no generation of Reused Models, etc.

Except as otherwise provided for in this Agreement, [each of the User and the Vendor] shall not conduct any of the following in relation to Deliverables:

(1) any act to extract a source code by reverse engineering, decompiling, disassembling, or other means;
VII  Model Contracts

[(2)  any act to generate a Reused Model];
[(3)  any act to generate a Trained Model by combining the data entered into the
      Trained Model with the data output of the Trained Model]; and
[(4)  any other act similar to any of the preceding items].

Points to Note:
- Article 19 provides for acts that are prohibited when the User or the Vendor uses a
  Deliverable that is a Trained Model.

Commentary:
1  Article 19 prohibits (1) reverse engineering, (2) generation of a Reused Model from a
    Trained Model, and (3) generation of a so-called distilled model.  Also, (4) a basket clause
    is included because it is assumed that there might be certain types of use that do not
    necessarily correspond to any of (i) through (iii) above depending on the AI-technology
    that is the subject matter of the agreement.  However, it would be advisable that, as a
    general rule, the parties identify all prohibited acts to the extent possible because which
    case would be considered to constitute a “similar act” would depend not only on the
    applicable technology but also on the specific circumstances the parties were in.
2  Also, which party (i.e., the User or the Vendor) becomes the party that is prohibited from
    conducting the act in question needs to be determined based on Article 17 and Article 18.
3  If the generation of a Reused Model by the User were permitted under the terms of use of
    a Trained Model in the main text of the agreement or in the Schedule, it would be necessary
    to ensure consistency with the provisions for the terms of use by deleting item (2) or by
    other means.

Article 20  Responsibility for use, etc. of Derivative Products

Use, reproduction, or alteration by the User of the Derivative Products and use by the
User of any product generated as a result of reproduction, alteration, or the like (“Use,
Etc. of Derivative Products”) must be conducted at the User’s own expense and
responsibility.  The Vendor is not liable to the User for any damage incurred by the
User resulting from the User’s Use, Etc. of Derivative Products, unless otherwise
provided for in this Agreement or unless the cause of the damage is attributable to the
Vendor.

Points to Note:
- Article 20 stipulates that, as a general rule, the Vendor will not be liable for any Use, Etc.
  of Derivative Products by the User.

Commentary:
VII  Model Contracts

1  In light of the legal nature of this Agreement (quasi-delegation contract), Article 20 stipulates that the User will be liable for any damage caused by Use, Etc. of Derivative Products by the User. However, this does not apply if “otherwise provided for in this Agreement” and “the cause of the damage is attributable to the Vendor.”

2  The stipulation “otherwise provided for in this Agreement” specifically refers to Paragraph 1 of [Version A-1], Paragraph 1 of [Version A-2], and Paragraph 1 of [Version B] of Article 21 (Liability for infringement of Intellectual Property Rights) of the Model Contract, but it is possible to establish “separate provisions” other than these provisions upon negotiation between the User and the Vendor.

Article 21  Liability for infringement of Intellectual Property Rights

[Version A-1]  In the case where the Vendor makes a warranty regarding no infringement of Intellectual Property Rights (at the initiative of the User)

1.  If the User infringes an Intellectual Property Right of any third party by Use, Etc. of Derivative Products, the Vendor shall compensate for the damage incurred by the User due to that infringement (including expenses required to progress to an alternative program for avoidance of infringement), limited to the amount provided for in Article 22, Paragraph 2, unless the cause of the infringement of the Intellectual Property Right is attributable to the User, in which case the Vendor will not be liable for that infringement.

2.  If the User is subject to any petition regarding infringement of an Intellectual Property Right filed by a third party in relation to Use, Etc. of Derivative Products, then, notwithstanding the provisions of Article 22, and only on the condition that all of the following requirements are satisfied, the Vendor shall bear the amount of damages and reasonable attorney fees to be paid by the User in accordance with the petition, unless the petition is filed by a third party due to reasons attributable to the User, in which case the Vendor will not bear any liability:

   (1)  the User notifies the Vendor of the fact that a petition was filed by a third party and the details of the petition no later than ● days after the date when the User becomes subject to that petition filed by the third party;

   (2)  in relation to negotiations with or a lawsuit against a third party, the User grants the Vendor practical opportunities to participate in that negotiation.

