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Report of the Bills Committee on Copyright (Amendment) Bill 2014

Purpose

This paper reports on the deliberations of the Bills Committee on Copyright (Amendment) Bill 2014 ("the Bills Committee").

Background

2. The existing Copyright Ordinance (Cap. 528) ("the CO") provides for exclusive rights to copyright owners to do certain "acts restricted by copyright" which include disseminating works through different modes of transmission including the right to broadcast a copyright work, the right to include the work in a cable programme service and the right to make available copies of work to the public by wire or wireless means including on the Internet. Copyright is infringed by any person who without the consent of the copyright owner does or authorizes another to do, any of the acts restricted by copyright which are not covered by any statutory copyright exceptions in Hong Kong. When making a civil claim for copyright infringement, a copyright owner has to prove that one or more of the acts restricted by copyright are committed.

3. With advances in information technology and the prevalence of high-speed Internet connectivity, new modes of content uses and transmissions have emerged which give copyright owners a wider choice of avenues to disseminate their copyright works. To make the copyright protection regime more forward-looking and to keep pace with technological developments, the Administration, following extensive consultations since 2006, introduced the Copyright (Amendment) Bill 2011 (the "2011 Bill") into the Legislative Council ("LegCo") in June 2011 to update the CO. The 2011 Bill sought to –

(a) provide for the rights to communicate a work or a performance to the public by a copyright owner or performer;

(b) provide for limitations on the liability of an online service provider ("OSP") relating to online infringing activities or materials;

(c) make further provisions with respect to the acts that might be done without infringing copyright or performers' rights; and

(d) provide for additional factors to which the court might have regard in considering whether additional damages should be awarded in an action for infringement of copyright or performers' rights.

4. A Bills Committee was formed in July 2011 ("the former Bills Committee) to scrutinize the 2011 Bill. During the scrutiny of the 2011 Bill, members of the former Bills Committee had raised concerns about, among other things, the making of parody[1] for dissemination on the Internet. After thorough scrutiny, the former Bills Committee supported the resumption of the Second Reading debate on the 2011 Bill with suitable amendments. The Administration undertook to separately consult the public on the treatment of parody under the copyright regime. The 2011 Bill however did not resume the Second Reading debate and lapsed upon expiry of the previous term of LegCo in July 2012.

5. In the light of the widespread concerns over the treatment of parody during the deliberation of the 2011 Bill, the Administration conducted a public consultation exercise from July to November 2013 to explore how parody

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[1] The Oxford Advanced Learners' Dictionary defines "parody" as "a piece of writing, music, acting, etc. that deliberately copies the style of somebody/something in order to be amusing". Webster's Dictionary defines parody as "a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule". Most recently, parody, among such terms as re-mix, mash-up works and derivative works, are loosely and collectively referred to by society to describe certain materials that sometimes adapt existing copyright works for amusement, criticism or satire. The term "Parody" has been used by the Administration as a general reference to cover all the four terms (namely, parody, satire, caricature and pastiche) in the 2013 consultation exercise. The Concise Oxford English Dictionary (12th Edition, 2012) defines the four terms respectively as follows –

Parody:	**1** an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect. **2** a travesty.
Satire:	**1** the use of humour, irony, exaggeration, or ridicule to expose and criticize people's stupidity or vices. **2** a play, novel, etc. using satire.→(in Latin literature) a literary miscellany, especially a poem ridiculing prevalent vices or follies.
Caricature:	a depiction of a person in which distinguishing characteristics are exaggerated for comic or grotesque effect.
Pastiche:	an artistic work in a style that imitates that of another work, artist or period.

should be taken care of as appropriate under the copyright regime having due regard to present day circumstances. After considering the views received, overseas experiences and the guiding principles identified for the consultation exercise, the Administration proposed a number of copyright exceptions for parody and related uses, and combined the new proposals with the legislative proposals under the 2011 Bill to form the Copyright (Amendment) Bill 2014 ("the 2014 Bill"). The Administration subsequently introduced the 2014 Bill into LegCo on 18 June 2014.

The Copyright (Amendment) Bill 2014

6. The 2014 Bill seeks to amend the CO to provide for –

(a) the rights to communicate a work or performance to the public by a copyright owner or performer;

(b) limiting an OSP's liability relating to online infringing activities or materials;

(c) acts that may be done without infringing copyright or performers' rights;

(d) additional factors in considering whether additional damages should be awarded in an action for infringement; and

(e) related matters.

7. According to the Administration, the 2014 Bill combines the proposals contained in the 2011 Bill (with the Administration's proposed Committee Stage amendments ("CSAs") discussed at the former Bills Committee incorporated) and the new proposals for the treatment of parody and related matters. Paragraphs 9 to 19 of the Legal Service Division Report (LC Paper No. LS63/13-14) highlight the major features of the 2014 Bill.

The Bills Committee

8. At the House Committee meeting on 20 June 2014, a Bills Committee was formed to scrutinize the 2014 Bill. Hon CHAN Kam-lam was elected Chairman of the Bills Committee. The membership list of the Bills Committee is in **Appendix I.**

9. The Bills Committee has held 24 meetings with the Administration and received views from the stakeholders, including copyright owners and users, at one of its meetings. A total of 8 419 written submissions on the 2014 Bill have also been received. The names of organizations and individuals that/who have given oral representations of their views to the Bills Committee are in **Appendix II.**

Deliberations of the Bills Committee

10. While members of the Bills Committee and deputations/individuals have divergent views on the proposed scope of exceptions under the copyright regime, there is a common consensus that a fair balance should be struck between protecting the legitimate interests of copyright owners and other public interests, such as fair and reasonable use of copyright works and freedom of expression. In the course of deliberation, members have expressed views about the communication right, criminal liability for copyright infringement, copyright exceptions, safe harbour provisions for OSPs, derogatory treatment, civil liability, the long title of the Bill and a number of drafting issues.

Communication right

11. With advances in information technology, new modes of electronic transmission, such as streaming, have emerged. According to the Administration, the current scope of statutory protection may not be adequate to cope with such rapid technological changes and might allow an infringer to evade liability and sanctions on technicality. The 2014 Bill, which is based on the original proposals in the 2011 Bill, introduces a new communication right and contains appropriate copyright exceptions to maintain a right balance between the interests of different stakeholders. New section 22(1)(fa) in clauses 9 of the 2014 Bill proposes an exclusive right of copyright owners in a work to communicate the work to the public through any mode of electronic transmission, including the broadcasting of the work, the inclusion of the work in a cable programme service, and the making available of the work to the public. Infringement of this right may carry both civil and criminal liabilities as provided under the new sections 28A and 118(8B) in Clauses 13 and 57(8) of the 2014 Bill respectively.

12. In response to some members' query as to whether Hong Kong is under any pressure from the international community to tighten up its copyright regime, the Administration has advised that the World Intellectual Property Organization's ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty, commonly known as the "Internet treaties", were adopted in 1996 to address the challenges of the new digital technologies. Given rapid

changes in information technology and 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. The introduction of a technology-neutral communication right is the mainstay of the current round of legislative update to bring Hong Kong's copyright regime on par with international developments and follows a long line of overseas jurisdictions. The enactment of the 2014 Bill, in providing for the communication right, will also address any uncertainty which the Customs and Excise Department ("C&ED"), the enforcement agency for criminal acts under the CO, may encounter when seeking to take enforcement action against illegal streaming of copyright contents.

Hyperlinks on the Internet

13. The Bills Committee notes that the use of hyperlinks to direct users to particular locations on websites to access information available to the public is a common feature of the Internet. Some members including Hon Charles Peter MOK have expressed concern whether the sharing of a hyperlink in itself would constitute the offence of unauthorised communication to public. Some other members including Hon Cyd HO have also raised concern whether the provision of embedded hyperlinks would constitute copyright infringement.

14. The Administration has advised that under the proposed new section 28A(5) in clause 13 of the 2014 Bill, a person does not communicate a work to the public if the person does not determine the content of the communication. Hence, ordinary acts by individual Internet users, such as the mere forwarding or sharing of a hyperlink on a web page or other Internet platforms to facilitate location of information already made available elsewhere on the Internet to the public, or the mere viewing of, or access to, materials made available or communicated by others, where the person so doing does not determine the content of the communication, would not constitute the copyright restricted act of communication to the public. Furthermore, parties such as OSPs, which provide facilities for the carriage or routing of signals, would not by the mere provision of facilities alone be considered as making a communication to the public. Also, the mere provision of embedded hyperlinks should not be regarded as a direct infringement because it is only a Hypertext Markup Language ("HTML") code pointing to the image or other material.

