



**Updating Hong Kong's Copyright Regime – Public
Consultation Paper**

Premier League Submission

1. Introduction

The Football Association Premier League Limited (the “**Premier League**”) is the organising body of the top level football competition for clubs in England and Wales, which is currently known as the Premier League (the “**Competition**”). The Premier League is owned by the 20 constituent member clubs of the Competition from time to time (the “**Clubs**”), who each hold one share in the Premier League. The Premier League is authorised by the Clubs to license broadcasters throughout the world to provide and offer audio-visual coverage of the 380 matches that are played in the Competition during the course of each season (“**Matches**”). The Premier League is broadcast to almost 800 million households around the world and has over 2.5 million followers in Hong Kong, some of its most committed and passionate fans anywhere in the world.

A high proportion of the Premier League’s revenue is generated from the sale of exclusive audio-visual broadcasting rights to the Matches. This revenue is crucial to the quality and success of the Competition, and for the Premier League’s ability to contribute to community projects around the world. By way of example, the Premier League contributed US\$100,000 to the Hong Kong Football Association following the 2017 Asia Trophy¹ pre-season tour, and that grant is still being used today to help run women and girls’ grassroots refereeing programmes in Hong Kong.

The Premier League has long experienced infringement of its copyright through unauthorised live streams and recorded clips of broadcasts of Matches on the internet. This has manifested itself in many ways over the years – from the use of satellite equipment, decoders and cards to receive broadcasts, through to the illicit streaming services (including illicit streaming devices (“**ISDs**”), apps and subscription services) seen today.

Today’s piracy ecosystem is complex and global, with a wide variety of entities involved in the access, capture and distribution of unauthorised content. The sums of illegal gains being made are large, and pirates have become increasingly sophisticated. For example, in March 2021 the Premier League worked with Spanish police (amongst others) to shut down an illegal streaming app called ‘Mobdro’², which was used by consumers around the world, including in Hong Kong. The operators of the app are estimated to have generated over 5 million euros from its illegal activity. Tackling a problem as sophisticated as modern internet piracy requires legislation that recognises that technology is rarely static, that pirates are often part of complex international crime organisations, and that the piracy ecosystem is joined together through a wide range of service providers that need to be held appropriately responsible for their various roles in the provision of infringing content.

Ultimately a varied approach which includes enforcement actions, collaboration with law enforcement authorities, cooperation with intermediaries, and educational messaging is necessary to combat piracy. The Premier League is committed to pursuing all of these in Hong Kong.

The Premier League is pleased to respond to the Hong Kong Government’s (the “**Government**”) public consultation paper (the “**Consultation Paper**”)³ and share its experiences of protecting its copyright against online piracy, through criminal and civil actions, across the world (including in Hong Kong). The Premier League welcomes the Government’s desire to ensure its copyright regime keeps pace with the rapidly evolving technologies of the digital world and that Hong Kong remains an IP hub, with a focus on combatting digital piracy as a core pillar of the proposed changes. Given how rarely IP legislation is reviewed and the speed at which technology develops, any review must be as comprehensive and forward-looking as possible. The Premier League is therefore particularly encouraged that the Consultation Paper has recognised *‘there is a need for us to update our copyright regime in the light of rapid advances in technology’*⁴.

¹ <https://www.premierleague.com/news/405498>

² <https://www.premierleague.com/news/2024038>

³ Updating Hong Kong’s Copyright Regime [https://www.cedb.gov.hk/assets/resources/citb/consultations-and-publications/\(Eng\)%20Consultation%20Paper%20on%20Copyright.pdf](https://www.cedb.gov.hk/assets/resources/citb/consultations-and-publications/(Eng)%20Consultation%20Paper%20on%20Copyright.pdf)

⁴ Ibid, p2

The Premier League eagerly awaits the outcomes of this consultation and hopes to see results that provide content owners with the necessary tools to address the various piracy issues currently evident in Hong Kong.

2. Executive Summary

This submission will cover the five key areas, as set out in the Consultation, for legislative proposal under The Copyright (Amendment) Bill 2014⁵ (the “**2014 Bill**”) which was drafted to amend the current Copyright Ordinance (Cap. 528) (the “**CO**”)⁶: (a) communication right, (b) criminal liability, (c) revised and new copyright exceptions, (d) safe harbour, and (e) additional damages in civil cases; and the four areas which generated much interest from stakeholders during the deliberation of the 2014 Bill: (a) exhaustive approach to exceptions, (b) contract override, (c) illicit streaming devices, and (d) judicial site blocking. For ease of reference, this submission will address these topics in the same order they are set out in the Consultation Paper.

