

Bills Committee on the Copyright (Amendment) Bill 2011

Committee Stage Amendments to be moved by the Administration

Purpose

This paper briefs Members on our proposed Committee Stage Amendments (“CSAs”) to the Copyright (Amendment) Bill 2011 (“the Bill”). The CSAs, in draft form, are set out at Annex A. The marked-up version of the Bill is provided at Annex B for Members’ reference.

Meaning of the term “Dealt With”

2. In a letter dated 12 December 2011, the Legal Advisor to the Bills Committee raised questions on the meaning of the term “dealt with” in relation to the new sections 37(6) and (7). In response, the Administration explained that where a legitimate copy of work made by virtue of the relevant permitted act has been subsequently “dealt with” by a third party not permitted to make and/or use the copy pursuant to the permitted act in question, the copy shall be treated as an infringing copy. The Administration also advised Members of the Bills Committee at the meeting on 15 December 2011 that it would propose certain CSAs to clarify the meaning of the term “dealt with” in the relevant provisions to give clear guidance to both right owners and users.¹

3. Our original proposal under Clause 18 is to add a new section 37(6) to unify the definition of the term “dealt with” which appears in different sections governing permitted acts. Our intent is to clarify that *no one other than the intended beneficiaries* should be permitted to possess, exhibit in public or distribute a copy of a copyright work/a fixation of performance made pursuant to the relevant section for the purpose of or in the course of any trade or business (the new section 37(6)(a) and (c)), or distribute such copy to such an extent that affects

¹ Sections 37 to 88 and sections 240 to 261 of the Copyright Ordinance (“the Ordinance”) specify respectively that the doing of certain permitted acts under prescribed conditions will not be considered as infringing copyright and the rights in performance. Many of these provisions carry one common condition, namely that if a legitimate copy of a work or fixation of performance made by virtue of the relevant permitted act has been subsequently “dealt with” (被用以進行交易), the copy shall be treated as an infringing copy or fixation, as the case may be.

prejudicially the right owner (section 37(6)(d)). In addition, we wish to make it clear that one should not be permitted to do acts otherwise than for the purposes prescribed by the statutory provisions governing certain permitted acts.

4. After the introduction of the Bill, there are, however, suggestions which point out that the intended beneficiaries under different permitted acts vary from one provision to another. There may be uncertainties as to who the beneficiaries are under each permitted act if they are not defined clearly in relation to the objective of each permitted act within the same section in a self-contained manner. Having weighed up the merits of capturing the different scenarios in a single omnibus provision for the term “dealt with”, we agree on balance that the purpose of giving greater legal certainty would be better served if the meaning of “dealt with” is specified in each relevant section in a manner reflecting the individual circumstance of each permitted act. For the above reasons, Clause 18 of the Bill will be withdrawn, and a provision which specifies the meaning of the term “dealt with” will be inserted in each of the following provisions –

<u>Purpose of the permitted act</u>	<u>Clause</u>	<u>Section</u>
(a) Making a special copy of a copyright work for people with print disability	21-23	40B(6), 40C(8), & 40D(8)
(b) Fair dealing for the purpose of giving and receiving instruction	24 69	41A(8) 243(3A)
(c) Things done for the purpose of instruction and examination	25(3) 68A	41(6) 242A(3A)
(d) Recording, copying or communication by educational establishments	26(6) 70	44(4)&(5) 245(3A)
(e) Copying or communication by educational establishments or pupils	27(9) 71	45(4)&(5) 245A(4A)
(f) Fair dealing for the purpose of public administration	37 71B	54A(4) 246A(3A)
(g) Advertisement of sale of artistic work	43	72(3)

Safe Harbour Provisions (Clause 45)

5. To facilitate the implementation of the safe harbour provisions, we have completed two rounds of public consultation on the Code of Practice.² Having carefully considered the comments received and other comments made by Members of the Bills Committee at earlier meetings, we propose the following major amendments to Clause 45 –

<u>Purpose</u>	<u>Section</u>
(a) <u>Definition of “online service”</u> To refine the definition to clarify that the online service covered in the safe harbour provisions should be those provided through the Internet	88A (“online service”) ³
(b) <u>Privacy</u> To provide a subscriber with an option to request an online service provider (“OSP”) not to disclose his personal data when sending a copy of his counter notice to a complainant	88A (“personal data”) 88D(5)(cb) 88G(2)(c)(ia)
(c) <u>Streamlining</u> To require both the complainants and subscribers to provide more information to substantiate their infringement claims or responses as the case may be, in the interest of facilitating resolution of disputes in a quicker and more cost-effective manner	88C(3)(a), (3)(b) & (3)(da) 88D(5)(a) & 5(ca)

² The Administration will separately submit to the Bills Committee a paper setting out the comments received on the second draft of the Code of Practice and the Administration’s response thereto.

³ At present, both Clauses 41 (new section 65A concerning the copyright exception for temporary reproduction) and 45 (the safe harbour provisions) share the same definition of “service provider”. Clause 41 aims to provide a copyright exception for caching by service providers who provide all types of online service, whether through the Internet or an intranet, such as search engines and web servers. Clause 45, on the other hand, covers online service provided through the Internet (which is accessible to the public) but not an intranet. Hence, the online service under Clause 41 should have a wider coverage than Clause 45 in order to provide adequate protection to OSPs who are engaged in caching activities. Consequently, we propose to amend Clause 41 to better reflect the policy intent. Under the new section 88A, the definition for online service that is covered by the safe harbour provisions will be ring-fenced to exclude any service provided through an intranet.

<u>Purpose</u>	<u>Section</u>
To streamline the procedure for handling a notice of alleged infringement	88B(2)(d) 88C(2)(ab), (2)(c), (3)(a) & (5)-(7) ⁴
To streamline the procedure for handling a counter notice	88D(1), (4)(ab), (4)(c), (7) & (8)
(d) <u>Clarification</u>	
To clarify OSPs' liability in relation to restoration of removed online materials or access to online materials/activities	88G(6) & (7)
To clarify that transitional arrangements may be incorporated into a revised Code of Practice	88I(3)

6. Separately, the Bills Committee has invited the Administration to revisit the merits of having the expression “in good faith” under section 88G (in relation to exemption of the OSPs’ liabilities vis-à-vis third parties for takedown and restoration).

7. The Administration’s response is set out below. While compliance with the safe harbour provisions is entirely voluntary on the part of OSPs, some OSPs indicate that they may choose to remove the material in question if they are reasonably confident that the allegation and the information therein adequately point to a specific incident of copyright infringement on their service platform, even though the notice of alleged infringement may contain minor technical deficiencies. Some OSPs have also expressed concerns that they could not rule out the possibility of their removing materials by mistake (or instances where more materials than specifically pinpointed in the notice of infringement are removed) due to mere administrative oversight, even though they in good faith believe that they have followed the notices. In this respect, the present formulation of the statutory exemption under the new section 88G which carries the expression “in good faith” may provide OSPs with the added protection they seek. Also, this is largely in line with the corresponding statutory provisions in other comparable overseas jurisdictions, such as Australia, Singapore and the US. For the above reasons, we consider that the expression “in good faith” should be kept.

⁴ Having considered a suggestion made by the Chairman of the Bills Committee, we propose to rearrange some provisions under sections 88C and 88D and add a new section 88CA in order to clarify the procedure pertaining to the receipt of a notice of alleged infringement by an OSP and his forwarding the same to a subscriber.

Criminal Provisions (Clauses 51 and 52)

8. At the meeting held on 28 February 2012, we briefed the Bills Committee (vide LC Paper No. CB(1)1180/11-12(01)) on the Administration's proposed amendments to the new sections 118(2AA) and 118(8C) (which appear under Clauses 51(1) and 57(7) of the Bill respectively). Along the lines suggested by Members of the Bills Committee, those amendments were proposed to clarify the scope of the prejudicial distribution and communication offences under the existing section 118(1)(g) and the new section 118(8B) respectively. As foreshadowed at that meeting, CSAs are now proposed to amend the relevant sections.

9. The other CSA that we have proposed is related to the penalty provision. The existing section 119(1) provides that a person who commits an offence under section 118(1)⁵ or (2A) is liable to a fine at level 5 (i.e. \$50,000) in respect of *each infringing copy* and to imprisonment for four years. In the Bill, we originally propose to apply the same penalty to the communication offence under the new section 118(8B). On further consideration, we reckon that such an approach is liable to cause enforcement difficulties. Technologically, an unauthorized communication under section 118(8B) may not always involve the production of an infringing copy, e.g. streaming a song on the Internet from a legitimately-purchased copy. To tackle this issue, we propose to introduce a new section 119(1A) that links the penalty for the communication offence to the number of copyright work being infringed, instead of tying it to the number of infringing copies. In other words, the proposed maximum penalty is a fine at level 5 for *each copyright work being infringed*, and a term of imprisonment for four years.

Exemption (Clause 51(2), (5) & (6A))

10. At present, the Hong Kong Film Archive is exempted from the offence under the existing section 118(2A) (more commonly known as the business end-user possession offence) if the reason of its possession or preservation of an infringing copy of a movie, television drama, musical sound recording or musical visual recording donated by the public is for the purposes of heritage conservation (see the existing

⁵ Both sections 118(1)(e) and (1)(g) relate to the distribution offence.

sections 118(2E) and (2F)). The Bill proposes to extend this exemption to other appropriate libraries, museums and archives in furthering the public cause of heritage conservation. To achieve this purpose, we need to further designate the appropriate institutions. Similar to the statutory exemption for another business end-user offence (more commonly known as the copying and distribution offence under the existing section 119B), we propose to directly designate libraries, museums and archives owned by the Government under the new section 118(2FA), and at the same time provide for a mechanism through which the Secretary for Commerce and Economic Development may make any other appropriate designation in future by way of subsidiary legislation under the new section 118(2FB).

Additional Damages (Clauses 49(3) and 65(3))

11. In response to a suggestion made by the Bills Committee at the meeting on 28 February 2012, the Administration has proposed CSAs to clarify the nature of the defendant's conduct that should be taken into account by the court in deciding whether to award additional damages in civil proceedings, including such unreasonable acts as destroying, concealing or disguising evidence of the infringement after having been informed of the infringement by the plaintiff.

Other Amendments

12. In the light of the drafting suggestions made by the Legal Advisor to the Bills Committee, we have also proposed CSAs to Clauses 15 (to add a phrase "if any" to section 31(3)(b) and (e)), 41 and 72 (both for the purpose of ensuring that the expression "一且" which appears in the Chinese version is duly reflected in the English version).

13. The proposed CSAs to Clause 56 (an index of terms used in the Ordinance) and section 246 of the Ordinance (for the purpose of allowing curators to enjoy the relevant permitted act like archivists and librarians) are consequential in nature which seek to ensure consistency amongst related provisions.

Next step

14. Members are invited to comment on the proposed CSAs to be moved by the Administration. Subject to the comments of the Bills Committee, the Administration will introduce these CSAs to bring in the revised amendments.

Commerce and Economic Development Bureau
Intellectual Property Department
March 2012

Copyright (Amendment) Bill 2011

Committee Stage

Amendments to be moved by the Secretary for Commerce and Economic
Development

<u>Clause</u>	<u>Amendment Proposed</u>
15(2)	In the proposed section 31(3)(b), by adding “(if any)” after “value”.
15(2)	In the proposed section 31(3)(e), by adding “(if any)” after “prejudice”.
18	By deleting the clause.
21	By deleting the clause and substituting— “21. Section 40B amended (Making a single accessible copy for a person with a print disability) Section 40B— Repeal subsection (6) Substitute “(6) For the purposes of subsection (5), an accessible copy is dealt with if it is— (a) possessed, exhibited in public or distributed, by any person other than the person by whom the copy is made or to whom the copy is supplied under subsection (1), for the purpose of or in the course of any trade or business; or

- (b) sold or let for hire, or offered or exposed for sale or hire.”.”.

22 By deleting the clause and substituting—

“22. Section 40C amended (Making multiple accessible copies by specified bodies for persons with a print disability)

Section 40C—

Repeal subsection (8)

Substitute

- “(8) For the purposes of subsection (7), an accessible copy is dealt with if it is—
- (a) possessed, exhibited in public or distributed, by any person other than the specified body by whom the copy is made under subsection (1) or the person to whom the copy is supplied under that subsection, for the purpose of or in the course of any trade or business; or
 - (b) sold or let for hire, or offered or exposed for sale or hire.”.”.

23 By deleting the clause and substituting—

“23. Section 40D amended (Intermediate copies)

Section 40D—

Repeal subsection (8)

Substitute

- “(8) For the purposes of subsection (7), an intermediate copy is dealt with if it is—
- (a) exhibited in public or distributed, by any person other than the specified body entitled to possess the copy under subsection (1) or the specified body to whom the

copy is lent or transferred under subsection (3), for the purpose of or in the course of any trade or business; or

- (b) sold or let for hire, or offered or exposed for sale or hire.”.”.

24 By deleting the clause and substituting—

“24. Section 41A amended (Fair dealing for purposes of giving or receiving instruction)

Section 41A—

Repeal subsection (8)

Substitute

“(8) For the purposes of subsection (7), a copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.”.

