



**APEC IPR Workshop on
“Using Market Research to Develop Effective IPR Campaigns”**

**Online piracy – New Challenges, New Policies from the
Perspective of Government Policy-Makers**

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- **Public Consultation on Copyright Protection in the Digital Environment**
- **Court Decision – BT Case**

Public Consultation on Copyright Protection in the Digital Environment



- ◆ Combat online piracy through
 - Effective legal framework
 - Public education
 - Enforcement
 - Cooperation with the industry

- ◆ Copyright Ordinance already accords protection to copyright works stored in digital media and on the Internet

Public Consultation on Copyright Protection in the Digital Environment (cont'd)



- ◆ The Government needs to ascertain public views on the future of protection of copyright works in the digital environment, with a view to reviewing current provisions
- ◆ Issued a public consultation paper in December 2006
“Whether and if so how the copyright protection regime should be enhanced to provide for effective protection in the digital environment”
(Consultation document at http://www.cedb.gov.hk/citb/ehhtml/pdf/consultation/Consultation_document.pdf)

(1) Legal Liability for Unauthorised Uploading and Downloading of Copyright Works (1)



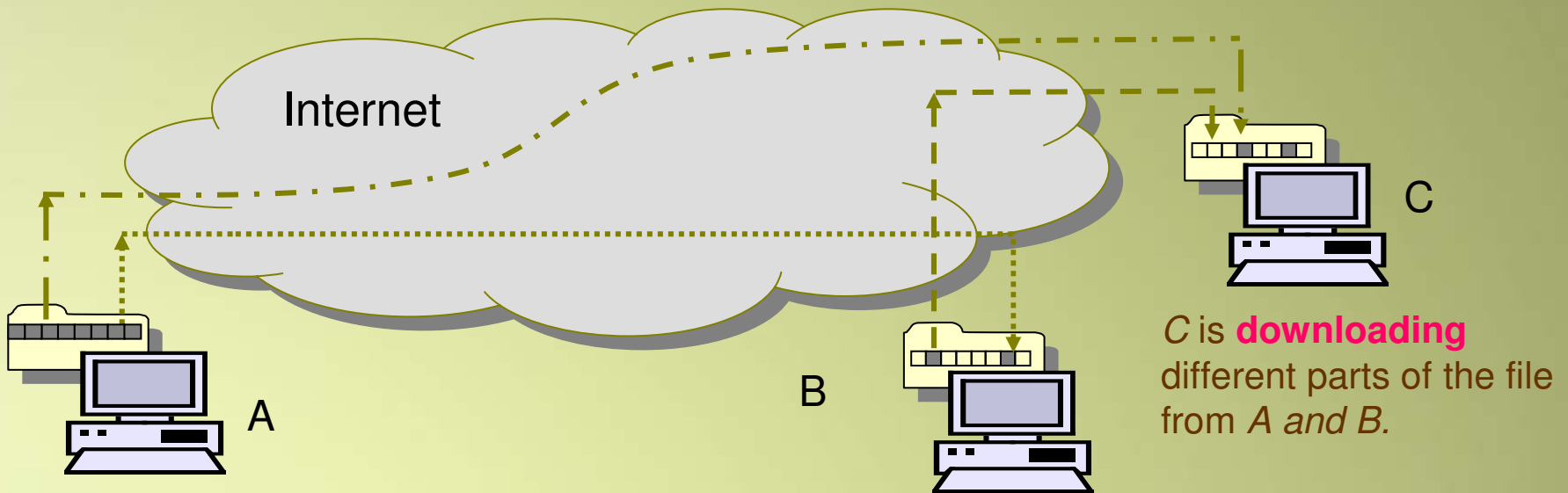
- ◆ Under the Copyright Ordinance
 - Unauthorised uploading of copyright works
 - civil remedies for copyright owners
 - criminal sanctions under certain circumstances
 - Unauthorised downloading of copyright works may incur civil liability

(1) Legal Liability for Unauthorised Uploading and Downloading of Copyright Works (2)



- ◆ Data transmission on the Internet becoming more and more efficient (e.g. using the Peer-to-Peer (P2P) technology)
- ◆ If a copyright work is shared among P2P users without the authorisation of the copyright owner, large scale copyright infringement quickly emerges

Uploading, Downloading and P2P Technology



A makes available a copy of copyright file in the specified folder and is **uploading** different parts of the file to *B* and *C* respectively.

B is downloading part of the file from *A* and at the same time **uploading** to *C* other part of the file that has been **downloaded** from *A*.

(1) Legal Liability for Unauthorised Uploading and Downloading of Copyright Works (3)



- ◆ Views of Copyright Owners
 - rampant Internet infringement activities have seriously hampered their development
 - their loss could hardly be compensated by damages awarded as a result of individual civil actions
 - propose that criminal sanctions should be introduced against unauthorised downloading / file sharing activities

(2) Criminal Liability for Unauthorised Downloading of Copyright Works (1)



- ◆ Considerations
 - Greater protection for the creative industries
 - Effects on the dissemination of information
 - Intrusion into individuals' homes for investigation of economic crimes such as copyright infringement other than on a commercial or significant scale

(2) Criminal Liability for Unauthorised Downloading of Copyright Works (2)



- ◆ Possible options on the extent of criminalisation, if introduced -
 1. all unauthorised downloading activities
 2. all unauthorised file sharing activities
 3. only those unauthorised downloading and file sharing activities which result in direct commercial advantage or are significant in scale

(3) Protection of Copyright Works Transmitted to the Public via all Forms of Communication Technology (1)



- Copyright materials transmitted across different medium platforms
- Current meanings of “broadcast”, “cable programme” or “making available” in the Copyright Ordinance may not be adequate to cope with technological development

(3) Protection of Copyright Works Transmitted to the Public via all Forms of Communication Technology (2)



◆ Considerations

- Introduction of an all-embracing right to communicate a copyright work to the public via all forms of communication technology : Could promote the development of digital content
- Obviate the need to review and amend the Copyright Ordinance whenever new technologies emerge
- Mindful of the implications of dissemination of information

◆ Should we introduce such right into our Copyright Ordinance?