Without clear legislation that addresses these issues, content owners in Hong Kong will continue to struggle to protect their copyright domestically and around the world. Based on the proposed changes in the Consultation paper, the Premier League suggests the following broad approaches, each of which is explained more fully in this submission:

Five key areas for legislative proposal under the 2014 Bill

- a) a communication right that is drafted to reflect the roles and responsibilities of the various entities in the piracy ecosystem, including illicit streaming service sellers;
- b) criminal liability for online copyright infringement, with strong deterrent sentences;
- c) copyright exceptions that protect legitimate use but also safeguard against abuse;
- d) if introducing a safe harbour framework, ensuring that it is practical, and tailored to the type of content being infringed; and
- e) damages provisions that reflect the various nefarious means pirates employ to generate revenue and obfuscate their identities, and that also recognise the difficulty rightsholders have in proving loss.

Four areas for further discussion

- a) an exhaustive approach to exceptions that allows for certainty and protects against unnecessary litigation;
- b) contract override provisions that allow content owners freedom to negotiate with consumers;
- c) technology neutral legislation that specifically targets commercial dealing in illicit streaming services and therefore gives content owners, law enforcement, and Government, certainty (both procedurally and legally) in bringing legal actions, as well as sending a deterrent message to the market; and
- d) flexible judicial site blocking provisions that give the courts the ability to grant blocking injunctions that are safe and proportionate.

The Premier League is generally supportive of the changes proposed by the Government in the Consultation Paper and believes these could represent a substantial step forward in legitimate content owners’ ability to protect their rights in Hong Kong. By implementing legislation that reflects the above nine points, the Premier League is confident that Hong Kong can lay claim to be at the forefront of progressive IP regimes, which will in turn help meet its economic and social targets.

⁵ <https://www.gld.gov.hk/egazette/pdf/20141824/es32014182421.pdf>

⁶ https://www.elegislation.gov.hk/hk/cap528?xpid=ID_1438403328788_001

Possible new issues for further studies

The Premier League is very willing to engage in discussions about any new areas of legislation that may impact content owners. In particular, the Premier League is supportive of extending the copyright term of protection but would have concerns around any exception for text and data mining particularly in the context of commercial research. The Premier League is happy to review any more detailed proposals when available.

3. Key Legislative Proposals of the 2014 Bill

a. Introduction of a 'Communication Right'

The Premier League is supportive of the introduction of a communication right and agrees that *'the introduction of a technology-neutral communication right will bring our [Hong Kong's] copyright regime on par with international developments and in line with the practices of many overseas jurisdictions'*⁷.

A communication right is a fundamental element of jurisdictions with strong IP frameworks, and something the Premier League has regularly relied on in a wide variety of copyright cases across the world. The Premier League respectfully suggests some small but important clarifications to the drafting to ensure it captures live streaming, and can be applied to all relevant entities whose acts lead to infringing content being made available.

In particular, the Premier League has concerns with the caveat in s13 of the 2014 Bill (introducing a new s28A(5) to the CO) that *'a person does not communicate the work to the public if the person does not determine the content of the communication'*. Today's piracy ecosystem involves a wide range of commercial entities, including those initially capturing the content, server providers responsible for delivering the video content and those directly supplying the illicit streaming services to the ultimate end users. By including a caveat that only someone who determines the content is responsible for communicating that content to the public, many of the entities that play a crucial role within the piracy ecosystem may well be able to use this to evade liability. Many sellers of illicit streaming services, for example, just import "fully loaded" devices (devices pre-configured with infringing content) for onward sale to consumers. Although they know that the devices provide access to infringing content, and what content is available on the device, they are often not the individuals directly responsible for the sourcing, delivery or choice of content, most of whom are not located in Hong Kong.

Furthermore, no similar requirement exists under UK or EU law. Recent case law in the EU has now determined the seller of an illicit streaming service to undertake a communication to the public when selling a device⁸. The EU position instead looks at a list of factors in determining whether a party is communicating to the public, and this approach has afforded the courts some flexibility to adjust to technical developments. The Premier League notes that such flexibility to adapt to changes in technology is a stated aim of this legislation. s 9 of the 2014 Bill (introducing a new s22(2A) to the CO) similarly has provided a list of factors to help the court determine the liability of parties or intermediaries authorising an infringement, but this may be irrelevant if s28A(5) prevents the legislation from applying.

It is therefore very important for a communication right that is going to allow legal action against sellers of illicit streaming services (or a piece of specific legislation, as discussed below) to be drafted broadly enough to reflect the role of such sellers. At the moment the 2014 Bill may well create an unintended loophole for these IP criminals to evade prosecution.

