HONG KONG GROUP

22nd February 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

Fax: 2147 3065
Email: co_consultation@cedb.gov.hk

Dear Sir/Madam,

Public Consultation on Updating Hong Kong's Copyright Regime

The International Federation of the Phonographic Industry (Hong Kong Group) Limited is a national group member of ifpi worldwide. We are a group comprising a membership of over 120 recording companies, mostly local companies, striving hard to sustain local music culture by investing in singing recording artists and musicians for local and overseas markets. We believe that the ever-changing digital online environment has already disrupted our current business model. It allows for an entirely new way of communicating (streaming technology), reproducing (mechanical reproduction within the network system), and distributing (downloading) the musical/visual sound recordings. It represents a new paradigm and a challenge upon which our future business models emerge. However, it would not happen if we do not have an efficient digital copyright law for e-commerce and adequate copyright protection in Hong Kong.

Following the introduction of the 14th Five Year Plan Opportunities for Hong Kong by the national delegation on 23 August 2021, on 24 November 2021. Mr Edward Yau, the Secretary for Commerce and Economic Development, announced that the Government launched a three-month public consultation on updating the copyright law of Hong Kong SAR. He emphasised that the copyright system is an integral part of the intellectual property (IP) regime. Hong Kong has all along been committed to enhancing the copyright regime to support our development needs. More importantly, he went on to say that the 'Outline of the 14th Five-Year Plan for National Economic and Social Development of the People's Republic of China and the Long-Range Objectives Through the Year 2035' approved by the National People's Congress in March 2021 raises, for the first time, the support for Hong Kong to develop into a regional IP trading centre. We believe that it is high time to revive the copyright review exercise." In this context, he invited the public to submit views by 23 February 2022.

We suggest that any updating of Hong Kong's digital Copyright Law should address the concerns needs of the contents industry, making Hong Kong a creative centre and a regional trading centre for copyright works. With this in mind, we would venture to make the following submissions in response to the Government's recent Public Consultation on Updating Hong

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

Kong's Copyright Regime ("Copyright Amendment Consultation 2022") that we believe are relevant to support Hong Kong needs and, more importantly, making Hong Kong a regional IP trading centre: -

1. We hereby support and agree with the IFPI's submission on the Copyright Consultation dated 14th February 2022. We do not propose to repeat their well-researched piece of work from the global copyright perspective, that is, worthy of special consideration. Undoubtedly, it reminds our concerns and worries when dealing with hot debates with netizens, ISPs and other stakeholders on the Copyright (Amendment) Bill 2014 (it lapsed on 16 July 2016).

2. We believe in introducing a broad-based technological neutral right of communication that covers all forms of push (active) and pull (passive) communication technology by electronic transmission. It is because even though the present copyright ordinance has already covered both the broadcast /cable program (active communication) and making available rights (passive communication), the rapid advancement of the digital communication technologies would render the present two defined modes of communication in the Copyright Ordinance out of date (for examples, the emergence of YouTube TV, YouTubers, emerging singers posted their songs in YouTube as a new way of promoting their talents). Therefore, the new right of communication should include other future acts of communication brought by new technology within its scope of the definition.

A. The Digital Copyright and TPM in Hong Kong

3. There is no disagreement that the Hong Kong Copyright Ordinance (2006) has provided well copyright protection against piracy in the analogue world. However, as the design of copyright enforcement mechanism against the traders of pirated goods must be different from the strategy for dealing with anonymous online infringers, the analogue copyright law is inefficient to deal with online piracy in a digital world, and Hong Kong has not been able to update the digital copyright law since 2007.

4. As the first sale doctrine would not apply to the online copy in the digital world, any use of online copy and the subsequent dealing thereof must be governed by the terms and conditions of the licence as imposed by the copyright owner when the deal is made. Therefore, the copyright owner must control access to and use a digitalised copy of his work by software code. The rights granted under the code are self-enforcing.

5. The software code for regulating and enforcing the terms of using the legitimate copy of a work in digital/electronic file format is known as the technological protection measures ('TPM'). The terms may cover access control, copy control, length of use, and the number of times of use. In short, TPM aims at ensuring the terms of purchase

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

are observed. The TPM is the central pillar of dealing with copyright works in the digital world.

