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香港律師會

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21 January 2010

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Ms. Yue Tin Po
Clerk to Panel
Legislative Council
Legislative Council Building
8 Jackson Road, Central, Hong Kong

Dear Ms. Yue,

**Re: Panel on Commerce and Industry
Meeting on 19 January 2010
Invitation for submissions**

I refer to the meeting on 19 January 2010.

Whilst the Law Society appreciated the opportunity to address the Panel, unfortunately in view of the shortage of time not all the points we wanted to emphasise could be covered. Accordingly, noting the comment of the Panel and the Secretary for Commerce and Economic Development that dialogue should be maintained, we are pleased to enclose a copy of the full text of the oral submission for your reference.

Yours sincerely,

Joyce Wong
Director of Practitioners Affairs
e-mail: dpa@hklawsoc.org.hk

cc Intellectual Property Committee



PROPOSALS FOR STRENGTHENING COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT

LAW SOCIETY ORAL SUBMISSION

Mr Chairman, Honourable Members and representatives of the Government. Thank you for this opportunity, albeit short, to address you on behalf of The Law Society in connection with these Refined Proposals to Strengthen Copyright Protection in the Digital Environment.

As the first speaker I would like if I may to set the scene a little. Our detailed submissions are to be found in our papers which you have dated 30 April 2007 and 3 September 2008 and 13 January 2010.

1. First of all, we would like to thank the Administration for its efforts so far in coming up with these proposals and attempting to keep the difficult and delicate balance of interests between rights owners and legitimate users, noting our treaty obligations and Article 140 of the Basic Law which requires us to protect by law the achievements and lawful rights of authors.
2. You will hear a variety of views this afternoon, but there are three principles that we submit they are all likely to share in common:
3. First, everyone wants legal certainty with regard to liability for copyright infringement in the digital environment, in particular as regards the liability of ISPs and OSPs. Currently, as the Proposals admit but do not address, this is not clear. As an example, "broadcast" is currently defined to include persons making the arrangements necessary for a transmission. Internet transmissions are covered by the expression "making available to the public". Liability covers both those directly infringing and those authorising another to infringe. The Proposal to introduce a further offence of *initiating* unauthorised communications to the public introduces another concept. It should not be left to the courts to decide what this means.
4. Secondly, everyone wants legal certainty with regard to any limitation of liability (or safe harbour), again in particular as regards the liability of ISPs and OSPs. The Proposal is (and again I quote) to "introduce a statutory regime which gives OSPs the assurance that compliance with certain conditions would qualify them for limitation of liability for copyright infringement. This regime will be underpinned by a Code of Practice...and

OSPs who observe the Code would be deemed to have complied with the conditions." This begs the question what in the first place is the liability of OSPs and ISPs? We also note and underline that implementation of the safe harbour provisions in the legislation must go hand in hand with any Code of Practice agreed by the relevant stakeholders.

5. Thirdly, everyone wants clarity in the law sooner rather than later. It is now more than 10 years since this issue was first raised and 4 years since the consultation began. The problem has not gone away. The Government (and I again quote from the Proposals) has a "commitment towards upholding a robust copyright protection regime in Hong Kong and its importance to the further sustainable development of our creative industries." No one who looks seriously at the issue should disagree with this proposition. However, we fear that these cautious Proposals will not as they stand achieve the Government's objective of tackling on-line infringement.
6. The Law Society urges the Panel and Legislators to do the right thing and to keep Hong Kong competitive. By that we mean Hong Kong needs to have and maintain a cutting edge and above all effective approach to dealing with internet piracy. It must keep up to date with developments in this area elsewhere and it must clearly set out in legislation the rights and remedies and procedures that can be directly, effectively and conveniently enforced - by the courts of course.
7. We'd like to say something about the 'graduated response' approach. The Government thinks that now is not the time to introduce such a system. In our submission Hong Kong runs the risk of being out of step and behind the curve in its mission to uphold a robust copyright protection regime in Hong Kong if it fails to keep up with developments in this area which, as we speak, are going ahead in places such as the UK, Australia, New Zealand, Singapore, South Korea and Taiwan.
8. The educational and proportionate nature of a graduated response to infringement is precisely what the Government should be looking at now. In particular, Hong Kong should not shy away from but be part of the debate as to what to do about serious repeat infringers. A notice and take down system does not work in the P2P environment. We urge the Panel to note developments elsewhere, for example in New Zealand which proposes a graduated approach subject to scrutiny by an expanded Copyright Tribunal and by the Court, including the ultimate remedy of service suspension.
9. On the question of legal certainty we have also advocated the adoption of statutory damages. Whilst we note the proposals for additional factors to assist the determination of additional damages, we also note the practical difficulty of proving actual loss for online infringement. There would be added certainty in having at least a range of damages to guide the court, which is all we are seeking.
10. Finally we ask the Government and this Panel to review our cost and time saving proposal for a simplified court based approach to the at present very expensive Norwich Pharmacal procedure for identifying potential on-line

infringers. The rejection of this or other proposals on the basis that they are not subject to court's scrutiny clearly does not apply.

11. Any further questions or discussion on this and any other points are welcome.

**The Law Society of Hong Kong
Intellectual Property Committee
21 January 2010
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