25(3) By deleting the proposed section 41(6) and substituting—

“(6) For the purposes of subsection (5), a copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed (otherwise than for the purposes of instruction or examination) for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire; or
- (c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (3).”.

26(6) By deleting the proposed section 44(4) and substituting—

- “(4) For the purposes of subsection (3), a recording or copy is dealt with if it is—
- (a) possessed, exhibited in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;
 - (b) sold or let for hire, or offered or exposed for sale or hire; or
 - (c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).
- (5) In this section—

authorized recipient (獲授權收訊人), in relation to a communication made by a person authorized by an educational establishment, means a teacher or pupil of the establishment who has been authorized by or on behalf of the establishment to receive the communication.”.

27(9) By deleting the proposed section 45(4) and substituting—

- “(4) For the purposes of subsection (3), a copy is dealt with if it is—
- (a) possessed, exhibited in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;
 - (b) sold or let for hire, or offered or exposed for sale or hire; or
 - (c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).
- (5) In this section—

authorized recipient (獲授權收訊人), in relation to a communication made by a person authorized by an educational establishment, means a teacher or pupil of the establishment who has been authorized by or on behalf of the establishment to receive the communication.”.

37 By deleting the clause and substituting—

“37. Section 54A amended (Fair dealing for purposes of public administration)

Section 54A—

Repeal subsection (4)

Substitute

“(4) For the purposes of subsection (3), a copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

41 In the proposed section 65A(1)(f), in the English text, by deleting “when” and substituting “in the event that”.

41 By deleting the proposed section 65A(2) and substituting—

“(2) In this section—

hosting (寄存) means providing space on a network server or any electronic retrieval system for storage of information or material at the direction of a user;

information location tools(資料搜尋工具) means tools such as directories, indexes, references, pointers, or hypertext links that link or refer users to an online location;

online service (聯線服務) includes—

- (a) the transmission, routing, or provision of connections for digital online communications, between or among points specified by a user, of material of the user's choosing;
- (b) the hosting of information or material that can be accessed by a user;
- (c) the storing of information or material on a system or network that can be accessed by a user;
- (d) the linking or referral of users to an online location by the use of information location tools; and
- (e) the provision of online social networking services to users;

routing (路由選擇) means directing or choosing the means or routes for the transmission of data;

service provider (服務提供者) means a person who, by means of electronic equipment or a network, or both, provides, or operates facilities for, any online services.”.

43 By adding—

“(3) After section 72(2)—

Add

- “(3) For the purposes of subsection (2), a copy is dealt with if it is—
- (a) possessed, exhibited in public or distributed (otherwise than for the purpose mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or
 - (b) sold or let for hire, or offered or exposed for sale or hire.”.

- 45 In the proposed section 88A, in the definition of *counter notice*, by deleting “88D(3)” and substituting “88D(1)”.
- 45 In the proposed section 88A, by deleting the definition of *online service* and substituting—
- “*online service* (聯線服務) has the meaning given by section 65A(2) but does not include any service provided through an intranet;”.
- 45 In the proposed section 88A, in the definition of *service provider*, by deleting “or operates facilities for” and substituting “, or operates facilities for,”.
- 45 In the proposed section 88A, by deleting the definitions of *hosting*, *information location tools* and *routing*.
- 45 In the proposed section 88A, by adding—
- “*personal data* (個人資料) has the meaning given by section 2(1) of the Personal Data (Privacy) Ordinance (Cap. 486);”.
- 45 In the proposed section 88B(1), by deleting “or operates facilities for” and substituting “, or operates facilities for,”.
- 45 In the proposed section 88B(2)(d), by deleting everything after “the public,” and substituting “the agent’s name and contact details.”.
- 45 In the proposed section 88C(2), by adding—
- “(ab) (if the service provider specifies the form of the notice under subsection (5)) must be in the form specified by the service provider;”.
- 45 In the proposed section 88C(2)(c), by deleting “electronic or other means” and substituting “the means specified by the service provider under subsection (6)”.
- 45 By deleting the proposed section 88C(3)(a) and (b) and substituting—
- “(a) must contain the complainant’s name and address for

service in Hong Kong and any other information that is reasonably sufficient for contacting the complainant;

- (b) must substantially identify the copyright work that is alleged to have been infringed;”.

45 In the proposed section 88C(3), by adding—

- “(da) must contain a description of how the material or activity mentioned in paragraph (c) infringes the rights of the copyright owner of the copyright work;”.

45 In the proposed section 88C, by adding—

- “(5) For the purposes of subsection (2)(ab), a service provider may specify the form of a notice of alleged infringement in so far as it is not inconsistent with the provisions in subsection (3).

- (6) For the purposes of subsection (2)(c), a service provider must specify, through the service provider’s service (which may include on the service provider’s website), the means (which may include electronic means) by which a notice of alleged infringement is to be provided to the designated agent of the service provider.

- (7) On receiving a notice of alleged infringement from a complainant, a service provider may—

- (a) send a copy of the notice to the service provider’s subscriber whose account for online services has been used or involved in the alleged infringement;

- (b) notify the subscriber that the subscriber may contact the complainant directly;

- (c) remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates; and

- (d) (if the service provider removes the material to which the alleged infringement relates, or disables access to the material or activity to which the alleged infringement relates) notify the subscriber of the removal or disabling.”.

45 In the proposed Division IIIA, by adding—

“88CA. Notice given by service provider

If a service provider becomes aware that an infringement of the copyright in a work has occurred on the service provider’s service platform or becomes aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, the service provider may—

- (a) remove the material to which the infringement relates, or disable access to the material or activity to which the infringement relates; and
- (b) by notice in writing given to the service provider’s subscriber whose account for online services has been used or involved in the infringement, notify the subscriber of the removal or disabling.”.

45 By deleting the proposed section 88D(1), (2) and (3) and substituting—

“(1) Within a reasonable time after receiving a copy of notice of alleged infringement sent by the service provider under section 88C(7) in respect of the matter mentioned in section 88C(7)(d) or a notice given by the service provider under section 88CA(b), the service provider’s subscriber may give a counter notice to the service provider—

- (a) disputing or denying the infringement alleged by the complainant or service provider; and
- (b) requesting the service provider to take reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.”.

45 In the proposed section 88D(4), by adding—

“(ab) (if the service provider specifies the form of the notice under subsection (7)) must be in the form specified by

the service provider;”.

45 In the proposed section 88D(4)(c), by deleting “electronic or other means” and substituting “the means specified by the service provider under subsection (8)”.

45 By deleting the proposed section 88D(5)(a) and substituting—

“(a) must contain the subscriber’s name and address for service in Hong Kong and any other information that is reasonably sufficient for contacting the subscriber;”.

45 In the proposed section 88D(5)(c), by deleting “and”.

45 In the proposed section 88D(5), by adding—

“(ca) must contain the grounds for the subscriber’s belief mentioned in paragraph (c);

(cb) (if the subscriber is an individual) must state whether the subscriber opts for or against the service provider’s disclosure of the subscriber’s personal data contained in the counter notice to the complainant; and”.

45 In the proposed section 88D, by adding—

“(7) For the purposes of subsection (4)(ab), a service provider may specify the form of a counter notice in so far as it is not inconsistent with the provisions in subsection (5).

(8) For the purposes of subsection (4)(c), a service provider must specify, through the service provider’s service (which may include on the service provider’s website), the means (which may include electronic means) by which a counter notice is to be provided to the designated agent of the service provider.”.

45 In the proposed section 88G(2)(c)(i), by deleting “and”.

45 In the proposed section 88G(2)(c), by adding—

“(ia) (if the subscriber is an individual) the service provider acts in accordance with the subscriber’s option stated in

the counter notice under section 88D(5)(cb); and”.

45 By deleting the proposed section 88G(6) and (7) and substituting—

“(6) Subsection (5) does not apply in a case where the material was removed, or access to the material or activity was disabled, pursuant to a notice of alleged infringement unless—

(a) the service provider promptly sends a copy of the counter notice to the complainant; and

(b) (if the subscriber is an individual) the service provider acts in accordance with the subscriber’s option stated in the counter notice under section 88D(5)(cb).

(7) Subsections (2)(c)(ii), (4)(c) and (5) do not apply if—

(a) proceedings have been commenced in Hong Kong seeking a court order in connection with any infringing activity that relates to the material or activity mentioned in those subsections; and

(b) the designated agent of the service provider has been notified in writing, by the person who brings the proceedings, of the proceedings—

(i) in the case of subsection (2)(c)(ii) or (5), within a reasonable time after the service provider sent a copy of the counter notice to the complainant; or

(ii) in the case of subsection (4)(c), within a reasonable time after the service provider received the counter notice.”.

45 In the proposed section 88I(3), by adding “including” after “construed as”.

49(3) By deleting the proposed section 108(2)(d) and substituting—

“(d) any unreasonable conduct of the defendant after the act constituting the infringement occurred, including any act done or attempt made by the defendant to destroy, conceal or disguise evidence of the infringement after having been informed of the infringement by the

plaintiff; and”.

51(1) By deleting the proposed section 118(2AA) and substituting—

“(2AA) For the purposes of subsection (1)(g), in determining whether any distribution of an infringing copy of the work is made to such an extent as to affect prejudicially the copyright owner, the court may take into account all the circumstances of the case and, in particular, whether more than trivial economic prejudice is caused to the copyright owner as a consequence of the distribution having regard to, amongst others—

- (a) the nature of the work, including its commercial value (if any);
- (b) the mode and scale of distribution; and
- (c) whether the infringing copy so distributed amounts to a substitution for the work.”.

51 By deleting subclause (2) and substituting—

“(2) Section 118(2E)—

Repeal

“recording by the Hong Kong Film Archive”

Substitute

“recording by a designated library, museum or archive”.”.

51 By deleting subclause (5) and substituting—

“(5) Section 118(2F)—

Repeal

“recording by the Hong Kong Film Archive”

Substitute

“recording by a designated library, museum or archive”.”.

51 By adding—

“(6A) After section 118(2F)—

Add

“(2FA) In subsections (2E) and (2F), references to a designated library, museum or archive are to—

(a) a library, museum or archive owned by the Government; or

(b) a library, museum or archive designated by the Secretary for Commerce and Economic Development under subsection (2FB).

(2FB) The Secretary for Commerce and Economic Development may, having regard to the advice of the Director of Leisure and Cultural Services, by notice published in the Gazette, designate, for the purposes of subsection (2FA)(b), any library, museum or archive that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112).”.

51(7) By deleting the proposed section 118(8C) and substituting—

“(8C) For the purposes of subsection (8B)(b), in determining whether any communication of the work to the public is made to such an extent as to affect prejudicially the copyright owner, the court may take into account all the circumstances of the case and, in particular, whether more than trivial economic prejudice is caused to the copyright owner as a consequence of the communication having regard to, amongst others—

(a) the nature of the work, including its commercial value (if any);

(b) the mode and scale of communication; and

(c) whether the communication amounts to a substitution for the work.”.

52 By deleting the clause and substituting—

“52. Section 119 amended (Penalties for offences under section 118)

After section 119(1)—

Add

“(1A) A person who commits an offence under section 118(8B) is liable on conviction on indictment to a fine at level 5 in respect of each copyright work and to imprisonment for 4 years.”.

56 By deleting subclause (4) and substituting—

“(4) Section 199, Table—

Add in alphabetical order

“communication to the public section 28A(2)

curator (in sections 46 to 53) section 46(5)

make available to the public section 28A(3)”.

65(3) By deleting the proposed section 221(2)(d) and substituting—

“(d) any unreasonable conduct of the defendant after the act constituting the infringement occurred, including any act done or attempt made by the defendant to destroy, conceal or disguise evidence of the infringement after having been informed of the infringement by the plaintiff; and”.

New By adding—

“68A. Section 242A amended (Fair dealing for purposes of giving or receiving instruction)

After section 242A(3)—

Add

“(3A) For the purposes of subsection (3), a fixation is dealt with if it is—

(a) possessed, shown or played in public or distributed (otherwise

than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or

- (b) sold or let for hire, or offered or exposed for sale or hire.”.”.

69 By adding—

“(3) After section 243(3)—

Add

“(3A) For the purposes of subsection (3), a fixation is dealt with if it is—

- (a) possessed, shown or played in public or distributed (otherwise than for the purposes of instruction or examination) for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire; or
- (c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (2).”.”.

70 By adding—

“(6) After section 245(3)—

Add

“(3A) For the purposes of subsection (3), a recording or copy is dealt with if it is—

- (a) possessed, shown or played in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or

exposed for sale or hire; or

- (c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).”.”.

71 In the proposed section 245A(1), in the English text, by deleting “education purposes of that establishment” and substituting “educational purposes of the establishment”.

71 In the proposed section 245A, by adding—

“(4A) For the purposes of subsection (4), a copy is dealt with if it is—

- (a) possessed, shown or played in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;
- (b) sold or let for hire, or offered or exposed for sale or hire; or
- (c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (2).”.

New By adding—

“71A. Section 246 amended (Copying by librarians or archivists: articles of cultural or historical importance)

- (1) Section 246, heading, after “**librarians**”—

Add

“, curators”.

