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Consultation paper on “Updating Hong Kong’s Copyright Regime”

AVIA welcomes the opportunity to comment on the Consultation Paper issued by the Commerce and Economic Development Bureau (CEDB) on “**Updating Hong Kong’s Copyright Regime**”. AVIA is the trade association for the video industry and ecosystem in Asia Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. Our membership consists of a combination of local, regional and multi-national companies, many of which are substantial cross-border investors; creating and purchasing video content to meet rapidly-expanding consumer demands and investing in Hong Kong’s communications and creative industries.

Our members welcome the CEDB’s efforts to update Hong Kong’s copyright regime in order to achieve its vision of becoming a regional intellectual property trading centre, a vision that has found support in the 2021 Central People’s Government’s “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” (“National 14th Five-Year Plan”).

We agree with the CEDB that “priority should be accorded to addressing the most imminent and fundamental copyright issues”. However, it is important that we clarify right at the outset of this submission, that it is not our understanding that the 2014 Bill generated broad stakeholder consensus on how those issues were to be addressed. Consensus, although achieved, was, at best, reluctant given industry’s perception that the 2014 Bill did not afford adequate copyright protection to rightsholders. We would therefore question whether the 2014 Bill is the most appropriate basis for further engagement and the ultimate adoption of legislation. Our members are also acutely aware of the substantial technological innovations and developments since the 2014 Bill was debated. Consequently, any reliance on the 2014 Bill’s proposed copyright protection measures, would fall short of the CEDB’s stated goals of keeping abreast with international norms and rapid advances in technology.

AVIA acknowledges that the path to passing legislation in Hong Kong, which addresses the rise in internet connectivity and the establishment of a robust copyright regime within this digital environment, has involved years of deliberation and consultation. Nevertheless, we

have an opportunity now to revisit some of the broad proposals and ensure that the legislation which is to be implemented, is fit for purpose and supports the innovation required to drive economic growth, support and develop a thriving economy in Hong Kong. Accordingly, we wish to commence our submission by briefly addressing the legislative proposals contained within the 2014 Copyright Bill:

- Introduction of a communication right – our members are supportive of this initiative to give copyright owners a technology-neutral communication right so as to ensure that the protection afforded to rights owners will cover their works communicated to the public through any mode of transmission. We are however concerned about the extent to which this right may be relied upon by copyright owners in the event that clear and unequivocal provisions relating to illicit streaming devices (ISDs) are not introduced into legislation. In most cases of ISD infringement, the ISD seller has no control over the content or the source of that content; similarly, there are also standalone software applications that merely provide the necessary access to the pirated content. Each of these operators does not “determine the content” as required by the current Ordinance. We would suggest that sections 28(A)(4)-(6) be deleted in order to ensure that they are not used as a loophole to impede the successful prosecution of ISD sellers. On a more general note, and to ensure that the introduction of this communication right truly captures content transmitted via any means, we would suggest that S28(A)(2)(c) be amended (in italics and underlined below) to take into account the transmission of live content, as follows:

“the making available (whether over a path, or a combination of paths, provided by a material substance or by wireless means or otherwise) of the work to the public”.

- Criminal liability - we welcome the introduction of criminal sanctions against the unauthorised communication of copyright works to the public for profit or reward. Our members would be keen to see stringent sanction parameters introduced, potentially up to 10 years imprisonment, in order to present a more effective deterrent against large-scale online piracy.(for reference purposes, see the UK Digital Economy Act 2017 ss 32(4) and (5)).
- Introduction of revised and new copyright exceptions including exceptions for the education sector (online learning) and fair dealing. While we understand the need for legislation to balance copyright protection and reasonable use, we would like to see the exception for “commenting” on current events reworded to reflect “reporting” on current events. This would bring the proposed Hong Kong legislation much more in line with copyright exceptions in other jurisdictions. Insofar as the educational exemption is concerned, we would urge the CEDB to require that:

- a. the exemption should only apply to a performance made at the direction or under the actual supervision of an instructor as an integral part of a class session, in turn offered as a regular part of the systematic, mediated instructional activities of an accredited, non-profit educational institution; and
- b. any such online educational instruction is to be provided only via a secure network accessible only by teachers and students who are registered to use the educational institution's instruction service; and
- c. any copy, used to make an exempted transmission, must have been made lawfully (our concern with the current wording in s245(A)(1) is that it is too broad in its suggestion that any copy made by an education institution for educational use by that institution, is automatically to be treated as non-infringing); and
- d. the portion of copyrighted content used must be "reasonable" and "limited" (as opposed to merely being "a part of" (s245(A)(2)) the copyrighted work); and
- e. "reasonable steps" in s245(A)(2)(b) be further expanded and clarified to include the application of technical measures to guard against (i) the retention of a work in an accessible format and/or (ii) unauthorized further dissemination.

