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Hong Kong and International Publishers' Alliance

Secretariat

Hong Kong Reprographic Rights Licensing Society
802 Stanhope House, 738 King's Road, Hong Kong
Tel: (852) 2516-6268 Fax: (852) 3105-1468
E-mail: info@hkrrls.org Website: www.hkrrls.org

Via electronic mail (mleung@legco.gov.hk)

11 January 2010

The Hon Vincent FANG Kang, SBS, JP
Chair, Panel on Commerce and Industry
Legislative Council
Hong Kong Special Administrative Region

Dear Mr Chairman

Thank you for inviting the Hong Kong and International Publishers' Alliance [HKIPA] to submit its views to the Panel on the Government's refined proposals regarding copyright protection in the digital environment.¹

About HKIPA

HKIPA was formed in September 2002. Its members include the Hong Kong Publishing Federation, the Anglo-Chinese Textbook Publishers Organisation, and the Hong Kong Educational Publishers Association in Hong Kong, as well as the Association of American Publishers in the USA, the Publishers Association in the UK, and the International Association of Scientific, Technical and Medical Publishers in the Netherlands.

1. Introduction

The digital environment offers exciting new opportunities for publishers to develop larger and more robust markets for copyrighted works. At the same time, digital technology opens broad new vistas for copyright piracy. While a recent CNN

¹ See LC Paper No. CB(1)341/09-10(08).

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report focused on how “Digital Piracy hits the e-book industry,” see <http://www.cnn.com/2010/TECH/01/01/ebook.piracy/index.html>, in fact publishers have long been confronted with digital piracy of their works. This widespread infringement undermines the growth of legitimate online markets in these works, and deprives publishers of the revenues needed to produce and disseminate high quality copyright works to consumers in Hong Kong. This discourages the growth of the healthy digital environment that Hong Kong wishes to promote. For this reason, HKIPA has participated actively in the consultation process leading up to the proposals that are now before the Panel.

As HKIPA told the Principal Assistant Secretary for Commerce, Industry and Technology in a submission in August 2005, “the rapid pace of change in technological developments has left [Hong Kong’s Copyright Ordinance] out of date. A thorough review and update is timely and indeed perhaps overdue.” Today, more than four years later, it is long past time for Hong Kong to bring its Copyright Ordinance into the 21st century. In particular, HKIPA’s August 2005 letter stressed that Hong Kong must “provide criminal sanctions against those who, in the course of or in connection with a trade or business, infringe electronic editions of copyrighted materials such as books, reference works, original databases, and scientific, technical or medical journals.” Unfortunately, this gap in Hong Kong’s legal infrastructure remains unfilled in 2010. While HKIPA appreciates the progress represented by enactment (via the Copyright (Amendment) Ordinance 2007 and the Copyright (Amendment) Ordinance 2009) of section 119B of the Copyright Ordinance, that section applies only to unauthorized copying and distribution of hard-copy originals, and does not in any way address the explosive growth of piracy of copyrighted works that originate in digital formats, which is fast becoming a much more serious problem.

Accordingly, HKIPA urges the Government and the Council to move expeditiously to update the Copyright Ordinance for the digital environment. This will benefit all Hong Kong residents by providing a safer and cleaner marketplace in which innovation and investment are encouraged. It will also bring our law into line with evolving international legal standards. Indeed, the shortcomings of Hong Kong’s criminal prohibitions against digital piracy in connection with a trade or business already raise serious questions about compliance with the obligation that Hong Kong took on many years ago to provide effective criminal remedies against “copyright piracy on a commercial scale.” See Article 61 of the TRIPS Agreement.

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We now address the topics discussed in the administration’s November “Proposals” paper, in the order in which they appear there. (Citations are to paragraph numbers in this paper.)

