

23 February 2022

Mr Edward Yau, GBS, JP
Secretary for Commerce and Economic Development
Commerce and Economic Development Bureau
23/F, West Wing, Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Dear Edward,

Re: Public Consultation on Updating Hong Kong's Copyright Regime

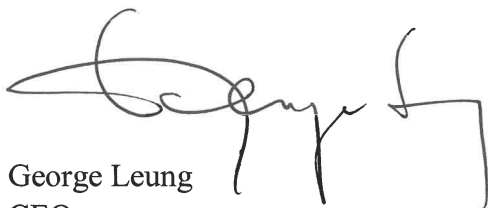
The Hong Kong General Chamber of Commerce welcomes the opportunity to comment on the subject consultation.

We generally agree that existing copyright laws should be updated but would also urge the government to take into account the need to strike a balance between the rights of copyright owners and users.

There are however certain issues on which we are unable to offer a definitive view such as that regarding the proposal to adopt an exhaustive approach on copyright exceptions and another concerning judicial site-blocking provisions. The divergence in views, well as our position on other aspects of the legislative proposals are as detailed in the attached.

We hope you will find our comments useful.

Yours sincerely,



George Leung
CEO

Encl.

Commerce and Economic Development Bureau’s Consultation Paper
“Updating Hong Kong’s Copyright Regime”

Response by The Hong Kong General Chamber of Commerce
(“HKGCC”)

1. HKGCC welcomes the opportunity to respond to the consultation paper on “Updating Hong Kong’s Copyright Regime” (“CP”).

General Comments

2. We agree that Hong Kong’s copyright legislation needs to be updated to take account of technological developments, and in particular the digital economy. As the CP states, this should help enhance copyright protection, thereby stimulating creativity and innovation. At the same time, it should ensure that there is a fair balance between the interests of copyright owners and copyright users.¹
3. The CP states that another benefit of updating Hong Kong’s copyright legislation would be “strengthening Hong Kong’s position as a regional IP trading centre”.² While this would be a positive outcome, the CP does not explain the concept of “regional IP trading centre”, or how updating Hong Kong’s copyright legislation in the way that the Government proposes would serve to strengthen Hong Kong’s position as such a centre. We would welcome clarification from the Government on these points, on what the Government’s other plans are to implement this objective, and how stakeholders can participate and benefit from it.
4. We note that the CP invites views on only four issues, namely:
 - exhaustive approach to exceptions;
 - contract override;
 - illicit streaming devices; and
 - judicial site blocking.

We set out our views on each of these issues below. Before doing so, we would like to comment on two other issues, namely (a) the proposal to clarify the criminal liability provisions in the proposed revisions to the legislation: and (b) the proposed “safe harbour” provisions.³

Criminal Liability

5. The Government proposes to apply the existing criminal offences of distributing or communicating infringing works to the new proposed technologically-neutral communication right.⁴ In principle, this proposal seems logical. However, the

¹ CP paras 1.6, 1.7.

² CP para 1.7.

³ CP para 2.6, 2.7, 2.12.

⁴ CP para 2.6.

CP also, rightly, recognises the need for legal certainty for businesses, particularly when it comes to conduct that would be deemed as criminal, and the serious sanctions and other consequences that would ensue from such a finding. In this respect, we welcome the CP's proposal to clarify the threshold of criminal liability, and in particular the concept of "*to such an extent as to affect prejudicially the copyright owner*", a concept which we believe is too vague in itself to be used as a threshold for assessing criminality.⁵ We look forward to further clarification from the Government.

