HONG KONG GROUP

11th January, 2010

The Chairman,
The Panel Committee of Legislative Council
Commerce and Industry
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sirs,

The Government's Refined Proposal to Strengthen Copyright Protection in the Digital Environment

We refer to your letter of 21 December 2009. We are very grateful for inviting us to submit our views and comments on the Government's Refined Proposals to Strengthen Copyright Protection in the Digital Environment (the "Proposal").

We would like to take this opportunity to express our thanks and appreciation for CEDB's hard work and effort in arranging a series of tripartite forum meetings and the sub-group discussions between August 2008 and June 2009, the effort has been well worthwhile and fruitful in getting the views, though not a consensus one, on the issues as raised in this Proposal from different interest groups affected that would facilitate and expedite the legislative processes of updating our digital copyright law in line with other leading jurisdictions that value the contribution of the creative/cultural industries to their economy.

We support that the scope of the communication rights be updated to a technological neutral definition so that it may embrace all forms of new communication technology in future. As regards the other issues, our views and positions have always been that

(1) The Transaction Costs

The transaction costs of copyright enforcement are the key and primary concern among the content industries as we strongly believe, based on our past painful and expensive experience, which the copyright system is unworkable and meaningless to the content

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industries if the transaction costs of litigation are prohibitively high.[1] It is imperative to understand that the legal rules do play a very important role in reducing the transaction costs in the voluntary exchange of property in a free market because

> "[t]he enforcement of property rights increases the stability predictability and credibility of property rights and also provides a stable framework for expectation and investment. Property right enforcement is an important means for reducing the transaction costs."[2]

Transaction costs of copyright enforcement are therefore must be a main consideration for any policy design for digital copyright law. High transaction costs of enforcement simply render the legislative rule unenforceable.

The 'Annual Survey on Public Awareness of Protection of Intellectual Property Rights conducted by the Intellectual Property Department of Hong Kong government in 2004, 2005 and 2008 respectively indicate the worrying upward trend of the percentage of the people sharing files with others from 3.5%[3] to 6.8%[4] and to 9.4%[5] in 2004, 2005 and 2008 respectively. The number of anti-copyright people has increased three times in 2008 as compared to 2004. It indicates that the civil action taken by both film and recording industries between 2005 and 2006 does not stop the online infringers from file sharing because they are well aware that copyright owners can only afford to sue a small fraction of file sharers and therefore the probability of being caught is very small.

However, it is interesting to note that, following the arrest of *Chan Nai Ming* for illegal distribution of three US movies (Daredevil, Miss Congeniality and Red Planet) on internet through Bit Torrent technology on 12 January 2005 and his subsequent conviction of an attempt online distribution offence on 25 October 2005,[6] the percentage of people who visited unauthorised websites for downloading infringing copies of copyright works dropped from 10% in 2004[7] down to 1.7% in 2005.[8] However, the

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[1] IFPI's letter to CEDB (Division 3) on the "Preliminary Proposals on the Strengthening of Copyright Protection in the Digital Environment in Hong Kong dated 27 August 2008.

[2] Barrère, Christian, 'Judicial System and Property Rights' in Colombatto, Enrico (ed), *The Economics of Property Right* (Edward Elgar, Cheltenham 2004) 129.

[3] Annual Survey on Public Awareness of Protection of Intellectual Property Rights – 2004 on page 3. Available at <http://www.ipd.gov.hk/eng/promotion_edu/annual_survey/ipr_biz_summary_2004.pdf> [Accessed June 09].

[4] Annual Survey on Public Awareness of Protection of Intellectual Property Rights – 2005 on page 3.. Available at <http://www.ipd.gov.hk/eng/promotion_edu/annual_survey/ipr_summary_2006.pdf> .

[5] Annual Survey on Public Awareness of Protection of Intellectual Property Rights – 2008 on page 3 . Available at <http://www.ipd.gov.hk/eng/promotion_edu/annual_survey/ipr_summary_2008.pdf>

[6] *HKSAR v Chan Nai Ming* TMCC 1268/2005; date of Judgment: 25 October 2005.

[7] See footnote 3 above.

[8] See footnote 4 above.

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percentage of visiting the unauthorised website increased to 17.0% in 2008,[9] a 10-fold increase as compared to 2005. It appears that while online infringer perceived file sharing was a civil matter, they considered downloading of a whole movie from a particular website would commit an offence. The potential risk of being stigmatised as a criminal may serve as an overall effective deterrence to the online infringers in 2005. However, once they came to realise from the judgment of *Chan Nai Ming* that the online distribution offence does not cover download situations, not only have they re-visited the download sites, they influence more people to do so.

The fact of the matter is that there is no efficient and effective copyright protection regime in place when it comes to the digital environment and on-line piracy has now become a norm in our community as the content industries simply cannot afford to sue the online infringers.

Any suggestion that **Hong Kong's digital copyright law** as it now stands **is efficient and effective against on-line infringement** and that there is no need to update the copyright law in combating against on-line piracy simply ***flies in the face of everything we know about rampant and blatant online piracy situation here in Hong Kong***. This is the result of high transaction costs of copyright infringement.

