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Commerce and Economic Development Bureau  
23<sup>rd</sup> Floor, West Wing  
Central Government Offices  
2 Tim Mei Avenue  
Tamar, Hong Kong

23<sup>rd</sup> February 2022

Dear Sirs,

**Public Consultation Paper on "Updating Hong Kong's Copyright Regime"**

PCCW and HKT groups are pleased to see the Government's proposal in updating the copyright regime in Hong Kong and welcome the opportunity to comment on the proposals set out in the consultation paper issued by the Commerce and Economic Development Bureau ("**Consultation Paper**"). The PCCW and HKT groups include major content producers and content service providers including Now TV, Viu TV and Viu OTT on the one hand, as well as a major internet / mobile service providers, Netvigator, csl. and 1010 on the other. We strive to provide a balanced view between copyright owners and online service providers ("**OSPs**") based on practical experience and concerns. Below we will first set out some overarching comments on the proposals in the Consultation Paper and then provide our comments on the key legislative proposals, four additional issues on which views are sought and possible new issues for further studies as set out in the Consultation Paper.

**Overarching Comments**

PCCW and HKT groups welcome the Government's efforts to update Hong Kong's copyright legislation leveraging the support received from the Central People's Government for Hong Kong to develop into a regional intellectual property trading centre, as set out in the "Outline of the 14<sup>th</sup> 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"



promulgated in March 2021.

We agree that priority should be accorded to completing the long overdue legislative amendment exercise to address the most imminent and fundamental copyright issues, to enhance protection for copyright in the digital environment and to help combat large scale piracy. In particular we strongly support the introduction of the new technology-neutral communication right and associated criminal liability as soon as possible. This is of fundamental importance.

However, we do have some concerns regarding the effectiveness of the proposed safe harbour mechanism because it is: (i) voluntary in nature; (ii) unclear on the actual implementation; and (iii) ineffective against illegal live streaming of many time-sensitive events such as live sports, concerts, movie premieres etc which command high acquisition costs and the piracy of which is a subject of international concern and causes very significant economic loss. It is our view that a judicial site blocking mechanism similar to that operating in the U.K., Australia and Singapore would be a more effective way to address the problem and we respectfully suggest that the Government should review the laws in the U.K. and elsewhere and consider introducing similar copyright-specific provisions for judicial site blocking in Hong Kong.

Similarly, we have some concerns regarding illicit streaming devices ("ISDs"). The problem of illicit streaming using ISDs is rampant and we respectfully suggest that the Government closely monitors the effectiveness of the new technology-neutral communication right and associated criminal liability in dealing with this. If the situation does not improve in the short term, then steps should be taken to introduce stronger and more specific provisions to deal with ISDs such as those which have been adopted in Singapore and are soon to be adopted in Malaysia.

#### **Key Legislative Proposals**

##### **(A) Communication Right**

We strongly support the introduction of a new technology-neutral exclusive communication right for copyright owners to communicate their works to the public through any mode of electronic transmission. This is a vitally important step to strengthen copyright protection in the digital environment, bring Hong Kong's copyright regime in line with existing international norms and to underpin



Hong Kong's vision of developing into a regional intellectual property trading centre.

**(B) Criminal Liability**

We strongly support the proposal to: (i) introduce criminal sanctions against those who make unauthorized communication of copyright works to the public (a) for the purpose of or in the course of trade or business or (b) to such an extent as to affect prejudicially the copyright owners; as well as to (ii) include clarifications of the threshold of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences.

**(C) Revised and New Copyright Exceptions**

We support the addition of revised copyright exceptions and the new fair dealing exceptions namely:

- The introduction of new copyright exceptions for the education sector, libraries, museums, archives, temporary reproduction of copyright works by OSPs and media shifting;
- The introduction of new fair dealing exceptions to cover use for the purpose of parody, satire, caricature and pastiche, use for the purpose of commenting on current events and use of a quotation the extent of which is no more than is required by the specific purpose for which it is used.

As a matter of principle, we support the use of an exhaustive list of exceptions as this provides greater protection for copyright owners and greater clarity and certainty for all.

**(D) Safe Harbour**

We understand that the intention of the safe harbour provisions is to encourage OSPs to cooperate with copyright owners in combating online piracy by providing for OSPs' liability for copyright infringements on their service platforms caused by subscribers to be limited provided that the OSPs meet certain prescribed conditions including taking reasonable steps to limit or stop a copyright infringement when notified. The provisions would be underpinned by a



voluntary code of practice ("COP") which sets out practical guidelines and procedures for OSPs to follow after receiving notification of infringing content.

While the proposed new provisions in the Copyright Ordinance ("CO") together with the COP would provide copyright owners with a mechanism to request the removal or blocking of infringing content and would appear to give OSPs some certainty in dealing with infringement complaints and in managing the risks of being dragged into litigation, we have a number of concerns about how the safe harbour mechanism would work in practice and whether it would be effective.

