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Hong Kong and International Publishers' Alliance

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(By electronic mail: priscilla_to@citb.gov.hk)

August 30, 2005

Ms Priscilla To
Principal Assistant Secretary for Commerce,
Industry and Technology (Commerce and Industry)
Level 29, One Pacific Place
88 Queensway
Hong Kong

Dear Ms To

The Hong Kong and International Publishers' Alliance (HKIPA) appreciates the opportunity to respond to your letter of June 15 to Simon Li.

HKIPA was formed in September 2002. Its members include the Hong Kong Publishing Federation, the Anglo-Chinese Textbook Publishers Organisation, and the Hong Kong Educational Publishers Association in Hong Kong, as well as the Association of American Publishers in the USA, the Publishers Association in the UK, and the International Association of Scientific, Technical and Medical Publishers in the Netherlands.

Your letter announces that there will be a public consultation toward the end of this year on "whether and how our Copyright Ordinance should be improved for more effective copyright protection in the digital environment." HKIPA applauds this decision. Although the current version of the Copyright Ordinance was enacted only ten years ago, the rapid pace of change in technological developments and international legal standards has left it out of date. A thorough review and update is

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timely and indeed perhaps overdue.

Many of the benchmarks that Hong Kong should strive to meet in updating its law can be found in the WIPO Copyright Treaty (WCT). Although Hong Kong, as a non-member of WIPO, is not in a position to ratify this treaty, it should seek to bring its law into full compliance with it. The WCT, along with its companion instrument, the WIPO Performances and Phonograms Treaty (WPPT), embody the current globally accepted minimum standard for copyright laws in the networked digital environment. As of July 1, 2005, some 53 countries around the world have acceded to the WCT, and dozens more are expected to do so in the near future. Hong Kong's law will remain outdated unless it meets the same standard. A Hong Kong law that fully complies with the WCT and WPPT would also mean that HKSAR has done its part to meet the mandate of APEC Leaders and Ministers for all APEC Members to fully implement the standards of the WIPO Treaties as soon as possible.

Your letter specifically asks for our views on four topics. We provide these below, and add a fifth topic that we believe is essential to include in any review of the Copyright Ordinance to improve copyright protection in the digital environment.

1. Whether a technologically neutral right of communication should be introduced for copyright owners

The short answer to this question is “yes.” The goal of the WCT is to ensure that copyright owners are able to control delivery of their works, regardless of the specific technological means employed. Alongside the familiar distribution channels such as broadcasting or cable transmission, copyright owners must be assured of control over the terms and conditions of dissemination of their creations through downloading from websites, on-demand services, peer-to-peer networks, file-swapping venues, or other new interactive media. Other delivery means such as subscription services, digital and Internet “webcasting” and Internet retransmissions of broadcasts, must also be covered. The WCT requires recognition of exclusive rights over any means of delivery in which “members of the public may access works from a place and at a time individually chosen by them.” To meet this benchmark, Hong Kong's law should cover any and every means of making works available to individual members of the public, and should do so in broad terms that will accommodate future changes in technology.

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2. How to facilitate copyright owners to take civil actions against infringing activities on the Internet

While many of the measures referenced in response to the next two questions would also advance this important goal, HKIPA offers the following additional suggestions:

First, online infringers often take elaborate and extensive measures to hide their identities and locations in order to evade detection and pursuit. Hong Kong law should include transparency measures to frustrate this technique. Notably, right holders should be provided with binding mechanisms to obtain immediate disclosure by Internet service providers of information accessible to the latter that help to identify and locate online infringers. For example, if a right holder presents the ISP with the Internet Protocol address from which a customer had uploaded infringing material to a peer-to-peer service at a designated date and time, the ISP should be required to promptly disclose the corresponding subscriber information so that the right holder can vindicate its rights. This mechanism should be backed up with a speedy means of compelling such disclosure, along with sanctions for non-compliance, if the ISP refuses to cooperate.

Second, it is often impractical, and almost always inefficient, to combat online piracy solely through individual lawsuits against infringing end-users. To provide a more efficient and effective remedy, Hong Kong should ensure that its legal regime for indirect liability for infringement is sufficiently robust. In other words, a right holder victimized by infringement should be able to hold liable (1) any person who induces or causes another to carry out the infringement, or who materially contributes to another's infringement of copyright, knowing or having reason to know of the infringing activity; or (2) any person who has the right or ability to control another's act of infringing copyright, and who receives a direct financial benefit as a result of the infringing activity. A firm and comprehensive foundation for such indirect liability is an essential pre-requisite to any "notice and takedown system" or similar mechanism.

