

**Joint Response of Yahoo, eBay, Google and Nokia re the Government's revised
proposal to strengthen copyright protection in the digital environment**

Executive Summary :

We are glad and appreciative to have the opportunity to share our joint views on the captioned issue with members of the Panel on Commerce and Industry (the Panel) and the Administration. Since the 2008 consultation, we have been actively engaging with the Administration and other industry representatives in the Tripartite Forum to exchange views on local and overseas experiences in copyright protection for the digital environment. With the rapid technology developments and increasing internet popularity around the world, we envisage that any rules and regulation promulgated in Hong Kong will have significant impact on not only the general public, but also on the perception regarding Hong Kong becoming an internet service hub and Hong Kong's position as a leading communications hub in Asia. Thus we advocate a fair and balanced regime that takes into due consideration the needs and concerns of the general public and consumers, copyright holders and the ISP/OSP operators, in light of technological advancements that continue to change the way people live and communicate in an increasingly globalised world. In the following section, we provide highlights of our joint views on certain issues with additional comments appended thereto.

1. Introducing a statutory limitation of liability regime for OSPs in dealing with online piracy - We
 - Support the introduction of the statutory limitation of liability to provide legal incentive for OSPs to cooperate with copyright holders to fight copyright infringement activity on internet,
 - Request further participation to help define the scope and details of the proposed Code of Practice and above all, its legal force and operating relationship in relation to the statutory limitation of liability regime,
 - Request any proposed regime to give avoidance of abuse a full consideration, and
 - Recommend the Administration to hold public consultation sessions to clarify rationale and benefits of the upcoming schemes to the general public.

2. Scope of criminal sanction against infringement - We

- Request clearer definitions of the terms used (e.g., initiate) in the proposal,
- Request a more defined and limited scope to move away from “an extent as to affect prejudicially the copyright owners”, and
- Urge an OSP exception affirmatively and explicitly characterized either in the statute or the ‘avoidance of doubt’ statement for legitimate OSP operational behavior.

3. Introducing a copyright exception for temporary reproduction of copyright works by OSPs - We

- Support the proposal but highlight to define to seek wider views on defining the scope and conditions of this exception.

4. Introduction of media shifting exception for sound recordings only - We

- Urge reconsideration of the proposed sound recording distinction to address the issues of potential public confusion, existing ‘grey area’ products, lack of technology neutrality and likely discrimination issues and its consequences.

Government Proposed :

(1) Recognising copyright owners' right to communicate their works through any mode of electronic transmission, with criminal sanctions against infringement

We propose that criminal sanction should be available against those who initiate unauthorised communication³ of copyright works to the public –

- (a) in the course of business conducted for profit; or***
- (b) where it is made to such an extent as to affect prejudicially the copyright owners.***

Note :

Similar provisions to combat large-scale infringing activities irrespective of whether they are for the purpose of commercial advantage or financial gain, could be found in the laws of the UK, Australia, the US and Singapore etc.

For the avoidance of doubt, the proposed criminal sanction only applies to the act of taking active steps to make an unauthorised communication to the public. It does not apply to the act of downloading/browsing infringing materials via electronic transmission.

Our Comment :

- We are concerned that clause (b) definition is too general and too broad despite similar wordings in current ordinances. In its current form, clause (b) is drafted so loosely as to potentially capture wide range of acts of infringement which may not be intentional nor for commercial benefit. Given the significant implications in the criminalization of an infringing act, we suggest the Administration to consider “providing a list of factors to be considered in determining what constitutes “an extent” that prejudices the interest of copyright owners”. One must consider the criminal sanction in light of the background that civil liability action is always available for copyright owner to protect their rights and interests.
- Based on our understanding, the similar criminal sanction in Australia will have the threshold of BOTH “**Commercial**” AND “**Substantially prejudicially**” affect the copyright owner’s interest as a requirement. We believe the cumulative

factors in Australia will provide a suitable balancing approach considering the gravity of criminal sanctions.

- Furthermore, there is uncertainty as to what constitutes “initiate”, among other terms. As it stands, the current wording would capture an OSP with only “constructive knowledge” of the unauthorized communication, i.e. the OSP should have known about it. We also note from the footnote that the proposed criminal sanction is intended to apply only to the act of taking active steps to make an unauthorized communication to the public. However, “active steps” is a very broad and overreaching term. We do not believe any legitimate OSP operational behavior should fall or even inadvertently fall into the scope for criminal sanction. Therefore, we urge an affirmative and explicit exception characterized either in the statute or in the ‘avoidance of doubt’ statement for legitimate OSP operational behavior, as well as the introduction of an ‘actual knowledge’ threshold which could be to replace the term “initiate” with “knowingly initiate”.

