

Legislative Council Panel on Commerce and Industry

Proposals for Strengthening Copyright Protection in the Digital Environment

We refer to the captioned paper issued by the Government in November 2009. PCCW welcomes a public consultation once the Government's views become more concrete. However, in the meantime it is pleased to have the opportunity to provide its views as set out in this paper.

Overview

PCCW Group is one of Hong Kong's local content producers, it produces its own content through the Now TV platform and is also one of Hong Kong's major internet service provider. This puts the PCCW Group in a unique position to understand the issues faced by both copyright owners and ISP/OSPs.

PCCW Group supports the protection of copyright, however it believes that any additional protection provided to copyright owners must be balanced by the following considerations:

- the costs of such protection must be borne by copyright owners rather than imposing costs upon ISP/OSPs which will ultimately be passed onto consumers, the majority of whom do not infringe intellectual property rights.
- any action taken by the ISP/OSPs to protect copyright owners' intellectual property rights must be subject to a 'safe harbour defence'. The safe harbour defence should be available once specific requirements set down in the relevant legislation are complied with (rather than making them conditional upon a code of practice which has yet to be agreed).
- Any requirement imposed on ISP/OSPs should be imposed upon all industry players, or those who are "doing the right thing" will be penalized at the expense of those who are not. This is also an important step to ensure the effectiveness of any measures taken.
- Any proposal should take into full consideration the rights of the internet user public and be consistent with the legislative principles set out in the Personal Data (Privacy) Ordinance and the Telecommunications Ordinance.

We also think it is important to understand the differences between ISPs who are a "dumb pipe" or highway and effectively have no legal means to monitor or control the messages they convey and OSPs who may host content.

We provide more detailed comments on some of the specific proposals contained in the paper and some issues which are yet to be addressed below.

Proposal 1 - Criminal sanctions in relation to unauthorized online communications

We would like to refer to our comments provided in our reply of 30 April 2007 in response to the December 2006 consultation (“2007 Reply”) and reiterate our opinion that criminal sanctions should better be confined to unauthorized activities for commercial purposes.

We note the Government’s concern to combat large-scale infringing activities that cause prejudice to the copyright owners. However, copyright owners who are of the view that their rights have been infringed have a right to take civil action and recover their loss and damage against the infringers. As explained in our 2007 Reply, it is counter-productive to impose criminal sanctions on individuals for private and domestic purposes.

Furthermore, the current proposed wordings of “where it is made to such an extent as to affect prejudicially (emphasis added) the copyright owners” is too wide and general and do not seem to reflect the “large-scale infringing activities” that the Government intends to combat here. Any one-off isolated small-scale infringement can readily be regarded as “affecting prejudicially the copyright owners” technically. If the Government is to impose any criminal sanction against private and domestic use, which is not recommended by us, it is of utmost importance that the Government should set out clear and precise wordings as to the exact scope of “criminal” activity it intends to capture or it would certainly cause immense uncertainty in the society among the general public who are participating in all sorts of online communications everyday.

Proposal 2 - Statutory limitation of liability regime for ISP/OSPs in dealing with online piracy

We agree that it is essential to provide a “safe harbour” mechanism for ISP/OSPs. However, in order to provide sufficient and certain protection, any prerequisites to obtaining that protection should be set out in legislation rather than being contained in a voluntary code. Such “safe harbour” should be a complete exemption of both civil and criminal liabilities of the complying ISP/OSPs.

We also agree that it is not appropriate to introduce the “graduated response” system at this time.

The cost of any “notice and notice” and “notice and take down” should be borne by the copyright owners in order to avoid unduly dampening the adoption of technology by the general public by passing costs onto consumers and to discourage any unmeritorious notices being given by the copyright owners.

General Comments

Public Consultation

We would like to emphasize that any legislation and policy proposed on this topic of “Strengthening Copyright Protection in the Digital Environment” and any detailed procedures about what the ISP/OSPs have to do under any legislation, regulations or code of practice should not be enacted without a sufficient public consultation.

Any procedures imposed on the ISP/OSPs would impact on the internet users and on the online communications conducted by the general public on a day to day basis. They should have the right to know in advance and to give opinion on what the ISP/OSPs may in future be bound legally to do to them, to their internet accounts and to their online communications. They should also be made aware of any additional costs the change in regime may bring.

Hence, we do urge the Government that, once the detailed proposal on the legislation/code of practice is ready, the Government should put it forth for sufficient public consultation.

We also like to take this opportunity to reiterate two important points we raised in our 2007 Reply but which have not yet been adequately and satisfactorily addressed by the Government so far.

Notice by way of Statutory Declaration

In both the “Notice and Notice” and “Notice and Take Down” systems, it is important that the notice which ISP/OSPs would rely upon to take further action is required to be in the form of a statutory declaration to be sworn by the copyright owners. This is in fact in compliance with the existing Copyright Ordinance regime which provides that a sworn affidavit will stand as prima facie evidence of proof of copyright ownership in any dispute. This will require copyright owners to stand behind their claims and discourage any potentially unmeritorious claims which will unfairly burden the system and result in higher costs and nuisance to genuine users.

While there is no readily available public registration system for copyright works in Hong Kong, there is no way for ISP/OSPs to verify if any claim set out in any particular notice sent by copyright owner is justified or at least if it is sufficient to prove a “prima facie” case for ISP/OSPs to take immediate action. A sensible way out is for the copyright owners who request the ISP/OSPs’ cooperation in the first place to do a statutory declaration verifying on oath the authenticity of the information set out in the notice and upon which, ISP/OSPs should act.

We believe that for the copyright owners who are anxious to get ISP/OSPs cooperation to protect their rights, this is the easiest and minimum thing they should do and we do not believe this would cause any practical difficulties to them who should be ready and able at all time to prove their rights. At the same time, this statutory declaration arrangement can help to eliminate any groundless and fictitious claim against any legitimate users.

It would seem rather unfair to have to ask the ISP/OSPs to act while the copyright owners are themselves unwilling to verify on oath and to stand by with their claim.

Compensation of ISP/OSP costs

The implementation of an appropriate system of receiving and verifying notices and hence engaging in any corresponding notice and takedown action would result in significant additional operational costs to ISP/OSPs. While the Government is concerned with saving copyright owners' time and expenses in initiating proceedings in Court or seeking injunctions, it should also be concerned not to unfairly pass the copyright owners' costs to protect their own rights on to ISP/OSPs which have nothing to do with the online privacy activities.

We believe that when copyright owners are more prepared to take action to protect their rights in relation to online privacy, ISP/OSPs would probably receive more and more notices and hence ISP/OSPs would have to delegate substantial resources to ensure that proper action is done in accordance with the agreed procedures. It would only be fair that the costs of ISP/OSPs in complying with the agreed procedures be adequately compensated.

This is in fact in line with an usual order by the Court in a Norwich Pharmacal application that the internet service providers shall be fully compensated (normally on a full-indemnity basis) for their costs in complying with the order of the Court. This is also consistent with the practice and proposal of other developed countries like New Zealand.

Submitted by PCCW Group on 11 January 2010.