

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 88A, in the Chinese text, in the definition of *標準技術措施*, by deleting “的成本有重大增加” and substituting “承擔高昂成本”.
- 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 By deleting the proposed section 88C(4) and substituting—

- “(4) If a notice of alleged infringement given to a service provider does not comply with subsection (2) or (3)—
 - (a) the notice is of no effect for the purposes of section 88B(2)(a)(i); and
 - (b) in determining whether the service provider was aware of any of the matters mentioned in section 88B(2)(a)(ii) or (iii), no account is to be taken of the notice.
- (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 counter 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 By deleting the proposed section 88D(6) and substituting—

- “(6) A counter notice that does not comply with subsection (4) or (5) is of no effect for the purposes of subsection (1)(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.”.

45 In the proposed section 88F(2), in the definition of *loss or damage*, by adding “actual and” after “that is”.

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.”.”.

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