

Bills Committee on Copyright (Amendment) Bill 2014
The Administration's response to views expressed by deputations

On 25 October 2014, the Legislative Council Bills Committee on the Copyright (Amendment) Bill 2014 (the Bill) (Bills Committee) convened a meeting inviting deputations to give their views on the Bill. The Bills Committee requested the Administration to provide a summary of the views expressed by the deputations and the submissions to the Bills Committee, as well as the Administration's responses.

2. This paper provides the summary and the Administration's responses on overview, communication right and the corresponding criminal liability, and copyright exceptions (see Annex). The summary and the Administration's responses on other topics, including safe harbour, civil liability and others, will be submitted later.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
30 January 2015

Bills Committee on 2014 Copyright (Amendment) Bill
The Administration's response to comments from deputations

Note on the Summary

On 25 October 2014, the Bills Committee convened a meeting inviting deputations to present their views on the Bill.

We received a total of 8 419 submissions. In view of the large amount of submissions, we put them into four groups to facilitate readers: (1) users; (2) copyright owners; (3) online service providers (OSPs); and (4) others.

There are 8 382 submissions from users (including netizen groups). Amongst all these submissions, 5 754 submissions originated or were generated from a number of online templates. There are 24 submissions from copyright owner organisations and companies, representing a wide spectrum of creative industries, including music, film and video, comics and animation, multimedia services, licensing bodies and publishers. There are two submissions from OSPs. A total of 11 submissions were received from “others”, which include professional bodies, political parties and non-government organisations.

This summary consists of three parts: overview, communication right and the corresponding criminal liability, and copyright exceptions. The remaining parts, including safe harbour, civil liability and others, will be submitted later.

A. Overview		
A1- Copyright regime of Hong Kong		
Organisations / Individuals	Comments	Administration's responses
<u>Copyright Owners</u> 1.1	<ul style="list-style-type: none"> The essence of the copyright regime is to provide economic rewards to authors and investors so as to promote creativity. 	<ul style="list-style-type: none"> Views noted.
1.2	<ul style="list-style-type: none"> Hong Kong is not free from the watchful eyes of the international community for lagging behind others in fulfilling our international obligations to protect intellectual property (IP) rights. We should update our copyright regime by introducing the communication right for copyright owners, and have the Bill passed as soon as possible. 	<ul style="list-style-type: none"> Rapid technological developments (notably the Internet) have been reshaping the information society. The World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) were adopted in 1996 to address the challenges of the new digital technologies. In response, and given the rapid changes in user behaviours, many overseas jurisdictions have updated their copyright regimes, including the introduction of a communication right to enhance copyright protection in the digital environment and safe harbour provisions for OSPs. We need to stay on par with international developments. With advances in technology, new modes of electronic transmission such as streaming have emerged. The current scope of statutory protection may not be adequate to cope with such rapid changes, allowing an infringer to evade liability and sanctions on technicality. We proposed in the Bill to introduce a new exclusive right for copyright owners to communicate their works to the public through any modes of
1.3	<ul style="list-style-type: none"> IP rights are a key pillar of a knowledge-based economy. Because of the outdated copyright regime, the development of creative industries has been hindered. The Government should introduce a technology-neutral communication right as soon as possible to assist the creative industries to face the challenges, especially the online piracy problem brought by streaming. 	

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		electronic transmission.
1.4	<ul style="list-style-type: none"> Hong Kong should take reference from other countries such as Singapore and Korea to introduce additional copyright protection measures, for example the graduated response system (GRS) and site-blocking. 	<ul style="list-style-type: none"> The introduction of the GRS is a controversial issue which needs further assessment on its impact. There are views that the GRS is too draconian in the sense that a user's right to access the Internet can be denied simply because of allegations from copyright owners. We consider that it is not an appropriate time to introduce the GRS to Hong Kong. We need to see what implications the GRS will bring in the light of the experience of other jurisdictions. We will continue to keep track of the latest developments in the international community and explore other possible options to strengthen copyright protection in the digital environment.
1.5	<ul style="list-style-type: none"> The Bill maintains a right balance between different interests, and has sufficiently addressed the concerns of users. Any new proposals to modernise the copyright regime should be put forward later. 	<ul style="list-style-type: none"> Views noted.
<u>Users</u> 1.6	<ul style="list-style-type: none"> The primary purpose of the copyright regime should be to protect creators' interests and promote creativity. However, it is now unreasonably distorted and exploited by copyright owners. 	<ul style="list-style-type: none"> Copyright is an intangible property right that promotes creativity by providing authors and copyright owners with economic incentives. However, the protection is not without limits. Fair access to and use of copyright works by users are also important, not only for the protection of freedom of

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1.7	<ul style="list-style-type: none"> The existing Copyright Ordinance (CO) already provides sufficient protection to copyright owners and even favours copyright owners. Users' acts are presumed to be unlawful and the CO has failed to consider the benefits that users' acts can bring to copyright works. The copyright law should be amended for the purpose of promoting creativity with due regard to users' right. It should also take into account cultural, artistic and social perspectives to ensure freedom of creation. 	<p>expression per se but also for dissemination and advancement of knowledge as well as promoting creativity.</p> <ul style="list-style-type: none"> There are over 60 provisions under the existing CO specifying a number of permitted acts (such as for the purposes of research, private study, education, criticism, review and reporting current events) which provide for the reasonable use of copyright works without attracting civil or criminal liability. To tie in with the introduction of the communication right, we would revise and expand the scope of the permitted acts as appropriate to maintain the balance between copyright protection and reasonable use of copyright works.
1.8	<ul style="list-style-type: none"> Some consider that the copyright industry is monopolised by copyright agents and only a small part of the commercial profits is distributed to original creators. There are also views that the Bill will commercialise non-commercial secondary creation, allowing a group of people to reap commercial benefits through copyright. The copyright system should be changed to allow creators to use their own works or authorise others to do so for non-trading purposes. 	<ul style="list-style-type: none"> Views noted.
1.9	<ul style="list-style-type: none"> Some view that it is not the right time to introduce the Bill, one of the reasons being the lack of universal suffrage. Some view that 	<ul style="list-style-type: none"> Our updating exercise on the copyright regime started way back in 2006. After three rounds of consultation, we introduced the Copyright (Amendment) Bill 2011 (the 2011

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	<p>the consultation period was too short with insufficient promotion, and suggest extending the consultation period, and postponing, shelving or withdrawing the Bill. Furthermore, some users are of the view that it is inadequate to rely on the result of the consultation on parody as the basis of the Bill. It is necessary to start a new round of public consultation on various issues such as communication right and safe harbour.</p>	<p>Bill) with the proposals of communication right, safe harbour and a number of copyright exceptions. The whole package of proposals and the Committee Stage Amendments (CSAs) agreed with the then Bills Committee, though lapsed, represent the respectable result and general consensus of years of deliberations between the Government, Legislative Council (LegCo), copyright owners, OSPs and general users on this sensitive subject.</p> <ul style="list-style-type: none"> On this basis, we conducted a public consultation on parody between July and November 2013. Taking into account the views collected and relevant overseas experience, we proposed a number of copyright exceptions in the Bill to exempt users from criminal and civil liabilities for using copyright works without authorisation from copyright owners. We consider that the Bill can maintain a right balance between different interests, including the protection of freedom of speech and creation.
1.10	<ul style="list-style-type: none"> Some opine that the Bill is very complicated and do not understand its impact. Some also consider that instead of explaining the Bill to the public by PowerPoint presentation, the Government should provide the public with a full version of the Bill. 	<ul style="list-style-type: none"> The full version of the Bill and the LegCo Brief can be accessed via LegCo and Government websites. We also uploaded frequently asked questions and answers and relevant information onto Government websites for public reference.
1.11	<ul style="list-style-type: none"> Because of an outdated copyright regime, the creative industries have suffered. We should modernise our copyright regime as 	<ul style="list-style-type: none"> Views noted. See response at A1.3.

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	soon as possible to keep it on par with those of other advanced countries.	
1.12	<ul style="list-style-type: none"> Some opine that most people use the Internet for sharing without any profit-making intent. Therefore, the CO should not be applied to the Internet. The operation of the copyright market has changed. Instead of relying on the law, copyright owners should endeavour to adapt to the market. They should make use of technology to solve the problem of piracy. 	<ul style="list-style-type: none"> The protection offered by copyright laws is not confined to physical copyright works. The existing CO is also applicable to the Internet. At the international level, the WCT and the WPPT were adopted in 1996 to address the challenges of the new digital technologies, especially the rapid development in the Internet. The Bill aims at updating the Hong Kong copyright regime to ensure that it stays on par with international trends. The Bill strikes a proper balance among copyright protection, free flow of information and reasonable use of copyright works. It does not favour any particular groups.
1.13	<ul style="list-style-type: none"> Some consider that copyright owners can rely on the existing CO or other laws to commence civil proceedings against copyright infringers, so it is not necessary to amend the law as per the proposals of the Bill. 	<ul style="list-style-type: none"> With advances in technology, new modes of electronic transmission such as streaming have emerged. The current scope of statutory protection may not be adequate to cope with such rapid changes, allowing an infringer to evade liability and sanctions on technicality. We therefore propose to introduce a new exclusive right for copyright owners to communicate their works to the public through any modes of electronic transmission. Other major common law jurisdictions (including Australia, New Zealand, Singapore, the United Kingdom (UK), Canada and the European Union (EU)) have also introduced similar communication rights. To ensure the effectiveness of this

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		<p>newly-introduced exclusive communication right, we consider it necessary to formulate corresponding criminal sanctions to combat large-scale piracy activities prejudicing copyright owners' interests. This is compatible with our obligations under a relevant international treaty (Article 61 of the Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO)), i.e. to provide for criminal procedures and penalties in cases of wilful copyright piracy on a commercial scale. Australia and the UK have similar criminal provisions in their copyright laws while the United States (US) and Singapore have general criminal provisions to combat wilful copyright infringement.</p>
<p><u>Others</u></p> <p>1.14</p>	<ul style="list-style-type: none"> Any amendment should maintain a balance of different interests. Support the proposals of fair dealing exceptions and safe harbour. 	<ul style="list-style-type: none"> Views noted.
<p>1.15</p>	<ul style="list-style-type: none"> The Bill has already properly addressed the public concerns over the 2011 Bill. The proposal enables Hong Kong to fulfil its international obligations and provides new copyright exceptions as well. Hong Kong should not delay the updating of its copyright regime any more. It is contrary to the interests of Hong Kong should the passage of the Bill be further delayed because of the proposal of User Generated Content (UGC). 	<ul style="list-style-type: none"> Views noted.