15. The Administration has further advised that the scope of the communication right has been carefully crafted within a justifiable ambit to achieve its policy objective. The proposed new section 28A(4) to (6) serves to clarify that certain acts should not, without more, constitute "communication to public". However, it does not seek to absolve the legal liability of a person if that person has taken active steps in the communication process, for example, by capturing and processing broadcast signals or data for simultaneous and

unaltered retransmission via the Internet. In such circumstances, the act might be caught as communication to the public.

16. The Administration has also explained that operators of websites which aggregate links to infringing materials hosted on third party websites might be liable for authorization of infringements, or joint tortfeasance in respect of the infringing acts, where the circumstances warrant. Specifically, if a "links aggregating site" is deliberately designed to facilitate infringing communication and/or downloading of copyright works as a business model for deriving commercial benefits, it is very likely that the operator of the "links aggregating site" will be liable for authorizing copyright infringement. Apart from attracting potential civil liability, an act of unauthorized communication of copyright works to the public may, when the evidence so supports it, constitute an offence.

17. In response to some members' enquiry whether the Administration would consider regulating the provision of hyperlinks on social media, the Administration has advised that the policy intent of introducing the concept of communication right and corresponding criminal sanctions in the CO is to combat large-scale online copyright piracy. A hyperlink does not in itself contain any substantive content, nor does it determine the availability of the information on that particular Internet location that it points to. The Administration does not consider it appropriate to regulate the mere act of sharing a hyperlink on individual social platforms, since such an intervention would not strike a proper balance between copyright protection and the reasonable use of copyright works.

Set top boxes

18. Hon MA Fung-kwok has relayed the concern of copyright owners about the proposed new section 28A(4) in clause 13 of the 2014 Bill which states that the mere provision of facilities by any person for enabling or facilitating the communication of a work to the public does not in itself constitute an act of communicating the work to the public. According to the copyright owners, the proposed new section may exonerate suppliers of unauthorized set top boxes (also refers to as TV boxes or media boxes), satellite television receivers and other similar devices which could be used improperly for copyright infringement from any legal liabilities. Such set top boxes may make it easier for users to locate materials available on the Internet, which may include in some circumstances, materials which were communicated (e.g. by streaming) without the authorization of the copyright owners.

19. Hon MA Fung-kwok is of the view that set top boxes with pre-loaded applications on the market are posing significant piracy challenges to and seriously undermining the economic interests of copyright owners. He urges

the Administration to introduce legislative amendments to protect the interests of copyright owners, in particular, the legitimate interests of TV broadcasters against online copyright infringements involving the use of set top boxes. Hon SIN Chung-kai also urges the Administration to deal with the issue by introducing amendments to the 2014 Bill to regulate sale of such set top boxes as a matter of priority.

20. Hon WONG Yuk-man and Hon Charles Peter MOK however oppose to the proposed regulation of sale of set top boxes as such digital devices could be used for both legitimate as well as infringing purposes. Any legislation imposing civil or criminal liabilities that target set top boxes might carry far-reaching implications. Instead, the Administration should adopt a technology-neutral approach and avoid setting a bad precedent on this issue, or else, the proposed regulation could be extended to other digital devices, including smart phones and home computers. In light of technological advancement, set top boxes might take many forms and it would be difficult, if not impossible, to define the scope of regulation.

21. According to the Administration, the proposed new section 28A(4) is not a new provision. It mirrors section 26(4) of the existing CO regarding the "making available" right. The proposed new section 28A(4) is in essence a consequential amendment arising from the introduction of the communication right. It is an important safeguard to ring-fence the ambit of the proscribed act in order to make clear that providers of facilities such as Internet service providers, OSPs, cybercafes, schools, libraries and business premises providing facilities for the carriage or routing of signals, server space, communication connections, wifi or computers would not, by the mere provision of the relevant facilities alone, be considered as making a communication to the public. The Administration considers the safeguard justifiable given the realities of the current local position as well as being consistent with the international norm.

22. The Administration has explained that the operation of set top boxes involves complicated technical as well as legal issues which require more careful consideration. New legislative provisions should only be proposed after thorough study and appropriate deliberation as well as public consultation. By introducing the concept of communication right, the passage of the 2014 Bill will provide beyond doubt that all forms of unauthorized electronic transmission of copyright works to the public (including streaming) would constitute copyright infringement. Sellers of set top boxes might be liable for authorizing the acts of copyright infringement of third parties who make the unauthorized communication should the facts and evidence warrant. This would enable copyright owners and C&ED to take appropriate enforcement actions against parties responsible for the unauthorized communication. The passage of the 2014 Bill would also provide a solid legal basis for law enforcement agencies to combat large-scale online piracy as well as cross-border collaboration.

23. The Administration has pointed out that if there is sufficient evidence that the developers of mobile applications and the manufacturers of set top boxes have authorized the illegal uploading or downloading of copyright works, or communication of copyright works to the public, or are acting in concert or pursuant to a common design to infringe copyright, they may incur civil liability of authorizing copyright infringement or as joint-tortfeasers. In this respect, the proposed new section 22(2A) in clause 9 of the 2014 Bill has set out a number of factors to assist the court in determining whether a person has authorized another person to do an infringing act. The existing section 275 of the CO also provides legal recourse to a person who charges for reception of programmes included in a broadcasting or cable programme service or sends encrypted transmissions against any person who "makes, imports, exports or sells or lets for hire any apparatus or device designed or adapted to enable or assist persons to receive the programmes or other transmissions when they are not entitled to do so". This section provides additional remedies to copyright owners against manufacturers and sellers of set top boxes in appropriate cases.

24. The Administration has further pointed out that the passage of the 2014 Bill will also improve the efficacy in taking criminal recourse against unauthorized communication of copyright works. This is so even though under the existing law the parties involved in developing and/or making available devices may already incur possible criminal liabilities depending on the facts and circumstances of each case. Where the facts of the case involve circumvention of technological measures adopted by right owners to protect against unauthorized copying or access to their works, there may be criminal liability for selling or making for sale or hire circumvention devices. The act of circumventing effective technological measures may also attract civil liability.

Criminal liability for copyright infringement

25. Currently, distribution of an infringing copy of a copyright work for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works constitutes an offence under section 118(1)(e) of the CO. In other cases, distribution of an infringing copy of a copyright workmay constitute an offence under section 118(1)(g) if the distribution is to such an extent as to affect prejudicially the copyright owner (hereinafter referred to as "the prejudicial distribution offence"). Instead of being limited to conventional distribution of hard copies, it also covers electronic copies distributed or transmitted through the Internet.

26. The Administration proposed in the 2011 Bill to introduce corresponding criminal sanctions against those who make unauthorized communication of copyright works to the public for the purpose of or in the course of any trade or business which consists of communicating works to the

public for profit or reward, or to such an extent as to affect prejudicially the copyright owners (hereinafter referred to as "the prejudicial communication offence"). The proposed criminal sanctions mirror the existing sanctions available in section 118(1)(g) of the CO. The Administration also proposed CSAs to the 2011 Bill to clarify what amounts to *"such an extent as to affect prejudicially the copyright owners"* by stating 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[2] to guide the court in determining the magnitude of economic prejudice.

27. Following the public consultation exercise on the issue of parody in 2013, and having regard to relevant decided cases on prejudicial distribution offence in Hong Kong, the United Kingdom ("UK") and Australia, the Administration clarifies in the 2014 Bill the threshold of criminal liability in relation to the existing prejudicial distribution and the proposed prejudicial communication offences, by dropping the phrase *"more than trivial economic prejudice"* and highlighting the factor of economic prejudice, for which whether the infringing copy distributed or the infringing communication amounts to a substitution for the work would be material. The Administration considers that the proposed provisions would achieve its policy objective of targeting large-scale copyright piracy and allay netizens' concerns regarding the possible impact of the criminal liability for the proposed prejudicial communication offence on the free flow of information through the Internet and to provide greater legal certainty.

28. The Bills Committee notes that some commonalities may be drawn from the relevant decided cases on the meaning of "prejudice". Firstly, the court takes into account all circumstances of the cases. Secondly, the infringement involves more or less a complete reproduction of the original work which can be used as a substitute for the original work. Thirdly, the mode of distribution, namely through the Internet, enables a potentially large number of members of the public to receive the infringing copies. Fourthly, the infringer's overall conduct has the potential of displacing the demand for the original work thereby shrinking the legitimate market for the copyright work. In the light of the above factors, economic prejudice has been caused to the copyright owners even though some infringers may not have an apparent profit motive. Hon Cyd HO however opines that the 2014 Bill should not be intended to prevent economic loss of copyright owners. Instead, criminal liability should only be imposed for the use of copyright works for profit-making.

