



Hong Kong Information Technology Federation

HKITF Response to Government's Preliminary Proposals for Strengthening Copyright Protection in the Digital Environment.

1 Introduction

- 1.1 The Hong Kong Information Technology Federation (**HKITF**) appreciates this opportunity to provide its views on the Administration's consultation paper entitled *Preliminary Proposals for Strengthening Copyright Protection in the Digital Environment*.

2 About HKITF

- 2.1 Founded in 1980, HKITF is a non-profit, non-political trade association that provides a forum within which Hong Kong's IT-related businesses can work together for the benefit of the industry. HKITF also strives to maintain a high level of business practice among its 300 plus members. For more information about HKITF, please see our website: www.hkitf.org.hk.

3 Right of communication

- 3.1 HKITF supports the Administration's proposal to introduce a broad, technology neutral right of communication into Hong Kong's Copyright Ordinance. HKITF is confident that the introduction of this right will remove any doubts that innovators may have about how they will be able to control the availability of their copyright works online. It will also ensure that Hong Kong's copyright laws are in-line with those enacted by Hong Kong's regional contemporaries, including Singapore and Australia.
- 3.2 However, HKITF considers that the proposed criminal offences for breach of the communication right require further consideration. Specifically, HKITF opposes the Administration's proposal that infringements not motivated by financial gain will only attract criminal sanctions where they are committed by *streaming* the copyright work.
- 3.3 As members of Hong Kong's IT industry, HKITF's members are acutely aware of the speed with which different technologies are superseded and the consequent disadvantages of tying laws to particular technologies. HKITF strongly supports technological neutrality in copyright and other laws, and therefore submits that the Administration ought to amend its proposed non-commercial communication offence so that it applies to all infringements not motivated by commercial gain *irrespective* of the technology by which those infringements are committed.

4 Caching by online service providers

- 4.1 HKITF is not convinced that it is necessary to enact a temporary reproduction exception to address the practice of caching by online service providers (**OSPs**). There are a number of noteworthy jurisdictions that have not enacted any such exception, including the United States of America and Canada. The absence of an OSP caching exception in those jurisdictions has neither impeded the development of their IT industries nor has it resulted in a raft of unproductive litigation.
- 4.2 On the other hand, there is a real risk that the enactment of a temporary reproduction exception for OSP caching might have unintended adverse consequences for copyright owners in the digital environment where the right to control copying is central.

- 4.3 Nevertheless, if the Administration considers it necessary to enact legislation that addresses the question of OSP caching, then HKITF considers that the best way to do so would be to enact a limitation of liability scheme – similar to that enacted by the United States’ Digital Millennium Copyright Act (**DMCA**) – that applies to caching activities. A limitation of liability scheme would give OSPs the certainty that they require, while protecting the ability of copyright owners to obtain court orders to prevent further infringements of their rights. This approach would also be consistent with the approach taken by Australia, New Zealand and Singapore to the issue of OSP caching.

5 Voluntary code of practice for online service providers

- 5.1 In general, HKITF and its members support voluntary cooperation among stakeholders as a means of addressing dynamic copyright issues that are presented by new technologies. However, in HKITF’s experience, there are some circumstances in which it is very difficult to achieve voluntary cooperation among stakeholders in the absence of “ground rules” that establish the basic parameters for cooperation.
- 5.2 HKITF considers that OSP liability for copyright infringements committed by users is one such area where it is necessary to first establish the “ground rules” for cooperation. Presently, there is a significant degree of uncertainty among OSPs as to their liability for infringements committed by users, and OSPs have not been given appropriate incentives to work with copyright owners to combat online infringement. In these circumstances, HKITF considers that voluntary cooperation between these stakeholders is unlikely to succeed.
- 5.3 To set the “ground rules” for cooperation HKITF advocates the introduction of a limitation of liability scheme similar to that enacted by the United States’ DMCA. HKITF considers that the DMCA limitation on liability scheme strikes a reasonable balance between providing OSPs with the incentives (and in particular, the certainty) that they require to take action against infringers, while affording copyright owners an efficient mechanism by which infringing material can be taken down. From HKITF’s point of view, the particular attraction of the DMCA scheme is that it has been “tried and tested” and proven to be effective in practice. Indeed the DMCA scheme has informed the development of a number of limitation of liability schemes in several jurisdictions around the world, including Singapore and Australia.
- 5.4 HKITF also submits that the Administration ought to consider codifying the factors relevant to whether an OSP has authorised a user’s infringement of copyright.¹ This codification will help OSPs better understand their liability position and how they might mitigate the risk of being held liable for authorising the infringements of their users.