(2) The Role of OSPs

The OSPs have been making money as a result of the subscribers using the bandwidth for online copyright infringement The harmful effect of online piracy (Coase's negative externality) imposes losses to copyright-based industries but OSPs have managed to externalise the losses to the copyright-based industries under the present copyright protection regime in the same way that pollution by a chemical factory does to its neighborhood. The bottom line is that who should pay for the cleaning up. We suggest that OSPs should internalize the costs of the negative externality (that is done to the content industries) or harmful effects of online piracy.

In short, **the cost structure of the externality-creating OSPs does not reflect the social costs of such harmful effect of online piracy on copyright-based industries.**[10]

The question is how to solve the conflict in this kind of harmful effect of online piracy or negative externality as a result of the way OSPs operate.

[9] See footnote 5above.

[10] Veljanovski VG , *Economic Principles of Law* (Cambridge University Press, Cambridge 2007) 39: 'It is why an externality is sometimes referred to as a divergence between private costs (which influence individual actions) and social costs (which determines economic efficiency).' See also footnote 1 above.

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First and foremost, we must spell out clearly the meaning of authorization in the networked environment under which OSPs may be found contributorily or vicariously liable for copyright infringement. This provides an incentive for OSPs to follow whatever the safe harbour provisions as may be imposed on them and in particular the follow up actions such as the issuing of take-down notice or notice to notice. There must have actions such as three strike mechanism[11], now widely adopted as effective graduated response, in place in order to make the take-down notice or notice to notice mechanism work for content industries if the infringers ignore the warning issued by OSPs on behalf of copyright owners. However, under no circumstances shall the costs incurred by the OSPs be borne by the content industries.

As there are millions of online infringers even if OSPs were obligated, by statute or voluntary agreement, to assist copyright-based industries to fight against online piracy; the key issue is which party should bear the transaction costs[12] of copyright enforcement

As online infringers are ultimately liable for their activities because they, not OSPs or the content industries, control their own behaviour, it has been suggested that subscribers/infringers should bear the transaction costs of copyright enforcement[13] because they are expected to 'avoid the costly enforcement action most cheaply'.[14] A U.K. Court, in *Stove v Wise,* also expressed the view that the principle of Least Cost Avoider be applied to solve the social problem of negative externality.[15] Perhaps, the

[11] Taiwan has passed the law on three strike mechanism today (21 April 2009).

[12] R Coase, 'The Problem of Social Costs' (1960) *Journal of Law and Economics* 3, 1-44. Nobel Laureate in Economic Sciences of 1991. Applying the Coase theorem to online piracy situation, the price of service provided by OSPs to their subscribers producing the negative externality as a result of online piracy will not include the losses of copyright-based industries, much less the marginal social cost, and such losses are borne by the copyright-based industries other than OSPs and online infringers.

[13] Charn Wing Wan, 'the Reform of Copyright Protection in the Networked Environment: A Hong Kong Perspective' (November 2008) 11 (5-6) *Journal of World Intellectual Property* 498-526, at 509. Also Professor Justin Hughes suggested that '*We should think of copyright laws in relation to other laws — for example tort law. We should think about it as the 'least cost avoider' — impose the cost on the most efficient party.*'-See Fordham International Intellectual Property Conference, Copyright Panel: Infringement & Remedies held on 15 April 2009 at the Cambridge University. Available at <http://iplj.net/blog/archives/468>.

[14] H Demsetz 'When Does the Rule of Liability Matter?' (1972) 1(1) *Journal of Legal Studies* 13-18 at 27: 'It would be possible for the legal system to improve the allocation of resources by placing liability on that party who in the usual situation could be expected to avoid the costly interaction most cheaply'. See also VG Veljanovski (n 10) 184; Shavell, S *Foundations of Economic Analysis of Law* (Harvard University Press, Cambridge MA 2004) para. 2.11 (The least-cost avoider) 189 and Mercuro, N and Medema, Steven G, *Economics and the Law: From Posner to Post-Modernism and Beyond* (2nd edn Princeton University Press, Princeton NJ 2006) 129.

[15] *Stove v Wise* [1996] 2 ALL ER 801, at 809: the court considered that 'in economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call 'externalities') the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by

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government may enact a law requiring every online service agreement to stipulate that the infringer shall bear the costs of the graduated response mechanisms based on the principle of the least cost avoider.

OSPs should categorically stipulate the liabilities of their subscribers for copyright infringement in their internet service contract and hold subscribers liable for and fully indemnify the OSPs against all the cost of enforcement which the OSPs might incur (one may allocate a fixed cost, for example, HK$ 150 for a cease and desist letter, HK $ 500 for removal of infringing materials from the servers of OSPs or disconnecting the internet services to repeat infringers etc.).

(3) The copyright exemption for temporary reproduction of copyright works such as hyperlink

The E.C. Electronic Commerce Directive 2000[16] excludes the liabilities of the 'Intermediaries' (as defined in recital 17), in respect of the activities of 'mere conduit' 'caching' and 'hosting' of infringing copies. By enacting the Electronic Commerce (E.C. Directive) Regulations 2002,[17] the United Kingdom has implemented the Electronic Directive for the exemption of liabilities of an OSP[18] due to the mere conduit, caching and hosting.[19] These activities must be of a technical, automatic and passive nature; an OSP must have neither knowledge of nor control over the transmission and/or storage of the infringing copies in its electronic network.[20]

Furthermore, Article 8.3 of the E.C. Directive 2001/29/EC (Information Society Directive)[21] stipulates that 'Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right'. The United Kingdom has also provided injunctive relief against the OSPs with special reference to the Electronic

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negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities' as quoted in VG Veljanovski (n 10) 39.