Adoption of these narrower interpretations with relation to these exemptions, will also ensure that a higher standard of care is exercised by those looking to use copyrighted works (or portions thereof) without the copyright owner's express, prior authorisation.

- Safe harbour principles to limit OSP's liability for infringement on its platforms - we understand that these provisions were intended to limit the liability of an online service provider (**OSP**) for copyright infringements occurring on its platform provided that the OSP has complied with certain conditions, including taking reasonable steps to limit or stop any infringement once the OSP has been made aware of the alleged infringement. The provisions will be underpinned by a voluntary Code of Practice that will set out the guidelines for a "notice and takedown"-style regime. OSPs who comply with this Code of Practice will be treated as having taken reasonable steps to limit or stop infringement occurring on their platform. However, compliance with the Code of Practice is voluntary and an OSP which chooses not to comply may still avail itself of any defence available to it in any proceedings for infringement of copyright. The voluntary nature of compliance may result in patchy compliance and an unequal playing field at best. Many OSPs will just adopt a wait and see attitude since there is really no commercial incentive for them to comply.

The principle of safe harbour typically relieves an OSP from any proactive obligation to actively monitor what happens on its platform. Unfortunately, the current Code of Practice (as referred to in the Copyright Bill 2014 and as drafted in 2012) is quiet on takedown timings. It merely refers to removal of content "as soon as practicable"

(D.4.9) which places the timing of such takedown solely within the discretion of the OSP. There is no mention of any objective reasonableness standard.

This is especially concerning when the content in question is live. Similar safe harbour provisions within EU or US legislation, which are also silent on removal timings, tend to lead to the unwelcome consequence that content is not removed quickly enough to be meaningful, for example, within a live-streamed sports event, unauthorised content needs to be removed during match time rather than post the event. All too often, bad actors hide behind vague safe harbour wording to justify non-compliance or slow removals. We would like to see adopted, preferably within the Copyright Bill itself or, at the very least, within the Code of Conduct, provisions which clearly stipulate removal times and set out the ensuing liability that attaches to those OSPs which fail to comply. This would also provide greater clarity and certainty for OSPs.

Reliance on safe harbour should furthermore not relieve OSPs from proactively putting in place measures which discourage infringement for example, the utilisation of piracy detection tools and the adoption of standardized repeat infringer policies.

In the event that the CEDB decides to revisit the guidelines within the Code of Practice, we would urge advance collaboration with industry so as to ensure that the safe harbour defence is not employed in a way that effectively renders the copyright protection this Bill seeks to offer, redundant. Ultimately, it is our members' view that a judicial or administrative site blocking regime (in the manner set out in our recommendations below) would provide greater efficiency and more certainty for all stakeholders.

- Additional damages – we appreciate and are grateful for the CEDB's decision to widen the discretion of the court (in civil cases in which infringement has been established) to take into account additional factors in its assessment of damages such as any unreasonable conduct of the infringer after the infringement has been notified.

In response to the four additional key issues which CEDB has identified as being the points on which it wishes to invite stakeholder comment, our combined members' feedback is set out below:

1. **Exhaustive approach to exceptions**:- Our members' preference would be for an exhaustive approach, that is in line with fair dealing, not "fair use", to be retained in order to (i) ensure legal certainty for both copyright owners and users and (ii) strike the correct balance between rightsowners and freedom of speech/expression.
2. **Contract override** – Our members agree with CEDB that safeguarding the principle of freedom of contract should always be the preferred starting position. Regulatory intervention and the imposition of restrictions should only be employed in

circumstances where market conditions so require. We would therefore advocate for parties to be allowed to override copyright exceptions if they so agree via commercial contract negotiation. We note that freedom of contract is not unfettered under Hong Kong law and acknowledge CEDB's comments in the consultation paper that remedies exist under the laws of contract and/or other instruments, such as the Unconscionable Contract Ordinance (Cap.458), for a party to seek redress in circumstances where (i) the terms of the contract are contrary to public policy or (ii) the override exemptions are contained in contracts which themselves have been constructed between two parties with unequal bargaining power.

3. **Illicit streaming devices (ISD)** - Our members strongly disagree with the stated position that there is no need to adopt specific ISD legislation and that the existing legal regime is sufficient to deal with ISDs. In the case raised in the consultation paper, it presupposed a number of factors that are inconsistent with the current ISD ecosystem that render existing legislation unfit for this purpose. Specifically, the 2012 case relied upon the fact that the infringers selling the boxes were also the ones directly responsible for infringing the content in the first instance, and hence breaching legislation specific to Technical Protection Measures. This was the exception rather than the norm in 2012. Since then, the ISD ecosystem has evolved such that the individuals who are initially infringing the content are almost certainly not the ones making that content directly available to consumers. Instead, there is a complex ecosystem of intermediaries, channel aggregators, wholesalers and retailers who are all involved in the chain before the consumers have the content made available to them. It should be noted that in some instances, such as is the case with boxes such as EVPAD or UBTv, Apps are also written such that they only operate on ISDs. It is this very obfuscation that makes necessary specific legislation targeting this type of criminal enterprise.