Government Proposed :

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

Our Comment :

- We are in full support of the statutory limitation of liability to provide appropriate legal incentive for OSPs to cooperate with rights holder to fight copyright infringement on internet. In fact, we have been strongly advocating the importance of this limitation in all Tripartite Forum meetings as it provides regulatory clarity for service providers, and avoids potential legal conflicts with rights holders and end users.
- As the Administration had indicated that, similar provisions have been in operation in the US, Australia, Singapore for years. In addition, the EU Directive on E-commerce (2000/31/EC) and parts of its intermediary liability provisions (articles 12-16) could also form the basis of a fair and balanced regime. Thus we would recommend the Administration to weigh in and adopt similar international best practice.
- We note that the proposed “Safe Harbour Provision” underpinned by the “Code of

Practice” had not been proposed previously and would therefore request further substantiation of the need for a “Code of Practice”. However, we envisage that its implementation will have significant impacts on the general public, we recommend the Administration to hold public consultations to educate the public, and collect comment on the operational details of the Code of Practice before any draft bill is submitted for Legislative Council for consideration

- (a) We urge the Administration to consider the role of ISPs and OSPs in the Code of Practice not to include more than mere hosts and conduits (E-commerce Directive, articles 12-14) and should therefore have no general obligation to monitor third party material which they host and transmit, nor any general obligation to actively police illegal activity (article 15).
- (b) It is of paramount importance that specific statutory legal effect and recognition must be given to the Code of Practice in the Copyright Ordinance itself. This will confirm the importance and the benefit to OSPs in complying with the Code of Practice and to give proper legal statutory defence to OSPs in any legal or court proceedings or disputes.
- (c) The “certain conditions” (e.g., notice, counter-notice, etc.) that must be complied with before the limitation of liability for copyright infringement can be relied upon by the OSPs must be sufficiently specific so as to give operational clarity to the OSPs.
- (d) We need clarity about how the Code of Practice will be discussed, drafted, enacted, maintained, revised, and which government agency will be responsible to manage, administer and has overall control over the operation of the Code of Practice. Without such clarity, there is the concern and implications that the Code of Practice may be changed without due consultation and process, and will impose heavy and substantial operational and administrative challenges to the OSPs.
- (e) We recommend Code of Practice to include a built-in mechanism to protect OSPs and the end users from abuses, for example, bulk notices without complaint verification and inadequate appeal channel in the counter-notice scheme so as to give opportunity for a comeback.

Government Proposed :

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

Our Comment :

- We agree with the government proposal to introduce a copyright exception for temporary reproduction of copyright works by OSPs as this will be crucial for the daily technical operation of internet operators, and also will provide regulatory regime clarity for the OSPs.
- In fine-tuning the scope of and conditions attached to the exception, we urge the Administration to engage a representative number of businesses and stakeholders in the industry to ensure that the scope and conditions to be set are workable in practice.

Government Proposed :

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

Our Comment :

- We agree that statutory damages is not the best way to deal with the assessment of damages in this area of the jurisprudence.
- We note that Administration proposes to prescribe factors for considering an award of additional damages. Although those are not specified in the revised proposals, we assume the Administration is considering factors set out in the Preliminary Proposals issued in April 2008. Out of the three examples set out in the April 2008 Preliminary Proposals, we would like to point out the ambiguities and the potential mis-interpretation that may be brought about by the factor “the possible widespread circulation of the infringing copy via digital transmission in the case of internet piracy”. Whilst we believe the intention of this factor is to deal with internet infringements, we believe some additional factors and caveats must be included in such a factor to warrant an award of “additional damages”. Once an infringement is found on part of a defendant, in most cases damages will

follow. The above proposed factor seems to suggest that any online infringement, which most of the time can be considered as “possibly having a widespread circulation” will naturally attract additional damages. We suggest that “possible widespread circulation” as it is drafted should not be a factor in deciding on additional damages.

Government Proposed :

(5) Introducing a media shifting exception for sound recordings

Only sound recording material will have the media shift exception but not rest of other copyright material

Our Comment :

- One of the benefits of convergence in the digital economy is that it gives consumers the ability to seamlessly access a host of applications and content over and across different platforms. In this respect, we are concerned from a public policy perspective to introduce a media shifting exception for sound recordings only.
- We would therefore urge the government to revisit the rationale applied to have different media shift policies for various copyright protected material. We are concerned that the different copyright treatments will have controversial discriminative effects towards various copyright protected material . Such differences also invite unnecessary statutory amendments as technology changes, and present arbitrary distinctions that are difficult for users and general public to comprehend and follow.

We are glad to work together with the Administration, copyright holders and general public to development public policy for the future digital industry growth in Hong Kong and if there are any further queries, we are pleased to provide further information and input.

Patrick Chu Yahoo
Contact : Tel : +852-2159-7756 email : pchu@yahoo-inc.com

Rubya Ramjahn eBay
Contact : Tel : +852-3550-8668 email : rramjahn@ebay.com

Julie Zhu Google
Contact : Tel : + 8610-6250-3000 email : yinghuai@google.com

Lily Chan Nokia
Contact : Tel : +852-2597-0226 email : lily.chan@nokia.com

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