DIGITAL COPYRIGHT REFORM IN HONG KONG: PROMOTING CREATIVITY WITHOUT SACRIFICING FREE SPEECH

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Introduction

The advent of the Internet and new communications technologies has brought about many challenges to copyright holders. The cost and speed of reproducing creative works have been greatly reduced, and the quality of the reproduced work has been substantially increased. Today, individuals are only a few clicks away from large-scale communications networks that allow them to distribute copyrighted works to tens of millions of their 'friends' from around the world. While copies made at home by individual users did not matter much in the past, due to their non-commercial nature and limited financial impact, the distribution of these copies online has now imposed significant costs on copyright holders.[1] As a result, the content industries have lobbied heavily for stronger copyright protection.

In December 2006, the HKSAR Government released the consultation document, 'Copyright Protection in the Digital Environment.' In an effort to assess whether the existing copyright regime in Hong Kong needs to be revised in light of challenges posed by the Internet and online file sharing activities, the document solicited comments concerning (1) legal liability for unauthorized uploading and downloading of copyrighted works; (2) protection of copyrighted works transmitted to the public via all forms of communication technology; (3) the role of online service providers in relation to combating internet piracy; (4) facilitating copyright owners to take civil actions against online infringement; (5) statutory damages for copyright infringement; and (6) copyright exemption for temporary reproduction of copyrighted works.

Commissioned by the Journalism and Media Studies Centre of the University of Hong Kong, this position paper addresses issues that lie at the intersection of copyright reform and the protection of free speech, free press, and privacy. In particular, the paper examines the benefits and shortcomings of criminal liability for unauthorized uploading and downloading of copyrighted works, a notice and takedown procedure for online service providers, a subpoena mechanism to facilitate copyright infringement actions, and statutory damages for copyright infringement. In addition to offering recommendations on whether and how copyright law should be revised, the paper also highlights the opportunities for Hong Kong created by the digital revolution. The paper contends that, if Hong Kong is to further develop its knowledge-based economy and to become a regional hub for digital technology, it needs to define copyright reform more broadly to include future authors, user communities, and not-for-profit organizations.

I. Criminal Liability

The most controversial item of the proposed copyright reform concerns criminal liability for unauthorized uploading and downloading of copyrighted works. There are two

general rationales behind such liability. First, criminal penalties serve as effective deterrents. The stiffer are the penalties, the less likely an individual is to commit an offence. Nobody is likely to distribute music or movies without authorization of the copyright holders if they will be sent to jail for thirty years or if their hands will be chopped off. Second, criminal penalties exact retribution for the infringers' wrongful conduct. Because unauthorized file sharers have inflicted financial harm on copyright holders, they should be punished. After all, a respect for the rule of law and for the rights of others is an important feature of a democratic society.

In the online copyright area, one could also make an additional claim that criminal enforcement is both necessary and effective. It is necessary because other policy options, which range from enforcement to education, have largely failed.[2] It is effective because those who make unauthorized copies of copyrighted works are likely to treat criminal penalties very seriously. Most of the file sharers are highly educated; they have decent jobs or, in the case of students, have potentially bright futures. As a result, they are likely to be particularly concerned about the stigma of criminal penalties.[3] Moreover, as researchers have shown empirically, only a small minority of users supplied the infringing materials for others to download.[4] If the law effectively targets this minority group, the unauthorized copyright problem on the Internet will be greatly reduced. As Hong Kong customs officials have noted, 'movie uploading had dropped to nearly zero' since the high-profile trial in 2005 of Chan Nai Ming, who was sentenced to three months of jail time for uploading copyrighted movies using BitTorrent software.[5]

Although criminal penalties have their benefits, their significant shortcomings have made the penalties especially unsuitable for individual, non-commercial file sharing activities. First, *imposing criminal penalty on unauthorized file sharing is disproportional to the offence*. As U.S. Senator Norm Coleman remarked, 'If you're taking someone else's property, that's wrong, that's stealing. . . . But in [the United States] we don't cut off people's hands when they steal. One question I have is whether the penalty here fits the crime.'[6]

Second, *the law imposing criminal penalties is likely to be selectively enforced and therefore highly unfair*. As demonstrated by experience abroad, out of the tens of millions of unauthorized file sharers, only a very small number of individuals are subject to civil copyright infringement actions. An even smaller number of them are subject to criminal actions. In the case of Hong Kong, one individual has been singled out to remind others that unauthorized uploading of copyrighted content is illegal.

