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Hong Kong and International Publishers' Alliance

Secretariat

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30 April 2007

Mr Joseph W P Wong
Secretary for Commerce, Industry and Technology
Commerce, Industry and Technology Bureau
Hong Kong

Dear Mr Wong

HKIPA is pleased to offer the following comments on the consultation paper on "Copyright Protection in the Digital Environment." HKIPA commends the administration for undertaking this inquiry.

Chapter 1 of the Consultation Paper addresses criminal liability for unauthorized uploading and downloading. In the view of HKIPA, the most pressing need in this regard is to provide criminal remedies against those who, in the course of or in connection with a trade or business, engage in digital infringements of copyright materials such as books, reference works, original databases, and scientific, technical or medical journals, whether through online or offline means. Hong Kong's law lacks clear criminal sanctions for this conduct today. This is a glaring violation of Hong Kong's obligation under international treaties to provide criminal remedies against acts of copyright piracy on a commercial scale, and we urge that it be remedied as quickly as possible. A sound criminal statute in this area would cover all acts on a commercial scale¹ that infringe copyright works in the digital environment, including but not limited to the downloading of such works for use in a trade or business.

¹ Of course, the "commercial scale" criterion must also be high volumes of digital infringements, even if they take place outside a conventional commercial context.

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With regard to Chapter 2 of the Consultation Paper, HKIPA strongly supports the recognition of a technologically neutral right of communication to the public for all copyright works. This would conform with the global minimum standards contained in the WIPO Copyright Treaty, and would best accommodate future changes in technology. Publishers continually encounter new means of unauthorized dissemination of their works, including electronic document delivery services, distribution of infringing products via e-mail, the use of peer-to-peer technology to disseminate unauthorized copies, and many more. It is essential to cover all channels in which infringing product flows. For further discussion of this point, we refer you to the 30 August 2005 letter from HKIPA to CITB, which we attach to this submission for your ready reference.

Chapter 3 addresses the critical issue of the role of online service providers in combating Internet piracy. We believe that both copyright owners and service providers have a common stake in ridding the electronic marketplace of pirate products, and the law can best promote that common interest by rewarding cooperation between the two groups. Sound rules of legal responsibility, whether developed by courts or codified in legislation, can maximize incentives for such cooperation. Robust rules of secondary copyright liability will discourage service providers from looking the other way unless and until they receive notification that infringing activity is taking place on their networks. We note too that the standards in the WCT require governments to provide means for effective action against any act of infringement, which certainly includes online infringement. This principle rules out the recognition of any broad immunities from liability for service providers, since that could discourage the cooperation that is required to combat online infringements effectively. Finally, with respect to remedies, the availability of injunctive relief from the courts must be preserved, even in circumstances when the exposure of OSPs to monetary damages may be curtailed. This topic as well is discussed in more detail in our August 2005 letter.

Regarding the issues discussed in chapter 4, Hong Kong's law can facilitate civil enforcement by copyright owners in the digital networked environment in several ways. First, the law should include transparency measures that require OSPs to turn over to copyright owners information in the provider's possession regarding infringing activities taking place on the provider's network. Copyright owners should be able to invoke this procedure quickly and easily, and sanctions should be

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available in case service providers do not comply promptly with such requests. Second, against the backdrop of sound secondary liability rules, Hong Kong should institute nonjudicial mechanisms, such as “notice and takedown” procedures, whereby, if the right holder so chooses, routine infringements can be eliminated without the necessity of commencing formal civil litigation. The requisites of such a procedure are spelled out in our August 2005 letter.

Chapter 5 asks whether statutory damages should be available in Hong Kong for copyright infringements. HKIPA believes that this is an essential tool in the digital environment, in which proof of the extent of infringement – e.g., the number of unauthorized downloads from a particular website – may be very difficult to obtain. Statutory damages also set expectations about the scope of a defendant’s possible monetary exposure, and therefore facilitate settlement of civil cases. This system has worked well in other jurisdictions that have adopted, including the U.S., Canada and Singapore, and Hong Kong should follow this trend.

Chapter 6 of the Consultation Paper concerns expanded exemptions for temporary reproductions of copyright works. We are concerned that the Consultation Paper’s discussion of this topic may reflect a misunderstanding of developments in the marketplace. Increasingly, copyright works are made available to the public in ways in which the user may obtain full value without ever making a copy of the work, other than a transient or temporary copy in the Random Access Memory of a personal computer, or a similar device. An example from the publishing sector would be a reference work or database which a user may consult online without needing to print or download the material. If Hong Kong law were to treat the right to make a temporary copy in this situation as excluded from the scope of the copyright owner’s exclusive right of reproduction, the impact on the copyright owner would be extremely detrimental. Thus, to state, as the Consultation Paper does, that the making of a temporary copy “is unlikely [to] ... affect the right owner’s normal exploitation of the work or cause any significant financial harm to the right owner” is simply incorrect. To the extent that the recommendations under consideration in Chapter 6 are based on this misapprehension, they must be re-examined. HKIPA is unaware of any compelling need at this time to expand the existing statutory exceptions to the reproduction right with regard to temporary copies, and we urge the HKSAR not to do so.

Finally, we wish to call your attention to the submission of the International

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Intellectual Property Alliance, which provides further details on the issues addressed both in HKIPA's 2005 letter and in this submission.

Thank you for considering the views of HKIPA. We look forward to participating in further discussion regarding the modernization of Hong Kong copyright law. While this project presents many complex issues, it is important for the future of Hong Kong authors, publishers, and readers and other consumers that they be addressed as soon as possible, and our organization stands ready to help.

Sincerely yours

Simon Li
Convenor (Hong Kong)

(no signature via electronic transmission)