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Legislative Council

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**Paper for the House Committee Meeting
on 17 June 2011**

**Legal Service Division Report on
Copyright (Amendment) Bill 2011**

I. SUMMARY

- 1. Objects of the Bill**
 - (a) To provide for the rights of the owner of the copyright in a work, and the rights of a performer in a performance, relating to the communication of the work or performance to the public;
 - (b) To provide for limitations on the liability of an online service provider (OSP) relating to online materials;
 - (c) To make further provision with respect to the acts that may be done without infringing copyright or performers' rights; and
 - (d) To provide for additional factors to which the court may have regard in considering whether additional damages should be awarded in an action for infringement of copyright or performers' rights.

- 2. Comments**
 - (a) The Bill seeks to provide for a technology-neutral communication right to copyright owners.
 - (b) A set of "safe harbour" provisions is proposed for OSPs with respect to their potential liability relating to online materials.
 - (c) The Bill also seeks to introduce copyright exceptions for temporary reproduction of copyright works by OSPs and media shifting of sound recordings.
 - (d) New offences are proposed in relation to communication of work to the public.

- 3. Public Consultation** According to the Administration, the legislative proposals were drawn up after two rounds of public consultation and extensive discussions with the relevant stakeholder groups.

- 4. Consultation with LegCo Panel** The Panel on Commerce and Industry was briefed on the preliminary proposals and the refined proposals on 15 April 2008 and 17 November 2009. Various views and concerns were expressed by Panel members at the meetings. The Panel also received views of deputations on 19 January 2010. The Panel supported in principle the legislative proposals and the Administration was urged to endeavour to strike a reasonable balance between the interests of the copyright owners and the users.

- 5. Conclusion** In view of the important policy issues involved and the concerns raised at the Panel meetings, members may wish to form a Bills Committee to study the Bill in detail.

II. REPORT

Objects of the Bill

- (a) To provide for the rights of the owner of the copyright in a work, and the rights of a performer in a performance, relating to the communication of the work or performance to the public;
- (b) To provide for limitations on the liability of an online service provider (OSP) relating to online materials;
- (c) To make further provision with respect to the acts that may be done without infringing copyright or performers' rights; and
- (d) To provide for additional factors to which the court may have regard in considering whether additional damages should be awarded in an action for infringement of copyright or performers' rights.

LegCo Brief Reference

- 2. CITB 07/09/17 issued by the Commerce and Economic Development Bureau dated 2 June 2011.

Date of First Reading

- 3. 15 June 2011.

Comments

Background

- 4. The existing Copyright Ordinance (Cap. 528) (the Ordinance) provides for exclusive rights to copyright owners to disseminate their work through certain specific modes of transmission including the right to broadcast a copyright work, the right to include the work in a cable programme and the right to make it available to the public by wire or wireless means including on the Internet. Such rights are provided in the Ordinance by way of various "restricted acts" and copyright is infringed by any person who, not being the

owner of the copyright or his licensee, does any of the acts restricted by the Ordinance in Hong Kong. When making a civil claim for copyright infringement, a copyright owner has to prove that the infringement was committed through one or more of the specified modes of transmission.

5. With advances in information technology and the prevalence of high-speed Internet connectivity, new modes of content uses and transmissions have emerged which give copyright owners a wider choice of avenues to disseminate their copyright works. According to the LegCo Brief, the Administration considers it necessary to make the copyright protection regime more forward-looking to keep pace with technological developments. From December 2006 to April 2007, the Administration conducted a public consultation exercise on "Copyright Protection in the Digital Environment" to seek public views on whether and if so how the existing copyright regime should be strengthened in the digital era. The main issues covered in the public consultation exercise include -

- (a) whether unauthorized file sharing of copyright works and/or unauthorised downloading should be criminalised;
- (b) whether protection of copyright works transmitted to the public should be made technology neutral, rather than being tied to certain modes of transmission;
- (c) what role OSPs should play in combating internet piracy;
- (d) whether legislation should be introduced to facilitate copyright owners in taking civil actions against online infringement;
- (e) whether statutory damages should be introduced into the copyright law; and
- (f) whether the existing scope of copyright exemption for temporary reproduction of copyright works should be expanded (See LC Paper No. CB(1)1211/07-08(03), at paragraph 3).

The Bill

6. The Bill seeks to amend the Ordinance in the light of views received in the public consultation exercise. The main provisions are summarized in the paragraphs below.

Communication right for copyright owners

7. The Bill proposes to introduce a new exclusive right of copyright owners in a work to communicate the work to the public. Under the new section 28A to be added to Part II of the Ordinance, the communication of a work of any description to the public is an act restricted by the copyright in the work. References in that Part to the "communication of a work to the public" are to the electronic communication of the work to the public, including the broadcasting of the work, the inclusion of the work in a cable programme service and the making available of the work to the public. According to paragraph 5 of the LegCo Brief, the introduction of this technology-neutral right would facilitate copyright owners in exploiting their works in the digital environment and minimize the need to amend the law in order to keep pace with advances in information technology.

8. A new section 118(8B) is proposed to impose criminal sanction on a person who, without the licence of the copyright owner of a copyright work, communicates the work to the public -

- (a) for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward; or
- (b) otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward, to such an extent as to affect prejudicially the copyright owner. (A list of non-exhaustive factors for the court's determination of the question of "affect prejudicially the copyright owner" is provided in proposed new section 118(8C)).