ISD's continue to be readily available and advertised openly on websites and printed publications in Hong Kong, providing these devices with an apparent legitimacy that is undeserved. There have been limited numbers of actions taken by either the police or Customs due to a lack of clarity around which legislative measures that can be relied upon. Indeed, in a 2018 case undertaken by Customs on behalf of TVB, 354 ISD's were seized and 8 individuals arrested. However, the Department of Justice was unable to decide if there was sufficient evidence of a circumvention case and eventually the time limit for prosecution lapsed. The sellers lodged a claim for the devices to be returned and the Department of Justice then turned (in March 2021) to the police to try and use that avenue for a prosecution. As of the date of writing this submission, no case has been brought. The lack of clarity and the real possibility that it may lead to seized ISDs being returned to the sellers are clear evidence that the existing legal regime must be updated to adopt specific ISD provisions. Claims based on circumvention of technology have become more challenging since 2014. The technology has evolved to such an extent that ISD retailers and the technology infrastructure are no longer always intertwined – more often than not, they operate

independently. The actual circumvention offence may well therefore not be taking place in Hong Kong, but rather in a foreign jurisdiction, with the ISD then receiving already unlocked content. Local industry has raised concerns about sections 28A(4) – (6) which do little to prevent the continued operations of these ISD sellers and we would therefore urge the CEDB to delete these provisions.

We appreciate that there has been some expectation on the part of the legislators, that the introduction of a technology-neutral communication right might offer some respite to copyright owners but in our members' view, this assumption is incorrect. As we already stated at the outset of this submission, in most cases of ISD infringement, the ISD seller has no control over the content or the source of that content and so does not “determine the content” as required by the current Ordinance.

Similarly, reliance by aggrieved copyright owners on an action of “conspiracy to defraud” can be challenging – an action generally (i) requires proof of dishonesty which can sometimes be challenging, (ii) requires multiple defendants in the jurisdiction to lend authority to the claim of a “conspiracy”, (iii) is not an appropriate way of dealing with smaller ISD retailers.

It is also worth noting that ISDs do not operate in a vacuum but generally require service and support, including the installation of software. There are now also numerous standalone software applications that provide consumers with access to illegal content. The Singapore government recently moved to address the issue of the wider ISD ecosystem and software applications by making it an offence to make available devices or services (e.g. ISDs or software applications), which allow access to copyright infringing material, for sale. The recent amendments in Singapore also provide rights holders with civil remedies against anyone who makes such devices or services commercially available. In order to address the current gaps within the copyright regime and to ensure that the HK legislation is fit for purpose given the substantial technological advancements since the Copyright Bill was first proposed, AVIA is of the view that clear and unequivocal copyright infringement legislation needs to be introduced. We would suggest implementing legislation similar to that adopted in Singapore or Malaysia (the latter due to come into force around mid-March 2022). Each piece of legislation sends a clear message to the market around the illegality of ISDs, offers certainty to content owners around available sanctions and prosecutions, and is deliberately drafted to avoid overreach onto legitimate devices. Critically, both legislatures recognise that an ISD is not just a box, but the provision of the infringing service designed to run on a TV box, or any Android device for that matter be that at point of sale of a TV box or at some point after. This technology neutral approach attempts to ensure that a changing piracy ecosystem is still captured by appropriately drafted legislation.

4. **Judicial Site-blocking** – Within the Asia Pacific region, site-blocking has become an important and effective tool in minimising the opportunity for piracy. We are aware

of CEDB's concerns around site-blocking especially insofar as these relate to the potential impact on freedom of expression but, in our view, provided the mechanism is implemented appropriately and subject to clearly identified safeguards, it could have a significant impact when targeting pirate applications and services.

Site-blocking has been steadily adopted in other markets within the region and offers an effective way in which to prevent access to both illegal streaming sites and applications that facilitate the illegal streaming of content where the source of that infringing content would not otherwise be enforceable within the territory. The impact of these sites has a tangible effect on the local industry. In a YouGov study undertaken in December 2021, 13% of Hong Kong residents had cancelled their access to legitimate local paid streaming services as a result of accessing pirate services in the last 12 months. In the same survey, 49% of surveyed individuals admitted to accessing pirate content on their computers, and mobile devices.

