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representing the recording industry worldwide

IFPI Comments on Hong Kong Copyright (Amendment) Bill 2011

July 2011

The International Federation of the Phonographic Industry (IFPI) thanks the Bills Committee of the Legislative Council for the opportunity to submit comments on the Copyright (Amendment) Bill 2011 ("the Bill"), published in the Gazette on 3 June 2011.

We welcome the government's initiative to update Hong Kong's copyright framework. It is encouraging to see that the stated goals of the bill are to "ensure that the copyright law will endure the test of rapid advances in technology" and to "enable cooperation between copyright owners and OSPs in the fight against online infringement". We are concerned, however, that the bill does not go far enough to achieve these goals. A number of clarifications and changes are needed in order to help establish a modern copyright regime that will support a healthy online environment and bring benefits to Hong Kong's creators, legal online services, and local economy.

In summary, we recommend the following amendments:

I. **The Bill should introduce further rules to address all forms of online piracy, including an obligation for OSPs to implement a graduated response mechanism to curb non-hosted content piracy.**
II. **The safe harbour regime should be amended by –**
    - **Narrowing the scope of services that may qualify for the safe harbour protection.**
    - **Recognising periodic payments as 'financial benefits' to the OSP.**
    - **Requiring OSPs to remove infringing content expeditiously.**
    - **Clarifying that OSPs must (as opposed to 'may') act when they obtain knowledge of the infringement, in order to qualify for the safe harbour.**
III. **The list of factors for determining 'authorisation' liability should be expanded.**
IV. **The exception for temporary reproduction by OSPs should form part of the safe harbour regime, and not be included as an additional stand-alone exception.**
V. **The fact that distribution of pre-release content prejudicially affects rightholders should be reflected in the bill or clarified by the administration.**

VI. **Clarification should be given to s22(5)-(6) to avoid confusions in the interpretation of an act of infringement by communication to the public.**

VII. **The private copying exception should be further clarified by expressly excluding copies made from online transmissions.**

Background

IFPI represents the recording industry worldwide with over 1400 members in 66 countries. Our membership includes the major multinational recording companies and hundreds of independent record companies, large and small, located throughout the world, including in Hong Kong. The members of IFPI are involved in the production and distribution of sound recordings representing music of all kinds, including popular, classical, jazz, and folklore.

The recording industry in Hong Kong has been shrinking in the past 10 years, and is now about one-third of its market size in 2000. The sharp decline in sales is primarily due to the rampant online piracy in Hong Kong. The sale of music through exploitation in digital channels has also been severely hampered and has failed to take off.

Hong Kong's legitimate digital market is severely underperforming and it is difficult to reconcile the fact that while the country sees a rapid growth and substantial development of its Internet and mobile networks[1], the digital market remains at only a fraction of its potential. Physical sales continue to fall, and digital sales do not compensate for this decline. In 2010, sound recording sales dropped 6.4% and growth of digital music sales was slow. The local industry in Hong Kong is facing some of the most difficult market conditions ever and its continued survival is at stake. If this situation continues, and no effective policy to support the recording industry in Hong Kong is introduced, the flourishing Canto-pop market will gradually disappear.

We welcome the government's initiative to update the Copyright Ordinance and introduce further safeguards for the protection of copyright works in the digital age. An updated regime of copyright protection in Hong Kong would positively impact the local creative industry and benefit domestic and foreign creators alike. However, the legislative texts need to be improved if they are to achieve this goal. Our industry's main concerns are detailed below and we urge the honourable members of the Bills Committee of the Legislative Council to address them, before the Copyright (Amendment) Bill is approved.

[1] In February 2011, the number of mobile service subscribers was boosted to 13.71 million, representing penetration rates at about 193%. Among these 13.71 million subscribers, 5.72 million were 3G/3.5G service customers. Data services such as short messaging, mobile Internet services, all sorts of download services, multimedia services, video call services and mobile TV services are very popular among consumers. As at February 2011, local mobile data usage recorded a remarkable surge to **1 949 Terabytes** (i.e. 1 948 760 Gigabytes), or an average of 291.2 Mbytes per 2.5G/3G mobile user. This represents 2.8 times the mobile data usage over the same period in 2010 and 12.1 times over the same period in 2009. Source : OFTA, http://www.ofta.gov.hk/en/datastat/hktelecom-indicators.html

I. ADDITIONAL MEASURES AGAINST ONLINE INFRINGEMENT SHOULD BE INTRODUCED TO ADDRESS ALL FORMS OF PIRACY, INCLUDING P2P

The Bill should introduce rules requiring OSPs to implement effective measures to address forms of infringement where the infringing content does not reside on the ISP's servers (for example, P2P file-sharing). These should include a 'graduated response' mechanism involving warnings with ultimate deterrent sanctions for users who refuse to stop infringing.