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[2] The relevant factors were -
(a) the nature of the work, including its commercial value (if any);
(b) the mode and scale of distribution/communication; and
(c) whether the infringing copy so distributed/communicated amounts to a substitution for the work.

29. Hon CHAN Chi-chuen and Hon Charles MOK expressed concern whether section 161 of the Crimes Ordinance (Cap. 200) (regarding the offence of accessing to computer with criminal or dishonest intent) would be applied as an alternative to section 118 (regarding the offences in relation to making or dealing with infringing articles, etc.) of the CO to deal with offences relating to copyright infringements involving the use of set top boxes and mobile applications. Mr CHAN Chi-chuen relayed the concern of some user groups that in CHAN Nai-ming ("the Big Crook") case[3] in 2005, the defendant not only faced charges brought by virtue of the then section 118(1)(f) of the CO of attempting to distribute an infringing copy of a copyright work, other than for the purpose of or in the course of any trade or business, to such an extent as to affect prejudicially the rights of the copyright owner; but also an alternative charge of obtaining access to a computer with dishonest intent pursuant to section 161 of the Crimes Ordinance.

30. The Administration has explained that offence of access to computer with criminal or dishonest intent as provided for in section 161 of the Crimes Ordinance was introduced by the Computer Crimes Ordinance enacted in 1993. In the resumption of the Second Reading debate on the relevant bill on 21 April 1993, the then Secretary for Security said that, "There has been some concern expressed that this offence could be used to prosecute copyright related activities. The offence has not been designed to tackle copyright related activities, which are regulated under separate legislation. It is the Administration's intention to continue to keep the copyright regime separate and not to use this provision for the prosecution of copyright offences." The Administration has confirmed that there is no change to the above policy intent in copyright enforcement.

31. Hon CHAN Chi-chuen, however, has pointed out that the pressing of alternative charges under section 161 of the Crimes Ordinance in the Big Crook case was contrary to what the then Secretary for Security had said in the resumption of the Second Reading debate of the relevant bill on 21 April 1993. Hon CHAN Chi-chuen cautions that if the Department of Justice ("DoJ") uses section 161 to press charges for copyright infringements again in future, the Administration's remarks in paragraph 30 above would serve as evidence in any related judicial review against DoJ's decision Hon Charles Peter MOK has suggested that the Administration should introduce amendments to the 2014 Bill to prevent the pressing of alternative charges using section 161 of the Crimes Ordinance against copyright infringements. Notwithstanding this, Hon MA Fung-kwok opines that the legislative intent of a piece of legislation should aim

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[3] In 2005, C&ED took action against an Internet user who, through the use of BitTorrent software, uploaded three infringing movies onto the Internet for file sharing. The uploader (who used an alias "the Big Crook" (古惑天王) on the Internet to disguise his true identity) was prosecuted and sentenced to three months' imprisonment. (*HKSAR v Chan Nai Ming* [2007] 1 HKLRD 95 (CFI) and [2007] 2 HKLRD 489 (CFA)).

to bring offenders to justice. In this regard, DoJ's discretion to invoke a certain piece of legislation for prosecution should not be unduly restricted by the legislature.

32. The Administration has advised that since its enactment in 1997, the CO has been amended a number of times to introduce criminal sanctions against certain infringing acts. The inclusion of new criminal provisions has followed the due process of public consultation and scrutiny by LegCo prior to implementation. The Administration reaffirms that it is not its policy intent to "criminalize" any acts which attract only civil liabilities under the CO by invoking section 161 of the Crimes Ordinance.

Copyright exceptions

33. In Division III of Part II of the existing CO, there are over 60 sections specifying a number of permitted acts which may be done in relation to copyright works notwithstanding the subsistence of copyright (such as for the purposes of research, private study, education, criticism, review and reporting current events), and thus attracting neither civil nor criminal liability for unauthorized use. To tie in with the introduction of the communication right, the 2014 Bill, just as the 2011 Bill, proposes to revise existing exceptions by providing that the new communication right will as appropriate be subject to the permitted acts provided for in Division III of Part II.

Fair dealing exceptions

34. According to the Administration, the 2014 Bill proposes new copyright exceptions for the education sector, libraries, museums and archives, for temporary reproduction of copyright works by OSPs, and for media shifting of sound recordings. New exceptions are proposed –

(a) to provide greater flexibility to the education sector in communicating copyright works when giving instructions (especially for distance learning), and to facilitate libraries, archives and museums in their daily operations and in preserving valuable works (revised sections 41, 44, 45, 46, 51, 52, 53 and new sections 51A and 52A);

(b) for OSPs to cache data[4], which technically involves copying, a restricted act under the CO and may technically constitute copyright infringement (new section 65A); and

[4] This includes the storing or caching of web content by OSPs on their proxy servers so that the content can be quickly retrieved in response to future requests. Caching is transient or incidental in nature and technically required for the process of data transmission to function efficiently. Caching activities help save bandwidth and are indispensable for efficient transmission of information on the Internet.

(c) for media shifting, which refers to the making of an additional copy of a copyright work from one media or format into another, usually for the purpose of viewing or listening to the work in a more convenient manner. As copying a copyright work is a restricted act under the CO, media shifting may technically constitute copyright infringement (new section 76A).

35. The 2014 Bill also proposes to expand the existing section 39 of the CO to cover uses of copyright works for the purposes of commenting on current events and quotation. A new fair dealing provision for the purpose of parody, satire, caricature and pastiche is also introduced in new section 39A.

36. Hon WONG Yuk-man is of the view that the copyright regime does not provide sufficient protection to users of copyright works against civil and criminal liabilities. For example, a wide range of activities on the Internet which may make use of copyright works (such as rewriting of lyrics and posting of earnest performance of copyright works without any parodic elements), is not covered by the fair dealing provisions. Hon WONG Yuk-man criticizes that the Administration has been selective in complying with international obligations and practices. He also opines that the copyright regime should not be biased towards the commercial interests of copyright owners, as this would curtail free flow of information and freedom of expression. Instead, the CO should be updated to keep abreast with the cultural and technological developments internationally. However, Hon Martin LIAO is of the view that all exceptions proposed in the 2014 Bill should be based on respect for and protection of copyright. A balance should be struck between protection of copyright and freedom of expression.

37. The Administration has advised that the new exceptions proposed in the 2014 Bill together with the existing ones should cover a wide range of activities on the Internet where justified on public policy grounds. The Administration considers that the overall package of the legislative proposals would adequately protect freedom of speech and expression, without causing unreasonable prejudice to copyright owners. The introduction of new fair dealing exceptions to cover the use of copyright works for the purposes of quotation and commenting on current events would also help safeguard freedom of press, regardless of the operation model of the media. There would be no legal liability for copyright infringements if the activities on the Internet fall within the scope of the existing or proposed exceptions and meet the relevant qualifying conditions (for example, the dealing of the copyright work is fair). In fact, some online service platforms such as YouTube have licensing arrangements with some copyright owners authorizing the posting of cover versions of songs. It may not be necessary for copyright owners to resort to copyright legislation.

Fair use

38. Some members including Hon Claudia MO have enquired whether the Administration would consider the adoption of the fair use doctrine rather than fair dealing in Hong Kong. As advised by the Administration, the exhaustive approach of fair dealing exceptions have been adopted in Hong Kong and many other common law jurisdictions, whereas the open-ended fair use approach has been adopted in the United States ("US"). Under the fair dealing regime, copyright exceptions may apply to the use of copyright materials if such use is for any of the prescribed purposes in the law. On the contrary, the fair use doctrine does not specify the purpose of the use so long as the use is "fair" according to the assessment of several "fairness" factors.

39. The Administration has pointed out that the public was consulted on whether the fair dealing approach should be replaced by the fair use approach in 2004. On balance, the Administration considered it important to give clear guidance to both copyright work users and owners regarding the particular purposes and circumstances under which an act might be done in relation to a copyright work without infringing copyright. The Administration came to the conclusion that a general non-exhaustive fair use regime along the US model should not be introduced, as the scope of the fair use regime was uncertain and it would involve a fundamental change to the copyright legal framework of Hong Kong.

40. The Administration has further advised that it does not rule out the possibility of reconsidering the adoption of the fair use doctrine in Hong Kong. Nevertheless, the reasons for maintaining the fair dealing exceptions following the abovementioned public consultation remain valid and any major changes to the existing copyright regime should only be introduced after a due process of thorough public consultation and discussion in LegCo.