Jurisdictions around the world have tended to rely on one of two methods of implementing site blocking - either judicial (such as in the United Kingdom, Singapore and Australia), or regulatory, via the relevant telecommunications authority (such as in Indonesia and Malaysia, although the latter also includes the relevant government copyright body in first determining whether sites are indeed infringing copyright). It is arguable that Hong Kong's current legislation under s21L of the High Court Ordinance or s52B of the District Court Ordinance does already allow for judicial blocking, however the mechanism the mechanism is not straightforward is yet to be tested.

In this consultation paper, the suggestion is made that copyright owners, in the absence of site-blocking legislation, are not left without a remedy. Copyright owners are instead encouraged to rely on the current Hong Kong High Court Ordinance, which offers injunctive relief. This suggestion appears to be predicated on the fact the Hong Kong High Court Ordinance or District Court Ordinance is similar to the UK Senior's Court Act which was successfully used to obtain a website blocking order in the United Kingdom. While we agree that this may be a potential tool for aggrieved copyright owners, in the interests of ensuring legal certainty, we would suggest that a definitive mechanism be adopted within the legislation.

In the event that a decision is taken to formally include site blocking relief in response to copyright infringement, we would urge the legislators to ensure that any such site blocking legislation is both nimble (i.e. not overly prescriptive and sufficiently flexible to ensure sites and applications can be blocked regularly and quickly) and future-proofed (i.e. not tied solely to existing forms of copyright infringement). Such legislation must also ensure that it balances the various competing interests involved between rights holders, ISPs, sites and consumers and examples of how this has been implemented in other jurisdictions to ensure that balance, should be reviewed. The current tendency is to adopt one of two options, either Judicial or Regulatory:

The preferred approach would be to implement an appropriately structured judicial mechanism which would entail amending the current provisions of the Ordinance to be more reflective of the United Kingdom's s97A of the Copyright, Designs & Patents Act (which now has an extensive body of judicial decisions that have overseen the development of one of the most effective blocking regimes in the world). Critically, the UK site blocking has a fast implementation of blocking orders with appropriate flexibility to adjust to the modus operandi of pirate site operators and is arguably the most efficacious system globally in the way it has adapted to technological change.

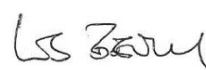
Alternatively, one could adopt a Regulatory approach, in which case we would recommend following the highly efficient and effective procedures used in Malaysia under which the Ministry of Domestic Trade & Consumer Affairs (MDTCA) first determines whether a site or application is infringing copyright and, if it so determines, informs the telecommunications regulator, the Malaysian Communications & Multimedia Commission (MCMC), who then orders the ISPs to block the infringing sites and/or applications. If this approach were to be followed, we would urge the CEDB to ensure there is sufficient scope provided in the legislation to cater for and cover any technological advances in the future.

Whichever method is adopted, the implementation of any new site blocking legislation should always be achieved through the deployment of clear and unequivocal checks and balances within the process to ensure that the tool is being used solely as a means to combat online piracy.

In conclusion, the unauthorized distribution of content causes tremendous loss to local creators and international copyright owners. The National 14th Five Year Plan identifies the importance of innovation to economic growth and sustainability. It is essential that this Copyright Bill addresses the ambiguities that have hampered efforts to combat online piracy in a constantly evolving online environment in order to offer creators the assurance that their works will be afforded the necessary copyright protection.

We stand ready to answer any questions you may have and as always, are open to engaging in further discussion on this and other issues which impact our industry.

Sincerely yours,



Louis Boswell
Chief Executive Officer
Asia Video Industry Association

About the Asia Video Industry Association (AVIA)

AVIA is the non-profit trade association for the video industry and ecosystem in Asia-Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. AVIA is the interlocutor for the industry with governments across the region, leads the fight against video piracy and provides insight into the video industry to support a vibrant industry ecosystem. AVIA evolved from CASBAA in 2018.

AVIA's leading members include: Amazon, AsiaSat, Astro, BBC Studios, Discovery Networks, The Walt Disney Company, WarnerMedia/HBO Asia, NBCUniversal, Netflix, now TV, Star India/Hotstar, TrueVisions, TV5MONDE, ViacomCBS Networks International, A&E Networks, Akamai, Baker McKenzie, BARC, beIN Asia Pacific, Bloomberg Television, Brightcove, Canal +, Cignal, Converge ICT, Dolby, Eutelsat, France 24, Globecast, Globe Telecom, Invidi, iQiyi, Irdeto, Intelsat, KC Global, La Liga, Limelight, Magnite, Mayer Brown, Measat, MediaKind, Motion Picture Association, NAGRA, NBA, NHK World, Nielsen, Planetcast, Premier League, Singtel, Skyperfect JSAT, Sony Pictures Television, SES, Synamedia, TMNet, TV18, TVBI, The Trade Desk, Vidio, Viaccess, Viacom18, White Bullet and Zee TV