⁷ Updating Hong Kong's Copyright Regime [https://www.cedb.gov.hk/assets/resources/citb/consultations-and-publications/\(Eng\)%20Consultation%20Paper%20on%20Copyright.pdf](https://www.cedb.gov.hk/assets/resources/citb/consultations-and-publications/(Eng)%20Consultation%20Paper%20on%20Copyright.pdf), p6

⁸ Brein v. Filmseper [C-527/15] (2017)

In addition to the above, the Premier League would respectfully recommend two further amendments to the 2014 Bill:

- i. S13 (introducing a new s28A(2)(a) to the CO) could be amended slightly to make it explicitly clear that live streaming is included. For example, the wording could be amended to '*the broadcasting or other electronic transmission of the work*'. Including explicit wording like this provides absolute legal certainty for content owners, and sends a clear message to the public of the Government's position on unauthorised streaming; and
- ii. the inclusion of the concept that a communication can take place either where the communicator is, or where the target audience is based. Given the global nature of the piracy ecosystem, the Premier League has often encountered piracy services that are popular within Hong Kong but operated internationally, and likewise the other way around. Clarifying this point would therefore provide certainty that both types of pirate operations could be pursued in the Hong Kong courts. Such an interpretation is already present in UK and EU law⁹ and the Premier League notes that in LC Paper No. CB(4)1182/14-15(02)¹⁰ the Government has stated that it may work with overseas law enforcement agencies to pursue mutual cooperation for domestic enforcement actions.

b. Criminal Liability

The Premier League is supportive of strong criminal sanctions and feels they are a necessary deterrent given the illegal gains that can be made from online piracy (as exemplified above with the 'Mobdro' case) and the fact that action cannot be pursued against every infringer.

In addition, deterrent criminal sentences send a clear policy message across society that copyright infringement is a serious crime. In other jurisdictions the Premier League has seen that this message resonates beyond just the operators and sellers of infringing devices and services to law enforcement authorities, consumers and the media. For Hong Kong to achieve its aim of being a regional IP trading centre, it should foster an environment in which the importance of IP protection is widely recognised. Having law enforcement authorities willing and able to provide time and resources to combat copyright infringement, a public that is well informed of the risks of engaging with criminal suppliers, and a media that sees IP crime as newsworthy and important, are all crucial to supporting legitimate IP trade and protection.

The Premier League notes that the maximum custodial sentence provided for under the 2014 Bill is four years, whereas recent legislation introduced in the UK has a maximum of 10 years in prison¹¹ for all online copyright infringement. The Premier League respectfully suggests that this longer sentence is more reflective of the damage done to content owners by unauthorised communication to the public, and the scale of illegal gains that sophisticated online pirate operators can, and often do, make.

c. Revised and New Copyright Exceptions

The Premier League has limited comments on these revised and new copyright exceptions, and generally feels they are well balanced. However, the Premier League has concerns with regard to the new fair dealing exception of 'use for the purpose of commenting on current events', and with the 'use of a quotation' exception.

Commenting on Current Events

An overly broad current events exception risks eroding the value of a wide range of content owners' rights. Any such exception therefore needs to strike a balance between protecting legitimate commercial exploitation whilst allowing appropriate reporting of sufficiently

⁹ EMI Records Ltd and others v British Sky Broadcasting Ltd and others, para 33-38

¹⁰ [bc1060623cb4-1182-2-e.pdf \(legco.gov.hk\)](#)

¹¹ Digital Economy Bill 2017 s32(4) (<https://www.legislation.gov.uk/ukpga/2017/30/section/32/enacted>)

significant events. The Premier League has seen the attempted misuse of a current events exception for example in relation to clips and highlights of sporting events (see *ECB v Tixdaq*¹²). This is a very valuable market, for both the underlying rights owners and their local authorised broadcast partners, particularly in territories where the time zone means that events are not always scheduled at times that allow passionate fans to enjoy live coverage.

The current events exception should be for the benefit of the press and broadcasters only; organisations that serve the main purpose of reporting news, or for whom there is a public policy justification of being able to use materials necessary to allow them to report matters of political and economic importance. It should not be available for use, for example, by individuals who want to exploit copyright protected content on social media or aggregator sites for their own commercial gain and without having appropriate licences.

Under the Berne Convention¹³, the test from Art 9(2) states that '*It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author*'. With this in mind, the current events exception should be limited to the purpose of 'reporting on' current events (as under the UK's Copyright Designs and Patents Act 1988), not 'commenting on' current events. In the Premier League's view, the latter is too broad to pass the above test in Art 9(2). Commenting on current events is not analogous to 'reporting on current events' as it is less objective in nature than reporting (therefore likely leading to more unnecessary disputes) and may arguably include even the most trivial of reactions.

