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Panel on Commerce and Industry

Meeting on 19 January 2010

**Updated background brief on
copyright protection in the digital environment**

Purpose

This paper summarizes previous discussions by the Panel on Commerce and Industry (the Panel) on issues relating to copyright protection in the digital environment.

Background

The Copyright Ordinance

2. The existing Copyright Ordinance (Cap. 528) accords protection to copyright works¹ stored in digital format and on the Internet. It also contains provisions dealing with unauthorized uploading and downloading of copyright works over the Internet. Civil remedies and, in some circumstances, criminal sanctions are provided against such unlawful activities. The legislative measures are backed by vigorous enforcement action taken by the Customs and Excise Department (C&ED). The Administration has also organized on-going public education programme to promote awareness of and respect for intellectual property rights in the community.

Public consultation on copyright protection in the digital environment

3. Further to the introduction of an enhanced and more flexible copyright protection regime by way of the Copyright (Amendment) Bill 2006 passed by the Legislative Council on 27 June 2007, the Administration separately launched a public consultation exercise on whether the regime should be further enhanced to provide wider protection for copyright works in the digital environment in the light

¹ Copyright works include (a) original literary, dramatic, musical or artistic works; (b) sound recordings, films, broadcasts or cable programmes; and (c) the typographical arrangement of published editions.

of advances in technology and the development of broadband network. The consultation document covered six issues, namely:

- (a) the legal liability for unauthorized uploading and downloading of copyright works (including whether unauthorized downloading should be criminalized);
- (b) protection of copyright works transmitted to the public via all forms of communication technology (i.e. whether copyright should be protected regardless of what form of transmission technology was used to disseminate the copyright works to the public);
- (c) the role of online service providers (OSPs)² in relation to combating Internet piracy (including whether online service providers should be held liable for infringing activities occurring on their service platforms);
- (d) facilitating copyright owners to take civil actions against online infringement (including whether simplified procedures should be introduced to assist copyright owners to obtain the personal particulars of online infringers);
- (e) statutory damages for copyright infringement; and
- (f) copyright exemption for temporary reproduction of copyright works.

4. Following the public consultation exercise conducted from December 2006 to April 2007, the Administration received over 600 submissions. In general, copyright owners urged the Administration to cast a wider criminal net and bring in relevant measures to facilitate their pursuit of civil actions. However, the copyright users, mostly trade associations and some professional groups, were concerned about criminalizing unauthorized downloading activities and the possible adverse impact that such measures might have on the free flow of information on the Internet, personal data privacy, and the development of Hong Kong as an Internet service hub.

5. In formulating the proposal for the second round of consultation with stakeholders and the public, the Administration had taken into account the public views received and latest developments in different jurisdictions overseas. The proposals were summarized below:

² OSPs refer collectively to operators who provide Internet services. The services may be broadly categorized as (a) access services; and (b) application services (e.g. offering server space for websites or storage space for data, managing and operating websites, domain name resolution services, web mail, discussion forums or newsgroups, providing search engines or information location tools to facilitate online information retrieval).

- (a) to introduce a right of communication covering all modes of electronic transmission for copyright works, with related criminal sanctions against the breach of this right in specific circumstances;
- (b) to introduce copyright exemption for temporary reproduction of copyright works by OSPs, which was technically required for (or enabled) the transmission process to function efficiently;
- (c) to facilitate the drawing up of a voluntary code of practice for OSPs in combating Internet infringements, the compliance with which or otherwise would be prescribed in law as a factor that the court should take into account when determining whether an OSP had authorized infringing activities committed on its service platform;
- (d) to continue to rely on the "Norwich Pharmacal"³ principles, as opposed to introducing an alternative infringer identity disclosure mechanism that was not subject to scrutiny by the court;
- (e) to prescribe in law additional factors to assist the court in considering the award of additional damages, in lieu of introducing statutory damages for copyright infringement actions; and
- (f) to refrain from introducing new criminal liability pertaining to unauthorized downloading and peer-to-peer⁴ (P2P) file-sharing activities.

The Government would also consult the public on the possible introduction of a media shifting⁵ exception, a subject not covered in the previous consultation document. The move came about as a result of some important developments in other jurisdictions since December 2006.

³ For copyright infringements committed on the internet, the identity of the online infringer is often unknown to the copyright owner, and difficult to track down unless with the cooperation of the relevant OSP. At present, copyright owners may rely on the "Norwich Pharmacal" discovery procedure to obtain a court order demanding disclosure from the relevant OSP (notwithstanding that it may be an innocent third party to the action) when it is the only practicable source of information.

⁴ A technology whereby all the participating P2P users were contributing their computing power and available bandwidth to facilitate file sharing and distribution.

⁵ "Media shifting" refers to the practice of copying an authorized copy of a copyright work from one medium to another, which may involve changing the format of the work, so that it can be enjoyed on an alternative device, for example by converting a genuine CD music recording to MP3 format for listening on an iPod. Although this practice is commonplace, it is technically a civil infringement of copyright law.

Previous discussions

Preliminary proposals

6. At the Panel meeting held on 15 April 2008, the Administration briefed members on the results of the public consultation exercise on "Copyright Protection in the Digital Environment" conducted from December 2006 to April 2007. The Administration also briefed members on the preliminary proposals for the second round of consultation with stakeholders and the public. The Panel considered that it was incumbent upon the Administration to ensure that the copyright protection regime would facilitate the free flow of information in the digital environment while not compromising the protection of personal data privacy.