[16] Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) [2000] OJ L178/1.

[17] The UK implemented the EC Electronic Commerce Directive by the Electronic Commerce (EC Directive) regulations 2002 (SI 2002/2013) on 21 August 2002.

[18] Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) [2000] OJ L178/1.Recital 17.

[19] The UK Electronic Commerce (EC Directive) Regulations 2002 (n 17). Article 17 (mere conduit); Article 18 (caching) and Article 19 (hosting) refer. The defence is limited and the service provider would be liable if they have actual knowledge of any infringement by a third party.

[20] Nothing in Regulations 17, 18 and 19 of Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) shall affect the rights of any party to apply to a court for relief to prevent or stop infringement of his rights. This avoids the complication raised in *RIAA v Verizon* case in US.

[21] Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

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Commerce (E.C. Directive) Regulations 2002 (SI 2002/2013).[22] Copyright owners are entitled to an injunctive relief against the OSPs which may not themselves be infringing the owners' rights as a result of the non-compliance of written notice given by the copyright owners in respect of the alleged copyright infringement, which the copyright owners are not be entitled to do under common law principles.

This is in line with the approach taken by DMCA which exempts an ISP's liability if it acts as a conduit for transitory digital network communications;[23] provides system caching[24]and user information storage facilities.[25] DMCA provides that in order for the ISP to take advantage of the safe harbour provisions, it must comply with the provision of notice and takedown[26] in good faith and remove, block or disable access to any infringing copies hosted by the ISP.[27] These procedures absolve an ISP from responsibility for the conduct of its customers as long as all other conditions for exemption from secondary liability are met.[28]

By applying this analysis to a search engine hyperlinking to illegal download sites, if it runs a general purpose search engine (similar to Google), the user will leave the original website and be directed to other websites, then, in the absence of the knowledge of or collaboration with the act of the subscribers, that original site would not be held liable for copyright infringement. However, if it runs a special search engine such as a music delivery service for locating and/or indexing, or for providing the deep linking to the infringing files on the Internet and to frames the web page with its own logo, name, advertising link and so forth, any facilitation of the downloading of copyrighted materials from that website by its subscribers should amount to authorisation of copyright infringement as long as it has some degree of control over the infringing act and it knew or had reason to believe that the files being transmitted were infringing.[29]

In this connection, we wish to point out that the US Supreme Court in the *Grokster* case[30] expressly adopted the active inducement test[31] in the copyright infringement

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[22] The United Kingdom Copyright and Related Rights Regulations 2003 (SI2003/2498) came into force on 31 October 2003 in order to implement the EC Directive 2001/29/EC. S 97A of UK Copyright, Designs and Patents Act 1988 provides injunctive relief against the ISPs with special reference to the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013). See also Article 11 of the EC Enforcement of Intellectual Property Rights Directive 2004 (2004/48/EC), which provides for the injunctive relief against the Internet intermediaries.

[23] DMCA s 512(a)(1)-(5).

[24] Ibid. s 512(b)(1)-(2).

[25] Ibid. s 512(c)(1).

[26] Ibid. s 512(g).

[27] Ibid. s 512(c).

[28] Garnett Garnett, Kelvin et al (eds), *Copinger and Skone James on Copyright* 1 (15th edn Sweet & Maxwell, London 2005).379.

[29] Cornish, W and Llewelyn, D, *Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights* (6th edn Thomson Sweet & Maxwell, London 2007) para 20-66 at p 849.

[30] *Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd* 125 S Ct 2764 (USS C 2005) certiorari to the United

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case:

> "One, who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement of third party .....the inducement theory of course requires evidence of actual infringement by recipients of the device, the software in this case."[32]

The plaintiff must prove the intention of inducement and the actual copyright infringement. The practical effect of this case is that the P2P provider will be encouraged to create the online technological control to protect copyright works against unauthorised copying while ensuring access to the users. This may help P2P providers and copyright owners to develop a universally accepted digital rights management system. This will then be incorporated into the P2P software system, which will protect copyright works without restricting users' access to materials using P2P software system. Perhaps Hong Kong should consider introducing the inducement theory into the concept of the authorization in our digital copyright law.

(4) The Criminal Sanctions

The key problem in the digital environment is **the rampant online piracy** has been committed by private individuals for personal use, naturally but not logically, one may assume that such an activity is far below the commercial scale and therefore does not warrant any criminal sanction as far as an individual online infringer is concerned. However, objectively and certainly, if we add the total sums of all the file-sharing activities (millions of infringing copies of copyright works are transferred among hundreds of thousands of P2P users every second at practically zero cost), **one may easily conclude that the total losses to the content industries are well beyond any**

States Court of Appeals for the 9th Cir, 545 US, 125 S Ct 2764, 162 LEd 2d 781, 73 USL W 4675, 75 USP Q 2d 1001, 33 *Media Law Report* 1865 (2005).