41. Hon CHAN Chi-chuen points out that the practice of fair use in the United States is adopted by some Asian jurisdictions such as South Korea, the Philippines and Singapore to protect the rights of copyright users. Some members including Hon SIN Chung-kai and Hon Claudia MO have queried about any negative impact of introducing provisions in the Bill that supports the practice of fair use, and whether such impact can be ameliorated by additional complementary copyright protection measures as implemented in other Asian jurisdictions having adopted the fair use regime.

42. The Bills Committee notes that the legal frameworks of jurisdictions which practise fair use vary. The idea of fair use was a subject of public consultation in 2004, and the Administration concluded that, on balance, the exhaustive fair dealing approach was preferable as it offers more certainty given

that the permitted acts would clearly set out with appropriate conditions. The Administration further informs the Bills Committee that the established fair dealing regime along with the extended scope and number of exceptions introduced in the Bill are suitable and appropriate with reference to Hong Kong's current situation and strikes a fair balance between the interests of different stakeholders. A shift to fair use would represent a fundamental revamp of our copyright regime and must be carefully considered in the light of a proper consultation exercise, and is beyond the scope of the current round of legislative update. That said, the Administration advises that it plans to launch a new round of copyright review to consider a number of copyright issues including the issue of fair use after the Bill is passed.

43. Hon CHAN Chi-chuen has proposed a set of CSAs which provide that the fair use of a copyright work, including such use by reproduction or distribution in copies or communications by any other means, for purposes such as criticism, review, quotation, reporting and commenting on current events, parody, satire, caricature, pastiche, education (including multiple copies for educational establishment use), scholarship, or research, is not an infringement of copyright. The proposed CSAs also include factors to be considered in determining whether the use made of a work in any particular case is fair. The Administration notes the proposed CSAs from Hon CHAN Chi-chuen and maintains its views as stated in paragraphs 39, 40 and 42 above.

Factors considered by the court on fairness assessment

44. Regarding the existing fair dealings exceptions for the purposes of research, private study, education, and public administration, the Bills Committee notes that the existing sections 38(3), 41A(2) and 54A(2) of the CO stipulate that "[i]n determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case, and, in particular (a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature, (b) the nature of the work, (c) the amount and substantiality of the portion dealt with in relation to the work as a whole, and (d) the effect of the dealing on the potential market for or value of the work." The 2014 Bill has included provisions to the same effect in both the proposed new section 39A and the revised section 39[5].

45. As explained by the Administration, the above statutory guidance is meant to provide clarity and flexibility to the fair dealing provisions. It is for the court to carry out a fairness assessment on a use which falls under one of the

[5] Corresponding exceptions to rights in performances in respect of the fair dealing of performances or fixations in section 241 and the proposed new section 241A have been introduced. Same non-exclusive factors for determining fairness have been included in these provisions for the sake of consistency and clarity.

fair dealing purposes to determine if it indeed constitutes a fair dealing. The assessment is necessarily very fact sensitive depending on all the circumstances of the individual case. The inclusion of a non-exhaustive list of factors would help the court in the assessment. Other factors may also be considered. The court would need to weigh all relevant factors, balance the interests of the copyright owners and the users of copyright works, and arrive at a fair result. This would also ensure compliance with the requirements of the "three-step test"[6] under the Berne Convention for the Protection of Literary and Artistic Works ("the Berne Convention") and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") of the World Trade Organization.

46. The Bills Committee has enquired about the court's judgement on what constitutes a "substantial part" of the underlying work in determining whether a certain act infringes copyright in the work. As advised by the Administration, in determining whether a certain act infringes the copyright in a work, the actual circumstances of each case should be considered. Under the existing copyright regime, the use of copyright works does not infringe copyright if only the ideas of the underlying work have been incorporated; only an insubstantial part of the underlying work has been incorporated; only works in the public domain in which copyright has expired have been used; the copyright owner has agreed; or the act concerned is one of the permitted acts under the existing CO. The 2014 Bill will not change the above situation.

47. As further advised by the Administration, where a person does a copyright restricted act in relation to the whole or a substantial part of an underlying work without its owner's permission, this may constitute a copyright infringement. In practice, the court will apply the principles established under the case law to the facts of the individual case to determine whether a substantial part of the underlying work has been used or reproduced. While "substantiality" depends on both the quantity and quality of the part taken from the underlying work, the quality of what has been taken will often be the more significant or important consideration in the court's determination. The court will first identify the alleged copied part of the plaintiff's work and compare it with the defendant's work to assess if the similarities are the result of copying instead of mere coincidence. The court will conduct a qualitative and holistic assessment of the similarities between the works, during which the similarities (which are the most relevant) and differences between the works will be examined.

48. The Administration has advised that in practice, the comparison of similarities and differences between the works is often a question of fact,

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[6] The "three-step test" requires that the exceptions must (a) be confined to "special cases", (b) not conflict with a normal exploitation of the work concerned, and (c) not unreasonably prejudice the legitimate interests of the author/copyright owner.

depending on the specific features involved in each individual work. Given the characteristics of each type of copyright works, the court may need to rely on expert evidence for an objective assessment. Upon determining from the facts that the defendant's work has indeed incorporated features taken from the plaintiff's work, the court will proceed to assess if such features constitute "the whole or a substantial part of the copyright work". In assessing the quality of the features of the underlying work that had been taken, the court will look into the skill and labour which constitute the parts of the work copied, such as the level of originality of the copied parts, and the importance of such copied features to the plaintiff's work as a whole. The question of "substantiality" has to be decided in accordance with the established principles based on the specific features of each copyright work and the facts and circumstances of each case.

New fair dealing exceptions for the purpose of criticism, review, quotation, and reporting and commenting on current events

49. Noting that copyright exception for the purpose of commenting on current events is not specifically provided in the UK copyright legislation, Hon MA Fung-kwok has raised concern whether the quotation exception proposed in the 2014 Bill is necessary as it may create a loophole for online piracy and may not be in line with the Berne Convention. However, Hon Cyd HO considers that an exception should be provided for quotation as the potential market of the original work would not be affected.

50. The Administration has advised that there are good public policy grounds justifying the exception for quotation for purposes such as academic citation or providing information to facilitate discussions. Similar copyright exception for quotation has been introduced in the UK. As to the exception for commenting on current events, the Administration shares the view of the Hong Kong Bar Association that it is analogous to reporting on current events which is a permitted act under the CO and should have similar treatment to further safeguard freedom of expression and public interest.

51. Hon Cyd HO has suggested that the Administration should consider including fair dealing exception for non-commercial re-posting of video clips of outdated news on the Internet in the 2014 Bill. Hon WONG Yuk-man opines that the fair dealing exception for the purpose of commenting on current events should also cover the re-posting of video clips of soccer matches which is very popular amongst Internet users.

52. According to the Administration, the existing CO does not provide a legal definition of "current events". The expression, as established by English jurisprudence, should be construed liberally. "Current events" are not confined to events of recent happenings. The same approach may be applied to the new fair dealing exception for "commenting on current events". Regarding the re-

posting of non-commercial video clips of outdated news on the Internet, even though the news *per se* is outdated, the event covered may still be qualified as a current event if its ramifications are still of current or continued interest to the public. Such re-posting may thus be exempted from both civil and criminal liabilities if it is for the purpose of commenting on events of current interest to the public and the dealing is fair for the particular purpose. The assessment of whether the dealing is fair is fact sensitive depending on all the circumstances of individual cases and the weighing of all fairness factors.

53. The Administration has further advised that apart from the purpose of commenting on current events, there are cases that the use of quotations from copyright works is justified. Users may use extracts in formal works, such as academic and scholarly texts, as well as in more informal works, such as blogs and social media, to help illustrate arguments and engage in comment and debate. The proposed fair dealing exception for the purpose of quotation covers reasonable uses of copyright works such as films, sound recordings, broadcasts and photographs as well as traditional text which are without any alterations or parodic or like elements if it is to facilitate expression of opinions or discussions in both the online and traditional environments. As such, the re-posting of video clips of news may be able to rely on this new copyright exception if the dealing is assessed to be fair and all the qualifying conditions under the proposed section 39(2)[7] in clause 18 of the 2014 Bill are met.

54. Hon CHAN Chi-chuen has expressed concern whether the inclusion of a non-exhaustive list of relevant factors in the new fair dealing exception would restrict the court's discretion in its determination. The Administration has advised that the existing CO already provided for a number of copyright exceptions in respect of fair dealing of copyright works for purposes including research and private study (section 38), education (section 41A) and public administration (section 54A) as well as the respective non-exhaustive list of relevant factors. The list served as a reference to the court which would always take into account all the circumstances of the case in arriving at a fair decision. Similar fairness factors can be found in relevant fair dealing or fair use provisions in the copyright legislation of Australia, the UK and the US.