Third, if the indirect liability regime is well-established, Hong Kong should consider providing nonjudicial mechanisms whereby online infringements can be eliminated quickly and efficiently, without the need to initiate litigation. Appropriate remedial limitations (such as on monetary relief) could be offered to ISPs as

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incentives to participate in such nonjudicial mechanisms. The limitations could be made available to any service provider who, as soon as it learns of infringing material or activity on its system (or of facts and circumstances from which infringing activity is apparent), then moves promptly to remove or cut off further access to the offending material. Simply to enact such a “notice and takedown” statute in a legal environment which lacks well-established doctrines of indirect liability for infringement is a recipe for failure and falls far short of satisfying international requirements for effective relief. But in the right environment, such a mechanism can provide a useful tool for resolving infringements quickly and inexpensively without the need for civil litigation. If the law includes a statutory notice and takedown regime, it should:

- be triggered by a written submission to the ISP, including via e-mail, avoiding needless formalities;
- provide remedial limitations only to ISPs that meet certain threshold requirements, notably the implementation of an effective policy to identify and deal with repeat infringers;
- require that the service provider expeditiously remove or disable access to the material in question in order to be entitled to the limitations on remedies;
- omit any requirement to refer the notification to a third party prior to the service provider's responsive action;
- provide safeguards against potential abuse or improper liability for a good faith takedown;
- serve as a supplement to judicial enforcement against infringement (e.g., through injunctive relief);
- be accompanied by a speedy procedure for right holders to obtain identifying information about an alleged infringer that is in the possession of a service provider.

3. Whether statutory damages for civil infringements should be introduced

Because of the difficulty of proving damages under current law, HKSAR should consider whether a system of pre-established statutory damages is necessary to fulfill its obligations under Article 41.1 of TRIPS to provide “remedies which constitute a deterrent to further infringements.” These proof difficulties may be especially severe in the online environment, in which it may be impossible to establish, for instance, exactly how many unauthorized copies were downloaded from a particular

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site or transferred on a particular peer-to-peer system. Thus, statutory damages appear to be an essential tool in providing deterrent civil remedies against online infringements.

4. The role of Internet Service Providers in the fight against Internet piracy

In addition to the proposals set forth in response to question 2 above, we offer the following general observations.

The key goal to which the law should be directed is cooperation between right holders and service providers. Both groups have a common stake in ridding the electronic marketplace of pirate products, in order to encourage both legitimate merchants (creators) and customers (consumers) to come there. Both groups can best advance their interests by working together to:

- deter the use of digital networks for copyright piracy;
- detect and eliminate infringements taking place over networks;
- identify and pursue the instigators of infringements;
- develop and deploy technological tools and solutions;
- promote responsible business practices;
- educate users and the public.

Rules of legal responsibility should maximize incentives for this cooperation. By contrast, an approach conditioning responsibility upon the service provider being formally notified that infringement is taking place through its network simply encourages the service provider to look the other way to avoid detecting infringements, and to minimize its efforts to clean up the electronic marketplace on which its long-term interests depend.

When all else fails, right holders must retain the ability to invoke judicial powers to prevent ongoing infringements and/or preserve evidence. Any legal exemption that places service providers beyond the reach of such judicial power is fundamentally destructive of the goal of promoting electronic commerce.

Creating blanket immunities from copyright liability for Internet service providers is a critical pitfall that must be avoided. Legally, these immunities likely violate the tripartite test against which, under Hong Kong's TRIPS obligations, all

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exceptions and limitations on protection must be measured. Furthermore, the obligation under both the WCT and TRIPS to provide effective action against any act of infringement, including online, cannot be fulfilled if providers of that online environment are immune from any liability. Finally, broad immunities for ISPs defeat the goal of developing electronic commerce by diminishing the incentives for these businesses to cooperate with creative industries to fight piracy.

5. Criminal penalties against online infringement on a commercial scale in a business context

While HKSAR should be applauded for focusing on what changes are needed to its laws to facilitate civil enforcement of copyright in the digital environment, it is essential that criminal enforcement not be neglected. It will certainly be the case that for many acts of online infringement, only criminal sanctions will suffice to provide deterrence. This concept is, of course, enshrined in the obligation that Hong Kong has taken on, pursuant to Article 61 of the TRIPS Agreement, to provide criminal remedies against “copyright piracy on a commercial scale.”

Hong Kong cannot possibly fulfill this obligation unless it provides criminal remedies against those who, in the course of or in connection with a trade or business, infringe electronic editions of copyrighted materials such as books, reference works, original databases, and scientific, technical or medical journals. Hong Kong’s law lacks such criminal sanctions today. This glaring violation of international standards should be remedied as quickly as possible, in the pending revision to the Copyright Ordinance now under consideration by LegCo. If it is not achieved there, then by all means it should be among the first orders of business in the further revision of the Ordinance to accommodate the digital networked environment.

The foregoing is by no means an exhaustive list of the topics that should be considered in the upcoming public consultation. It also, of necessity, lays out a general approach, rather than specific statutory language. HKIPA once again commends HKSAR for undertaking this consultation and for seeking to upgrade its Copyright Ordinance to evolving world standards. We look forward to participating in the consultation process as it progresses, and stand ready to provide any further information you may require.

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Sincerely yours

Simon Li
Convenor (Hong Kong)

(no signature via electronic transmission)