Asia Internet Coalition (AIC) Comments on
Government of Hong Kong's Copyright Regime

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18 February 2022

To
Division 3, Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
23/F, West Wing, Central Government Offices
2 Tim Mei Avenue, Tamar, Hong Kong

I am writing on behalf of Asia Internet Coalition ("**AIC"**), which is an industry association that represents leading global internet companies on matters of public policy. To further its mission of fostering innovation, promoting economic growth, and empowering people through the safe and open internet, AIC would like to present our comments and recommendations on updating Hong Kong's copyright regime to the Government of Hong Kong and Commerce and Economic Development Bureau.

We understand that the public consultation on Copyright Regime will set out the key legislative proposals and at the same time, address four issues which generated much interests from stakeholders during the deliberation of the 2014 Bill and remain relevant today, namely

(a) exhaustive approach to exceptions (Chapter 3),
(b) contract override (Chapter 4),
(c) illicit streaming devices (Chapter 5), and
(d) judicial site blocking (Chapter 6).

As responsible stakeholders in this policy formulation process, we appreciate the opportunity to submit our views on the proposed legislative amendments.

As such, please find appended to this letter, detailed comments and recommendations which we would like to respectfully request you to consider when reviewing the Copyright Regime before finalising the new amendment Bill based on the key legislative proposals in the 2014 Bill for introduction into LegCo. We look forward to engaging with the Commerce and

Economic Development Bureau with a view to striking a proper balance between the legitimate interests of copyright users and owners, and serving the best interest of Hong Kong.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at or at . Furthermore, we would also be happy to offer our inputs and insights on industry best practices, directly through meetings and discussions and help shape the dialogue for the advancement of copyright regime framework in Hong Kong.

Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Detailed Comments and Recommendations

Copyright regimes should recognise, appreciate and match how the public today create, access and interact with copyrighted works. It is worthwhile noting that creativity requires a flexible framework permitting creators to draw on each other's creations as well as common knowledge. Very often, creators such as poets, choreographers, musicians, filmmakers and novelists are only able to find their voice after learning, adapting, and transforming other works. This forms a positive, reinforcing cycle of growth and creativity. This is true, perhaps even more so, in this digital era.

Today, creative content is created and distributed more than ever around the world, and not just locally. Online platforms allow everyday people, via their laptops or smartphones, to simultaneously be their own creator, publisher, and distributor, easily reaching millions of people across the globe on a multitude of devices. Online platforms are used daily by both traditional and new kinds of artists as a launchpad for their careers, helping them to reach entirely new markets. Digital tools and online distribution help to reduce costs and introduce new opportunities for every kind of creative endeavor, whether amateur or professional.

With innovative forms of creativity a regular and important fact of social life today, we welcome the spirit and several of the proposals in Hong Kong's copyright law review. We would stress in particular the central importance of safe harbors, that provide certainty and predictability for all stakeholders, while fostering growth and diversity in online services. In addition, in order to have a future-oriented legislation in place, we believe that copyright law should not only allow for exceptions, limitations, and unprotectable subject-matter, but also recognize and enshrine their importance for creativity and innovation. We urge Hong Kong to follow the global trend of moving away from a rigid, exhaustive set of exceptions typified by the European Union, in favor of a flexible fair use approach that will support innovation in Hong Kong. We also encourage Hong Kong to enact a text and data mining exemption along the lines of Japan's or Singapore's.

Our responses to individual questions in the consultation document are set out below.

I. Chapter 3 - Proposal for Maintaining an Exhaustive Exception Approach

The government's question / position: Hong Kong, similar to most jurisdictions worldwide, should continue to maintain the current exhaustive approach by setting out all copyright exceptions based on specific purposes or circumstances in the CO.

Hong Kong should follow the global trend of moving away from a rigid, exhaustive set of exceptions, in favor of a flexible fair use approach that ensures that Hong Kong can further innovation. It is hardly a coincidence that the world's most innovative countries with the most dynamic economies have taken the flexible approach: Singapore, South Korea, Japan, Israel, and the United States. Today, fair use supports search engines, social media services, streaming platforms, cloud technologies, translation software, artificial intelligence, and more. It also has fostered creativity of all kinds.

In addition, a flexible approach is also the most consistent with the nature of creativity itself: creativity is dynamic, not static. There is simply no way for even the most prescient government and legislators to anticipate new forms of expression and new forms of innovating. Static laws inherently, of necessity, inhibit creativity and innovation. Static laws lead to static economies. Copyright laws that include exceptions and limitations, like fair use have fueled economic growth and benefited the public around the world.

This does not mean that anything goes. None of the countries that have adopted the flexible approach permit *any* use; to the contrary, permitted uses are guided by principles honed over many decades, and successfully so. Flexibility exists within those principles, not outside it.

