

11 January 2010

The Honourable Vincent FANG Kang, SBS, JP
Chairman, Panel on Commerce and Industry
Hong Kong Special Administrative Region of the People's Republic of China
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

BY EMAIL (mleung@legco.gov.hk) AND FAX (+852-2978-7569)

Dear Hon. Chairman Fang,

**Submission on "Proposals for Strengthening Copyright
Protection in the Digital Environment"**

On behalf of Time Warner Inc. (TW), whose regional headquarters is located in Hong Kong, and where we employ approximately 700 people, we are pleased to provide comments to the Legislative Council's Panel on Commerce and Industry's review of the Administration's "Proposals for Strengthening Copyright Protection in the Digital Environment."

TW, a global leader in media and entertainment with businesses in television networks, filmed entertainment and publishing, uses its brands to create, package and deliver high-quality content worldwide through authorized arrangements via virtually every form of media distribution currently devised.

Whether measured by quality, popularity or financial results, our divisions are at the top of their categories. Warner Bros. Entertainment, Turner Broadcasting System, Home Box Office (HBO) and Time Inc. maintain unrivaled reputations for creativity and excellence as they keep people informed, entertained and connected. We are industry leaders in delivering the most entertaining and informative content through various traditional and new media. Thus protection of copyright and online content in the digital environment is of major importance to our company.

TW has previously provided comments on this subject in response to the Government's preliminary proposals and we welcome the opportunity to comment further. We congratulate the LegCo Panel on the extensive consultation that is being conducted on this important issue. We will address the issues in the order presented in the proposal.

- (a) Recognizing copyright owners' right to communicate their works through any mode of electronic transmission, with criminal sanctions against infringement.**

TW wholeheartedly agrees with the proposition that the copyright law should be forward-looking and encompass future developments in digital delivery, and thus not be limited by definitions based on current technology. We are pleased to see the enlargement of criminal sanctions to cover all commercial-scale activities and support the Administration's proposal in 8 (a) and (b). However, there are some points that we feel require further consideration.

The first is the use of the word "initiate." While we understand that the intent is to carve out browsers and casual downloaders who do not have an illegal intent, this limitation appears to already be served by the conditions set forth in 8 (a) and (b) -- i.e., that such activities be in business or prejudicially affect copyright owners. Further limiting the criminal sanction to only unauthorized "initiators" could potentially exclude commercial infringers of the right of communication, provided that they are not the initiators of the communication. It would appear to be consistent with the principles set forth in 8(a) and (b) that any infringements that cause prejudice to the copyright carrier, as well as commercial infringements, should be caught by the criminal sanction. We further notice that in the context of P2P technology where files are shared automatically between peer networked computers, the concept of establishing who the initiator is for a particular file transfer, may potentially be very difficult.

Second is the use of the expression 'in the course of a business conducted for profit'. This language will need to be carefully considered when fine-tuning the drafting of the legislation in order to avoid creating a loop-hole. For example, if a business structures it so that it does not return profits to its stakeholders and yet is clearly a commercial enterprise; would it then escape the net of the legislation as a non-profit organization? We suggest that, amongst other sources, guidance should be drawn from the Australian legislation in this regard, where the language is broader, referring to the intention of trading or obtaining a commercial advantage or profit. We are not attempting to draft the legislation here, but providing a placeholder for future efforts.

Third, relating to 'bringing in appropriate exceptions to facilitate the reasonable use of copyright works', we note that reference is made to a possible exception for education and library sectors. It is not apparent to us why infringing conduct by such entities should be permitted further exemption beyond the current fair dealing provisions already enshrined in legislation. In any event, if any further exemptions are to be contemplated over time, any harmful impact imposed by the proposed sanctions should be credibly demonstrated and the impact of proposed exceptions weighed against the benefits afforded by the sanction. We are confident that the introduction of the criminal sanction will support the increased availability of legitimate content and services, and so will not necessitate the introduction of additional exceptions and limitations.

(b) Introducing a statutory limitation of liability for OSPs in dealing with online piracy

TW agrees with this proposal for a statutory regime which gives OSPs the assurance that compliance with certain conditions would qualify them for limitations of liability for copyright infringement. We would like to sound a note of caution that a wholesale limitation of liability that prevents rights-holders from seeking all judicial or quasi-

judicial remedies whatsoever is unnecessary and counter-productive. In order to give practical remedies to rights-holders, any limitation extended to OSPs should only apply to liability for monetary damages in certain circumstances, and not operate to exclude, for example, the ability of rights-holders to obtain injunctive relief against ongoing infringing activity. Such an approach strikes an appropriate balance by protecting OSPs against monetary liability in certain circumstances, but ensures that rights-holders can still take steps to stem ongoing infringement.

Furthermore, we note that the "Notice and Notice" regime continues to be one of the proposed measures. We would like to reiterate that this type of regime is out of step with international norms and practices and is insufficient in addressing widespread piracy on a range of services such as those that host information linking to infringing content, caching services or those that operate centralized servers to host content, such as user generated content (UGC). Under such a regime, by the time the service platform has notified the alleged infringer, and awaited a response (which may not be forthcoming at all if the infringement is deliberate), widespread economic damage to the rights-holder has already taken place given the ubiquitous and instantaneous nature of the Internet. We support an expedited "Notice and Takedown" regime as it is far more effective in protecting copyright owners, particularly with respect to OSP-hosted services such as UGC sites. Under such a regime the content owner issues a notice to the site operator OSP requiring immediate takedown of the content. We would support the inclusion of safeguards to ensure that notices are properly substantiated and that posters have the right to contest the takedown notice and have content restored if no infringement can be substantiated. Such a balanced approach, with due process safeguards, would protect legitimate users on the Internet, yet also allow the content owner a more direct pathway to mitigate the damage flowing from true infringements.