Third, *criminal penalties are likely to be very costly to society*. The social costs imposed by criminal copyright liability are likely to far outweigh its social benefits. Because the number of file sharers is exceedingly high, a provision that imposes criminal liability has the potential of criminalizing the behaviour of a large number of individuals—and, worse, a large number of youngsters who are the future pillars of our society. To begin with, it does not make sense to have a law that most people will break, and the costs of enforcement in that scenario would be quite high. But more importantly, the social impact of criminalization is likely to be significant, and the costs of programs that are needed to rehabilitate these 'copyright criminals' are likely to be considerable. Even worse, taxpayers will have to bear the high costs of enforcement and rehabilitation, while there is no guarantee that criminalization would induce the creation of more socially beneficial works.

Fourth, *imposing criminal penalties on unauthorized downloading is inconsistent with existing law*. In Hong Kong (as well as in many other jurisdictions), one is not subjected to

criminal liability for purchasing or obtaining a pirated copyrighted work. One therefore wonders why unauthorized downloaders should be subjected to a higher penalty. After all, the financial impact on the copyright holder of the purchase of one physical copy of the infringing work is no different from that of the online downloading of an equivalent copy. A law that covers both unauthorized uploading and downloading would create asymmetry between penalties in physical space and those in cyberspace.

Finally, *new criminal penalties are unnecessary*. Although there is a tendency to introduce new legislation to respond to new harms, copyright holders have failed to make a convincing case explaining why existing copyright law is inadequate. As mentioned earlier, an individual file sharer was recently sentenced to three months of jail time for uploading copyrighted movies. Some observers have also noted that copyright holders enjoy stronger protection in Hong Kong than in other parts of the world.[7]

Thus, this position paper recommends the following:

- *Refrain from introducing new criminal penalties on unauthorized downloading of copyrighted works.*

- *Refrain from introducing new criminal penalties on unauthorized uploading of copyrighted works except when the infringing activity is conducted on a commercial scale and has resulted in financial benefits that are directly attributable to the infringing activity*. The rationale behind this commercial/non-commercial distinction and the direct financial benefit requirement is that commercial pirates should not be able to use the Internet as a haven for their crimes.

- *If criminal penalties are unavoidable, impose a legal burden on the copyright holder to prove beyond a reasonable doubt that the infringer does not have a good-faith belief that the infringing activity is legal*.

Taken together, these recommendations are important for a number of reasons. First, *copyright infringement is not the same as theft*. As the U.S. Supreme Court observed in *Dowling v. United States*, 'interference with copyright does not easily equate with theft, conversion, or fraud. . . . While one may colloquially link infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud.'[8] By their nature, copyrighted works are non-rivalrous goods. The unauthorized reproduction and distribution of a song or a movie does not permanently deprive the copyright holder of the use or enjoyment of that creative work. In fact, multiple individuals can use and enjoy that work at the same time.

In addition, unauthorized reproduction and distribution do not always result in financial harm to the copyright holder. Many file sharers are simply not interested in buying the products or are unable to afford them. At times, the potential infringing activities may also benefit the copyright holder. For example, after sampling a song or a portion of the movie online, some downloaders may decide to purchase the album or the DVD. Even if they do not purchase the product they have already viewed, they may purchase future works created by the artist or producer. Without sampling, many downloaders are unlikely to be aware of the product or be interested in making the purchase in the first place.

Second, unlike, say, pornography, *infringing copyrighted materials are hard to identify*. It is not uncommon for courts to spend a considerable amount of time, effort, and resources to determine whether an infringement has taken place. In copyright law, there are also numerous exceptions and limitations that allow individuals to use copyrighted works *without the authorization of the copyright holders*. Examples of these exceptions and limitations include the originality requirement, the idea-expression dichotomy (the distinction between an unprotectible idea and a copyrighted expression), durational limits of copyright protection, the fair dealing (or fair use) privilege, the exhaustion of rights (or first sale) doctrine, the parody defence, and *de minimis* use.

Finally, *it is very difficult for an individual user to determine whether an online website or service is legal*. The user may download copyrighted works from a site or service that he or she believes in good faith is legal, yet the user may find out later that the site or service is in fact unauthorized. In fact, without examining the relevant contracts, even the record or movie producer may not be able to determine with certainty whether a particular site or service is legal. Although one tends to assume that the record or movie producer holds exclusive rights in the copyrighted work, this is not always the case. Some artists, especially famous ones, may have retained nonexclusive licenses to use the work on their websites or other businesses associated with them. Some commercial websites may have obtained permission or worked out a licensing arrangement with the copyright holder. In addition, due to administrative mix-ups, some record or movie producers may not have obtained the needed rights from the creators in the first place. If that is not enough, some companies may have only the rights to distribute the creative works in the physical space but not on the Internet, while in other cases the rights may have reverted back to the creators. There are many other scenarios in which the rights are unclear. There are also additional scenarios in which a legitimate record or movie producer may be sued for copyright infringement. In light of such uncertainty, it is grossly unfair to put the burden on an individual user to determine whether a particular online website or service is legal.

