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## CISAC comments on Updating Hong Kong's Copyright Regime

CISAC, the International Confederation of Societies of Authors and Composers, is the world's leading network of authors' societies. With 228 member societies in 120 countries/territories, CISAC protects the rights and promotes the interests of over 4 million creators, from all geographic areas and all artistic repertoires. The Composer and Authors Society of Hong Kong (CASH) is the only member of CISAC in Hong Kong.

CISAC would like to thank the Commerce and Economic Development Bureau (CEDB) of Hong Kong for the opportunity to highlight certain key suggestions for updating Hong Kong's copyright regime.

### **1 THE COMMUNICATION TO THE PUBLIC RIGHT SHOULD BE UPDATED IN LINE WITH INTERNATIONAL PRACTICE**

CISAC welcomes the initiative of the Hong Kong Government to update the copyright legislation and to strengthen copyright protection in the digital environment. It is noted that the current review is based on the key legislative proposals in the Copyright (Amendment) Bill 2014. In fact, the digital environment has changed tremendously since 2014. Due to the advancement of digital infrastructures, the rapid increase of transmission speed via internet and mobile networks, and the popularisation of mobile devices, many new business models have already emerged in the fast-growing digital arena. If the definition of the "communication to the public right" proposed in section 28A of the 2014 Bill remains unaltered in the current review, it will definitely not provide an adequate protection to copyright holders under the current digital environment. The most problematic part of the definition of "communication to the public" is section 28A(5), which provides that "A person does not communicate a work to the public if the person does not determine the content of the communication." This sub-section was drafted at a time when the business models of digital service providers, such as YouTube, Facebook, and Tiktok (hereinafter "OSPs") were either not available or not sufficiently mature. Currently, these OSPs provide platforms that allow users to upload contents (many of which are illegal) on them and generate enormous revenues. Although these OSPs do not "determine" the content of the communication, they are deliberately taking advantage of this legal loophole to gain tremendous commercial advantages.

In Europe, this problem has been addressed through the Directive on copyright and related rights in Digital Single Market Directive (CDSMD) (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019) in which it clarified the liability of Online Content-Sharing Service Providers (OCSSP) in Article 17. OCSSP are digital platforms storing and giving the public access to a large amount of copyright-protected

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works or subject matter uploaded by their users, through which the platform organises and promotes for profit-making purposes (Article 2). The EU carefully considered and balanced the interest of various stakeholders before adopting the controversial Article 17. Article 17(1) and (2) provide that OCSSPs carry out a copyright relevant act of 'communication to the public' when they give access to copyright-protected content uploaded by their users, and therefore need to obtain an authorisation from the relevant rightholders.<sup>1</sup> In a European Parliament's press release<sup>2</sup>, it stated the following important information about the CDSMD :

- Currently, due to outdated copyright rules, online platforms and news aggregators are reaping all the rewards while artists, news publishers and journalists see their work circulate freely, at best receiving very little remuneration for it;
- The directive intends to oblige giant internet platforms and news aggregators (like YouTube or GoogleNews) to pay content creators (artists/musicians/actors and news houses and their journalists) what they truly owe them;
- The directive does not target the ordinary user. By contrast, the directive will impact large online platforms and news aggregators like Google's YouTube, Google News or Facebook, making it essential for them to correctly remunerate artists and journalists whose work they monetise;
- Freedom on the internet, as in the real world, will continue to exist as long as the exercise of this freedom does not restrict the rights of others, or is illegal. This means that a user will be able to continue uploading content to internet platforms and that these platforms will be able to continue hosting such uploads, as long as the platforms respect the creators' right to fair remuneration.

CISAC therefore strongly urges the Hong Kong Government to introduce a "communication to the public" rights following the example of the EU by introducing a similar provision as Article 17 of the CDSMD.