7. Panel members generally supported the strengthening of copyright protection in the digital environment, noting that it would not be feasible to trace the source of online infringement because a new technology was being developed based on the P2P technology to achieve "streaming"⁶. Panel members noted that the Administration proposed to bring in criminal sanction relating to unauthorized communication of copyright works by "streaming". Some members doubted whether and how the criminalization of "streaming" could be enforced. They also pointed out that as it was common that uploading, downloading and sharing of video clips were offered by video sharing websites such as "YouTube", many users of these websites might be unaware that criminal liability would be extended to cover "streaming".

8. The Administration advised that "streaming" was at present one of the most common forms of copyright infringement. To guard against massive piracy on the Internet, the Administration proposed to bring in criminal sanctions, in the non-business context, against unauthorized communication of copyright works utilizing "streaming" which was made to such an extent as to affect prejudicially the interests of copyright owner. C&ED had deployed professional staff from its Anti-Internet Piracy Teams, Computer Analysis and Response Team and Computer Forensic Laboratory to enforce the Copyright Ordinance. To this end, C&ED would deploy its professional resources and collaborate with relevant experts with a view to ensuring the enforceability of the future legislative proposal.

9. Panel members were keen to ensure that, in addition to enforcement, the Administration would devise measures to forestall infringing acts. As criminal sanction would bring far-reaching effect on one's life, the Administration should also be mindful of such a concern and to consult the public extensively before formulating any new legislative framework to combat Internet infringement. Wide publicity should be conducted after passage of the legislative proposals to prevent the public from being caught unaware.

⁶ A technology for transferring data such that the data could be processed as a steady and continuous stream. Very often, the technology enables users to view or listen to a work online though, unlike downloading, users will generally not be able to retain a complete copy of the work after streaming.

Refined proposals

10. At the Panel meeting held on 17 November 2009, the Administration briefed the Panel on the Administration's refined proposals to strengthen copyright protection in the digital environment, taking into account the views that had been received regarding its preliminary proposals, and the latest developments in overseas jurisdictions. The refined proposals were summarized below:

- (a) recognizing copyright owners' right to communicate their works through any mode of electronic transmission, with criminal sanctions against infringement;
- (b) introducing a statutory limitation of liability regime for OSPs in dealing with online piracy;
- (c) introducing a copyright exception for temporary reproduction of copyright works by OSPs;
- (d) prescribing additional factors for considering the award of additional damages; and
- (e) introducing a media shifting exception for sound recordings.

11. Whilst Panel members in general welcomed the Administration's refined proposal for enhancing copyright protection in the digital environment, some members warned against the stifling of creativity and innovation by over-regulation, and opined that public education was equally important for the prevention of internet piracy. Some Panel members opined that without specifying the kinds of technology used in the infringement activity, the proposal as stated in paragraph 10(a) might increase the risk of inadvertent breaches by members of the public. Panel members also urged the Administration to liaise with the Mainland and overseas authorities with a view to developing possible cooperative mechanism in combating online copyright piracy.

12. The Administration advised that it recognized the legitimate or fair use of copyright works by users, and had been soliciting views from stakeholders including the users. The proposal was in line with the relevant laws in the United Kingdom and Australia. The Administration had been maintaining contacts with overseas and Mainland authorities, including the General Administration of Customs as well as the National Copyright Administration of the People's Republic of China, on combating online copyright infringement activities.

13. Noting the Administration's proposal to introduce a media shifting exception limited to sound recordings, some Panel members opined that the exception should be extended to other types of works such as films or publications provided that it was limited to personal use. The Administration advised that while some stakeholders did not oppose to the introduction of a media shifting exception limited to sound recordings, there were strong objections from copyright

owners to extending the exception to films. Nevertheless, the Administration would monitor overseas developments and make suitable adjustments as and when necessary.

Latest position

14. The Panel will receive views from deputations and members of the public on 19 January 2010 on the Administration's refined proposals to strengthen copyright protection in the digital environment.

Relevant papers

Information papers provided by the Administration for the Commerce and Industry Panel meeting on 16 January 2007

<http://www.legco.gov.hk/yr06-07/english/panels/ci/papers/ci0116cb1-694-3-e.pdf>

Minutes of the Commerce and Industry Panel meeting on 16 January 2007

<http://www.legco.gov.hk/yr06-07/english/panels/ci/minutes/ci070116.pdf>

Information papers provided by the Administration for the Commerce and Industry Panel meeting on 15 April 2008

<http://www.legco.gov.hk/yr07-08/english/panels/ci/papers/ci0415cb1-1211-3-e.pdf>

Background brief prepared by the Legislative Council Secretariat for the Commerce and Industry Panel meeting on 15 April 2008

<http://www.legco.gov.hk/yr07-08/english/panels/ci/papers/ci0415cb1-1211-4-e.pdf>

Minutes of the Commerce and Industry Panel meeting on 15 April 2008

<http://www.legco.gov.hk/yr07-08/english/panels/ci/minutes/ci080415.pdf>

Information papers provided by the Administration for the Commerce and Industry Panel meeting on 17 November 2009

<http://www.legco.gov.hk/yr09-10/english/panels/ci/papers/ci1117cb1-341-8-e.pdf>

Updated background brief prepared by the Legislative Council Secretariat for the Commerce and Industry Panel meeting on 17 November 2009

<http://www.legco.gov.hk/yr09-10/english/panels/ci/papers/ci1117cb1-341-9-e.pdf>

Minutes of the Commerce and Industry Panel meeting on 17 November 2009

<http://www.legco.gov.hk/yr09-10/english/panels/ci/minutes/ci091117.pdf>