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Panel on Commerce and Industry

Meeting on 17 November 2009

**Updated background brief on
copyright protection in the digital environment**

Purpose

This paper summarizes previous discussions by the Panel on Commerce and Industry (the Panel) on issues relating to copyright protection in the digital environment.

Background

The Copyright Ordinance

2. The existing Copyright Ordinance (Cap. 528) accords protection to copyright works¹ stored in digital format and on the Internet. It also contains provisions dealing with unauthorized uploading and downloading of copyright works over the Internet. Civil remedies and, in some circumstances, criminal sanctions are provided against such unlawful activities. The legislative measures are backed by vigorous enforcement action taken by the Customs and Excise Department (C&ED). The Administration has also organized on-going public education programme to promote awareness of and respect for intellectual property rights in the community.

Public consultation on copyright protection in the digital environment

3. Further to the introduction of an enhanced and more flexible copyright protection regime by way of the Copyright (Amendment) Bill 2006 passed by the Legislative Council on 27 June 2007, the Administration separately launched a public consultation exercise on whether the regime should be further enhanced to provide wider protection for copyright works in the digital environment in the light of advances in technology and the development of broadband network. The consultation document covered six issues, namely:

¹ Copyright works include (a) original literary, dramatic, musical or artistic works; (b) sound recordings, films, broadcasts or cable programmes; and (c) the typographical arrangement of published editions.

- (a) the legal liability for unauthorized uploading and downloading of copyright works (including whether unauthorized downloading should be criminalized);
- (b) protection of copyright works transmitted to the public via all forms of communication technology (i.e. whether copyright should be protected regardless of what form of transmission technology was used to disseminate the copyright works to the public);
- (c) the role of online service providers (OSPs)² in relation to combating Internet piracy (including whether online service providers should be held liable for infringing activities occurring on their service platforms);
- (d) facilitating copyright owners to take civil actions against online infringement (including whether simplified procedures should be introduced to assist copyright owners to obtain the personal particulars of online infringers);
- (e) statutory damages for copyright infringement; and
- (f) copyright exemption for temporary reproduction of copyright works.

4. Following the public consultation exercise conducted from December 2006 to April 2007, the Administration received over 600 submissions. In general, copyright owners urged the Administration to cast a wider criminal net and bring in relevant measures to facilitate their pursuit of civil actions. However, the copyright users, mostly trade associations and some professional groups, were concerned about criminalizing unauthorized downloading activities and the possible adverse impact that such measures might have on the free flow of information on the Internet, personal data privacy, and the development of Hong Kong as an Internet service hub.

5. In formulating the proposal for the second round of consultation with stakeholders and the public, the Administration had taken into account the public views received and latest developments in different jurisdictions overseas. The proposals were summarized below:

- (a) to introduce a right of communication covering all modes of electronic transmission for copyright works, with related criminal sanctions against the breach of this right in specific circumstances;

² OSPs refer collectively to operators who provide Internet services. The services may be broadly categorized as (a) access services; and (b) application services (e.g. offering server space for websites or storage space for data, managing and operating websites, domain name resolution services, web mail, discussion forums or newsgroups, providing search engines or information location tools to facilitate online information retrieval).

- (b) to introduce copyright exemption for temporary reproduction of copyright works by OSPs, which was technically required for (or enabled) the transmission process to function efficiently;
- (c) to facilitate the drawing up of a voluntary code of practice for OSPs in combating Internet infringements, the compliance with which or otherwise would be prescribed in law as a factor that the court should take into account when determining whether an OSP had authorized infringing activities committed on its service platform;
- (d) to continue to rely on the "Norwich Pharmacal"³ principles, as opposed to introducing an alternative infringer identity disclosure mechanism that was not subject to scrutiny by the court;
- (e) to prescribe in law additional factors to assist the court in considering the award of additional damages, in lieu of introducing statutory damages for copyright infringement actions; and
- (f) to refrain from introducing new criminal liability pertaining to unauthorized downloading and peer-to-peer⁴ (P2P) file-sharing activities.

The Government would also consult the public on the possible introduction of a media shifting⁵ exception, a subject not covered in the previous consultation document. The move came about as a result of some important developments in other jurisdictions since December 2006.