## **2 URGENCY FOR AN UP-TO-DATE REGIME STRENGTHENING THE PROTECTION OF COPYRIGHT IN A DIGITAL ENVIRONMENT**

Access to copyright protected contents via internet and digital technology has become an essential part of people's everyday life. Therefore, it is important to ensure that updated and proper policies and legislations are in place to nurture the healthy and orderly development of the digital environment. We understand it is the intention of the Hong Kong Government to re-introduce a similar online protection regime as in the Copyright (Amendment) Bill 2014. However, due to the rapid development of the digital environment, the previously proposed legal framework does not provide sufficient and comprehensive solutions to regulate the new business models operated by the digital service providers/intermediaries. As a result, many digital services providers/intermediaries take advantage of the current "legislative loophole" and refuse to remunerate copyright owners fairly.

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<sup>1</sup> Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM(2021) 288 final : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0288>

<sup>2</sup> Questions and Answers on issues about the digital copyright directive, press release on 27-03-2019 : <https://www.europarl.europa.eu/news/en/press-room/20190111IPR23225/questions-and-answers-on-issues-about-the-digital-copyright-directive>

As mentioned in the previous comment, by responding to the rapid development of the digital environment, a CDSMD was introduced in 2019 which is a milestone in copyright legislation in Europe. Such Copyright Directive is the first legislation that addresses key issues such as the “transfer of value” and builds a fairer playing field in the digital market whereby creators will be protected and remunerated for the use of their works online. The final text of Article 17 ensures that OCSSPs, such as YouTube, cannot continue to benefit from outdated safe harbour provisions that were introduced in the 2000s, a completely different digital environment from now. The new Directive strengthens the position of rightsholders when negotiating licences with online platforms while introducing balanced solutions among stakeholders: major and small digital platforms, rightsholders and users. With this new Directive, Europe is leading governments worldwide in aligning legislation to better support authors and creative industries by laying the foundations for a fairer digital environment. Overseas jurisdictions are starting to follow the EU approach to review their safe harbour regimes : Ukraine has adopted a similar approach as in the EU. Canada has reviewed its safe harbour regime to adapt it under the new digital environment and although the UK Government has no immediate plans to implement the CDSM Directive, it is waiting to see how Article 17 is implemented by EU Member States in order to adopt a pragmatic approach, including adoption of certain sections that may work in the UK, including Article 17. The US has also undertaken a public consultation to assess whether the DMCA should be updated. CISAC hopes that Hong Kong will also follow this new standard of copyright protection.

The “transfer of value” or “value gap” problem arises because of the fundamental imbalance between the enormous value derived from the exploitation of creative works by online content sharing service providers (OCSSPs) and the minimal value being returned to the creators of those works. CISAC strongly urges the Hong Kong Government not to adopt the previously proposed regime in the Copyright (Amendment) Bill 2014, but instead to adopt a more updated approach following the European model.

CISAC would like to further propose the following suggestions to the new safe harbour regime :

- The safe harbour regime proposed in Copyright (Amendment) Bill 2014 needs to be adjusted to the current evolving digital world.
- OSPs (including online platforms, hosting providers and other intermediaries) should be subject to effective obligations to ensure they do not distribute nor facilitate the distribution of illegal content. This means:
  - It is necessary to limit the scope of safe harbour provisions to make sure these apply only to purely passive and neutral intermediaries and notice and take down systems need to ensure that OSPs take effective measures against infringing content.
  - OCSSPs carry out a relevant act of ‘communication to the public’ when they give access to copyright-protected content uploaded by their users, and need to obtain an authorisation from the relevant rightsholders. These services cannot benefit from safe harbours when engaging in such acts of communication to the public.
  - Other services, such as App stores, P2P platforms, cyberlockers, etc. should not have a back-door to liability immunity through excessively broad safe harbours.
  - Effective measure should include, at least, the need to act expeditiously to remove or disable access to infringing content when the OSP obtains knowledge or awareness by whatever means, including through a notification sent by a rightholder;
  - After decades of implementation of “Notice and take down” systems around the world, it is clear that such system is not an effective measure to curb infringing activities. A “Notice and stay down” regime is a preferred option under the current digital environment in the case of copyright infringements.