55. The Bills Committee has requested the Administration to explain the difference between "communication of a work to the public" under the proposed new section 28A and "the performance, exhibition, playing or showing of the

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[7] The proposed section 39(2) stipulates that –
"Copyright in a work is not infringed by the use of a quotation from the work (whether for the purpose of criticism, review or otherwise) if –
(a) the work has been released or communicated to the public;
(b) the use of the quotation is fair dealing with the work;
(c) the extent of the quotation is no more than is required by the specific purpose for which it is used; and
(d) (subject to subsection (6)) the use of the quotation is accompanied by a sufficient acknowledgement."

work to the public" under the proposed section 39(5)(a)(iii). According to the Administration, "performance, playing or showing of work in public" are acts restricted by copyright as stipulated in section 27 of the existing CO. As stipulated in section 27(2), "performance", in relation to a work, includes delivery in the case of lectures, addresses, speeches and sermons; and in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film, broadcast or cable programme of the work.

56. The Administration has explained that the restricted acts of public performance, playing or showing in public under the existing section 27 concern with performances, playing or showing which take place in the presence of a public audience, whereas the restricted act of communication to public under section 28A concerns primarily with cases where a work is communicated through an electronic transmission process to the public which is not present at the place where the "communication" originates. There is therefore a distinction between a "direct representation or performance in public" envisaged in the existing section 27 and a "communication to the public" within the meaning of the proposed new section 28A[8]. It is the Administration's policy intent that the concept of "performance, exhibition, playing or showing of the work in public" in the existing section 27 should remain intact, separate and distinct from the concept of "communication to the public" in the proposed new section 28A.

57. The Bills Committee has also requested the Administration to explain the difference between "release", "issue" and "communicate" to the public under the proposed section 39(5). According to the Administration, the proposed new section 28A defines the meaning of "communication", which is a new restricted act. The proposed section 39(5)(a) elaborates the meaning of "released to the public" for the purposes of the proposed sections 39(1)(a) and 2(a). A work will be regarded as having been "released to the public" if it has been provided to the public by various means. The "issue of copies to the public" is one of such means, which refers to the act restricted by copyright as defined in the existing section 24 of the CO (i.e. the act of putting into circulation copies not previously put into circulation, in Hong Kong or elsewhere, by or with the consent of the copyright owner, but does not include any subsequent distribution of such copies in public circulation).

58. The Administration has explained that "issue of copies to the public" refers to the first release or distribution to the public copies of a work, whether in hard copies or in electronic form. "The performance, exhibition, playing or showing of the work to the public", as explained in paragraphs 55 and 56 above,

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[8] According to the Administration, it is not uncommon for the public showing and playing of a work to be preceded by an electronic transmission process, for example, playing or showing a work in public via audio/visual equipment such as a television or loudspeaker by way of broadcasting. In this case, the acts may involve both the playing and showing of a work in public and communicating a work to the public.

is also one of the means that will be regarded the work as having been "released to the public".

59. Hon Charles Peter MOK has relayed the concern of some netizens on whether acts, such as uploading materials on the web and receiving advertising payments and paying to boost or promote one's posts constitute a dealing of commercial nature and would therefore not qualify for the copyright exception under the proposed section 241 in relation to fair dealing with a performance or fixation for the purpose of criticism, review, quotation, and reporting and commenting on current events.

60. The Administration has advised that whether a dealing is for a profit-making purpose or of commercial nature is only one of the factors for consideration. Even if the dealing in question is for a profit-making purpose or of commercial nature, it does not automatically render it unfair. In determining whether the dealing is fair, the court must take into account all the circumstances of the case, as well as other relevant factors. The non-exhaustive list of factors as set out in the proposed section 241(4) are identical to those in the existing fair dealing exceptions under the CO and are in line with the wording in overseas legislation. The Administration considers it appropriate to adopt the same approach in formulating the copyright exception under the proposed section 241. In addition, the introductory provision in section 37 of the CO provides an overriding principle regarding the application of permitted acts. The primary consideration is that the act in question should not conflict with a normal exploitation of the work by the copyright owner and should not unreasonably prejudice the legitimate interest of the copyright owner.

New fair dealing exceptions for the purpose of parody, satire, caricature and pastiche

61. In response to some members' concern about the lack of statutory definitions for the terms "parody", "satire", "caricature" and "pastiche" in the 2014 Bill, the Administration has advised that the copyright legislation in the UK provides for fair dealing exceptions for the purpose of parody, caricature and pastiche, but does not provide for the statutory definitions of these terms. Among other common law jurisdictions, Australia and Canada provides copyright exceptions for the purpose of parody and satire, which are crafted within the ambit of fair dealing with no statutory definitions of such terms. The US adopts a general fair use doctrine and does not provide specific copyright exceptions as such in law.

62. The Administration has further advised that not providing statutory definitions for terms which encompass sophisticated concepts such as parody would allow flexibility in interpretation according to their ordinary and general meanings and for the court in adjudication, and indeed is the established practice

found in common law jurisdictions. This approach reflects the consensus reached by various stakeholders during the public consultation exercise on parody conducted in 2013.

63. Noting that there has not been a single prosecution case on parody, Hon Ronny TONG opines that the Administration should consider maintaining the status quo by refraining from the introduction of the new fair dealing exceptions in the 2014 Bill on the use for the purpose of parody, which has caused grave concern from users. The Administration has advised that the fair dealing exceptions were introduced in line with the international copyright developments, with a view to balancing the protection of the rights of the copyright owners and the users of copyright works.

Contract override

64. The Bills Committee notes that in the UK, the new fair dealing exception for parody, caricature and pastiche has included a provision restricting contractual terms from overriding or limiting the exception. The Bills Committee is also aware that the UK Government has explained at the House of Lords that the contract override provision would give users, consumers and businesses certainty and clarity that the new fair dealing exception would apply in all circumstances regardless of the terms of a contract. Without such a provision, restrictive contract terms could prevent the uses permitted by the exception, thus preventing benefits from being realized. The contract override provision would ensure that, where the law provides for an exception to copyright, people would be able to rely on that law without having to work out whether there exists a contractual term to the contrary creating a whole patchwork of different legal situations.

65. Some members including Hon Dennis KWOK, Hon CHAN Chi-chuen and Hon Charles Peter MOK opine that there is a need to include in the 2014 Bill an express provision limiting private contractual terms which purports to exclude or limit statutory permitted acts by a contractual party as in the case of the UK. In the absence of such restrictions or limitations, commercial contracts could be concluded to circumvent copyright exceptions. Hon Dennis KWOK has also pointed out that a number of the provisions in the existing Ordinances in Hong Kong has already overridden the freedom of contract, such as section 21 of the Employment Ordinance (Cap. 57) (regarding void conditions) and section 83 of the Disability Discrimination Ordinance (Cap. 487) (regarding validity and revision of contracts). However, Hon MA Fung-kwok does not support the proposed express provision as it would interfere with freedom of contract and legitimate business dealings.

66. According to the Administration, the introduction of the contract override provision in the UK is highly controversial and has attracted much debate during the legislative process. The UK Government has been criticized for underestimating the adverse economic impact on the content industry and has been urged to monitor closely the impact of the implementation of the provision in the UK. The responsible minister reassured the House of Lords that the impact of the change would be evaluated within five years. In addition, the Administration has considered the justifications for and against contract override provisions in various overseas jurisdictions and is aware that there is no international consensus on the issue.

67. As regards the situation in Hong Kong, the Administration has advised that freedom of contract plays a vital role in Hong Kong's free-market economy and it remains a cornerstone in the law of contract. Allowing copyright owners and individual users to enter into contractual arrangements on terms mutually agreed to both parties in respect of the use of copyright works not only provides flexibility and legal certainty, but also facilitates the efficient and competitive exploitation of copyright works to the benefits of both owners and users of copyright works.

68. The Administration has elaborated that it has carefully considered whether Hong Kong should follow suit and concluded with reservation over such a course limiting private contractual terms in the 2014 Bill. Contract override, if applicable, is enforceable only between the parties privy to the contract. In practice, the Administration does not observe any problem of users exercising the permitted acts. There is no evidence showing that the current copyright exceptions have failed to achieve the intended benefits owing to contractual provisions. Further, the doctrine of freedom of contract is not unfettered. For example, where a contract term is found to be contrary to public policy, it might be unenforceable. There is room for judicial intervention where important public interest is at stake. The doctrine may also be subject to statutory encroachment, for instance, consumer protection legislation such as the Unconscionable Contracts Ordinance. The Administration considers it unsatisfactory to include only contract override provisions in the new copyright exceptions, as this might amount to a hierarchy of different exceptions provided for in Division III of Part II of the existing CO without cogent analysis and justification in a comprehensive manner. Piecemeal inclusion of the limitation on contract override in respect of specific new exceptions would have the unintended consequence that existing copyright exceptions that are silent on the limitation could be overridden by contracts. This might also amount to a fundamental change of the legal norms underpinning the incentive mechanism intended by the copyright regime.