[31] Ibid. the Supreme Court states that 'who "not only expected but invoked [infringing use] by advertisement" was liable for infringement on principles recognized in every part of the law'; *Kalem Co* v *Harper Bros*, 222 US, at 62.63 (copyright infringement). See also *Henry* v *A B Dick Co*, 224 US, at 48.49 (contributory liability for patent infringement may be found where a good's 'most conspicuous use is one which will cooperate in an infringement when sale to such user is invoked by advertisement of the infringing use'); *Thomson-Houston Electric Co* v *Kelsey Electric R Specialty Co*, 75 F 1005, 1007.1008 (CA2 1896) (relying on advertisements and displays to find defendant's 'willingness .... to aid other persons in any attempts which they may be disposed to make towards [patent] infringement'); *Rumord Chemical Works* v *Hecker*, 20 F Cas 1342, 1346 (No.12,133) (CC NJ 1876) (demonstrations of infringing activity along with 'avowals of the [infringing] purpose and use for which it was made' supported liability for patent infringement).

[32] *Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd* 125 S Ct 2764 (USS C 2005) certiorari to the United States Court of Appeals for the 9th Cir, 545 US, 125 S Ct 2764, 162 LEd 2d 781, 73 USL W 4675, 75 USP Q 2d 1001, 33 *Media Law Report* 1865 (2005).

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known infringing activity of a commercial scale. IT IS THE INFRINGING ACTIVITY which is objectionable.

We believe that both criminal and civil sanctions be targeted at both the source (the supply side) and the users (the demand side) in order to raise the price against those who carry costless online infringement at the expense of the content industries. Hong Kong has amended the copyright law to make it an offence for a person or a business entity to distribute copies of literary works (such as books, magazines, journals and newspapers) in a workplace if the aggregate value of such copies exceeds **HK$ 6,000.00** in a given period.[33] We suggest that **the downloaders will attract criminal liability if the value of the downloaded copyrighted materials exceeds a certain amount, say HK$ 6,000.00.**

The aim of the legislative rules is to change the behavior of the file sharers. Considering the downloader as a purchaser of a physical pirated copy of a work is a non-starter.[34] At least, the purchaser of the infringing copy must pay for or incur costs in getting it and he himself does not reproduce the copy and so do the suppliers of the infringing copies in physical format whereas it is practically costless for an online infringer to get thousands of infringing copies on-line from other uploaders in a matter of minutes by downloading, reproducing and storing it in his server.

(5) The Statutory Damages

The statutory damage provisions would certainly reduce the transaction costs of proving damages in court especially in the uploading situations. It further deters hardliner online infringers as they carry out online infringement irrespective of what the law says because they believe that the probability of being caught and punished is very low. If the damages awarded are of compensatory in nature, they are better off by a factor of the probability of being caught and punished (if he is caught, he only needs to compensate the copyright owners for their actual losses, he is, therefore, better off by a factor of 10,000 if the probability of being caught is 10,000-see Hand's formula below).

It is however not difficult to estimate the risk of being caught in 2005 as IFPI had only managed to obtain the identity of 49 target subscribers from the OSPs during the two

[33] Section 119 B of the Copyright (Amendment) Ordinance 2007. The amended section was duly passed as the Copyright (amendment) Ordinance 2009 on 18 November 2009. This section will not be in force until further appointment date to be made and section 118 (B) 4 (2) provides that the threshold value for criminal sanction is HK$6,000.00. See page A331 of the Gazette notice on Copyright (Amendment) Ordinance 2009 under Ord No. 15 of 2009 (issued on 26 November 2009). Available at http://www.legco.gov.hk/yr09-10/english/ord/ord015-09-e.pdf .

[34] Comparing the purchase of a physical pirated copy to online piracy as suggested in the Preliminary Proposals is difficult to comprehend.

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successive legal actions against the uploaders. According to the IFPI (HKG)'s survey [35] of Internet users done in 2005, 41.3% of the Internet users between the ages of 15 and 64 had in the past year done illegal file sharing on the Internet. This 41.3% translated into 1.1 to 1.3 million people. The odds of hardliners being caught and punished are 1 in 26,500 (i.e. 49 out of 1.3 million people), undoubtedly, hardliners consider the risk acceptable, let alone the odds are now virtually zero because of the prohibitively high transaction costs of copyright enforcement in the online environment.

We are somewhat perplexed and confused when reading the statement from the Report that "[h]owever, they failed to come up with solutions that could help overcome the difficulties we envisaged in specifying a range (or ranges) of statutory damages that could do justice over a wide spectrum of infringements."

We venture to suggest that if civil action is the only choice, the amount of damages to be paid by an illegal **downloader** would be estimated by Hand's formula: [36]

For illustration, supposing the social costs of downloading a song are HK$10.00[37] and the probability of being caught and punished is 1 in 26,500, then the optimal penalty or a fine for copyright infringement due the download will be HK$10.00 divided by 1 and then multiplied by 26,500 which is HK$ 265,000.00 per song.

