

Submission by Television Broadcasts Limited (TVB) on Government's Proposals for Strengthening Copyright Protection in the Digital Environment

TVB thanks the members of the Legislative Council Panel on Commerce and Industry for the opportunity to present our views on the Government's proposals for strengthening copyright protection in the digital environment published in November 2009. For the creative industries to thrive and continue to contribute to the Hong Kong economy, Hong Kong is critically in need of implementing effective measures which can reduce/deter digital online piracy and also serve to educate the public in using legal sources of copyright works.

Background

More than four years have passed since the Government launched a public consultation on the review of the copyright law in the digital environment in Hong Kong. Such public consultation had been urged by the content owners, in particular music, movie and TV industries in Hong Kong since early 2004 calling for the Government to address the increasingly sophisticated and rampant piracy activities in the digital age.

The content industry has been suffering from increasing online piracy for the past six years. TVB, a free TV broadcaster in Hong Kong and a major Chinese TV programme producer in the world produces more than 10,000 hours of TV programmes every year. Our programmes are also distributed worldwide on different media and TV platforms. This rampant online infringing activity has been adversely affecting our business and licensees worldwide. We have been urging the Government in the past few years to implement effective deterrent measures against online infringing activities by legislation so that the creative industries in Hong Kong can survive.

We are supportive of most of the current proposals put forward by the Government in LC paper No. CB(1)341/09-10(08) ("Proposals"). However, we are rather disappointed by the conservative approach taken with respect to, in particular, the measures for discouraging and reducing unauthorized online distribution as proposed in paragraphs 12 and 13 of the Proposals. The proposed measures together with other rather "soft" approaches (i.e. without statutory damages or a more simplified alternative to the "Norwich Pharmacal" discovery procedure to identify the suspected

infringer as advocated by content owners but rejected by the Administration under the Proposals) are simply not effective to deter repeated infringers.

Proposal (b) on statutory limitation of liability regime for OSPs and Code of Practice

We would like to address this specific proposal first as it underpins how effectively the legislative amendments can combat and reduce online piracy.

We support the proposal to introduce a statutory regime to limit the liability of OSPs for copyright infringement provided that they comply with certain conditions in combating online infringements on their service platforms. However, at the same time, the liability of OSPs should be set out in legislation before any limitation can apply. Further, the statutory limitation should only apply to monetary damages. Injunctive relief should always be available to copyright owners.

The Administration proposes the limitation regime is to be underpinned by a Code of Practice to be drawn up by the Tripartite Forum. The observance of such Code of Practice by an OSP would be a factor to be taken into account by the Court when determining the extent of liability of the OSP in relation to infringing activities occurring on its service platform. We are however disappointed with the slow progress of drawing up the Code of Practice and the measures of “Notice and Notice” and “Notice and Takedown” proposed by the Administration, which fall short of providing effective measures for dealing with repeat infringers. Even with the two systems proposed, no procedural details have been agreed by the Tripartite Forum so far which can be put into test.

The “Notice and Takedown” system only applies where the OSPs provide storage service, caching service and the like and are required to cooperate with copyright owners to take down or disable access to infringing materials. Such system will only be effective if the OSPs are required to act expeditiously to remove infringing materials with simple notification requirement. The longer the infringing materials are allowed to be remained online, the more revenue loss the copyright owners (including the underlying right holders) will suffer.

Under the “Notice and Notice” system, the OSPs (who are providing access as opposed to storage service) are only required to forward a notice of infringement to

users who are engaging in unauthorized file sharing.

We believe both systems with mere notice given to infringers have no real deterrent effect in dealing with persistent infringers. We urge the Administration to reconsider the introduction of the “graduated response” system with interim measures and step up sanctions. Such system can have an educative as well as deterrent effect. Some developed countries have proposed or adopted such a system. We believe Hong Kong can also take the leading role in implementing an effective system which can incorporate adequate due process and review/appeal mechanism to protect the interests of users. The Government has always been forward looking and brave to adopt policy to enhance the competitiveness of Hong Kong and strive to protect the creative industries. It appears that on this issue, the Government is taking a back seat “wait and see” approach in waiting for the system to be tested in overseas jurisdictions. Should the Government be minded not to include the “graduated response” system at the outset, we recommend it should not be ruled out and it should be included and triggered if there remains repeated infringers within a certain period of time.

In summary, we propose that

- there should be a set time frame for the finalization of the Code of Practice which should include the “graduated response” system
- it is preferable that such a Code of Practice can be put into trial as soon as possible so that it can be tested and refined before legislation comes into effect
- the Government should proceed speedily with drafting the amended bill to strengthen copyright protection as proposed including among others, the introduction of a statutory regime in relation to OSPs’ liability and limitation.

Proposal (a) on copyright owners’ right to communicate their works through any mode of electronic transmission, with criminal sanctions against infringement

We applaud the Administration taking a more forward looking approach in making the copyright law of Hong Kong technology neutral. We fully support the proposal to strengthen the protection of copyright works communicated to the public via any mode of electronic transmission, and to introduce criminal sanction against those who initiate unauthorized communication of copyright works to the public in the course of business conducted for profit or where it is made to such an extent as to affect prejudicially the copyright owners.

We look forward to working with the Government on the scope of exceptions to facilitate the reasonable use of copyright works.

Proposal (c) on introducing a copyright exception for temporary reproduction of copyright works by OSPs

We have no objection for introducing such an exception subject to the scope of and the conditions attached to be agreed with stakeholders.

Proposal (d) on prescribing additional factors for considering the award of additional damages

We are disappointed that the Administration, while recognizing the difficulties encountered by copyright owner in proving actual loss in online infringement cases, are unsupportive of our request to introduce statutory damages.

We propose that the statutory amount should be a maximum per work for each infringing act and the court will still be given the discretion to determine the amount of damages awarded having regard to the circumstances of the case. The copyright owner will be given the option to seek statutory damages or damages based on actual loss. Other major jurisdictions have prescribed statutory damages which can be of useful reference.

We would ask that this issue be reconsidered. We are prepared to discuss with the Administration in specifying a range (or ranges) of statutory damages.

Proposal (e) on introducing a media shifting exception for sound recordings

We have no objection on this proposal.

Conclusion

We would like to thank the Lego Panel for its attention to the important issues raised in the Proposals and our submission herein.

We are in support of the Proposals (a), (c) and (e) in principle and would like the

members of the Panel to urge the Administration to reconsider and refine their Proposals (b) and (d) for reasons given above. Hong Kong should remain forward looking and take a proactive approach in dealing with issues of online infringement instead of following the footsteps of other jurisdictions.

We would ask the Legislative Council to encourage the Administration to work swiftly on the drafting of the proposed amendments and to put forward to the Bills Committee for vetting within a reasonably short time frame. Further delay will cause further losses to the content industry and the economy of Hong Kong.

11 January 2010