Our Submission

6. Therefore, we believe that digital copyright law's objectives are to help restructure our copyright market to cope with the ever-changing digital environment and organise the ways to allow the IP creators to disseminate and commercially exploit the fruits of their intellectual creations.

7. From the economic point of view, it is desirable to find a legislative solution that would provide a least-cost solution for the adequate protection of digital copyright, increasing the social benefits that must comply with the international copyright conventions and treaties trade agreements.

8. Both the WCT and WPPT harmonise the global digital copyright by clarifying how copyright protection should be applied in the digital environment, how to adapt existing norms to new technology; and how to introduce new norms where they are indispensable to provide the appropriate level of copyright protection in the digital environment.[1] WCT and WPPT are collectively known as the WIPO Internet Treaties.

9. Each WIPO treaty includes two provisions requiring member countries to provide technological adjuncts to copyright protection. These technical *adjuncts* are intended to further the development of digital networks by making them a safe environment for copyrighted works to be disseminated and exploited. One provision protects against circumvention of the technology that copyright owners may use to protect their works against infringement.

10. Therefore, the treaties mandate that solid legal protection of TPM is required to discourage hackers. Any circumvention of the TPM governing the licence terms of use of an online copy amounts to copyright infringement. TPM provides the first layer of protection. If it is hacked, any further dissemination of the online copy will be stopped by the second layer: copyright infringement, especially if the copyright owner cannot locate the hacker but finds his works being transmitted all over the internet.

11. More importantly, Strong TPM protection substantially reduces the costs of enforcing the licence terms, increases the cost of copying in the networked environment, and reduces the transaction costs of copyright enforcement in the digital environment.

---

[1] Dr Ficsor, Mihály, 'The Role of Copyright and Related Rights in Promoting Literary, Musical and Artistic Creativity' (2003a) *WIPO National Seminar on Intellectual Property Tripoli, Libya* WIPO/IP/TIP/03/8, April 2003, para 43 at p 10.

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

12. Therefore, no user of online copyright might remove the copyright owner imposed TPM in his device, be that a mobile phone, USB etc. **It equally applies to any karaoke server system as it must source the musical/visual sound recordings from a legitimate source.**

13. It is crucial to appreciate that Article 10(1) of WCT (also Article 16 of WPPT) stipulates that the **provision of the limitation and exception is not mandatory. In contrast, Article 11** (also Article 18 of WPPT) states that contracting parties **shall provide** adequate legal **protection against the circumvention of TPM**, which is therefore **mandatory**. The additional requirement of Article 11 of the WCT (also Article 18 of WPPT) that protect against the circumvention which is 'not authorised by the authors concerned' supports the view that copyright owners' rights prevail over copyright users' rights under WIPO Internet Treaties given the special characteristic of the networked environment. Therefore, there should not be any fair dealing in the anti-circumvention of the TPMS provisions. The permitted acts of the circumvention of the digital work are for purposes that are much narrower than fair dealing of copyright exceptions.

B. Contract Override and TPM

14. An author has an exclusive right to deal with the fruit of its creative efforts. S/he could shelf it or exploit it commercially in any manner and form as s/he considers fit.

15. There is no disagreement that copyright exceptions and copyright infringement are mutually exclusive as the act within the copyright exceptions *per se* is an infringement act, but for the exceptions created for special cases; the bottom line for copyright exception is that the act cannot cause any harm to right holders under the copyright regime. **This means that copyright exceptions and acts restricted by copyright are mutually exclusive.**

16. However, any exception must comply with the three-step test of WIPO Internet Treaties, Berne Convention and TRIPS Agreement, namely, (i) exception is confined to "special cases," (ii) exception does not conflict with a normal exploitation of the work and (iii) exception does not unreasonably prejudice the legitimate interests of the copyright owner.

17. The scope of fair dealings is uncertain as it is difficult to predict how the court may apply the three steps test or four steps fair use test in any infringement case; if there is a disagreement on an exempted use, the contract reduces the risk of legal uncertainty. It is more efficient for the user and the copyright owner to agree on the limits of using the copyrighted materials.