II. Notice and Takedown Procedure

Online service providers are important to Internet development. To ensure continuous development, copyright legislation around the world has introduced 'safe harbour' provisions to shelter online service providers from secondary copyright infringement actions. The provisions are important for a number of reasons. First, because of their 'deep pockets,' online service providers are easy targets for copyright infringement. Second, these providers often do not have control over the considerable amount of copyrighted materials stored on their websites. Thus, it is unfair and unreasonable to impose liability on them for activities that are conducted beyond their control. Third, as with the protection of physical property, copyright holders share the responsibility of protecting their own intellectual assets. It is unfair to shift the costs of protecting copyrighted works from copyright holders to online service providers. Finally, while it is important to create incentives for authors to create, society should not sacrifice Internet development to protect only a small group of copyright holders. If Hong Kong is to further develop its knowledge-based economy and to become a regional hub for digital technology, healthy development of online service providers is of paramount importance.

Although 'safe harbour' legislation is beneficial to Hong Kong, the devil is in the detail. Whether the legislation is beneficial will depend on what online service providers need to do to earn the protection of the 'safe harbour.' For example, in exchange for protection, the law can require the providers to take down allegedly infringing materials, to

introduce online surveillance, content control and filtering technologies, or to remove Internet access of repeat offenders. While the latter two options present more problems as far as free speech, civil liberties, and human rights are concerned, this position paper focuses mainly on the notice and takedown procedure, due to its widespread adoption in legislation abroad (thanks partly to the U.S. free trade agreements).

The predominant template for this notice and takedown procedure is the Digital Millennium Copyright Act of 1998 of the United States. Under section 512(c) of the U.S. Copyright Act, an online service provider, upon notification of copyright infringement or upon obtaining knowledge or awareness of such activities, needs to 'respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.' To notify the online service provider, the copyright holder needs to identify the allegedly infringed copyrighted work, provide information about the location of the infringing material, and declare that the copyright holder has a good-faith belief that infringement has occurred.

On its face, this notice and takedown procedure seems to be a good compromise between online service providers and copyright holders. In reality, *the procedure is flawed; it ignores the interests of future authors and user communities and has resulted in many unintended consequences*. To be fair, the DMCA was enacted at a time when the U.S. Congress had a difficult time grasping the future development of the Internet. Due to the drafters' short-sightedness and insufficient information available to them, the law quickly became outdated and has since been abused by others who have been using the statute beyond what it was originally intended for.

Two types of problems have arisen out of these abuses. The first type concerns mistaken identities. Consider the infamous case of poor Professor Peter Usher, a retired professor of astronomy and astrophysics at Pennsylvania State University, whom the U.S. recording industry (RIAA) confused with Usher Raymond, the best-selling rhythm-and-blues performer.[9] In May 2003, the RIAA sent Professor Usher a cease-and-desist letter after one of its automated web crawlers located on his university's departmental server a directory named 'usher' that contained a sound file in MP3 format. As it turned out, the suspect file, which almost caused the departmental server to shut down during the final examination period, was a recording by The Chromatics, an *a cappella* group of Penn State astronomers and astrophysicists, of a song about the Swift gamma ray satellite that Penn State had helped to design. The RIAA later withdrew the notice and apologized to Professor Usher; it claimed that the *dozens* of faulty copyright infringement notices it sent that week were sent by a temporary worker who failed to follow regular protocol to confirm the content of the suspect files.

Professor Usher, however, is not the only case. There are many other cases of mistaken identities or erroneous takedown notices. For example, Speakeasy, a national broadband provider, was sent a notice alleging that one of its subscriber sites had illegally 'offered approximately 0 sound files for download.'[10] Approximately *zero* infringing files! The RIAA has also filed a lawsuit against a 66-year-old Boston woman, accusing her of offering hardcore rap songs for download. Interestingly, she had never downloaded any songs online, and her computer was not capable of running the file-swapping software she was alleged to be using.[11] If those examples were not enough, Warner Brothers has misidentified a child's book report on *Harry Potter and the Sorcerer's Stone* as an infringing Harry Potter movie.[12] While it is understandable that infringement-identifying technology is imperfect, it is no laughing matter for a parent to deal with the psychological trauma of a

youngster who was wrongfully accused of copyright infringement—or, worse, to be threatened with a copyright infringement lawsuit that potentially would bankrupt the entire family.

The second type of problems concerns abuse by competitors, critics, as well as those who file frivolous complaints because of their ignorance of the complexities of copyright law. Consider the following examples:

- a vendor who wants to remove price-comparison materials posted by its competitor, claiming that its prices are copyrighted;

- a politician who attempts to silence journalists who criticized his platform by quoting passages he wrote;

- a company that seeks to prevent a whistle-blower from disclosing damaging internal e-mails or other documents; and

- an individual who has a good-faith belief that her work has been infringed even though she is wrong on the law and the unauthorized use is in fact legal.