One of the stated purposes of the Bill is to facilitate cooperation between copyright owners and OSPs in the fight against online infringement. Although it includes a number of important provisions to encourage such cooperation, the Bill does not go far enough in addressing today's enforcement challenges, and fails to achieve its stated goal. The proposed safe harbour regime will help deal with hosted-content piracy by encouraging OSPs to take down infringing content, but will do little to address other forms of piracy, including P2P infringements, where the content is not hosted by the OSP and cannot be taken down.

P2P piracy is a major problem for the recorded music industry. Many of the tracks downloaded illegally from the Internet are downloaded from P2P networks. Our research has shown that in 2008, over 40 billion music files were illegally distributed among P2P users. This form of infringement cannot be addressed under a 'notice and takedown' provision such as the one proposed under Division IIIA of the Bill, because the content does not reside on the ISP's servers and therefore cannot be taken down. Meaningful measures at the network level, as well as a 'graduated response' procedure for dealing with repeat infringement, could reduce P2P piracy and provide effective deterrence. They could also reduce the need to bring litigation to stop online infringement. Such solutions have already been adopted, or are being considered, in a number of countries. In the last two years, there has been major progress on this issue and the adoption of a legislative 'graduated response' mechanism is becoming a trend among countries that update their laws to address digital piracy.

Graduated response legislation establishes a procedure that includes several warnings sent to the account holder, leading to deterrent sanctions that can include account suspension if the warnings are ignored. In France, a system of graduated response is now being implemented on the basis of a law that was adopted in October 2009. This law created a system of warnings with ultimate sanctions that can include account suspension of up to one year. In the UK, the 2010 Digital Economy Act introduced a graduated sanctions mechanism with obligations on ISPs to notify infringing users who were subject to a rightholder complaint, and to keep records of these reported subscribers. Measures against repeat infringers, including account suspension and limitation of service, may be required to be implemented by the Secretary of State. In South Korea, a graduated

response law passed in April 2009 established an administrative procedure of graduated sanctions against online infringement, operated by the Ministry of Culture. These sanctions include issuance of warnings and closure of accounts held with online services, and sanctions against online services that do not respond to administrative sanction orders. Similar measures are already in place in Taiwan, New Zealand and Chile. In other countries, such as the US, Australia and Singapore, OSPs must adopt and implement a policy of terminating repeat infringers' accounts as a condition on safe harbour protection.

An appropriately crafted 'graduated response' system provides not only a meaningful deterrent to P2P infringement, but also an effective way to stop it while maintaining user privacy and avoiding the need to go to court. The OSP's legal right to suspend or terminate accounts in circumstances of repeat or serious infringements is already specified in their agreements with users, and OSPs should be required to give this obligation real effect.

Other measures to address non-hosted online infringement, such as the implementation of technological measures at network level to prevent the unauthorised distribution of protected content, are also possible. Effective technologies to identify copyright content are available in the market and can be used by OSPs to assist in reducing online infringement.

II. THE SAFE HARBOUR REGIME SHOULD BE AMENDED TO MAKE IT EFFECTIVE

Division IIIA of the Bill creates a safe harbour regime which limits the potential liability of OSPs that meet a list of specified conditions. Although the conditions may be further detailed and expanded in a 'code of practice' issued by the Secretary for Commerce and Economic Development under Section 88I, a number of changes to the existing conditions are necessary.

a. The list of services that may qualify for the safe harbour protection should be narrowed.

The definition of "Online Service" in proposed section 88A includes 6 categories. Two of these categories appear to address the same type of service: subsection (a) refers to services offering *"transmission, routing or... connections"* and subsection (f) refers to services providing *"access to the Internet"*. It seems that both subsection (a) and (f) address 'mere conduit' services, i.e. services that provide users with internet access. To avoid duplication and confusion, we recommend merging these two subsections.

Also, subsection (e) of the definition covers "*application based services... such as social networking"*. To the extent that they are not already covered by the safe harbour for hosting services, there is no reason to exclude this category of service from the general liability regime under Hong Kong's law. No other country offers to social networks operators the benefits of a separate safe harbour protection. Social networks and other sites offering a platform for users to directly connect and share content, to the extent that their activities go beyond solely hosting, should be responsible for preventing abuse of their service for infringing activity.

b. One-off or periodic payments should be recognised as 'financial benefits' to the OSP.

