

Issues in IT Law—Legal and Policy Challenges of P2P Networks

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Topics

Consultation Issues

1. Uploading and Downloading
2. Right of Public Communication
3. Online Service Providers
4. Facilitation of Copyright Lawsuits
5. Statutory Damages
6. Exemption for Ephemeral Copies

New or Missing Issues

1. Media Shifting
2. Fair Use
3. Digital Convergence
4. User-Generated Content
5. Creative Commons Hong Kong

Types of New Rights

1. The Right of Distribution
2. The Right of Making Available
3. The Right of Communication to the Public
4. The Right to Authorize
5. “An Infringing Copy”

Historical Perspectives

1. The Printing Press
2. Player Pianos
3. Vinyl Albums
4. Cassette Tapes
5. Digital Audio Tapes

Types of New Technologies

1. Napster
2. Grokster
3. BitTorrent
4. YouTube
5. Live Streaming

International and Comparative Issues

1. WIPO
2. WTO
3. China
4. Commonwealth Countries
5. European Union
6. United States

Alternative Solutions

Future Developments

Creative Commons Hong Kong

October 24-25, 2008

Official Launch of Creative
Commons Hong Kong

Legal Transplant: DMCA

A Different Kind of Legal Transplant

How can HK Adapt the CC
License to Its Local Conditions?

The Porting Process

Creative Commons



Creative Commons Hong Kong

Identifying Goals

Reduce Media Concentration

Unleash Creative Impulses

Rethink Copyright Reform

Underlying Concepts

Free Culture

Free Society

Free Speech

Free Trade

Free Iraq

The Public Domain

The Public Domain

What Does Public Mean in
the **United States**?

What Does Public Mean in Hong Kong?

What Is Missing from the
Consultation Document?

(1) Expansion of the Fair Dealing Provision

107. Limitations on exclusive rights:

Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

38. Research and private study

(1) Fair dealing with a work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) Copying by a person other than the researcher or student himself is not fair dealing if—

(a) in the case of a librarian, or a person acting on behalf of a librarian

39. Criticism, review and news reporting

(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, if it is accompanied by a sufficient acknowledgement, does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement. . . .

41A. Fair dealing for purposes of giving or receiving instruction

(1) Fair dealing with a work by or on behalf of a teacher or by a pupil for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement. . . .

54A. Fair dealing for purposes of public administration

(1) Fair dealing with a work by the Government, the Executive Council, the Judiciary or any District Council for the purposes of efficient administration of urgent business does not infringe the copyright in the work or, in the case of a published edition, in the typographical arrangement. . . .

WIPO:
Multilateral Instrument on
Limitations and Exceptions
to Copyright

(2) Abolition of Crown Copyright

§ 105. Subject matter of copyright: United States Government works

Copyright protection under this title is **not available for any work of the United States Government**, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

At Least:

Open Access Initiatives for
Government Documents!

(3) Support for New Copyright Tools

Creative Commons Hong Kong?

Why do we introduce digital
copyright reforms?

Foreign Pressure?

Lobbying from Copyright Industries?

Following Others Countries?

We Have to Do Something!

Question We didn't Ask?

Questions to Think About

Would foreign countries reduce pressure on Hong Kong after enacting the proposed laws?

Would the enacted laws change the persistent bias toward China—or worse, the Chinese?

Would the proposed laws create more incentives for foreign content providers?

Would foreign rights holders pull out
from markets in China and in Hong
Kong?

Are our piracy problems more serious than those of other countries?

Tendency to Focus on External Factors:

- Increase Trade and Investment
- Foreign Pressure
- Lobbying from Copyright Industries
- Following Other Countries
- We Have to Do Something

Why Don't We Ask What We Want?

China National
Intellectual Property Strategy
(June 2008)

INDIGENOUS INTELLECTUAL
PROPERTY (自主知识产权)

What is HKSAR Intellectual Property Strategy?

What's going on?

The “Terminator” Theory

(1) Humans v. Machines

(2) Generation Y

(2) It's the Network!

Future Developments

Ten Questions

(1) What are the main differences between analog and digital technology?

From Analog to Digital

- Cheap
- Efficient
- Perfect Copies
- Many-to-Many
- Increasing Convergence

(2) Do digital technologies affect primarily the music industry?

Piracy starts with Music Files . . .

- Small Files
- Abundant Access to Digital Music
- Pent-up Demand for Digital Music
- Popular Among Students (Right Demographics)
- Enjoyable with Existing Technologies
- Enough Sophistication to Understand the Required Technology
- Allow Listeners to Multitask

The Film Industry?

The Publishing Industry?

(3) Are there benefits to suing individual file-sharers?

Justin Hughes, *On the Logic of Suing
One's Customers and the Dilemma of
Infringement-Based Business Models*, 22
Cardozo Arts & Ent. L.J. 725

(4) Are we talking about business models after all?

One-hit Wonders!

17 U.S.C. 115 (Mechanical Licenses):
9.1 cents or 1.75 cents per minute of
playing time or fraction thereof,
whichever is greater

$$9.1 / 1.75 = 5.2$$

(5) Why can't we switch back to the patronage system?

(6) What about the levy system used in Europe and Canada?

- Hard to determine how to divide the **royalty pool**
- May not generate **sufficient funds** to compensate artists
- May create **cross-subsidization** problems by requiring low-volume users to pay more
- May drive consumers to **switch to alternative** (and often cheaper) products that do not bear the levy
- Is likely to create a culture that assumes **everything should be licensed**

(7) Can we rely on technological protection measures?

Speed bumps!

Dilemma: Hackers!

Consumers' Concerns

High-Tech



Low-Tech

“What the f___ do you think
you’re doing?”

(8) Can artists rely on performances instead?

Studio Artists?

Stage Fright?

(9) Are there other alternatives?

iTunes

Stephen King: The Ransom Model

Tips and Voluntary Contributions

Magnatunes

(10) What's wrong with Napster, Grokster and similar services?

Copyright Protection

The Rule of Law

Not Benefiting Artists

The Need for Choices:
Copyright +
Non-copyright-based Models