In all of these examples, the online service providers, upon receipts of takedown notices from copyright holders, are likely to take down the allegedly infringing material to take advantage of the 'safe harbour.' Unfortunately for individual users, the information should not have been taken down, because the use of the materials, though unauthorized, is not considered copyright infringement.

Thus, this position paper recommends the following:

- *Introduce a notice and takedown procedure only if sufficient safeguards to protect against misuse and abuse are implemented*. The ensuing recommendations cover some of these needed safeguards.

- *Introduce a counter notice procedure that would require the online service provider to immediately 'put back' materials that have been wrongfully taken down*. Although section 512(g) of the U.S. Copyright Act requires online service providers to restore materials within a period of 10-14 days if the copyright holder does not initiate a lawsuit, a waiting period of ten days may be far too long for time-sensitive materials.[13] Examples of these materials include information about a competitive sale shortly before the Chinese New Year, announcements of an upcoming political protest, and web log entries that break important news that has not been covered by the mainstream media.

- *Introduce penalties for the misrepresentation of copyright claims using the notice and takedown procedure*. Although section 512(f) of the U.S. Copyright Act penalizes those who 'knowingly materially misrepresents' information, that section is badly drafted. Due to the complexities inherent in copyright law, it is virtually impossible to show that a copyright holder has 'knowingly materially misrepresent[ed]' information on the takedown notice. In fact, as Professor Jennifer Urban and Laura Quilter noted, 'copyright holders may send insufficient or vague notices, and even send notices on suspicion instead of diligent investigation, without triggering 512(f).'[14] Likewise, Professor Alfred Yen

warned that 'copyright's ambiguity assures that many statements of infringement can be made in good faith, even though a court may find that no infringement actually exists.'[15] Thus, the 512(f) language should be avoided, as it virtually guarantees that those whose materials have been wrongfully taken down can never obtain compensation from the copyright holder. Instead, the proposed law should embrace a lower evidentiary burden, such as 'knowingly misrepresents.'

- *Prohibit online service providers from using contracts to escape liability for their failure to put back materials that have been wrongfully taken down*. The terms of service of many online service providers have included immunity clauses that shield the providers from lawsuits for damages caused by their failure to put back materials that have been wrongfully taken down.[16] As a result, even when the law mandates a counter notice and put back procedure, the terms of service have greatly reduced the providers' incentives to put back materials that have been wrongfully taken down. In fact, as commentators have noted, the providers are 'likely to always err on the side of caution and on the side of the complaining copyright holder.'[17]

- *Introduce a complaint and enforcement procedure to examine and respond to cases where the online service provider fails to put back materials on a timely basis following the receipt of a counter notice*. Modelled after the British law that facilitates legitimate uses of copyrighted works that are 'locked up' by copy-protection technologies, [18] this complaint and enforcement procedure is particularly important when the takedown request involves time-sensitive materials or in cases where a brief removal of the materials would result in significant financial harm.

- *Introduce a review mechanism for the notice and takedown procedure*. This mechanism is particularly important in light of the rapid development of the Internet and continuous emergence of new communications technologies. The review mechanism would also allow the legislature to update copyright law in response to unforeseen challenges created by new technologies. In fact, section 1201 of the U.S. Copyright Act requires the Librarian of Congress to conduct a review of the anti-circumvention provision every three years to determine whether users would be or are likely to be adversely affected.[19] Such a mechanism is far superior to a provision that automatically extends protection to all future communications technologies.

- *Maintain a public record of takedown and counter notices for legislative review, keeping in mind the need for protection of privacy and confidential information of copyright holders and individual users*. One of the major barriers to successful copyright reform in the digital environment is the lack of empirical data that can be used to assess the strengths and weaknesses of policy responses. Given the unforeseen problems and unintended consequences raised by the notice and takedown procedure in the United States and in other parts of the world, this public record is likely to be important in future copyright reforms in Hong Kong. If online form notices are used, they can be stored in a public database that incurs only limited costs.[20]

- *Provide funding for universities or other relevant not-for-profit organizations in Hong Kong to establish legal clinics to assist individual users to deal with copyright-related legal problems*. In North America, organizations like the Electronic Frontier Foundation and law school-based legal clinics offer free or low-cost legal assistance to those confronted with copyright-related problems. These organizations have been particularly important as copyright protection expands and as individuals increasingly have to deal with technology-related legal problems. Unfortunately, similar institutions do not exist in Hong Kong. Thus, if copyright protection is to be strengthened and if individuals are likely to be subjected to potential complaints or lawsuits in the copyright area, the government should seriously consider the need for offering free or low-cost legal assistance to individuals who are unable to afford to hire copyright attorneys.