We are disappointed that the Administration states that it is not "an opportune time to consider introducing a [graduated response]¹ system at this time." While we do not dispute the importance of Internet access, we strongly urge the LegCo to seize the opportunity to recognize that graduated response systems are not all-or-nothing recommendations. The Administration should adopt the approach of distinguishing access to the Internet from access to certain online services that allow users to distribute and make available infringing copyright works such as UGC sites, cyberlockers, online forums, etc. It should remain an integral part of any industry's "Code of Practice," covering practices of certain OSPs mentioned above and listed in footnote 9 (page 5) of the Administration's proposal. We therefore urge LegCo to recommend implementation of a graduated response system in addressing repeat infringers as well as striking a balance between the interests of end-users and rights-holders, particularly given the Administration's acknowledgement of the clear trends towards such a system in jurisdictions as varied as France, the UK, South Korea, New Zealand, Taiwan, and other territories.

In the last decade, Hong Kong has been at the forefront of digital rights management discussion and legislation, which is a strong factor why it has become a key media

¹ Graduated response systems offer one of the most effective methods of educating Internet users about legitimate alternatives to illegal online activities. It is rooted in educating Internet users and changing infringing behavior. Graduated response is a non-litigious process and provides a sensible/reasonable platform for copyright holders and OSPs to work cooperatively to address online infringements.

and entertainment hub in the Asia Pacific. However, Hong Kong risks slipping back. In the Asia Pacific, South Korea and Taiwan have passed their models of graduated response, and New Zealand is considering similar proposals. Hong Kong should do likewise, and thereby continue its role as a leader in regulating for digital rights protection.

(c) Introducing a copyright exception for temporary reproduction of copyright works by OSPs.

As we have stated previously, experience in other jurisdictions has demonstrated that such an exception is not necessary and its absence has not impeded the ability of OSPs to operate effectively. In the absence of any impediment to legitimate activity, we are concerned that this exception could be widely employed by a variety of online services having no technical need to make a temporary copy simply for the purposes of enabling unauthorized transmissions, and this could adversely affect rights-holders. Introducing such a loophole may be abused by entities operating illegally. We will closely follow the proposed language of this exception and expect we may have detailed comments on the drafting.

(d) Prescribing additional factors for considering the award of additional damages

There are unique policy reasons for a statutory damages regime applicable to intellectual property infringement cases, given the inherent difficulty in establishing the extent of losses. The enactment of a statutory damages regime for copyright offences does not necessarily have to impact on other civil proceedings as any changes in other areas would also have to be enacted into law.

Moreover, the unique situation faced by copyright owners in proving damages, especially in online infringement cases where the damage can be worldwide, would not normally be replicated in other sectors. Statutory damages can be a very effective tool for effective deterrence and to motivate the public to comply with the law. Statutory damages will also increase the efficiency of proceedings as they would remove the need for assessment of damages in a separate proceeding, thus saving time and money.

(e) Introducing a media shifting exception for sound recordings

TW notes that under the proposed media shifting exception, audiovisual products are no longer included and the proposal is limited to only sound recordings. Therefore, we have no further substantial comments on this proposal. We wish to reiterate that in a rapidly evolving digital environment, as copyright owners and OSPs experiment with new business models, a range of new offerings has been and is being brought to consumers to provide users with the ability to experience copyrighted content in a variety of ways, and on a variety of devices. The market is therefore responding to consumer demand and any move to needlessly create new exceptions could serve to undermine these developments.

In paragraph 20 the Administration has included a number of proposals which it does not support, including alternatives to the "Norwich Pharmacal" principles. We

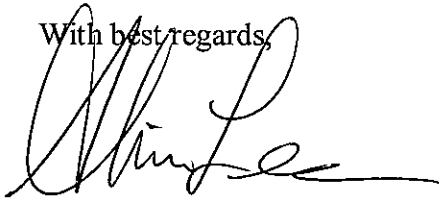
understand the Administration's concern of compromising personal data privacy. However the present process is unworkable. It is cumbersome and slow and its costly nature means that it has seldom been used. There are various ways to streamline this process while respecting due process and we recommend that the Administration continues to explore opportunities for streamlining the disclosure mechanism.

We commend the LegCo's efforts in reviewing the current proposals and the Administration's intention to introduce the amendment bill in an expeditious manner. The proposals have been long in-the-making, and we hope Hong Kong will reaffirm its leadership role in intellectual property rights protection by assuming an even more rapid adoption of the legislative amendments than the proposed timeline of the second half of 2010.

Hong Kong has long exercised regional leadership in protecting intellectual property, which is one of the key reasons underpinning its role as an important regional media and entertainment hub. Hong Kong needs to maintain that competitive edge. Passage of updated legislation to ensure effective protection for content in the digital age is a key element in this strategy. The current proposals, while adequately addressing concerns in some areas, unfortunately fall short in several other areas, as discussed above, and we urge LegCo to strengthen the proposals accordingly.

We wish to thank you for the opportunity to express our views and look forward to further dialogue as LegCo reviews the proposals.

With best regards,



Alvin Lee
Executive Director
International Relations and
Public Policy, Asia Pacific