

# HONG KONG

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR actively monitor developments in Hong Kong during 2014 with respect to the issues discussed in this Special Mention report.<sup>1</sup>

## LEGISLATIVE ISSUES

More than seven years ago, authorities in the well-wired, tech-savvy Hong Kong Special Administrative Region (HKSAR) recognized that Hong Kong's Copyright Ordinance needed updating for the digital networked environment, and launched an extensive public consultation in December 2006 to identify what changes were needed. Further consultations, public hearings, and drafting exercises followed; but to date, the entire effort has borne no fruit. Meanwhile, the landscape of copyright piracy in Hong Kong has undergone a dramatic shift. Thanks in great part to the persistent enforcement efforts of the Hong Kong Customs & Excise Department (HKC&E), which has a good working relationship with many right holder groups, hard goods piracy in Hong Kong's shops and its local online auction sites has been reduced to low levels. But Hong Kong residents find a plethora of options online to obtain unauthorized access to creative content, ranging from well-established cyberlocker services (mainly based overseas), illegal streaming sites, peer-to-peer (P2P) services and forum sites, to a new generation of mobile apps that stream music, movies and other content without authorization to the millions of smartphone owners in the territory.<sup>2</sup> These developments have roared past Hong Kong's outdated copyright legal regime, leaving right holders and law enforcement alike with inadequate tools to combat online piracy, and providing insufficient incentives to service providers to cooperate to the extent necessary to combat the problem. Consequently, legitimate online and mobile services are handicapped in their efforts to compete against pirates. Accordingly, the top priority must be to get the copyright reform effort back on track as promptly as possible in 2014.

The Copyright (Amendment) Bill 2011 (Bill) was presented to the Legislative Council (LegCo) in June 2011. The Bill included several progressive features, such as providing criminal remedies for violations of the "making available" right for on-demand streaming in appropriate cases. It did fall short in a number of other areas,<sup>3</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 copyright liability could arise from parodies.

After legislative elections intervened in September 2012, the copyright reform project lay dormant until July 2013, when the Administration launched a public consultation exercise on the parody issue, which did not conclude until November. The process was further delayed when some groups seized on the public consultation exercise to propose a much broader and ill-defined exception to the exclusive rights of copyright owners, modeled on the user-generated content exception recently enacted in Canada. IIPA is pleased that the Administration's preliminary analysis of this proposal cast grave doubt on whether it is consistent with Hong Kong's international obligations to confine exceptions and limitations to those that satisfy the familiar "three-step test."<sup>4</sup> But the need to respond to this out-of-scope proposal risks distracting the Administration from the overriding priorities: to come to closure on an

<sup>1</sup>For more details on Hong Kong's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Hong Kong's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

<sup>2</sup>Over 83% of Hong Kong households have access to broadband services; but it is the mobile subscriber penetration rate (236.6% in September 2013) that is truly astonishing, especially considering that there are over 11.4 million 3G or 4G mobile customers in a territory of less than 7.2 million residents. See [http://www.ofca.gov.hk/mobile/en/media\\_focus/data\\_statistics/index.html](http://www.ofca.gov.hk/mobile/en/media_focus/data_statistics/index.html) and [http://www.ofca.gov.hk/filemanager/ofca/en/content\\_108/wireless\\_en.pdf](http://www.ofca.gov.hk/filemanager/ofca/en/content_108/wireless_en.pdf).

<sup>3</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>.

<sup>4</sup>See WTO TRIPS Agreement, Article 13.



appropriate clarification of how Hong Kong's criminal copyright provisions apply to parodies; to incorporate that clarification into the Copyright (Amendment) Bill 2011; and to enact the Bill (as modified) as promptly as possible. Until this happens, both law enforcement and right holders will continue to be significantly hampered in their efforts to use the outdated Copyright Ordinance to combat digital piracy effectively. While there are certainly other improvements that could be made to the Copyright Ordinance beyond those contained in the 2011 Bill, any proposal for an additional public consultation at this stage is a recipe for further delay for a measure whose enactment is already long overdue.<sup>5</sup>

