



11 January 2010

Dear Chairman Fang and the Legislative Council Panel on Commerce & Industry:

In advance of your January 19th hearing, we are pleased to submit these comments on the Administration's refined proposals to strengthen copyright protection in the digital environment.

We appreciate your dedication to these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Welch".

Joe Welch
Senior Vice President
Government Relations, Asia
News Corporation

Introduction

The Commerce and Economic Development Bureau (CEDB or “the Bureau”) in **December 2006** issued a consultation document related to the strengthening of copyright protection in the Digital Environment in Hong Kong.

Three years later, in **November 2009**, the Bureau released a document setting forth **five specific recommended proposals** to the Legislative Council Panel on Commerce and Industry.

News Corporation is pleased to submit these brief comments to the Legislative Council in advance of its 19 January 2010 hearing to consider these five proposals from the Bureau.

Background

News Corporation is a global media and entertainment company with operations in a number of industry segments.

In Hong Kong, News Corporation has a substantial presence in the pay television industry, providing 26 channels across various genres under the **STAR, Fox** and **National Geographic** Channel brands.¹

News Corporation’s operations in Hong Kong also include creation of the **STAR Chinese Movie** channel. Each year for this channel we procure the rights to the majority of the Cantonese films made in Hong Kong. In turn, we create and broadcast these films on our Cantonese movie channel, which is distributed not only in Hong Kong but throughout Asia, North America and Europe.²

Of further relevance is News Corp’s ownership of the **Fortune Star Library**, the world’s largest contemporary Chinese language film library, many of which showcase Hong Kong’s superstars and renowned film makers such as Bruce Lee and Andy Lau.

News Corporation is also the parent company of **Twentieth Century Fox**, one of the six major Hollywood studios.

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General Comments

The CEDB November 2009 document submitted to the Legislative Council covers five specific issues – listed as proposals (a) through (e) - relating to the strengthening of Copyright Protection in Hong Kong.

¹ STAR MOVIES, STAR CHINESE MOVIES, STAR CHINESE MOVIES 2, ESPN, STAR Sports, STAR Cricket, FOX News, Sky News, FOXCRIME, FX, tvN, STAR WORLD, Xing Kong, CHANNEL [V] International, CHANNEL [V] China, CHANNLE [V] Taiwan, National Geographic Channel, Nat Geo Wild, Nat Geo Adventure, National Geographic Channel HD, Baby TV, STAR PLUS, STAR NEWS, CHANNEL [V] India, STAR ONE, STAR VIJAY

² In Hong Kong, the STAR Chinese Movie channel is typically rated one of the top five channels by viewership on the NOW TV platform

Four of the five proposals from CEDB are straightforward in our view and we structure our comments below to make this clear, as follows:

Proposal (a) – fine

Proposal (b) – a good start but needs further refinement

Proposal (c) – fine

Proposal (d) – fine but with a caveat

Proposal (e) – fine

To be clear, there are certain aspects of CEDB’s proposals (a), (c), (d) and (e) that we do not agree with. Nevertheless, on balance, we state that we are ‘fine’ with each of these four proposals because each has a positive element that we can support.

Save for Proposal (b) – “OSP Cooperation” - which is a crucial issue and in need of further refinement by CEDB. In light of its importance, our specific comments below take this issue first.

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OSP Cooperation

This is the Bureau’s “**Proposal (b)**” which sets forth the need in Hong Kong for “**Introducing a statutory limitation of liability regime for OSPs in dealing with online piracy**”.

We view this as the most crucial issue at hand and we ask that the Legislative Council consider it with care.

The issue relates to the educational, non-litigious process of copyright holders working cooperatively with online service providers (OSPs) in response to identified instances of unauthorized or illegal activity by the OSPs’ customers via peer-to-peer networks.

Broadly referred to as “OSP Cooperation”, the focus is to educate end-users that are infringing, to discourage their further file sharing through warnings and the potential application of deterrent measures and to encourage those engaged in unauthorized file sharing to migrate from pirate activity to legitimate alternatives, thereby creating a sustainable legitimate online market.

In short, it is a common sense approach to unauthorized file-sharing that is effective yet not overly punitive to the end user.

CEDB’s proposal in this regard in its November 2009 document is on track as follows.

