



The Chairman,  
The Panel Committee of Commerce and Industry  
The Legislative Council  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

21 January 2010

Dear Sirs,

The Government's Refined Proposal to Strengthen Copyright Protection  
in the Digital Environment

We are extremely grateful for granting us three minutes of your time to present our views and comments before your panel members on the Government's Refined Proposals to Strengthen Copyright Protection in the Digital Environment (the "Proposal") in the afternoon of 19<sup>th</sup> January 2010.

If we understand correctly, it appears that the Government has maintained an open attitude in response to the specific request made by the content industries that the Government should and must include the Graduate Response Mechanisms. Much as they would like to include this item into the forthcoming tripartite forum discussions on the Code of Practice for which we would like to express our appreciation, they consider that it may be too early to consider taking the matter further because of the limited working experience on this Graduate Response Mechanisms ("GRM") from other leading jurisdictions.

As Sookman and Glover<sup>1</sup> rightly pointed out, GRM are not intended to be anti-users; on the contrary, users' privacy, interests and legal rights are well respected. Instead of taking a user to court for copyright infringement as what we have done, the user receives two warning notices before the copyright owner takes any further action. These notices provide ample opportunities to change the infringer's behavior from unauthorized file sharing activities to purchase copyright works legally. His name still remains anonymous up to that stage.

If the warning notices fall on the deaf ear, the copyright owner may then take a further action against him, yet we have procedures to safeguard his legal rights. GRM address the online infringement in constructive way that is sensitive to the subscribers of the OSPs, to their

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<sup>1</sup> Barry Sookman and Dan Glover 'Graduated Response and Copyright: an idea that is right for the times' *The Lawyers Weekly* Published online on 20 January 2010. Available at:  
<http://www.barrysookman.com/2010/01/20/graduated-response-and-copyright-an-idea-that-is-right-for-the-times/>

privacy, and to content industries. And more importantly, they may be a good response to OSPs' needs in term of network congestion.

Perhaps, you may wish to know that Hong Kong universities have been engaged in their own form of graduated response, albeit in variant forms of informal graduate response, for years such as warning of the students not to commit any copyright infringement or else their privilege of using the universities online facilities will be denied.

Of course, OSPs may have a different view on GRM. Perhaps, they focus more on increasing their broadband penetration and cutting back on piracy is not part of their business interest. This is understandable. "Firstly, they do not want to annoy their customers who have implicitly encouraged to free ride. Secondly, they do not want to lose markets to the benefit of their free riding competitors."<sup>2</sup> If Hong Kong grants the safe harbour provisions to OSPs making them not liable for their free rider users of copyrighted materials, there is more reason for them to ignore the request from the content industries.

In short, the content industries do not expect that they will have full cooperation from OSPs absent the clarification of the meaning of authorization of copyright infringement in the networked environment under and by virtue of which "the OSPs may be found contributorily or vicariously liable for copyright infringement". The defined OSPs liability provides an incentive for them to follow whatever the safe harbour provisions as may be imposed on them and in particular the follow up actions."<sup>3</sup> In short, "the graduated response mechanism operates like an internalisation of the piracy externalities, in a way close to the "polluter pays' principle."<sup>4</sup>

Perhaps, we would like to invite OSPs to consider that the business interests of the content industries and those of the OSPs are eventually converging when the time comes they want to offer their subscribers good quality copyright contents through their own content distribution or communication channels or portals; something that distinguishes one from another.

As we have repeatedly pointed out earlier,<sup>5</sup> the GRM would have had an impact on the cost and therefore the efficiency of copyright infringement;<sup>6</sup> the GRM including the three strikes

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<sup>2</sup> Olivier Bomsel and Heritiana Ranaivoson, 'Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response' vol. 6(2) *Review of Economic Research on Copyright Issues*, 2009, 13-29 on p.26.

<sup>3</sup>Page 4 of the Submissions on the Proposal to the LegCo's Panel on Commerce and Industry by IFPI (Hong Kong Group) Limited dated 11<sup>th</sup> January 2010 refers

<sup>4</sup> See footnote 2 above on p.27. Also Charn Wing Wan, 'the Reform of Copyright Protection in the Networked Environment: A Hong Kong Perspective' (November 2008) 11 (5-6) *Journal of World Intellectual Property* 498-526, on p. 509. "The OSPs have been making money from subscribers using their bandwidth for online copyright infringement and have tried externalizing their costs to the content industries in the same way that a chemical factory pollutes its neighborhood."

<sup>5</sup> IFPI's letter to CEDB (Division 3) on the "Preliminary Proposals on the Strengthening of Copyright Protection in the Digital Environment in Hong Kong dated 27 August 2008.

law are now recognized as being critical instruments of copyright policy in leading jurisdictions such as EU, Australia, New Zealand, the United Kingdom and Canada following the enactment of the similar law in France, Korea and Taiwan. New Zealand government considers that GRM are now emerging as an international copyright norm or eventually an international trade standard.<sup>7</sup> **The timely implementation of the GRM would only be beneficial for Hong Kong.**

Accordingly, we must stress, in no uncertain terms, the importance of including the OSPs' liability (by clarifying the meaning of authorization in the context of networked environment) and GRM in our desperately needed new copyright amendment bill that can and should be introduced sooner rather than later.

For further clarification, the undersigned may be reached at 28614303 and [rickceo@ifpihk.org](mailto:rickceo@ifpihk.org).

Thank you for your kind attention.

Yours truly,  
For and on behalf of  
International Federation of the Phonographic Industry  
(Hong Kong Group) Limited



Ricky Fung  
CEO

c.c. IFPI (Hong Kong Group) – Committee  
IFPI

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<sup>6</sup> See footnote 2 above. Also Charn Wing Wan 'Three Strikes Law: A Least Cost Solution to Rampant Online Piracy' *Journal of Intellectual Property Law & Practice*, 2010, 5(4) forthcoming.

<sup>7</sup> See footnote 1 above.