



Hong Kong
January 12, 2010

The Honorable Vincent FANG Kang, SBS, JP
Chairman, Panel on Commerce and Industry
Legislative Council of the Hong Kong SAR
8 Jackson Road Central
Hong Kong

Dear Chairman Fang,

In response to the request of the Panel on Commerce and Industry, you will find attached the submission of the Cable & Satellite Broadcasting Association of Asia, on the subject of the Government's proposals on "Strengthening Copyright Protection in the Digital Environment."

We would be grateful if you would distribute our submission to all of the Panel's members. Should you, the Panel, or the Legco staff require any further information, please do not hesitate to contact the undersigned.

Sincerely yours,

John Medeiros
Deputy Chief Executive Officer
CASBAA



**Submission by the Cable and Satellite Broadcasting Association of Asia
(CASBAA)
To the Panel on Commerce and Industry
Legislative Council of the Hong Kong SAR
January 12, 2010**

Strengthening Copyright Protection in the Digital Environment

This submission is made on behalf of the Cable and Satellite Broadcasting Association of Asia (CASBAA); we thank the Panel for the opportunity to present our organization's views.

Headquartered in Hong Kong, CASBAA is an industry association with members and activities in 16 Asia Pacific markets. The Association is dedicated to the promotion of multi-channel television via cable, satellite, broadband and wireless video networks across the Asia-Pacific region and represents some 130 corporations, which deliver TV programming to than 330 million Asian households. Member organizations with significant operations in Hong Kong include I-Cable, TVB, PCCW's now Broadband TV, Celestial Pictures, Newscorp, Fox International Channels, Time Warner, Turner Broadcasting International Asia Pacific, Sony Pictures Television International, Discovery Networks Asia, AsiaSat, Asia Broadcast Satellite, Eurosport, TV5 Monde, Standard Chartered Bank, PricewaterhouseCoopers and Viaccess SA.

The Broadcasting Industry, Hong Kong, and Asia

Hong Kong is a hub of the Asian broadcasting industry. The ongoing growth and development of this industry brings major economic benefits to the SAR. We estimate that companies in this sector are responsible for creating around 2,000 high-paying posts in the international sector and another 10,000 jobs in local distribution platforms. With a forecast average growth of about 12% per annum over the next five years, this is a dynamic, high-tech industry that will continue to make a very important contribution to Hong Kong's economic growth for the foreseeable future – as long as the SAR continues the policies which have favored the industry's growth.

Hong Kong also plays a major role in creation of Chinese-language content for the television industry. TV dramas made in Hong Kong are sold and distributed

worldwide; TVB -- a pillar of Hong Kong's free-to-air broadcasting industry -- is also a major pay-TV player in other markets.

Achieving Strengthened Copyright Is Taking Excessively Long

CASBAA is pleased that the question of strengthening copyright in the digital environment is finally on the agenda of the Legislative Council. We began raising the issue of peer-to-peer piracy and ISP responsibility in response to a December 2004 consultation, and have been actively participating in the Hong Kong government's deliberative process on this subject for five years. We have repeatedly stressed to the government the urgency of dealing with the mushrooming digital piracy phenomenon. Unfortunately the deliberative process is becoming a protracted one; digital online piracy continues to grow without any effective deterrent being put in place.

Digital Piracy Continues to Grow in the Face of Inaction

Unauthorized online distribution of TV programming has grown massively during the five years that the government has had this under consideration. Increased availability of bandwidth and propagation of more efficient peer-to-peer transmission software has resulted in a huge increase in availability of unauthorized and uncompensated TV programming online. A recent APEC seminar on signal piracy and an OECD study last year both noted that a series of international website providers have found very profitable business models in facilitating propagation of the software and streaming of the copyrighted material, so the growth of this pirate distribution has been driven both by consumer demand for unpaid content and by some online service providers' hunger for profits.

Hong Kong suffers from this increase both directly and indirectly. As a regional hub, Hong Kong loses economic benefits when the growth of the TV industry in general is impaired by unauthorized distribution of TV content. And as content creators in their own right, Hong Kong's authors, directors, actors and technicians all suffer direct losses from piracy of their work. A simple web search for "TVB Series streaming" produces dozens of links to unauthorized sources for Hong Kong-made content, whose creators are not receiving appropriate remuneration for this distribution of their work.

The Government's Proposals

Unfortunately, the government's current approach to this issue, as laid out in LC Paper No. CB(1)341/09-10(08), does not propose to put in place effective deterrence against online piracy.