18. Any introduction of Contract Override provisions may only encourage the otherwise as some users might perceive that the removal of the licence requirements for the use

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

of copyright works on an alleged fair dealing ground amounted to *carte blanche* for them to make whatever copies they wanted without asking for consent or license from copyright owners given that the transaction costs of enforcement against them are prohibitively high. Not to mention the user's perceived right to remove the TPM behind the cloak of fair dealing.

19. Therefore, the critical amendment to the Copyright law is even more vital in our digital environment, given that purchased online copy will inevitably come with a contract or licence enforceable by the TPM. Any contract override will damage the integrity of the legal protection of the TPM as the first layer of protection against copyright infringement (by legal definition, any violation of the terms of the contract amount to a breach of contract as well as copyright infringement). But such breaches and infringements are difficult to be caught.

20. A rational designer of digital copyright law based on incomplete information (the difficulty of the copyright owner to follow the use of copyright work in the pretend of fair dealing) should focus on the design that interest parties affected agree 'ex-ante to guarantee against ex-post opportunism (strategic behaviour), and transaction costs play an important role in this context.'[2] A least-cost solution for digital copyright protection should be to make copyright enforcement in the networked environment more cost-efficient so that society will benefit from communication technology.

21. Cooter and Ulen argue that "copyright law will die because technology will make law unnecessary. In the model of digital libertarianism, technology protection through cheap encrypting will be more efficient than legal protection of IP. Cheap encryption will allegedly enable producers of digital information to control who uses it without much need for law."[3] It is an overstatement as even Creative Common needs copyright protection. The point is that the contract governing the terms of use of the copyrighted work makes the digital copyright law more efficient. It caters for the different needs of users-some prefer streaming, and others prefer keeping an online copy on their neutral devices.

Our Submission

22. We would respectfully submit that we should leave the working of copyright exceptions open for negotiation between users and copyright owners based on the

---

[2] Furobotn EG and Richter R, *Institutions & Economic Theory: The Contribution of the New Institutional Economics* (2nd ed Michigan University Press, Ann Arbor MI 2005) 23: 'Because they require resources, activities undertaken to enforce an institution's operating rules should be treated as a standard economic problem (citation omitted).'

[3] Cooter, Robert and Ulen, Thomas, *Law and Economics* (4th edn Addison-Wesley series in economics, Pearson/Addison Wesley, Boston MA 2003) 133.

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

efficiencies of the market - the interaction between owners and users is left to the **more efficient instrument of private ordering rather than a legal one.**

C. Artificial Intelligence

23. It is crucial to appreciate that work created by Artificial Intelligence attracts copyright protection for a term of 50 years from the date of creation (section 17 (6) of the Copyright Ordinance) and the author of such work is a non-human (the only exception to other copyright works that requires human creativity in order to attract copyright protection) (section 198). The owner of Artificial Intelligence created work is the one who makes the necessary financial arrangement to produce it (section 11 (3)).

24. The EU has not been able to finalise the policies on AI and copyright, after a decade of discussion among the stakeholders, as EU's traditional approach is that only humans own intellectual creation shall be protected as evidenced by Articles 2 (5) and (8)- artistic or literary works attract copyright protection if they are human intellectual creations. More importantly, article 1 (3) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 stipulates that a computer program shall be protected if it is the human's own intellectual creation.

Our Submission

25. As indicated above, if we accept that only a human is capable of creative activities in our copyright norm, it is quite difficult to protect the results of AI activity by copyright law as opposed to Patent protection.

26. Therefore, we submit that as the Copyright Ordinance has already provided copyright protection for AI-created work, we do not see the need for any further amendment to it now. The Government should consult with the stakeholders before finalising any AI and copyright policy.

27. More importantly, the copyright law must sanction and guard against any human being falsely claiming the AI created works as if his own if the Government is mindful of encouraging AI-created works. A criminal sanction is desirable for such fraudulent acts against the contents industry.

28. As the purpose of copyright protection is to encourage human creativity rather than non-human ones, we suggest that the term of copyright protection for human-created works be extended to 70 years to promote human creativity and investment in human creativity.

D. Data Mining

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon, 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

29. Regarding data mining, there is no reason for anybody to analyse every bit and piece of a copyrighted work (unlike human buying behaviours). Social media might use such data mining technology to screen undesirable materials posted in them. But such screening technology would only ban the work, but such work is still copyright protected.