Our concerns can be broken down into three broad categories: (i) the voluntary nature of compliance; (ii) the provisions in the CO and the COP are rather complicated and unclear in some cases; and (iii) the safe harbour mechanism will not be effective in dealing with the very significant problem of illegal streaming of live and time-sensitive events. We provide more detail on each of these concerns below.

(i) The voluntary nature of compliance

In principle, OSPs who comply with the COP will be treated as having taken reasonable steps to limit or stop infringement occurring on their platform and this will provide a defence against their liability for copyright infringement on their platform. Although this would seem to provide OSPs with some certainty, compliance with the COP is voluntary rather than mandatory or statutory in nature and will result in additional operational expenses and a significant administrative burden on the OSPs. Since compliance is voluntary, an OSP may choose not to comply and take the risk of being sued knowing that it will still be able to avail itself of any defence available to it in any subsequent proceedings for copyright infringement. Consequently, the voluntary nature of the COP will very likely result in inconsistent compliance and an unequal playing field. Many OSPs will just adopt a wait and see policy since there is little commercial or legal incentive for them to comply.

(ii) The provisions of the CO and the COP are rather complicated and unclear in some cases

In addition to the extra cost and administrative burden for OSPs which chose to comply with the COP, we also foresee some practical and potential legal issues with compliance which should be clarified in advance. For example:

- (a) OSPs must bear their own risks in case any action taken in purported compliance with the COP results in a breach of other laws and regulations on the part of the OSPs. This is illustrated by paragraph 1.5 of the COP which states, "For the avoidance of doubt, when electing to implement any procedure and practice to limit or stop any alleged infringement on its service platform (including the removal of any material or the disabling of access to any material or activity), a service provider should ensure due compliance with all applicable laws, notably the Telecommunications Ordinance and the Personal Data (Privacy) Ordinance.";
  - (b) information provided by a complainant may not be sufficient to identify the relevant material to be blocked or removed and this may result in the wrong material being blocked or removed in error;
  - (c) there is no way for an OSP to adequately verify if a complaint is legitimate and there is a risk of liability to the legitimate copyright owner. Ownership of the copyright may be disputed or there may be more than one owner; and
  - (d) the wording "become aware that the infringement has occurred, or become aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred" is unclear. How should the OSP interpret this given that OSPs are not required to monitor their services or actively seek facts / evidence that indicate infringing activity? What if the OSP is wrong?
- (iii) The safe harbour mechanism will not be effective in dealing with the very significant problem of illegal streaming of live events

The voluntary COP is silent on timing as to when an OSP has to take action. This is a significant concern especially with respect to live and other time-sensitive content for which content service providers pay very

significant licence fees as legitimate rights owners. Under the COP, upon receipt of a notice of alleged infringement as prescribed, the OSP shall, as soon as practicable, remove the material or disable access to the material or activity as specified in the notice. The "Notice and Notice" and "Notice and Take down" schemes would not be helpful for combating infringement of live and other time-sensitive content unless the OSPs can and will take action immediately upon receipt of notice from rights owners. Where content, especially a sports event, is live streamed it is pointless for content to be removed after the event. Unauthorized content needs to be removed as soon as possible while the event is still streaming live. At the minimum the CO or COP should specify removal times and cater to live and time-sensitive content. Not only would this render the provisions effective, it would also provide greater clarity and certainty for OSPs to comply and all within the same timeframe. This would minimize any potential unfair manipulation of action time by any individual OSP. However, on the other hand, should specific removal times be specified in the CO or the COP, this could impose extra cost on the OSPs in terms of extra manpower resource to be able to meet the time specified and this cost will not be compensated by the copyright owners or content service providers.

In light of the above, we are of the view that judicial site blocking would be far more preferable and would provide greater efficacy and more certainty for all stakeholders. Our specific comments on judicial site blocking are set out at page 8 below.

**(E) Additional Damages in Civil Cases**

We support the inclusion of additional factors for the court's assessment of additional damages namely (a) the unreasonable conduct of an infringer after having been informed of the infringement and (b) the likelihood of widespread circulation of infringing copies as a result of the infringement.

**Four Additional Issues On Which Views Are Sought**

**(A) Exhaustive Approach to Exceptions**

We support the maintenance of the current exhaustive approach to exceptions



to copyright infringement. This provides greater protection for copyright owners and greater certainty and clarity for all.

**(B) Contract Override**

We support maintaining the commercial flexibility of contract override and agree that Hong Kong should not introduce provisions to the CO to exclude or limit the application of statutory copyright exceptions(s).

**(C) ISDs**

ISDs are readily available in Hong Kong and the problem of illicit streaming using ISDs is rampant. In fact, a legitimate streaming device can easily turn into an ISD by uploading or accessing illegal content. Indeed, advice on how to upload or access illegal content via legitimate streaming devices, including step-by-step guidance, is widely published and promoted in otherwise reputable magazines, newspapers and websites and it is common practice for traders selling such devices to give instructions to their customers on how to access pirated content or even claim, as part of the sales process that selling and / or buying ISDs does not contravene any laws in Hong Kong. While, as the Consultation Paper points out, the existing legal regime has in the past been used to deal with a few cases involving ISDs, the technological ecosystem has since evolved rapidly and significantly. More recent attempts to bring actions have not been successful and have demonstrated the difficulties of enforcing the current law against sellers of ISDs. The devices being sold cannot be classified as illicit until they have been uploaded with or used to access illegal content and the sellers of the streaming devices may not have control over the content or the source of that content.

