

**TVB's Response to the Public Consultation Paper
on "Updating Hong Kong's Copyright Regime"**

1. Television Broadcasts Limited ("**TVB**") welcomes the opportunity to comment on the captioned consultation paper.
2. There is an urgent need to amend the Copyright Ordinance (Cap. 528) ("**CO**") as the existing law is far lagging behind the advances in digital technology and grossly inadequate in protecting the copyright holders in the digital environment. Over recent years, illicit streaming devices ("**ISDs**") and infringing links have become exponentially rampant in the market. Yet, the copyright law in Hong Kong has not been reformed to address the problem.
3. Consequentially, the entire creative industry has suffered substantial losses including losses of subscription, advertising and licensing incomes, and has been deprived of the right to fair returns. This jeopardizes the sustainability and development of the industry.
4. Basic Law specially provides, in Articles 139 and 140, that the Hong Kong Government should develop appropriate policies and afford legal protection for intellectual property rights. This requires not only a copyright protection mechanism on paper, but one that is effective in dealing with modern technology which evolves from time to time.
5. While we appreciate the Hong Kong Government's initiative in updating the Hong Kong's copyright regime and generally support the Copyright (Amendment) Bill 2014 ("**2014 Bill**"), we are of the view that some improvements are necessary. Particularly, in dealing with ISDs and infringing links, a more aggressive approach is needed. If there is no specific provision to address ISDs and infringing links, which are the predominant problems faced by the industry today, the legislative review will be of limited use.
6. Our response to the key legislative proposals of the 2014 Bill and other issues covered in the Consultation Paper is set out below.

Key Legislative Proposals of the 2014 Bill

7. Communication Right

- (a) We support the introduction of a new technology-neutral communication right to allow copyright owners to communicate their works through any mode of electronic transmission. This can plug the glaring loopholes in the current copyright regime.
- (b) However, we are concerned that the following exceptions to the definition of “communication right” (s. 28A(4) to (6) of the 2014 Bill) will exonerate those who intentionally provide infringing facilities or infringing links from legal liabilities. Thus we suggest taking down the following provisions.

28A.(4) The mere provision of facilities by any person for enabling or facilitating the communication of a work to the public does not of itself constitute an act of communicating the work to the public.

28A.(5) A person does not communicate a work to the public if the person does not determine the content of the communication.

28A.(6) For the purposes of subsection (5), a person does not determinate the content of a communication only because the person takes one or more steps for the purpose of –

- (a) gaining access to what is made available by someone else in the communication; or*
- (b) receiving the electronic transmission of which the communication consists.*

- (c) These exceptions are redundant. No one would take, for example, Apple Shop and its salespersons as communicating a copyright work to the public in their ordinary course of business, in the same way as no one would take Fortress as broadcasting a copyright work when they sell a TV set. Such innocent parties will not be held liable for copyright infringement even without these exceptions. Conversely, inclusion of these exceptions will undesirably create a shield for

those who intentionally or knowingly supply infringing communication facilities (e.g. ISDs or infringing applications) to escape from legal liabilities, thereby rendering law enforcement actions against such suppliers impossible. Obviously, deletion of these exceptions will not cause injustice, but the inclusion of them will.

8. Criminal Sanctions

We support the introduction of criminal sanctions for the unauthorized communication of a work as proposed in the consultation paper. This can create a greater deterrent effect.

In addition, we strongly urge the Government to make it an offence to sell ISDs or install infringing applications as a service. This will deter the unscrupulous peddlers who are openly doing the aforesaid at the notorious spots in the city. More details are provided in paragraph 14 below.

9. New Fair Dealing Exceptions

While we remain neutral to the proposed new fair dealing exceptions for parody, satire, caricature and pastiche, commenting on current events and quotation, we notice that there has been a trend of netizens using a copyright owner's copyright work to smear or maliciously attack the copyright owner. Thus, we propose to make it clear in the CO that no dealing can be considered "fair" if it is done with malice.

10. Safe Harbour for OSP

We have no objection to the proposed safe harbour provisions to provide a defence regime to the online service providers ("**OSP**") for liability for infringements occurring on their platforms provided that they meet the prescribed conditions, including in particular implementing a measure to ensure that infringing contents or links are taken down within a reasonably short time limit. This is especially important for time-sensitive contents like live tournaments.

11. Additional Damages

We support the proposed introduction of additional factors for the court's assessment of damages in civil cases.

Other issues covered in the Consultation Paper

12. Exhaustive Approach to Exceptions

We support the keeping of the current exhaustive approach by setting out all copyright exceptions based on specific purposes or circumstances in the CO.

13. Contract Override

We support the approach of not introducing provisions to the CO to restrict the use of contracts to exclude or limit the application of statutory copyright exceptions.

14. ISDs

(a) We strongly urge the Government to introduce specific provisions to the CO to govern devices used for accessing unauthorized contents on the internet, including set-top boxes and applications.