30. Text and data mining (a critical process for AI development) inevitably requires accessing, copying, and processing a large amount of copyright materials using computer programs for analysis. For example, the data processing in an extensive collection of scientific papers in a particular medical field could suggest a possible association between a gene and a disease. The data miners consider that using copyright materials for data mining should be allowed as the computing process is merely incidental to the way the data mining technology works. It never aims to exploit the copyright materials. The difficulty facing the copyright owners is that the data mining process requires contents to be in the digitalised format as raw data into computers to process it for deep learning purposes, they would lose control of the digitalised copy of their works in the data miners' hands, and more importantly, the data miners would circumvent the TPM (that is considered impeding access to the copyright content) to access the digitalised copy of a copyrighted work before carrying out a computational analysis.

31. On 15 January 2015, the European Court of Justice ruled, in Ryanair v **PR Aviation BV (**Case C-30/14), that when a database is not protected either by copyright or the 'database right', the owner is free to determine the contractual conditions of the use of such database. In effect, this means the owner can rely on contract law to prevent or restrict text and data analysis of the database. In effect, the owner can rely on contract law to prevent or restrict text and data analysis of the database.

32. Articles 3 and 4 of the **Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC** (came into force on 7 June 2019) provides two exceptions to copyright and the data infringement for text and mining:- namely (1) scientific research; and (2) those in the fields of education and preservation of cultural heritage with lawful access to the work to conduct the data mining so long as it has not been expressly reserved by the copyright owner and the copies are only kept as long as necessary. In short, the second exception can be overridden by contracts by copyright (or the data) owners.

33. In the UK, copyright law provides an exception that allows researchers to make copies of works 'for text and data analysis under the following conditions: -
    (1) The computational analysis must be for non-commercial research.
    (2) The copy is accompanied by sufficient acknowledgement (unless this is practically impossible)

    The provision further specifies that copyright is infringed if used for purposes different from those permitted by the exception.

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

Our Submission

34. We would respectfully submit that any analysis of copyright contents and data for data mining purposes might be excepted as long as the researchers do not exploit the protected expression in the copyright works but only process the digitalised copy or data to extract knowledge without doing any harm to the legitimate interests of copyright owners. More importantly, any proposed use of the copyright works for data mining can be overridden by the contract on which these researchers want to engage in analysis. Needless to say, any circumvention of TPM (that governs the terms of use of the digitalised copy of a copyrighted work) must amount to a copyright infringement unless the researcher has obtained prior consent from the copyright/data owner. The exceptions only apply to scientific, innovation, education, and cultural heritage research for non-profit purposes.

E. The Internet Service Provider Liability

35. As discussed above, Hong Kong's digital copyright protection laws should aim to reduce the transaction costs of copyright enforcement in the networked environment and that any such laws should comply with the copyright treaties such as WIPO Internet Treaties and the Berne Convention.

36. In line with other leading jurisdictions, it is imperative to stipulate ISPs' liability when dealing with rampant online copyright infringement that has caused billions of dollars to the contents industry. They will only be allowed a 'passive carrier' or safe harbour exemption if they properly follow up complaints made by copyright owners in the prescribed ways in respect of any online infringement, such as the issuing of a cease-and-desist notice, compliance with the notice and takedown procedure that leads to informing infringers that their acts are illegal and any follow-up action against online infringers. In addition, they must also facilitate the copyright protection procedures such as injunctive relief against online infringers and site blocking (see discussion below).

F Safe Harbour Rule, Injunctive Relief and Judicial Site Blocking

37. However, leading jurisdictions have recently shown a move away from the safe harbour rule. Article 17 of the **EU Directive 2019/790 of the European Parliament and of the Council** introduced new obligations for intermediaries or online content sharing platforms (**OCSPs**). It makes OCSPs directly liable if their users post unauthorised copyright material on their platforms unless OCSPs demonstrate that they have made "best efforts" to obtain permission from rightsholders and acted diligently to remove any infringing content once notified by rightsholders, as well as keep it disabled (Article 17 (4) refers). Companies that host user-generated content on their online services will continue to be a 'notice and take down' regime where the

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

platform must remove illegal content that they become aware of or risk incurring liability.

