AAP | ASSOCIATION OF AMERICAN PUBLISHERS

Via electronic mail: co_consultation@cedb.gov.hk

February 22, 2022

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

Subject: Updating Hong Kong's Copyright Regime: Public Consultation

Dear Sirs:

The Association of American Publishers (AAP) appreciates this opportunity to submit comments in response to the "Updating Hong Kong's Copyright Regime: Public Consultation Paper" (Consultation Paper) and commends the Commerce and Economic Development Bureau (CEDB) for resuming its efforts to strengthen Hong Kong's Copyright Ordinance.

AAP is the national trade association of the U.S. book and journal publishing industry. AAP represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions.

As the Consultation Paper notes, Hong Kong has twice attempted to modernize its copyright regime, and a modern framework suited to the realities of today's digital environment is long overdue. Thus, we welcome Hong Kong's commitment to updating its copyright law "to strengthen copyright protection in the digital environment," given the importance of a strong copyright protection system to "underpinning the development of the creative economy." Our responses to the questions posed in the Consultation Paper appear below, in which we also share selected comments made in prior consultations.

Chapter 2: Key Legislative Proposals of the 2014 Bill

(B) Criminal Liability (for infringement of the communication right)

The Consultation Paper references language proposed in the 2014 Bill, which provides that criminal sanctions will apply to "those who make unauthorized communication of copyright works to the public (a) for the purpose of or in the course of any trade or business which consists of communicating works to the public for profit or reward; or (b) to such an extent as to affect prejudicially the copyright owners." AAP generally supports the creation of a criminal offense for serious infringements of the exclusive communication right. Holding infringers of the communication

right criminally liable is necessary to deter and punish unauthorized streaming and other online infringements when they take place on a commercial scale. However, to make the provision clearer and more readily enforceable, we suggest the following clarifications.

First, that the reference to a trade or business "that consists of communicating works to the public for profit or reward" be omitted from the proposed amendment. As revised, infringing acts of communication that are carried out in the course of any trade or business would presumptively attract criminal liability. It is fair to presume that any intentional act of infringement performed in a business context serves a commercial end and seeks to gain some commercial advantage for the business's proprietor, even if that business consists of something wholly different from the communication of works to the public. (If necessary, an affirmative defense could be provided to allow the proprietor to overcome this presumption.) For example, a website that streamed copyright material without authorization to attract users to the site should face criminal liability, even if the site's main business were to provide some good or service other than streaming.

Second, the language "as to affect prejudicially the copyright owner" may be too narrow. We suggest restoring the language proposed in the 2011 Bill, under which a court would be directed to consider "the effect of the communication on the potential market for or value of the work." This formulation would more accurately address the "prejudicial effect" category of infringements that deserve criminal prosecution. This includes infringements carried out by entities not engaged in a "trade or business." For example, if a not-for-profit research institution were intentionally engaged in communicating a large volume of copyrighted material to the public without authorization, causing significant harm to the potential market for the material, such institution should not be immune from criminal liability simply because it lacks profit-making status.

(C) Revised and New Copyright Exceptions

The Consultation Paper notes that new exceptions are proposed to be introduced, "with appropriate preconditions," "to provide greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning), and to facilitate libraries, archives and museums in their daily operations and in preserving valuable works." These exceptions, when enacted with the "appropriate preconditions," should be helpful in allowing these institutions to work within the new communication right. We note, however, that our support of these provisions is contingent upon the enactment of the "appropriate preconditions" in the legislation as safeguards against abuse. These safeguards include: 1) limiting the number of copies to three, of which only one may be accessible to the public at one time; (2) allowing access to the copies only through a computer terminal installed on the premises of the specified library, archive, or museum; 3) limiting access to a particular copy to one user at a time; 4) requiring appropriate measures to prevent users from making further copies or further transmitting such copies; and 5) making the exception inapplicable if a license is available under a licensing scheme. We reserve our opportunity to comment on the specific legislative proposal when released to the public.

A new exception is also proposed to allow media shifting of sound recordings. AAP is concerned that the proposed exception may include within its scope audiobooks and digitally

delivered books (ebooks) that include a read-aloud function, per the current definition of "sound recordings" in the Copyright Ordinance. We reserve our ability to comment further on the specific legislative proposal, but at this early stage urge the CEDB to make any media shifting exception inapplicable to sound recordings of literary works.

(D) Safe Harbour

Any safe harbour regime should be carefully crafted to ensure that it protects only innocent, responsible parties engaged in neutral conduct. Safe harbours should not benefit OSPs that would otherwise have been held liable for knowing about and facilitating infringing activity, nor those entities that profit from infringing activity that they have the right and ability to prevent. The Consultation Paper notes that the provisions governing the safe harbour regime will be underpinned by a voluntary Code of Practice, which includes an infringement notification system. AAP suggests, that in defining the criteria for safe harbour eligibility, the following factors be included among the "prescribed conditions" that will determine whether an OSP should qualify for safe harbour protection:

- Whether the OSP's behavior or business model increases infringement;
- Whether the OSP allows users to upload content and/or provide links anonymously;
- Whether the OSP rewards or incentivizes the uploading and/or linking of infringing content;
- Whether the OSP enables the uploader to obtain a link to publicly distribute their uploaded content;
- Whether the OSP allows unlimited downloading and/or viewing by anonymous third parties unknown to the uploader;
- Whether the OSP has failed to adopt commercially reasonable technical measures suitable to its service to reduce infringement, including preventing the re-uploading or re-linking of works that were the subject of a compliant notification from a copyright owner;
- Whether benefits realized by the OSP can be attributed to infringement, e.g., increased traffic to the site and/or increased profit from selling advertising, subscriptions, or service enhancements such as faster downloading speeds; and
- The overall quantity of infringing content and/or links on the site.