One of the conditions for safe harbour protection is that the OSP does not receive a *"financial benefit directly attributable to the infringement"*. Referring to this condition, new subsection 88B(2)(b) states that *"one-off set up fees or flat periodic payments charged by the service provider"* shall not be considered as "financial benefits".

The requirement that the OSP does not benefit financially from the infringement is a key factor in determining safe harbour applicability. It is therefore important that there is no substantial carve out from the scope of this element. In today's online market, many infringing services (including all major cyberlockers) charge consumers monthly membership fees. It simply does not make sense to exclude these services from potential liability, especially when they not only directly profit from infringement but also offer heavy uploaders financial rewards for increased activity. Flat periodic payments, which are today charged by different illegal offerings, should be recognised as 'financial benefits' even if a payment is only made once. No other country explicitly carves out such payments from the scope of the term 'financial benefits' and we strongly recommend that the proposed subsection 88B(2)(b) is deleted, or further clarified so that the term "financial benefits" is left open for judicial interpretation. If subsection 88B(2)(b) remains unchanged, it will protect a large number of sites that profit from infringement from potential liability.

c. OSPs should be obliged to remove infringing content expeditiously.

While new section 88B provides that OSPs shall not be liable for damages if they meet the safe harbour conditions, new subsection 88D(2) states that the OSP "may" remove infringing material when it becomes aware of it. The word "may" suggests that the OSP does not have to take down infringing content. Also, the provision does not specify the required timing for the removal of the content.

If there is no affirmative obligation on OSPs to remove infringing content, there is no reason to offer them a limitation of their liability for damages. Safe harbour provisions in other countries require hosting services to expeditiously take down content when they become aware that an infringement is occurring. One critical element of any takedown procedure is that infringing content is taken down as quickly as possible by the OSP. This is because of the huge damage to the rightholder while the material remains publicly available for downloading, in particular in the case of pre-release recordings.

An obligation to expeditiously remove content is required for the safe harbours available under US law (Sec. 512(g)(2)(C) of the US Copyright Act), EU law (Article 14(1)(B) of the E-Commerce Directive, and EU Member States' domestic laws implementing this Directive), and other countries. Hong Kong should follow this approach.

III. THE LIST OF FACTORS FOR DETERMINING "AUTHORISATION LIABILITY" SHOULD BE EXPANDED

Four additional elements, which were previously proposed by CEDB but deleted from the current version of the Bill, should be added to the list of factors for determining "authorisation".

We welcome the clarification provided under section 22(1) as to what constitutes "authorisation". The amended provision will bring greater clarity to parties involved in online activities and assist the courts in deciding whether a party has authorised the direct infringement. However, we note that four important factors, which were originally proposed by the administration, were not included in the bill. These factors are:

(a) Whether that person knew or should have known of the infringement;
(b) Whether that person induced or encouraged the infringing act;
(c) Whether the equipment or other material supplied by that person constitutes the means used to infringe;
(d) Whether that person deliberately facilitated infringement.

These four factors have been previously taken into account in judicial decisions in Australia, the US and UK, and were consequently proposed by the administration for inclusion in the new law. We urge that they be re-inserted in the bill, to provide further clarity to the notion of "authorisation" and to assist the courts.

IV. THE EXCEPTION FOR TEMPORARY REPRODUCTION BY OSPS SHOULD ONLY BE INTRODUCED AS PART OF THE SAFE HARBOURS.

The proposed new exception in section 252A (and 65A for copyright works) should be part of the OSP safe harbours in section 88B-I, and should not be a stand-alone exception. It should limit liability for monetary relief, but leave open the possibility to obtain injunctions against OSPs that are involved in temporary reproduction.

In the US, under the EU E-Commerce Directive and in other countries' laws, providers of caching services may benefit from a limitation of their liability for monetary relief only if they meet a list of narrowly crafted conditions. This limitation is part of a safe harbour regime that is aimed at providing incentives for these services to take measures against infringement. The Bill includes, in section 88B the elements adopted under US, EU and other laws' safe harbour for caching services, but also offers an additional, stand-alone exception from any liability under section 252A. It is not part of the safe harbours in Division IIIA, and the relationship between this exception and the safe harbour is unclear. We recommend including section 252A under Division IIIA, and clarifying that an OSP that meets the conditions in this provision may benefit from a limitation of potential liability for damages.