- A clear process against repeat infringers, such as termination of accounts, should be introduced.
- Search engines cannot benefit from a broad and unjustified “safe harbour”. These services must comply with specific due diligence provisions.

### **3 OPEN FAIR USE EXCEPTION SHOULD NOT BE INTRODUCED IN HONG KONG**

The current Hong Kong Copyright Ordinance has already introduced an extensive range of exceptions, in particular the ‘fair dealing’ exceptions which allow the use of copyright material for specified purposes (e.g. education, criticism, etc.).

Adding to such existing exceptions an open-ended exception for “fair use” is bound to create more confusion with respect to the scope of permitted acts under Hong Kong copyright legislation and weaken the value of exclusive rights. As seen in the US, the vague system of “fair use” as a defence leaves both copyright owners, as well as those who wish to use a copyright, in an uncertain situation of not understanding what is and is not a “fair use” without going to court. It may result in fewer licenses as users will rely on “possible” fair use, and an increase of the number of cases that reach courts, as both rightholders and users will be unable to determine the scope of the exception in advance. This situation will put copyright owners/authors at a disadvantage, both because of the costs of legal proceedings to those authors that can afford it, and because of the period of time it will take for a decision to be issued. Many copyright owners/authors who are not in a position to pay for legal proceedings will simply be unable to stop unauthorized and unfair use.

In light of these considerations, CISAC strongly urges the Hong Kong Government to maintain the existing approach of fair dealing exceptions and avoid adding an open-ended fair use exception. We request the Hong Kong Government to defend the economic and moral interests of local and foreign authors and refrain from placing copyright owners in a significantly worse position in Hong Kong than in other countries/territories.

### **4 THE PARODY EXCEPTION SHOULD BE CAREFULLY CRAFTED**

Under proposed section 39A, a new “fair dealing” exception for parody, satire, caricature and pastiche was introduced in the Copyright (Amendment) Bill 2014. CISAC urges that such exception should be narrowly crafted to ensure that it is not misinterpreted as permitting derogatory treatment of copyright-protected content. Many examples can be found online that the so-called “parody” or “mash-ups” are not only offensive, but were made with the intention to derogate the reputation of the music creators, performing artist and the sound recording. This so-called “parody” is unlikely to create any value or promote creativity in the society.

Moreover, the proposed parody exception should not allow a person who makes a dealing with a work to receive any direct/indirect profit and/or commercial gain/benefit. Nowadays, many YouTubers adapt copyrighted contents in their videos and claimed that they are parody, but in practice they intentionally make these videos for the purpose of receiving payments from YouTube. Section 39A exception should not create a loophole to allow the so-called “secondary creation” generating any commercial gain to the detriment of the original creators. Although “non-profit-making” and “non-commercial nature” is one of the factors proposed in section 39A(2)(a) for the court to determine whether a dealing with a work is a fair dealing, the effect of such factor is not clearly stated in this section. It is CISAC’s suggestion that the requirement of “non-profit-making” and “non-commercial nature” should be expressly included as a condition for the application of the section 39A.

## **5 A REMUNERATION SCHEME AND/OR LEVY SYSTEM SHOULD BE INTRODUCED TO ENABLE CREATORS TO RECEIVE FAIR COMPENSATION FROM THE PRIVATE COPYING OF COPYRIGHTED CONTENTS**

Under proposed section 76A, it introduces a new exception to allow copying of sound recordings for private and domestic use. However, this copying exception is not subject to any remuneration or compensation scheme ensuring that copyright holders are duly compensated for their loss of revenues or harm caused, whenever their works have been copied for personal use and for which they are de facto unable to license or monitor the use. A private copying levy system is an efficient mechanism that allows rights holders to be compensated for the limitation of their exclusive right of authorizing the reproduction of their works. The introduction of a private copying levy system is even more justified in a modern copyright regime in light of the widespread copying on digital media and the growing popularity of mobile devices with large storage capacities, which have substantially increased the ability of users to reproduce protected content and thus increased the potential for private copying.