2. Communication Right and Criminal Sanctions

HKIPA supports the government’s decision to make criminal sanctions applicable to “those who initiate unauthorised communication of copyright works to the public in the course of a business conducted for profit, or where it is made to such an extent as to affect prejudicially the copyright owners.” (Para. 8.) In particular, we are pleased to see that the availability of criminal remedies would not be tied to use of a specific technology, such as “streaming.” While the administration’s proposal should be broad enough to cover all types of uploading of copyright material (including uploading in the course of participating in a peer-to-peer network), we note that it still seems to lack any provision for criminal liability for unauthorized downloading of copyright works for use in a trade or business, since this may not involve “initiating” a communication. We urge that this gap be filled. For example, a business that knowingly engages in high volumes of unauthorized downloading in order to amass research or reference materials that it uses in delivering a service to clients ought not to escape criminal liability.

We also urge that the first limb of this formulation be expanded to cover piracy that is carried out in the course of any trade or business. For example, if a large academic or scientific institution were intentionally engaged in making a large volume of copyrighted material available to the public without authorization, it should not be immune from criminal liability simply because it lacks profit-making status. Not-for-profit status does not justify an exemption from criminal statutes to which comparable businesses are subject.

In addition, it must be made clear that a for-profit business can be criminally liable even without evidence that it sought to make a profit from the infringing activity itself. For instance, a for-profit business may intentionally make copyrighted publications in digital form available to current or potential customers for its own promotional or marketing purposes, or as an ancillary service for which no fee is charged. This action should attract criminal liability if it takes place without the authorisation of the copyright owner.

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With regard to the second limb, we welcome the administration's assurance that "large-scale infringing activities that cause prejudice to the copyright owners, irrespective of whether they are for the purposes of commercial advantage or financial gain," should attract criminal liability in Hong Kong. (Para. 6) However, because the scope of this limb is inherently uncertain, the preferable course is to expand the reach of the first limb, in order to deter the operator of any trade or business from relying on digital piracy in order to advance its objectives.

3. OSP Liability Limitation

HKIPA believes that the government shares with it the belief that any effective policy to combat the growing tide of online piracy in Hong Kong will require enhanced cooperation between copyright owners and online service providers (OSPs) of all kinds. Publishers have consistently advocated for clearer legal incentives for such cooperation. We are encouraged to see that the administration, which earlier took the position that no legislative changes were needed, now is considering the introduction of a statutory regime with the stated goal of providing these incentives.

However, HKIPA is concerned that the administration's approach, as summarized in paragraph 10 of the Proposals, may be one-sided and incomplete. It purports to provide OSPs with a safe harbor against copyright liability, without ever clearly stating what liability they would be subject to if they do not meet the "prescribed conditions." Any incentives provided by such a statutory regime are likely to be deficient, because the adverse consequences of failing to meet the conditions -- of refusing to cooperate -- are never spelled out.

Reliance upon the statutory approaches taken in the US and Australia may be inappropriate. In both those jurisdictions, the statutory safe harbors were enacted against the background of strong judicial precedents establishing the concepts of contributory or vicarious liability (in the US) or authorisation liability (in Australia). This pre-existing legal background made it possible for the legislatures in these countries to craft effective incentives for cooperation through statutory safe harbors. But as the Proposals paper candidly notes in footnote 6, Hong Kong courts have yet to flesh out the contours of authorisation liability under the Copyright Ordinance; thus the background of well-established secondary liability principles is lacking. HKIPA urges the administration to reconsider whether it might be advisable to include a codification of basic secondary liability principles for the online environment in its proposed statutory regime for OSPs.

