

# HONG KONG

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR actively monitor developments in Hong Kong during 2013 with respect to the issues discussed in this Special Mention report.<sup>1</sup>

## LEGISLATIVE ISSUES

In the well-wired, mobile-connected, and tech-savvy Hong Kong Special Administrative Region (HKSAR), online piracy is the main concern of many copyright sectors, and a growing concern for all the others. Cyberlocker services (mainly based overseas), illegal streaming sites, and “black boxes” that access TV content without authorization from offshore websites are the main problems for the movie industry, while cyberlockers, peer-to-peer (P2P) services and forum sites offering links to unauthorized music files are cited by the recording industry,<sup>2</sup> and by the entertainment software sector, although many of the specific problem sites are different. Hong Kong enforcement authorities are actively engaged and generally responsive, and have close and productive working relationships with most right holder organizations. However, the HKSAR Government has long recognized that its Copyright Ordinance needs updating for the digital networked environment, and it has been working for more than six years to do so.<sup>3</sup> In 2012, however, the process hit an unexpected snag that led the Administration to shelve the effort. The top priority is to get the copyright reform effort back on track as promptly as possible in 2013.

The Copyright (Amendment) Bill 2011 was presented to the Legislative Council (LegCo) in June 2011. The Bill included several progressive features, such as recognizing an exclusive “making available” right for on-demand dissemination of copyright works, and providing criminal remedies for violations of this right in appropriate cases. It did fall short in a number of other areas,<sup>4</sup> but constructive discussions were underway to improve the Bill. However, in mid-2012, the LegCo suspended further consideration of the Bill, which had become embroiled in a controversy over whether criminal liability could arise from parodies. This meant that the Bill could not be taken up again until after legislative elections in September; and to date, the legislation has not been re-activated. Local copyright industry representatives have urged the government to propose specific amendments to address the parody issue, and to re-submit the Bill to the LegCo without further delay. IIPA urges USTR to reinforce this message. Hong Kong may have missed its chance to be on the cutting edge of copyright reform for the 21st century, but it is crucial that this key regional market not be allowed to slip too far behind. The government should focus on the passing of the present Bill as it is, and then start another round of public consultation on other issues as soon as possible. Any proposal for a full spectrum public consultation at this stage is a recipe for further delay for a measure whose enactment is already long overdue.<sup>5</sup>

<sup>1</sup>For more details on Hong Kong’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.

<sup>2</sup>Sales of music in physical formats have plummeted in Hong Kong as a result of Internet piracy, and legitimate channels for online and mobile distribution of music have failed to take off.

<sup>3</sup>The process began with issuance of a consultation document in December 2006.

<sup>4</sup> Some of these shortcomings were discussed in IIPA’s 2012 Special 301 filing on Hong Kong, see <http://www.iipa.com/rbc/2012/2012SPEC301HONGKONG.PDF>. Hong Kong law also needs reform with respect to the efficient operations of the Copyright Tribunal, including authorizing orders for payment of interim licensing fees. The slow pace of Tribunal proceedings allows copyright works to continue to be used for excessive periods without any payment.

<sup>5</sup>For example, the issues that should be addressed in the next public consultation will likely include, but not be limited to, extension of copyright term; online border control measures; specific measures combating peer-to-peer infringement; additional damages and statutory damages; and further clarification on secondary liability and action against repeated offenders. These complex issues must not be allowed to hold up prompt action on the current Copyright (Amendment) Bill.



Improved public education on IP rights is essential to pave the way for the re-introduction of the Bill. Industry is working effectively with the Department of Intellectual Property on this, but the Education Bureau is being less cooperative. The Concern Group of IPR Education (“the Concern Group”), with members from different organizations in the content/copyright industry, was established in May 2012 to work for sorely needed improvements in school curricula regarding IPR. Aside from one meeting with staff in October 2012, the Concern Group has been unable to gain any feedback or reply from the Education Bureau, and requests for meetings with the Secretary have been ignored. IIPA urges the Hong Kong authorities to be more responsive on this important educational effort.

In parallel with the law reform effort, Hong Kong authorities had been engaging with stakeholders on a draft Code of Conduct for Online Service Providers (OSPs). While ultimately this Code would interlock with the legislation, with compliance with the Code creating a presumption that an OSP was entitled to a statutory safe harbor for its role in infringement involving its system or network, there is no reason why the Code discussions cannot progress even during the hiatus on the legislation. The most recent draft, issued in March 2012, was very similar to the January 2012 draft IIPA reviewed in its Special 301 filing last year.

One of the fundamental flaws of the draft Code, ever since the first version was unveiled in August 2011, is its failure to deal with those who persistently use the services of an OSP to infringe. These repeat infringers of copyright inflict a disproportionate share of the harm to copyright owners and to legitimate e-commerce that results from online infringement. In its most recent draft, the Code of Practice sets forth procedures for both a “notice and takedown” system (for removing infringing hosted material or links to such materials), and a “notice and notice” system (for providing warnings to subscribers who employ network services to engage in infringement via peer-to-peer (P2P) services and similar means). But in neither case is the service provider required to take any steps to deal with repeat infringers, or even to identify who they are. Nothing in the Code requires service providers even to correlate a given notice of infringement with previous notices in order to determine whether this particular notice involves a repeat infringer. In effect, a service provider can remain in the safe harbor even if it receives (and forwards) 10, 100 or 1000 infringement notices about the same subscriber, and yet chooses not to do anything else about it. Under such circumstances, it is extremely unlikely that the notice-and-notice system set forth in the Code of Practice will accomplish any material change in the infringing behavior of those subscribers doing the most harm; instead, it will squander resources that would be better expended in identifying repeat infringers and dealing with their persistent misconduct.