However, we cannot assume that every song downloaded would cause the **actual** loss of a sale, so the people who downloaded the song would not **actually** buy the song and therefore the record company would not suffer any **actual** loss. This view fails to consider the spillover effect to other people obeying copyright law and the social costs are inevitably increased as one of the objectives of the sanction against the hardliner is to deter online infringing activity. Assuming we accept that argument, 'in a study completed in October, 2003, Wharton School economists found that on average one downloaded song would reduce purchases of 0.2 copies of that song, which is a small to moderate effect'.[38] If we take half of this figure, then the average damage payable would still be HK$265,000.00 times 0.1, or HKS26, 500.00 per downloaded song (not an uploaded song). This is the way that the instrumental economic approach would calculate damages.

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[35] The survey was conducted by Telephone Survey Research Laboratory, Hong Kong Institute of Asia-Pacific Studies of the Chinese University of Hong Kong during the month of September 2005. A total of 1005 Internet users aged 15-64 were successfully interviewed. <http://www.ifpihk.org/www_1/display.php?cnt_id=12&langsel=LANG_ID_EN>.

[36] Depoorter, Ben and Vanneste, Sven, 'Norms and Enforcement: the Case against Copyright Litigation' (2005) 84 *Oregon Law Review* 1127, 1136. See also Posner, Richard *Economic Analysis of Law* (7th edn. Aspen Publishers 2007) 167-171.

[37] It is extremely difficult to ascertain the exact social costs of downloading a song but as the price of a downloaded song is US$1.25, the figure is taken to represent the loss of revenue of one downloaded song.

[38] Moohr, Geraldine Szott, 'Defining Overcriminalization through Cost-Benefit Analysis: the Example of Criminal Copyright Laws' (2005) 54 *American University Law Review* 783. See fn 34 of that article.

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This is the result of the high transaction costs in enforcing copyright law by the society.

However, if we reduce the transaction costs such as the implementation of the three strikes law or other remedies alternative to Norwich Pharmacal discovery order, it will definitely increase the probability of being caught by a factor of 10 (i.e. content industries may be able to go after 490 on-line infringers at any given time, then the amount of statutory damages may now be down to HK$265.00 per song.

Increase the odds against on-line infringers will inevitably decrease the amount of damages payable by them. That is how one may estimate a range of statutory damages.

However, in Hong Kong, the damages are generally compensatory and the award is based on the actual loss caused by the defendant's behaviour. For downloading cases, the price per downloaded song is HKS$10.00 given that an average infringer would only buy one songs out of the ten songs he downloaded, then the damage awarded will be HK$10.00 X 0.1 = HK$1.00 per song. There is simply no justification for a copyright owner to take downloaders to court in Hong Kong based on the amount of the damages recoverable from the infringer. The only deterrence is the legal costs which range from HK$20,000.00 to HK$40,000.00 per case which is hardly ever covered half of the actual costs incurred by the copyright owner assuming the case settled at an early stage but the money goes to the lawyers, not to the copyright owners.

This formula applies to the downloading of a music file. The scenario will change dramatically in an uploading situation. The social costs will be exceptionally high. [39] It may translate into the losses of HK$300.00 per hour per day per an uploader.[40] Therefore, the tremendous amount of damages caused to the record industry justifies criminal sanction against uploaders. Other content industries may follow this example to calculate their losses due to uploading activities.

(6) The US DMCA Subpoena System

The US Court of Appeals for the District of Columbia held, in *RIAA v Verizon,*[41] that only materials hosted by an ISP can be subpoenaed under section 512(h) of the DMCA. It does not apply to P2P system, and the copyright owner must file a traditional 'John Doe' lawsuit to obtain the person's identity.

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[39] It only takes 1 minute to upload a song and four to six people can upload a song from a single server of an uploader. It means that 240 to 360 songs may be uploaded from a server in an hour. If 100,000 uploading hardliners operate the P2P system for an hour every day, 24,000,000 to 36,000,000 songs in one day or 900 million songs are uploaded in a month.

[40] Following footnote 15 above, we may assume that one uploader may be able to upload 300 songs in one hour per day. Each song values HK$10.00 and one downloaded song reduces the purchase of 0.1 copy per that song.

[41] *RIAA v Verizon Internet Service Inc*, 351 F 3d 1229 (DC Cir 2003).

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This means that for the P2P cases, there is no procedural difference in obtaining the list of infringers through the US common law subpoena system (not DMCA one) and through the Norwich Pharmacal discovery order in Hong Kong as both processes are expensive, time-consuming and subject to the scrutiny of the court. However, if an OSP hosts the infringing materials, the safe harbour provisions would exempt its liability if it discloses the identity of the infringers. The DMCA subpoena will discourage infringers from storing the infringing materials in the physical facilities of the OSPs, and anyway, will make them contributorily liable for copyright infringement upon receipt of copyright notice from the copyright owners.

In order to reduce the transaction costs, we invite the Panel Committee members to consider the introduction of **DMCA subpoena system** which is still subject to the court's scrutiny for those infringing materials hosted in the servers of OSPs. If there is any complaint of abuse or misuse of the process, the subscribers will still have the protection and remedies under the Personal Data (Privacy) Protection Ordinance (Cap 486). If the infringers choose to use the P2P system, the copyright owners will have to seek a Norwich Pharmacal order against the OSPs (not the DMCA Subpoena) for the identity of the infringers but the cost will be high unless the procedure can be streamlined to a standard protocol and the process will still be subject to the scrutiny of the court. We suggest that the **DMCA subpoena system** will signal to the infringers the high risk of hosting the infringing materials in the servers of OSPs that will substantially reduce, if not eliminate, this kind of online infringement. The law enforcement agents and the copyright owners may then focus their resources on the p2p type of file sharing of infringing materials.