- The Bureau recommends introduction of a “statutory regime which gives **OSPs** the assurance that compliance with certain conditions would qualify them for **limitation of liability** for copyright infringement”; and

- The Bureau correctly recognizes that this regime – i.e., the specific conditions of cooperation that will deliver limited liability for the OSPs – will need to be set forth in an industry **Code of Practice**; and
- The Bureau rightly proposes that the Code of Practice include a “**notice and takedown**” system for rights holders and OSPs to cooperate in the removal infringing content hosted by the OSP and from caching services and the like; and
- The Bureau further concludes that the industry Code of Practice should include a “**notice and notice**” system whereby rights holders and OSPs cooperate in the forwarding of notices to the broadband internet subscribers that are identified as engaging in unauthorized file sharing.

This framework as proposed by CEDB is a good start. Our experience in other jurisdictions, however, leads us to suggest the following modifications.

- The OSPs ‘**safe harbour**’ liability and limitation on liability should be **made explicit in the legislation**;
- The industry’s development of a **Code of Practice** be made **mandatory by a date certain**; and
- The framework should include a trigger for the move to a **phase II system** (“notice and graduated response³”) if the “notice and notice” system is not working sufficiently well to reduce repeat infringements by recalcitrant end users.

With these core aspects of an OSP Cooperation framework, Hong Kong will have a regime with an educational focus that is reasonable (i.e., not punitive nor litigious) in its response to copyright infringements over peer to peer networks.

Importantly, this approach works in practice. Trials and surveys completed in 2008 and 2009 in a number of territories indicate warning notices are highly effective in preventing unauthorized file sharing. For instance, in the U.S., two of the largest broadband network providers conducted a year-long trial and found that one warning notice was sufficient to end further infringements by the vast majority of subscribers.⁴

This is also an approach that other forward-thinking jurisdictions are moving toward, including most recently the United Kingdom, which in November formally proposed adoption of the ‘phase I, phase II’ approach.

We are optimistic that the Bureau will look favorably on the three modifications we suggest in these comments and in particular on the need to legislate in the area of the second and third of our three suggested modifications. That is, the requirement of a

³ A “phase II” graduated response regime, if needed, could include for serious repeat infringers temporary technical measures such as bandwidth capping and the suspension of the broadband connection.

⁴ It is important to note that the initial notice in these trials included warning of future deterrent measures against recidivists.

mandatory Code by a date certain and the implementation of a **phase I, phase II approach** akin to the developments in the UK.

OSP Cooperation is a critical issue for the industry and we look forward to working more closely with the Legislative Council and CEDB on these proposed modifications to the Bureau's approach.

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Other Issues

As mentioned earlier in these comments, the remaining four proposals in the Bureau's November 2009 document – i.e. proposals (a), (c), (d) and (e) - are straightforward and not controversial in any way.

We comment on each of these proposals below but urge the Legislative Council not to allow these basic issues to slow the government's ability to address the more significant issue of ISP Cooperation.

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

CEDB concludes its analysis of this issue by proposing that Hong Kong's copyright law should be amended to protect copyright works communicated to the public via any mode of electronic transmission. We agree.

CEDB also concludes that it could strengthen this right by imposing criminal sanctions against those who initiate unauthorized communication of copyright works in the course of business or in instances of large-scale infringing activities irrespective of whether conducted in the course of business.

We are in broad agreement with the Bureau on this issue and raise no objection to its proposal.

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

The Bureau proposes to proceed with an exception in this regard, engaging stakeholders in fine-tuning its scope.

We raise no objection to CEDB's proposal on this issue.

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

CEDB recognizes the difficulties copyright owners encounter in proving the actual loss of sustained infringement in the on-line environment but feels it has insufficient information to propose that a statutory damages scheme be added to the Copyright Ordinance.

We disagree and believe that the industry, via the Motion Picture Association and others, has set forth a reasonable and sufficiently detailed framework for statutory damages.

We therefore ask the Legislative Council to suggest to the Bureau that it reconsider this point.

Nevertheless, we hope that any possible reconsideration of this point will not slow the government's disposition of the other proposals.

Proposal (e) – Introducing a media shifting exception for sound recordings

The Bureau, in agreement with the Motion Picture Association and other film copyright holders, does not see a need to create an exception for the film industry. We concur.

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Conclusion

We thank CEDB and the Legislative Council for its attention to this important topic, strengthening copyright protection in the digital environment.

Four of the Bureau's five proposals in the November 2009 document are straightforward in our view and we encourage the Legislative Council to work with the Bureau to move swiftly forward in drafting the specific legislative language on each.

One of the proposals - the one concerning OSP Cooperation – is a good start but requires further refinement, as we have highlighted in these comments.

We look forward to working closely with the Legislative Council and CEDB in this regard in the first quarter of this year.