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<i>1.16</i>	<ul style="list-style-type: none"> The rights and interests of copyright owners should be protected. Severe punishment should be imposed on piracy on a commercial scale. 	<ul style="list-style-type: none"> Views noted. See response at A1.13.
<i>1.17</i>	<ul style="list-style-type: none"> The copyright regime of Hong Kong, once reputable, is now lagging far behind others in recent years. It is even possible that Hong Kong may be listed by the US' Special 301 Report as an area which provides inadequate IP protection. Should it be the case, it will put Hong Kong in a disadvantaged position to compete with Korea and Singapore as an IP trading hub. 	<ul style="list-style-type: none"> Views noted. See response at A1.2.
<i>1.18</i>	<ul style="list-style-type: none"> An outdated copyright regime is detrimental to the creative industries. Hong Kong should fulfil the international obligations of IP protection, update the outdated copyright regime and protect the legal rights of copyright owners in different digital media so as to maintain Hong Kong's competitiveness, as well as to keep ourselves on par with other advanced countries. 	<ul style="list-style-type: none"> Views noted. See response at A1.2.
A2- Copyright and freedom of speech and creativity		

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<u>Copyright owners</u> 2.1	<ul style="list-style-type: none"> It is groundless to say that freedom of speech will be threatened after the passage of the Bill. Hong Kong is one of the 94 contracting countries/regions of the WCT. The other 93 countries/regions have already provided statutory protection for the communication right, and freedom of speech in these places is not affected. 	<ul style="list-style-type: none"> Views noted.
2.2	<ul style="list-style-type: none"> No civil proceedings / criminal prosecution have ever been taken against parody works, and this reflects that freedom of creation is supported by copyright owners. 	<ul style="list-style-type: none"> Views noted.
2.3	<ul style="list-style-type: none"> No other copyright regimes of overseas countries provide better protection to freedom of speech than the proposals put forward in Hong Kong. 	<ul style="list-style-type: none"> Views noted.
<u>Users</u> 2.4	<ul style="list-style-type: none"> The copyright regime stifled freedom of creation and has lots of room for improvement. Some users call the Bill “Internet Article 23”, considering that it will suppress freedom of speech and creation. Under the Bill, civil responsibility will be transformed or escalated to criminal responsibility. The Bill also empowers and extends the power of the law enforcement agency. By imposing criminal 	<ul style="list-style-type: none"> The Bill aims at updating Hong Kong’s copyright regime to ensure that it would keep pace with technological and overseas developments. Parody and other works which do not constitute copyright infringement under the existing law for any of the reasons below will remain lawful after the legislative amendment – <ul style="list-style-type: none"> (a) the copyright owner has agreed or acquiesced;

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	sanctions on copyright infringing acts, it will provide the legal basis for criminalising people who express their views and the laying of charges on a selective basis.	<ul style="list-style-type: none"> (b) the copyright protection in the underlying work has expired; (c) only the ideas of the underlying work have been incorporated; (d) only an insubstantial part of the underlying work has been reproduced; or (e) one of the permitted acts under the existing CO (such as for the purposes of research, private study, education, criticism, review and news reporting) applies.
2.5	<ul style="list-style-type: none"> • Concerned that the Government will bypass copyright owners and prosecute the alleged copyright infringers directly. Suggest adding a statutory provision stating that the Government cannot proceed to prosecution without the copyright owners' authorisation or provision of sufficient evidence. 	<ul style="list-style-type: none"> • The Bill proposes a number of new copyright exceptions to facilitate users to use copyright works under appropriate circumstances, without the need for obtaining authorisation from copyright owners and without attracting any civil or criminal liability. These copyright exceptions, including the following uses, are sufficient to cater for common activities on the Internet and protect the freedom of expression of users: <ul style="list-style-type: none"> (a) for the purposes of parody, satire, caricature and pastiche; (b) commenting on current events; (c) quotation; (d) educational instruction (especially for distance learning) and facilitating daily operations of libraries, archives and museums; (e) for OSPs to cache data; and (f) media shifting of sound recordings.
2.6	<ul style="list-style-type: none"> • Parody or secondary creations are the main and effective tools for the public to express their discontent to the Government. Some consider that the Bill and the existing CO threaten freedom of speech, expression and creation, and can be manipulated as a means to suppress opposing voices. Secondary creation can promote freedom of speech and cultivate civil sense. Secondary creators should not be requested to self-censor their own works. 	

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		<ul style="list-style-type: none"> • For law enforcement, the fundamental element of copyright offences is that, to constitute copyright infringement, the relevant acts must have been done without the consent of the copyright owner. If the copyright owner does not object or pursue the matter any further, there is no basis for the law enforcement agency to undertake any criminal investigation, not to mention laying a prosecution. • In practice, if the law enforcement agency comes across an act which is alleged or reasonably suspected to constitute a copyright offence, it must take the necessary step to promptly locate and contact the legitimate copyright owner of the work to see if he has any objection or wishes to pursue the matter further. It is only when the copyright owner wishes to pursue the matter further that the law enforcement agency has reasons to consider further steps to take. • Even if the copyright owner wishes to pursue the matter further, he must provide evidence to prove to the law enforcement agency during the course of investigations (a) the subsistence and legitimate ownership of copyright in the underlying work; and (b) that the work in question has indeed infringed such copyright. The law enforcement agency will only refer the case to the Department of Justice for consideration of whether to prosecute if such key evidence and all other necessary evidence are available. • If, during the process, the copyright owner fails to provide sufficient evidence, or changes his stance and considers that there is no copyright infringement (e.g. the parties reach a settlement), it would be impossible for the law enforcement

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		agency to continue its investigations or proceed to prosecution.
2.7	<ul style="list-style-type: none"> Request to give comprehensive protection to the secondary creation right, e.g. giving full exemption of civil and criminal liabilities or copyright exceptions to personal, non-commercial or non-libel use of copyright works. Such protection is important to secure the genuine freedom of speech, expression and creation. Any civil or criminal responsibility will pose a threat to parody creators during the process of creation. The legal gaps that secondary creators can now rest on will be eliminated following the enactment of the Bill. 	<ul style="list-style-type: none"> See responses at A.2.4 to A.2.6. The proposed new fair dealing exceptions under the Bill cover, in appropriate cases, a wide range of day-to-day Internet activities, so long as they are for the purposes of parody, satire, caricature, pastiche, commenting on current events, or quotation. This should go a long way to address the major concerns of many users who make use of existing copyright works for the above purposes in the digital environment.
2.8	<ul style="list-style-type: none"> Article 27 of the Basic Law and the relevant international conventions on human rights, which provide for the freedom of speech, expression and creation, should be the guiding 	<ul style="list-style-type: none"> Copyright is a kind of property rights, which is recognised and protected by the Basic Law and the general law of Hong Kong. On the international level, Hong Kong is obliged to provide copyright protection under a number of international

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	<p>principles for formulating the policy on copyright and parody exception. All these rights are core values which deserve more protection than economic interests do and should only be limited to a reasonable extent. Consider that the Bill cannot protect such kinds of freedom effectively.</p>	<p>treaties on copyright. On the other hand, freedom of expression is protected under the Basic Law and Hong Kong Bill of Rights. Both copyright and freedom of expression are not absolute and are subject to certain limitations. As the two rights may somehow contradict each other, we should strike a reasonable balance between protecting copyright and securing freedom of expression of those who want to use and communicate copyright works.</p> <ul style="list-style-type: none"> • The proposed new fair dealing exceptions under the Bill cover, in appropriate cases, a wide range of day-to-day Internet activities, so long as they are for the purposes of parody, satire, caricature, pastiche, commenting on current events, or quotation. Users' freedom of speech, expression and creation is sufficiently protected. • Moreover, according to section 192(3) of the CO, the court has the jurisdiction to prevent or restrict the enforcement of copyright on grounds of public interest.
2.9	<ul style="list-style-type: none"> • Some view that the human rights organisations of the United Nations (UN) have repeatedly condemned human rights problems arising from international trade and IP rights. As Hong Kong is a party to more than ten human rights treaties, the Government should attach importance to the impact that the laws may have on human rights protection. Commercial and economic benefits should not override freedom of expression, freedom of publication, 	<ul style="list-style-type: none"> • The copyright regime of Hong Kong is not inconsistent with the obligations that Hong Kong should fulfil under the international treaties on human rights. The relevant committee of the UN has never made any allegation that the copyright regime of Hong Kong is inconsistent with human rights treaties. • The proposed new fair dealing exceptions under the Bill cover, in appropriate cases, a wide range of day-to-day Internet activities, so long as they are for the purposes of