- (2) Section 246(1)—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

- (3) Section 246(1), after “at the library”—

Add

“, museum”.

71B. Section 246A amended (Fair dealing for purposes of public administration)

After section 246A(3)—

Add

“(3A) For the purposes of subsection (3), a fixation is dealt with if it is—

(a) possessed, shown or played in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or

(b) sold or let for hire, or offered or exposed for sale or hire.”.

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In the proposed section 252A(1)(f), in the English text, by deleting “when” and substituting “in the event that”.

A BILL

To

Amend the Copyright Ordinance to provide for the rights of the owner of the copyright in a work, and the rights of a performer in a performance, relating to the communication of the work or performance to the public; to provide for limitations on the liability of an online service provider relating to online materials; to make further provision with respect to the acts that may be done without infringing copyright or performers' rights; to provide for additional factors to which the court may have regard in considering whether additional damages should be awarded in an action for infringement of copyright or performers' rights; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Copyright (Amendment) Ordinance 2011.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

2. Copyright Ordinance amended

The Copyright Ordinance (Cap. 528) is amended as set out in sections 3 to 80.

3. Section 7 amended (Films)

After section 7(4)—

Add

- “(5) Nothing in this section affects any copyright subsisting in a film sound-track as a sound recording.”.

4. Section 8 amended (Broadcasts)

Section 8(1)—

Repeal

“making available to the public of copies of works or fixations of performances”

Substitute

“making works or fixations of performances available to the public”.

5. Section 9 amended (Cable programmes)

Section 9(2)(b)—

Repeal

“making available to the public of copies of works or fixations of performances”

Substitute

“making works or fixations of performances available to the public”.

6. Section 17 amended (Duration of copyright in literary, dramatic, musical or artistic works)

- (1) Section 17(5)(a)(i)—

Repeal

“or”

Substitute

“and”.

- (2) Section 17(5)(a)—

Repeal subparagraph (ii)

Substitute

“(ii) communication to the public; and”.

- (3) Section 17(5)(b)(ii)—

Repeal

“or”

Substitute

“and”.

- (4) Section 17(5)(b)—

Repeal subparagraph (iii)

Substitute

“(iii) communication to the public.”.

- (5) Section 17(5)—

Repeal paragraph (c).

7. Section 18 amended (Duration of copyright in sound recordings)

Section 18(3)—

Repeal

“, broadcast or included in a cable programme service”

Substitute

“or communicated to the public”.

8. Section 19 amended (Duration of copyright in films)

- (1) Section 19(6)(a), after the semicolon—

Add

“and”.

- (2) Section 19(6)—

Repeal paragraph (b)

Substitute

“(b) communicating to the public.”.

- (3) Section 19(6)—

Repeal paragraph (c).

9. Section 22 amended (The acts restricted by copyright in a work)

- (1) Section 22(1)—

Repeal paragraph (d).

- (2) Section 22(1)—

Repeal paragraph (f).

- (3) Before section 22(1)(g)—

Add

“(fa) to communicate the work to the public (see section 28A);”.

- (4) After section 22(2)—

Add

“(2A) For the purposes of subsection (2), in determining whether a person has authorized another person to do any of the acts restricted by the copyright in a work, the court may take into account all the circumstances of the case and, in particular—

- (a) the extent of that person’s power (if any) to control or prevent the infringement;
- (b) the nature of the relationship (if any) between that person and that other person; and
- (c) whether that person has taken any reasonable steps to limit or stop the infringement.”.

10. Section 25 amended (Infringement by rental of work to the public)

Section 25(3)(a)—

Repeal

“, broadcasting or inclusion in a cable programme service”

Substitute

“or communicating to the public”.

11. Section 26 repealed (Infringement by making available of copies to the public)

Section 26—

Repeal the section.

12. Section 28 repealed (Infringement by broadcasting or inclusion in a cable programme service)

Section 28—

Repeal the section.

13. Section 28A added

Before section 29—

Add

“28A. Infringement by communicating to the public

- (1) The communication of a work of any description to the public is an act restricted by the copyright in the work.
- (2) References in this Part to the communication of a work to the public are to the electronic communication of the work to the public, including—
 - (a) the broadcasting of the work;
 - (b) the inclusion of the work in a cable programme service; and
 - (c) the making available of the work to the public.
- (3) References in this Part to making a work available to the public are to making the work available, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as by making works available through the Internet).
- (4) The mere provision of facilities by any person for enabling or facilitating the communication of a work to

the public does not of itself constitute an act of communicating the work to the public.

- (5) A person does not communicate a work to the public if the person does not determine the content of the communication.
- (6) For the purposes of subsection (5), a person does not determine the content of a communication only because the person takes one or more steps for the purpose of—
 - (a) gaining access to what is made available by someone else in the communication; or
 - (b) receiving the electronic transmission of which the communication consists.”.

14. Section 29 amended (Infringement by making adaptation or act done in relation to adaptation)

Section 29(2)—

Repeal

“sections 23 to 28”

Substitute

“section 23, 24, 25, 27 or 28A”.

15. Section 31 amended (Secondary infringement: possessing or dealing with infringing copy)

(1) Section 31, heading—

Repeal

“**possessing or**”.

(2) After section 31(2)—

Add

- “(3) For the purposes of subsection (1)(d), in determining whether any distribution of an infringing copy of a work is made to such an extent as to affect prejudicially the owner of the copyright, the court may take into account all the circumstances of the case and, in particular—

- (a) the purpose of the distribution;
- (b) the nature of the work, including its commercial value (if any);
- (c) the amount and substantiality of the portion copied (in relation to the work as a whole) that was distributed;
- (d) the mode of distribution; and
- (e) the economic prejudice (if any) caused to the owner of the copyright as a consequence of the distribution, including the effect of the distribution on the potential market for or value of the work.”.

16. Section 32 amended (Secondary infringement: providing means for making infringing copies)

Section 32(2)—

Repeal

“broadcasting or inclusion in a cable programme service”

Substitute

“communicating to the public”.

17. Section 35 amended (Meaning of “infringing copy”)

(1) Section 35(7)(i)—

Repeal

“reprographic copying”

Substitute

“copies made”.

(2) Section 35(7)(j), after “librarian”—

Add

“, curator”.

(3) Section 35(7)(m)—

Repeal

“or”.

(4) After section 35(7)(m)—

Add

“(ma) section 76A(2) (copies made for private and domestic use); or”.

~~18. Section 37 amended (Introductory provisions)~~

~~After section 37(5)—~~

~~**Add**~~

~~“(6) In sections 40B(5), 40C(7), 40D(7), 41A(7), 54A(3) and 72(2)—~~

~~*dealt with* (被用以進行交易), in relation to a copy of a work, means—~~

~~—(a) possessed for the purpose of or in the course of any trade or business;~~

~~—(b) sold or let for hire, or offered or exposed for sale or hire;~~

~~—(c) exhibited in public or distributed for the purpose of or in the course of any trade or business; or~~

~~—(d) distributed (otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright in the work.~~

~~—(7) For the purposes of paragraph (d) of the definitions of *dealt with* in subsection (6) and sections 41(6), 44(4) and 45(4), in determining whether any distribution of a copy of a work is made to such an extent as to affect prejudicially the owner of the copyright, the court may take into account all the circumstances of the case and, in particular—~~

~~—(a) the purpose of the distribution;~~

~~—(b) the nature of the work, including its commercial value;~~

- ~~(c) the amount and substantiality of the portion copied (in relation to the work as a whole) that was distributed;~~
- ~~(d) the mode of distribution; and~~
- ~~(e) the economic prejudice caused to the owner of the copyright as a consequence of the distribution, including the effect of the distribution on the potential market for or value of the work.”.~~

19. Section 39 amended (Criticism, review and news reporting)

(1) Section 39—

Repeal subsection (1)

Substitute

“(1) Fair dealing with a work for the purpose of criticism or review of that or another work, or of a performance of a work, does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement if—

- (a) it is accompanied by a sufficient acknowledgement; and
- (b) the work has been released or communicated to the public.”.

(2) After section 39(1)—

Add

“(1A) For the purposes of subsection (1)(b), a work has been released to the public if it has been provided to the public by any means (other than by communication to the public) including—

- (a) the issue of copies of the work to the public;
- (b) the rental of copies of the work to the public; and
- (c) the performance, exhibition, playing or showing of the work to the public.

(1B) In determining whether a work has been released or communicated to the public for the purposes of subsection (1)(b), no account is to be taken of any unauthorized act.”.

20. Section 40 amended (Incidental inclusion of copyright material)

(1) Section 40(2)—

Repeal

“or making available”.

(2) Section 40(2)—

Repeal

“, broadcasting or inclusion in a cable programme service”

Substitute

“or communicating to the public”.~~21. Section 40B amended (Making a single accessible copy for a person with a print disability)~~

~~Section 40B—~~

~~Repeal subsection (6).~~

21. Section 40B amended (Making a single accessible copy for a person with a print disability)

Section 40B—

Repeal subsection (6)

Substitute

“(6) For the purposes of subsection (5), an accessible copy is dealt with if it is—

- (a) possessed, exhibited in public or distributed, by any person other than the person by whom the copy is made or to whom the copy is supplied under subsection (1), for the purpose of or in the course of any trade or business; or

(b) sold or let for hire, or offered or exposed for sale or hire.”.

~~22. Section 40C amended (Making multiple accessible copies by specified bodies for persons with a print disability)~~

~~Section 40C—~~

~~Repeal subsection (8).~~

22. Section 40C amended (Making multiple accessible copies by specified bodies for persons with a print disability)

Section 40C—

Repeal subsection (8)

Substitute

“(8) For the purposes of subsection (7), an accessible copy is dealt with if it is—

(a) possessed, exhibited in public or distributed, by any person other than the specified body by whom the copy is made under subsection (1) or the persons to whom the copy is supplied under that subsection, for the purpose of or in the course of any trade or business; or

(b) sold or let for hire, or offered or exposed for sale or hire.”.

~~23. Section 40D amended (Intermediate copies)~~

~~Section 40D—~~

~~Repeal subsection (8)-~~23. Section 40D amended (Intermediate copies)

Section 40D—

Repeal subsection (8)

Substitute

“(8) For the purposes of subsection (7), an intermediate copy is dealt with if it is—

(a) exhibited in public or distributed, by any person other than the specified body entitled to possess the copy under subsection (1) or the specified body to whom the copy is lent or transferred under subsection (3), for the purpose of or in the course of any trade or business; or

(b) sold or let for hire, or offered or exposed for sale or hire.”.

~~24. Section 41A amended (Fair dealing for purposes of giving or receiving instruction)~~

~~Section 41A—~~

~~Repeal subsection (8).~~

24. Section 41A amended (Fair dealing for purposes of giving or receiving instruction)

Section 41A—

Repeal subsection (8)

Substitute

“(8) For the purposes of subsection (7), a copy is dealt with if it is—

(a) possessed, exhibited in public or distributed (otherwise than for the purposes mentioned

in subsection (1) for the purpose of or in the course of any trade or business; or

(b) sold or let for hire, or offered or exposed for sale or hire.”.

25. Section 41 amended (Things done for purposes of instruction or examination)

(1) Section 41(5)—

Repeal

everything after “purposes.”.

(2) Section 41(5), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品被用以進行”.

(3) After section 41(5)—

Add ~~“(6) In subsection (5) —~~

~~dealt with (被用以進行交易), in relation to a copy of a work, means —~~

~~—(a) — possessed for the purpose of or in the course of any trade or business;~~

~~—(b) — sold or let for hire, or offered or exposed for sale or hire;~~

~~—(c) — exhibited in public or distributed for the purpose of or in the course of any trade or business;~~

~~—(d) — distributed (otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright in the work; or~~

~~—(e) — communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (3).”.~~

“(6) For the purposes of subsection (5), a copy is dealt with if it is—

(a) possessed, exhibited in public or distributed (otherwise than for the purposes of instruction or examination) for the purpose of or in the course of any trade or business;

(b) sold or let for hire, or offered or exposed for sale or hire; or

(c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (3).”.

26. Section 44 amended (Recording by educational establishments of broadcasts and cable programmes)

(1) Section 44, heading—

Repeal

“Recording by educational establishments of broadcasts and cable programmes”

Substitute

“Recording, copying or communication by educational establishments: broadcasts or cable programmes”.

(2) After section 44(1)—

Add

“(1A) A person authorized by an educational establishment may, without infringing copyright, communicate to an authorized recipient a recording or copy of a recording of a broadcast or cable programme that has been made in accordance with subsection (1) if—

(a) the person makes the communication for the educational purposes of the establishment; and

- (b) the establishment takes all reasonable steps to ensure that—
- (i) only authorized recipients receive the communication; and
 - (ii) the authorized recipients do not make any copy or further transmission of the communication.”.

(3) Section 44—

Repeal subsection (2)

Substitute

“(2) Recording, copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the recording, copying or communication in question and the person making the recording, copies or communication in question knew or ought to have been aware of that fact.”.

(4) Section 44(3)—

Repeal

everything after “purposes.”.