69. As regards cross-border contracts governed by laws other than those of Hong Kong, the Administration has advised that the effect of a contract override provision in the CO on the enforceability or interpretation of contractual terms in such contracts will likely be called into question. This may result in legal uncertainty and more legal disputes. In addition, a general statutory limitation on all copyright exceptions may result in reduced access to digital copyright works outside Hong Kong for Hong Kong residents if the right-holders or licensees of such works take the view that they do not wish to conduct business in Hong Kong as a result of the perceived consequences of the change.

70. In addition to analysing overseas experiences and reflecting on Hong Kong's circumstances and copyright regime, the Administration is of the view that this is not an appropriate time to consider contract override in the Hong Kong context because of the divergent views it received during the scrutiny of the 2014 Bill. While some users advocate that Hong Kong should follow the UK footpath of introducing restrictions on contract override for parody, copyright owners consider that restrictions on contract override should not be introduced without proper discussion as it may restrict freedom of contract and impact on businesses. Any material change would upset the balance between the interests of different stakeholders. Nevertheless, the Administration will closely monitor future operations of the new fair dealing exceptions when the 2014 Bill is passed and implemented as well as overseas developments in relation to statutory limitation on contract override. The Administration will also maintain an open mind in reviewing the subject in future.

71. Some members including Hon Martin LIAO opine that as the discussion on the introduction of restriction on contract override is not without controversy in overseas jurisdictions, and the relevant provision has only just been implemented in the UK, it would be advisable for Hong Kong to keep in view the impact of implementation of the provision in the UK, as well as the international development, instead of rushing to incorporate the statutory limitation on contract override into the 2014 Bill.

72. Hon WONG Yuk-man opines that freedom of contract is not an absolute right. A certain extent of restriction on freedom of contract is necessary for public policy reasons, especially when the bargaining powers between the contracting parties are unequal. Without such a restriction on contract override, the balance of interests of the copyright regime would be tilted in favour of copyright owners. He is of the view that a balance should be restored, or else freedom of creation would be stifled. As such, Hong Kong should follow the UK example and introduce restrictions on contract override, and evaluate the impact of the change within three to five years after enactment.

73. Hon Dennis KWOK has indicated his intention to move CSAs to the 2014 Bill and has provided for the consideration of the Bills Committee a set of CSAs to include a provision restricting contractual terms from overriding or limiting the exception for research and private study, criticism, review, quotation, reporting and commenting on current events, parody, satire, caricature and pastiche, and for purposes of giving or receiving instruction in a specified course of study provided by an educational establishment.

74. The Administration notes the proposed CSAs from Hon Dennis KWOK and reiterates its observations and explanations as stated in paragraphs 65 and 66 above. The Administration is further of the view that in relation to Hon WONG Yuk-man's proposal to include a categoric contract override provision in the CO to which all permitted acts in Division III of Part II would be subject might amount to a fundamental change of the legal norms underpinning the incentive mechanism intended by our copyright regime and would also be equally unsatisfactory as Hon Dennis KWOK's proposal.

75. The Administration also explains that there is no obligation to limit contract override under international treaties which apply to Hong Kong, including copyright treaties or the International Covenant on Economic, Social and Cultural Rights. The Administration further notes that in the European Union (EU), recital 45 of the EU Information Society Directive[9] provides that the exceptions and limitations should not prevent the definition of contractual relations designed to ensure fair compensation for the rights holders insofar as permitted by national law. Article 9 further states that the Directive shall be without prejudice to the law of contract. As such, given the complexity of the subject, the Administration remains the view that it would not be prudent to rush into legislating contract override provisions without a comprehensive review (including on the operation of the new copyright exceptions), thorough consultations with stakeholders and consideration of the on-going developments in overseas jurisdictions.

User-generated content

76. The Bills Committee notes the view of some deputations that the proposed copyright exceptions under the 2014 Bill would not provide adequate protection for users of copyright works who are engaged in online dissemination of user-generated content ("UGC") such as altered pictures/videos, mash-up works, video clips of cover versions of songs or songs with rewritten lyrics, fan-made videos and streaming of video game playing, etc. These deputations are of the view that UGC would not adversely affect the original work and hence

[9] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

warrant exception. The Law Society of Hong Kong is of the view that the concept of UGC is worthy of consideration in light of overseas developments. However, such consideration should not delay the current legislative work on updating the copyright regime.

77. The Bills Committee also notes the view of some copyright owners that UGC falls in a grey area between infringement and non-infringement of copyright and should be carefully studied before introduction. These copyright owners are concerned that the ownership of the copyright of a work would become unclear if exception were to be provided to UGC. Instead, the UGC exception should be assessed on a case by case basis rather than providing a blanket approval.

78. Hon WONG Yuk-man considers that non-profit making UGC or UGC not disseminated in the course of trade would not have a substantial adverse effect on the exploitation of the existing work or on an existing or potential market. He also considers that the absence of precedent should not be an excuse for not adopting the UGC exception which would facilitate freedom of expression. Quoting the views of Professor Peter YU (Kern Family Chair in Intellectual Property Law, Drake University Law School, US) that the UGC exception complies with the three-step test, and that the different views on the application of the three-step test should not preclude the introduction of the UGC exception in Hong Kong, Hon Cyd HO and Hon CHAN Chi-chuen urge the Administration to introduce copyright exception for non-commercial UGC in the 2014 Bill. Hon Charles Peter MOK also shares the view that the introduction of exception for UGC would provide greater, if not absolute, protection for users of copyright works.

79. The Administration has indicated that it has reservation in adopting a generic concept of UGC as a subject matter for copyright exception in this round of update as the concept of UGC is vague and undefined. There is no widely accepted definition of UGC at the international level[10]. The concept appears to be evolving alongside technological developments. It is not clear what additional problems a UGC provision may be able to address, given the enlarged scope of permitted acts proposed in paragraph 35 above. In theory, this may be able to benefit some acts outside the enlarged scope. But this still begs the question why such acts are justified to be excepted from copyright protection.

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[10] According to an Organization for Economic Co-operation and Development study ("Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking" (2007)) which the US quoted in its latest Green Paper (released in July 2013) and the ALRC quoted in its Final Report (submitted to the Australian Government in November 2013), UGC is defined as: (i) content made publicly available over the Internet, (ii) which reflects a certain amount of creative effort, and (iii) which is created outside of professional routines and practices. On the other hand, according to the European Union (in its consultation document of December 2013), UGC can cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort, and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content.

80. The Administration also has reservation about whether the UGC exception, in particular the one proposed by the netizens, notably the Copyright and Derivative Works Alliance, would comply with the three-step test under the Berne Convention and the TRIPS Agreement. As far as the Administration is aware, only Canada has introducedthe UGC exception in her copyright legislation. The subject of UGC remains unsettled in the international community and there are conflicting views as to whether the UGC exception would fail the three-step test among academics (such as Dr Mihaly Ficsor, the former Assistant Director General of WIPO and Professor Peter Yu). As the matter is still subject to debate, the Administration considers it prudent not to legislate with reference to the concept of UGC in the current exercise. Nevertheless, the Administration will continue to monitor international copyright developments in this respect for reference in future reviews of the copyright regime.

81. In response to members' concern, the Administration has advised that the new copyright exceptions proposed in the 2014 Bill and the existing ones will cover many daily activities on the Internet. The proposal represents a balance between copyright protection and reasonable use of copyright works. The proposed fair dealing exceptions and the high threshold for criminal liability would also provide adequate protection for users of copyright works. It is unlikely that UGC, which does not amount to a substitute for the original copyright work, would be caught by the criminal net. Given the legal principles governing civil liability, frivolous or vexatious civil claims would not be entertained by the court. The Administration believes that there should be reasonable safeguards to minimize abuse of civil action.

82. Hon Cyd HO is of the view that under the existing CO, the balance is tilted in favour of the copyright owners, thereby stifling the freedom of creation. According to the Organization for Economic Co-operation and Development study, UGC, which reflects a certain amount of creative effort and is created outside of professional routines and practices, is defined as content made publicly available over the Internet. With the introduction of the concept of UGC in the CO, a more relaxed copyright environment would be created, hence enabling the creative industry to thrive. As such, Hon Cyd HO has indicated her intention to move CSAs to the 2014 Bill and has provided for the consideration of the Bills Committee a set of CSAs to include copyright exception for predominantly non-commercial UGC.