Another problem plaguing effective enforcement in Hong Kong is the difficulty and expense of identifying online infringers so that they can be pursued in court. Today, expensive “John Doe” court proceedings must be initiated to obtain this information; and, in addition to legal fees, service providers have asserted their entitlement to onerous administrative charges of up to HK\$50,000 (about US\$6,400) per subscriber. The draft Code not only does nothing to expedite the identification of online infringers, such as by encouraging service providers to respond to right holder requests for such information; it compounds the problem. It would allow a subscriber who posts infringing material that is taken down in response to a right holder notice to file a “counter-notice,” thus triggering a reinstatement of the material in question, but also to prohibit the service provider from disclosing the subscriber’s contact information to the right holder when it notifies the latter of the reinstatement. This “opt out” provision undercuts the entire purpose of the counter-notice concept, which is to allow the service provider to step out of the dispute, restore the *status quo ante*, and enable the right holder to proceed directly against the subscriber in an infringement action. It should be deleted. Indeed, so long as it remains, it is difficult to see how the Code would represent any improvement over today’s informal notice and takedown practice, in which most service providers respond reasonably promptly to most takedown requests involving infringing material that they host.

IIPA appreciates that the revised Code of Practice requires records of notices received and processed to be preserved for 18 months, but we note that the Code should include reasonable requirements that the service provider consult these records in order to identify repeat infringers, especially in situations in which the identity of the infringing subscriber ordinarily cannot be known to the right holder (e.g., in the P2P scenario). We also urge the drafters to re-examine the decision to require the right holder to include in each infringement notice information such as the date of

creation or first publication of the work. This data is of no relevance, and requiring its inclusion significantly increases the risk that a notice will be rejected as defective, or even that the right holder might be liable for an inadvertent error in this data element, especially since the infringement notice must take the form of a statutory declaration. Such a result would discourage use of the notice process, and thus limit the right holder's ability to protect its copyrighted works online, which is the opposite of the stated legislative intent. It could also represent a step backward from the status quo.

While Hong Kong courts generally impose appropriate sentences in piracy cases, the disturbing trend of excessive leniency in cases involving uploading of infringing materials to the Internet continued in 2012.<sup>6</sup> The outcomes in two more cases in the Magistrates' Court dealing with infringing uploads to cyberlocker sites resembled those in several cases the preceding year: 120 hours of community service was imposed on one offender, while the other was acquitted. This appears to violate clear guidelines from the Court of Appeal, in the case of *Secretary for Justice v. Choi Sai Lok*<sup>7</sup> and from the Court of Final Appeal in *HKSAR v. Chan Nai Ming*.<sup>8</sup> Those guidelines provide that custodial sentences should be imposed in copyright piracy cases, even those in which a commercial motivation or financial gain to the defendant cannot be proven, unless "truly exceptional circumstances" are present. IIPA urges Hong Kong courts to issue additional guidelines to assist trial courts in imposing consistent, proportional and deterrent penalties for online copyright offenses in Hong Kong. Further training for prosecutors regarding copyright licensing regimes and the scope of various licenses in place in Hong Kong is also needed, along with improved communication between prosecutors and licensing bodies.

Finally, the outstanding efforts in 2012 of Hong Kong Customs and Excise Department (HKC&E) in recent cases involving major piracy sites, as well as continued efforts to combat hard goods piracy, deserve commendation. Publishers commend the HK C&E's consistent efforts against copy shops, conducting numerous raids and pursuing these cases of book piracy through to conviction; many infringers have received jail time and/or significant fines as a result. This agency also played a critical role in the January 2012 shutdown, led by the FBI, of the leading pirate site MegaUpload, raiding offices, domestic premises, and luxury hotel suites in Hong Kong and freezing millions of dollars in Hong Kong-based assets of the MegaUpload conspirators. In June, HKC&E collaborated with their counterparts in the Macau Customs Service to seize the servers of the forum site Fdzone.org, which had for years enabled its more than 280,000 paying subscribers to download infringing music, movies, games and software. Macau authorities made further seizures of assets and arrested four ringleaders, three of whom are being prosecuted in Macau for unauthorized provision of protected works as well as money laundering. Finally, we applaud HKC&E's efforts to establish a research and development laboratory to conduct training and research to strengthen investigations of online piracy cases.

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<sup>6</sup>More traditional piracy schemes do receive significant sentences, even if they involve the Internet. MPAA reports that a defendant was sentenced by District Court to ten months imprisonment for making and selling infringing physical copies of U.S., Japanese and Hong Kong movies via a website.

<sup>7</sup>[1999] 4 HKC 334.

<sup>8</sup>[2005] 4 HKLRD 142; [2007] 1 HKLRD 95; [2007] 2 HKLRD 489.