Private copying remuneration schemes are recognized in nearly 80 countries around the world. Most countries of the EU have recognized these rights for decades, even prior to the Directive 2001/29 EC on the harmonization of certain aspects of copyright and related rights in the information society, which, under article 5.2 (b), allows Member States to introduce limitations to the exclusive right of reproduction, under the condition that the copyright owners receive a proportional compensation.

Globally, in 2020, private copying remunerations generated 516 million euros in collections, representing an important source of income for creators, in particular in the context of the Covid-19 crisis. In many countries, specific measures have been adopted so that collections from private copying can be used to help impacted rightsholders. This has been the case, for example, in France but also in the Netherlands, Austria, Germany, Italy and other countries.

Considering the above, CISAC encourages the Hong Kong Government to promote the adoption of a proper private copying levy system in Hong Kong where importers and manufacturers are required to pay a levy on recording equipment and/or media used by individuals for their private use to a collective management organization in charge of the collection and distribution of this remuneration. In this system, the funds collected could generally be redistributed to creators and thus contribute to the creative process. Introducing an effective remuneration or levy scheme in Hong Kong would align Hong Kong's copyright legislation with accepted international standards and further set an important precedent for proper implementation of private copying levies in other countries/territories in Asia.

## **6 COPYRIGHT TERM OF PROTECTION SHOULD BE EXTENDED TO ALIGN HONG KONG WITH INTERNATIONAL STANDARDS**

The majority of countries/territories outside Hong Kong protect copyright works for a term of 70 years after the author's death or longer. In fact, in many countries worldwide, the term of protection has been extended from the Berne minimum requirement of the author's life plus 50 years to author's life plus 70 years (in particular in the EU, the term was harmonised by Directive 93/98/CEE), and even longer (e.g. Colombia 80 years).

The current update of the copyright regime provides an excellent opportunity to bring Hong Kong copyright legislation in line with the vision of a growing number of modern countries to provide for a longer period of protection, to ensure that Hong Kong creators are not at a disadvantage compared with foreigners, particularly in cases of cross-border online uses.

Maintaining protection of works at the current term of 50 years after the death of the author means that Hong Kong authors are at a disadvantage compared with foreigners. It also means that the families of Hong Kong authors lose potential royalties not only from the Hong Kong market, but also from other countries/territories that apply reciprocity and deny the longer term to works originating from countries that do not recognise it.

Extending the duration of copyright to at least 70 years post-mortem will harmonize Hong Kong legislation with modern copyright standards. It will also ensure that Hong Kong creators continue to be protected for the longer term in countries outside Hong Kong that grant this term on a reciprocal basis.

## **7 INTRODUCTION OF COPYRIGHT SPECIFIC STATUTORY PROVISIONS FOR SITE BLOCKING INJUNCTIONS**

CISAC supports the introduction of copyright-specific statutory provisions in Hong Kong.

## **8 A RESELL ROYALTY RIGHT REGIME SHOULD BE INTRODUCED**

CISAC strongly supports the introduction of the resale royalty right for visual artists as it would help to strengthen the copyright protection of visual artists in Hong Kong.

Visual art is a significant form of creation that represents the culture and life of a nation. In recent years, CISAC, together with visual artists worldwide, have been actively promoting stronger copyright protection for visual artists. In particular, the introduction and implementation of the resale right is a very important aspect of copyright protection because it ensures that visual artists receive a fair remuneration in the recognition of their efforts.

The artist's resale right ensures that the artist and his/her family receive compensation each time a work is resold. This makes it possible for the artist to retain a share in his/her work as it increases in value. Without the resale right, the artist receives no compensation after the initial sale, while auction houses, art dealers and private collectors cash in on the growing value of the work, which is derived from the artist's reputation. Furthermore, as the resale right requires accountability on the part of auction houses, dealers and galleries, it helps artists maintain a connection with their works and an accurate view of their value.