"Safe harbour" for OSPs

9. The Bill seeks to add a new Division IIIA (proposed new sections 88A to 88I) to provide for limitations on the liability of OSPs relating to online materials. The proposed "safe harbour" scheme for OSPs is summarized as follows:

- (a) Subject to the conditions provided in the new section 88B (e.g. the OSP has taken reasonable steps to limit or stop the infringement as soon as practicable after he received a notice of alleged infringement, he has not received any financial benefit, etc), an OSP is not liable for damages in respect of copyright infringement that has occurred on the service platform of the OSPs.

- (b) Procedures are provided in the new section 88C for notification by copyright owners to an OSP in respect of an alleged infringement of copyright, requesting the OSP to remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates.
- (c) The new section 88D provides for the actions that an OSP may take after he receives a notice of alleged infringement or becomes aware that an infringement of copyright has occurred on his platform or becomes aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, and the procedures for giving a counter notice to dispute the alleged infringement.
- (d) Criminal liability is proposed in the new section 88E for knowingly or recklessly making a false statement in a notice of alleged infringement or counter notice.
- (e) Civil liability is proposed for making a false statement in a notice of alleged infringement or counter notice.
- (f) Subject to certain conditions specified in the new section 88G, an OSP is not liable for any claim in respect of his removing the material to which an alleged infringement relates, disabling access to the material or activity to which an alleged infringement relates, reinstating the material, or ceasing disabling access.
- (g) The new section 88I empowers the Secretary for Commerce and Economic Development to publish in the Gazette a code of practice for providing practical guidance to OSPs in respect of the new Division IIIA and such code of practice is not subsidiary legislation. Under the new section 88B(3), an OSP is to be treated as having taken reasonable steps to limit or stop the infringement if the OSP complies with all the provisions in the code of practice respecting the course of action that an OSP may adopt in limiting or stopping an alleged infringement.

Permitted acts

10. Under proposed new sections 44(1A) and 45(1A), a person authorized by an educational establishment may, subject to certain conditions, without infringing copyright, communicate to an authorized recipient (meaning a teacher or a pupil under proposed new sections 44(4) and 45(4)) a recording or

copy of a recording of a broadcast or cable programme, a copy of an artistic work, a passage from a published literary, dramatic or musical work, or an extract from a published sound recording or film for the educational purposes of the establishment.

11. Proposed new section 51A seeks to allow the librarian, curator and archivist of a specified library, museum or archive to, without infringing copyright, communicate a copy of an item in the permanent collection of library, museum or archive, to users or staff of the library, museum or archive, by making it available online to be accessed through the use of a computer terminal installed within the respective premises. Under new section 52A, the librarian, curator and archivist may, without infringing copyright, play or show any sound recording or film held in the permanent collection of the library, museum or archive to the public.

12. A new section 65A is added to provide for copyright exception for OSPs to cache data in that an OSP may, without infringing copyright, make and store a temporary copy of a work to enable more efficient transmission of the work through a network.

13. The new section 76A seeks to allow media shifting of sound recordings for private and domestic use without infringing copyright in the sound recording or any literary, dramatic or musical work included in the sound recording.

Award of additional damages

14. Under section 108(2) of the Ordinance, the court may in an action for infringement of copyright award such additional damages as the justice of the case may require, having regard to all the circumstances, and in particular, to the flagrancy of the infringement, any benefit accruing to the defendant by reason of the infringement, and the completeness, accuracy and reliability of the defendant's business accounts and records.

15. The Bill seeks to add two more factors for the court's consideration in determining the award of additional damages, that is,

- (a) the conduct of the defendant after the act constituting the infringement occurred, including but not limited to the conduct of the defendant after having been informed of the infringement; and
- (b) the likelihood of widespread circulation of infringing copies as a result of the infringement.

According to paragraph 14 of the LegCo Brief, this amendment is proposed in view of the difficulties encountered by copyright owners in proving actual loss, particularly in online piracy cases.

Commencement

16. The Bill, if enacted, will come into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

Public Consultation

17. According to paragraph 19 of the LegCo Brief, the legislative proposals were drawn up after two rounds of public consultation and extensive discussions with the relevant stakeholder groups.

Consultation with LegCo Panel

18. At the meeting of the Panel on Commerce and Industry (the Panel) held on 15 April 2008, the Administration consulted members on its preliminary proposals for strengthening copyright protection in the digital environment. 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.

19. At the Panel meeting held on 17 November 2009, the Administration briefed members on its refined proposals, taking into account the views that had been received regarding its preliminary proposals, and the latest developments in overseas jurisdictions. While the Panel supported in principle the legislative proposals, Panel members have expressed various views and concerns, for example -

- (a) some members warned against the stifling of creativity and innovation by over-regulation, and opined that public education was equally important for the prevention of internet piracy;
- (b) without specifying the kinds of technology used in the infringement activity, the proposal on recognizing copyright owners' right to communicate their works through any mode of electronic transmission, with criminal sanctions against

infringement, might increase the risk of inadvertent breaches by members of the public;

- (c) the exception proposed for media shifting of sound recordings should be extended to other types of works such as films or publications provided that it was limited to personal use; and
- (d) the Administration should endeavour to strike a reasonable balance between the interests of the copyright owners and the users.

20. On 19 January 2010, the Panel received views from stakeholders, including copyright owners association and copyright users, as well as members of the public on the Administration's refined proposals to strengthen copyright protection in the digital environment. Whilst some copyright owners were of the view that the refined proposals had lagged behind global practices and was still insufficient for tackling online infringement, some copyright users called for a careful consideration of the refined proposals as these proposals would curtail the free flow of ideas and information.

Conclusion

21. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the important policy issues involved and the concerns raised by members of the Panel and deputations at the above Panel meetings, members may wish to form a Bills Committee to study the Bill in detail.

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