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	privacy protection and other fundamental human rights.	<p>parody, satire, caricature, pastiche, commenting on current events, or quotation. Users' freedom of speech, expression and creation is sufficiently protected.</p>
2.10	<ul style="list-style-type: none"> Most western countries provide better protection for human rights while complying with the relevant "international obligations" concerning copyright. It is unfair that the Government selectively complies with those international obligations only when it considers appropriate. 	<ul style="list-style-type: none"> Any copyright exception must be fully compliant with our international obligations. Article 61 of the TRIPS Agreement of WTO requires members to at least provide for criminal procedures and penalties in cases of wilful copyright piracy on a commercial scale. Article 13 of the TRIPS Agreement also provides that members must ensure that copyright exceptions should comply with the "three-step test", i.e.- <ul style="list-style-type: none"> (a) are confined to "special cases"; (b) do not conflict with a normal exploitation of the work; and (c) do not unreasonably prejudice the legitimate interests of the copyright owner. <p>To completely exempt parody works from civil and criminal liabilities without condition is contrary to the requirements of international treaties. It is also inconsistent with the policy intent to strike a balance between copyright protection and freedom of expression.</p>
2.11	<ul style="list-style-type: none"> Copyright owners may use their abundant resources to commence litigation against creators of secondary creations. Even if the outcome of the litigation is unsuccessful, it will 	<ul style="list-style-type: none"> As per the responses at A2.4 to A2.6, the Bill has proposed a number of copyright exceptions which can provide sufficient protection to creators by exempting their civil and criminal

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	create heavy financial burden and psychological stress on creators and consequently result in a chilling effect.	<p>liabilities.</p> <ul style="list-style-type: none"> • In real-life situations, the economic or other interests involved in most trivial, technical infringement cases are minimal. In view of the litigation costs and time, legal uncertainties and effectiveness of remedies in question, there may not be sufficient incentive for copyright owners to commence civil actions. • In copyright infringement cases, frivolous or vexatious claims would not be entertained by the court. We are not aware of any local incidents of copyright owners commencing legal proceedings against parodists in the past.
2.12	<ul style="list-style-type: none"> • If a copyright owner finds that a piece of news report has damaged his reputation and takes legal action on the basis of copyright infringement, it will affect freedom of press. 	<ul style="list-style-type: none"> • The Bill provides a number of copyright exceptions to protect freedom of expression. See responses at A2.4 to A2.6.
<u>Others</u> 2.13	<ul style="list-style-type: none"> • Suggest hiring overseas academics to review the Bill to ensure it is compliant with the international legal framework and the latest technology. 	<ul style="list-style-type: none"> • Views noted. We have aptly taken into account public opinion and made reference to the experience of overseas jurisdictions when drafting the Bill.
2.14	<ul style="list-style-type: none"> • Dissemination of parody works is a basic form of freedom of speech protected by the Basic Law. The existing copyright regime already provides sufficient protection to copyright owners. The Government should not easily 	<ul style="list-style-type: none"> • See responses at A2.8 to A2.10.

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	introduce legislative amendments lest freedom of expression be affected.	
2.15	<ul style="list-style-type: none"> It is important that the public have the right to monitor the Government. Secondary creations help promote expression of views and encourage public discussion. If the room for secondary creations is restricted, the public will be deprived of the right to monitor the Government. The limited exceptions will become invisible political censorship. 	
2.16	<ul style="list-style-type: none"> Copyright is about culture. Freedom of speech should override copyright protection. 	<ul style="list-style-type: none"> See response at A2.8.

B. Communication right and criminal responsibility		
Organisations / Individuals	Comments	Administration's responses
<u>Copyright owners</u> 1.1	<ul style="list-style-type: none"> Support the enactment of criminal provisions on acts which severely infringe the exclusive communication right. Suggest amending section 118(8B) so as to impose criminal sanction on unauthorised communication for the purpose of any trade or business, or in the course of any trade or business (irrespective of 	<ul style="list-style-type: none"> We continue to adopt the proposal in the 2011 Bill to impose criminal sanction on unauthorised communication of copyright works to the public under the following circumstances- (a) 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) to such an extent as to affect prejudicially the copyright owner. The proposed criminal sanction is similar to that under the existing CO. We believe

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	whether it is for profit or reward).	that the proposal can maintain a proper balance between copyright protection and use of copyright work.
1.2	<ul style="list-style-type: none"> The proposed sections 118(2AA) and 118(8C) stipulate a non-exhaustive list of relevant factors that the court may consider in determining whether any unauthorised distribution or communication is made to such an extent as to affect prejudicially the copyright owner. It is suggested that the version that was considered in 2011 should be adopted. 	<ul style="list-style-type: none"> To allay netizens' concerns regarding the possible impact of the criminal liability for the proposed prejudicial communication offence on the free flow of information on the Internet and to provide greater legal certainty, we proposed in the 2011 Bill and the agreed CSAs to clarify what would amount to "such an extent as to affect prejudicially the copyright owners" by highlighting in the legislation the consideration of whether the infringing acts have caused "more than trivial economic prejudice" to the copyright owners and introducing a non-exhaustive list of relevant factors to guide the court in determining the magnitude of economic prejudice. During the consultation on parody, many users considered that a mere clarification of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences is not sufficient. They also criticised the description of "more than trivial economic prejudice" as ambiguous, casting a wide criminal net and resulting in a chilling effect on freedom of expression. As such, the Bill proposes criminal sanction against unauthorised communication, and further clarifies the threshold of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences. Instead of adopting the phrase "more than trivial economic prejudice", we have stipulated

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		the factor of “economic prejudice” as the main factor of consideration, with substitution for the original copyright work as an important factor for the court to assess the relevant criminal liability.
1.3	<ul style="list-style-type: none"> To tackle the problem of streaming, suggest amending sections 28A(4)-(6) to provide criminal sanctions for all commercial activities relating to unauthorised streaming, including the sale of illicit streaming set-top boxes and phone applications installation services for accessing pirated websites. 	<ul style="list-style-type: none"> With advances in technology, new modes of electronic transmission such as streaming have emerged. The current scope of statutory protection may not be adequate to cope with such rapid changes, allowing an infringer to evade liability and sanctions on technicality. We proposed in the Bill to introduce a new exclusive right for copyright owners to communicate their works to the public through any modes of electronic transmission. Whether an act involves copyright infringement depends on the operating mode of individual devices or services. According to the existing CO, a person is liable to criminal sanction if he authorises others to commit an act restricted by copyright (for example illegal copying of copyright work). Moreover, according to the existing CO, where an effective technological measure has been applied to control or limit the use of a copyright work, if a person knowingly commits an act which circumvents such measure; makes, imports, exports, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire any product, component or means which is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of the measure or promoted, advertised or marketed for the purpose of the circumvention of the measure; or provides any service

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		<p>which is performed for the purpose of enabling or facilitating the circumvention of the measure or promoted, advertised or marketed for the purpose of the circumvention of the measure, he may attract civil liability.</p> <ul style="list-style-type: none"> • In certain circumstances, relevant acts are subject to criminal sanction. The maximum punishment for offences in relation to circumvention of technological measures is imprisonment of 4 years and a fine of \$500,000. • We understand the concern of the industry. The technical problem concerning TV set-top boxes is complicated, and it usually involves overseas jurisdictions as well. We should therefore duly consider the circumstances of each case. Customs has all along kept in touch with the industry and has been working to set up a notification mechanism to deal with the problem, including how the law should be applied.
1.4	<ul style="list-style-type: none"> • The proposed section 28A(5) and (6) covers all acts of re-transmission of copyright content and would encroach on copyright owners' exclusive right to "make available" copyright works to the public. It is inconsistent with the requirements of international treaties and should be deleted. 	<ul style="list-style-type: none"> • Section 28A(5) stipulates that a person does not communicate a work to the public if the person does not determine the content of the communication. Section 28A(6) stipulates that for the purpose of subsection (5), a person does not determine the content of a communication only because the person gains access to what is made available by someone else in the communication or receives the electronic transmission of which the communication consists. • Based on the above provisions, the mere act of forwarding or sharing a hyperlink on a webpage or the Internet, or browsing or accessing the information provided or communicated by

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		<p>others is not a communication to the public.</p> <ul style="list-style-type: none"> • However, the provisions do not apply where a person has taken active technical steps in the communication process, such as capturing and processing broadcasting signal/data and re-transmitting a copyright work to the public via cable systems or the Internet. Such acts may constitute an infringement of the communication right of the copyright owner. • On the other hand, if a person authorises others to commit any act restricted by copyright (for example illegal copying or communicating a copyright work), the person is also liable for copyright infringement.
1.5	<ul style="list-style-type: none"> • The Government should follow Singapore and introduce a judicial injunctive process to prevent users from accessing infringing contents streamed from other countries. 	<ul style="list-style-type: none"> • Views noted. Since the enactment of the CO in 1997, it has been regularly updated with regard to the technological and overseas developments as well as our economic needs. We will continue to keep in view major developments in the international community and explore other feasible options to strengthen our copyright protection in the digital world. • Following the passage of the Bill, we would proceed with reviewing a number of copyright issues including the updates to the Copyright (Libraries) Regulations (Cap. 528B) and orphan works. We also need to consider the application of the Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled to Hong Kong and the necessary amendments to the

B. Communication right and criminal responsibility		
		CO. As part of our ongoing efforts to update our copyright regime, we would also keep track of major developments in the international community such as site blocking, extending the copyright term and discussions on the concept of UGC.
1.6	<ul style="list-style-type: none"> Suggest clarifying section 28A that the newly introduced communication right will not affect the existing licensing mechanism in the market. 	<ul style="list-style-type: none"> The new right of communication of the work to the public includes making available of the work to the public, broadcasting and inclusion in a cable programme service. Other existing exclusive rights (e.g. copying and distributing a copy) will not be affected by the Bill. Unless the act concerned is a permitted act, users should obtain relevant permission or authorisation from copyright owners for committing any act restricted by copyright.
<u>Users</u> 1.7	<ul style="list-style-type: none"> Disagree with the introduction of the communication right. Under the pretext of technology-neutrality and the need to provide for unforeseeable technological developments, the Government extends the net for civil and criminal liabilities to include all modes of electronic transmission under the CO, the coverage of which is so wide that it even includes non-physical copying. Technology-neutrality also forbids future means of communication which may not affect the interests of copyright owners. Infringement of communication right will only bring economic loss to copyright owners, and 	<ul style="list-style-type: none"> Many overseas jurisdictions have updated their copyright regimes and introduced a communication right to enhance copyright protection in the digital environment. The current scope of statutory protection rendered by the CO may not be adequate to cope with such rapid changes, allowing an infringer to evade liability and sanctions on technicality. We proposed in the Bill to introduce a new exclusive right for copyright owners to communicate their works to the public through any modes of electronic transmission. To tie in with the introduction of the new exclusive communication right, we consider it necessary to impose a corresponding criminal sanction on large scale infringing activities which are detrimental to the interests of copyright owners. It is compliant with our obligations under the