(5) Section 44(3), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品被用以進行”.

(6) After section 44(3)—

Add

~~“(4) In this section—~~

~~*authorized recipient* (獲授權收訊人), in relation to a communication made by a person authorized by an educational establishment, means a teacher or pupil of the establishment who has been authorized by or on~~

~~behalf of the establishment to receive the communication;~~

~~*dealt with* (被用以進行交易), in relation to a copy of a work, means—~~

~~—(a) possessed for the purpose of or in the course of any trade or business;~~

~~—(b) sold or let for hire, or offered or exposed for sale or hire;~~

~~—(c) exhibited in public or distributed for the purpose of or in the course of any trade or business;~~

~~—(d) distributed (otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright in the work; or~~

~~—(e) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).”.~~

“(4) For the purposes of subsection (3), a recording or copy is dealt with if it is—

(a) possessed, exhibited in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;

(b) sold or let for hire, or offered or exposed for sale or hire; or

(c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).

(5) In this section—

authorized recipient (獲授權收訊人), in relation to a communication made by a person authorized by an educational establishment, means a teacher or pupil of the establishment who has been authorized by or on

behalf of the establishment to receive the communication.”.

27. **Section 45 amended (Reprographic copying made by educational establishments or pupils of passages from published works)**

(1) Section 45, heading—

Repeal

“Reprographic copying made by educational establishments or pupils of passages from published works”

Substitute

“Copying and communication by educational establishments or pupils: passages or extracts from published works”.

(2) Section 45(1)—

Repeal

“Reprographic copies”

Substitute

“Copies”.

(3) Section 45(1), after “musical works”—

Add

“, or extracts from published sound recordings or films.”.

(4) Section 45(1)—

Repeal

“or in the typographical arrangement”

Substitute

“in the typographical arrangement, or in the sound recording or film (as the case may be)”.

(5) After section 45(1)—

Add

“(1A) A person authorized by an educational establishment may, without infringing copyright, communicate to an authorized recipient a copy of an artistic work, a passage from a published literary, dramatic or musical work, or an extract from a published sound recording or film, that has been made in accordance with subsection (1) if—

(a) the person makes the communication for the educational purposes of the establishment; and

(b) the establishment takes all reasonable steps to ensure that—

(i) only authorized recipients receive the communication; and

(ii) the authorized recipients do not make any copy or further transmission of the communication.”.

(6) Section 45—

Repeal subsection (2)

Substitute

“(2) Copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the copying or communication in question and the person making the copies or communication in question knew or ought to have been aware of that fact.”.

(7) Section 45(3)—

Repeal

everything after “purposes.”.

(8) Section 45(3), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品被用以進行”.

(9) After section 45(3)—

Add

~~“(4) In this section—~~

~~*authorized recipient* (獲授權收訊人), in relation to a communication made by a person authorized by an educational establishment, means a teacher or pupil of the establishment who has been authorized by or on behalf of the establishment to receive the communication;~~

~~*dealt with* (被用以進行交易), in relation to a copy of a work, means—~~

~~—(a) possessed for the purpose of or in the course of any trade or business;~~

~~—(b) sold or let for hire, or offered or exposed for sale or hire;~~

~~—(c) exhibited in public or distributed for the purpose of or in the course of any trade or business;~~

~~—(d) distributed (otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright in the work; or~~

~~—(e) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).”.~~

~~“(4) For the purposes of subsection (3), a copy is dealt with if it is—~~

~~—(a) possessed, exhibited in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;~~

~~—(b) sold or let for hire, or offered or exposed for sale or hire; or~~

~~—(c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).~~

~~“(5) In this section—~~

~~*authorized recipient* (獲授權收訊人), in relation to a communication made by a person authorized by an educational establishment, means a teacher or pupil of the establishment who has been authorized by or on behalf of the establishment to receive the communication.”.~~

28. Cross-heading before section 46 substituted

Cross-heading before section 46—

Repeal the cross-heading

Substitute

“Libraries, museums and archives”.

29. Section 46 amended (Libraries and archives: introductory)

(1) Section 46, heading, after “**Libraries**”—

Add

“, museums”.

(2) Section 46(1)(b), after “libraries”—

Add

“, museums”.

(3) Section 46(1)—

Repeal

“(copying by librarians and archivists)”

Substitute

“(copying and communication by librarians, curators and archivists)”.

(4) Section 46(2)(b)—

Repeal

“library or archive” (wherever appearing)

Substitute

“library, museum or archive”.

- (5) Section 46(3)(a), after “librarian”—

Add

“, curator”.

- (6) Section 46(3)(b), after “libraries”—

Add

“, museums”.

- (7) Section 46(5), after “librarian”—

Add

“, curator”.

30. Section 48 amended (Copying by librarians: parts of published works)

- (1) Section 48(1)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work, or of a sound recording or film”.

- (2) Section 48(1)—

Repeal

“or in the typographical arrangement”

Substitute

“, in the typographical arrangement, or in the sound recording or film (as the case may be)”.

31. Section 50 amended (Copying by librarians: supply of copies to other libraries)

Section 50(1)(b)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work”.

32. Section 51 amended (Copying by librarians or archivists: replacement copies of works)

- (1) Section 51, heading—

Repeal

“Copying by librarians or archivists: replacement copies of works”

Substitute

“Copying by librarians, curators or archivists: preservation or replacement copies of works”.

- (2) Section 51(1)—

Repeal

“The librarian or archivist of a specified library or archive”

Substitute

“Subject to subsection (1A), the librarian, curator or archivist of a specified library, museum or archive”.

- (3) Section 51(1), after “the library”—

Add

“, museum”.

- (4) Section 51(1)(b)—

Repeal

“another specified library or archive”

Substitute

“another specified library, museum or archive”.

- (5) Section 51(1)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work”.

- (6) After section 51(1)—

Add

“(1A) The total number of copies made from an item in the permanent collection of a specified library, museum or archive and placed in the permanent collection of that library, museum or archive must not exceed 3 at any one time, and only one of those copies may be accessible to the public at that library, museum or archive.”.

33. Section 51A added

After section 51—

Add

“51A. Communication by librarians, curators or archivists: copies of works

- (1) If the conditions specified in subsection (2) are complied with, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, communicate a copy of an item in the permanent collection of the library, museum or archive made under section 51 to the users or staff of the library, museum or archive, by making it available online to be accessed through the use of a computer terminal installed within the premises of the library, museum or archive.
- (2) The conditions are—

(a) that only one user may access the copy at any one time; and

(b) that the library, museum or archive takes appropriate measures to prevent users from making further copies or communicating the copy to others.

- (3) Communicating to users and staff of a specified library, museum or archive is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the communication in question and the person making the communication in question knew or ought to have been aware of that fact.”.

34. Section 52 amended (Copying by librarians or archivists: certain unpublished works)

- (1) Section 52, heading, after “**librarians**”—

Add

“, **curators**”.

- (2) Section 52(1)—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

- (3) Section 52(1)(a)—

Repeal

“dramatic or musical work”

Substitute

“dramatic, musical or artistic work”.

- (4) Section 52(1), after “the library”—

Add

“, museum”.

- (5) Section 52(2)(a), after “library”—

Add

“, museum”.

- (6) Section 52(2), after “librarian”—

Add

“, curator”.

- (7) Section 52(3)(a), after “librarian”—

Add

“, curator”.

- (8) Section 52(3)(c), after “library”—

Add

“, museum”.

35. Section 52A added

After section 52—

Add

“52A. Playing or showing by librarians, curators or archivists: sound recordings or films

- (1) If the condition specified in subsection (2) is complied with, the librarian, curator or archivist of a specified library, museum or archive may play or show any sound recording or film held in the permanent collection of the library, museum or archive to an audience consisting of members of the public within the premises of the library, museum or archive, without infringing copyright in the sound recording or film or any work included in the sound recording or film.
- (2) The condition is that if the audience is required to pay for the playing or showing of the sound recording or film, the payment required is no more than a reasonable contribution towards the maintenance of the library, museum or archive.

- (3) The playing or showing of a sound recording or film is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the playing or showing in question and the person playing or showing the sound recording or film in question knew or ought to have been aware of that fact.”.

36. Section 53 amended (Copying by librarians or archivists: articles of cultural or historical importance)

- (1) Section 53, heading, after “**librarians**”—

Add

“, **curators**”.

- (2) Section 53—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

- (3) Section 53—

Repeal

“the specified library”

Substitute

“the library, museum”.

~~**37. Section 54A amended (Fair dealing for purposes of public administration)**~~

~~Section 54A—~~

~~**Repeal subsection (4).**~~

37. Section 54A amended (Fair dealing for purposes of public administration)

Section 54A—

Repeal subsection (4)**Substitute**

“(4) For the purposes of subsection (3), a copy is dealt with if it is—

(a) possessed, exhibited in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or

(b) sold or let for hire, or offered or exposed for sale or hire.”.

38. Section 55 amended (Statutory inquiries)

Section 55(3)—

Repeal

“the issue or making available to the public of copies of the report of a statutory inquiry containing the work or material from it”

Substitute

“making available to the public the report of a statutory inquiry containing the work or material from it or by issuing copies of the report to the public”.

39. Section 56 amended (Material open to public inspection or on official register)

Section 56(3)—

Repeal

“the copying or issuing or making available to the public of copies of the material”

Substitute

“copying the material, making the material available to the public or issuing copies of the material to the public”.

40. Section 57 amended (Material communicated to the Government in the course of public business)

(1) Section 57(2)—

Repeal

“or issue or make available copies of the work to the public”

Substitute

“make the work available to the public or issue copies of the work to the public”.

(2) Section 57(3)—

Repeal

“or issue or make available copies of a work to the public”

Substitute

“make a work available to the public or issue copies of a work to the public”.

41. Section 65A added

After section 65—

Add**“65A. Temporary reproduction by service providers**

(1) The copyright in a work is not infringed by the making and storage of a copy of the work by a service provider if—

(a) the sole purpose of the making and storage of the copy is to enable more efficient transmission of the work by the service provider through a network;

(b) the making and storage of the copy forms an automatic and essential part of a technological process, and that process neither modifies the work, nor interferes with the lawful use of technology to obtain data on the use of the work;

(c) the storage of the copy is temporary;

- (d) the service provider updates the database in which the copy is stored in accordance with reasonable industry practice;
- (e) the service provider complies with conditions (if any) on access to the work; and
- (f) the service provider acts promptly to remove the copy or disable access to the copy ~~when~~ when in the event that either of the following facts comes to the service provider's actual knowledge—
 - (i) the work has been removed from the original source from which the copy was made; or
 - (ii) access to the work at the original source from which the copy was made has been disabled.

~~(2) In this section—~~

~~*service provider* (服務提供者) has the meaning given by section 88A.”~~

~~(2) In this section—~~

hosting (寄存) means providing space on a network server or any electronic retrieval system for storage of information or material at the direction of a user;

information location tools (資料搜尋工具) means tools such as directories, indexes, references, pointers, or hypertext links that link or refer users to an online location;

~~*routing* (路由選擇) means directing or choosing the means or routes for the transmission of data;~~

~~*service provider* (服務提供者) means a person who, by means of electronic equipment or a network, or both, provides, or operates facilities for, any online services.~~

online service (聯線服務) includes —

- (a) the transmission, routing, or provision of connections for digital online communications, between or among points specified by a user, of material of the user's choosing;

(b) the hosting of information or material that can be accessed by a user;

(c) the storing of information or material on a system or network that can be accessed by a user.

(d) the linking or referral of users to an online location by the use of information location tools; and

(e) the provision of online social networking services to users;

routing (路由選擇) means directing or choosing the means or routes for the transmission of data;

service provider (服務提供者) means a person who, by means of electronic equipment or a network, or both, provides, or operates facilities for, any online services.

42. Section 71 amended (Representation of certain artistic works on public display)

Section 71(3)—

Repeal

“issue or making available to the public of copies, or the broadcasting or inclusion in a cable programme service,”

Substitute

“issue to the public of copies, or the communication to the public,”.

43. Section 72 amended (Advertisement of sale of artistic work)

(1) Section 72(2)—

Repeal

everything after “purposes.”.

- (2) Section 72(2), Chinese text—

Repeal

“有人進行該複製品的”

Substitute

“該複製品被用以進行”.

- (3) After section 72(2) —

Add

“(3) For the purposes of subsection (2), a copy is dealt with if it is—

(a) possessed, exhibited in public or distributed (otherwise than for the purpose mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or

(b) sold or let for hire, or offered or exposed for sale or hire.”.

44. Section 76A added

After section 76—

Add

“76A. Copying sound recordings for private and domestic use

- (1) Copyright in a sound recording or in any literary, dramatic or musical work included in a sound recording is not infringed by the making of a copy of the sound recording (*private copy*) if—
- (a) the copy of the sound recording from which the private copy is made (*original copy*) is not an infringing copy;
- (b) the private copy is made by the lawful owner (*owner*) of the original copy solely for the private

and domestic use by the owner or a member of the household in which the owner lives;

- (c) not more than one private copy of the original copy is made and stored in each device lawfully owned by the owner; and
- (d) the owner retains the ownership of both the original copy and the private copy.
- (2) A private copy that, but for subsection (1), would be an infringing copy is to be treated as an infringing copy if—
- (a) it is used otherwise than for the purpose mentioned in subsection (1)(b); or
- (b) the condition mentioned in subsection (1)(c) or (d) is broken.”.

