



Hong Kong Information Technology Federation

## HKITF Submission to Panel on Commerce and Industry on Copyright protection in the digital environment

### 1 Introduction

- 1.1 The Hong Kong Information Technology Federation (“HKITF”) appreciates this opportunity to comment on the Administration’s refined proposals for updating Hong Kong’s Copyright Ordinance.

### 2 About HKITF

- 2.1 Founded in 1980, HKITF is a non-profit, non-political trade association that provides a forum within which Hong Kong’s IT-related businesses can work together for the benefit of the industry. HKITF also strives to maintain a high level of business practice among its 300 plus members. For more information about HKITF, please see our website: [www.hkitf.org.hk](http://www.hkitf.org.hk).

### 3 The increasing impact of Internet piracy

- 3.1 Access to the Internet, once restricted to large organisations, continues to expand at a rapid pace both within Hong Kong’s borders and around the world. The benefits of Internet access are well known and are eagerly embraced by each member of the HKITF.
- 3.2 Regrettably, the impact of expanding Internet access is not exclusively positive. The increasing incidence of Internet piracy continues to damage organisations that depend on strong copyright laws to operate their businesses. HKITF therefore considers that the introduction of legislative reform in this area is timely and essential in order to preserve the strength of Hong Kong’s digital economy .

### 4 Right to communicate to the public

- 4.1 HKITF supports the Administration’s proposal to introduce a broad, technology-neutral right of communication to the public that covers all forms of electronic transmissions. HKITF also welcomes the institution of criminal sanctions against those who initiate unauthorised communication of copyrighted works. However, given the importance of P2P technology as a medium for copyright infringement, and the fact P2P technology makes it difficult to determine which subscriber has ‘initiated’ any given communication, HKITF is concerned that this restriction may impede the practical application of these new criminal sanctions. HKITF recommends that the Administration consider amending the wording of the new criminal sanction provision to ensure that P2P behaviour is captured.

### 5 Caching by online service providers

- 5.1 HKITF notes that the Administration intends to proceed with a copyright exception for temporary reproduction of works by online service providers (“OSPs”). HKITF reiterates its view that any such exception, if implemented, should take the form of a limitation of liability scheme, given that this is the approach that has been adopted in the United States, Australia, New Zealand and Singapore.

### 6 Limitation of liability for online service providers

- 6.1 HKITF welcomes the introduction of a statutory limitation of liability scheme for OSPs in conjunction with a voluntary Code of Practice that allows OSPs to access the statutory protections. However, HKITF considers that care must be taken to develop the law and the Code of Practice in parallel, and

to ensure that the Code of Practice which enters into force is robust and has the support of relevant stakeholders. Such an approach will stimulate the debate about the obligations of OSPs in Hong Kong, and avoid the uncertainty that would be created if statutory immunities are enacted in the absence of an approved code.

## **7 Content of the proposed Code of Practice**

- 7.1 HKITF believes that the proposed Code of Practice should include clear guidelines on the procedure to be followed by OSPs on becoming aware of the existence of infringing material. Such guidelines are necessary to provide a unified yet flexible approach to the problem of copyright infringement.
- 7.2 In the case of material hosted on OSPs' own servers, HKITF's view is that OSPs should implement a "notice and takedown" procedure. This procedure would be followed where a notice of infringement is provided to an OSP by a rights holder.
- 7.3 HKITF notes that the Administration has rejected the concept of a graduated response scheme. In the case of material hosted elsewhere than the OSPs' own servers, such as through distributed P2P networks, HKITF believes that there are two key benefits to implementing a graduated response scheme. First, such a scheme serves an important educational function within the community about the importance of copyright, as well as being an effective deterrent to illegal behaviour. Second, graduated response strikes a balance between the rights of internet users and the rights of copyright owners, since it only imposes sanctions against persistent infringers. For these reasons, HKITF views the adoption of a graduated response system in Hong Kong (with contract-based sanctions, and/or administrative sanctions incorporating due process) as an important and appropriate measure to combat online piracy, and urges the Administration to reconsider its position on this issue.

## **8 Revision of damages regime**

- 8.1 HKITF supports the prescription of factors within the Copyright Ordinance that would assist the Court in determining additional damages suffered by copyright holders. HKITF would welcome the opportunity to discuss with the Administration the exact content of these factors.
- 8.2 HKITF notes, however, that the concept of a statutory damages scheme has been rejected by the Administration. HKITF remains of the view that the institution of such a scheme would greatly assist the efficient operation of the judicial system. The setting of a schedule of damages would add considerable certainty to the administration of copyright law, while at the same time relieving copyright owners from the costly and time consuming burden of having to quantify actual damages.
- 8.3 Moreover, the experience of the United States and Canada demonstrates that such a scheme can operate flexibly, with graduated damages to reflect the circumstances of the infringement. It has been the experience of those two nations that such a scheme has proven remarkably effective in practice, and that this experience ought to commend such a scheme to the Administration. HKITF therefore urges the Administration to reconsider the incorporation of a statutory damages regime in Hong Kong's updated Copyright Ordinance.

## **9 Media shifting exception for sound recordings**

- 9.1 Given that the Administration has decided to adopt a limited media shifting exception, HKITF reiterates its previous submission that the Administration take note of the equivalent Australian and New Zealand provisions as providing guidance for the structure of such an exception.



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**10 Ongoing consultation**

- 10.1 HKITF thanks the Administration for its consideration of this submission and welcomes the opportunity to discuss any of the points raised within this document.