

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

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First Consultation  
(December 2006 – April 2007)

Copyright Protection in the  
Digital Environment

# 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

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Introduce a copyright **exemption for temporary reproduction** of copyright works by **online service providers**, which is **technically required** for (or enables) the **transmission process to function efficiently**.

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1. Criminal Enforcement
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# Rationales for Criminal Enforcement



# (1) Deterrence

## (2) Retribution

## (3) Necessity

## (4) Effectiveness

Problems

# (1) Proportionality

## (2) Unfairness — Selective Enforcement

## (3) Costly Side Effects



(4) Incoherency —  
Online v. Offline Treatment

# Things to Remember

(1) Copyright infringement is different from theft.

(2) The boundaries are elusive.

# Exceptions and Limitations

- originality requirement
- idea-expression dichotomy
- durational limits
- fair dealing
- exhaustion of rights
- parody defense
- incidental use

(3) There may not be harm.

(4) People may not know whether the upload is authorized.

## Which Download Is Illegal?

- A. From Katz.cd
- B. From the Official Fan Club
- C. From the Artist
- D. From the Record Company
- E. None of the Above



# Second Consultation (April 2008)

## Preliminary Proposals for Strengthening Copyright Protection in the Digital Environment

2. The Government is committed to upholding a **robust copyright protection regime**. This helps provide an environment conducive to the **sustainable development of our creative industries**. . . . .

. . . We believe that our copyright protection regime should also facilitate **advancement in technology and innovation** in disseminating digital content, thereby helping Hong Kong develop into an **internet service hub**.

5. **Copyright owners** considered that internet piracy was so rampant and blatant that **further protection by way of legislation** was called for . . . .

. . . The **users**, most **trade associations** as well as some **professional groups** were concerned about the possible **adverse impact** that such legislation might have on the **free flow of information** on the internet, **personal data privacy**, and the development of Hong Kong as an **internet service hub**. . . .

. . . The majority view was against casting the criminal net to catch unauthorised downloading activities.

# Preliminary Proposals

# Consultation Issues

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



(1) Refrain from introducing new criminal liability pertaining to unauthorised downloading and peer-to-peer (P2P) file-sharing activities.

(2) Introducing **new criminal liability** for **streaming** as it relates to a new right of public communication

# Consultation Issues

2. Right of Public Communication
3. Online Service Providers
4. Facilitation of Copyright Lawsuits
5. Statutory Damages

(3) Introduce a **right of communication** covering **all modes of electronic transmission** for copyright works, with **related criminal sanctions** against the breach of this right.

WIPO Copyright Treaty  
(adopted Dec. 20, 1996)

# Article 6

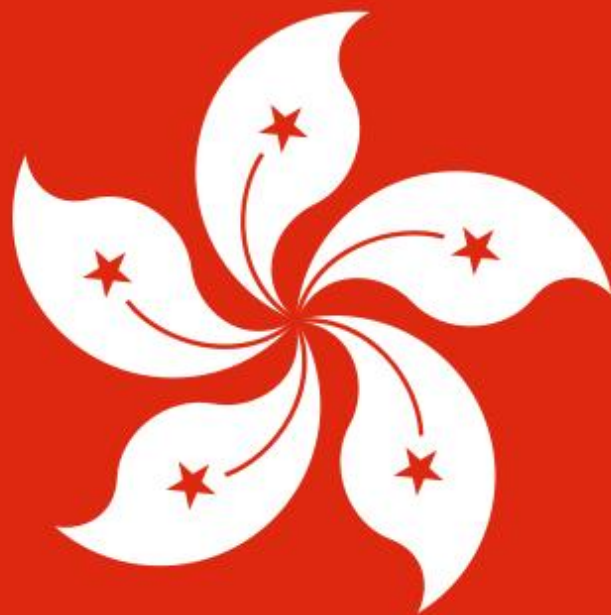
## Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the **making available to the public** of the original and copies of their works through sale or other transfer of ownership.

## Article 8

### Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the **exclusive right of authorizing any communication to the public** of their works, by wire or wireless means, **including the making available to the public** of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.





## 22. The acts restricted by copyright in a work

(1) The owner of the copyright in a work has, in accordance with the following provisions of this Division, the exclusive right to do the following acts in Hong Kong—

- (a) to copy the work (see section 23);
- (b) to **issue copies of the work to the public** (see section 24);
- (c) to rent copies of the work to the public (see section 25);
- (d) to make available copies of the work to the public (see section 26);
- (e) to perform, show or play the work in public (see section 27);
- (f) to broadcast the work or include it in a cable programme service (see section 28);
- (g) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 29),

## 118. Offences in relation to making or dealing with infringing articles, etc.

(1) A person commits an offence if he, without the licence of the copyright owner of a copyright work—

(g) **distributes** an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner.

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Pros

# (1) Media Neutrality

## (2) Forward-looking

## (3) Growing Convergence

Cons



(1) Overinclusive

# Second Consultation (April 2008)

Preliminary Proposals for  
Strengthening Copyright  
Protection in the Digital  
Environment

11. . . . [W]e propose that **criminal sanctions** should be introduced against acts of **making/initiating unauthorised communication to the public** in defined circumstances, namely —

(a) where communication is made for the purpose or in the course of business (being a business conducted for profit, which includes the provision to the public of a service consisting of unauthorised communication of copyright works);  
or

(b) where, other than for the purpose or in the course of business, communication is made by “streaming” the copyright work to the recipients and the communication is made to such an extent as to affect prejudicially the copyright owner.

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(1) A person commits an offence if he, without the licence of the copyright owner of a copyright work—

(g) distributes an infringing copy of the work (otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works) to such an extent as to affect prejudicially the copyright owner.

What is “streaming”?

“**Streaming**” is a technology for transferring data (usually multimedia data) such that the data **can be processed as a steady and continuous stream**. **Very often**, the technology enables users to view or listen to a work online though, **unlike downloading**, users will **generally not be able to retain a complete copy** of the work after streaming.



Pros

Streaming is **different** from  
downloading.

Criminal liability for uploading  
already exists.

THEREFORE:  
Criminal liability  
for streaming is OK.

More Importantly:

There will be a **loophole**  
without new criminal liability.

Cons

Criminal liability may not be  
necessary.

If unavoidable, be specific.



Define “streaming”!

State clearly who would be  
liable.

Businesses: For-profit Educational  
Institutions? Appropriation Artists?  
Web Designers? Bloggers?

Don't over-penalize uploaders!

Why?

(1) Uploaders can be creators!



(2) Streaming may result in less harm to copyright holders than uploading.



(3) Many countries separate streaming from uploading!



# Digital Performance Right in Sound Recordings Act of 1995

- (1) **Non-subscription, non-interactive broadcasts** - exempt from control by rights holders
- (2) **Non-interactive subscription services (streaming)** - subject to a compulsory license
- (3) **Interactive services** - authorization from rights holders necessary

What should HK do?