According to the Consultation Paper we understand that, when the new technology-neutral communication right and the corresponding criminal liability are in place, the relevant enforcement units (Customs and Police) will have sufficient tools and power to take enforcement actions against ISDs and that, in principle, the practice of encouraging / advising on / giving instructions on how to upload / access illegal content using a "clean" / "innocent" streaming device, as well as the publication of advice or step-by-step guidance in magazines, newspapers and websites about how and where to access pirated content will also be illegal. We look forward to more enforcement and prosecution actions in

this regard. We would respectfully request that a close eye is kept on the effectiveness of the new provisions of the CO in addressing the rampant ISD problem and that, if the situation does not improve within a short time, additional steps should be taken to introduce specific provisions to deal with ISDs whether via a regulation, subsidiary legislation or otherwise. In this regard, the effectiveness of the new legislation adopted in Singapore and (effective around March 2022) in Malaysia should be closely monitored. We would also strongly suggest that sections 28(a)(4)-(6) of the CO are deleted as they appear to provide a loophole which could be exploited by ISD sellers.

Finally, careful consideration should also be given to whether, with the above changes, the provisions of the CO will be sufficiently wide to tackle the aforementioned practice of encouraging /advising on / giving instructions as well as the publication of advice or step-by-step guidance in magazines, newspapers, websites, discussion forums etc. on how to turn "clean" / "innocent" streaming devices into ISDs.

#### **(D) Judicial Site Blocking**

Judicial site blocking is absolutely necessary and is widely recognized as the most effective way to tackle current online infringement problems including in particular the illegal streaming of live and other time-sensitive content. It has been successfully adopted by many countries around the world including Australia, Singapore and the U.K. as an efficient and effective way to tackle infringing content which originates outside a country's jurisdiction. Such cases now make up the majority of piracy activities.

In suggesting that Hong Kong should not introduce a copyright-specific judicial site blocking mechanism to the CO, the Consultation Paper notes that Hong Kong's High Court Ordinance already provides a general tool (i.e. not specific to copyright infringement) for seeking injunctive relief and that both the U.K. and Canada have recently issued website blocking orders under similarly general legal provisions for providing injunctive relief. However, this mechanism is, as yet, untested for copyright infringement in Hong Kong and it is very unclear how effective it would be, in particular against illegal streaming of live or other time-sensitive content. It is our view that the Government should make reference to the dynamic / live blocking injunctions occurring in Australia,



Singapore and the U.K. (e.g. those granted under section 97A of the Copyright, Designs and Patents Act 1988 in the U.K. which gives the High Court power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using its service to infringe copyright) and formulate effective provisions in the CO to achieve site / server blocking in a timely and effective manner. There are quite a number of reported judicial cases which demonstrate how injunctive court orders based on carefully drafted statutory provisions can achieve effective restraint on online infringing activities. Such court orders can cover blocking of servers, not only specified websites only for the length of time when the subject content (e.g. a live sports event) is being broadcast and may also allow for the list of servers to be blocked to be reset regularly to include new infringing targets and to remove existing targets which are no longer engaged in infringing activities so as to avoid “overblocking”.

Judicial site blocking would also provide more certainty and clarity for OSPs as well as maintain a level playing field among OSPs as they can rely on the court’s decision whether to grant an injunction and the appropriate scope of the injunction order based on the court’s review of the evidence and submissions made by the rights owners. This removes the uncertainty which is inherent in the safe harbour mechanism. While rights owners would mostly, based on their own their interests, apply for an order against all OSPs, such order once granted would be mandatory across all OSPs and would not give rise to an unequal playing field or leave implementation loopholes as under the safe harbour provisions where participation by individual OSPs is voluntary.

#### **Possible New Issues for Further Studies**

##### **(A) Extension of Copyright Term of Protection**

We support the proposal of extending the term of protection under the copyright regime to 70 years after the life of the author.

##### **(B) Introduction of Specific Copyright Exceptions for Text and Data Mining**

We support to give more consideration to the introduction of text and data mining exceptions under the existing copyright regime.



**(C) AI and copyright**

We support to give more consideration to the extension of copyright protection to AI-created work.

While we agree that it is extremely important that the CO should be updated as soon as possible to keep up with the latest technology developments and international practices and standards, we are of the view that it is also of utmost importance that the relevant amendments should reflect the balanced interests of copyright rights owners, OSPs and copyright users.

We are grateful for the Government's due consideration of our views set out in this response and we are happy to provide any additional information the Government may need.

Yours faithfully

A handwritten signature in black ink, appearing to read "V. Lockyer", written in a cursive style.

Veronica Lockyer  
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PCCW and HKT Groups