[Version A-2]  In the case where the Vendor makes a warranty regarding no infringement of Intellectual Property Right (at the initiative of the Vendor)

1.  If the User is subject to any petition regarding infringement of an Intellectual Property Right filed by a third party in relation to Use, Etc. of Derivative Products, then, notwithstanding the provisions of Article 22, and only on the condition that all of the following requirements are satisfied, the Vendor shall bear the amount of damages and reasonable attorney fees to be paid by the User in accordance with the petition, unless the petition is filed by a third party due to reasons attributable to the User, in which case the Vendor will not bear any liability:
or lawsuit and the authorization to make decisions regarding all matters and provides necessary support; and

(3) it is determined that the User has lost the lawsuit, or, if the Vendor makes a decision other than to pursue a lawsuit, the User reliably resolves the matter through a settlement.

2. If it is likely that a Derivative Product will be unusable for the future by reason of infringement of an Intellectual Property Right due to a cause attributable to the Vendor, the Vendor may, at its own discretion and expense, take any of the following measures: (i) replace the Derivative Product with one that does not infringe any rights; (ii) change the part that infringes the right; or (iii) acquire rights in order to continue to use the Derivative Product.

3. Damage incurred by the User other than the damage to be borne by the Vendor in accordance with Paragraph 1 is governed by the provisions of Article 22.

[Version B] In the case where the Vendor does not make a warranty regarding no infringement of Intellectual Property Right (excluding copyright)

1. If the User infringes a copyright of any third party by Use, Etc. of Derivative Products, the Vendor shall compensate for the damage incurred by the User due to that infringement (including expenses required to progress to an alternative program for avoidance of infringement), limited to the amount provided for in Article 22, Paragraph 2, unless the cause of the infringement of the copyright is attributable to the User, in which case the Vendor will not be liable for that infringement.

2. The Vendor does not make any warranty to the User to the effect that Use, Etc. of Derivative Products does not infringe any Intellectual Property Right of any third party (excluding copyright).

3. If the User is subject to any petition regarding infringement of an Intellectual Property Right filed by a third party in relation to Use, Etc. of Derivative Products, the User shall immediately notify the Vendor to that effect, and the Vendor shall, at the request of the User, provide necessary support for the defense of the User.

Points to Note:
- Article 21 applies in the case where the User infringes an Intellectual Property Right of a third party by Use, Etc. of Derivative Products.

Commentary:
1 Article 20 stipulates provisions regarding damage caused by the User’s Use, Etc. of Derivative Products, and, in relation to such damage, Article 21 stipulates special provisions regarding “damage caused by infringement of Intellectual Property Rights of third parties.”
VII  Model Contracts

2  It is believed in many cases difficult in practice for the Vendor to fully investigate and verify whether there is any infringement of an Intellectual Property Right (Patent Right, Etc.) of a third party, and sometimes it will require a significant amount of expense if overseas areas are included in the investigation and verification. Provisions regarding the burden of liability at the time of infringement of an Intellectual Property Right of a third party are established in accordance with the actual nature of each individual transaction, and the Model Contract presents three types of draft provisions.

3  In [Version A-1], the Vendor makes a warranty regarding no infringement of Intellectual Property Right of any third party with respect to the use of Derivative Products. Paragraph 1 of [Version A-1] falls under the stipulation “otherwise provided for in this Agreement” in Article 20.

[Version A-1] is premised on the User resolving the dispute at its initiative, and it is stipulated that the Vendor will bear any damages or the like to be paid by the User to the owner of the right in question, up to the amount of the service fee.

It is conceivable that the parties would attach reservations to the warranty regarding no infringement of Intellectual Property Rights by the Vendor by including the wording “to the best of the Vendor’s knowledge.” In this case, Paragraph 1 of [Version A-1] would be modified as follows.

[Version A-1]  In the case where the Vendor makes a warranty regarding no infringement of any Intellectual Property Right (at the initiative of the User)

1.  The Vendor warrants to the User that, to the best of the Vendor’s knowledge, the Derivative Products do not infringe any Intellectual Property Right of any third party. If the User infringes an Intellectual Property Right of any third party by its Use, Etc. of Derivative Products in breach of the warranty, the Vendor shall compensate for the damage incurred by the User due to that infringement (including expenses required to progress to an alternative program for avoidance of infringement), limited to the amount provided for in Article 22, Paragraph 2, unless the cause of the infringement of the Intellectual Property Right is attributable to the User, in which case the Vendor will not be liable for that infringement.