B. Communication right and criminal responsibility		
	<p>the loss should be claimed by copyright owners through civil proceedings rather than relying on criminal sanctions. Some opine that the proposed sanction should target Internet piracy on a commercial basis but not Internet users' non-profit making secondary creation activities. Secondary creators should only be criminally liable when the economic interests of copyright owners are prejudiced and they obtain actual economic benefits. Otherwise, it should be sufficient for copyright owners to lodge a complaint to the relevant platform to seek the removal of the parody work.</p> <ul style="list-style-type: none"> • Communication right encompasses all modes of electronic transmission. If uploading or downloading secondary creation is unlawful, general creators would not be protected. The Government should introduce open-ended exceptions to maintain a proper balance between the interests of copyright owners and the freedom of expression and creation of users. 	<p>relevant international treaty (Article 61 of the TRIPS Agreement of the WTO), i.e. provide for criminal procedures and penalties in cases of copyright piracy on a commercial scale. Australia and the UK have similar criminal provisions in their copyright law, and the US and Singapore have general criminal provisions to combat wilful copyright infringement.</p> <ul style="list-style-type: none"> • To tie in with the introduction of the communication right, we propose a number of new copyright exceptions to facilitate users to use copyright works under appropriate circumstances, without the need for obtaining authorisation from copyright owners and without attracting any civil or criminal liability. The proposed exceptions seek to maintain a balance between copyright protection and use of copyright works. The proposed new copyright exceptions together with the existing ones will cover a wide range of day-to-day Internet activities and protect the freedom of expression of users.
1.8	<ul style="list-style-type: none"> • It is not possible to take legal actions against streaming under the existing copyright laws. Once the Bill is passed, the grey area in the laws will be clarified, copyright owners would certainly strive for a precedent case by lodging 	<ul style="list-style-type: none"> • It has always been our policy intent to combat piracy activities on a commercial scale. The Bill proposes criminal sanction against unauthorised communication, and further clarifies the threshold of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial

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	<p>complaints to Customs on parody creators, which is an abuse of public resources. On the other hand, the Government may possibly encourage copyright owners to initiate litigation as a means to suppress opposing views.</p>	<p>communication offences. It helps to clarify that common personal and non-commercial activities on the Internet would unlikely fall into the criminal net if the infringement does not amount to a substitution for the original copyright work.</p> <ul style="list-style-type: none"> Regarding civil responsibility, the economic or other interests involved in most trivial, technical infringement cases are minimal, in view of the litigation costs and time, legal uncertainties and effectiveness of remedies in question, there may not be sufficient incentives for copyright owners to commence civil actions. Frivolous or vexatious claims would not be entertained by the court. We are not aware of any local incidents of copyright owners commencing legal proceedings against parodists in the past.
1.9	<ul style="list-style-type: none"> It is difficult to determine who “communicates the work to the public” as it may include non-initiators of the communication. Worried that the mere use of instant communication software to share a parody work will become unlawful. The recipient may breach the law by downloading the contents he receives, even though he does not know the contents. 	<ul style="list-style-type: none"> If the “link” in question merely provides those who click on it a means to access materials on another website, and the person who shares the link does not distribute an infringing copy of the copyright work (e.g. by uploading an infringing song to a website for others to download), the mere act of sharing a link will not constitute copyright infringement. The proposed section 28A(5) of the Bill has clearly specified the same.
1.10	<ul style="list-style-type: none"> The definition of “distribution to the public” is too wide. With the technological developments and popularity of the Internet, merely pressing a button could distribute a 	

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	video or a picture. If the law restricts distribution to the public, a person may be criminalised for sharing hyperlinks. Suggest making the relevant provisions in the law.	
<i>1.11</i>	<ul style="list-style-type: none"> Suggest clarifying in the Bill that criminal sanctions will only be restricted to cases causing serious economic loss. Also, “potential commercial value” should not be taken into account to avoid giving too much power to the law enforcement agency. A time frame should be imposed on the concept of “amounting to a substitution for the original copyright work”. Otherwise, copyright owners may rely on future economic loss caused by a parody work as a basis of their claim. 	<ul style="list-style-type: none"> In setting out the factors that the court should consider in determining what constitute the prejudicial distribution offence and the prejudicial communication offence, we have taken into account and distilled from the applicable principles from local and overseas precedent cases involving large-scale copyright infringement. According to the overseas decisions, potential market or value consists of the market which the copyright owners will exploit or authorise others to exploit in general circumstances, which is limited to markets which are traditionally reasonable and likely to be developed.
<i>1.12</i>	<ul style="list-style-type: none"> Suggest clarifying the definition of “prejudicial communication” and “prejudicial distribution”, which should not be limited to considering whether the communication would cause economic prejudice to copyright owners, but also whether the communication would amount to a substitution for the original work. Such a concept may be manipulated for oppressing freedom of speech by malicious prosecution or frivolous litigation by copyright 	<ul style="list-style-type: none"> The Bill proposes to further clarify the criminal threshold in relation to the existing prejudicial distribution and the proposed prejudicial communication offences. It helps to clarify that common personal and non-commercial activities on the Internet would unlikely fall into the criminal net if the infringement does not amount to a substitution for the original copyright work.

B. Communication right and criminal responsibility		
	owners.	
<i>1.13</i>	<ul style="list-style-type: none"> Some support the introduction of criminal liability for unauthorised communication of copyright work. 	<ul style="list-style-type: none"> Views noted.
<u>OSP_s</u> <i>1.14</i>	<ul style="list-style-type: none"> Support the introduction of communication right. 	<ul style="list-style-type: none"> Views noted.
<u>Others</u> <i>1.15</i>	<ul style="list-style-type: none"> Suggest improving the provision in such a way that “substitution for original work” would only be one of the factors, but not the most important factor for the court’s consideration. 	<ul style="list-style-type: none"> The Bill lists a number of relevant factors to guide the court in determining “to such extent as to affect prejudicially the copyright owner”. These factors are primarily distilled from precedent cases. While the court may attach different weight to various factors with regard to the facts and circumstances of individual cases, it may also consider factors which are not stipulated in the statutory provision. The proposals of the Bill are based on the version scrutinised in 2011 with due consideration of the views received during the public consultation on parody in 2013.
<i>1.16</i>	<ul style="list-style-type: none"> Apart from “economic prejudice” and “substitution for original work”, the factors of “personal, non-commercial creation” and “having a clear record of publishing non-infringing parody works” should be 	<ul style="list-style-type: none"> See response at B1.15.

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	included for the court's consideration.	
<i>1.17</i>	<ul style="list-style-type: none"> Sections 118(2AA) and 118(8C) stipulate that the court shall consider a non-exhaustive list of factors in determining the extent of economic prejudice. Suggest adopting the version scrutinised in 2011. 	
<i>1.18</i>	<ul style="list-style-type: none"> Criminal provisions should be clear to ensure that the public will not accidentally fall into the criminal net. 	<ul style="list-style-type: none"> Views noted.

C. Copyright exceptions		
C1- Fair dealing		
Organisations / Individuals	Comments	Administration's responses
<u>Copyright owners</u> 1.1	<ul style="list-style-type: none"> Section 37 of the CO should be amended to fully and accurately embody the three-step test under the TRIPS Agreement of the WTO. 	<ul style="list-style-type: none"> We have been fully compliant with our international obligations (such as the “three-step test” requirements under Article 13 of the TRIPS Agreement of the WTO) when formulating all copyright exceptions. The proposed exceptions of the Bill are also compliant with this principle.
1.2	<ul style="list-style-type: none"> Welcome the Government's making reference to the US fair use principle when formulating the copyright exceptions. 	<ul style="list-style-type: none"> Views noted.
<u>Users</u> 1.3	<ul style="list-style-type: none"> The US has adopted the open-ended fair use copyright exception for years, which is also adopted in the Philippines and Israel. Australia and Ireland have the intention to follow suit. In Canada, an open-ended “UGC” approach has been adopted since 2011. It is an international trend to have an open-ended exception. An open-ended copyright exception not only benefits certain creative industries but society and culture as a whole too. At the same time, 	<ul style="list-style-type: none"> The Bill introduces a number of new copyright exceptions to facilitate users to use copyright works under appropriate circumstances, without the need for obtaining authorisation from copyright owners and without attracting any civil or criminal liability - <ul style="list-style-type: none"> (a) for the purposes of parody, satire, caricature and pastiche; (b) commenting on current events; (c) quotation; (d) educational instruction (especially for distance learning)

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	<p>it is also compatible with the world of Internet which transmits voluminous information speedily and helps facilitate the communication of original works on the Internet, which is a special media, and the continued growth of creativity. It is beneficial to all when citizens have the freedom to bring out their creativity, the creative industries can further develop and copyright owners would be able to discover creative talents. Fair dealing should be replaced by fair use.</p>	<p>and facilitating daily operations of libraries, archives and museums;</p> <p>(e) for OSPs to cache data;</p> <p>(f) media shifting of sound recordings.</p> <ul style="list-style-type: none"> The proposed exceptions could cater for common activities on the Internet, protecting the freedom of expression of users. Public consultation was conducted in 2004 to collect views on the proposal of fair use. As such a proposal will cause fundamental changes to Hong Kong's copyright regime, we should consider its impacts carefully. We will continue to closely monitor overseas developments in copyright protection and make due reference to them in our future legislative proposals.
1.4	<ul style="list-style-type: none"> After its legislative amendment, the number of "fair dealing" exceptions in the UK is twice as much as those in Hong Kong. The proposed copyright exceptions in the Bill cannot keep up with the latest technological developments or the global trend in copyright law. 	<ul style="list-style-type: none"> We have made reference to other overseas jurisdictions including the UK when formulating the exceptions. We noted that the UK has recently provided new exceptions for private copying, data mining, parody, archiving, education, the disabled and quotation in 2014. In fact, a lot of the newly-added UK exceptions are already covered in the proposed exceptions in our Bill. Upon the passage of the Bill, the scope of copyright exceptions of Hong Kong will be substantially the same as the UK's. The scope of our existing copyright exceptions, such as research and private study, news reporting, performing, playing or showing works in the course of activities of