In the circumstances, we suggest that the procedures obtaining the discovery order for list of infringing subscribers from OSPs should be streamlined in order to reduce the transaction costs of copyright enforcement so that we may be able to increase the odds against hardliners.

(7) Graduated Response Systems

Because of the prohibitive high transaction costs of copyright enforcement, civil action alone against the online infringers will not be efficient and effective. The government should provide other cost-effective alternative remedies to litigation. The copyright-based industries have now called for the implementation of the graduated response mechanisms or follow-up measures such as the disconnection of Internet services to repeat infringers (or better known as three strikes law), the use of filtering technology and so on, in order to make the warning notice system work for them. **The graduated response mechanisms are considered to provide a least cost and practical solution, alternative to litigation, to the market failure due to rampant online piracy.**

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Given the prohibitively high costs of enforcing copyright in the networked environment, this solution makes sense as copyright owners cannot afford to incur substantial litigation costs to enforce their rights in the networked environment (this leads to market failure) and they are not interested to know the identity of online infringers. What they are interested in is to get online piracy under control.[42] The graduated response mechanisms will provide the alternative cost effective remedies to litigation against online infringers and will force the P2P software developers to create new technology which will prevent the users from sharing infringing materials over the Internet. It requires coordination among content industries, technology developers and OSPs.

The US copyright law allows the termination of Internet services to repeat infringers.[43] South Korea[44] and Taiwan[45] passed the three strikes mechanism on 3 March and 21 April 2009 respectively.

The controversial French HADPOPI legislation adopted by the French National Assembly on 12 May 2009 and passed by the French Senate on 13 May was struck down by the French Constitutional Council of France on 10 June insofar as those related to the three strikes mechanism because, inter alia, it violates the principle of presumption of innocence because it is only a judge not the administrative body who can impose sanction.[46] On 8 July, the French Senate adopted a revised version or HADPOPI2 by requiring the Administrative body to report all the repeated infringers to a judge who might impose a fine up to 300,000 Euros or a two year jail sentence or disconnection of

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[42] Perlmutter, Shira Executive Vice President, Global Legal Policy of IFPI opined that 'Privacy concerns are not a problem. Enforces existing terms of service. Avoids the need for individual lawsuits. Gives users opportunity to stop violating the law without consequences. Reports show a large percent of users would stop after a warning — almost all would stop after two. The ability to challenge notices is being built in some places.....There are a lot of issues, but what we are trying to do is find a practical and pragmatic solution. Much better if it doesn't involve litigation.' See Fordham International Intellectual Property Conference, Copyright Panel: Infringement & Remedies held on 15 April 2009 at the Cambridge University. Available at <http://iplj.net/blog/archives/468> .

[43] DMCA of US s 512(i)(1)(A): '...has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers'.

[44] Soulxtc 'South Korea to Become 1st Country with "Three-Strikes" for File-Sharers?' (29 March 2009) *Zeropaid.com news*. Available at <http://www.zeropaid.com/news/85895/south-korea-to-become-1st-country-with-three-strikes-for-file-sharers/ >

[45] --'Taiwan Legislature passes "3 Strikes You're Out" online IPR protection amendments' (21 April 2009) *taiwannews.com*. Available at <http://www.etaiwannews.com/etn/news_content.php?id=926069&lang=eng_news&cate_img=logo_taiwan&cate_rss=TAIWAN_eng&pg=9>

[46] Angela Gunn Constitutional Council strikes down key portion of HADOP *betanews.com* (published on 10 June 2009). Available at < http://www.betanews.com/article/Constitutional-Council-strikes-down-key-portion-of-HADOPI-law/1244657497>.

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Internet service to the repeated infringers.[47] However, the passing of the HADPOPI2 has been delayed[48] until 22 September 2009 as a result of the low turnout of parliamentary members in the French National Assembly on 21 July, the date on which the Bill were to be passed. And on 22 October 2009, the French Constitutional Council approved or HADPOPI2.[49]

Although the final report of the Digital Britain Report prepared by the Department for Business and Innovation and Skill on 16 June 2009 [50] proposed policy initiatives fell short of the graduated response mechanisms including three strikes law;[51] nonetheless on 25 August 2009, the U.K. government issued an amendment to the June Digital Britain Report considering to add suspension of accounts to repeat infringers as a possible sanction and to suggest that essentially individual parties will have to bear his own costs except the costs of sending notification, 'which will be split 50:50 between ISPs and right holders.' On 20 November 2009, the Digital Economic Bill was introduced to the parliament embodying the amendment into the bill.

(8) Privacy Freedom of Expression and Copyright

The debate will not be completed without setting out the relation between freedom of expression and copyright as one may always argue that all these measures might limit the freedom of expression in the cyber world. We hereby attached a copy of our letter to CEDB (Division 3) dated 14 November 2008 clarifying that the freedom of expression is not the right to take someone else's copyrighted expression and copy it.