Improved public education on IP rights is essential to pave the way for the re-introduction of the Bill. 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. The Concern Group is working effectively with the Department of Intellectual Property on this, but the Education Bureau is being less cooperative. IIPA urges 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. However, in fact, no progress was made on the Code during 2013. It is disappointing to report that no new draft of the Code has been issued since March 2012.<sup>6</sup> Accordingly, the critique of the draft Code set forth in IIPA's previous submissions remains fully relevant, including the Code's failure to deal with the issue of repeat infringers; its compounding of the problem of identifying online infringers, by validating counter-notifications from users whose identities are not disclosed; and other provisions that could discourage use of the notice-and-takedown process that the Code was intended to promote.<sup>7</sup> Unless these flaws are addressed, it is difficult to see how the Code would represent any significant improvement over today's informal notice and takedown practice, in which service providers generally respond reasonably promptly to most takedown requests involving infringing material that they host, but do nothing to deal effectively with repeat infringers.

Although the critical task is for the HKSAR Administration to take prompt action to bring its Copyright Ordinance into the digital networked era, some remaining (or growing) physical piracy problems are worth noting. For example, devices aimed at circumventing the technological measures used to prevent the play of pirate videogames on consoles are still widely available in Hong Kong. While trafficking in these devices is a criminal violation, recent practice changes instituted by the Department of Justice could make prosecutions much more onerous by requiring documentation regarding copyrighted material in the console itself, rather than in the game. IIPA urges Hong Kong authorities to reconsider this change, which is contrary to well-established practice in most jurisdictions.

While some pirate optical discs (CDs and DVDs), most imported from the PRC, continue to appear in the Hong Kong market, a more worrisome trend is the availability of digital devices that enable piracy, such as karaoke players pre-loaded with more than 30,000 unauthorized music videos, or devices that provide internet browsing capability, and HDMI connectivity between Internet lines and televisions, and that are pre-loaded with "entertainment" icons which, when clicked, take the user to infringing websites. The growing presence of such "black box" devices for sale or rental in Hong Kong threatens the legitimate pay TV, theatrical and home video markets, and deserves increased attention from Hong Kong enforcement authorities.

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<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 repeat offenders. These complex issues must not be allowed to hold up prompt action on the current Copyright (Amendment) Bill.

<sup>6</sup>That draft was very similar to the January 2012 draft IIPA reviewed in its 2012 Special 301 filing. See <http://www.iipa.com/rbc/2012/2012SPEC301HONGKONG.PDF>.

<sup>7</sup>See IIPA 2013 submission on Hong Kong, at <http://www.iipa.com/rbc/2013/2013SPEC301HONGKONG.PDF>, at 306-07.

While Hong Kong courts generally impose appropriate sentences in piracy cases, IIPA urges the courts to issue additional guidelines to assist trial courts in imposing consistent, proportional and deterrent penalties for copyright offenses in Hong Kong.<sup>8</sup> 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 of HKC&E in enforcement against piracy continued in 2013. Publishers commend the HKC&E's consistent efforts against copy shops, conducting numerous raids and pursuing these cases of book piracy through to conviction, which has led to significant fines in a number of cases. Software copyright owners praise the HKC&E's continuing efforts in combatting enterprise software piracy in Hong Kong, and in arranging related publicity to raise the public's awareness on the legal and security risks in using unauthorized software. The music industry notes that in December 2013, HKC&E conducted the first ever raid against a one-stop service providing and updating karaoke systems loaded with infringing recordings, as well as against five pubs which were the service's customers. The agency's efforts to tackle the problem of heavy uploaders of infringing material in popular Hong Kong online fora such as discuss.com.hk and uwants.com also deserve acknowledgement. Finally, all copyright industry groups in Hong Kong continue to benefit from close cooperation with HKC&E in training and research, as well as on-the-ground enforcement actions.

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<sup>8</sup>For instance, prosecutors need to do more to draw the attention of sentencing courts to precedents such as the *Choi Sai Lok* case (1999), establishing the guideline that most criminal copyright convictions should result in custodial sentences, absent truly exceptional circumstances.