III. Subpoena Mechanism

The anonymous communication on the Internet has made it difficult for copyright holders to identify potential infringers for the purpose of issuing warnings or taking copyright infringement actions. Indeed, privacy-related legislation in Hong Kong, such as the Personal Data (Privacy) Ordinance and the Public Non-Exclusive Telecommunications Service Licence (PNETS Licence), has made it particularly difficult for copyright holders to obtain information about Internet users. As the consultation document stated:

> [C]opyright owners may apply under the *Norwich Pharmacal* principles for a court order which requires the disclosure of the personal data of alleged online infringers by the relevant [Internet access service providers]. *Norwich Pharmacal* relief is a well-established equitable relief under the common law which requires a third party who has facilitated certain wrongdoing to disclose the identity of the wrongdoer to the victim. The essential considerations that the court bears in mind before a *Norwich Pharmacal* order is made are (i) there must be cogent and compelling evidence to demonstrate that serious tortious or wrongful activities have taken place; (ii) it must be clearly demonstrated that the order will or will very likely reap substantial and worthwhile benefits for the plaintiff; and (iii) the discovery sought must not be unduly wide.

Although court orders are available, they are often slow and costly. Thus, copyright holders have pushed for a streamlined procedure that would allow them to obtain information needed to pursue copyright infringement actions. The information they seek includes not only the personal information of the alleged infringer but also information about potential infringing activities. To facilitate the disclosure of such information, online service providers may be asked to track the online activities of their subscribers and to retain records of those activities for a specified period of time.

The institution of this disclosure and retention mechanism is not only costly for the providers (which are likely to pass the costs down to consumers), but is likely to create many problems outside the copyright area. First, *a disclosure and retention mechanism does not respect the privacy of individual users*. Although one tends to identify copyright holders with major media companies, anybody can become a copyright holder. If you have written an original email or letter, you are a copyright holder! Thus, in theory, anybody can take advantage of the disclosure mechanism, and its impact on the protection of privacy of individual users is likely to be significant.

Second, *the disclosure and retention mechanism is likely to chill speech*. One of the biggest benefits of Internet communication is anonymity. As the caption of a *New Yorker*

cartoon states, 'On the Internet, nobody knows you're a dog.'[21] Indeed, online communication has been essential in promoting free speech in repressive countries where information is heavily controlled. However, if online service providers can freely disclose subscriber information, individual users are likely to become reluctant to freely discuss matters (especially political matters) on the Internet. Freedom of speech and of the press has been one of the main attractive features of Hong Kong. It is important that these important features should not be sacrificed in the name of copyright protection.

Third, *a disclosure mechanism may result in other unforeseen problems, which range from cyberstalking to old-fashioned blackmail*. For example, a cyberstalker can easily request the disclosure of the personal information of his or her target by claiming that an email the stalker sent to the target is stored on the server. The same can be said for batterers, paedophiles, or other social deviants. Similarly, a pornographer can blackmail those who received or purchased pornography by threatening to post their personal information on a publicly accessible website. As U.S. Senator Sam Brownback maintained, 'Titan [a gay-porn producer] probably calls that intellectual-property protection. I call that blackmail.'[22]

Finally, *a disclosure and retention mechanism may slow down Internet development by making consumers reluctant to surf on the Internet*. Such a mechanism would therefore frustrate the development of electronic commerce, deployment of broadband services, and creation of new Internet-based services. Indeed, the promotion of Internet development was one of the main reasons why privacy protection of Internet users is particularly important. If individuals are reluctant to use the Internet for their daily activities, many new Internet services would not be rolled out, and society would be worse off.

Thus, this position paper recommends the following:

- *Refrain from introducing a streamlined mechanism that would allow copyright holders to obtain the personal information of Internet users from online service providers that merely serve as a conduit for the transmission of information sent by others.*

- *With respect to information that is stored on a system or network of the online service providers, refrain from introducing a streamlined mechanism that would allow copyright holders to obtain the personal information of Internet users directly from the providers without going through the court system*. Section 512(h) of the U.S. Copyright Act introduces a streamlined subpoena procedure. Although commentators have documented the flaws of that procedure, at the very least it requires a copyright holder to obtain a subpoena through the clerk of a federal district court and to include in the request a sworn declaration that the subpoena is requested to obtain the identity of an alleged infringer and that such personal information will only be used for copyright enforcement purposes. It is important to keep in mind that the subpoena procedure is intended to be a legitimate attempt by the right holder to stop copyright infringement, rather than a fishing expedition for potential infringing activities. There is no justification whatsoever for copyright holders to have broader investigative powers than police authorities.