In order to ensure that the exception for commenting on current events is not misused, the Premier League suggests 'current events' should be defined so as to not be any wider than the provision for defences for use by the press, or broadcasters of copyright works '*on current economic, political or religious topics*' contained in Art 10bis(1) of Berne Convention. This would not include, for example, sports events. If the reporting of sports events is to be possible under the exception then, as above, it is essential it is drafted sufficiently narrowly to ensure it is not exploited by those seeking to make profit in the manner highlighted above, rather than for genuinely reporting news.

Finally, given the additional defences of 'use for the purposes of parody etc.' and 'use of a quotation' for the public to engage in comment and debate, it is questionable whether there is a need for an exemption for 'comment on current events' to guarantee the freedom of expression, particularly in the context of news reporting.

Use of a Quotation

With regard to the exception for the use of quotation, the Premier League suggests this should be narrowly defined so that it is clearly limited to infringing acts in relation to literary works, rather than also potentially being interpreted as applying to the reproduction or communication of audio-visual works (films and broadcasts).

d. Safe Harbour

If the Government intends to introduce safe harbour provisions, the Premier League believes it is essential to strike a balance that fairly protects online service providers but still allows content owners access to effective means of enforcement. The Premier League respectfully suggests the current draft safe harbour legislation and draft Code of Practice¹⁴ require some amendments to achieve this aim. These suggested changes should actually alleviate, rather than increase, the resources required to ensure compliance by online service providers and content owners, while ensuring the swift removal of infringing content without prejudicing legitimate use or rights.

¹² *ECB v Tixdaq* [2016] EWHC 575 (Ch)

¹³ Berne Convention for the Protection of Literary and Artistic Works (<https://www.wipo.int/treaties/en/ip/berne/>)

¹⁴ Copyright in the Digital Environment – Code of Practice
[https://www.cedb.gov.hk/assets/resources/citb/\(Eng\)%20Draft%20Code%20of%20Practice%20\(March%202012\).pdf](https://www.cedb.gov.hk/assets/resources/citb/(Eng)%20Draft%20Code%20of%20Practice%20(March%202012).pdf)

Currently the E-Commerce Directive¹⁵ in the EU and the Digital Millennium Copyright Act¹⁶ in the US struggle to achieve a balance between protecting online service providers and removing infringing content in a timely manner. From a content owner's perspective, they have become very challenging to use, and are consistently abused by notorious infringing online service providers to justify non-compliance, or extremely slow compliance, with takedown requests. The main issue with both is that there is too much ambiguity around the speed of removal of content. For live sports, time is of the essence for the removal of illegal streams from the internet. Every minute that an infringing live stream remains online represents a significant threat to sports rights owners' economic interests.

The current draft of the 2014 Bill requires a service provider to have taken '*reasonable steps to limit or stop the infringement as soon as practicable*'¹⁷ and the Code of Practice requires an online service provider to serve a notice to the subscriber '*as soon as practicable*'¹⁸ after receiving a complaint notice from the copyright owner. The Premier League suggests that legislation, rather than a voluntary code, deals with speed of removals, and should require removals to take place as fast as practicable and in any event not later than within 30 minutes of the online service provider obtaining knowledge or awareness of the relevant illegal activity. This timeframe was deemed appropriate by the court in the Premier League's successful legal action in the EU against an online service provider responsible for delivering infringing live streams of Matches¹⁹.

Regarding the liability of online service providers, the Premier League suggests clarifying in legislation, as the EU has recently done, that online service providers perform an act of communication to the public or an act of making available to the public when they give the public access to copyright-protected works uploaded by their users (unless they come within a limited safe harbour)²⁰, and that there is an obligation on online service providers (if they wish to benefit from a safe harbour) not just to take infringements down, but also to take effective steps to prevent future uploads (for example by implementing effective repeat infringer policies and/or proactive filtering)²¹.

Where not already covered by the suggested changes to the legislation above, the Premier League suggests that the Code of Practice is amended to allow more efficient removal of infringing content from online service providers. The Premier League recommends that in order to be impactful, it should place the following requirements on online service providers to:

- (i) provide access to an automated content recognition system, such as those operated by YouTube and Facebook, which prevents unauthorized streams from being uploaded to the internet and/or enables content owners to access a real-time takedown tool for the removal of any infringing content uploaded to the platform (the costs associated with which are minimal);
- (ii) implement policies with their end-users that enable them to terminate, suspend or limit their service to those users who repeatedly deal with infringing materials – such repeat infringer policies should be standardised;
- (iii) offer standardised counter claims procedures and complaint forms, and ensure that counter claim procedures deter potential infringers from making false counter claims by requiring statutory declarations accompany any counter notice; and

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031>

¹⁶ <https://www.copyright.gov/dmca/>

¹⁷ S88B (3) Copyright (Amendment) Bill 2014 (<https://www.gld.gov.hk/egazette/pdf/20141824/es32014182421.pdf>)