4  As in the case of [Version A-1], in [Version A-2], the Vendor makes a warranty regarding no infringement of any Intellectual Property Right of any third party with respect to the use of Derivative Products. Paragraph 1 of [Version A-2] also falls under the stipulation “otherwise provided for in this Agreement” in Article 20.

[Version A-2] is premised on the Vendor resolving the dispute at its initiative, and therefore no limit has been specifically set for the amount of damages.

5  In [Version B], it is stipulated that the Vendor does not make a warranty regarding no infringement of any Intellectual Property Right (excluding copyright) with respect to the Derivative Products. For example, if the Vendor is a venture corporation or in a similar case, often the Vendor would not have sufficient personnel or financial capacity to investigate and verify whether there is any infringement and, if the obligation to investigate that there is no infringement of any Intellectual Property Right is imposed on the Vendor or the burden of liability is imposed on the Vendor, development would be hindered or the
VII Model Contracts

speed of development would decelerate. Because the speed of technological development in AI technology is very fast, a slowdown in the speed of development may cause a grave disadvantage. In addition, if the Vendor must investigate that there is no infringement of any Intellectual Property Right, the service fee would also increase because the cost of the investigation needs to be included. Thus, it is assumed that, in some cases, not imposing on the Vendor such an obligation or a liability would also be a reasonable choice for the User in terms of implementing development, ensuring the speed of development, and preventing an increase in the service fee, and therefore the Model Contract contains provisions to the effect that the Vendor makes no warranty regarding no infringement of any Intellectual Property Right.

However, even in the case of [Version B], while dependence is a prerequisite of infringement with respect to an Intellectual Property Right that is a copyright (for example, copyright in a program), in most cases it is believed the Vendor would be able to warrant that no infringement exists. For this reason, Paragraph 1 stipulates an obligation to compensate for damage if the Derivative Products infringe a copyright of a third party. Paragraph 1 of [Version B] falls under the stipulation “otherwise provided for in this Agreement” in Article 20.

In addition, although the Model Contract is based on the premise that the deliverables are to be used in Japan, if it is envisaged that deliverables would be used overseas, then it is conceivable that the parties would establish provisions that limit to certain regions the scope of warranty regarding no infringement of any Intellectual Property Right (by, for example, making a warranty regarding no infringement of copyright in Japan and the United States).

Article 22 Compensation for damage

1. If the User or the Vendor incurs any damage due to any event attributable to the other party in relation to the performance of this Agreement, the party incurring damage may claim from the other party compensation (limited to any ordinary damage directly and actually incurred by the party incurring damage). However, such a claim may not be made after ● months have passed from the date when services are completed.

2. The amount of the compensation for damage owed by the Vendor to the User is limited to the service fee for this Agreement, irrespective of the grounds for the claim, including default, warranty against defect under law, infringement of any Intellectual Property Right, unjust enrichment, tortious act, or any other grounds.

3. The provisions of the preceding paragraph will not apply if the damage has been caused by the willful misconduct or gross negligence of the party owing compensation.

Points to Note:
- Article 22 provides for compensation for any damage incurred in relation to the performance of the agreement.
Commentary:

1. Article 19 stipulates provisions regarding liability for damage compensation in relation to the performance of the agreement. While the details of provisions regarding the scope and amount of liability for damage compensation and the period during which compensation may be claimed must be determined upon agreement between the User and the Vendor after taking into account the details of the object of development and other related matters, the Model Contract contains the same provisions as those contained in the Model Contract 2007. Liability for damage compensation that is not related to the "performance of the agreement," that is, "liability for damage compensation with respect to Use, Etc. of Derivative Products," is provided for in Article 20 and Article 21.

2. Paragraph 1 stipulates that each party will be liable for compensation for damage if the damage is caused by willful misconduct or gross negligence of that party, and it limits the scope of compensation to any ordinary damage directly and actually incurred.

3. Also, Paragraph 2 stipulates that the maximum amount of compensation for damage is limited to the service fee, irrespective of the grounds for the claim.

4. However, it is stipulated that the provisions regarding the limit of compensation will not apply if the damage has been caused by willful misconduct or gross negligence (Paragraph 3). This provision was established because judicial precedents indicate that courts take the view that provisions regarding exemption from liability and limitation of liability will become void if the relevant damage is caused by willful misconduct, and it is a predominant view that such provisions will also become void if the relevant damage is caused by gross negligence that corresponds to willful misconduct.

Article 23 Use of OSS

1. When intending to use Open Source Software ("OSS") as a component in Deliverables in the course of performing the Development, the Vendor must propose to the User the use of the OSS after providing the User with appropriate information regarding licensing provisions, functions, vulnerability, and the like of the OSS.