45. Part II, Division IIIA added

Part II, after section 88—

Add

“Division IIIA

Limitations on Liability of Service Providers Relating to Online Materials

88A. Definitions

In this Division—

code of practice (《實務守則》) means the code of practice published by the Secretary for Commerce and Economic Development under section 88I;

complainant (投訴人), in relation to a notice of alleged infringement given to a service provider, means the person who gives the notice;

counter notice (異議通知) means a notice given to a service provider under section 88D(13) in relation to an alleged copyright infringement; ~~*hosting* (寄存) means providing~~

~~space on a network server or any electronic retrieval system for storage of information or material at the direction of a user;~~

~~**information location tools** (資料搜尋工具) means tools such as directories, indexes, references, pointers, or hypertext links that refer or link users to an online location;~~

notice of alleged infringement (指稱侵權通知) means a notice given to a service provider under section 88C(1) in relation to an alleged copyright infringement;

~~**online service** (聯線服務) includes—~~

- ~~— (a) the transmission, routing, or provision of connections for or access to digital online communications, between or among points specified by a user, of material of the user's choosing;~~
- ~~— (b) the hosting of material that can be accessed by a user;~~
- ~~— (c) the storing of material in a person's system or network temporarily as an automatic response to the request of another person without modifying the material;~~
- ~~— (d) the linking or referral of users to an online location by the use of information location tools;~~
- ~~— (e) the provision of application-based services to users such as social networking services; and~~
- ~~— (f) the provision of access to the Internet;~~

~~**online service** (聯線服務) has the meaning given by section 65A(2) but does not include any service provided through an intranet;”.~~

~~**routing** (路由選擇) means directing or choosing the means or routes for the transmission of data;~~

personal data (個人資料) has the meaning given by section 2(1) of the Personal Data (Privacy) Ordinance (Cap. 486);

service platform (服務平台), in relation to a service provider, means a system or network controlled or operated by or for the service provider that is accessible to the users of online services provided by the service provider;

service provider (服務提供者) means a person who, by means of electronic equipment or a network, or both, provides ~~or operates facilities for, or operates facilities for,~~ any online services;

standard technical measures (標準技術措施) means any technical measure widely accepted by the industry that—

- (a) is used to identify or protect copyright works;
- (b) has been developed through an open, voluntary process by a broad consensus of copyright owners and service providers;
- (c) is available to any person on reasonable and non-discriminatory terms; and
- (d) does not impose substantial costs on service providers or substantial burdens on the systems or networks controlled or operated by or for service providers.

88B. Limitations on liability of service providers

- (1) If the conditions specified in subsection (2) are complied with, a service provider is not liable for damages or any other pecuniary remedy for infringement of the copyright in a work that occurs on the service provider's service platform merely because the service provider provides ~~or operates facilities for, or operates facilities for,~~ online services.
- (2) The conditions are—

- (a) that the service provider has taken reasonable steps to limit or stop the infringement as soon as practicable after the service provider—
 - (i) received a notice of alleged infringement in relation to the infringement;
 - (ii) became aware that the infringement has occurred; or
 - (iii) became aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred;
 - (b) that the service provider has not received and is not receiving any financial benefit directly attributable to the infringement;
 - (c) that the service provider accommodates and does not interfere with standard technical measures that are used by copyright owners to identify or protect their copyright works; and
 - (d) that the service provider designates an agent to receive notices of alleged infringements, by supplying through the service provider's service, including on the service provider's website in a location accessible to the public, ~~the name, address, telephone number and electronic mail address of the agent.~~ the agent's name and contact details.
- (3) For the purposes of subsection (2)(a), a service provider is to be treated as having taken reasonable steps to limit or stop the infringement in question if the service provider complies with all the provisions in the code of practice respecting the course of action that a service provider may adopt in limiting or stopping an alleged infringement.
- (4) For the purposes of subsection (2)(b)—
- (a) in determining whether a service provider has received or is receiving a financial benefit directly

attributable to the infringement in question, the court may take into account all the circumstances of the case and, in particular—

- (i) industry practice in relation to the charging for online services provided by other service providers that are similar to the online service to which the infringement relates;
 - (ii) whether the fee of the online service provided by the service provider is for, and the value of the online service provided by the service provider lies in, providing access to infringing material; and
 - (iii) whether the financial benefit obtained by the service provider for providing the online service to which the infringement relates was greater than the benefit that would usually result from charging for the online service in accordance with accepted industry practices; and
- (b) financial benefits directly attributable to the infringement do not include one-off set up fees or flat periodic payments that are charged by the service provider in respect of all users on a non-discriminatory basis.
- (5) To avoid doubt—
- (a) nothing in this Division requires a service provider to—
 - (i) monitor the service provider's service or actively seek facts that indicate infringing activity, except to the extent consistent with a standard technical measure complying with subsection (2)(c); or
 - (ii) gain access to, remove, or disable access to material in cases where such actions are prohibited by law,

in order to qualify for the limitations on liability established by this section; and

- (b) the failure of a service provider to qualify for the limitations on liability established by this section has no adverse bearing on the consideration of any defence that may be available to the service provider in proceedings for infringement of copyright.
- (6) This section does not apply to proceedings for infringement of copyright commenced before the day on which this section comes into operation.

88C. Notice of alleged infringement

- (1) If it is alleged that an infringement of the copyright in a work has occurred or is occurring on a service provider's service platform, a notice in respect of the alleged infringement may be given to the service provider under this section.
- (2) A notice of alleged infringement—
 - (a) must be in writing;
 - ~~(ab) (if the service provider specifies the form of the notice under subsection (5)) must be in the form specified by the service provider;~~
 - (b) must be signed or otherwise authenticated by the owner of the allegedly infringed copyright or that owner's authorized representative; and
 - (c) must be provided to the designated agent of the service provider by ~~electronic or other means~~the means specified by the service provider under subsection (6).
- (3) A notice of alleged infringement—
 - ~~(a) must contain the name and address of the complainant and any other information that is~~

~~reasonably sufficient for contacting the complainant;~~

- ~~(b) must substantially identify the copyright work that is alleged to have been infringed or, if the notice alleges that multiple copyright works have been infringed at a single online site, must identify a representative number of such works;~~
- ~~(a) must contain the complainant's name and address for service in Hong Kong and any other information that is reasonably sufficient for contacting the complainant;~~
- ~~(b) must substantially identify the copyright work that is alleged to have been infringed;~~
- (c) must identify—
 - (i) the material, or the link or reference to the material, that is alleged to be infringing or to be the subject of infringing activity;
 - (ii) the activity, or the link or reference to the activity, that is alleged to be infringing;
- (d) must contain information sufficient to enable the service provider to locate the material, activity, link or reference mentioned in paragraph (c);
- ~~(da) must contain a description of how the material or activity mentioned in paragraph (c) infringes the rights of the copyright owner of the copyright work;~~
- (e) must contain a statement to the effect that the complainant believes in good faith that use of the material, or conduct of the activity, in the manner complained of is not authorized by law, and has not been authorized by the copyright owner or the authorized representative of the copyright owner;
- (f) must contain a statement to the effect that the complainant requests the service provider to—

- (i) send a copy of the notice to the service provider's subscriber whose account for online services has been used or involved in the alleged infringement; and
 - (ii) if applicable, remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates; and
- (g) must contain a declaration to the effect that—
- (i) the information contained in the notice is true and accurate to the best of the complainant's knowledge and belief;
 - (ii) the complainant is the copyright owner or is authorized to act on behalf of the copyright owner; and
 - (iii) the complainant understands that the complainant commits an offence and is liable to pay compensation by way of damages to any person who suffers loss or damage as a result of any false statement contained in the notice.
- (4) A notice of alleged infringement that does not comply with subsections (2) and (3) is of no effect for the purposes of section 88B(2)(a).

(5) For the purposes of subsection (2)(ab), a service provider may specify the form of a notice of alleged infringement in so far as it is not inconsistent with the provisions in subsection (3).

(6) For the purposes of subsection (2)(c), a service provider must specify, through the service provider's service (which may include on the service provider's website), the means (which may include electronic means) by which a notice of alleged infringement is to be provided to the designated agent of the service provider.

(7) On receiving a notice of alleged infringement from a complainant, a service provider may—

(a) send a copy of the notice to the service provider's subscriber whose account for online services has been used or involved in the alleged infringement;

(b) notify the subscriber that the subscriber may contact the complainant directly;

(c) remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates; and

(d) (if the service provider removes the material to which the alleged infringement relates, or disables access to the material or activity to which the alleged infringement relates) notify the subscriber of the removal or disabling.

88CA. Notice given by service provider

If a service provider becomes aware that an infringement of the copyright in a work has occurred on the service provider's service platform or becomes aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, the service provider may—

(a) remove the material to which the infringement relates, or disable access to the material or activity to which the infringement relates; and

(b) by notice in writing given to the service provider's subscriber whose account for online services has been used or involved in the infringement, notify the subscriber of the removal or disabling.

88D. Counter notice

- ~~(1) On receiving a notice of alleged infringement from a complainant, a service provider may—~~
- ~~(a) send a copy of the notice to the service provider's subscriber whose account for online services has been used or involved in the alleged infringement; and~~
 - ~~(b) notify the subscriber that the subscriber may contact the complainant directly.~~
- ~~(2) If a service provider becomes aware that an infringement of the copyright in a work has occurred on the service provider's service platform or becomes aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, the service provider may—~~
- ~~(a) remove the material to which the infringement relates, or disable access to the material or activity to which the infringement relates; and~~
 - ~~(b) by notice in writing given to the service provider's subscriber whose account for online services has been used or involved in the infringement, notify the subscriber of the removal or disabling.~~
- ~~(3) On receiving a copy of notice of alleged infringement sent by the service provider under subsection (1) or a notice given by the service provider under subsection (2), the subscriber may give a counter notice to the service provider—~~
- ~~(a) disputing or denying the infringement alleged by the complainant or service provider; and~~
 - ~~(b) if the service provider has removed any material, or disabled access to any material or activity, requesting the service provider to take reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.~~

- (1) Within a reasonable time after receiving a copy of notice of alleged infringement sent by the service provider under section 88C(7) in respect of the matter mentioned in section 88C(7)(d) or a notice given by the service provider under section 88CA(b), the service provider's subscriber may give a counter notice to the service provider—
- (a) disputing or denying the infringement alleged by the complainant or service provider; and
 - (b) requesting the service provider to take reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.
- (4) A counter notice—
- (a) must be in writing;
 - (ab) (if the service provider specifies the form of the notice under subsection (7)) must be in the form specified by the service provider;
 - (b) must be signed or otherwise authenticated by the subscriber; and
 - (c) must be provided to the designated agent of the service provider by electronic or other means the means specified by the service provider under subsection (8).
- (5) A counter notice—
- ~~(a) must contain the name, address and telephone number of the subscriber;~~
 - (a) must contain the subscriber's name and address for service in Hong Kong and any other information that is reasonably sufficient for contacting the subscriber;
 - (b) must identify—
 - (i) the material that has been removed or to which access has been disabled, and the

- location at which the material appeared before it was removed or access to it was disabled;
- (ii) the activity to which access has been disabled, and the location at which the activity appeared before access to it was disabled;
 - (c) must contain a statement to the effect that the subscriber believes in good faith that the material was removed, or access to the material or activity was disabled, as a result of a mistake or misidentification; ~~and~~
 - (ca) must contain the grounds for the subscriber's belief mentioned in paragraph (c);
 - (cb) (if the subscriber is an individual) must state whether the subscriber opts for or against the service provider's disclosure of the subscriber's personal data contained in the counter notice to the complainant; and
 - (d) must contain a declaration to the effect that—
 - (i) the information contained in the counter notice is true and accurate to the best of the subscriber's knowledge and belief; and
 - (ii) the subscriber understands that the subscriber commits an offence and is liable to pay compensation by way of damages to any person who suffers loss or damage as a result of any false statement contained in the counter notice.
 - (6) A counter notice that does not comply with subsections (4) and (5) is of no effect for the purposes of subsection (3)(b).
 - (7) For the purposes of subsection (4)(ab), a service provider may specify the form of a counter notice in so far as it is not inconsistent with the provisions in subsection (5).

- (8) For the purposes of subsection (4)(c), a service provider must specify, through the service provider's service (which may include on the service provider's website), the means (which may include electronic means) by which a counter notice is to be provided to the designated agent of the service provider.

88E. Offence of making false statements

- (1) A person commits an offence if the person—
 - (a) makes any statement in a notice of alleged infringement or counter notice that the person knows to be false in a material respect; or
 - (b) recklessly makes any statement in a notice of alleged infringement or counter notice that is false in a material respect.
- (2) A person who commits an offence under subsection (1) is liable on conviction to a fine at level 2 and to imprisonment for 2 years.