(b) ISDs are commonly used and can be easily purchased in Hong Kong¹. The fact that distributors are openly selling ISDs fearlessly is the strongest evidence that the existing law is ineffective.

(c) The current copyright law is inadequate in the following aspects:

- (i) s. 118(1)(g) of the CO (distribution of infringing copy) – Unlike torrenting, there is no storage of a complete copy of the infringing work in the ISDs of the streaming users. Series of packets of the infringing work are kept only temporarily and will be replaced by subsequent series of packets. Thus, s. 118(1)(g) of the CO cannot apply to streaming piracy.

¹ 探射燈：侵權又犯聚 電視盒子疫市通街賣, available at https://orientaldaily.on.cc/cnt/news/20200501/mobile/odn-20200501-0501_00176_066.html

- (ii) s. 273A to 273C of the CO (circumvention of effective technological measures) – This offence requires the circumvention of access control or protection process (including the encryption, scrambling and any other transformation of the work) or copy control mechanism. It does not apply to streaming of free TV programmes by means of ISD as free TV signals are not encrypted and technically there is no circumvention.
 - (iii) s. 275 of the CO (unauthorized reception of transmissions) – It protects only pay or encrypted programmes. Thus, free TV programmes like ours are not protected. In addition, it gives rise to civil liabilities only and has no deterrent effect.
 - (iv) Conspiracy to defraud under the common law involves subsistence of an agreement to use dishonest means to cause economic loss to another. It is difficult, if not impossible, to establish the defraud element in the case of streaming of free TV signals.
- (d) The consultation paper states that (i) there is no genuine need to introduce specific provisions since the existing legal regime has been effective as demonstrated in the Maige Box case², and (ii) to do so would run the risk of banning legitimate use of neutral devices³. These arguments are misguided.
- (i) Regarding “no genuine need”, we have set out above the limitations of the current copyright law. The offenders in the Maige Box were successfully convicted of circumvention and conspiracy to defraud for their acts done in relation to paid TV channels only, but not free TV channels. Further, they were convicted since they pleaded guilty. The applicability of the subject offences to dealings of ISDs has not been argued and tested in court.

In another operation to tackle ISDs in 2018, eight persons were arrested for infringing TVB's content and over 350 ISDs were seized. No circumvention charge was laid against the offenders as the Department

² Consultation Paper, paragraph 5.9(a)

³ Consultation Paper, paragraph 5.9(b)

of Justice hesitated to do so and eventually the action was time barred under the CO. Thereafter, the offenders lodged claims for return of the seized ISDs. The authority proposed to charge them under conspiracy to defraud instead. But again, there is no prosecution up to date. This shows that prosecution based on existing offences does not really work.

- (ii) Regarding “the risk of banning legitimate use of neutral devices”, ISDs (usually coupled with illegal applications) are specifically designed and made for accessing unauthorized contents, forming an integral part of illegal streaming activities. They are always bundled with proprietary illegal applications, which can only run on designated ISDs. For instance, the illegal UBlock applications can only run on UnBlock devices, but not other brands of ISDs, computer, mobile phone or other digital devices. Similarly, the illegal 恆星 applications can run on EVPAD devices only. The so-called “neutral device” is just a label used by the unscrupulous suppliers to disguise the real purpose of ISDs, namely stealing contents from the copyright owners. As long as the CO states clearly the definition of ISDs, there is no real risk of banning genuine neutral devices.
- (e) Specific provisions to govern ISDs are necessary for combating the prevalence of ISDs in Hong Kong, and is conducive to developing Hong Kong as the regional IP hub.
- (f) The introduction of specific provisions will give greater legal certainty and make enforcement easier as the law enforcers can tackle ISDs even if the act does not fall into any of the existing offences.
- (g) The chain of operation of ISDs usually involves more than one party (such as manufacturers, distributors and salespersons). Specific criminal provisions should cover the liabilities of all these parties.

15. Judicial Site Blocking

- (a) We support the introduction of a copyright-specific site blocking mechanism to the CO.
- (b) The current general injunctive relief mechanism is obviously inadequate, because:
 - (i) the cost of obtaining an injunction is very high, which may not be affordable to many private and small businesses, and this has deterred them from applying for injunctions to protect their legitimate interests. Compared to other grounds for injunctions, copyright infringement is a rather straightforward issue which should be dealt with cost effectively and speedily. To achieve that end, a specific mechanism is needed.
 - (ii) injunction granted to copyright owner does not have long lasting effect as the infringers may bypass the blocked links by changing the DNS server configuration, creating an alternative domain name and/or subscribing to VPN service.⁴ Further rounds of variation application for blocking the new links are necessary, and this creates huge burden to the copyright owners. Taking into account the reality of how infringement activities work, there should be a specific site-blocking mechanism that is capable of addressing the bypassing issue.
 - (iii) granting of injunction is solely at the court's discretion, which fails to provide certainty and expediency to copyright owners seeking redress from infringing activities. In the absence of specific provisions, the court may be less ready to grant site-blocking injunctions on the ground of copyright infringement.
- (c) Many other jurisdictions have specific statutory provisions for blocking piracy websites. As at August 2018, 45 countries have already adopted site-blocking regulations.⁵ Hong Kong should act proactively as well.