2. The User shall, at its own responsibility, deliberate and evaluate the proposal of the Vendor provided for in the preceding paragraph and determine whether to introduce the OSS.

3. Notwithstanding other provisions of this Agreement, the Vendor does not warrant that the OSS does not infringe copyright or other similar rights or that there is no defect in the OSS, and the Vendor is not liable for any such infringement or defect, unless, at the time of the proposal of OSS use prescribed in Paragraph 1, the Vendor does not notify the User of the existence of any infringement of rights or defects (a) despite knowing of that existence or (b) as a result of not knowing of that existence due to the Vendor’s gross negligence.
VII  Model Contracts

Commentary:
The Model Contract stipulates provisions regarding the use of OSS because, in many cases, OSS is used in the development of AI-based software. The provisions of Article 23 are the same as those set forth in Version A of Article 49 of the Model Contract 2007.

Article 24 No Assignment of rights and obligations

Neither the User nor the Vendor may, without the prior written consent of the other party, (a) cause any third party to succeed to any contractual status under this Agreement or (b) assign to any third party, cause any third party to succeed to or assume, or provide as security for the benefit of any third party, all or part of the rights and obligations arising from this Agreement.

Article 25 Termination

1. The User or the Vendor may immediately terminate all or a part of this Agreement without making any demand for remedy if the other party falls under any of the following:
   (1) the other party commits gross negligence or a breach of faith;
   (2) the other party suspends payments or is subject to a petition filed for provisional attachment, attachment, auction, commencement of bankruptcy proceedings, commencement of civil rehabilitation proceedings, commencement of corporate reorganization proceedings, or commencement of special liquidation;
   (3) the other party is subject to disposition for suspension of transactions with a clearing house;
   (4) the other party is subject to disposition for non-payment of taxes and public charges; or
   (5) any other material event equivalent to any of those set out in the items (1) through (4) above that makes it difficult to continue this Agreement occurs with respect to the other party.

2. The User or the Vendor may terminate all or a part of this Agreement if the other party breaches any of the provisions under this Agreement and fails to remedy the breach despite receiving a demand to remedy the breach that sets a reasonable period for that remedy.

3. If the User or the Vendor falls under any of the items set out in Paragraph 1 above or causes the grounds for termination in the case of termination as provided for in the preceding paragraph, then it (a) will automatically forfeit the benefit of time with respect to any and all monetary obligations that it owes to the terminating party without any notice or demand for remedy from the terminating party and (b) shall immediately pay those obligations.
### Article 26 Effective period

This Agreement will be effective from the execution date of this Agreement to the date when the payment of the service fee set forth in Article 4 has been completed or the date when the confirmation set forth in Article 11 has been completed, whichever is later.

### Article 27 Surviving provisions

The provisions of Article 7, Paragraph 3 through Paragraph 6 of Article 12, Article 13, Article 14 through Article 23, this Article, and Article 28 will remain effective after this Agreement ends.

### Article 28 Jurisdiction

All disputes regarding this Agreement will be dealt with by the District Court, which has exclusive jurisdiction as the court of first instance.

### Article 29 Consultation

The User and the Vendor shall consult with each other to endeavor to amicably resolve all matters not provided for in this Agreement or any doubts arising from this Agreement in accordance with the principle of good faith.
This Agreement is executed in two originals, to each of which the User and the Vendor have affixed their respective names and seals, and each party retains one original.

[TBD]

User

Vendor
1. **Object of development**
   (e.g.) Software that has the following functions (Name “●”)
   (1) Function
       ______________________________
   (2) Operating environment
       ______________________________
   (3) Preconditions
       ______________________________

2. **Details of the Agreed Data**
   (1) Details of data provided by the User
       (e.g.) Data to be stated in the Schedule “Data List”
       [(2) Details of data provided by the Vendor]

3. **Materials, etc. provided by the User**
   (1)
   (2) If there are other materials, etc. necessary for performance of the Development, the User and the Vendor shall consult with each other separately.

4. **Work framework**
   [State the roles, departments, and names of each of the Vendor’s and the User’s respective persons in charge and, as required, members, and state the location where software development is carried out, etc.]