Even with the resale right in place, the major share of the resale price still goes to the seller. Nonetheless, the money received by artists, while usually representing an insignificant sum compared to the sellers, is a significant source of income for artists. Thus, the amount received from the resale of their works is a vital part of their income. After an artist's death, the need for resale income remains crucial as families and heirs inherit not only the rights to the work but also the burden of managing an artist's estate, including the costs of storage, conservation, cataloguing, research and restoration. The Hong Kong art market is now the second largest contemporary art auction market in the world according to ArtTactic.<sup>3</sup> Therefore, a resale right regime is urgently needed in Hong Kong to ensure a fair protection to visual artists.

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<sup>3</sup> <https://www.artsy.net/article/artsy-editorial-hong-kongs-art-market-emerges-tumultuous-year-optimism>

Current practices in other countries/territories where artists' resale right has been introduced:

- More than 80 countries already granted the resale right to visual artists. In many other countries, possible implementation of the resale right is under discussion. However, due to the reciprocal nature of the right in the Berne Convention, the absence of the right in major auction markets for artistic works like Hong Kong, prevents visual artists worldwide from fully benefiting from the right.
- Directive 2001/84/EC of 27 September 2001 required all EU countries to introduce the resale right and represented a major step forward towards the global recognition of the right.
- In most countries, the resale right is efficiently managed and paid through a collective management organisation for administrative and financial simplicity. In many countries, this is even required by law.
- Discussions concerning global harmonisation of the resale right are currently ongoing at the WIPO SCCR, under a proposal of Senegal and Congo in 2015. At the 36<sup>th</sup> SCCR session in May 2018, it was decided to create a task force to track the implementation of resale right at a national level in order to enrich the debate and prepare it for the next stage.
- Research results conducted in the **United Kingdom** and **Australia**,<sup>4</sup> where such a right has been introduced in recent years, show that this right does not adversely affect the art sale market, as is often claimed by auction houses in order to deter governments from the introduction of such a right. In fact, studies conducted in the aftermath of the introduction of the resale royalty right in the UK showed that the value of art sales did not decline.
- In **Australia**, royalties generated since the introduction of the resale right on 9 June 2010 is AU \$10 million. More than 2,240 artists benefitted from more than 24,500 resales, of which over 65% of the artists receiving royalties are Aboriginal or Torres Strait Islander artists who have received 38% of the total royalties generated. Of the 50 artists who have received the most money under the scheme, 18 are Aboriginal or Torres Strait Islander. Over 46% have been paid directly to living artists with some paid to artists' estates and beneficiaries. Given the experience in Australia, introducing resale right in Hong Kong should serve as an incentive to encourage young artists to practise traditional art.<sup>5</sup>

CISAC stands ready to help the Hong Kong Government to setup a copyright collective management organisation for visual arts in charge of collecting resale right royalties, as well as the other royalties, when it is introduced in Hong Kong.

## **9 ARTIFICIAL INTELLIGENCE & COPYRIGHT EXCEPTION FOR TEXT AND DATA MINING**

The consultation paper states that these topics may be addressed in the future, but likely not in the upcoming amendment Bill. CISAC believes that the Hong Kong government's view is coherent with the approach taken by many other countries as it is clearly premature for the Artificial Intelligence (AI) provisions, and not

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<sup>4</sup> WIPO published an interesting study on the economic impact of RR, with analysis of the UK & Australia market (Graddy-Farchy). [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_35/sccr\\_35\\_7.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf)

<sup>5</sup> This information is provided by Copyright Agency which is the CMO dedicated by the Australian Government to be responsible for the collection of resale royalty.

welcome for the text and data mining (TDM) exception. Please find below the arguments to support this proposition for both topics:

**i) AI & Copyright**

Given the current level of AI technologies, there is no need for specific copyright legislation in this regard for now because AI technologies are not at present (and will not be for the foreseeable future) capable of the autonomous generation of artistic works. The majority of contemporary AI-assisted works (i.e. works created by humans using AI) are capable of being protected by copyright. This is because, at either the training stage or the output stage (or indeed at both stages), significant human input is still required when using AI to create a work.