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		educational establishments, is wider than that of the UK provisions.
1.5	<ul style="list-style-type: none"> Hong Kong's unique political environment and needs should be taken into account in formulating the scope of exceptions. 	<ul style="list-style-type: none"> The Bill introduces a number of new fair dealing exceptions, including for the purpose of parody (and related works), commenting on current affairs and quotation, etc., with a view to protecting freedom of expression and speech as well as facilitating users to use copyright works under appropriate circumstances, without the need for obtaining authorisation from copyright owners.
1.6	<ul style="list-style-type: none"> While the Government proposes the introduction of the communication right, the scope of exceptions is very limited with harsh conditions imposed. 	<ul style="list-style-type: none"> We have set a reasonable scope for the communication right and introduced corresponding new copyright exceptions to balance different interests. See response at A2.4.
1.7	<ul style="list-style-type: none"> Whether the dealing of a work is fair or not is to be determined by the court. However, as judges may not possess any background in the creative profession, their decisions may not provide adequate protection to creators. Guiding the court to consider several factors in assessing whether a use constitutes fair dealing may prevent judges from making a decision in the most objective manner. The definition of "fairness" in relation to the dealing is unclear. The room for 	<ul style="list-style-type: none"> The US has a long history in resorting to a fairness assessment by the court in applying the fair use doctrine; so do many other common law jurisdictions (including Australia, Canada and the UK) in dealing with specific copyright exceptions (such as for education, libraries and archives and news reporting purposes). Australia, Canada and the UK adopted the same approach when introducing the new exception for parody. To determine whether the fair dealing exception is applicable, the court may take into account relevant precedent cases and the circumstances of individual cases.

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	<p>interpretation may be manipulated for suppressing secondary creations and may lower the threshold for copyright owners to commence litigation and open a floodgate of litigation against secondary creators.</p>	<ul style="list-style-type: none"> The Bill does not lower the threshold of litigation concerning infringement. LegCo Paper CB(4)11/14-15(02) provides information on the factors which the court will consider in determining whether a use is “fair dealing” or “fair use”.
1.8	<ul style="list-style-type: none"> Among the various factors of fairness assessment, the meanings of “potential market” and “degree of transformative” are ambiguous and will be determined subjectively. Suggest determining clearly market value or value because “a minute amount of monetary income” is different from true piracy on a commercial scale, and will not undermine the protection for copyright owners. Moreover, even if the work is non-profit-making and there are no monetary gains, it is suggested that quotation of the source and the relevant information in reasonable circumstances should be required as a token of respect to the original author. On the other hand, some suggest removing factor (d), i.e. the effect of the dealing on the potential market for or value of the work, and including an exception to secondary creators who gain some income from advertising, for example providing certain exception with regard to the amount of income received so as 	<ul style="list-style-type: none"> The Bill stipulated several factors for the court to consider in determining “fair dealing”. All these factors are distilled from relevant precedent cases and expressly set out in several fair dealing provisions under the existing CO. Whenever fair use is raised as a defence, US courts will have to consider similar factors as well. According to the decided cases in the US involving parody, satire and appropriation art, in considering the “purpose and nature” of a work, it is important to consider whether and to what extent the new work is “transformative” and its degree of transformation. This means that whether the new work merely substitutes the original creation or adds something new, with a further purpose or different character, altering the underlying work with new expression, meaning or message. The courts appear to be generally of the view that the more transformative is the new work, the less significant will be other factors (e.g. whether the new work is of a commercial nature) in determining a finding of fair use. As to “the effect of the use upon the potential market for or value of the copyright work”, according to US precedent cases, courts are of the view that where a new work, when put

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	to protect secondary creations.	<p>into commercial use, becomes essentially the same as the original work in the latter's entirety, the new work will completely replace the original as a substitute in the market, resulting in a recognisable harm to the original work. Courts do not only consider the degree of prejudice caused to the market of the original work by the alleged infringers, but also whether their other actions (such as unrestricted and widespread acts) would result in a substantial and severe adverse impact on the potential market for the original work. The court will take into account not only the prejudice to the original work but also to its potential market, including its market for derivative works. Hence, if the new work would substitute the original in the market, the use would less likely be regarded as fair.</p> <ul style="list-style-type: none"> • The statutory factors are stipulated for the court's consideration. The court may consider the circumstances of the case and the specific facts for determining the relevant weight for different factors. • LegCo Paper CB(4)11/14-15(02) provides information on the factors which the court will consider in determining whether a use is "fair dealing" or "fair use".
1.9	<ul style="list-style-type: none"> • Instead of discussing "fairness", suggest providing a copyright exception for cases in which the source is acknowledged and the use is not for profit. 	<ul style="list-style-type: none"> • Whether an act amounts to copyright infringement is to be determined on whether an act which is restricted by copyright is committed in relation to the whole or a substantial part of a copyright work, but not whether the act is for profit. However, copyright protection is not without limitations. Fair access to and uses of copyright works by users are also

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		<p>important, not only for the protection of freedom of expression per se but also for advancement and dissemination of knowledge, as well as promoting creativity. There are over 60 provisions in the CO specifying a number of permitted acts which may be done reasonably in relation to copyright works notwithstanding the subsistence of copyright, and would not attract civil nor criminal liability.</p> <ul style="list-style-type: none"> • We have been fully compliant with the “three-step test” requirements when formulating any copyright exceptions as mentioned above. It is therefore necessary to stipulate in the CO the factors for assessing fair dealing.
1.10	<ul style="list-style-type: none"> • Some view that fair dealing can balance the interests of copyright owners and users, and that reference should be drawn from precedent cases in other common law jurisdictions. 	<ul style="list-style-type: none"> • Views noted.
<u>Others</u> 1.11	<ul style="list-style-type: none"> • Welcome the introduction of fair dealing exceptions. Some view that the conditions for exception should be carefully identified and any exception provisions should be clear and easy to understand so as to avoid any misunderstanding that could result in fear and affect the development of the creative industries. 	<ul style="list-style-type: none"> • Views noted.
1.12	<ul style="list-style-type: none"> • Providing a fair dealing copyright exception for parody and determining whether there is 	<ul style="list-style-type: none"> • Views noted.

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	infringement with reference to the purpose of use of a work is a fair approach. It will provide more comprehensive protection to commercial and non-commercial users.	
C2- Parody, satire, caricature and pastiche		
Organisations / Individuals	Comments	Administration's responses
<u>Copyright owners</u> 2.1	<ul style="list-style-type: none"> True parody will not substitute an original work, and it would not prejudice the market or potential market for the original work. 	<ul style="list-style-type: none"> Views noted.
2.2	<ul style="list-style-type: none"> Not opposed to the provision of copyright exceptions for parody works. However, exceptions for satire, caricature and pastiche which do not have any commentary elements on the original work should not be provided. 	<ul style="list-style-type: none"> With regard to the introduction of the proposed communication right in the Bill, we consider that the copyright regime should be liberalised at the same time with a view to striking a balance between different interests. The reasons for introducing fair dealing exceptions for the use of copyright works for the purposes of parody, satire, caricature and pastiche are as follows- <ul style="list-style-type: none"> (i) the scope is clear and confined, the types of works belong to well recognised literary or artistic creative practices which are reasonably accepted as appropriate in overseas copyright regimes ; (ii) they are common means for the public to express views or comment on current events, and can help

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		<p>promote freedom of expression;</p> <p>(iii) they may encourage creativity, nurture new talents and even encourage the development of entertainment business, therefore contributing to the overall economic and cultural development of society; and</p> <p>(iv) they are generally critical or transformative in nature, and are unlikely to substitute the original works.</p> <ul style="list-style-type: none"> In drafting the scope of exceptions, we have made reference to other overseas jurisdictions, including the US, Australia, Canada and the UK, as well as the public consultation result on parody in 2013.
2.3	<ul style="list-style-type: none"> Some copyright owners request that the exception should not be applicable to parody works uploaded to intermediary platforms (such as YouTube) as it will affect the licensing arrangements between copyright owners and intermediary platforms. 	<ul style="list-style-type: none"> A non-exhaustive list of factors has been introduced in the fair dealing exception provision to assist the court in analysing the circumstances of each case and balancing different interests with a view to reaching a fair decision. In future litigations when the court has to determine whether a dealing is fair, licensing arrangements between copyright owners and intermediary platforms may be one of the factors for consideration.
2.4	<ul style="list-style-type: none"> Any amendment should aim at exempting the legal responsibility of derivative works. Since there are obvious differences between derivative works and original works, the former would not compete with the latter and cause economic prejudice to copyright owners 	<ul style="list-style-type: none"> According to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), producing derivative works, including translation, adaptation or alternation of an original work, is an exclusive right of the copyright owner. Unless the act falls under any copyright