   (1) **Work framework of the Vendor**
       * Name of the person in charge at the Vendor: ●● ●●
       The person in charge at the Vendor is in charge of the following roles:
       (i) ______________________________
       (ii) ______________________________
       [ · Members]
       The members are in charge of the following roles:
       [Note: Insert an organization chart/names/roles]
VII Model Contracts

(2) Work framework of the User

- Name of the person in charge at the User: ●● ●●

The person in charge at the User is in charge of the following roles:

(i) ____________________________
(ii) ____________________________

[ Members]

The members are in charge of the following roles:

(i) ____________________________
(ii) ____________________________

[Note: Insert an organization chart/names/roles]

(3) Location where software development is carried out

[State the location where work or the like for software development is carried out]

5. Specific details of work (scope, specifications, etc.)

(1) Work that the Vendor is in charge of:

(2) Work that the User is in charge of:

Note: Enter collaborative work (if any) under both.

6. Liaison committee meetings

(1) Expected frequency:

(2) Meeting location:

7. Work period and schedule

8. Details of deliverables for which the Vendor conducts development support based on delegation by the User

(e.g.) (Circle the applicable boxes)

<table>
<thead>
<tr>
<th>Objects</th>
<th>Subject to delivery</th>
<th>Form of delivery*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Training Dataset</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
VII Model Contracts

<table>
<thead>
<tr>
<th>Training Program</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Trained Model</td>
<td></td>
</tr>
</tbody>
</table>

Note: In the case of data: in data format
In the case of program: in source code, binary code, or the like

9. Completion of services
   (1) Due date for provision of deliverables by the Vendor: ●●●
   (2) User’s confirmation period: The period of ● days after the due date for provision of deliverables

10. Service fee

11. Payment date and method for service fee
   (e.g.) The User will pay the service fee by bank transfer into the bank account designated by the Vendor no later than ● days after confirming the completion of the Services. Bank transfer fees will be borne by the User.
VII  Model Contracts

[Schedule] Terms of use of User-Provided Data (in relation to the proviso in Article 13, Paragraph 2)

<table>
<thead>
<tr>
<th>Scope of use</th>
<th>Appropriateness of use and terms of use</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Use for any purpose other than the Development</td>
<td></td>
</tr>
<tr>
<td>(ii) Provision to a third party</td>
<td></td>
</tr>
</tbody>
</table>
VII Model Contracts

[Schedule] List of terms of use (in relation to Article 18)

List of terms of use

<table>
<thead>
<tr>
<th>Derivative Products subject to this list</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

[User]

<table>
<thead>
<tr>
<th>Scope of use</th>
<th>Appropriateness of use and terms of use</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Use to the extent necessary for performance of the User’s own services (excluding the use stated in (ii))</td>
<td></td>
</tr>
<tr>
<td>(ii) Generation of a Reused Model</td>
<td></td>
</tr>
<tr>
<td>(iii) Disclosure, licensing, provision, etc. to a third party (“Provision, Etc. to a Third Party”)</td>
<td></td>
</tr>
</tbody>
</table>

[Vendor]

<table>
<thead>
<tr>
<th>Scope of use</th>
<th>Appropriateness of use and terms of use</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Use for any purpose other than the Development (generation of a Reused Model or the like)</td>
<td></td>
</tr>
<tr>
<td>(ii) Provision, Etc. to a Third Party</td>
<td></td>
</tr>
</tbody>
</table>
VIII Summary

As described above, these Guidelines (AI Section) present a fundamental approach to, and model contracts for, the development and utilization of AI-based software. We hope these Guidelines (AI Section) serve as an aid in the establishment of contract practices regarding development and utilization of AI-based software and contribute to the development and utilization of AI technology.

These Guidelines (AI Section) and the Model Contracts apply to software using specific AI technology for particular purposes and will require significant revision in the future if, for example, software using general-purpose AI technology emerges or data becomes unnecessary for training. It should be noted that AI technology is advancing day by day and that it will be necessary to revise the Model Contracts presented by these Guidelines (AI Section) in accordance with advances in AI technology in the near future.
Information Economy Division, Commerce and Information Policy Bureau, Ministry of Economy, Trade and Industry

The AI Team within the AI and Data Contract Guidelines Review Working Group consists of the following members:

- Shinnosuke Fukuoka, Attorney-at-law (leader)
- Kurumi Otsubo, Attorney-at-law
- Taichi Kakinuma, Attorney-at-law
- Yuki Saito, Attorney-at-law
- Takashi Hatae, Attorney-at-law
- Gai Matsushita, Attorney-at-law
- Tomoharu Watanabe, Patent Attorney