83. The Administration notes the proposed CSAs from Hon Cyd HO and has reiterated its observations and explanations as stated in paragraphs 79 to 81 above. It maintains that the existing copyright exceptions together with new exceptions proposed in the Bill would cover a great many UGC commonly seen on the Internet. The concern posted by Hon Cyd HO could be greatly addressed with the clarification of the criminal liability and the provision of the safe

harbour in the Bill as well as the operation of the principles governing civil liability.

Copyright exceptions for the education sector

84. The Bills Committee notes that the exception under the proposed section 45 in clause 27 of the 2014 Bill allows copying or communication of passages or extracts from published works by educational establishments for the purposes of giving instruction, or by a pupil for the purposes of receiving instruction in a specified course of study. If educational establishments copy copyright works for the purposes of giving instruction in a specified course of study or communicate copies of the works made pursuant to section 45(1) for its educational purposes, they will not infringe the copyright in the works. Some members have expressed concern whether "authorized recipients" as defined in the proposed section 45 include teachers, school staff members with no teaching responsibilities, parents and siblings of young students who share reference materials and homework containing passages or extracts from published works, and private tutors using such materials and homework in conducting private tutorials.

85. As advised by the Administration, "authorized recipient" is defined under the proposed section 45(5) to mean "teacher or pupil of the establishment who has been authorized by or on behalf of the educational establishment to receive the communication". Under section 195(2) of the existing CO, the expressions "teacher" and "pupil" would include "any person who gives and any person who receives instruction". A staff member of an educational establishment may fall under the definition of "authorized recipient" if his or her duties and roles involve or are related to giving instruction. Parents and guardians of minors who are authorized recipients may also be covered if they are acting on behalf of minors in receiving the communication for the purpose of receiving instruction.

86. The Administration has explained that the purpose of the proposed section 45 is to address a specific situation in educational establishments and to provide their teachers and students with some flexibility in the use of copyright materials in the process of teaching and learning. Apart from section 45, there are other copyright exceptions in the CO to cater for various circumstances and situations which are not mutually exclusive, such as section 38 for research and private study, section 41A for purposes of giving or receiving instruction and so on. Users may, in the appropriate circumstances, make reasonable use of copyright works without owners' consent. For example, siblings who need to share reference materials and homework containing passages or extracts from published works, and private tutors using such materials and homework in conducting private tutorials may invoke the fair dealing exception in section 38.

87. Hon Cyd HO has raised concern whether the possession or communication of passages or extracts from published works by educational establishments for illustration purposes on school open days or in admission seminars would be covered by the exceptions provided under section 45. The Administration has advised that should an insubstantial part of a copyright work be required for such purposes, it will not constitute a copyright infringement. In the event that a substantial part of the work is required, various copyright exceptions in Division III of Part II of the CO may apply as the circumstances may warrant. For example, the new copyright exception for the purpose of quotation (the proposed section 39(2)) may be available to the educational establishment provided that the dealing with the work is fair and the extent of quotation is no more than is required by the specific purpose for which it is used.

88. Hon Claudia MO has raised concern whether the wording of the proposed section 45 provide adequate protection for parents as an innocent party from legal liabilities resulting from inadvertent infringements. The Administration has indicated that this section has built in safeguards to prevent any inadvertent infringements by requiring the educational establishments to take all reasonable steps to ensure that only authorized recipients will receive the communication and no copying or further transmission of the communication can be made. Such a provision requires educational establishments to deploy suitable technical protection measures, such as disabling certain downloading or copying functions in the communication, restricting access by implementing login requirements, etc. (which are commonly adopted in the digital environment) so as to ensure that copyright works may not be reproduced or disseminated outside the intended scope of this exception.

89. The Administration has explained that it does not intend to provide an exhaustive list of "reasonable steps" in the statutory provision as what "steps" are "reasonable" have to be determined with reference to the actual circumstances, such as technological developments, resources and technical expertise available to different educational establishments. The Administration considers that the law should provide adequate flexibility for educational establishments to adopt suitable measures. A flexible approach also obviates the need to amend the law whenever any measure specified in the 2014 Bill becomes obsolete or any new measure emerges in the future. If a dispute is put before the court, flexibility would be allowed for the court to define the term with reference to the prevailing circumstances.

90. Hon MA Fung-kwok opines that guidelines should be issued to teachers, students and parents to prevent possible abuse of the exceptions provided under the proposed section 45. According to the Administration, the Intellectual Property Department continues to maintain close collaborations with educational establishments in organizing seminars on copyright exceptions in relation to education every year to familiarize teachers and students with the copyright

exceptions provided under the CO. The Education Bureau's website also provides detailed information and questions and answers on copyright exceptions in relation to education. After the passage of the 2014 Bill, the Administration will continue its promotion campaign to educate members of the public, including stakeholders in the education sector, on the copyright exceptions.

Copyright exceptions for libraries, museums and archives

91. Hon Cyd HO is of the view that non-profit-making private museums which are open to the public such as the Hong Kong Museum of Medical Sciences should also be covered by the copyright exceptions provided to "specified museums" under the proposed amendments to section 46 of the CO. The Administration has advised that specified libraries would cover public libraries, museums and archives under the Leisure and Cultural Services Department, universities and other organizations for non-profit-making purpose as appropriate. Under section 46(1)(b) of the CO, the Secretary for Commerce and Economic Development ("SCED") may by notice in the Gazette specify libraries, museums or archives for the purposes of any provision in sections 47 to 53 of the CO.

92. The Bills Committee notes that the proposed new section 51A in clause 33 of the 2014 Bill is meant to facilitate a specified library, museum or archive to communicate to its staff or users a copy, made pursuant to section 51 (regarding copying by librarians, curators or archivists: preservation or replacement copies of works), of an item in its permanent collection. A proviso has been specified in section 51A(2)(a), i.e. only one user may access the copy through the use of a computer terminal installed within the premises of the library, museum or archive at any one time, so as to balance the legitimate interests between copyright owners and users.

93. Hon Cyd HO has pointed out that under the Books Registration Ordinance (Cap. 142), the publisher of a new book should, within a month after the book is published in Hong Kong, deliver several copies of the book free of charge to the Books Registration Office, Hong Kong Public Libraries of the Leisure and Cultural Services Department. She considers that the Administration should relax the condition in the proposed new section 51A(2)(a) to allow not only one user of the library, museum or archive to access through the use of a computer terminal at any one time the copy of an item made under the proposed amended section 51, so as to facilitate the free flow of information. She is also of the view that any impact on the interest of the copyright owner resulting from such a relaxation would be minimal.

94. The Administration has explained that this section concerns the communication of preservation copies held in the permanent collections of specified libraries, museums and archives. It does not concern copyright works in the general collections of those institutions. The prescribed condition aims at ensuring the fair use of copyright works and preventing abuse of the exception. If there is more than one original copy of the works in the permanent collection, more than one set of preservation copies can be made and more than one user could have access to the work through the use of a computer terminal at any one time. Moreover, access to the preservation copy of a work by multiple users at any one time would be permissible by obtaining a relevant licence from the copyright owner by the specified libraries, museums and archives. The Administration is of the view that this exception can facilitate libraries, museums or archives to preserve the original work and promote the spread of knowledge, and at the same time would not unreasonably limit the legitimate interests of copyright owners, e.g. commercial models of developing e-books, licensing for e-communication, etc.

95. The Bills Committee has also noted that where the amended section 53 is applicable, a librarian, curator or archivist may make a copy of an article of cultural or historical importance or interest without infringing any copyright in respect of the article. Hon Cyd HO has raised concern whether it would constitute copyright infringement for making a copy of such an article which is subsequently lost to Hong Kong through sale or export to a country which does not provide copyright exception similar to that provided under the amended section 53, or if there is a provision in the relevant sale and purchase agreement of the article which prohibits the making of such a copy.

96. The Administration has advised that copyright protection is territorial. Acts done in Hong Kong in relation to a copyright work are subject to the provisions of the CO. It is generally immaterial whether the copyright laws of the jurisdiction which later imports the article have such a copyright exception similar to that provided under the amended section 53. It is also immaterial whether the sale and purchase agreement of the article may contain a clause prohibiting the making of a copy, as whether there is any copyright infringement on the part of the librarian, curator or archivist is an issue governed by the statutory provisions of the CO, but not by a private sale and purchase agreement between the copyright owner and the overseas buyer. In any case, the terms of such an agreement are only binding on the two contracting parties, but not on a third party who is not privy to the agreement.