Chapter 3: Exhaustive Approach to Exceptions

3.9 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.

AAP agrees that Hong Kong should "continue to maintain the current exhaustive approach by setting out all copyright exceptions based on specific purposes or circumstances in the CO," which approach is supported by the rationale outlined in the Consultation Paper. Well defined exceptions provide clarity and certainty for both rights holders and users of copyright works. As also noted by CEDB, there is little empirical evidence that a non-exhaustive approach is a pre-requisite

for innovation, reflecting the sense of similarly situated jurisdictions that have considered a non-exhaustive approach but chose instead to maintain its fair dealing framework to define exceptions and limitations to the exclusive rights granted by copyright. An exhaustive exception approach that achieves the requisite balance between promoting copyright to drive investment in the creative endeavour while also providing user privileges to enjoy creator and copyright owner output provides similar incentives for, and likewise drives, innovation — in the creation and delivery of high quality copyright works, no less than under a non-exhaustive approach to exceptions.

While a non-exhaustive approach may appear to provide more flexibility, and perhaps some advantages, such flexibility also imposes significant costs. Indeed, the fundamental uncertainty of the scope or applicability of the fair use exception to any particular set of facts can be a debilitating cost. Unless this uncertainty can be mitigated or managed by other features of the fair use system, it would be very difficult to maintain an orderly marketplace in which works of authorship are created, published, disseminated, and used in a predictable fashion. In the United States, these costs are mitigated, principally by the existence of a deep and rich body of case law and precedent. Counsel to a publisher in the United States does not rely on the language of the U.S. fair use statute alone when analyzing whether a particular use of a copyright work is or is not likely to be considered fair. Rather, it is far more important to consult the case law. These precedents were compiled over the course of nearly two centuries, during most of which the fair use statute did not exist. Only the case law gives meaningful context to the broad principles stated in the U.S. fair use provision.

We also wish to address the inaccuracy of the argument that a non-exhaustive approach provides "better protection for freedom of speech and expression." As stated by the U.S. Supreme Court, "copyright is the engine of free expression"[1] — critical to the continued development of a people's culture and political freedom. Copyright provides the incentives for an author or creator to express their point of view, which they may choose to share with the public, free from the restrictions that might be imposed under a patronage system as was extant in the Middle Ages, for example. Freedom of speech and expression are protected whether under an exhaustive or a non-exhaustive exception framework. It is the balance achieved in a robust copyright protection framework that safeguards freedom of expression. Authors and publishers create and disseminate works that inform, educate, and entertain, thereby enriching public discourse.

Further, while copyright is also intended to foster public discourse, by facilitating access to copyright works that inform, educate, and entertain, user behaviour should not assume prominence in the calculation of the balance of rights and privileges. Many jurisdictions continue to employ an exhaustive approach to copyright exceptions, and it has not been shown that a non-exhaustive approach more readily accommodates changing user behaviour. Indeed, it is copyright owners — whether they operate within a jurisdiction with an exhaustive or non-exhaustive exception approach — that are developing innovative business models and delivery mechanisms that more readily meet *reasonable* user expectations with respect to how they consume and enjoy high quality content.

[1] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)

Chapter 4: Contract Override

4.7 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).

AAP agrees with CEDB's position. The rationale enunciated in the Consultation Paper — that is, to not unnecessarily interfere with the principle of freedom of contract and that there remains a lack of empirical evidence that there is a "relentless exploitation of restrictive contractual provisions by copyright owners" which has prevented users enjoying copyrighted works under existing exceptions — supports the CEDB's position to not introduce provisions to restrict the use of contract override provisions to exclude or limit the application of a statutory copyright exception. In any case, as CEDB notes, should a contract be unconscionable on public interest grounds, there are already measures under existing law that provide both appropriate protection and means of redress.

Licensing agreements allow the parties to define the scope of rights and privileges more clearly as between rights holders and users, i.e., to better delineate what can and cannot be done with respect to the works subject of the contract. A rights holder and user may disagree as to the scope or applicability of an exception, and rather than this potential disagreement having been settled through the terms of a contract, parties may instead be compelled to litigate their differing interpretations as to the scope of a statutory exception.

As contractual arrangements play an important role in providing certainty in the marketplace, freedom of contract should be preserved, and the Hong Kong government should not introduce provisions that would restrict the use of contracts to exclude or limit the application of a statutory copyright exception.