⁴ The Asia Video Industry Report 2020 (p. 24 to 25), available at <https://sipi-ip.com/wp-content/uploads/2020/09/The-Asia-Video-Industry-Report-2020.pdf>

⁵ Site Blocking Global Best Practices (p.4 to 7), available at

- (d) As to which authority should grant site-blocking orders, we prefer administrative or regulatory authority to judicial body, in a way similar to Malaysia and Indonesia.
- (i) In Malaysia⁶, the copyright owner applies to the Ministry of Domestic Trade and Consumer Affairs who will review and confirm the evidence within 48 hours of receipt. Blocking orders are then sent by the Malaysian Communications and Multimedia Commission to all ISPs who then have to implement the orders.
- (ii) Similarly, in Indonesia⁷, copyright infringement complaint can be filed with the Ministry of Communication and Information Technology. If the Ministry decides to act on the complaint, access to the illegal sites will be blocked in Indonesia.
- (e) The administrative approach has proven to be more effective and cost-efficient than the judicial approach. After the enactment of site-blocking legislations, piracy has been reduced by 60% and 76% in Malaysia and Indonesia respectively since 2019⁸. Conversely, piracy has only been reduced by 7 to 12% in the United Kingdom, where the judicial approach is adopted.⁹
- (f) On a personal consumption level, a study by Asia Video Industry Association shows that administrative site-blocking is more effective than judicial site-blocking in dissuading consumers from using piracy services. Details are tabulated below.

https://www.ipaj.org/bunkakai/content_management/event/pdfs/20180728/Schlesinger_20180728_2.pdf

⁶ Copyright Act 1987, section 41; Communications and Multimedia Act, section 263

⁷ Copyright Law No. 28 of 2014, Article 55

⁸ Asia-Pacific: Progress against piracy in 2021, says AVIA & CAP, available at <https://piracymonitor.org/southeast-asia-progress-against-piracy-in-2021-says-avia/>

⁹ In Anti-Piracy Work, Blocking Websites More Effectively When Multiple Sites Are Targeted, available at <https://www.heinz.cmu.edu/media/2019/October/anti-piracy-blocking-multiple-websites>

Impact	Administrative			Judicial
	Vietnam	Indonesia	Malaysia	Singapore
Yes, I no longer access piracy services	26%	30%	20%	10%
Yes, I only rarely access piracy services	23%	23%	25%	12%
Yes, I find alternative piracy services	19%	17%	12%	10%
No impact	22%	14%	20%	42%

- (g) Another advantage of administrative site-blocking is that it does not need to take years for relevant case law to develop (which is at the cost and expense of the copyright owners), unlike judicial site-blocking.
- (h) We are of the view that the appropriate authority to be tasked with administrative site-blocking is the Communications Authority (“CA”), which regulates *inter alia* all ISPs in Hong Kong. All along, the CA has been entrusted with the task of protecting the copyright of pay TV licensees pursuant to sections 6 and 7A of the Broadcasting Ordinance (Cap. 562). It is our suggestion to extend the role and power of the CA in copyright protection so that the CA can mandate the ISPs to help stopping infringement of any copyright work via the Internet.
- (i) If there are compelling reasons not to take administrative approach, then site-blocking applications should be heard and determined by a specialty court with appropriate mechanisms to determine urgent cases expeditiously.
- (j) We are of the view that the Copyright Tribunal can be such a specialty court. The tribunal has a statutory duty to deal with a case in a cost-efficient and expeditious manner under rules 3 and 4 of the Copyright Tribunal Rules (Cap. 528D), and has the specialty of dealing with copyright issues. Its jurisdiction can be extended to cover site-blocking applications through a simple amendment of the CO. Appropriate resources may need to be put to the tribunal, which currently operates on a part-time basis, so that it will be able to deal with urgent applications.

- (k) To safeguard freedom of speech and expression, we agree that evidence needs to be produced to the authority or the court (as the case may be) for adjudication as to whether the sites concerned are infringing.

Possible New Issues for Further Studies

16. We support the proposal to extend the copyright term of protection to 70 years to be in line with international standards. With the improved archiving system and new media technology, copyright works may still have significant commercial value exploitable by the owners after 50 years.

Conclusion

17. Digital piracy has stifled the development and sustainability of the Hong Kong creative industry. We hope the Government would (i) accept our aforesaid suggestions which address the shortcomings of the 2014 Bill, and (ii) introduce an improved bill to the Legislative Council as soon as possible so that the creative industry can be salvaged without further delay.

Television Broadcasts Limited

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