The government has proposed creation of a new all-embracing "right of communication." This is a positive step, but it will not in itself do much to deter further rapid growth in online piracy of television content. The very limited criminal penalties it calls for will not have any deterrent effect on the vast majority of downloaders of infringing material.

The government has rejected, for various reasons – none of which are persuasive to us – several steps that could have made concrete contributions to effective deterrence, including establishment of statutory damages for copyright piracy, creation of an efficient mechanism for disclosure by ISPs of the identities of infringers to replace the burdensome “Norwich Pharmacal” mechanism, and/or prompt introduction of a “graduated response” system.

The government proposes to create a statutory limitation of liability for OSPs. We support a limitation of liability for OSPs who participate in a system of measures designed to strengthen copyright protection (the government’s goal) in a meaningful and effective way. We believe, however, that the enactment of this limitation must proceed in tandem with implementation of these measures; one should not proceed without the other. This is particularly important as we do not believe that sufficient protection would be afforded by previous drafts of a “Code of Practice.”¹

In sum, the net effect of the government’s current set of proposals will be small, and in our view it is now too late for small measures to have any meaningful effect. It is regrettable to see Hong Kong, formerly an Asian leader in adopting firm measures to protect intellectual property, become a passive follower, which will consider such measures only after they have been adopted, and “fully tested” (the government’s own words) in overseas jurisdictions. In the meantime, Hong Kong’s own creative industries are withering, and the SAR’s role as a leader in the global system of trade and services is eroding.

How To Achieve the Needed Deterrence

We believe that Hong Kong should join the growing number of jurisdictions implementing “graduated response” systems, which serve to educate consumers who are using illicit means to obtain copyrighted materials, and redirect them to legitimate routes. Such systems are of particular importance to the television industry because they are effective even in cases where the pirated content does not reside on a server, including infringement of “live” content via peer-to-peer networks.

Effective graduated response systems are “soft” options – they do not involve criminal penalties, or even civil ones, but they create a system clearly designed to impart educational messages to consumers. Experience has shown that the vast majority of consumers will respond positively to such messages – particularly where they have the expectation that repeat offenses will result in concrete disadvantages to them. In the case of a small number of recidivist traders in pirated material, “graduated response” systems

¹ For the avoidance of any doubt: the “rough outline of a Code of Practice” referred to in the government’s paper has not been agreed by the Tripartite Forum, and does not embody in its current form enough of a deterrent to the “streaming” piracy which is a particular concern of the TV industry. “Notice and Takedown” cannot be effective, where content is being streamed live and there is no copy to “take down.” “Notice and notice” is meaningless unless it represents the first step in a graduated series of responses, which the government in its current paper rules out.

carry the threat that their access to the internet could be constrained – slowed or suspended.

We understand concerns that concrete sanctions under such a system should be processed using mechanisms that provide adequate due process, and therefore we believe that subscribers must be afforded a reasonable opportunity to challenge allegations of infringement before the ultimate sanctions are imposed.

- At the beginning stages of the process, a counter-notice procedure can be put in place.
- Where a recidivist might be subject to the ultimate sanction in the system, he may be given an opportunity to appeal to an impartial court or government administrative body.
- Imposition of the maximum sanctions, such as suspension of Internet service, may be stayed until the court has decided the appeal. The judicial review process must, of course, be expeditious, to avoid abuse of the system by serious infringers.

This type of due process is being used in several other jurisdictions where “graduated response” solutions are being implemented; it helps ease worries about arbitrary imposition of burdensome penalties.

If the chosen means for implementing a graduated response system is the Code of Practice for ISPs, then it is now essential to move quickly. Too much time has already been lost. Drafting of a good, strong Code of Practice must proceed in tandem with drafting the legislation, and implementation of a safe harbor must be contingent upon stakeholders agreeing to the Code within a defined timeframe. There have already been too many opportunities for delay, while digital piracy has burgeoned.

With prompt implementation of safeguards such as those described above, Hong Kong can and should join other jurisdictions in implementing a graduated response system as a meaningful deterrent to online piracy. After five years of consideration, the need for serious action – and not further years of study – is now urgent. Hong Kong is falling behind, as other jurisdictions in this hemisphere and elsewhere implement serious measures to deter the growth of digital copyright infringement.

We are most grateful for this opportunity to give our view of the situation to the Legislative Council; we will be pleased to convey further information as appropriate to the Legislature or the Administration in the coming weeks and months.