- *Refrain from introducing a mechanism that would require the online service providers to track and monitor behaviour by Internet users and to retain information of such behaviour for an extended period of time*. Such a mechanism

would set a very dangerous precedent that opens the doors for other laws that significantly threaten civil liberties.

- *Explore the use of a streamlined online dispute resolution system or an ombudsperson procedure*. A few years ago, Professors Mark Lemley and Anthony Reese proposed to design a 'quick, cheap dispute resolution system that enables copyright owners to get some limited relief against abusers of [peer-to-peer] systems and to deter others from such abuse.'[23] Their proposal was modelled after the Uniform Domain Name Dispute Resolution Policy, which has been used to resolve disputes over Internet domain names. Although the proposal has its limitations and policy makers may disagree on how best to implement such a proposal, the government should study carefully the feasibility of establishing a quick and cheap online dispute resolution system or ombudsperson proceeding to resolve disputes concerning unauthorized copying on the Internet.

IV. Statutory Damages

Section 504(c) of the U.S. Copyright Act provides for statutory damages for copyright infringement. These damages were instituted for at least two reasons. First, it is difficult to prove actual damages in some cases. If copyright holders have suffered financial harm, they should not be barred from obtaining compensation just because the financial harm is hard to be proven. Moreover, the actual damages in some serious cases of violations, such as wilful commercial copyright infringement, may be too low to have any deterrent effect. Imposing statutory damages therefore would serve as a major deterrent, just like the imposition of punitive damages. It also would provide an effective tool to punish repeat offenders.

Unfortunately, unauthorized downloading and uploading is not an appropriate area for introducing statutory damages. Consider a provision that sets statutory damages at HK$150,000 per copy (as compared to US$150,000 under the U.S. Copyright Act). A wilful infringement of 10 songs will result in statutory damages of $1.5 million, while a wilful infringement of 10,000 songs will result in statutory damages of $1.5 billion. To be certain, the illegal reproduction and distribution of 10,000 songs are considered egregious and therefore should be heavily punished. However, a $1.5 billion damage award for distributing 10,000 songs is likely to be deemed unfair, arbitrary, and excessive by any standards.

While courts have discretion to determine whether it is appropriate to award statutory damages and how much of such damages should be awarded, the biggest concern about statutory damages stem from the threat of damages (and its intimidating effect), rather than the damages themselves. In fact, the provision is likely to be abused—to the point that individual users would be 'blackmailed' into settling infringement lawsuits even if they had a good-faith belief that their unauthorized use was legal—or, worse, if their use was in fact legal.

If one were to be given a choice between a statutory damage award of HK$1.5 billion and a settlement offer of $10,000, most rational people would pick the settlement offer regardless of whether they had violated any law. The potential loss is just too high, and fighting the lawsuit can be very costly. In that scenario, the law would not serve its intended purpose. Worse still, by coercing law-abiding citizens to pay the settlement even when they had not broken the law, the law would gradually lose its legitimacy, and the damage to the copyright system and the rule of law in Hong Kong could be quite high.

Moreover, as mentioned above, online sampling can benefit copyright holders, while unauthorized distribution may pose no or limited harm to copyright holders. For example, a distribution of an audiovisual performance of a Beethoven sonata by an emerging pianist may promote the artist. Even if it does not, the financial damage to that emerging pianist is quite limited. Because the copyright system rewards authors based on the market, the law should not grant copyright holders a windfall of statutory damages except in such limited cases of wilful commercial copyright infringement. Requiring a proof of actual damages is not only prudent, but socially beneficial.

Thus, this position paper recommends the following:

- *Refrain from introducing statutory damages except when the infringing activity is conducted on a commercial scale and has resulted in financial benefits that are directly attributable to the activity*.

- *If statutory damages are unavoidable, impose a legal burden on the copyright holder to prove beyond a reasonable doubt that the infringer does not have a good-faith belief that the infringing activity is legal*.

V. Other Options

In light of the challenges created by the Internet and new communications technologies, copyright holders have called for a revision of copyright law. However, *copyright law reform is not the only option*. *In fact, reform that relies solely on legal changes is likely to fail*. Compared to other non-legislative measures, such reform is also less responsive to rapid technological changes. Even worse, because of the slow and lengthy deliberative process in the legislature, outdated legislation that stifles creativity and innovation usually remain on the books even though the technology has evolved. Thus, if the unauthorized copying problem is to be addressed, copyright holders and policy makers need to explore policy options that meet the needs of consumers while taking into account the evolving technological architectures and the Internet users' changing social norms.[24]

In an earlier article, I catalogued eight different types of proposals advanced by commentators and policy makers. These proposals include:

- mass licensing (iTunes and campus-wide subscription);

- compulsory licensing (levies on Internet service subscriptions, computers, and digital audio and video equipment);

- voluntary collective licensing (subscriptions fee in exchange for rights to make unauthorized copies for private, non-commercial use);

- voluntary contribution (asking price, tipping, and honour code);

- technological protection (encryption, digital watermarking, trusted systems, and other digital rights management tools);

- copyright law revision;

- administrative dispute resolution proceeding; and

- alternative compensation (patronage, ancillary service, and home/peer production).[25]

The list here is not exhaustive; additional options include education, development of user etiquette, and formulation of industry codes of conduct. As this list shows, *copyright law revision is only one of the many options available to address the unauthorized copying problem on the Internet*. There are other policy options that are available for copyright holders to protect their intellectual assets while at the same time promoting creativity, innovation, and public access.