88F. Civil liability for making false statements

- (1) Any person who makes any statement in a notice of alleged infringement or counter notice that the person knows to be false, or does not believe to be true, in a material respect, is liable in damages to any person who suffers loss or damage as a result of the making of the statement.
- (2) In this section—

loss or damage (損失或損害), in relation to a statement, means loss or damage that is reasonably foreseeable as likely to result from the making of the statement.

88G. Exemption of service providers from liability for removal of material etc.

- (1) Subject to subsection (2), if a service provider has, in good faith, removed any material, or disabled access to

any material or activity, pursuant to a notice of alleged infringement, the service provider is not liable to any person for any claim made in respect of the removal or disabling, whether or not the material or activity is ultimately determined to be infringing.

- (2) Subsection (1) does not apply with respect to material residing at the direction of a subscriber of the service provider on the service provider's service platform and that is removed, or to material or activity residing at the direction of a subscriber of the service provider on the service provider's service platform and to which access is disabled, unless—
- (a) the service provider takes reasonable steps to notify the subscriber that the service provider has removed the material or disabled access to the material or activity;
 - (b) the service provider takes reasonable steps to send a copy of the notice of alleged infringement to the subscriber; and
 - (c) where the subscriber gives a counter notice to the service provider—
 - (i) the service provider promptly sends a copy of the counter notice to the complainant; ~~and~~
 - (ia) (if the subscriber is an individual) the service provider acts in accordance with the subscriber's option stated in the counter notice under section 88D(5)(cb); and
 - (ii) subject to subsection (7), the service provider takes reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.
- (3) Subject to subsection (4), if a service provider has, in good faith, removed any material, or disabled access to any material or activity, after the service provider

became aware that the material or activity relates to an infringement of copyright or became aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, the service provider is not liable to any person for any claim made in respect of the removal or disabling, whether or not the material or activity is ultimately determined to be infringing.

- (4) Subsection (3) does not apply with respect to material residing at the direction of a subscriber of the service provider on the service provider's service platform and that is removed, or to material or activity residing at the direction of a subscriber of the service provider on the service provider's service platform and to which access is disabled, unless—
- (a) the service provider takes reasonable steps to notify the subscriber that the service provider has removed the material or disabled access to the material or activity;
 - (b) the service provider takes reasonable steps to provide the subscriber with—
 - (i) information reasonably sufficient to enable the subscriber to identify the material or activity; and
 - (ii) the service provider's reasons for the removal or disabling; and
 - (c) subject to subsection (7), where the subscriber gives a counter notice to the service provider, the service provider takes reasonable steps to reinstate the material, or cease disabling access to the material or activity, within a reasonable time after receiving the counter notice.
- (5) Subject to subsections (6) and (7), if a service provider has, in good faith, reinstated any material, or ceased disabling access to any material or activity, pursuant to a

counter notice, the service provider is not liable to any person for any claim made in respect of the reinstatement or cessation, whether or not the material or activity is ultimately determined to be infringing.

~~(6) Subsection (5) does not apply in a case where the material was removed, or access to the material or activity was disabled, pursuant to a notice of alleged infringement unless the service provider takes reasonable steps to send a copy of the counter notice to the complainant.~~

~~(7) Subsections (2)(c)(ii), (4)(c) and (5) do not apply if the designated agent of the service provider has been notified that proceedings have been commenced in Hong Kong seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material or activity on the service provider's service platform.~~

(6) Subsection (5) does not apply in a case where the material was removed, or access to the material or activity was disabled, pursuant to a notice of alleged infringement unless—

(a) the service provider promptly sends a copy of the counter notice to the complainant; and

(b) (if the subscriber is an individual) the service provider acts in accordance with the subscriber's option stated in the counter notice under section 88D(5)(cb).

(7) Subsections (2)(c)(ii), (4)(c) and (5) do not apply if—

(a) proceedings have been commenced in Hong Kong seeking a court order in connection with any infringing activity that relates to the material or activity mentioned in those subsections; and

(b) the designated agent of the service provider has been notified in writing, by the person who brings the proceedings, of the proceedings—

(i) in the case of subsection (2)(c)(ii) or (5), within a reasonable time after the service provider sent a copy of the counter notice to the complainant; or

(ii) in the case of subsection (4)(c), within a reasonable time after the service provider received the counter notice.

88H. Evidence of compliance with conditions

In an action relating to the liability of a service provider, if the service provider adduces evidence tending to show that the service provider has complied with—

(a) a condition described in section 88B; or

(b) a condition specified in the code of practice,

the court must presume, in the absence of evidence to the contrary, that the service provider has complied with that condition.

88I. Code of practice

(1) The Secretary for Commerce and Economic Development may publish in the Gazette a code of practice for providing practical guidance to service providers in respect of this Division.

(2) Without limiting subsection (1), the Secretary for Commerce and Economic Development may in the code of practice specify—

(a) the procedures for giving a notice of alleged infringement or counter notice, including the forms of and information to be contained in the notice, the manner of sending the notice and the manner of verification of statements in the notice; and

(b) the course of action that a service provider may adopt on receiving a notice of alleged infringement or counter notice.

- (3) The Secretary for Commerce and Economic Development may from time to time revise the whole or any part of the code of practice published under subsection (1) in a manner consistent with the Secretary's power to publish the code under that subsection, and any reference to the code of practice in this Ordinance is to be construed as including a reference to the code as so revised.
- (4) Any code of practice published under subsection (1) is not subsidiary legislation.”.

46. Section 89 amended (Right to be identified as author or director)

- (1) Section 89(2)(a)—
Repeal
 “, broadcast or included in a cable programme service”
Substitute
 “or communicated to the public”.
- (2) Section 89(2)—
Repeal paragraph (b)
Substitute
 “(b) a film or sound recording including the work is made available to the public, or copies of such a film or sound recording are issued to the public,”.
- (3) Section 89(3)(a)—
Repeal
 “, broadcast or included in a cable programme service”
Substitute
 “or communicated to the public”.
- (4) Section 89(3)—
Repeal paragraph (b)
Substitute

- “(b) a sound recording of the work is made available to the public, or copies of such a sound recording are issued to the public; or”.
- (5) Section 89(3)—
Repeal paragraph (c)
Substitute
 “(c) a film of which the sound-track includes the work is shown in public or made available to the public, or copies of such a film are issued to the public,”.
- (6) Section 89(4)(a)—
Repeal
 “broadcast or included in a cable programme service”
Substitute
 “communicated to the public”.
- (7) Section 89(4)—
Repeal paragraph (b)
Substitute
 “(b) a film including a visual image of the work is shown in public or made available to the public, or copies of such a film are issued to the public; or”.
- (8) Section 89(4)(c)—
Repeal
 “copies of a graphic work representing it, or of a photograph of it, are issued or made available to the public”
Substitute
 “a graphic work representing it or a photograph of it is made available to the public, or copies of such a graphic work or photograph are issued to the public”.
- (9) Section 89(6)—
Repeal
 “, broadcast or included in a cable programme service”

Substitute

“or communicated to the public.”.

- (10) Section 89(6)—

Repeal

“or made available”.

- (11) Section 89(7)(a)—

Repeal

“or making available”.

- (12) After section 89(7)(a)—

Add

“(aa) in the case of making a film or sound recording available to the public, to be identified in or on the film or sound recording or, if that is not appropriate, in some other manner likely to bring the author or director’s identity to the notice of a person acquiring the film or sound recording;”.

- (13) Section 89(7)(c)—

Repeal

“, broadcast or cable programme”

Substitute

“or communication”.

47. Section 92 amended (Right to object to derogatory treatment of work)

- (1) Section 92(3)(a)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

- (2) Section 92(3)—

Repeal paragraph (b)**Substitute**

“(b) makes available to the public a film or sound recording of, or including, a derogatory treatment of the work, or issues copies of such a film or sound recording to the public.”.

- (3) Section 92(4)(a)—

Repeal

“, or broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

- (4) Section 92(4)(b)—

Repeal

“or issues or makes available to the public copies of such a film”

Substitute

“, makes such a film available to the public or issues copies of such a film to the public”.

- (5) Section 92(4)(c)—

Repeal

“issues or makes available to the public copies of a graphic work representing, or of a photograph of, a derogatory treatment of the work”

Substitute

“makes available to the public a graphic work representing, or a photograph of, a derogatory treatment of the work, or issues copies of such a graphic work or photograph to the public”.

- (6) Section 92(6)(a)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

- (7) Section 92(6)(b)—

Repeal

“or makes available”.

48. Section 96 amended (False attribution of work)

- (1) Section 96(3)(a)—

Repeal

“, broadcasts it or includes it in a cable programme service”

Substitute

“or communicates it to the public”.

- (2) Section 96(3)(b)—

Repeal

“, broadcasts it or includes it in a cable programme service”

Substitute

“or communicates it to the public”.

49. Section 108 amended (Provisions as to damages in infringement action)

- (1) Section 108(2)(b)—

Repeal

“and”.

- (2) Section 108(2)(c)—

Repeal

“records;”

Substitute

“records;”.

- (3) After section 108(2)(c)—

Add

~~“(d) the conduct of the defendant after the act constituting the infringement occurred, including but not limited to the conduct of the defendant after having been informed of the infringement; and~~

“(d) any unreasonable conduct of the defendant after the act constituting the infringement occurred, including any act done or attempt made by the defendant to destroy, conceal or disguise evidence of the infringement after having been informed of the infringement by the plaintiff; and

- (e) the likelihood of widespread circulation of infringing copies as a result of the infringement.”.

50. Section 116 amended (Presumptions relevant to sound recordings, films and computer programs)

Section 116(5)—

Repeal

“, broadcast or included in a cable programme service”
(wherever appearing)

Substitute

“or communicated to the public”.

51. Section 118 amended (Offences in relation to making or dealing with infringing articles, etc.)

- (1) After section 118(2)—

Add

~~“(2AA) For the purposes of subsection (1)(g), in determining whether any distribution of an infringing copy of the work is made to such an extent as to affect prejudicially the copyright owner, the court may take into account all the circumstances of the case and, in particular—~~

~~—(a) the purpose of the distribution;~~

~~—(b) the nature of the work, including its commercial value;~~

- ~~(c) the amount and substantiality of the portion copied (in relation to the work as a whole) that was distributed;~~
- ~~(d) the mode of distribution; and~~
- ~~(e) the economic prejudice caused to the copyright owner as a consequence of the distribution, including the effect of the distribution on the potential market for or value of the work.”~~

“(2AA) For the purposes of subsection (1)(g), in determining whether any distribution of an infringing copy of the work is made to such an extent as to affect prejudicially the copyright owner, the court may take into account all the circumstances of the case and, in particular, whether more than trivial economic prejudice is caused to the copyright owner as a consequence of the distribution having regard to, amongst others—

- (a) the nature of the work, including its commercial value (if any);
- (b) the mode and scale of distribution; and
- (c) whether the infringing copy so distributed amounts to a substitution for the work.”

(2) Section 118(2E)—

Repeal

“recording by the Hong Kong Film Archive”

Substitute

“recording by a specified-designated library, museum or archive”.

(3) Section 118(2E)(a)—

Repeal

“the Hong Kong Film Archive”

Substitute

“the library, museum or archive”.

(4) Section 118(2E)(b)—

Repeal

“the Hong Kong Film Archive”

Substitute

“the library, museum or archive”.

(5) Section 118(2F)—

Repeal

“recording by the Hong Kong Film Archive”

Substitute

“recording by a specified-designated library, museum or archive”.

(6) Section 118(2F)(a)—

Repeal

“the Hong Kong Film Archive” (wherever appearing)

Substitute

“the library, museum or archive”.

(6A) After section 118(2F)—

Add

“(2FA) In subsections (2E) and (2F), references to a designated library, museum or archive are to—

(a) a library, museum or archive owned by the Government; or

(b) a library, museum or archive designated by the Secretary for Commerce and Economic Development under subsection (2FB).

(2FB) The Secretary for Commerce and Economic Development may, having regard to the advice of

the Director of Leisure and Cultural Services, by notice published in the Gazette, designate, for the purposes of subsection (2FA)(b), any library, museum or archive that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112).”.

(7) Before section 118(9)—

Add

“(8B) A person commits an offence if the person—

- (a) without the licence of the copyright owner of a copyright work, communicates the work to the public for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward; or
- (b) without the licence of the copyright owner of a copyright work, communicates the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner.

~~—(8C) For the purposes of subsection (8B)(b), in determining whether any communication of the work to the public is made to such an extent as to affect prejudicially the copyright owner, the court may take into account all the circumstances of the case and, in particular—~~

- ~~—(a) the purpose of the communication;~~
- ~~—(b) the nature of the work, including its commercial value;~~
- ~~—(c) the amount and substantiality of the portion communicated in relation to the work as a whole;~~
- ~~—(d) the mode of communication; and~~
- ~~—(e) the economic prejudice caused to the copyright owner as a consequence of the communication;~~

~~including the effect of the communication on the potential market for or value of the work.~~

~~(8C) For the purposes of subsection (8B)(b), in determining whether any communication of the work to the public is made to such an extent as to affect prejudicially the copyright owner, the court may take into account all the circumstances of the case and, in particular, whether more than trivial economic prejudice is caused to the copyright owner as a consequence of the communication having regard to, amongst others—~~

- ~~(a) the nature of the work, including its commercial value (if any);~~
- ~~(b) the mode and scale of communication; and~~
- ~~(c) whether the communication amounts to a substitution for the work.~~

(8D) It is a defence for a person charged with an offence under subsection (8B) to prove that the person did not know and had no reason to believe that, by communicating the work in question in the circumstances described in subsection (8B)(a) or (b), the person was infringing the copyright in the work.”.

