

HONG KONG

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Recommendation: IIPA recommends that USTR actively monitor developments in Hong Kong during 2010 with respect to the issues discussed in this Special Mention report.

LEGISLATIVE ISSUES

In November 2009, the government of the Hong Kong Special Administrative Region (HKSAR) took another step in the protracted process of updating its Copyright Ordinance.¹ The administration's "Proposals for Strengthening Copyright Protection in the Digital Environment", which were discussed by the Legislative Council's Panel on Commerce and Industry on January 19, 2010, do reflect some forward progress; but much more needs to be done if the formal legislation, now scheduled to be introduced in the second half of 2010, is to respond effectively to the 21st century realities of the digital networked environment. IIPA urges the U.S. government to remain engaged with the HKSAR administration to encourage a positive legislative outcome.

One of the chief challenges remains the regime for dealing with the pervasive problem of online piracy, especially via peer-to-peer (p2p) file-sharing services. The goals are clear: The law must provide sufficient incentives for service providers to cooperate with anti-piracy efforts or face serious liability consequences. A more efficient and cost-effective mechanism must be put in place to legally allow disclosure of other infringers to right holders, so that they may pursue timely remedies against them. Hong Kong's law enforcement authorities, now largely sidelined because of uncertainty about criminal liability for uploading and downloading under Hong Kong law, must get the legal tools they need to fully enter the fray.

The November 2009 "proposals" reflect positive momentum in some aspects of meeting this challenge. The HKSAR administration acknowledged criticisms that its earlier drafts took too cramped a view of criminal liability, and now propose that all who initiate unauthorized communication of works to the public, either in the course of for-profit businesses or "to such an extent as to affect prejudicially" the copyright owners, should face criminal sanctions. While it is encouraging that, unlike earlier proposals, the criminal offense is no longer tied to the use of a specific technology ("streaming"), a number of issues require clarification. Hong Kong should spell out that the criminal offense covers all forms of uploading copyright material (including in the p2p context); that a for-profit business could be liable even without evidence that it sought to make a profit from the unauthorized communication itself; and that even a not-for-profit institution could be prosecuted for high volumes of intentional, unauthorized uploading. Hong Kong also needs to clarify that those who induce others to commit infringements (including in the online environment) face both civil and, in appropriate circumstances, criminal liability.

On the difficult issue of providing legal incentives for online service provider (OSP) cooperation with right holders, much work remains. A Tripartite Forum Committee process overseen by the Commerce and Economic Development Bureau has failed to achieve any results, in the view of rights holder representatives participating in the process. The government's most recent proposals continue to take the form of providing a "safe harbor" from infringement liability for responsible OSPs, without first spelling out the OSP's exposure if it fails to qualify for the safe harbor. While this legislative approach makes sense in jurisdictions where principles of secondary or indirect infringement liability are already well established, this is not the case in Hong Kong. Accordingly, Hong Kong should

¹ The process began with issuance of a consultation document in December 2006.

amend the Copyright Law to state clearly the circumstances under which OSPs may be liable for acts of infringements occurring over their networks.

Perhaps more significantly, the steps that OSPs would have to take in order to qualify for the safe harbor remain unsettled. All that exists is a “rough outline of a Code of Practice,” which was widely rejected by industry observers; and from all reports even this falls short of requiring the level of cooperation needed in order to grapple effectively with online infringements. Without clear legal incentives for ISPs to cooperate with right holders to take down identified infringing material on hosted services, enforcement against online piracy remains ineffective.

One of the most critical shortfalls is the lack of any effective policy to identify and deal with repeat infringers of copyright. The HKSAR administration’s “Proposals” paper pre-emptively dismissed one approach to such a policy – a statutory graduated response system – but offered no alternative. While giving OSPs incentives to pass on to their subscribers notices of infringing activity received from right holders – a so-called “notice and notice” system – could form part of an effective legal response to p2p and other online infringements, it is clearly insufficient by itself if the receipt of repeated notices about the same subscriber carries no consequences. In any case, Hong Kong should require that OSPs implement sound policies on repeat infringers, as a prerequisite to qualifying for any safe harbor from infringement liability.

Disappointingly, the proposals paper showed no forward progress on other important “digital environment” issues. The proposed exception for certain “temporary copies” remains too broad, although IIPA welcomes the invitation of the administration for stakeholders to work with it to “fine tune” the proposal. This should include making the exception inapplicable to copies made in the course of unauthorized transmissions, wherever they originate, and ensuring the right to “opt-out” of caching through the use of appropriate technical means. The administration also continues to reject the introduction of pre-set statutory damages, the best available method of ensuring that victims of infringement – both online and offline – are fully compensated for their injuries, and that further infringements are deterred. Here too, right holders will work with the administration to identify factors for courts to consider in awarding “additional damages” in infringement cases.

The HKSAR government also proposed a “media shifting exception” which is limited to sound recordings. A new exception for media shifting is unnecessary, and likely to have unintended negative consequences. The right holders have never sought to hold anyone liable for this type of private conduct. Moreover, it risks creating a confusing message that any private copying, from any source, is legitimate. Misinterpretation of the exception could negatively impact the legitimate market for the sale of digital recordings. Therefore, if any such media shifting exception is introduced, it must be carefully crafted to apply only to personal use from legitimate sources in small quantities.

The digital environment initiative is Hong Kong’s best opportunity to craft a world-class copyright law for the 21st century. IIPA urges the U.S. government to monitor developments closely in 2010.