V. NEW CRIMINAL OFFENCE AND NEW FACTORS FOR "PREJUDICIAL EFFECT"

We welcome the suggestion to provide a list of factors to determine a communication or distribution of the work to the public is made to such an extent as to affect prejudicially the copyright owner in a copyright offence under section 118(2AA) and section 118(8C) with the aim to criminalise the distribution of pre-released content. In fact, if someone is posting a link or forwarding such link of the leaked pre-released material online (i.e. the music track that is found being made available or distributed before its official release date), then it will cause tremendous loss to the right owners. The literal interpretation of the new section 118(2AA)(e) and section 118(8C)(e) may not be clearly regarded as the situation of distribution or making available of pre-released content. There is no doubt that distribution of pre-release content prejudicially affects rightholders, and that it would be good to reflect that in the bill or to be clarified by the administration.

VI. RIGHT OF COMMUNICATION TO THE PUBLIC

IFPI supports the introduction of a broad right of communication that is technologically neutral and covers all modes of electronic transmissions. However, there are two issues which need to be clarified in the proposed amendments.

a. Potential issues with the proposed communication right and the exemption of liability for accessing communications

Under new proposed amendments, communication of a work includes broadcasting of such work, but the proposed sections 28A(5)-(6) would exclude liability for people who do not determine the content of the communication when they gain access or receive communications. It appears that the language of the new right was taken from Copyright, Designs and Patents Act 1988 of the UK, while the exclusion follows the wording of Australian law under s22(6) of the Copyright Act 1968. This can create confusion when this provision is applied to a situation involving different aspects of the communication right. For instance, situation may arise where a website operator is providing a streaming function on its site to allow the public to get access to a sound broadcast channel. If the new amendment is adopted, this website operator's action may not constitute a communication, hence, no infringing activity will be found for the re-broadcasting of sound broadcast via the Internet (e.g. simulcasting). If this is not the intention of the administration to allow unauthorised source of sound or TV broadcast to be rebroadcast or simulcast via the internet or mobile platform, then it is suggested that section 28A should be carefully redrafted to avoid creating an unreasonable permitted act in the law.

b. Clarification is needed as to what constitutes communication to the public and the exclusion of liability for accessing communications

An example was given by the administration at the first Bills Committee meeting : a person is not initiating a communication by forwarding or posting a hyperlink to a copyrighted file made available by someone else, as he has no control over the content of that file. This example embeds a fallacy because it assumes that someone has no control over the content when he merely posts a hyperlink to a copyrighted material made available by someone. In fact, many forum users may use different cyber identities or work with other accomplices to post infringing contents on third party 'file hosting' services such as cyberlocker or video locker sites and then post the links to these infringing contents on a social network, forum or blogs to conduct infringing activities.

Actually, it is the legislative intention for section 22(6) of the Copyright Act 1968 of Australia (similar to the proposed section 28A(5)) that a person who merely accesses or browses material online is not considered to be responsible for determining the content of the communication and, therefore, is not the maker of the communication for the purposes of the communication right. An example is given in an explanatory note to the section 22(6) of the Copyright Act 1968 of Australia in which a person does not determine the content of material by merely doing

the technical process necessary to receive a communication, e.g., by clicking on a hyperlink.[2] This interpretation is contrary to the explanation provided by the administration. In order to avoid confusion and ensure that the new section 28(5)-(6) do not provide an unwarranted protection for infringing activity, we recommend clarifying the position given by the administration.

VII. THE PRIVATE COPYING EXCEPTION SHOULD BE FURTHER CLARIFIED BY EXPRESSLY EXCLUDING COPIES MADE FROM ONLINE BROADCASTS.

The proposed private copying exception under section 76A includes a number of important elements. We welcome the restriction of the exception to one copy only, made for private purposes by the lawful owner of an original copy. We recommend, however, clarifying that the exception does not apply when copies are made from online transmissions. Under Australian law, the format shifting exception (section 109A of the 1968 Copyright Act) does not cover copies made "by downloading over the internet a digital recording of a radio broadcast or similar program". The purpose of this language is to exclude from the scope of the exception the making of digital recordings from online transmission such as 'podcasts'.[3] This exclusion helps ensure the commercial value of podcasts and similar online transmissions, and prevents unauthorised stream ripping. We recommend that a similar carve-out from the scope of the format shifting exception be introduced in the Bill.

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[2] Copyright Amendment Bill 2006, Explanatory Memorandum (House of Representatives, Parliament of the Commonwealth of Australia) at p130 (Source: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=%28Id:legislation/billhome/r2640%29;rec=0).

[3] Copyright Amendment Bill 2006, Explanatory Memorandum (House of Representatives, Parliament of the Commonwealth of Australia), at pg 105.