Many academic reports published on the issue have generally been of the view that existing copyright laws are sufficient to address the issues posed by the current level of AI technology, to confront and adopt to technological changes, as well as protect the rights of human creators.

Finally, overseas jurisdictions have not published any specific copyright legislations for now. Although the European Commission has published proposals for a legislative package on AI, these legislative proposals are based on a proportional and risk-based approach, focusing on “high-risk” areas and do not affect copyright-related issues, nor cultural diversity-related matters. The US and the UK are also having public consultations on the impact of AI on IP laws, but none of them has published any legislative reform initiative so far.

**ii) Copyright exception for text and data mining (TDM)**

An exception for TDM to facilitate research and innovation should be avoided in the Hong Kong copyright legislation as this may have unforeseen detrimental consequences on creators' rights. Please find below the reasons that support this position:

- TDM is a broad term used to cover any advanced techniques for computer-based analysis of large quantity of data of all kinds. This data often contains copyright material although it sometimes can be based on public domain works. It is a tool frequently used in many areas of research and innovation, including notably AI. TDM for research and innovation could cover a lot of different use cases, which could easily cover commercial and business activities, generating huge revenues and new markets for users. Therefore, any exception for TDM shall be strictly limited in its scope in order not to diminish or derogate the rights of rightholders.
- When TDM is applied as part of the process of creating an AI-assisted work, TDM is merely part of a longer process. The data gleaned from TDM of a copyright work is then processed through an algorithm which creates a new work. The end result is the AI assisted work generated by the TDM analysis, which could compete with copyright protected work. Creators of AI using TDM, may wish to commercialize the resulting AI works. This would mean that copyright owners' works are being exploited to create profit for third parties without any remuneration to the copyright holders. Such use of the copyright holders' works unfairly harms and prejudices the rights of the copyright holders.
- TDM exception for research and innovation included in overseas jurisdictions have already proven to be harmful to the copyright holders. For example, the unforeseen implication of the TDM exception to facilitate scientific research included in the article 3 of the EU Directive 790/2019 on Copyright in the Digital Single Market (“CDSM”) is that copyright material could be used to train an AI, and once the AI is sufficiently trained and the “scientific research” completed, the AI would constitute a commercially viable product. It is considered that, where an AI system is trained on copyright works for scientific



research, and then generates works of its own once that system is trained, and those works are introduced into the stream of commerce, such commercial availability should retroactively negate the scientific research exception.

For the reasons mentioned above, CISAC welcomes the cautious approach of the Hong Kong government on AI and the copyright exception for TDM.



CISAC thanks again the Hong Kong government for the opportunity to provide comments on the proposed approach to update its copyright region and we remain ready to assist the authorities in crafting a modern Copyright regime, and to share from our international experience and expertise in this field.

### **About CISAC**

CISAC – the International Confederation of Societies of Authors and Composers – is the world's leading network of authors' societies.

With 228 member societies in 120 countries/territories, CISAC represents more than 4 million creators from all geographic areas and all artistic repertoires: music, audiovisual, drama, literature and visual arts. CISAC is presided over by Swedish songwriter, musician, singer, guitarist, producer and a member of the Swedish musical group ABBA **Björn Ulvaeus** and our four Vice Presidents are: South African singer, songwriter, actress, entrepreneur, humanitarian and teacher **Yvonne Chaka Chaka**, Mexican composer and director **Arturo Márquez**, Chinese director, writer and producer **Jia Zhang-ke**, and International Neo-Expressionist visual artist **Miquel Barceló**.

CISAC protects the rights and promotes the interests of creators worldwide. We enable collective management organisations to seamlessly represent creators across the globe and ensure that royalties flow to authors for the use of their works anywhere in the world.

Founded in 1926, CISAC is a non-governmental, not-for-profit organisation with headquarters in France and regional offices in Africa, South America (Chile), Asia-Pacific (China) and Europe (Hungary).

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