¹⁸ Copyright in the Digital Environment – Code of Practice [https://www.cedb.gov.hk/assets/resources/citb/\(Eng\)%20Draft%20Code%20of%20Practice%20\(March%202012\).pdf](https://www.cedb.gov.hk/assets/resources/citb/(Eng)%20Draft%20Code%20of%20Practice%20(March%202012).pdf), Clause 3.13

¹⁹ The Football Association Premier League Limited v Ecatel (C/09/485400 / HA ZA 15-367)

²⁰ A similar provision can be found at Art 17(1) of the EU Copyright in the Digital Single Market Directive (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN>)

²¹ A similar provision can be found at Art 17(4)(c) of the EU Copyright in the Digital Single Market Directive (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN>)

- (iv) implement meaningful know your client obligations, coupled with a mechanism for content owners to require the online service providers to disclose contact details for persons involved with copyright infringement, to help reduce repeat infringement.

To ensure clarity and necessary scope with the Code of Practice, terms such as 'service providers' and 'subscribers' should be clearly defined and broadly interpreted to reflect the variety of entities involved in online piracy.

e. Additional Damages in Civil Cases

The Premier League is supportive of this proposal. Proving loss can be difficult for content owners, and these additional factors will be helpful in ensuring they are appropriately recompensed.

In order to simplify the drafting, the new wording at s55 (3)(d) of the 2014 Bill (amending s108 (2)(c) of the CO) could be amended so that "after having been informed of the infringement by the plaintiff" is deleted. The reason for this is (i) the unreasonable conduct must be after the infringement in any event, and (ii) anything done to destroy or conceal evidence is clearly unreasonable, no matter when it happens. Furthermore, given the ease with which infringers can mask their identities and operate anonymously, it is worth including wording that captures this type of obfuscation: *'destroy, conceal or disguise evidence of the infringement or to conceal or disguise the defendant's identity, contacts details or whereabouts'*.

Finally, the Premier League suggests factor s55(3)(e) in the 2014 Bill (also amending s108(2)(c) of the CO) is drafted more broadly to ensure it applies to communication to the public and therefore covers online streaming. This could be achieved by changing the current wording to: *'the likelihood of widespread circulation of infringing copies, or of widespread access to or receipt of infringing communications to the public, as a result of the infringement'*.

4. Issues for Further Discussion

a. Exhaustive Approach to Exceptions

Issue: *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*

The Premier League is supportive of the position taken by the Government that the exhaustive approach should be maintained, for the reasons that are set out in the Consultation Paper and as explained above.

In the Premier League's experience, infringers are often creative in their attempts to exploit any areas of uncertainty in copyright law. Introducing a vague and broad 'fair use' defence would blur the boundaries of what amounts to infringement (potentially thereby devaluing IP rights), and encourage infringers to run disingenuous arguments that their use is fair, potentially resulting in avoidable, time-consuming and costly litigation.

b. Contract Override

Issue: *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).*

The Premier League is supportive of the Government position on contract override, for the arguments set out in the Consultation Paper. Imposing restrictions on freedom of contract tend to hinder the ability for copyright owners to maximise the value of their IP, which in turn hinders economic activity and innovation.

c. Illicit Streaming Devices

Issue: *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.*

The Premier League respectfully disagrees with the statement that Hong Kong should not introduce specific provisions to the CO to govern illicit streaming services used for accessing unauthorised content on the internet. For the reasons set out below, the Premier League would strongly recommend the introduction of piracy-specific provisions that are technology-neutral and enable legitimate content owners to pursue civil and criminal action against the various entities commercially benefitting from online piracy, including operators of illicit streaming services.

The global nature of today's piracy ecosystem means that illicit streaming services themselves form one part of a network that includes: (1) those manufacturing the hardware for ISDs, (2) app creators and programmers who build the software, (3) those initially capturing the content, (4) server providers delivering the content, (5) business to business wholesalers, (6) resellers, and (7) end users. The ease with which sellers are able to set themselves up (either through online marketplaces or using physical shops) as alternatives to buying a legitimate subscription makes these devices and services particularly dangerous to content owners, especially as technology improves. With this in mind, legislation tackling this issue needs to be tech-neutral in order to cover illicit streaming services generally, and be reflective of the mass copyright infringement that illicit streaming services facilitate.

The Illicit Streaming Service Problem

Illicit streaming services, such as EVPAD²², SVI Cloud²³ or BossTV²⁴ boxes available in Hong Kong, have caused a shift in the way unauthorised content is consumed and perceived by consumers. Illicit streaming services are often seen as an alternative viewing experience to an authorised subscription due to how easy they are to use, the quality of the streams provided, and their professional marketing. The ease with which sellers are able to set themselves up (either through online marketplaces or using physical shops) as alternatives to buying a legitimate subscription makes these services particularly dangerous to content owners, especially as technology improves. They contain more content in one place than any legitimate content provider could ever compete with, without making any investment in rights or production. The EVPAD service, for example, has been found to provide access to 1,786 channels, including 75 offering live sports broadcasts.