Thus, this position paper recommends the following:

- *Conduct a careful consideration of these alternative options before deciding on whether copyright law should be revised.*

Due to its limited scope, this position paper is not able to address the benefits and shortcomings of these proposals. Nevertheless, it is worth pointing out that the use of technological protection measures to protect digital copyrighted works and the introduction of anti-circumvention legislation have been quite controversial abroad.[26]

VI. The Internet's Promise for Hong Kong

Although the consultation paper focuses primarily on the challenges to copyright holders and the need for stronger copyright protection, it is important to recognize the many promises brought about by the Internet and new communications technologies, such as wider dissemination of information, greater access to knowledge and cultural content, the promotion of citizen media and semiotic democracy, and the availability of socially beneficial recoding of copyrighted works.

In fact, as the foreign experience has shown, copyright holders tend to have short-sighted goals, and they often fail to recognize the benefits brought about by new technologies. As the Committee on Intellectual Property Rights and the Emerging Information Infrastructure of the U.S. National Research Council stated:

> In 17th century England, the emergence of lending libraries was seen as the death knell of book stores; in the 20th century, photocopying was seen as the end of the publishing business, and videotape the end of the movie business. Yet in each case, the new development produced a new market far larger than the impact it had on the existing market. Lending libraries gave inexpensive access to books that were too expensive to purchase, thereby helping to make literacy widespread and vastly increasing the sale of books. Similarly, the ability to photocopy makes the printed material in a library more valuable to consumers, while videotapes have significantly increased viewing of movies.[27]

As the government studies the impact of the Internet and new communications technologies on the copyright system, it also needs to explore the growing needs by future authors, user communities, not-for-profit organizations, and Internet companies in the dynamic and fast-changing technological environment.

Moreover, in the United States, Europe and other parts of the developed world, commentators and policy makers have widely questioned the balance in the existing intellectual property system. The report by the U.K.-based Commission on Intellectual

Property Rights, for example, identifies serious problems in the current system that have hindered economic development in less developed countries.[28] Similarly, the *Gowers Review of Intellectual Property*, which was commissioned by the U.K. government, has made important recommendations on how to maintain balance, coherence, and flexibility in the intellectual property system.[29] Even in the United States, numerous studies by both the government and leading commentators have called for reforms of the intellectual property system.[30]

In such an atmosphere when there are global demands for the correction of the unbalanced intellectual property system, Hong Kong should think carefully about how it is to reform its copyright system. In particular, it should be very sceptical of emulating outdated models introduced in foreign countries in the mid-1990s when the Internet first became popular. After all, there is no reason to follow the mistakes of other countries if those mistakes have already been documented and can be avoided. It would be very unfortunate, indeed, if Hong Kong does not take account of the experience and problems abroad and use this opportunity to develop laws that are in line with the current and future technologies.

To enable Hong Kong to take advantage of the promise of the Internet, this position paper recommends the following:

- *Introduce a broad fair use privilege*. Section 35 of the Singapore Copyright Act considers the following factors in assessing whether a particular use is considered fair dealing:

  > (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
  >
  > (b) the nature of the work or adaptation;
  >
  > (c) the amount and substantiality of the part copied taken in relation to the whole work or adaptation;
  >
  > (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
  >
  > (e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

  Given the competition between Hong Kong and Singapore in attracting Internet-related investment, a broader fair use privilege is likely to ensure Hong Kong to maintain its much-needed competitive edge.

- *Introduce a format shifting exception that would allow copyright holders to reproduce legitimately purchased copyrighted works in different formats*. This exception, which is recommended by the *Gowers Review of Intellectual Property*,[31] is particularly important in light of rapid evolution of communications technologies.

- *Introduce a 'safe harbour' for innovators to develop products that are capable of substantial non-infringing use*. Inspired by the U.S. Supreme Court ruling in *Sony Corp. of America v. Universal City Studios, Inc.*,[32] this safe harbour provision will provide the much-needed protection for innovators to develop socially beneficial products that may unfortunately be misused by some copyright users.