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	of original works.	exception, copyright owner's authorisation is required.
2.5	<ul style="list-style-type: none"> The existing law has already provided sufficient protection for parody works. If the definition of parody works is restricted, the exception provided for parody will become a tool for political prosecution. 	<ul style="list-style-type: none"> See response at A2.4.
<u>Users</u> 2.6	<ul style="list-style-type: none"> Some welcome the provision of copyright exceptions to parody, satire, caricature and pastiche. 	<ul style="list-style-type: none"> Views noted.
2.7	<ul style="list-style-type: none"> Some view that the use of original works for the purposes of parody, satire, caricature and pastiche or secondary creation should be exempted so long as it does not involve the relatives of the targeted person and does not contain any libel, inaccurate information or pornographic elements. 	<ul style="list-style-type: none"> Views noted.
2.8	<ul style="list-style-type: none"> The scope of control over "parody, satire, caricature and pastiche" is too wide and would include many non-commercial or commercial works in the community, posing serious threat to freedom of creation. Some view that parody, satire, caricature and pastiche works are being targeted and suppressed by the Bill 	<ul style="list-style-type: none"> Parody which does not constitute copyright infringement under the existing law will remain the same after the legislative amendment and freedom of expression will not be restricted. On the contrary, the Bill provides an exemption from civil and criminal liabilities for fair dealing in copyright works for purposes such as parody etc., without the authorisation/acquiescence from copyright owners, which

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	<p>or may be subject to criminal sanction. Others point out that other countries do not have similar statutory control on the abovementioned works. The Bill intends to protect certain individuals from being criticised by means of “kuso” at the expense of freedom of speech.</p>	<p>further protects freedom of expression.</p>
2.9	<ul style="list-style-type: none"> The ambiguous definition, scope and applicability of parody create uncertainties for creators as to the circumstances resulting in copyright infringement. Moreover, the Government may interpret the definition as it wishes and use it as a tool to suppress secondary creations and hinder their development. The Bill provides no definition for parody and related works. Whether a work falls within the exception is to be determined by judges who may not have professional creative background. Moreover, determining whether a work is a parody involves entirely subjective assessment, it is worrying whether the court’s decisions would be in favour of freedom of creation. Some support that it is not necessary to provide a definition for the above-mentioned terms, while some consider that reference 	<ul style="list-style-type: none"> There is no uniform definition of parody or unified approach in dealing with parody in the international community. “Parody” is not defined in the copyright legislation of Hong Kong as well as in overseas countries such as Australia, the US, Canada, the UK, etc. We noted that in formulating copyright exceptions for parody, caricature and pastiche, the UK Government also found it practically difficult to define these terms and therefore no statutory definition has been enacted to the legislation which became effective last October. In the public consultation in 2013, we invited views on whether and how to provide statutory definition for parody. We noted that the majority found it practically difficult to provide a statutory definition and such definition would unnecessarily restrict the court from striking a balance between different interests when making a fair decision in deciding cases. According to the common law, the court will adopt the common and ordinary meaning when interpreting the language of a statutory provision. Definitions from

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	should not be made to dictionaries when defining parody.	dictionaries can serve as one of the sources of reference.
2.10	<ul style="list-style-type: none"> The subject of the exception should be “publication of works for the purposes of parody, satire, caricature and pastiche” (i.e. the method of creation), not “parody work” (the work itself). 	<ul style="list-style-type: none"> The Bill proposes a new section 39A which provides an exception for fair dealing of copyright works for the purposes of parody, satire, caricature and pastiche. Hence, the exception is not restricted to a work itself.
2.11	<ul style="list-style-type: none"> Merely providing exceptions for some specific types of work will affect freedom of creation. It is also unfair to other works (for example some traditional creations and artistic expressions, writing lyrics, re-arrangement of songs or singing acoustic covers of copyright works). Creators will be easily caught by the legal net by creating works which do not fall under the exceptions. For parody and caricature, comical element is required in the creation in order to be qualified for the exception. As such, one is forced to behave like a clown in order to be exempted. It is evident that the proposed fair dealing exceptions fall short of addressing the concerns of creators and netizens, and will cause confusion to the public. Some point out that it is weird that exceptions 	<ul style="list-style-type: none"> The Bill proposes a number of new copyright exceptions covering uses - <ul style="list-style-type: none"> (a) of a work for the purpose of parody, satire, caricature and pastiche (b) of a work for the purpose of commenting on current events (c) of a quotation from a work The types of work subject to the proposed copyright exceptions are not limited to “comical” only. As long as the use fulfils the relevant qualifying conditions (for example, belongs to fair dealing), it will benefit from the proposed copyright exceptions and will not constitute copyright infringement. Freedom of creation is not overriding and should be subject to other reasonable legal rights. Copyright is a property right protected by law. As the proposed copyright exceptions

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	<p>will be provided to one who sings a song off-key in a comical way, but not for those who sing the acoustic cover of a song beautifully in an earnest way.</p>	<p>under the Bill will amount to a limitation of property rights, they should be confined to certain “special cases” and justified by adequate public policy grounds.</p> <ul style="list-style-type: none"> The fact that certain types of works are not exempted only reflects that there are insufficient public policy grounds to justify a limitation of property rights in such instances. This by no means amounts to discrimination against freedom of creation.
2.12	<ul style="list-style-type: none"> To whom will the copyright of secondary creation or parody works belong? 	<ul style="list-style-type: none"> The copyright of secondary creations or parody works depends on the originality of the works. The secondary creator or parodist will enjoy copyright protection for the original parts created by them as long as it does not affect the copyright of the original work.
2.13	<ul style="list-style-type: none"> Suggest deleting sections 39A(2)(b), (c) and (d) for the following reasons: Section 39A(2)(b): Exception should be provided if the purposes of use of the work is for parody, satire, caricature and pastiche. It is unnecessary to consider whether such use is fair dealing or not. Section 39A(2)(c): The amount and substantiality of the portion being dealt with is not related to the original intent of the exception. 	<ul style="list-style-type: none"> See responses C1.7 to C1.8. All copyright exceptions must be fully compliant with the “three-step test” requirements. Using fair dealing as the basis for consideration can ensure that the legal interests of copyright owners will not be unreasonably prejudiced. We have provided information vide LegCo Paper CB(4)11/14-15(02) on the factors which the court will consider in determining whether the use is “fair dealing” or “fair use”.

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	<p>Section 39A(2)(d): Such kind of work may possibly have negative impacts on the potential market for or value of the original work. So it should be deleted.</p> <p>Suggest amending section 39A(2)(a) by replacing “non-profit-making” with “not for pecuniary interests”.</p>	
2.14	<ul style="list-style-type: none"> Disagree with the introduction or amendment of sections 39A, 241 and/or 241A regarding the fair dealing provisions. These provisions aim at combating non-profit-making secondary creations, instead of commercial piracy activities. Some point out that although some secondary creations, which are critical or ironical in nature, may affect the potential market for or value of the original works, they do not directly compete with the original works and are therefore not related to copyright infringement. 	
2.15	<ul style="list-style-type: none"> The UK parody exception provides that the exception is not to be restricted by private contractual terms. Hong Kong should follow suit to eliminate the threat of civil liability completely. 	<ul style="list-style-type: none"> Currently, there are over 60 provisions in the CO specifying permitted acts to facilitate users to use copyright works in appropriate circumstances without attracting any liability for copyright infringement. Whether a private contractual term will override or restrict the operation of certain permitted acts depends on other areas of law distinct from the CO. The existing CO has no provision limiting the enforceability of

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		<p>such contractual terms. For example, under contract law, contractual terms which are contrary to public policy may be void or unenforceable. The Unconscionable Contract Ordinance (Cap. 458) stipulates that in appropriate circumstances, “unconscionable” contract terms will be void or unenforceable. Each case has to be determined with regard to its specific circumstances. Even if the private contractual terms to restrict the application of a permitted act are enforceable, the terms only bind the contracting parties. In reality, we are not aware of users having any particular difficulties when relying on the statutory permitted acts.</p> <ul style="list-style-type: none"> • We note that when introducing the fair dealing exceptions for parody, caricature and pastiche, the UK Government introduced a statutory provision to limit the enforceability of contractual terms which contradict or restrict the exception. The introduction of this statutory provision was highly controversial and attracted vigorous debate during the legislative process. The UK Government was criticised for underestimating the economic impacts the provision might bring to the content industry and was asked to closely monitor the effects of the implementation of this provision. • For prudence’s sake, we did not follow UK’s approach to introduce a statutory provision prohibiting the use of contractual terms to restrict the permitted acts in our proposed fair dealing exceptions for parody, satire, caricature and pastiche. The UK appears to be the only jurisdiction which adopted such a provision. Although Hong Kong or elsewhere has no such provision yet, the operation of the

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		relevant permitted acts has not been affected. After the passage of the Bill and the implementation of the newly-added fair dealing exceptions, we will closely monitor their implementation and the overseas developments regarding the “contract override” issue.
<i>Others</i> 2.16	<ul style="list-style-type: none"> Hong Kong has no imminent need to provide exceptions to parody works. However, taking into account that the UK and Australia have introduced the exceptions, Hong Kong can follow suit as long as the exceptions are not abused. 	<ul style="list-style-type: none"> Views noted.
2.17	<ul style="list-style-type: none"> It is not feasible to give a full exception to parody works as it will deviate from international practices and contravene international treaties. 	<ul style="list-style-type: none"> Views noted.
2.18	<ul style="list-style-type: none"> Suggest seeking academic advice for the definition of parody. 	<ul style="list-style-type: none"> See response at C2.2.
2.19	<ul style="list-style-type: none"> The definition, scope and applicability of parody are unclear, it will be difficult for the court to decide whether a work is infringing or not. 	<ul style="list-style-type: none"> See response at C2.9.