As regards the protection of privacy in the cyber world, in addition to the views expressed in our letter of 14 November 2008, we may want to know that a US court held in *US v Kennedy* (2000), a P2P case,[52] that 'there is no legitimate expectation of privacy in information he voluntarily turns over to the third parties (citing *Katz v US* (1967))'.[53]

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[47] AFP – 8 July 2009. Also By Jacqui Cheng, French '3 strikes' law returns, now with judicial oversight! *Ars Techica,com news* (July 10, 2009), available at <http://arstechnica.com/tech-policy/news/2009/07/its-baack-french-3-strikes-law-gets-another-go-from-senate.ars>.

[48] Patrick Smith Hadopi Law Delayed Again As French MPs Stay Away Paid Content UK .com (21 July 2009). Avialable at < http://paidcontent.co.uk/article/419-hadopi-law-delayed-again-as-french-mps-stay-away/> .

[49] Sam Gustin, 'World's toughest anti-piracy law: French high court upholds three-strikes policy' *dailyfinance.com* (23 Oct. 2009). Available at http://www.dailyfinance.com/2009/10/23/worlds-toughest-anti-piracy-law-french-high-court-upholds-thre/.

[50] Final report of the Digital Britain Report issued on 16 June 2009, available at <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf> .

[51] Ibid. para. 46.

[52] *US v Kennedy,* 81 F Supp 2d at 1110.

[53] 389 US 347, 351 (1967).

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The other court also held in *Verizon*[54] that plaintiffs are entitled to discovery of the identity of the defendants in light of defendants' minimal expectation of privacy.[55] The same principle applies to the copyright infringement cases such as *Electra v Doe* (2004).[56] In short, privacy is not an absolute right either in the US or in Hong Kong.

(9) A Credible Copyright System and Creative Industries

We believe that the new digital law must provide the legal framework for the content industries to experiment with business paradigms in Hong Kong's networked environment in accordance with the economic principles of transaction costs but it requires a credible efficient enforcement mechanism to tell Hong Kong people what is socially unacceptable. And the efficiency of such an enforcement mechanism is a function of transaction costs.

We believe that any policy proposal must take transaction costs of enforcing copyright in the unique online environment into consideration.

We must partner with OSPs by providing safe harbor provisions to them as an incentive if there is to be any reasonable fighting chance against online infringement.

We must have efficient and effective graduated response mechanisms to deal with millions of online infringers as opposed to hundreds of traders of physical infringing goods and that the costs incurred should not and must not be borne by the content industries

We must have US DMCA subpoena procedures against OSPS for hosting infringing copies in their servers for their subscribers and the streamlining the procedures of Norwich Pharmacal against OSPs for obtaining the list of the infringing subscribers.

We must have statutory damages in order to reduce the transaction cost of proving damages in court and of deterring further online infringing activities.

We must have criminal sanction against uploaders and those downloaders who have download of more than a threshold amount of infringing copies in any given week. We

We must make the online infringers to pay for the costs of the cleaning up as a result of their infringing activities.

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[54] *Recording Indus. Ass'n of America, Inc v Verizon Internet Services, Inc* 351 F 3d 1229.
[55] See also the Opinion of Judge Chin on *Sony Music v Does* 9-40 defendants No 04 CIV 473(DC) on 26 July 2004. <http://www.citizen.org/documents/JudgeChinOpinion.pdf>.
[56] F Supp 2d, 2004 WL 2095581 (SDNY), Fed Sec L Rep pp 28, 873.

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We must remake our digital copyright law so that it may once again be respected and credible. Any legislative solution must meet the requirements of international norms and standards. **It would be a terrible mistake to put our content industries at risk for no good reason. There is no reason Hong Kong copyright law cannot be adapted to meet a new set, however unfamiliar.**

Yours faithfully,
For and on behalf of
International Federation of the Phonographic Industry
(Hong Kong Group) Limited

Ricky Fung
CEO

c.c. Committee - IFPI (Hong Kong Group) Limited
IFPI

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HONG KONG GROUP

14th November, 2008

Ms. Bonnie Yau
Principal Assistant Secretary (CI)3
Commerce, Industry and Tourism Branch,
Commerce and Economic Development Bureau
Hong Kong SAR Government.

By Fax: 2869 4420 and Email

Dear Ms Yau,

Re: Freedom of Expression in the context of online piracy

As regards OSPs liability, it is imperative to appreciate that the solution of the leading jurisdictions is to provide safe harbour provisions for exempting the liability of an OSP if it follows the statutory requirements of the relevant safe harbour provisions such as removing or disabling access to the infringing materials upon notice, as long as it does not receive any direct financial benefit from the online infringing activities. The internet technology has created a great demand for high quality copyrighted materials such as sound/visual recordings. OSPs do have a key role to play to minimize the harmful effect of online piracy causes to the content industries.

Hong Kong OSPs are not alone in facing the challenge of online piracy. Their counterparts in other jurisdictions have dealt with the similar issues for years. It is about time for us to learn from their experience including their practice and rules (statutory or otherwise) with a view to seeking ways to reduce the significant impact of the harmful effect of online piracy on both content industries and OSPs in Hong Kong.