38. The UK High Court has granted a significant number of section 97A (of the Copyright Designs and Patents Act 1988, which implements Article 8(3) of Council Directive 2001/29/EC (the InfoSoc Directive)) injunctions against ISPs, in favour of film studios, record companies and the FA Premier League since *Twentieth Century Fox v British Telecommunications Plc [2011] EWHC 1981* case. The practice of making section 97A orders against ISPs has become so common that these applications are now rarely opposed by ISPs and usually made without any oral hearing (although there are still disputes about the breadth of the orders).

39. These cases indicate that the Court (and EU's positions) must have found that the IP rights clearly outweighed the rights of the operator of a website who has profited from infringement on a large scale.

40. On 25 February 2021, Miles J, in a UK High Court case *Young Turks Recordings Ltd and others v British Telecommunications plc and others [2021] EWHC 410 (Ch)*, has adopted section 97A to site blocking by ordering various internet services providers to block access to the stream-ripping website, a site enabling third parties to circumvent technological protection measures (TPMs) employed by legitimate music streaming services.

Our Submission

41. Therefore, we submit that the balance should be in copyright holders' favour to compel ISPs to prevent their users from accessing infringing online content and that we should introduce a similar to the UK section 97 A injunctions in the forthcoming Copyright Amendment Bill, which provides that the High Court shall have the power to grant an injunction against an Internet Service Provider if it has actual knowledge of another person using their services to infringe copyright and site blocking injunctive relief against overseas third parties online infringers. The transaction costs for seeking such an injunctive relief must be at the level that makes copyright protection enforcement efficient and cost-effective.

G. Parody, Satire, Caricature and Pastiche

42. The UK amended the Copyright, Designs and Patents Act 1988 (CDPA) in October 2014 to allow fair dealing with a copyrighted work for the purpose of caricature, parody, or pastiche (*section 30A*) in compliance with Article 5(3)(k) of the Copyright Directive (*2001/29/EC*) that recognised parody is an exception to copyright infringement.

43. In broad terms: **parody** imitates a work for humorous or satirical effect. It evokes an existing work while being noticeably different from it. It is not seeking to honour

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

anything; it is not trying to criticise; it tends not to have anything witty or to cut to say about art or society (though there are exceptions.) Instead, it is all about pointing, mocking, and laughing.

44. **Pastiche** is a musical or other composition made up of selections from various sources or one that imitates another artist's style or period. Pastiche draws humour from imitating an existing work, but it does so with an affection that often leads to genuine insight.

45. A **caricature** portrays its subject simplified or exaggeratedly, which may be insulting or complimentary and **may serve a political purpose or be solely for entertainment**.

46. Unlike works of pastiche, parody, and caricature, works of **satire** are purposeful; they tend to be far more engaged in the real world and often pick various real-world powers and ideologies as the targets of their ire to spread awareness or incite some change. **Satire, essentially, is a form of social criticism**. Therefore, it tends to be less imitative and referential and more inventive in its approach, structure, and style by utilising humour, absurdity, tragedy, and allusion in its criticism.

Our Submission

47. Our view is that if any person produces a derivative work without consent from a copyrighted work for the reason of parody satire etc., it becomes a new copyright work, and it is not an infringement of the original as there is no substantial reproduction of the original work under the disguise of fair dealing. The question is, who owns such a derivative work. Much less the copyright owner's concern that any relaxation of the scope on creating a derivative work by a third party without his consent would have a devastating effect on the market values for the original works and their various derivatives. Not to mention the derogatory treatment of a work that amounts to the violation of the author's moral rights. In short, an exemption for secondary or transformative use of an underlying work for the purpose of parody can only be justified within the parameters of the International Copyright Law's Three-Step Test (Berne or TRIPs or WIPO internet treaties).

48. **We cannot emphasise enough the importance of** maintaining an author's moral rights and **the exclusion of any act of commercial use for the purpose of Parody, Caricature, Pastiche and Satire if any exemption is being considered to be included in the forthcoming Copyright Amendment Bill.**

49. As parody, caricature pastiche and satire serve different social purposes in our society; therefore, they must be treated differently and independently. There is no evidential basis for introducing fair dealing exceptions for parody and other special purposes in Hong Kong. We invite the Government to consider whether Hong Kong needs such fair dealings.