~~52. Section 119 amended (Penalties for offences under section 118)~~

~~Section 119(1) —~~

~~Repeal~~

~~“section 118(1) or (2A)”~~

~~Substitute~~

~~“section 118(1), (2A) or (8B)”.~~

52. Section 119 amended (Penalties for offences under section 118)

After section 119(1)—

Add

“(1A) A person who commits an offence under section 118(8B) is liable on conviction on indictment to a fine at level 5 in respect of each copyright work and to imprisonment for 4 years.”.

53. Section 121 amended (Affidavit evidence)

(1) After section 121(2C)—

Add

“(2CA) For the purposes of any proceedings instituted under section 118(8B), an affidavit that purports to have been made by or on behalf of the copyright owner of a copyright work and which—

- (a) states the name of the copyright owner; and
- (b) states that the person named in the affidavit does not have the licence of the copyright owner to do an act referred to in section 118(8B) in respect of the work,

is, subject to the conditions contained in subsection (4), to be admitted without further proof in the proceedings.”.

(2) Section 121(3), after “(2C)”—

Add

“, (2CA)”.

(3) Section 121(4), after “(2C)”—

Add

“, (2CA)”.

(4) Section 121(7), after “(2C)”—

Add

“, (2CA)”.

(5) Section 121(13)(a), after “(2C)”—

Add

“, (2CA)”.

54. Section 154 amended (Licensing schemes to which sections 155 to 166 apply)

(1) Section 154—

Repeal paragraph (d)

Substitute

“(d) communicating the work to the public;”.

(2) Section 154(e)—

Repeal

“or making available”.

55. Section 161 amended (Licences to which sections 162 to 166 apply)

(1) Section 161—

Repeal paragraph (d)

Substitute

“(d) communicating the work to the public;”.

(2) Section 161(e)—

Repeal

“or making available”.

56. Section 199 amended (Index of defined expressions)

(1) Section 199, English text, Table—

Repeal

“librarian (in sections 45 to 52)”

Substitute

“librarian (in sections 46 to 53)”.

(2) Section 199, Table—

Repeal

“make available copies to the public section 26”.

(3) Section 199, Table—

Repeal

“specified library or archive (in sections 46 to 52)”

Substitute

“specified library, museum or archive (in sections 46 to 53)”.

~~(4) Section 199, Table—~~

Add in alphabetical order

~~“communication to the public — section 28A
curator (in sections 46 to 53) — section 46(5)”.~~

~~(4) Section 199, Table—~~

Add in alphabetical order

~~“communication to the public — section 28A(2)
curator (in sections 46 to 53) — section 46(5)
make available to the public — section 28A(3)”.~~

57. Section 200 amended (Rights conferred on performers and persons having fixation rights)

Section 200(2), definition of *fixation*—

Repeal paragraph (b)**Substitute**

“(b) made from a communication to the public including the performance; or”.

58. Section 202 amended (Consent required for fixation, etc. of unfixed performance)

(1) Section 202(1)—

Repeal paragraph (b)**Substitute**

“(b) communicates to the public live the whole or any substantial part of a qualifying performance; or”.

(2) Section 202(1)—

Repeal paragraph (c)**Substitute**

“(c) makes a fixation of the whole or any substantial part of a qualifying performance directly from a communication to the public which includes the unfixed performance.”.

(3) Section 202—

Repeal subsection (4).

59. Section 203 amended (Consent required for copying of fixation)

Section 203(3), after “electronic means”—

Add

“, and making a copy that is transient or is incidental to some other use of the fixation”.

60. Section 205 amended (Consent required for making available of copies to public)

(1) Section 205, heading—

Repeal

“copies”

Substitute

“fixations”.

(2) Section 205(1)—

Repeal

“copies of”.

(3) Section 205(2)—

Repeal

“making available to the public of copies of a fixation of a performance”

Substitute

“making a fixation of a performance available to the public”.

- (4) Section 205(2)—
Repeal
 “making available of copies of the fixation”
Substitute
 “making the fixation available”.
- (5) Section 205(2)—
Repeal
 “the making available of copies of works through the service commonly known as the INTERNET”
Substitute
 “by making fixations available through the Internet”.
- (6) Section 205—
Repeal subsection (3).
- (7) Section 205—
Repeal subsection (4)
Substitute
 “(4) The mere provision of facilities by any person for enabling or facilitating the making available of fixations to the public does not of itself constitute an act of making the fixations available to the public.”.
- (8) Section 205(5)—
Repeal
 “copies of”.
- 61. Section 206 amended (Infringement of performer’s rights by use of fixation made without consent)**
- (1) Section 206(1)(b)—
Repeal
 “broadcasts or includes in a cable programme service”
Substitute
- “communicates to the public”.
- (2) Section 206—
Repeal subsection (2).
- 62. Section 207A amended (Infringement of performers’ rights by renting copies to the public without consent)**
 Section 207A(2)(b)(i)—
Repeal
 “, broadcasting or inclusion in a cable programme service”
Substitute
 “or communicating to the public”.
- 63. Section 210 amended (Infringement of fixation rights by use of fixation made without consent)**
- (1) Section 210(1)(b)—
Repeal
 “broadcasts or includes in a cable programme service”
Substitute
 “communicates to the public”.
- (2) Section 210—
Repeal subsection (2).
- (3) Section 210(3)—
Repeal
 “or (2)”.
- 64. Section 214 amended (Duration of rights)**
 Section 214(3)—
Repeal
 “, broadcast, included in a cable programme service or made available to the public”
Substitute

“or communicated to the public”.

65. Section 221 amended (Provisions as to damages in infringement action)

(1) Section 221(2)(b)—

Repeal

“and”.

(2) Section 221(2)(c)—

Repeal

“records;”

Substitute

“records;”.

(3) After section 221(2)(c)—

Add

~~“(d) the conduct of the defendant after the act constituting the infringement occurred, including but not limited to the conduct of the defendant after having been informed of the infringement; and~~

(d) any unreasonable conduct of the defendant after the act constituting the infringement occurred, including any act done or attempt made by the defendant to destroy, conceal or disguise evidence of the infringement after having been informed of the infringement by the plaintiff; and

(e) the likelihood of widespread circulation of infringing copies as a result of the infringement.”.

66. Section 229 amended (Meaning of “infringing fixation”)

(1) Section 229(2)—

Repeal

“private purposes”

Substitute

“private and domestic use”.

(2) Section 229(3)—

Repeal

“private purposes”

Substitute

“private and domestic use”.

(3) After section 229(3)—

Add

“(3A) If a fixation lawfully made for private and domestic use under this Part is used for any other purpose, the fixation is to be treated as an infringing fixation.”.

(4) After section 229(7)(d)—

Add

“(da) section 245A(4) (fixations made by educational establishments for educational purposes);”.

67. Section 238 amended (Expressions having same meaning as in copyright provisions)

Section 238(1), after expression “Commissioner;”—

Add

“communication to the public;”.

68. Section 239 amended (Index of defined expressions)

Section 239, Table, after entry relating to cable programme, cable programme service (and related expressions)—

Add

“communication to the public section 238(1) (and section 28A)”.

68A. Section 242A amended (Fair dealing for purposes of giving or receiving instruction)

After section 242A(3)—

Add

“(3A) For the purposes of subsection (3), a fixation is dealt with if it is—

(a) possessed, shown or played in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or

(b) sold or let for hire, or offered or exposed for sale or hire.”.

69. Section 243 amended (Things done for purposes of instruction or examination)

(1) Section 243(3)—

Repeal

everything after “purposes.”.

(2) Section 243(3), Chinese text—

Repeal

“有人進行如此製作的錄製品”

Substitute

“如此製作的錄製品被用以進行”.

(3) After section 243(3)—

Add

“(3A) For the purposes of subsection (3), a fixation is dealt with if it is—

(a) possessed, shown or played in public or distributed (otherwise than for the purposes of instruction or examination) for the purpose of or in the course of any trade or business;

(b) sold or let for hire, or offered or exposed for sale or hire; or

(c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (2).”.

70. Section 245 amended (Recording of broadcasts and cable programmes by educational establishments)

(1) Section 245, heading—

Repeal

“Recording of broadcasts and cable programmes by educational establishments”

Substitute

“Recording, copying or communication by educational establishments: broadcasts or cable programmes”.

(2) After section 245(1)—

Add

“(1A) A person authorized by an educational establishment may, without infringing the rights conferred by this Part, communicate to an authorized recipient a recording or copy of a recording of a broadcast or cable programme that has been made in accordance with subsection (1) if—

(a) the person makes the communication for the educational purposes of the establishment; and

(b) the establishment takes all reasonable steps to ensure that—

(i) only authorized recipients receive the communication; and

(ii) the authorized recipients do not make any copy or further transmission of the communication.”.

(3) Section 245—

Repeal subsection (2)**Substitute**

“(2) Recording, copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the recording, copying or communication in question and the person making the recording, copies or communication in question knew or ought to have been aware of that fact.”.

(4) Section 245(3)—

Repeal

everything after “purposes.”.

(5) Section 245(3), Chinese text—

Repeal

“有人進行該紀錄或複製品的”

Substitute

“該紀錄或複製品被用以進行”.

(6) After section 245(3)—

Add

“(3A) For the purposes of subsection (3), a recording or copy is dealt with if it is—

(a) possessed, shown or played in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;

(b) sold or let for hire, or offered or exposed for sale or hire; or

(c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (1A).”.

71. Sections 245A and 245B added

After section 245—

Add**“245A. Copying or communication by educational establishments: sound recordings or films**

(1) The making of a copy of part of a sound recording or film by or on behalf of an educational establishment for the ~~education purposes of that establishment~~ educational purposes of the establishment does not infringe any of the rights conferred by this Part in relation to any performance or fixation included in it.

(2) A person authorized by an educational establishment may, without infringing the rights conferred by this Part, communicate to an authorized recipient a copy of part of a sound recording or film that has been made in accordance with subsection (1) if—

(a) the person makes the communication for the educational purposes of the establishment; and

(b) the establishment takes all reasonable steps to ensure that—

(i) only authorized recipients receive the communication; and

(ii) the authorized recipients do not make any copy or further transmission of the communication.

(3) Copying or communicating to authorized recipients is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the copying or communication in question and the person making the copies or communication in question knew or ought to have been aware of that fact.

(4) Where a copy which would otherwise be an infringing fixation is made in accordance with this section but is

subsequently dealt with, it is to be treated as an infringing fixation for the purposes of that dealing, and if that dealing infringes any right conferred by this Part, for all subsequent purposes.

(4A) For the purposes of subsection (4), a copy is dealt with if it is—

(a) possessed, shown or played in public or distributed (otherwise than for the educational purposes of the educational establishment concerned) for the purpose of or in the course of any trade or business;

(b) sold or let for hire, or offered or exposed for sale or hire; or

(c) communicated to the public, unless that communication is not an infringement of copyright by virtue of subsection (2).

(5) Expressions used in this section have the same meaning as in section 45.

245B. Communication, playing or showing by librarians, curators or archivists: sound recordings or films

(1) The communication of a sound recording or film made by the librarian, curator or archivist of a specified library, museum or archive under section 51A to the users or staff of the library, museum or archive, by making it available online to be accessed through the use of a computer terminal installed within the premises of the library, museum or archive, does not infringe any of the rights conferred by this Part in relation to any performance or fixation included in it.

(2) The playing or showing by the librarian, curator or archivist of a specified library, museum or archive under section 52A of a sound recording or film held in the permanent collection of the library, museum or archive to an audience consisting of members of the public within the premises of the library, museum or archive

does not infringe any of the rights conferred by this Part in relation to any performance or fixation included in it.

(3) The communication, playing or showing of a sound recording or film is not authorized by this section if, or to the extent that, licences under licensing schemes are available authorizing the communication, playing or showing in question and the person communicating, playing or showing the sound recording or film in question knew or ought to have been aware of that fact.”.

71A. Section 246 amended (Copying by librarians or archivists: articles of cultural or historical importance)

(1) Section 246, heading, after “librarians”—

Add

“, curators”.

(2) Section 246(1)—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

(3) Section 246(1), after “at the library”—

Add

“, museum”.

71B. Section 246A amended (Fair dealing for purposes of public administration)

After section 246A(3)—

Add

“(3A) For the purposes of subsection (3), a fixation is dealt with if it is—

- (a) possessed, shown or played in public or distributed (otherwise than for the purposes mentioned in subsection (1)) for the purpose of or in the course of any trade or business; or
- (b) sold or let for hire, or offered or exposed for sale or hire.”.