Taking Action Under the Current Copyright Regime

Current options for taking action in Hong Kong (either under conspiracy to defraud or circumvention offences) do not allow content owners to properly tackle the illicit streaming service problem. Whilst law enforcement authorities such as Hong Kong Customs have demonstrated their willingness to support content owners through some positive raid actions²⁵, it is currently very difficult to prosecute suppliers of infringing services. This has stymied the recent efforts of Hong Kong Customs (whose investigation powers the Premier League understands are restricted to IPR offences), particularly in the many instances where the underlying infringing content emanates from beyond Hong Kong.

The Premier League recognises the value of the message sent to the market by the Maige case²⁶, which involved the supply of infringing content through ISDs, and in which a conviction was achieved in 2017. However, this result took years, the charges were specific to the fact that circumvention was taking place in Hong Kong, and there have been no successful prosecutions

²² <https://www.evpadpro.com/>

²³ <http://www.svicloud.net/en/question.html>

²⁴ <https://www.mybosstv.com/>

²⁵ <https://www.info.gov.hk/gia/general/201805/28/P2018052800661.htm>

²⁶ https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=113009&QS=%2B&TP=RS

since despite sellers of illicit streaming services continuing to operate openly. Indeed, a number of enforcement investigations relating to ISDs have since been commenced without leading to prosecutions due to a perceived lack of sufficient evidence²⁷. For example, raids against retail outlets in Sham Shui Po and Wan Chai (referred to as Operation Trojan Horse, and referenced above) showcase the difficulty content owners currently face in bringing an action to prosecution, and the uncertainty that exists around utilising current legislation. It took years for charges to be decided in this case (so long that the suspects have lodged claims for the return of the ISDs), there is still no confirmation that charges have actually been laid, and it seems unlikely a prosecution is close to taking place. These issues have created an impression amongst sellers and consumers that the sale of devices is not strictly prohibited.

Another avenue that was pursued in the Maige case was circumvention under S273 of the 528 CO, which imposes a civil liability on a person who knowingly does an act which circumvents a technological measure applied to a copyright work. This provision was drafted with a focus on outdated technological means that do not reflect the way today's piracy ecosystem works. The legislation requires the content owner to establish that the device in question plays an active role in the circumvention of the technical measures adopted to protect the legitimate content. Illicit streaming services, however, are often restreaming content that has already been obtained through circumvention methods. It is also highly unlikely that the seller operating a retail shop in Hong Kong will have knowledge of this process. They will knowingly be selling a device that provides access to infringing content, but may not be concerned with how the infringing content was originally obtained and the technical means by which it is made accessible to the service. Finally, the circumvention of technological measures, and entity responsible for the circumvention, is unlikely to be located in Hong Kong, even if the device and seller are located there.

The common law offence of conspiracy to defraud is another option for prosecuting illicit streaming service sellers. This was used in the Maige case, and the Premier League understands is being considered for Operation Trojan Horse. The Premier League has successfully brought several prosecutions against pirate operators under conspiracy to defraud in the UK. Examples are the cases of *R v William O'Leary and Terrence Reilly*²⁸, *R v Dodds*²⁹, and *R v King, Rolston and Malone*³⁰. However, despite these successes, it is the Premier League's strong view, as has also been made clear in previous consultations with the UK Government, that although conspiracy to defraud should be an avenue available for prosecution (where appropriate, such as against sophisticated organised crime groups), legislation which specifically targets the sale of illicit streaming services needs to also be made available. Conspiracy to defraud will not be applicable to all cases as it requires clear proof of dishonesty, multiple defendants to be located in Hong Kong and is not an appropriate way of addressing smaller retail outlets.

Communication Right

Whilst it is possible that a communication right could be used to bring action against those involved in the sale of illicit streaming services, applying the communication right in this context can be complicated. Under the current drafting proposed in the new s28A(5) of the 2014 Bill, it may not even be an applicable means of enforcing against many parts of the piracy ecosystem. Therefore, if no piracy specific legislation is brought in, content owners would be in no better position than they are currently.

More generally, the application of a communication right to the sale of illicit streaming services can be a challenging litigious environment. In the EU a string of cases³¹ examining the different facets of communication to the public, and its application to piracy, were required before the

²⁷ <https://www.uspto.gov/sites/default/files/documents/APEC-DomesticTreatmentofISDs.pdf>, p10 – states that between March 2020 and March 2021, “Hong Kong, China, reported the highest number of law enforcement investigations commenced (23)...” and p67 states that ‘insufficient evidence’ was the most common reason cases were not pursued.