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2.20	<ul style="list-style-type: none"> Merely providing exceptions for certain categories of work will affect freedom of expression. In fact, creation is subjective and ever-changing, pre-setting a limit on liability cannot provide comprehensive protection to secondary creation. 	<ul style="list-style-type: none"> See response at C2.11.
2.21	<ul style="list-style-type: none"> To promote creativity, the Government should exempt the civil and criminal liabilities of both the creator and distributor if the parody work has not infringed copyright and the creator has not received any commercial benefits. 	<ul style="list-style-type: none"> A work that has not infringed copyright will not attract criminal nor civil liabilities.
C3- Commenting on current events		
<u>Copyright owners</u> 2.22	<ul style="list-style-type: none"> The Government has not consulted the public on this exception. 	<ul style="list-style-type: none"> The existing CO has already provided a fair dealing exception for “reporting current affairs”. Considering that “commenting on current events” is analogous or akin to “reporting current events”, it should be given the same treatment to further protect freedom of expression and other public interests. That is the reason why we proposed to provide a fair dealing exception for “commenting on current events” in the Bill.
2.23	<ul style="list-style-type: none"> As some people hold very extreme views on current events, this exception would allow the 	<ul style="list-style-type: none"> According to the existing copyright law, authors and directors have the right to object to derogatory treatment of their works.

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	adaptation or use of the works of lyricists or composers. Some of the comments may be contrary to the authors' views or stances. Disagree with this exception.	The Bill does not change the legal framework which provides for the protection of such moral rights.
2.24	<ul style="list-style-type: none"> The existing and proposed exceptions already cover a wide range of uses of copyright works. The Government should not introduce unnecessary exceptions affecting the right of copyright owners. This is an unprecedented exception. No such exception has been brought into the UK law after years of deliberation. The Government and LegCo should carefully consider if there are sufficient justifications for the introduction of such an exception. The existing law has already provided an exception for "reporting current events", which can be judged objectively by facts. "Commenting on current events" is however more subjective in nature. 	<ul style="list-style-type: none"> With regard to the introduction of the proposed communication right in the Bill, we consider that the copyright regime should be liberalised at the same time with a view to striking a balance between different interests. We understand the concerns of the copyright industry regarding the new exceptions. However, one of the characteristics of the fair dealing exceptions under the copyright regime is to enable the court to undertake a fairness assessment that would take into account the overall circumstances of a case in dispute before it with a view to protecting the legal right of the copyright owner from being unreasonably prejudiced. Such an approach has been widely adopted in overseas jurisdictions. Australia, Canada and the UK followed such an approach when introducing a new exception for parody, so did the US in using their fair use provisions to deal with parody. In common law jurisdictions (on top of Hong Kong, including Australia, Canada and the UK), as an established practice, when dealing with other copyright exceptions (such as for education, libraries and archives and news reporting purposes), it is also for the court to determine whether the dealing of the work is fair or not.
2.25	<ul style="list-style-type: none"> Article 10bis of the Berne Convention is meant for the benefit of the press, not the netizens. 	<ul style="list-style-type: none"> We understand that in some cases the use of copyright works for the purpose of commenting on current events does not

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	<p>The exception proposed by the Government is not compliant with the Convention.</p>	<p>necessarily rely on parody. In such cases, facilitating freedom of expression itself would be a sufficient justification to provide an exception for some works.</p> <ul style="list-style-type: none"> Copyright exception provisions should be able to strike a balance between the interests of copyright owners and the public. The existing section 39(2) of the CO provides a fair dealing exception for “reporting current events”. This exception is applicable to any person who reports current events, and not limited to reporters. As “commenting on current events” is analogous or akin to “reporting current events”, it can and should be given the same treatment. That is the reason why we proposed to provide a fair dealing exception for “commenting on current events” to further protect freedom of expression and other public interests.
2.26	<ul style="list-style-type: none"> According to some academic views, the exception for reporting current events should be limited to the following:- (i) for the purpose of providing information; (ii) the subject matter of the report must be current events; and (iii) the work used must have already been seen or heard. 	<ul style="list-style-type: none"> The Bill does not change the existing fair dealing exception provided for reporting current events.
2.27	<ul style="list-style-type: none"> The scope of this exception is too wide as one is exempted as long as the dealing of the work is fair. The protection for copyright owners is insufficient. 	<ul style="list-style-type: none"> See response at C2.24.

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<u>Users</u> 2.28	<ul style="list-style-type: none"> Agree to provide a copyright exception for commenting on current events. 	<ul style="list-style-type: none"> Views noted.
2.29	<ul style="list-style-type: none"> Press organisations should be given an exception directly. 	<ul style="list-style-type: none"> Both the existing fair dealing exception for reporting current events and the proposed exception for commenting on current events do not contain a restriction on the identity of users.
2.30	<ul style="list-style-type: none"> Some express concern about how to accurately define “criticism” in section 39 relating to “criticism, review, quotation, and reporting and commenting on current events”. 	<ul style="list-style-type: none"> “Criticism” exists in the existing section 39 of the CO. In Hong Kong and in other overseas jurisdictions having the similar provision, such as in the UK, no statutory definition of “criticism” is provided in the copyright law. In deciding individual cases, the court will apply common sense, in light of the relevant case precedents and the actual circumstances of the case to determine whether an act amounts to “criticism”.
2.31	<ul style="list-style-type: none"> Secondary creations mostly involve commenting on current events, and should not be obstructed. Some view that programmes which comment on current events by “kuso”, or works with re-written lyrics or adapted images will be restricted by sections 39A and 241A after the Bill is passed. Some consider that the Bill targets works on commenting current events by imposing criminal liability. Apart from satire and commenting on current 	<ul style="list-style-type: none"> The existing CO already provides a fair dealing exception to “reporting current events” but not “commenting on current events”. Having considered that “commenting on current events” is analogous or akin to “reporting current events”, it should be given the same treatment. The Bill also introduces a fair dealing exception for “quotation”, i.e. the newly added section 39(2) which allows reasonable quotation from a work in different circumstances.

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	events, Internet creations may be an expression of feelings on current events. The coverage of the exception is therefore not sufficient.	
C4-Quotation		
<u>Copyright owners</u> 2.32	<ul style="list-style-type: none"> The Government has not consulted the public on this exception. 	<ul style="list-style-type: none"> The exception can facilitate expression of opinions or discussions in the online and traditional environments. We note that the UK Government has provided for a fair dealing exception for the use of quotation, with reference to Article 10 of the Berne Convention, to facilitate users to use extracts in formal works, such as academic and scholarly texts, as well as in less formal works, such as blogs and social media, to assist in illustrating arguments and engaging in commenting and debates. Qualifying conditions of the exception include that the extent of the quotation is not more than that required by the specific purpose and that the dealing of the work is fair. Our proposal in the Bill is formulated along similar lines.
2.33	<ul style="list-style-type: none"> Regarding the exception on quotation, the phrase ‘whether for the purpose of criticism, review or otherwise’ is unrestricted, thus making the provision not compliant with the three-step test. Subsection 2(c) requires that “the extent of the quotation is no more than is required by the specific purpose for which it is used”. 	<ul style="list-style-type: none"> The first step of the “three-step test” requires confining any prospective copyright exceptions to certain special cases through identifying a clear and narrow scope supported by reasonable objectives. The proposed exception on quotation, which is based on Article 10 of the Berne Convention, is compliant with the requirement of the first step. In formulating the whole package of proposals in updating the copyright regime, a proper balance between different interests may not be struck if we only extend copyright exceptions to

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	<p>However, it is unclear what “specific purposes” refers to. Suggest deleting “specific purposes”.</p>	<p>parody or political parody works. We consider that it is a proper balance to provide copyright exceptions to quotation and other specific cases.</p> <ul style="list-style-type: none"> According to the remaining two steps of the “three-step test”, we should ensure that the exception does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the copyright owner. On this basis, the Bill also includes in each of the new fair dealing exceptions a non-exhaustive list of relevant factors to assist the court in analysing individual cases and balance different interests to reach a fair decision.
<p><u>Users</u> 2.34</p>	<ul style="list-style-type: none"> Agree to provide a copyright exception for “quotation”. 	<ul style="list-style-type: none"> Views noted.
<p>2.35</p>	<ul style="list-style-type: none"> The definition of “quotation” is unclear. It is unclear whether “capturing images” is included. Consider that the phrase “the extent of the quotation is no more than is required by the specific purpose for which it is used” is too ambiguous. The public will be hesitant to create for fear of breaking the law, which will bring adverse impacts to the creative industries. 	<ul style="list-style-type: none"> “Quotation” refers to extracting from copyright works (including films, sound recordings, broadcasts, photographs as well as traditional texts) for the purposes of providing information, illustrating arguments and facilitating dialogue and communication in various circumstances, including capturing images as appropriate. We note that the UK Government did not provide a statutory definition when they introduced the copyright exception for “quotation” last year. The provision also stipulates that “the extent of the quotation is no more than is required by the specific purpose for which it is used”, which means that the extent of quotation must be reasonable and not exceed the

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		amount justified by the purpose in order to satisfy the principles of fair dealing.
C5-Media shifting of sound recordings		
<u>Copyright owners</u> 2.36	<ul style="list-style-type: none"> Some disagree with this exception. Some suggest that the media shifting exception should not apply to literary works in sound recordings and the word “literary” in the proposed section 76A(1) should be deleted. 	<ul style="list-style-type: none"> To provide greater certainty to users and having regard to similar statutory exceptions in overseas jurisdictions, we propose to introduce a media shifting exception limited to sound recordings and restricted for private and domestic use. We are of the view that the proposal strikes a proper balance between the interests of copyright owners and users.
<u>Users</u> 2.37	<ul style="list-style-type: none"> The exceptions should also be applicable to media other than sound recordings. The existing proposal permits users to make one copy only. Some consider it should permit users to make one extra copy. 	<ul style="list-style-type: none"> See response at C2.36. When formulating any copyright exceptions, we must fully comply with the “three-step test” requirements to ensure that the exception does not conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the copyright owner. Therefore conditions are imposed to strike a balance between the interests of copyright owners and users. To cater for users’ needs, the relevant exception permits users to copy and store a private copy produced from an original copy of a sound recording in each device legally owned by them.
C6- Education and daily operation of library, archive and museum		