72. Section 252A added

After section 252—

Add

“252A. Temporary reproduction by service providers

- (1) The rights conferred by this Part in a fixed performance are not infringed by the making and storage of a copy of a fixation by a service provider if—
- (a) the sole purpose of the making and storage of the copy is to enable more efficient transmission of the fixation by the service provider through a network;
- (b) the making and storage of the copy forms an automatic and essential part of a technological process, and that process neither modifies the fixation, nor interferes with the lawful use of technology to obtain data on the use of the fixation;
- (c) the storage of the copy is temporary;
- (d) the service provider updates the database in which the copy is stored in accordance with reasonable industry practice;
- (e) the service provider complies with conditions (if any) on access to the fixation; and
- (f) the service provider acts promptly to remove the copy or disable access to the copy ~~when in the event that~~ either of the following facts comes to the service provider’s actual knowledge—

- (i) the fixation has been removed from the original source from which the copy was made; or
- (ii) access to the fixation at the original source from which the copy was made has been disabled.

- (2) Expressions used in this section have the same meaning as in section 65A.”.

73. Section 272A amended (Moral rights conferred on certain performers)

- (1) Section 272A(4)—

Repeal the definition of *make available to the public live*.

- (2) Section 272A(5)—

Repeal

“cable programme service; and”

Substitute

“cable programme service; communication to the public; and”.

- (3) Section 272A(9)—

Repeal

“, (3)”.

- (4) Section 272A(9)—

Repeal

“copies of” (wherever appearing).

74. Section 272B amended (Right to be identified as performer)

- (1) Section 272B(1)(a)—

Repeal

“, made available to the public live, broadcast live or included live in a cable programme service”

Substitute

“or communicated to the public live”.

- (2) Section 272B(1)—

Repeal paragraph (b)**Substitute**

“(b) the sound recording in which the performance is fixed is communicated to the public or copies of such a sound recording are issued to the public.”.

- (3) Section 272B(2)—

Repeal

“or making available”.

- (4) Section 272B(3)—

Repeal

“, broadcast or cable programme”

Substitute

“or communication”.

75. Section 272E amended (Right to object to derogatory treatment)

- (1) Section 272E(2)(a)—

Repeal

“, broadcasted, included in a cable programme service or made available to the public live”

Substitute

“or communicated to the public live”.

- (2) Section 272E(2)(b)(i)—

Repeal

“, broadcasts or includes in a cable programme service”

Substitute

“or communicates to the public”.

- (3) Section 272E(2)(b)—

Repeal subparagraph (ii).

- (4) Section 272E(2)(c)(i)—

Repeal

“, broadcasts or includes in a cable programme service the sounding recording; or”

Substitute

“or communicates to the public the sound recording.”.

- (5) Section 272E(2)(c)—

Repeal subparagraph (ii).

76. Section 273 amended (Interpretation of sections 273 to 273H)

- (1) Section 273(1)(c)(i), after the semicolon—

Add

“or”.

- (2) Section 273(1)(c)—

Repeal subparagraph (ii)**Substitute**

“(ii) communicates the work to the public.”.

- (3) Section 273(1)(c)—

Repeal subparagraph (iii).

77. Section 273A amended (Rights and remedies in respect of circumvention of effective technological measures)

- (1) Section 273A(2)(c)(i), after the semicolon—

Add

“or”.

- (2) Section 273A(2)(c)—

Repeal subparagraph (ii)**Substitute**

“(ii) communicates the work to the public.”.

(3) Section 273A(2)(c)—

Repeal subparagraph (iii).

78. Section 273B amended (Rights and remedies in respect of devices and services designed to circumvent effective technological measures)

(1) Section 273B(3)(c)(i), after the semicolon—

Add

“or”.

(2) Section 273B(3)(c)—

Repeal subparagraph (ii)

Substitute

“(ii) communicates the work to the public.”.

(3) Section 273B(3)(c)—

Repeal subparagraph (iii).

79. Section 273D amended (Exceptions to section 273A)

Section 273D(8)(b)—

Repeal

“librarian or archivist of a specified library or archive”

Substitute

“librarian, curator or archivist of a specified library, museum or archive”.

80. Section 274 amended (Rights and remedies in respect of unlawful acts to interfere with rights management information)

(1) Section 274(2)(b)—

Repeal

“makes available to the public, sells or lets for hire, imports into or exports from Hong Kong, broadcasts or includes in a cable programme service,”

Substitute

“communicates to the public, sells or lets for hire, or imports into or exports from Hong Kong,”.

(2) Section 274(3)—

Repeal

“making available”

Substitute

“communication”.

Explanatory Memorandum

The object of this Bill is to amend the Copyright Ordinance (Cap. 528) (*the Ordinance*) for the purposes set out in the long title.

2. Clause 1 sets out the short title and provides for commencement.

Right of communication to the public

3. New sections 22(1)(fa) and 28A are added to the Ordinance to provide for an exclusive right of the owner of the copyright in a work to communicate the work to the public (clauses 9(3) and 13). The communication of a work to the public is the act of communicating the work to the public by electronic communication, including—
 - (a) the broadcasting of the work;
 - (b) the inclusion of the work in a cable programme service; and
 - (c) the making available of the work to the public.
4. Consequential amendments are made to the Ordinance to delete or modify the references to the acts which are subsumed by the expression “communication to the public” as defined in the new section 28A added by clause 13 (the acts are mentioned in paragraph 3 above), and other similar references (clauses 6, 7, 8, 9(1) and (2), 10, 11, 12, 16, 20, 42, 46(1), (3), (6), (9), (10), (11) and (13), 47(1), (3), (6) and (7), 48(1) and (2), 50, 54, 55 and 56(2)).
5. Amendments are made to sections 8(1), 9(2)(b), 55(3), 56(3), 57(2) and (3), 89(2), (3), (4) and (7) and 92(3) and (4) of the Ordinance to delete the references to “copies of” contained in the expression “making available to the public of copies of works” and in similar expressions (clauses 4, 5, 38, 39, 40, 46(2), (4), (5), (7), (8) and (12) and 47(2), (4) and (5)). Given that a work may be made available to the public in different forms and no formal copy is required, the references to “copies” are unnecessary.
6. Similar amendments are made to the provisions of Parts III, IIIA and IV of the Ordinance in relation to the rights of a performer to

communicate the performance to the public, circumvention of effective technological measures and rights management information (clauses 57, 58, 60, 61, 62, 63, 64, 67, 68, 73, 74, 75, 76, 77, 78 and 80).

7. A new subsection (8B) is added to section 118 of the Ordinance to impose criminal liability on a person who, without the licence of the copyright owner of a copyright work, communicates the work to the public in the circumstances specified in that subsection (clause 51(7)).
8. A new subsection (2CA) is added to section 121 of the Ordinance to enable the deponent of an affidavit to state that the person named in the affidavit does not have the licence of the copyright owner of a work to communicate the work to the public (clause 53(1)).

Limitations on liability of online service providers

9. A new Division IIIA (new sections 88A to 88I) is added to Part II of the Ordinance to provide for limitations on the liability of an online service provider relating to an alleged infringement of copyright in a work that has occurred on the service provider’s service platform (clause 45). In particular—
 - (a) new section 88A provides for the meaning of the expressions (for example, *online service* and *service provider*) used in the new Division;
 - (b) new section 88B provides that, subject to the specified conditions, a service provider is not liable for damages or any other pecuniary remedy in respect of copyright infringement that has occurred on the service provider’s service platform;
 - (c) new section 88C provides for the procedures for giving a notice to a service provider in respect of an alleged infringement of copyright, requesting the service provider to remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates;
 - (d) new section 88D provides for the actions that a service provider may take after the service provider receives a

notice of alleged infringement or becomes aware that an infringement of copyright has occurred on the service provider's service platform or becomes aware of facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred, and the procedures for giving a counter notice to dispute the alleged infringement;

- (e) new section 88E imposes criminal liability on a person who knowingly or recklessly makes any false statement in a notice of alleged infringement or counter notice;
- (f) new section 88F provides for the civil liability of a person who makes any false statement in a notice of alleged infringement or counter notice;
- (g) new section 88G provides that, subject to the specified conditions, a service provider is not liable for any claim in respect of the service provider removing the material to which an alleged infringement relates, disabling access to the material or activity to which an alleged infringement relates, reinstating the material, or ceasing disabling access;
- (h) new section 88H provides for a rebuttable presumption that a service provider has complied with the conditions specified in that section; and
- (i) new section 88I empowers the Secretary for Commerce and Economic Development to publish a code of practice for providing practical guidance to service providers in respect of the new Division IIIA.

Permitted Acts

- 10. Section 39(1) of the Ordinance is substituted by a new provision to make clear that fair dealing with a work for the purpose of criticism or review does not infringe any copyright in the work if the work has been released or communicated to the public (clause 19(1)).
- 11. A new subsection (1A) is added to section 44 of the Ordinance to provide that, subject to the specified conditions, a person authorized by an educational establishment may, without infringing copyright, communicate a recording, or a copy of a recording, of a broadcast

or cable programme that has been made in accordance with section 44(1) of the Ordinance (clause 26(2)).

- 12. A new subsection (1A) is added to section 45 of the Ordinance to provide that, subject to the specified conditions, a person authorized by an educational establishment may, without infringing copyright, communicate a copy of an artistic work, a passage from a published literary, dramatic or musical work, or an extract from a published sound recording or film, that has been made in accordance with section 45(1) of the Ordinance (clause 27(5)).
- 13. Section 48(1) of the Ordinance is amended to extend the scope of works that the librarian of a specified library may, without infringing copyright, copy so as to cover artistic works, sound recordings and films (clause 30).
- 14. Section 50(1)(b) of the Ordinance is amended to extend the scope of copies of works that the librarian of a specified library may, without infringing copyright, make and supply to another specified library so as to cover copies of artistic works (clause 31).
- 15. A new section 51A is added to the Ordinance to provide that, subject to the specified conditions, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, communicate a copy of a specified item made under section 51 of the Ordinance to the users or staff of the library, museum or archive (clause 33).
- 16. A new section 52A is added to the Ordinance to provide that, subject to the specified conditions, the librarian, curator or archivist of a specified library, museum or archive may, without infringing copyright, play or show any sound recording or film held in the permanent collection of the library, museum or archive to the public (clause 35).
- 17. Certain permitted acts under the Ordinance that are applicable to specified libraries and archives are extended to cover museums (clauses 32, 34 and 36).
- 18. A new section 65A is added to the Ordinance to provide that, subject to the specified conditions, an online service provider may, without infringing copyright, make and store a temporary copy of a

work to enable more efficient transmission of the work through a network (clause 41).

19. A new section 76A is added to the Ordinance to provide that, subject to the specified conditions, the making of a private copy of a sound recording for private and domestic use does not infringe copyright in the sound recording or any literary, dramatic or musical work included in the sound recording (clause 44).
20. A new subsection (1A) is added to section 245 of the Ordinance to provide for a new permitted act in respect of the communication of a recording, or a copy of a recording, of a broadcast or cable programme by a person authorized by an educational establishment (clause 70(2)). The new permitted act is similar to that provided by the new section 44(1A) added by clause 26(2).
21. A new section 245A is added to the Ordinance to provide for a new permitted act in respect of the copying and communication of a sound recording or film by or on behalf of an educational establishment (clause 71).
22. A new section 245B is added to the Ordinance to provide that, under the specified circumstances, the communication, playing or showing of a sound recording or film does not infringe the performers' rights in the performance or fixation included in it (clause 71).
23. A new section 252A is added to the Ordinance to provide for a new permitted act in respect of the making and storage of a temporary copy of a fixation by an online service provider to enable more efficient transmission of the fixation through a network (clause 72). The new permitted act is similar to that provided by the new section 65A added by clause 41.

Additional damages

24. Sections 108(2) and 221(2) of the Ordinance are amended to add 2 factors to which the court may have regard in considering whether additional damages should be awarded in an action for infringement of copyright or infringement of the rights of a performer (clauses 49(3) and 65(3)).

Related amendments

25. A new subsection (5) is added to section 7 of the Ordinance to make clear that the copyright in a film sound-track that does not accompany the film but falls within the meaning given to "sound recording" in section 6(1) of the Ordinance is to be protected as a sound recording (clause 3).
26. A new subsection (2A) is added to section 22 of the Ordinance to set out a non-exhaustive list of factors for determining whether a person has authorized another to do any of the acts restricted by the copyright in a work (clause 9(4)).
27. New sections 31(3), 37(7) and 118(2AA) are added to the Ordinance to set out a non-exhaustive list of factors for determining whether any distribution of a copy of a work is made to such an extent as to affect prejudicially the owner of the copyright in the work (clauses 15(2), 18 and 51(1)).
28. New sections 37(6), 41(6), 44(4) and 45(4) are added to the Ordinance to define the meaning of the expression *dealt with* in the relevant provisions of the Ordinance (clauses 18, 25(3), 26(6) and 27(9)).
29. Subsections (2E) and (2F) of section 118 of the Ordinance are amended to extend the scope of exemption under those subsections to specified libraries, museums and archives (clause 51(2), (3), (4), (5) and (6)).