



IFPI Comments on Right of Communication to the Public in Hong Kong

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EXECUTIVE SUMMARY

The introduction of a broad right of communication requires clarification to avoid creating an unreasonable permitted act in the law that encourages infringement via deeplinking or link forwarding.

CLARIFICATION IS NEEDED AS TO WHAT CONSTITUTES “COMMUNICATION TO THE PUBLIC” AND THE EXCLUSION OF LIABILITY FOR INFRINGEMENT VIA DEEP-LINKING

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 assumes that someone has no control over the content when he merely shares, forwards or posts a hyperlink to a copyrighted material made available by a third party. But in practice, this assumption fails when anonymous infringers using different cyber identities or working with other accomplices who uploaded infringing contents on third party “file hosting” services such as cyberlocker or video locker sites, and subsequently someone would post, forward, and/or share the hyperlinks to these infringing contents on various platforms. Thus, a person may be able to escape liability by claiming that he/she has no responsibility to determine the content and therefore he/she has no knowledge of the content under the proposed Article 28A(5)–(6) of the Bill.

By way of illustration, we can see many examples of Internet services that make use of the excuse of “user generated content” or “users’ ability to forward content” to obtain commercial gain at the expense of the copyrighted content owner. For instance, an Internet user is paid by the cyberlocker sites for every download of the “contents” uploaded by this Internet user and therefore Internet users are given the incentive to upload as many “contents” as possible to the cyberlocker sites and subsequently Internet users have the incentive to encourage other users to post,

forward, or “share” the links to these infringing contents on multiple platforms including forum sites. The end result is that the cyberlocker and forum sites operators would be able to obtain commercial gain by using the infringing contents directly or indirectly in order to attract more advertisement.

The business model which aims to attract more visitors, subscribers or audience, by disseminating copyrighted contents without authorization, also happens in other platforms including social networking sites such as facebook or twitter or blogs or micro-blogs (“weibo”) and mobile apps in various territories including mainland China and Indonesia. Internet users are encouraged to use the so called “one button sharing” function to forward the links to infringing contents on multiple platforms all at once.

The legislative intention for section 22(6) of the Copyright Act 1968 of Australia (which is similar to the proposed section 28A(5)) aims to protect the general public from liability by defining 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. If it is the intention of the Hong Kong Government to consider that “a person who makes use of hyperlinks to copyrighted contents, is not responsible to determine the content of the communication”, then we urge the Government to seriously consider the above-mentioned examples and a separate consultation exercise is needed to analyse its likely impact on local market and the copyright content industry.

To avoid creating any confusion or an unreasonable permitted act that encourages infringement via deep-linking or link forwarding, especially in the absence of clear judicial precedents on authorisation of infringements in Hong Kong, we strongly urge that the proposed section 28A(5)–(6) of the Bill should clarify that “a person who posts hyperlinks to infringing contents, is responsible for determining the content of the communication”.



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