²⁸ <https://www.fact-uk.org.uk/illegal-iptv-box-supplier-jailed-for-four-years/>

²⁹ <https://www.premierleague.com/news/656708>

³⁰ <https://www.premierleague.com/news/1110569>

³¹ *Svensson and Others v Retriever Sverige AB* (C466/12) and *GS Media v Sanoma Media Netherlands and Others* (C-160/15)

court decided communication to the public applied to the sale of ISDs³². In Singapore, although a communication right exists, the Premier League was advised not to rely on it in its recent prosecution of an ISD retailer³³. This was due to uncertainties caused by previous case law³⁴ considering the point at which a communication to the public takes place. This was one of the reasons for Singapore clarifying the position in relation to illicit streaming services with the introduction of the specific legislative provision discussed below.

Suggested Illicit Streaming Service Legislation

For the reasons set out above, the Premier League would therefore respectfully recommend that Hong Kong adopts similar legislation to that recently enacted in Singapore (under the Copyright Act 2021)³⁵ and due imminently to be brought into force in Malaysia (under the Copyright (Amendment) Act 2021)³⁶. These pieces of legislation provide content owners with direct and clear causes of action against those knowingly commercially dealing in illicit streaming services and, importantly, are drafted in such a way as to be as technology neutral as possible, thus providing futureproof legislation against developments in pirate technology.

The legislation in Singapore for example, this has been drafted to strike a balance between giving certainty to content owners and ensuring there is no scope for primarily legitimate devices or services to be caught up in legal actions. Liability is therefore founded on knowledge that a device or service, which is capable of facilitating access to works communicated to the public without authorisation, has only a limited commercially significant purpose other than that capability.

This legislation is concise, simple to understand and should leave no room for ambiguity in the minds of sellers of illicit streaming services, or indeed consumers, as to the legality of such devices and services. The legislation soon to be introduced in Malaysia follows a very similar structure. Although neither piece of legislation has yet been tested, the Premier League has worked closely with law enforcement in both countries since the respective pieces of legislation were announced, and found that selecting targets, and planning prosecutions is already much more efficient.

Furthermore, the announcement of such legislation has sent a clear message to the market that the respective governments in Malaysia and Singapore will not tolerate such criminal activity through widespread press coverage³⁷, and unambiguous statements of support for content owners in advance of the legislation being introduced. The Premier League anticipates that the new legislation will allow for a quick, tangible impact on the prevalence of illicit streaming service sellers and other operators of illicit streaming services.

d. Judicial Site Blocking

Issue: *Hong Kong should not introduce a copyright-specific judicial site blocking mechanism to the CO.*

The Premier League respectfully disagrees with the conclusion not to introduce copyright-specific judicial site blocking legislation. A truly effective IP protection framework should include a blocking regime that enables content owners to prevent ongoing mass infringement of their copyright by blocking access to infringing services without prejudicing legitimate internet users.

Even with tools in place to enable content owners to take action against infringers within the relevant territory, such as via civil or criminal prosecutions, a large number of pirate service operators will be located abroad, rendering direct enforcement very challenging. The ability to block infringing content within the territory therefore becomes crucial to mitigate the impact of piracy. This is certainly true for Hong Kong which, like many other regions in Asia Pacific, sees most

³² Brein v. Filmspeler [C-527/15] (2017)

³³ Neil Kevin Gane v Jia Xiaofeng and Synnex Trading PTE LTD

³⁴ RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd [2010] SGCA

³⁵ <https://sso.agc.gov.sg/Acts-Supp/22-2021/Published/20211007?DocDate=20211007>

³⁶ <https://www.parlimen.gov.my/files/billindex/pdf/2021/DN/DR%2014%20-%20BI.pdf>

³⁷ <https://www.straitstimes.com/singapore/politics/selling-set-top-boxes-offering-pirated-streamed-shows-to-be-made-illegal-in>

of its pirate content originating from internationally operated services. Blocking has been shown in many other territories to be particularly effective in stopping access to free-to-use pirate websites, which the Premier League's research shows is currently the most popular form of consuming pirate content in Hong Kong. Even more importantly for live sports rights owners, blocking can, when properly targeted, and supported by appropriate court orders, provide an effective and proportionate solution to removing access to content in real time.

The Premier League agrees with the Government that a correct interpretation of Section 21L of Hong Kong's High Court Ordinance provides a tool for seeking injunctions against online copyright infringements. However, to provide certainty to content owners, and save costs and time on clarifying the issue through litigation, as well as sending a strong message to the pirate market, the Premier League respectfully suggests Hong Kong introduces legislation similar to Section 97A of the Copyright, Designs, and Patents Act 1988 ("**s97A CDPA**")³⁸. Given current legislation would seemingly already allow for such injunctions, there should not be any additional concerns about freedom of access to information. Such concerns should also be allayed by the fact the court would have oversight of any such blocking orders.