Discussions by the Panel on Commerce and Industry

6. At the Panel meeting held on 15 April 2008, the Administration briefed members on the results of the public consultation exercise on "Copyright Protection in the Digital Environment" conducted from December 2006 to April 2007. The Administration also briefed members on the preliminary proposals for the second round of consultation with stakeholders and the public. The Panel considered that it was incumbent upon the Administration to ensure that the copyright protection regime would facilitate the free flow of information in the digital environment while not compromising the protection of personal data privacy.

³ For copyright infringements committed on the internet, the identity of the online infringer is often unknown to the copyright owner, and difficult to track down unless with the cooperation of the relevant OSP. At present, copyright owners may rely on the "Norwich Pharmacal" discovery procedure to obtain a court order demanding disclosure from the relevant OSP (notwithstanding that it may be an innocent third party to the action) when it is the only practicable source of information.

⁴ A technology whereby all the participating P2P users were contributing their computing power and available bandwidth to facilitate file sharing and distribution.

⁵ Media shifting refers to the practice of copying genuine copyright material from one medium to another, such as copying legitimate musical recordings from an audio CD to a portable music player.

7. Panel members generally supported the strengthening of copyright protection in the digital environment, noting that it would not be feasible to trace the source of online infringement because a new technology was being developed based on the P2P technology to achieve "streaming"⁶.

8. Panel members noted that the Administration proposed to bring in criminal sanction relating to unauthorized communication of copyright works by "streaming". Some members doubted whether and how the criminalization of "streaming" could be enforced. They also pointed out that as it was common that uploading, downloading and sharing of video clips were offered by video sharing websites such as "YouTube", many users of these websites might be unaware that criminal liability would be extended to cover "streaming".

9. The Administration advised that "streaming" was at present one of the most common forms of copyright infringement. To guard against massive piracy on the Internet, the Administration proposed to bring in criminal sanctions, in the non-business context, against unauthorized communication of copyright works utilizing "streaming" which was made to such an extent as to affect prejudicially the interests of copyright owner.

10. According to the Administration, C&ED had deployed professional staff from its Anti-Internet Piracy Teams, Computer Analysis and Response Team and Computer Forensic Laboratory to enforce the Copyright Ordinance. To this end, C&ED would deploy its professional resources and collaborate with relevant experts with a view to ensuring the enforceability of the future legislative proposal.

11. Panel members were keen to ensure that, in addition to enforcement, the Administration would devise measures to forestall infringing acts. As criminal sanction would bring far-reaching effect on one's life, the Administration should also be mindful of such a concern and to consult the public extensively before formulating any new legislative framework to combat Internet infringement. Wide publicity should be conducted after passage of the legislative proposals to prevent the public from being caught unaware.

Latest position

12. The Administration will report to the Panel on 17 November 2009 the results of the public consultation exercise, including deliberations among stakeholders on the voluntary code of practice for internet service providers to help combat on-line infringements, and the proposed way forward.

⁶ A technology for transferring data such that the data could be processed as a steady and continuous stream. Very often, the technology enables users to view or listen to a work online though, unlike downloading, users will generally not be able to retain a complete copy of the work after streaming.

Relevant papers

Information papers provided by the Administration for the Commerce and Industry Panel meeting on 16 January 2007

<http://www.legco.gov.hk/yr06-07/english/panels/ci/papers/ci0116cb1-694-3-e.pdf>

Minutes of the Commerce and Industry Panel meeting on 16 January 2007

<http://www.legco.gov.hk/yr06-07/english/panels/ci/minutes/ci070116.pdf>

Information papers provided by the Administration for the Commerce and Industry Panel meeting on 15 April 2008

<http://www.legco.gov.hk/yr07-08/english/panels/ci/papers/ci0415cb1-1211-3-e.pdf>

Background brief prepared by the Legislative Council Secretariat for the Commerce and Industry Panel meeting on 15 April 2008

<http://www.legco.gov.hk/yr07-08/english/panels/ci/papers/ci0415cb1-1211-4-e.pdf>

Minutes of the Commerce and Industry Panel meeting on 15 April 2008

<http://www.legco.gov.hk/yr07-08/english/panels/ci/minutes/ci080415.pdf>

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