



Strengthening protection of digital copyright in Hong Kong

Hong Kong's Commerce and Economic Development Bureau has proposed reforming its copyright laws, updating them for the digital age. This briefing outlines the main proposals and their possible implications for any entities that deal with copyright-protected work in Hong Kong.

On 17 November 2009, the Hong Kong Commerce and Economic Development Bureau issued a package of proposed reforms to the Copyright Ordinance. Its aim is to update Hong Kong's copyright law to meet the demands of the digital age. Since releasing a package of preliminary proposals in April 2008, the government has conducted further public consultations to arrive at the current package of proposals. It is intended that an amendment bill will be introduced in the latter half of 2010.

The following are some of the key proposals.

Electronic transmission

Currently, the Copyright Ordinance recognises the right to communication for the copyright owner only in specific modes of communication. Obviously, this does not cover the full range of possible content delivery in the electronic age. As such, the government has proposed recognising a copyright owner's right to communicate his works through any mode of electronic transmission.

In recognising this expanded right, criminal sanctions are proposed against those who initiate unauthorised communication of copyright works to the public:

- (a) in the course of business conducted for profit; or
- (b) where it is made to such an extent as to affect prejudicially the copyright owners.

The criminal sanctions are limited to the extent that they apply only to those who take active steps in making

unauthorised communications to the public. The operation of part (b) notably strengthens the rights of copyright owners by comparison with the preliminary proposals, which sought to limit part (b) to instances in which streaming technology was used.

Liability for online service providers

Under the Copyright Ordinance, online service providers (OSPs) that allow infringing activities on their service platforms (even if only by not taking action against) may be susceptible to civil liability. In an attempt to create incentives for OSPs to combat copyright infringement, the proposals introduce a statutory limitation of liability for copyright infringement if the OSP has complied with certain conditions set out in a code of practice. The code of practice, which is still under development, will include 'notice to notice' and 'notice and takedown' measures which, in general, provide a mechanism for copyright owners to forward notices of infringement to the alleged infringer and take down infringing materials. 'Notice to notice' refers to the sending of a notice to the claimed infringer on the receipt of a notice from the copyright owner. 'Notice and takedown' refers to taking down or disabling access to the claimed infringing materials on the receipt of a notice from the copyright owner.

The government decided that the graduated response system followed in some other jurisdictions was not appropriate for Hong Kong, at least for the time being. This system involves giving warning notices to repeat offenders. If offenders do not comply after being

provided with three warnings, then they face having their internet access suspended for up to one year.

Temporary reproduction exception

An exception to copyright infringement for temporary reproduction of copyright works by OSPs is also supported. This exception is narrow and requires that the reproduction be 'transient' or 'incidental' in nature and technically necessary for the transmission to occur efficiently. It has been widely supported to allow more efficient online information transmission and is unlikely to be controversial.

Damages

The government has rejected calls by copyright owners to introduce fixed statutory damages for copyright infringement. Instead, the proposals introduce additional factors that a court may take into account in awarding additional damages for infringement cases, reflecting concerns that copyright owners often find it difficult to prove the extent of their loss in online digital copyright cases. These include the conduct of the defendant after the infringing act, the possible widespread circulation of the infringing copy due to the nature of digital transmission and the need to deter similar copyright infringements.

Media shifting

The proposals also introduce a media-shifting exception. This allows the owner of a non-infringing copy of a sound recording to make one copy of the recording in each device he lawfully owns for personal and domestic use. This exception is consistent with laws in other jurisdictions, such as the UK and New Zealand, which have proposed similar provisions. The exception, however, is narrower than the one currently in force in Australia, which extends the media shifting exception to a number of other formats, including books, newspapers, photographs and cinematographic films.

Conclusion

Overall, it seems that the government has drafted the proposals cautiously, so that they are generally

uncontroversial in their operation. The most contentious issue may be that the government has decided not to propose a graduated response system such as has been proposed or adopted in other jurisdictions (eg New Zealand, France and South Korea). The criminal sanctions and media-shifting exception, though seemingly far-reaching in nature, are in conformity with the approach taken in other jurisdictions.

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