A non-exhaustive exception should be sufficiently broad to ensure that courts are able to remain flexible and agile, but also contain clear factors and parameters, as well as Flexibility is ensured by setting out the principles but with illustrative language:("such as," "including"), which point courts to those principles to guide the courts in their application of the broader principles and

determination of whether a particular use falls within the exception.[1] In this way, a non-exhaustive approach can strike an appropriate balance between certainty and flexibility.

We do not agree that the non-exhaustive approach may not be compatible with the three-step test under the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (the "Berne Convention"). In essence, the three-step test for exceptions allows limitations to the exclusive rights of a copyright holder: (i) in certain special cases, (ii) that do not conflict with the normal exploitation of the work, and (iii) that do not unreasonably prejudice the legitimate interests of the author. According to the WTO dispute-settlement panel, the term "certain" in Article 9(2) means that an exception or limitation had to be clearly defined, but there was no need "to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception was known and particularised". Thus, in our view, a non-exhaustive approach that is sufficiently broad but clearly defined would be compatible with the three-step test under the Berne Convention.

II. Chapter 4 - Contract override

The government's question / position: Hong Kong should not introduce provisions to the CO to restrict the use of contracts to exclude or limit the application of statutory copyright exception(s).

We support the Government's position to maintain a non-interference approach to contractual arrangements between copyright owners and users, and not introduce provisions to restrict the use of contracts to exclude or limit the application of statutory copyright exceptions.

As outlined in the Public Consultation Paper, freedom of contract is of vital importance in business operations, and there is no empirical evidence to support that users are prevented from using existing copyright exceptions to their detriment by contract override.

III. Chapter 5 - Proposal on streaming devices

The government's question / position: Hong Kong should not introduce specific provisions to the CO to govern devices used for accessing unauthorised contents on the Internet, including set-top boxes and Apps.

We support the proposal of not introducing specific provisions to the CO to govern devices used for accessing unauthorised contents on the Internet, including set-top boxes and Apps.

[1] See, for example, the 'fair use' exception in Singapore's Copyright Act, Sections 191-194 and the Copyright Law of the United States, §107.

IV. Chapter 6 - Proposal on site blocking

The government's question / position: Hong Kong should not introduce a copyright-specific judicial site blocking mechanism to the CO.

We support the proposal of not introducing a copyright-specific judicial site blocking mechanism to the CO. As outlined in the Public Consultation Paper, the Hong Kong High Court Ordinance already provides a ready tool for seeking injunctions against online copyright infringements, which may include orders to online service providers to block access to copyright infringing content, and there is no evidence that the current injunctive relief mechanism is inadequate for that purpose. Moreover, a copyright-specific judicial site blocking mechanism may be vulnerable to potential abuse which might result in adverse impact on freedom of access to information

V. Safe Harbour Provisions

Alongside enforcement mechanisms and an exception framework, a robust copyright regulatory framework should also include safe harbour for intermediaries. An effective safe harbour mechanism should incentivise platforms to develop mechanisms for combatting copyright infringement without imposing unreasonable liability on online service providers. In this regard, we have a number of concerns in relation to the safe harbour provisions proposed in the 2014 Bill, which we understand will form the basis for the new amendment Bill:

- *Definition of online service providers:* In the 2014 Bill, "service provider" is defined as "a person who, by means of electronic equipment or a network, or both, provides, or operates facilities for, any online services". It is unclear if non-Hong Kong service providers fall within the ambit of this definition. We propose that it be clarified that non-Hong Kong service providers fall within the ambit of this definition and may have recourse to the proposed safe harbour provisions. Like Hong Kong service providers, non-Hong Kong service providers may be subject to copyright infringement claims arising from content on their platforms, and should be entitled to have recourse to the proposed safe harbour provisions.

- *Scope of safe harbour provisions*: In the 2014 Bill, it is envisaged that the safe harbour provisions would exclude liability for damages or any other pecuniary remedy. Safe harbour should also exclude criminal liability and sanctions.

