



匯賢智庫政策研究中心有限公司

Savantas Policy Institute Limited

**Legislative Council Panel on Commerce and Industry
Proposals for Strengthening Copyright Protection in the Digital Environment**

Dear Chairman,

Our Institute concurs with the majority views and comments as submitted by the users on the presented issues. As an advocate for developing Hong Kong into a knowledge-based economy, we strongly believe that while copyright protection is fundamental to providing the incentive for fostering creative works, any law making that curtails the free flow of ideas and information should be carefully construed while having the intended effects firmly in mind.

Public interest is the crown jewel of copyright law

Copyright law presents a difficult balance. On the one hand, the interests of owners in the control and exploitation of their works need to be protected. This needs to be balanced on the other hand against society's interest in the culture of free creativity and free expression.

Copyright law was enacted to provide protection, but it is neither unlimited nor primarily designed to provide a special private benefit to owners. Instead, the limited grant is a means by which an important public purpose may be achieved, i.e., to foster creativity of authors for the public good. Copyright law was never designed to accord the owners complete control over all possible use of their works, where the primary objective in conferring the monopoly lies in the benefits derived by the public, and to induce release to public of the products of their creative genius.

We believe creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of copyright law is to secure the owner a fair return for the creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. Consequently, even when technological changes have rendered its literal terms ambiguous, our copyright law must be construed in light of these underlying principles.

Law-making methodology

The enactment of copyright legislation should not be based upon any natural rights that the author has, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their works.

Therefore, in legislating new copyright law, we must consider two questions: First, how much will the legislation stimulate creativity and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights should confer a benefit upon the public that outweighs the evils of the temporary monopoly.

The principle should be securing income to artists while allowing the market to secure the most efficient way to promote and distribute content. Our copyright law should not assure that copyright holder gets all the value that his/her copyright created. Just because some regulation is good, it does not follow that more regulation is better. The legislators owe a special duty to prevent the new law from becoming a deterrent to innovation, and to ensure that the changes they create, in response to the request of those hurt by changing technology are changes that preserve the incentives for continual progress and change.

The government's role is not to support one way of doing business against others; its role is not to pick winners and protect them against loss. The least society needs is increased government policy that kills commercial growth and controls innovation.

A free culture

The consuming public supports reasonable conduct by digital content owners to enforce their ownership rights, subject to important benefits for the public, such as lower prices for the content, wider range of consumer choice as to the content and its use, and a more convenient consumer experience with regard to content access.

Free market and free culture depend upon vibrant competition. Free society is supported by free enterprise and free trade. Yet the effect of the law today appears to undermine just this kind of competition – the effect is to produce an over-regulated culture. Overregulation stifles creativity; it smothers innovation.

Conclusion

Copyright law in the digital context aids owners in exercising the degree of control in ways unparalleled to pre-digital days. It burdens speech and defeats creativity,

the spirit with which copyright law was created. Amendments that protect certain industries against competition may undermine the interests that copyright law was intended to protect and may deter the objective to promote progress in the science and arts.

Our Institute considers that a free culture is a necessary condition to nourish innovation and creativity, which are vital ingredients to our city's gradual development towards being a knowledge-based economy.

Comments on the proposal items set out in LC Paper No. CB(1)341/09-10(08) can be found in the appendix.

Respectfully submitted,

Savantas Policy Institute

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Appendix:

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

Savantas' comments:

While the proposal to broaden the protection coverage to "any mode" is justified, criminal liabilities should be sanctioned only upon a limited class of actions.

"For profit" alone, without more, should not be sufficient to justify criminal liability, although it can be an important factor. For instance, it may be beneficial to have businesses selling content that copyright owners no longer deem profitable to make available to the public.

A fair use exception must be considered to take account of the public's interest in having reasonable access to the works for legitimate purposes.

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

Savantas' comments:

Providing a code of practice is a good way to enlist OSPs' alliance. However, this standard may be subject to abuse. For example, copyright owners may encourage website owners to take down infringing content and links when it may not in fact be infringing. When website owners receive a takedown notice, it is in their interest not to challenge it, even if it is not clear whether infringement is taking place, because the website owner will not be held liable if the potentially infringing content is taken down. By challenging it and subsequently found to be wrong, website owners may subject themselves to avoidable liabilities. Thus, it may be necessary to allow for opt outs to website owners, whereby website owners would also be relieved from liability even if the determination of non-infringement was later found invalid, so long as a good-faith and diligent effort to determine non-infringement was rendered.

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

Savantas' comments:

The proposed is not ripe for commentary at this point as the scope of the exception is still being developed.

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

Savantas' comments:

We oppose to the idea of prescribing statutory damages to copyright infringement. As with other civil tort actions, wronged party should be compensated only to the extent of losses suffered and proved, with emphasis on the nature of the damages being compensatory, not punitive.

One suggested alternative approach should be that once liability is determined, infringers' actions leading up to the action would enable the court to award a higher damage to combat against willful infringers or acts that have caused far-reaching public harm.

(e) Introducing a media shifting exception for sound recordings

Savantas' comments:

We support the introduction of a media shifting exception. However, we urge the Government to consider extending the exception to other types of works to accommodate foreseeable development.