



THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG

Submission in Response to the Consultation Paper Entitled Copyright Protection in the Digital Environment

The American Chamber of Commerce in Hong Kong (“AmCham”) is pleased to provide its views on the issues raised in Hong Kong Government’s consultation paper entitled *Copyright Protection in the Digital Environment*. AmCham welcomes the Government’s commitment to modernising its copyright regime to keep pace with the rapid technological changes in the digital arena. Several of AmCham’s members have contributed toward the digital agenda reforms of copyright legislation in the United States of America, Australia and Singapore, and look forward to sharing with the Hong Kong Government their experiences in those jurisdictions.

Background

AmCham is a volunteer and independent business organization, which was established in 1969 and now has a history of over 30 years. AmCham is one of the most dynamic and influential international economic organizations in the Asia-Pacific region, representing more than 3,200 member companies and enterprises from over 30 nations, with members from the United States, Europe and across Asia. Among them, there are large multinational corporations as well as small and medium-sized enterprises. The objectives and duties of AmCham include representing our diverse membership on issues of common interest and serving as an advocate with governments.

CRIMINALISATION OF ILLEGAL DOWNLOADING AND UPLOADING ACTIVITIES

Whether the scope of criminal liability should be expanded.

AmCham recognises that one of the biggest challenges for copyright owners is preventing unauthorised downloading and uploading of copyright works on the Internet. In AmCham’s experience, these illegal activities are prevalent in the peer-to-peer context, as well as on Internet portals. AmCham’s members have suffered significant losses as a result of illegal downloading and uploading activities, and consider that civil sanctions alone are not effective to deter these activities.

Thus, AmCham supports the criminalisation of illegal downloading and uploading activities in appropriate circumstances. This would include where the infringement is wilful and is committed:

- (a) for the purpose of commercial advantage or private financial gain (where private financial gain is defined to include the expectation of receipt of anything of value, including other copyright works¹); and/or
- (b) on a commercial scale.

¹ This reflects the approach taken in the United States’ No Electronic Theft Act of 1997.

AmCham notes that there are different ways of defining what constitutes commercial scale infringement. In the United States, wilful infringements are criminalised where a person reproduces or distributes during any 180-day period 1 or more copies of 1 or more copyright works, which have a total retail value of more than USD\$1,000. Australia and Singapore take a different approach: in those countries, ‘commercial scale’ or ‘significant’ infringement is defined by reference to a list of factors - such as the volume and value of any illegally downloaded or uploaded copies of works - that a court takes into account in determining whether or not the infringement was on a commercial scale. In AmCham’s view, the advantage of United States’ approach is that it is certain in its application, whereas the benefit of the Australian and Singaporean approach is that it allows courts to take into account broader considerations.²

COMMUNICATION OF COPYRIGHT WORKS TO THE PUBLIC

Whether an all-embracing right to communicate copyright works to the public should be introduced to ensure adequate protection irrespective of the form of communication technology through which they are disseminated, and if so, whether infringement of this right should attract criminal sanctions.

The online environment is characterised by constant changes in technology and forms of content delivery. To ensure that Hong Kong’s copyright laws remain relevant in this environment, AmCham supports the enactment of a technology neutral right to communicate copyright works to the public. This would provide protection for copyright works irrespective of the means by which they are disseminated, and remove the need to update legislation whenever a new method of content delivery is created. By introducing a technology neutral right of communication to the public, the Hong Kong Government would also conform with the obligations in the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty to do so.

Consistent with its recommendation in relation to illegal downloading and uploading activities, AmCham considers that criminal penalties should apply to wilful infringements of the right of communication to the public where those infringements are committed for the purposes of commercial advantage or private financial gain, and/or where they occur on a commercial scale.

ROLE OF ONLINE SERVICE PROVIDERS IN COMBATING ONLINE COPYRIGHT INFRINGEMENT

Whether liability on OSPs should be imposed for online piracy activities undertaken by their clients via their service platforms. . If so, whether there should be limitations on liability of OSPs. If not, what appropriate measures could be implemented to address the Internet piracy problem.

AmCham believes that online service providers (“OSPs”) have an important role to play in combating copyright infringement that occurs on their service platforms, and welcomes the Hong Kong Government’s interest in clarifying the scope of that role.

AmCham considers that the existing concept of ‘authorisation’ liability in the Hong Kong Copyright Ordinance is an appropriate mechanism to impose secondary liability on OSPs for copyright infringement that occurs on their service platforms. Australia and the United Kingdom have successfully relied on this concept, including in the recent *KaZaa* case in Australia.³ There,

² For example, section 136(6A) of Singapore’s Copyright Act (Cap. 63) permits the court to take into account (a) the volume of any articles that are infringing copies, (b) the value of any articles that are infringing copies, (c) whether the infringement has a substantial prejudicial impact on the owner of the copyright and (d) all other relevant matters.