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<u>Copyright owners</u> 2.38	<ul style="list-style-type: none"> The provisions for preventing abuse should be maintained in the legislation and be fully implemented after enactment. Such provisions include: 1) limiting the number of copies to three, of which only one may be accessible to the public at one time; 2) allowing access to the copies only through a computer installed within the premises of the specified library, archive or museum; 3) limiting access to a particular copy to one user at a time; 4) imposing appropriate measures to prevent users from making further copies or further transmitting such copies; and 5) the exception should not be applicable if it is known that there are licences under licensing schemes available. 	<ul style="list-style-type: none"> The newly introduced sections 51A and 52A allow libraries, museums and archives to make copies of a copyright work for the purposes of preservation or replacement as well as to communicate, play or show the copyright work in its premises, subject to prescribed conditions.
C7-User Generated Content (UGC)		
<u>Copyright Owners</u> 2.39	<ul style="list-style-type: none"> Drawing reference from the views of academics, the UGC proposal should not be adopted. The existing licensing mechanism can deal with UGC. It is not necessary to introduce an exception for such kind of work. 	<ul style="list-style-type: none"> Views noted.
2.40	<ul style="list-style-type: none"> Articles 8 and 12 of the Berne Convention provide the relevant rights on derivative works 	<ul style="list-style-type: none"> The rights of translation and adaptation are protected by Articles 8, 12 and 14 of the Berne Convention. The existing

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	to copyright owners. Copyright should not subsist in an unauthorised adaptation regardless of its high originality.	CO also confers these exclusive rights to copyright owners. However, similar to other exclusive rights such as reproduction, these rights are not unrestricted. It is very important to allow users to access and use copyright contents in a fair manner. In view of the introduction of the communication right, we would revise and expand the scope of permitted acts as appropriate to maintain the balance between copyright protection and reasonable use of copyright works.
2.41	<ul style="list-style-type: none"> According to international norms, the adaptation of a work or a derivative work is a new copyright work if sufficient skill and labour is expended upon it. The new work will amount to an infringement of an original work only if it is a substantial/voluminous reproduction of the original work. However, any exception for derivative works should not affect the creation and production of original works. 	<ul style="list-style-type: none"> In respect of any unauthorised uploading of translated and adapted works, which are not used for the purposes of parody, review, caricature, pastiche or do not concern current events and merely contain some creative elements or transformative effects, there are insufficient public policy grounds to justify the special treatment of these works. No exception is provided for these kinds of work in this round of amendment of the CO.
<u>Users</u> 2.42	<ul style="list-style-type: none"> Secondary creations and modes of communication are ever-changing. If exemptions are given to certain types of expression only, some categories of creations and modes of communication will definitely be left out. The absence of such an exception would cause nuisance to the public and put the court under pressure. The UGC exception can cater for public needs without prejudicing copyright owners' commercial interests. Copyright owners should not unreasonably 	<ul style="list-style-type: none"> We have reservations about adopting a generic concept of UGC as a subject matter for copyright exception in this round of updates of the copyright regime for the following reasons- <ul style="list-style-type: none"> (a) The Bill already proposes to expand the scope of permitted acts reasonably. We consider that providing an exception to UGC may not be appropriate. In theory, it may be able to cover some works not in the scope of the permitted acts, however, it cannot answer the question as to why such works are justified to be provided with an

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	<p>reject the UGC proposal. The Government should not turn a blind eye to public opinion and refuse to accept the UGC proposal which was supported by 97% of the submissions.</p>	<p>exception;</p> <p>(b) UGC is a wide and ambiguous concept with no widely accepted definition at the international level. We note that there are views that the UGC exception may not comply with the first step under the “three-step test” in the TRIPS Agreement, i.e. any limitation or exception should be confined to a certain special cases; and</p> <p>(c) The concept is unsettled and developing. Canada is the only country which introduced UGC in its copyright regime. Although the Copyright Review Committee of Ireland recommended the Irish Government to follow suit, the latter has yet to make any legislative decision. Australia has rejected the idea, while the US and the EU are reviewing a series of copyright issues, including UGC. The UK is of the view that there is insufficient justification to support any regulatory intervention at the moment. Therefore, whether to introduce an exception for UGC remains controversial. We shall remain vigilant about international development in copyright matters.</p> <ul style="list-style-type: none"> • LegCo Paper CB(4)100/14-15(01) has already provided the reasons for not adopting the UGC proposal.
2.43	<ul style="list-style-type: none"> • “Secondary creations” is a clearly defined academic term. The distinction between secondary creations, copyright piracy and infringement as well as plagiarism is clear. The Government’s claim that “secondary 	<ul style="list-style-type: none"> • The substantial coverage of “secondary creation” is difficult to determine. For example, some consider that “secondary creation” should cover translation and adaptation or view "secondary creation" as derivative works. However, derivative works such as translations and adaptations are

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	<p>creations” is “not a term commonly used in copyright jurisprudence” reflects the fact that the copyright law profession is out of touch with the academia and has failed to provide proper protection for acts which are in line with academic requirements and the doctrine of justice. The Government should incorporate the definition of secondary creations into the statutory exceptions to close the gap in between.</p>	<p>clearly recognised in international copyright conventions and copyright laws all over the world as belonging to the exclusive rights of copyright owners. While a particular secondary creation per se may consist of some elements of originality, it may not be appropriate or justifiable to provide a copyright exception to all “secondary creations”.</p>
2.44	<ul style="list-style-type: none"> It is a common form of creation and expression in secondary creations to use a work, item or character as the basis for further development, clearly demonstrating touches of quotation and transformation. After independent creation, the secondary creation brings out new cultural meaning and creative elements when compared with the original work. 	<ul style="list-style-type: none"> Views noted.
2.45	<ul style="list-style-type: none"> In most countries, creators of “secondary creations” re-arrange, remix, and rewrite lyrics, sing cover versions of songs or produce music videos and upload their works onto online platforms for free access or sharing with peers with a view to promoting and supporting the original works. This is a common practice in the field of secondary creations. Authors of the original works normally would not prohibit 	<ul style="list-style-type: none"> If the use of a work falls under the existing or proposed exceptions (such as for the purposes of criticism or review, commenting on current events, parody, etc.) and the relevant conditions under the exceptions are met (for example it is a fair dealing of a copyright work), it will not constitute copyright infringement. We understand that some online platforms, such as YouTube, have already entered into licensing agreements with the

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	secondary creators from doing so if it is for non-commercial purposes.	Composers and Authors Society of Hong Kong, authorising YouTube to communicate cover versions of songs.
2.46	<ul style="list-style-type: none"> The secondary creations commonly seen in the community involve making ironic comments on current events in a casual manner with a view to entertaining the public, meeting personal social purposes or expressing feelings. This is part of Hong Kong's culture which does not involve replacing any commercial trade or business operations. It causes no actual prejudice to copyright owners, or its impacts are not so tremendous that the amendment of the CO is required. It is not convincing as the Government did not provide statistics on the economic prejudice caused by secondary creations to original works, or how secondary creations increase the value of original works through increased awareness. On the contrary, creators of original works in general do not mind their works being re-arranged, remixed or otherwise used for secondary creation or doujinshi purposes. Providing copyright exceptions for these acts will not affect the commercial interests in trading or business sense (including the rights of translation and making adaptations) or contravene the copyright treaties with the WTO. 	<ul style="list-style-type: none"> The right to translate and make adaptations are expressly protected by Articles 8, 12 and 14 of the Berne Convention. In respect of any unauthorised uploading of translated and adapted works, which are not used for the purposes of parody, review, caricature, pastiche or do not concern current events and merely contain some creative elements or transformative effects, there are insufficient public policy grounds to justify the special treatment of these works. Providing exceptions for these translated and adapted works may not comply with our international obligations.

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2.47	<ul style="list-style-type: none"> Drawing reference from the views of academics, the UGC proposal is compliant with the WTO's "three-step test". It fulfils the first step requirement that the exception should be confined to "special cases" if exceptions are only provided to individuals or individual groups for their non-commercial, trade or business uses. Under the UGC proposal, the exempted secondary creations should not be used in trade or business operations and should not substitute the market for the original work, and it fulfils the second step requirement of "not in conflict with a normal exploitation of the work" and the third step requirement of "not unreasonably prejudice the legitimate interests of the copyright owner". 	<ul style="list-style-type: none"> We notice the divergent views on this issue amongst academics, which shows that the concept of UGC is unsettled and controversial in the international community. We consider that we should focus on updating Hong Kong's copyright regime in this round of amendment to ensure it is on par with other overseas mainstream developments. The proposed copyright exceptions in the Bill are formulated based on overseas examples and all the exceptions are compliant with the "three-step test" requirements. LegCo Paper CB(4)100/14-15(01) has already provided the reasons for not adopting the UGC proposal.
	<ul style="list-style-type: none"> The WTO has not received any complaints on the UGC exceptions adopted by Canada. This proves that the claim that UGC is not compliant with WTO's "three-step test" is not substantiated. In discussing the "three-step test", the approach adopted by the Government is too stringent and has hence exaggerated the level of controversy over the Canadian exception. If the US "fair use" copyright exception can pass the "three-step test", so can the Canadian 	

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	UGC copyright exception given its narrower scope.	
<u>Others</u> 2.48	<ul style="list-style-type: none"> Suggest adopting this proposal or providing other means to exempt works which are made personally without commercial interests and not a substitute for the original work. 	<ul style="list-style-type: none"> Views noted.
2.49	<ul style="list-style-type: none"> Drawing reference to overseas development, the application and impact of UGC are tremendous. The UGC exception is different from the exceptions provided for works which have specific purposes, such as parody. UGC does not only involve legal issues, but also concerns policy issues with tremendous economic and social impacts. The Government should take reference from overseas experience and consult stakeholders before considering introducing it. 	<ul style="list-style-type: none"> Views note.
2.50	<ul style="list-style-type: none"> Some consider that introducing such an exemption without imposing control would affect the interests of copyright owners. 	<ul style="list-style-type: none"> Views noted.