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

H Other Submissions

50. Fair use

The UK case law indicates that it is difficult to justify free expression defence under public interest ground-based on fair dealing if the act causes the right owners' pecuniary and/or non-pecuniary interests. So did the ruling made the European Court of Human Rights.[4]

We believe that we have said enough on this subject matter in our previous submissions on the Copyright Amendment Bill 2014; suffice to say that it does not fit well with Hong Kong litigation culture as every purported fair use case will inevitably be adjudicated by the court, the outcome is uncertain, not to mention the transaction costs of enforcing fair use are prohibitive high.

51. Prejudicial offence

We consider it a criminal sanction against any breach of fair dealings or, more specific against any violation of three-step tests or the Fair Use 4 factors test. Only educational professionals and researchers might be exempted from such prejudicial offences. Therefore, social media users who post their own created UGC would be the most targeted.

Our observation is that it is difficult to predict if a particular use of the copyright materials might be fallen within the scope of fair dealing exceptions and exemptions. Therefore, it might infringe the principle of legal certainty in criminal law; according to Bennion *Statutory Interpretation* (3rd Ed), p 673 states that "There is a principle that a person should not be penalised except under clear law ….'

It is interesting to observe that, on the one hand, the Government proposes to expand the list of fair dealings. Still, on the other hand, those who find a refuge of copyright infringement under the cloak of fair dealings would find themselves liable to criminal prosecution for breach of fair dealings. It just does not add up.

H The Way Forward

---

[4] *Ashby Donald and others v. France;* ECHR Judgment on 10 January 2013. No violation of right of free expression and held that that the conviction of the applicants because of breach of the French Copyright Act (photographers made catwalk pictures of Paris fashion shows available to the public via the internet) did not amount to a violation of Article 10 of the Convention (freedom of expression) by the French authorities. The Court was indeed of the opinion that the conviction for breach of copyright and the award of damages was to be considered as an interference with their rights protected by Article 10 of the Convention. However, this interference was prescribed by law, pursued the legitimate aim of protecting the rights of others and was to be considered necessary in a democratic society. Also, EHRC found no violation of freedom of expression in *Peta Deutschland v. Germany; Szima v. Hungary*

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org

52. Last but not least, if we may, we wish to point out that the final product of the Copyright Amendment Bill 2014 is inefficient because it results from the compromises of the political bargaining process based on non-market consideration among the netizens, ISPs and contents industry. Perhaps, the Copyright Amendment Consultation 2022 would provide us with a fresh perspective on what Hong Kong needs from digital copyright law.

53. Based on our lobbying experience since 1997, we have observed that the outcome of copyright legislation is not necessarily socially efficient. Instead, the copyright law is created to serve the interests of those with the bargaining power to devise the rules. With that in mind, we submit that we have tried very hard to set out our local recording industry's views on the future of digital copyright in the role of Hong Kong as a copyright content creative centre and as an IP regional trading centre as most of the transactions and deals in the copyright industry will be done online on regional if not on a global level. Being a leading fintech hub worldwide, Hong Kong is well placed to be an IP regional trading centre for the copyright industry.

54. The new digital copyright law will provide the legal framework for the content industries to experiment with business paradigms in Hong Kong's networked environment that meets her cultural, societal, and economic needs.

55. We will assist the legislative process as in the past and try to voice our opinion on various issues in the forthcoming Copyright Amendment Bill 2022 as and when we need or are asked to do so.

We would like to express our appreciation for the opportunity to submit our views and comments on the Copyright Amendment Consultation 2022.

For and on behalf of
The International Federation of the Phonographic Industry
(Hong Kong Group) Limited

Ricky Fung BBS
C.E.O.

c.c. IFPI
Committee – IFPI (Hong Kong Group) Limited

國際唱片業協會(香港會)有限公司
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (HONG KONG GROUP) LIMITED
Unit 18A, Tower A, Billion Centre, No.1 Wang Kwong Road, Kowloon Bay, Kowloon. 九龍灣宏光道1號億京中心A座18樓A
Telephone: (852) 2861 4313 Facsimile: (852) 2866 6859 E-mail: main@ifpihk.org