³ *Universal Music Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* [2005] FCA 1242

the persons involved in operating the KaZaa service were found to have authorised the copyright infringements of their customers by reason of the fact that they were aware that a major use of KaZaa was the unauthorised transmission of copyright material and yet they failed to take reasonable steps to prevent their customers' infringements. One of the significant factors giving rise to this liability was the fact that the operators of the KaZaa service had the capacity to control, or at least influence, the conduct of KaZaa users in sharing unlicensed copyright materials.

As the Commerce, Industry and Technology Bureau ("CITB") is aware, there have been no cases in Hong Kong on authorisation liability to date. AmCham does not consider this absence of existing case law to be problematic. In AmCham's opinion, Hong Kong's courts are well placed to leverage from the Australian and United Kingdom jurisprudence in this area, which now embodies clear principles of authorisation liability, including in the online context.⁴

Limitations on the liability of OSPs

AmCham supports the introduction of a limitation of liability regime for OSPs based on that enacted by the United States' Digital Millennium Copyright Act of 1998 ("DMCA"). In AmCham's opinion, the DMCA safeharbour regime provides appropriate incentives for OSPs to assist rights holders to combat online piracy, and as a matter of practice, AmCham's members have found the DMCA regime to be effective and efficient.

The basic premise underpinning the DMCA safeharbour regime is that OSPs should not be liable to pay monetary damages to rights holders by virtue of the mere provision of facilities that enable users to access and transmit infringing copyright materials. There are a number of conditions that OSPs must satisfy in order to avail themselves of this limitation of liability, which largely vary by the capacity in which the OSP is acting (ie whether the OSP provides Internet access, caches Internet content or hosts Internet content). AmCham notes that the DMCA safeharbour regime does not affect the ability of rights holders to apply for injunctive relief requiring OSPs to refrain from providing access to infringing material, or providing a connection to particular subscribers engaged in infringing activity.

A central feature of the DMCA safeharbour regime is its notice and takedown procedure. In AmCham's experience, this procedure has met with the approval of both rights holders and OSPs. Rights holders are provided with a quick and inexpensive method of ensuring that infringing material is taken down or otherwise made inaccessible, while OSPs enjoy the benefits of an immunity for acting on takedown notices in good faith and limited liability in respect of their customers' infringements.

An important element of a notice and take down procedure is the active co-operation of OSPs. AmCham therefore proposes that under the legislated procedure, an OSP that receives adequate notification that its network is being used for hosting or accessing infringing materials and fails to act, should not be able to rely on any limitations of liability for infringement. This is an important element to ensure that the program is effective.

An additional suggestion is to require OSPs to designate a representative or agent to receive and to take action on notice and takedown requests. The aim would be to avoid a situation whereby OSPs deny receipt of a notice and takedown request, or contend that the request was issued to the wrong people, hence resulting in a delay in taking action. Ideally, the nominated representative

⁴ These well-established principles give consideration to: (a) the extent (if any) of the person's power to prevent the doing of the act concerned; (b) the nature of any relationship existing between the person and the person who did the act concerned; and (c) whether the person took any reasonable steps to prevent or avoid the doing of the act.

would be stationed within the OSP organization itself (larger OSPs will likely be able to assign internal staff to this role), although smaller OSPs may prefer to delegate the function to an outside agent.

AmCham also endorses the provisions of the DMCA that are intended to guard against abuse of the notice and takedown procedure – for example, through a counter notification procedure for alleged infringers to challenge a takedown notice, and liability provisions on copyright owners that make known misrepresentations in relation to a takedown request.

Another important aspect of the DMCA safeharbour regime from AmCham’s point of view is the requirement that OSPs accommodate and not interfere with standard technical measures used to protect and identify copyright material. AmCham considers that the use of digital rights management technologies should be encouraged, and suggests that it may be appropriate for industry codes of conduct to define what constitutes ‘standard technical measures’ used to protect and identify copyright material. This reflects the approach taken in Australia.

In this context, AmCham notes that it does not consider it appropriate for copyright legislation to require online service providers to implement specified technological measures to guard against primary copyright infringements by their users. Such an approach would run contrary to the Hong Kong Government’s commitment to technological neutrality.

Further measures to address the Internet piracy problem

AmCham submits that, in addition to clarifying the liability of OSPs, the Hong Kong Government should consider further legislative measures to address the problem of Internet piracy. In particular, AmCham suggests that the Hong Kong Government consider enacting a provision in the Copyright Ordinance that requires OSPs to adopt and reasonably implement a policy that provides for the termination in appropriate circumstances of account holders who are repeat infringers. The DMCA contains a provision of this kind, and AmCham considers that it would be a useful tool in the fight against Internet piracy, provided that its operation is reasonable. AmCham also suggests that it would be important for any implementing legislation to define the circumstances in which a person will be considered a ‘repeat infringer’.