In the UK, the EU, and now in many jurisdictions around Asia Pacific (such as Singapore, Malaysia, Vietnam, Indonesia) blocking access to infringing content either through judicial or administrative means is well-established, with rights owners regularly using the various regimes to protect their content. The Premier League is involved with site blocking actions in all of the abovementioned jurisdictions. Whilst each jurisdiction has adopted its own approach, the Premier League believes that the UK framework is the most effective in developing a safe and proportionate blocking regime that is able to match the constantly evolving piracy landscape.

The Premier League took its first blocking action in the UK in 2013 against a website overwhelmingly engaged in sports piracy <https://www.firstrow1.eu>³⁹. This was hugely successful and saw the relevant domain move from the 239th most popular website in the UK at the time of the application to being 25,000th⁴⁰ within a few months. In 2017, to reflect changes in the way consumers in the UK were accessing pirate content (through ISDs rather than free to access websites) the Premier League was granted an order allowing it to dynamically block streaming servers which were delivering live pirate streams of Matches in real time⁴¹. This allowed the blocking of pirate content being delivered to consumers through websites, apps and subscription services at the same time. It has had a seismic impact on sports piracy levels in the UK. This development was able to take place safely, under the close oversight of the court, because s97a CDPA gave the court flexibility to make these dynamic orders.

The introduction of similar legislation in Hong Kong would quickly and neatly implement a blocking regime that enables content owners to meaningfully reduce levels of online piracy without prejudicing those who legitimately operate on the internet. The Premier League would strongly advise against introducing prescriptive legislation, as has been the case in other jurisdictions such as Singapore. The procedures and safeguards outlined in s6.10(a) of the Consultation Paper, for example, should be left to the discretion of the court rather than being set out in legislation. In the Premier League's experience, including such provisions in statute would significantly reduce the efficiency of blocking orders and increase the time and costs associated with applications for injunctions. The speed and extent to which pirate technology can and does change (often in direct response to enforcement measures) means that overly prescriptive and rigid legislation will inevitably become outdated very quickly. Conversely, a relatively succinct and flexible statutory basis, like s97a CDPA, would allow the courts to reflect the dynamism of pirate technology and carefully build precedents that are capable of swiftly addressing the ever evolving piracy landscape.

³⁸ S97a CDPA (<https://www.legislation.gov.uk/ukpga/1988/48/contents>) which implements Article 11 of Directive 2004/48/EC ([https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0048R\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0048R(01)&from=EN))

³⁹ Football Association Premier League Limited v British Sky Broadcasting Ltd and others 2013 EWHC 2058

⁴⁰ According to Alexa data (<https://www.alexa.com/siteinfo>) measured between 2013 – 2019.

⁴¹ Football Association Premier League Limited v British Telecommunications Plc and others 2017 EWHC 480

5. Conclusion

Legitimate rights owners require legal systems that enable impactful enforcement action against all parties involved in the piracy ecosystem. For live sports rights owners, such as the Premier League, it is critical that this includes the ability to take action during the live event. In the Premier League's experience, such a framework can largely be achieved through the following key features:

- i. Clear and technology-neutral provisions under the copyright legislation that establish civil and criminal liability for pirate operators, with sufficient sanctions to reflect the severity of infringement and act as a genuine deterrent;
- ii. A blocking regime which enables content owners to block websites and device-based piracy, and allows for swift and dynamic reaction to circumvention measures, without prejudicing those legitimately operating on the internet;
- iii. Engaged and sufficiently resourced law enforcement authorities that are able and prepared to swiftly investigate, dismantle and seize necessary evidence to prosecute pirate services operating from within their jurisdiction; and
- iv. The ability to use the tools provided by the framework to bring and conclude enforcement actions before technology has developed and the piracy problem has evolved.

In the Premier League's view, many of the approaches and amendments suggested in this submission would significantly assist in materially improving the IP enforcement framework in Hong Kong and thereby achieving the Government's aim of *'strengthening Hong Kong's position as a regional IP trading centre'*⁴².

We would be very happy to answer any questions or discuss the submission in greater detail.

⁴² Updating Hong Kong's Copyright Regime [https://www.cedb.gov.hk/assets/resources/citb/consultations-and-publications/\(Eng\)%20Consultation%20Paper%20on%20Copyright.pdf](https://www.cedb.gov.hk/assets/resources/citb/consultations-and-publications/(Eng)%20Consultation%20Paper%20on%20Copyright.pdf), p4