(4) Role of Online Service Providers in Relation to Combating Internet Piracy (1)



- ◆ Existing legal liability
 - Online Service Providers (OSP) may be liable for online piracy activities if they
 - authorise others to do the infringement act; or
 - “joint tortfeasors”

- ◆ Request of the Copyright Owners
 - OSP should be liable for online piracy activities occurring on their service platforms if they, having been made aware of the piracy activities, fail to take any action to remove the infringing materials or block access to them

(4) Role of Online Service Providers in Relation to Combating Internet Piracy (2)



◆ Considerations

- operating cost of OSP, competitiveness, reasonableness and fairness

◆ Possible Solutions

- Introduce new liability of OSPs for online copyright infringement occurring on their service platform
- Introduce a certain notice and takedown system and limit OSP's legal liability under specified circumstances
- Introduce injunctive relief
- Non-legislative routes (e.g. industry guidelines or codes of practice binding on all operators)?

(5) Facilitating Copyright Owners to Take Civil Action against Online Infringement (1)



- ◆ Need to identify the infringers for taking civil actions
 - the identity and addresses of Internet users are personal data protected under the Personal Data (Privacy) Ordinance
 - the telecom licence held by Internet Access Service Provider (IASP) prohibits disclosure of customer's information
- ◆ Need to apply for a Norwich Pharmacal Order to require IASP to disclose the personal data of the alleged infringers

(5) Facilitating Copyright Owners to Take Civil Action against Online Infringement (2)



- ◆ Views of Copyright Owners
 - Existing mechanism to seek a Norwich Pharmacal Order is costly and timely
 - IASP should retain subscriber data for a sufficiently long period of time

(5) Facilitating Copyright Owners to Take Civil Action against Online Infringement (3)



◆ Considerations

- a mechanism without going through court proceedings would be more expedient and probably less costly
- mindful of the need to protect personal privacy
- allowing a subpoena to be made without recourse to the court will represent a significant departure from the current position
- whether the burden placed on an IASP is too onerous if no third party to examine copyright owners' requests for personal data

(5) Facilitating Copyright Owners to Take Civil Action against Online Infringement (4)



◆ Possible options

- introduce a specific mechanism under the law for copyright owners to compel IASP to disclose their client's information
- impose a mandatory requirement for IASPs to keep log
- Non-legislative route - develop some guidelines and measures among copyright owners and IASPs with a view to facilitating communication

(6) Statutory Damages for Copyright Infringement (1)



- ◆ Present situation
 - Need to substantiate the loss for damages

- ◆ Views of Copyright owners
 - Not easy to find evidence as to the causation and extent of loss
 - Difficult to gather evidence for infringements occurred on the Internet
 - Introduction of statutory damages

(6) Statutory Damages for Copyright Infringement (2)



◆ Considerations

- stronger incentive to copyright owners to assert their rights against infringers through civil actions
- may have a stronger deterrent effect to copyright infringers
- an exception to the general legal principles by which damages are compensatory in nature
- statutory damages would fetter the court's discretion to determine the appropriate damages to be awarded
- difficult to stipulate a range of statutory damages which may reasonably accommodate all circumstances of copyright infringement

(6) Statutory Damages for Copyright Infringement (3)



- ◆ Possible options
 - to wait for more cases to build up first; or
 - To amend the Copyright Ordinance to provide for statutory damages

(7) Copyright Exemption for Temporary Reproduction of Copyright Works (1)



- ◆ Section 65 of the Copyright Ordinance
 - copyright in a work is not infringed by the making of a transient and incidental copy which is technically required for the viewing or listening of a work by a user to which the work is made available on the Internet
- ◆ May not cover all other temporary reproduction of copyright works such as IASP caching activities

(7) Copyright Exemption for Temporary Reproduction of Copyright Works (2)



◆ Considerations

- Expanded exemption unlikely to cause significant financial harm to the right owner
 - Expanded exemption would provide assurance to users for their reasonable use of copyright works and facilitate further development of Internet services in Hong Kong
 - Should comply with the 3-step test in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the WTO
- ◆ Should we expand the exemption for temporary reproduction of copyright works?

Public Consultation



- The Government has an open mind on how the various issues should be addressed
- The consultation period ended on 30 April 2007
- 609 submissions
- We are now analysing the responses with a view to releasing preliminary proposals in early 2008 for building up a consensus

Court Decision – BT Case



The first copyright infringement case relating to BT

- The accused was found to upload three movies of different titles to a local BT discussion forum. Arrested in Jan 2005
- The accused was convicted by the Court on 24 Oct 2005 for infringement charges (attempting to distribute). Sentenced to three months imprisonment

Court Decision – BT Case (cont'd)



- Conviction upheld by the Court of Final Appeal in May 2007
- The conviction sends a warning signal to those committing this kind of infringement (CFA decision at http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=57111&currpage=T)

Thank You

<http://www.ipd.gov.hk>