1. Privacy v Piracy

Regarding the alleged privacy issue, the courts in the two IFPI Hong Kong Group cases against the uploaders clearly spell out that the Personal Data (Privacy) Ordinance (Cap 486) will not assist the online infringer to hide behind the cloak of anonymity. As professor Posner, E (in his book *Law and Social Norms* (2000) at page 221) puts it, **"[t]o say that a person values privacy is the same thing as saying that he fears the enforcement of social norms**". We do not oppose any safeguard measures for protecting the privacy of subscribers given that case law has ruled that the copyright infringers

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cannot hide behind Internet technology. In any event, if there is any complaint of abuse or misuse of the discovery process, the subscribers would still have protection and remedies under the Personal Data (Privacy) Ordinance.

2. Freedom of Expression and Copyright

The freedom of expression argument bewilders the content industries in the context of online infringement. The short answer is that the freedom of expression is not the right to take someone else's copyrighted expression and copy it.

If I may be allowed to borrow the parallel arguments from a US case, *Harper & Row, Publishers, Inc v Nation Enterprises* (471 U. S. 539, 558 (1985)), article 140 of the Hong Kong Basic Law (copyright clause) is considered as an engine of free expression. That copyright clause and the freedom of expression (article 39 of the Hong Kong Basic Law) are not in conflict with each other. The fact that the copyright clause and the freedom of expression are enshrined in the Basic Law indicates that, according to the view of the drafters of the Basic Law, the copyright is compatible with the principle of freedom of expression. Indeed the copyright's purpose is to promote the creation and publication of free expression (see *Eldred v Ashcroft* 2003, a US Supreme Court case).

At page 560 of the judgment of *Harper & Row*, the Supreme Court went on to say that Copyright law contains built-in First Amendment accommodations. "First, 17 U.S.C. § 102(b), which makes only expression, not ideas, eligible for copyright protection, strikes a definitional balance between the First Amendment and copyright law by permitting free communication of facts while still protecting an author's expression." Second, the fair use defence allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.

In short, it is clear that the U.S. Supreme Court has held that using another person's copyrighted expression can be prevented by copyright law and does not violate the First Amendment.

In *Ashdown v Telegraph Group Ltd*, a U.K. fair dealing defence case based on freedom of expression argument, the U. K. Court of Appeal held on 18 July 2001 ([2001] EWCA Civ 1142) that "rare circumstances could arise where the right of freedom of expression [guaranteed by art 10 of the European Convention on Human Rights] came into conflict with the protection afforded by the Copyright, Designs and Patents Act 1988 ..... if a newspaper considered it necessary to copy the exact words created by another, it should in principle indemnify the author for any loss caused to him or account to him for any profit made as a result of copying his work".

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In short, **freedom of expression should not normally carry with it the right to make free use of another's work-** see also *Hyde Park Residence Ltd v Yelland* [2000] EMLR 363.

3. Basic Law Freedom of Expression and Copyright

Furthermore, Article 39 of the Basic Law clearly provides that the freedom of expression may be restricted by law. Also **article 16 (a)** under **section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383)** further stipulates that the exercise of the right of freedom of expression "provided for in this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of **the rights** or reputations of others." Freedom of expression is not an absolute right as one may have perceived wrongly.

4. Human Rights Include Copyright

Perhaps OSPs may wish to know that Article 27 (2) of the **Universal Declaration of Human Rights** provides that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Therefore, not only has the right of freedom of expression been considered as human rights, but also the right of authorship.

To put the matter beyond doubt, article 15 (1) of the United Nations **International Covenant on Economic, Social and Cultural Rights** also provides that

> "The States Parties to the present covenant recognize the right of everyone:
>
> 1. To take part in cultural life;
> 2. To enjoy the benefits of scientific progress and its applications';
> 3. To benefit from the **protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**"

5. Summary

I may sum up the issues by quoting Justin Hughes's work ("The Philosophy of Intellectual Property" *Georgetown Law Journal* 77, 287 (1988)):

> "Freedom of expression is meaningless without assurances that the expression will remain unadulterated. Free speech requires that speech be guaranteed some integrity. It follows that if intellectual property is expression, it merits the same

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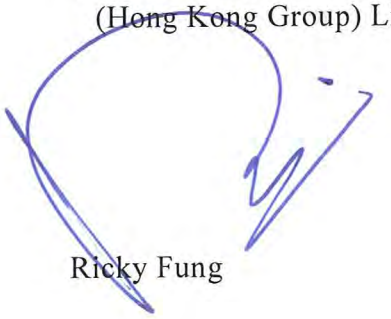
guarantee (at p359)..... Copyright protects written and artistic expressions that generally are protected by the first amendment. The writer or the artist is the speaker (at p360)."

In summary, we invite the OSPs to consider that, in a networked environment, we are not talking about the balance between the interest of copyright owners and of access to copyrighted materials **but the balance between OSPs liability and the avoiding of a meltdown in online copyright protection.**

I sincerely hope that my writing will narrow down the issues of concern among the stakeholders.

For and on behalf of
The International Federation of the Phonographic Industry
(Hong Kong Group) Limited



Ricky Fung

c.c. IFPI (HKG) – Committee

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