Proposed Safe Harbour Provisions

6. While these proposed provisions are a welcome first step in tackling online piracy, we cannot see how the safe harbour provision would be effective in dealing with illegal streaming of live events, where live and dynamic blocking of infringing content is required. This is a very significant concern for copyright owners. Consideration should be given to addressing this issue.
7. In addition, there are other practical and legal concerns that should be addressed before the new provisions are introduced. These concerns include the following:
 - 7.1. The significant administrative and cost burden for online service providers ("OSPs") in complying with the new provisions, and how this can be alleviated.
 - 7.2. Information provided by a complainant may not be sufficient to identify the relevant material and/or may result in the wrong material being blocked in error.
 - 7.3. Ensuring that materials intercepted by OSPs is not in breach of the Telecommunications Ordinance.
 - 7.4. The ability by an OSP to verify a complaint's legitimacy and ensuring that the OSP does not cause harm to a legitimate copyright owner.
 - 7.5. Situations where copyright ownership is disputed, or there is more than one copyright owner.
 - 7.6. Clarification or practical guidance is needed on the wording "*become aware that the infringement has occurred, or become aware of facts or circumstances that would inevitably lead to the conclusion that the infringement has occurred*". Presumably OSPs are not required to proactively monitor their services or to seek facts that indicate infringing activity in which case this should be clarified. Clarification is also needed to address circumstances where the OSP commits an error in making such a determination.

⁵ CP para 2.7.

- 7.7. Given that compliance with the safe harbour mechanism is voluntary, how a level-playing field between OSPs can be maintained, if some choose to comply and others do not.

Exhaustive approach to Exceptions

8. Our members' views are divided on the Government's proposal to maintain an exhaustive approach to the issue of copyright exceptions although most agree with the proposal. Given the possible criminal consequences of breaches of copyright (see paragraph 5 above), it is important that both infringing acts, and exceptions to copyright infringements, are clearly specified, so that all relevant parties know with sufficient certainty what acts will and will not be regarded as criminal offences. However, a contrary view has been expressed that a non-exhaustive approach would not be inconsistent with criminal liability and that it would actually provide a stronger safeguard for those accused of criminal activity. Such an approach is consistent with the dynamic nature of creativity and conducive to innovation. An exhaustive approach would therefore have the undesirable effect of inhibiting creativity and innovation.

Contract Override

9. We agree with the Government's proposal not to restrict the use of contracts to exclude or limit the application of statutory copyright exceptions. As the CP states, "*freedom of contract plays a vital role in Hong Kong's free market economy*".⁶ Parties should be free to decide to override the statutory exceptions, if they agree to do so.

Illicit Streaming Devices (ISDs)

10. If the existing legal regime is sufficient to deal with the issue of ISDs, we agree that there is no need for specific legal provisions to be introduced. We have consistently advocated that regulations should only be introduced or maintained where there is a demonstrable clear need, and where their benefits exceed their costs. On this basis, consideration should be given to whether the existing provisions (with any amendments) are sufficient to deal with the practice of encouraging, advising on, or giving instructions on, how to upload or access content illegally. For example, we have been informed that it is a common practice for magazines to publish information about how and where to access pirated content.

Judicial Site-Blocking

11. Our members' views are divided on the issue of whether specific judicial site-blocking provisions should be inserted into the Copyright Ordinance. Most members agree with the argument cited in the CP that existing Hong Kong law is sufficient to enable the Hong Kong courts to issue site-blocking orders in

⁶ CP para 4.4(a).

appropriate cases, without the need for specific provisions to be introduced into the legislation for the courts to issue such orders. As with the issue of ISDs (see paragraph 10 above), there is therefore no demonstrable need for new provisions to be introduced regarding site-blocking orders. However, a contrary view has been expressed that specific provisions on judicial site-blocking should be included, as these would provide greater certainty and clarity for OSPs.

Conclusion

12. We hope our views as set out above are helpful. We would welcome further consultation on the proposed threshold for criminal liability in respect of copyright infringements, and the practical and legal concerns we have raised regarding the implementation of the new safe harbour mechanism. We would also appreciate clarification of, and further details on, the concept of Hong Kong as a “*regional IP trading centre*”, as explained above. Finally, we note that the relationship between copyright and artificial intelligence is only listed in the CP as a possible issue for further studies, although this issue is currently being actively studied or addressed in other jurisdictions such as the UK and EU. We also note that there is no mention in the CP of the copyright implications of other technologies associated with what is referred to as metaverse or metauniverse. We recommend that these issues are addressed at this stage, or as soon as possible, to ensure that our copyright legislation keeps pace with modern developments, and is as far as possible “future-proof”.

HKGCC Secretariat
February 2022