Chapter 6: Judicial Site Blocking

6.12 Hong Kong should not introduce a copyright-specific judicial site blocking mechanism in the CO.

On the contrary, AAP strongly believes that a copyright-specific judicial site blocking remedy should be introduced. Though a general injunctive remedy is available in Hong Kong, a copyright-specific no-fault injunctive remedy that identifies the type of sites to be subject to a blocking action, specifies the safeguards against possible overreach (which would alleviate concerns that freedom of access to information may be impinged), and defines the statutory procedures for applying for the remedy would lend clarity to the efforts of rights holders to mitigate online piracy, while also expediting the availability of relief against blatantly infringing sites. As CEDB also notes, providing for the specific remedy in law will likewise benefit online intermediaries whose responsibilities with respect to the actions they would be required to take would be appropriately enunciated. Rather than dismiss outright the utility of a copyright-specific site blocking remedy due to nebulously articulated concerns about cost, AAP encourages the CEDB to further examine such concerns by engaging in discussions with the relevant stakeholders — including rights holders, platform operators, and

internet engineers with experience in implementing site blocks — to conduct a real world assessment of actual costs.

Chapter 7: Possible New Ideas for Further Studies

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

AAP believes that the introduction of a specific copyright exception for text and data mining (TDM) is not necessary, and strongly cautions against the creation of new exceptions to purportedly facilitate the use of data subsisting in copyright works for TDM (or machine learning or AI training purposes). Licensing solutions remain the best tool for facilitating TDM activities while also protecting the rights of creators, publishers, and other copyright owners and licensees. Further, licensing arrangements best provide the desired flexibility, while affording rights holders and users of data greater stability and certainty with respect to their rights and obligations. Publishers of copyrighted literary works already license such works for TDM purposes. The market for licensing large-scale collections of copyright works for TDM research activities is nascent but growing. For example, several publishers have developed and continue to develop licensing programs to address user demand for corpora on which to carry out such activities. These programs are focused on ensuring the security of copyright works by imposing access protocols, as well as fair remuneration for use of the works as appropriate, especially in the case of for-profit users.

However, if in the course of its further study on this issue CEDB comes to believe an exception might be necessary, AAP suggests the government consider the formulation of the exception under the *EU Directive on copyright in the digital single market (DSM)*.[2] Under the EU formulation, the beneficiaries of the mandatory TDM exception are limited to *bona fide* organizations engaged in scientific research. For TDM activities conducted by commercial entities, the DSM allows rights holders to opt-out of the exception by reserving such uses in an "appropriate manner, such as machine-readable means in the case of content made publicly available online."[3] As Recital 18 notes, *"(r)ightholders should remain able to license the uses of their works or other subject matter falling outside the scope of the mandatory exception provided for in this Directive for text and data mining for the purposes of scientific research and of the existing exceptions and limitations provided for in Directive 2001/29/EC."* Such a formulation recognizes that a viable market exists for licensing works for TDM activities with a commercial purpose. Given the downstream commercial applications to which a commercial data miner might apply the output of its mining of works, and the benefits that will likely accrue to the commercial actor, it is quite reasonable that the creator/owner of copyright works used as inputs be compensated for the use of their works.

[2] Directive on copyright in the digital single market (DSM) Art. 3.1: Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

[3] DSM Art. 4.3 The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.

Given that CEDB is only beginning its inquiry into this subject, we look forward to providing specific comments on possible draft legislation in a future public comment process.

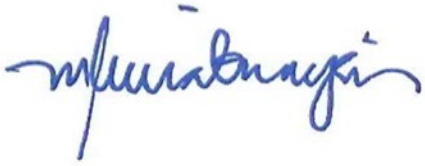
(c) AI and copyright

The intersection of artificial intelligence (AI) and copyright raises interesting and novel questions not only with respect to the output of a trained AI program, but likewise as regards the use of inputs (i.e., corpora of copyright works) that would be used to train an AI program. Input data is essential to the development of AI technologies, and in many instances, such data will be embodied in the copyright protected works of authors, publishers, and other copyright owners. Policies directed to facilitating AI development must be such that its pursuit does not unreasonably impinge on nor detract from the rights of creators and rights holders in whose works may be embodied data needed to train AI. While the Consultation Paper enumerates a few questions regarding copyrightability and ownership of AI outputs as well as liability for AI-facilitated infringements, we note that the question of the use of copyright works to train AI programs should not be overlooked. We look forward to providing the industry's perspectives on the important questions pertaining to the intersection of AI and copyright in a future public comment process.

Conclusion

AAP appreciates the CEDB's consideration of the views expressed above. As Hong Kong examines its copyright framework, we encourage the CEDB to ensure that the proposed amendments continue to recognize and provide for exclusive rights for copyright owners, and that any exceptions to and limitations on copyright protection do not unreasonably impinge on nor detract from the rights of creators and rights holders. We look forward to again participating in a robust public comment process on the draft legislation intended to enact the reforms first considered under the 2014 Bill, and in the consultation process to be directed at examining the "new ideas for further study" identified in the Consultation Paper.

Sincerely,



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