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While HKIPA will reserve further comment until a more specific statutory regime is proposed, we wish to emphasize a few elements that it should contain:

- Any safe harbors should apply only to exposure to monetary remedies, and not to underlying concepts of secondary liability themselves. (This is the approach taken by the legislation in both the US and Australia.)
- In particular, the possibility of a judicial injunction against activities that facilitate infringement should remain, even for OSPs that otherwise demonstrate that they are entitled to safe harbor status that would curtail the availability of awards of damages.
- Among the OSP behaviors for which the statutory regime should provide incentives, one of the most critical is an effective policy to identify and deal with repeat infringers of copyright. This could take the form of a statutory graduated response system, as recently enacted in France and South Korea, and as under active consideration in other jurisdictions, including the UK. Whether it takes this form or not, measures to identify and deal with repeat infringers are an essential ingredient of any effective anti-piracy strategy, and one which cannot possibly be effective without the active cooperation of service providers.
- The actions which OSPs should be required to take in order to benefit from statutory safe harbors – including in particular repeat infringer policies -- should address their role as “conduits” for infringing activity, as well as other roles such as storage, caching and the provisions of information location tools.

We also reserve comment at this time on the Code of Practice developed by some members of the Tripartite Forum convened by the administration to bring together copyright owners, OSPs and Internet users. The Proposals paper indicates that this Code exists only in the form of a “rough outline,” and HKIPA looks forward to commenting on a more refined product.

We note that the Proposals paper, in paragraph 20(a), appears to shut the door on the introduction of any “infringer identity disclosure mechanism that is not subject to scrutiny by the court.” If this statement is meant to encompass mechanisms that might be introduced as part of a statutory regime to provide incentives for OSP cooperation, or even those that might be entered into voluntarily as part of a Code of Practice or otherwise, this conclusion is extremely discouraging, and will make it much more

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difficult to achieve the stated goal of more effective cooperative action against online piracy. In this regard, HKIPA urges that the administration assess whether there are other provisions of Hong Kong law, aside from the Copyright Ordinance, that might need adjustment in order to remove unjustified impediments to voluntary arrangements for such cooperation.

4. Temporary Copies

As stated in previous submissions, HKIPA has concerns about the breadth of proposed statutory exceptions to copyright protection for temporary copies made in the course of transmission. This is because in the digital environment, a user increasingly may extract the full value of copyright works -- for example, consulting a reference work -- without ever making or possessing a “permanent” copy. Thus any exception in this area must be carefully scrutinized for its impact on the normal exploitation of works and the legitimate interests of right holders, in accordance with international standards.

While HKIPA does not object in principle to the proposal in paragraph 14 to create a new statutory exception for transient or incidental copies that are technically required for efficient transmission of information on the Internet, it welcomes the opportunity to be involved, along with other stakeholders, in “fine-tuning the scope of and the conditions attached to the exception” (para. 15). These would include, without limitation, restricting the scope of the exception to copies made in the course of authorized transmissions (whether originating within or outside Hong Kong), and providing for right holders to use appropriate technical means to render the exception inapplicable (e.g., the use of robots.txt tags to prevent unauthorized network caching by search engines).

5. Additional Damages

It is disappointing that the administration seems to have ruled out the use of pre-set statutory damages, an effective means employed by other common-law jurisdictions to ensure that fully compensatory and deterrent damages are available to injured right holders, especially in the Internet environment. HKIPA will, of course, welcome the chance to participate in further discussions to codify specific factors that courts could consider in awarding additional damages under section 108(2).

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6. Media Shifting Exception

Publishers are directly concerned by the proposed media shifting exception for sound recordings, since audiobooks and digitally delivered books that include read-aloud capability are a growing part of the market, and would be captured by the current definition of “sound recording” in the Copyright Ordinance.² We question whether a need for any new exception has been demonstrated with respect to such works (even if it has been shown with respect to sound recordings of musical works), and urge that any media shifting exception be made inapplicable to sound recordings of literary works.

Conclusion

HKIPA appreciates this opportunity to offer its perspectives on the current proposals for copyright protection in the digital environment. If there are any questions concerning this submission, please do not hesitate to contact the undersigned.

Respectfully submitted

Simon Li

Convenor (Hong Kong)

(no signature via electronic transmission)

² See section 6(b): “a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced.”