- *Conditions for safe harbour:* The proposed conditions for safe harbour in the 2014 Bill were unduly prescriptive and would impose an unreasonable burden on online service providers. For example, service providers are required to designate an agent to receive notices (Section 88B(2)(d) of the 2014 Bill). Further, service providers are required to take

reasonable steps to limit or stop the infringement as soon as practicable after the provider receives a notice of alleged infringement (Section 88B(2)(a)(i) of the 2014 Bill), whether or not the copyright owner has provided a complete and valid claim of infringement. Such a requirement risks curtailing legitimate and permissible use of copyright work and free speech and expression, since service providers would be required to remove or disable access to material or activity even if the allegation of infringement is not made out. As such, we propose that the conditions for safe harbour be limited to the following:

- The online service provider has taken reasonable steps to remove the infringing content expeditiously after: (a) the online service provider received a notice of complete and valid claim of infringement from the copyright holder containing the URL to the alleged infringing content; and (b) the copyright owner has provided the the online service provider with sufficient evidence to make out a case of infringement. If a complete and valid claim of copyright infringement has not been provided, the online service provider is not required to take any steps.
- The online service provider has in place appropriate mechanisms to receive and address reports / notices on copyright infringement. The details of the mechanism should not be legislated, but should instead be left to the online service provider, who would be best placed to design a mechanism that would most appropriately and effectively address instances of copyright infringement on its platform.
- Further, it is currently unclear if overseas-based intermediaries or their local subsidiaries may be subject to criminal sanctions where users commit a copyright offence in respect of content posted on their platforms. From an industry standpoint, subjecting intermediaries or their local subsidiaries to criminal sanctions for copyright offences arising out of user-generated content is a disproportionate and unnecessary response to copyright infringement, given that intermediaries are neutral platforms with no editorial control over the content posted by users on their platforms. What the platforms do is to provide a service / noticeboard to users to post user-generated content. We therefore propose that it be clarified in the Copyright Ordinance that overseas-based intermediaries and their subsidiaries are not subject to any criminal liability and sanctions in relation to copyright offences (if criminal liability and sanctions are not excluded under the proposed safe harbour provisions).[2]

[2] see World Trade Organization, Report of the Panel on United States - Section 110(5) of the US Copyright Act, at para. 6.108, accessible at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/160R-00.pdf&Open=True

VI. Chapter 7 - Possible New Issues for Further Studies

(a) Extension of copyright term of protection

Hong Kong should not extend the term of copyright. Far from leading to the creation of new works, the continual extension of copyright terms have suppressed the creation of new works and costs libraries and schools countless opportunities to present what should be public domain works to students. In addition, term extension has prevented the translation of potentially hundreds of thousands of works that should be in the public domain. We strongly urge Hong Kong to avoid such term extensions.

(b) Introduction of specific copyright exceptions for text and data mining

(c) AI and copyright

Concerning (b) and (c) - Enacting a text and data mining (TDM) exemption along the lines of Japan's[3] or Singapore's[4]: Machine learning and artificial intelligence are rapidly transforming every aspect of our daily lives, from how healthcare information is captured and monitored in order to enable more targeted and actionable healthcare interventions; to using AI to help build early warning systems that minimize risk of disasters; to building open-source input tools to accelerate publishing of openly licensed content. These powerful tools rely on the ingestion of large amounts of data for processing and analysis. Innovative countries like Japan and Singapore have text and data mining exemptions that allow for the processing of such data while still ensuring that rights holders' interests are protected. While TDM should also qualify as a fair use, we would emphasize that fair use does not obviate the need for a specific exception: exceptions are appropriate where a case-by-case factual determination is not necessary. Non-expressive, non-consumptive, non-competitive use of copyrighted material in the context of scientific, medical and general research is such an activity, whether by non-commercial or commercial entities. We urge Hong Kong to take the same approach to text and data mining as Singapore most recently did: such uses are available to commercial and non-commercial entities alike, with the exception living alongside of a flexible fair use provision.

Applications that rely on TDM are increasingly used to enhance research and improve communication technologies. For example, machine translation tools were made possible thanks to the types of exceptions and limitations in the US legal framework, principally the fair use doctrine. Machine translation services use electronically available data that already exists in a

[3] https://eare.eu/japan-amends-tdm-exception-copyright/
[4] https://www.lexology.com/library/detail.aspx?g=1ce9c997-22a1-4953-bd0b-68a95d31bc89

translated version. They analyse millions of different online translated text, using algorithms to crunch the large amount of data to detect patterns and learn translations. These advances would not be possible in a situation of legal uncertainty. It is crucial that Hong Kong's copyright framework include exceptions for text and data mining to enable local companies to innovate in similar ways.

Other countries have also recognised the benefits of TDM and have supported it in various ways. In the United States, the use of copyrighted text for TDM purposes is permitted under fair use because it is transformative and does not serve as a substitute to the original work. Japan has a specific copyright exception for TDM purposes; the Japan Copyright Act (2011) makes explicit provision to allow TDM. In the UK, the mining of copyright works without the permission of the copyright owner was made legal in June 2014, reflecting the recommendations made in the Hargreaves report. In a submission to the World Intellectual Property Organization, the Computer & Communications Industry Association also shared the position that a work produced by an AI algorithm or process, without the involvement of a natural person contributing to the resulting work, should not qualify as a work of authorship protectable under copyright law.