- *Introduce a special exception for the use of online materials by educational and research institutions*. This exception has become increasingly important in light of the growing use of online materials for educational and research purposes. A greater facilitation of such use not only would enhance the educational and research experience, but it might also considerably reduce the cost of education and research while promoting greater access to information and knowledge.

- *Broaden the privilege for unauthorized use of online materials for news reporting purposes.* In developing this privilege, 'news' should be broadly defined to cover all newsworthy issues, while those who cover the news should *not* be narrowed to only traditional journalists or mainstream media. Because the Internet has created many opportunities for new forms of media (for example, citizen media), the copyright system should be adjusted to help realize these new-found opportunities.

- *Explore the use of levies to facilitate private copying*. The use of levies is common in Europe and in Canada. The benefits of such levies can be substantial, especially in the face of massive copyright infringement lawsuits against individual file sharers and heavy criminal penalties for egregious offenders.

- *Facilitate the use of orphan works on the Internet*. Orphan works are works for which their authors can no longer be found. A law or procedure that facilitates such use therefore would unlock important copyrighted materials that are previously unusable. A similar proposal has been recommended by the *Gowers Review of Intellectual Property*.[33]

- *Explore government support of open access initiatives and new flexible copyright regimes*. Examples of these initiatives include open format for government documents, open access journals, and Creative Commons. Although it is not part of the government's job to promote other forms of copyright regimes, it is important to note that such promotion may considerably reduce the monies government need to spend in education, research, and other areas. Because it has a direct impact on taxes, the government should take an active role in exploring these alternative options.

- *Facilitate interoperability of new communications software, platforms, and technologies*. Such facilitation would not only promote innovation and competition but also ensure the protection of consumer interests.

- *Limit the protection of government works in the digital environment*. Government works should be freely available for reproduction and distribution on the Internet. As Deborah Hurley, the former director of the Harvard Information Infrastructure Project, pointed out, 'The step that would make the biggest sea change tomorrow in intellectual property protection and access to information would be for governments to put the works that they produce into the public domain.'[34]

- *Ensure proper labelling of goods that deploy digital rights management to restrict consumer rights*. As the deployment of digital rights management technologies increases, legislation may be needed to avoid confusion between copy-protected products and traditional unprotected products. These safeguards are particularly

useful in allowing consumers to choose away from those copy-protected products that may require new playback devices.

Conclusion

The advent of the Internet and new communications technologies has posed serious challenges to copyright holders. However, it has also created many new opportunities. Indeed, through the use of these technologies, people can now converse with others via e-mail and online chats, look up information in virtual libraries, increase knowledge by taking distance-learning courses, publish social commentaries on their own websites, and develop social communities in the virtual world. If Hong Kong is to further develop its knowledge-based economy and to become a regional hub for digital technology (rather than a hub for only digital content), it needs to take advantage of the promise of the Internet and the opportunities innovation affords.

As in other parts of the world, there remains a very serious unauthorized copying problem on the Internet in Hong Kong. However, the solution to the problem may not necessarily be copyright law reform. As this position paper has shown, many of the reform proposals would incur significant socio-economic costs, which at times have outweighed their benefits. There are also many other effective alternative non-legislative proposals that are not mentioned in the consultation document. If policy makers are to undertake a complete and accurate assessment of the needs for copyright law reform, they cannot limit stakeholders to copyright holders and Internet services alone; instead, they need to include future authors, user communities, and not-for-profit organizations (such as schools and libraries). They also need to take advantage of the research and empirical data that have now become available abroad. The Internet today is very different from the Internet in the mid-1990s, when Internet-related legislation first emerged.

Copyright reform cannot be based on a leap of faith; it has to be based on a careful empirical assessment of the local needs, interests, and goals. A holistic copyright law reform that takes into account of the various stakeholders not only would be socially beneficial, but also would set an important example for other countries that are struggling with similar legal problems and policy challenges. Instead of staying behind or playing catch-up, a well-managed copyright law reform would move Hong Kong to the forefront of the Internet debate.

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About the Journalism and Media Studies Centre, University of Hong Kong

The Journalism and Media Studies Centre of the University of Hong Kong is dedicated to the professional training of journalists in the highest international standards of ethics, skills, knowledge and critical thinking. Established in 1999, the Centre offers graduate and undergraduate degrees, seminars, workshops and courses for news professionals at all levels of expertise. Leveraging its unique position at the crossroads of China, Asia and the West, the Centre's special programs and research have made it a focus for understanding exciting changes underway in journalism throughout the region. The Centre's emphasis is on professional education designed to produce graduates for the local, regional and international media who will practice in English or Chinese or both. The Centre's faculty have served at senior levels at ABC News, CNN, the *New York Times*, the *Daily News*, the *South China Morning Post* and Dow Jones, among other organizations. Adjunct professors drawn from the top levels of journalism in Hong Kong also teach at the Centre.

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