6 Reliance on ‘Norwich Pharmacal’ principles to identify infringers

- 6.1 HKITF considers that any court-sanctioned procedure to identify online infringers should be streamlined, cost efficient and timely. In the experience of HKITF’s members, the existing Norwich Pharmacal procedure for identifying infringers does not satisfy any of these criteria. Rather, that procedure is cumbersome, costly and time-consuming.
- 6.2 As an alternative to the DMCA’s expedited subpoena regime (which HKITF acknowledges the Administration has reservations with), HKITF suggests that the Administration introduce a streamlined Norwich Pharmacal procedure whereby

¹ See, for example, the factors listed in s 36(1A) of Australia’s *Copyright Act 1968* (Cth).

applications for Norwich Pharmacal orders in the copyright infringement context can be determined on the papers in chambers (ie without a formal hearing before a judge) and on an expedited basis.

- 6.3 In HKITF's opinion, this streamlined procedure would better secure the important objective of identifying infringers without imposing undue expense or delay on copyright owners and OSPs. HKITF considers that this area would be fertile ground for OSPs and copyright owners to work together to develop a mutually acceptable procedure by which infringers' details can be released upon the making of a Norwich Pharmacal order by the court.

7 Revised additional damages provision

- 7.1 The future growth of Hong Kong's IT industry is contingent upon Hong Kong enacting and enforcing strong measures against software piracy.
- 7.2 While HKITF strongly supports the Administration's proposal to prescribe in law additional factors to assist the court in determining the award of additional damages, HKITF also advocates the enactment of a statutory damages regime. Statutory damages regimes allow copyright owners to recover a pre-determined amount of damages irrespective of their ability to prove their losses arising out of the infringement. This is important in the software piracy context because it is often difficult for copyright owners to prove their losses. In some cases, this is due to factors beyond the copyright owner's control, such as where the infringer does not keep complete business records of their dealings in infringing software.
- 7.3 HKITF therefore urges the Administration to enact a statutory damages regime in addition to prescribing in law the proposed additional factors to assist the court in determining the award of additional damages. Statutory damages and additional damages are not mutually exclusive remedies; they co-exist productively in the United States. Moreover, HKITF considers that the Administration's stated reservations with a statutory damages regime can be overcome: it is not prohibitively difficult to determine a range of statutory damages; and the enactment of a statutory damages regime for copyright infringement will not "open the floodgates" for the availability of this remedy in the case of all other torts.

8 Criminal liability for unauthorised downloading and peer-to-peer file-sharing activities

- 8.1 HKITF agrees with the Administration that the existing distribution offence in section 118(1)(g) of the Copyright Ordinance will apply to some illegal downloading and peer-to-peer file sharing activities. Indeed, HKITF notes that the concept of 'distribution' was successfully relied upon by the prosecution to secure a conviction in Hong Kong's BitTorrent case.²
- 8.2 Provided that the proposed non-commercial communication offence is amended to remove the existing streaming restriction (as further discussed in paragraphs 3.2 and 3.3 above), HKITF considers that Hong Kong's laws will be sufficient to criminalise the most damaging forms of unauthorised downloading and peer-to-peer file-sharing activities.

² *HKSAR v Chan Nai Ming* HCMA 1221 of 2005.

8.3 As conveyed to the Administration previously, HKITF considers that there is a real role for education in reducing the incidence of unauthorised downloading and peer-to-peer file sharing activities. HKITF would welcome the Administration's commitment to engaging in an education campaign to alert end users to the civil and criminal consequences of engaging in unauthorised downloading and peer-to-peer file-sharing activities in Hong Kong.

9 Media shifting exception

9.1 HKITF does not presently see the need for any media or format shifting exception in Hong Kong. HKITF is not aware of how Hong Kong's existing copyright legislation is failing to accommodate the legitimate activities of users.

9.2 Nevertheless, if the Administration satisfies itself - on the basis of objectively verifiable evidence and not mere assertions - that a media or format shifting exception is necessary in Hong Kong, then HKITF submits that the Administration ought take note of the extremely confined nature of the equivalent exceptions enacted in Australia and New Zealand. In particular, HKITF notes that none of the United Kingdom, Australia or New Zealand have proposed or enacted a media or format shifting exception that applies to computer software.

10 Further consultation

10.1 HKITF thanks the Administration for its consideration of this submission, and welcomes the opportunity to further discuss the points we have raised.

Hong Kong Information Technology Federation
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Established in 1980, the Hong Kong Information Technology Federation is a nonprofit, non-political trade association that acts as a forum in which the IT-related businesses in Hong Kong can work together for the benefit of the industry and to maintain a high level of business practice amongst the members.

Web: <http://www.hkitf.org>