FACILITATING CIVIL ACTIONS AGAINST ONLINE INFRINGEMENT

Whether a specific mechanism should be provided for copyright owners to request IASPs to disclose the identity of their clients who are allegedly engaged in online infringing activities. Whether a legislative route should be pursued to require IASPs to keep records of their clients’ online communication. If the status quo is to be maintained, whether any industry guidelines and measures could be formulated.

AmCham supports the introduction of a procedure to allow copyright owners to request, following due process, Internet Access Service Providers (“IASPs”) to disclose the identity of subscribers allegedly engaged in online piracy. In AmCham’s opinion, the objective of any such procedure should be to provide for a streamlined and efficient mechanism that still preserves the due process requirements that copyright owners should be required to follow. As noted in the CITB’s consultation paper,⁵ one existing model that the Hong Kong Government may consider adopting is the expedited subpoena procedure enacted by the United States’ DMCA. That procedure permits copyright owners, on the provision of certain information, to request the clerk of any United States district court to issue a subpoena to the relevant service provider to identify the alleged infringer.

⁵ See page 21.

AmCham envisages that any legislated procedure to identify alleged infringers would be subject to the normal rules regarding payment of costs by the party requesting the subpoena.

In its consultation paper, the CITB raises the question of whether industry guidelines and measures would be sufficient to implement a procedure that allows copyright owners to identify online infringers with the assistance of IASPs. Based on AmCham's experience with voluntary initiatives of this kind, AmCham's view is that any measure short of legislation is unlikely to be effective. This is because there will always be some IASPs that are reluctant to participate in voluntary programs, particularly in the absence of legislative protection for releasing the personal details of their subscribers.

Mandatory obligation for IASPs to keep records

AmCham does not think that it is necessary for the Hong Kong Government to enact legislative measures requiring IASPs to retain records of their subscriber's communications. There is no similar legislative requirement under the DMCA. AmCham believes that the existing record retention practices of IASPs in Hong Kong are sufficient for enforcement purposes, and is concerned that any legislative record-keeping obligation would not be workable in practice (particularly for IASPs with significant traffic on their platforms) and impose burdensome compliance costs on IASPs.

STATUTORY DAMAGES FOR COPYRIGHT INFRINGEMENT

Whether statutory damages for copyright infringement should be introduced.

AmCham strongly supports the introduction of a statutory damages regime into Hong Kong's Copyright Ordinance. In both the online and offline environments, copyright owners struggle to assess their actual losses attributable to an infringer's activities due to the difficulty of obtaining the necessary evidence of infringement, among other things. A statutory damages regime would overcome this difficulty and assist Hong Kong to implement its obligation under Article 41 of the TRIPS Agreement to provide remedies that deter further copyright infringements.

Statutory damages regimes are a feature of the copyright legislation enacted in the United States and Singapore. In the United States, the quantum of statutory damages awarded by a court is linked to the wilfulness of the infringement in that wilful infringers are liable to a higher range of statutory damages than innocent infringers. By contrast, in Singapore, the quantum of statutory damages awarded by a court is calculated by reference to an extensive list of factors, including the nature and purpose of the infringing act, the flagrancy of the infringement and the need to deter other similar infringements. AmCham would support the enactment of either of these approaches to the calculation of statutory damages.

EXCEPTION FOR TEMPORARY REPRODUCTION OF COPYRIGHT WORKS

Whether the existing scope of copyright exemption for temporary reproduction of copyright works should be expanded.

Rather than extending the existing exception for temporary reproductions of copyright works, AmCham submits that the Hong Kong Government should remove this exception from Hong Kong's Copyright Ordinance. AmCham strongly believes that there is no demonstrated need for an exception of this kind, and that it unjustifiably encroaches on the right of copyright owners to control the reproduction of their works in the digital environment. In this regard, AmCham notes that the copyright regimes in the United States and Canada do not contain general temporary

copying exceptions to the reproduction right and this has not affected the availability or use of copyright works made available online.

However, if the Hong Kong Government decides to retain the existing temporary reproduction exception, then AmCham submits that it should be narrowed so that it does not apply where the work from which the transient and incidental copy is made is an infringing copy. This would accord with the approach taken by Singapore and Australia on this issue.

CONCLUSION

As a general comment, given the global and borderless nature of the issues considered under this Consultation, AmCham urges the Hong Kong Government to strive to harmonise any proposed laws with similar laws that have been enacted elsewhere, wherever possible.

AmCham looks forward to working with the CITB to craft the Hong Kong Government's legislative proposals, and would be happy to answer any queries that members of the Bureau may have.

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