Copyright exceptions for purposes of public administration and temporary reproduction by service providers

97. On material open to public inspection or on official register, the Bills

Committee notes that the exception under section 56(3) of the CO mainly permits the appropriate person (i.e. the person required to make the material open to public inspection or the person maintaining the statutory register) or by or with his or her authority, to copy or issue or make available to the public copies of material which is open to public inspection pursuant to a statutory requirement, or which is on a statutory register (such as the register on company registration, trademark and patent registration or land registration), which contain information about matters of general scientific, technical, commercial or economic interest, for the purpose of disseminating that information. Hon WONG Yuk-man is of the view that the scope of the information about these matters should be enlarged to cover other matters, including those of general educational, religious and social interest.

98. The Administration has pointed out that since such statutory registers mainly contain information about matters of general scientific, technical, commercial or economic interest with less information on matters of other areas, and that there is a higher possibility that the general public would be interested in the former type of information, they were specifically stated in the CO. This section is similar to the equivalent UK provision and there are no difficulties in the actual application since its enactment in 1997. The Administration considers that section 56(3) needs not be amended.

Safe harbour

99. To provide incentives for OSPs to cooperate with the copyright owners in combating online piracy, and to provide sufficient protection for their acts, the Administration proposed in the 2011 Bill to introduce safe harbour provisions to limit OSPs' liability for copyright infringement on their service platforms caused by subscribers, provided that they meet certain prescribed conditions, including taking reasonable steps to limit or stop a copyright infringement when being notified. The provisions will be underpinned by a voluntary Code of Practice ("CoP") which sets out practical guidelines and procedures for OSPs to follow after notification.

100. The 2014 Bill proposes to add a new Division IIIA to Part II of the CO to provide for limitations on the liability of an OSP relating to an infringement of copyright in a work that has occurred on the OSPs' service platform (new sections 88A to 88J in clause 50 of the 2014 Bill). In particular –

(a) subject to the specified conditions in the proposed new section 88B, an OSP is not liable for damages or other pecuniary remedy in respect of copyright infringement that has occurred on the OSPs' service platform;

(b) procedures are provided for in the proposed new section 88C for giving a notice to an OSP in respect of an alleged infringement of copyright, requesting the OSP to remove the material to which the alleged infringement relates, or disable access to the material or activity to which the alleged infringement relates;

(c) the actions that an OSP may take after the OSP becomes aware that an infringement of copyright has occurred on the OSP's service platform, or becomes aware of the facts or circumstances that would lead inevitably to the conclusion that the infringement has occurred is provided for in the proposed new section 88D;

(d) the procedures for giving a counter notice to dispute the alleged infringement are provided for in the proposed new section 88E;

(e) criminal liability is imposed on a person who knowingly or recklessly makes any false statement in a notice of alleged infringement or counter notice under the proposed new section 88F;

(f) civil liability of a person who makes any false statement in a notice of alleged infringement or counter notice is provided for in the proposed new section 88G;

(g) subject to certain conditions specified in the proposed new section 88H, an OSP is not liable for any claim in respect of the OSP's removing the material to which an alleged infringement relates, disabling access to the material or activity to which an alleged infringement relates, reinstating the material, or ceasing disabling access, in good faith;

(h) a rebuttable presumption that an OSP has complied with the conditions specified in the proposed new section 88I is provided for in that section; and

(i) SCED is empowered to publish the CoP for providing practical guidance to OSPs in respect of the new Division IIIA under the proposed new section 88J.

101. Hon Charles Peter MOK has expressed the view that the stakeholders, including copyright owners, users and service providers, all welcome the introduction of the safe harbour and the proposed CoP. This serves as a mechanism to deal with infringement claims in an efficient and effective manner other than court proceedings to the benefit of copyright owners, users and intermediaries. As these stakeholders would be given better protection in the

digital environment, they hope that the CoP would be implemented as soon as possible. Having examined the latest version (as at March 2012) of the proposed CoP, Hon Charles Peter MOK is of the view that the Administration should update the stakeholders on the progress of the drafting of the CoP. According to the Administration, two rounds of consultation in August 2011 and January 2012 have been conducted for the drafting of CoP. Stakeholders and the LegCo Panel on Commerce and Industry would be consulted should there be further amendments to the CoP in the future.

102. The Bills Committee has discussed the difference between "online service" in the proposed new section 88A (regarding definitions) and Internet service. The Administration has advised that the definition of "online service" in the proposed section 88A refers to the proposed section 65A(2), where online service is defined to include (a) the transmission, routing, or provision of connections for digital online communications, between or among points specified by a user, of material of the user's choosing; (b) the hosting of information or material that can be accessed by a user; (c) the storing of information or material on a system or network that can be accessed by a user; (d) the linking or referral of users to an online location by the use of information location tools; and (e) the provision of online social networking services to users. The scope of online service may be wider than that of Internet service which commonly refers to connection service to the Internet.

103. The Bills Committee has also discussed the definition of "service provider" under the proposed new section 88A. Hon WONG Yuk-man is of the view that the definition of service provider is too wide. It may cover Facebook users who act as, or are unknowingly made to be, administrators of Facebook pages or groups. These users could be subject to unexpected legal liabilities.

104. The Administration has advised that, depending on the circumstances, Facebook users may be covered by the definition of service provider under the safe harbour provisions by acting as page or group administrators, and, if meeting the statutory requirements, benefit from the provisions that are intended to offer service providers additional protection against liabilities for copyright infringements occurring on their platforms, in the same way as other service providers. The proposed new section 88B(5)(b) also provides that a service provider does not incur extra liability if it fails to qualify for the limitations on liability under the safe harbour provisions.

105. The Bills Committee notes that subject to compliance with the qualifying conditions in the proposed new section 88B(2) (including the condition that the OSP accommodates and does not interfere with standard technical measures that are used by copyright owners to identify or protect their copyright works in the proposed new section 88B(2)(c)), an OSP may receive

protection under the safe harbour provisions. Hon WONG Yuk-man has pointed out that while the proposed new section 88B(5) is added to restrict the liabilities to be imposed by subsections (1) to (3), the addition of an exception by subparagraph (i) has make the provision difficult to read. With the unclear definition of "standard technical measure", it is difficult to judge whether the provision is reasonable.

106. As explained by the Administration, the proposed new section 88B(5)(a)(i) seeks to further clarify that, as long as it complies with the conditions in the proposed new section 88B(2), an OSP is not required to monitor and actively seek infringing activities in order to receive protection under the safe harbour provisions. Provisions that are similar to the proposed new section 88B(5)(a)(i) have been adopted in the copyright legislation in Australia, Singapore and the US. The proposed provision facilitates the understanding of the conditions set out in the proposed new section 88B(2) and clearly reflects the legislative intent.

Derogatory treatment

107. Division IV of Part II of the CO affords protection to three kinds of moral rights, namely the right to be identified as author or director (section 89(1), the right to object to derogatory treatment of a work (section 92(1)), and the right not to have a work falsely attributed to him as author or director (section 96(1)). Under section 105, the economic rights relating to copyright works are assignable, whereas the moral rights are not. In this regard, the right to be identified as the author or director, and the right to object to derogatory treatment of a work remain to be held by the author or director regardless of any transfer of the economic rights, whereas the right to object to false attribution may be exercised by someone other than the author or director. An author or director may commence proceedings against an infringer of his moral rights to seek appropriate remedies, such as injunction and damages. Such action is civil in nature. In other words, an infringement of the moral rights (including the integrity right against derogatory treatment) does not attract criminal liability.

108. Section 92 of the CO defines the concept of "derogatory treatment" and specifies certain acts (e.g. commercial publication and performance in public of a derogatory treatment of a work) which would amount to infringement of the integrity right. "Treatment" of a work means "any addition to, deletion from or alteration to or adaptation of the work", but excludes a translation of a literary or dramatic work, or an arrangement or transcription of a musical work involving no more than a change of key or register. In addition, the treatment of a work is derogatory if it amounts to being prejudicial to the honour or reputation of the author or director through (a) distortion (involving some form of twisting or perversion of it); (b) mutilation (involving some form of cutting or destruction so as to render it imperfect); or (c) other modifications (which may cover any

addition to, deletion from or alteration to or adaptation of the work which, although not a distortion or mutilation, is nevertheless prejudicial to the honour or reputation of the author or director).

109. Some members have expressed concern whether the right to object to derogatory treatment of work under section 92 would be in conflict with the fair dealing exceptions for the purpose of parody, satire, caricature and pastiche in the proposed new section 39A. The Administration has advised that generally speaking, treatments such as parody, satire and the rewriting of song lyrics would unlikely have prejudicial effect to the honour or reputation of the authors or directors as the treatments would not be mistaken as the original works of the authors or directors. The right to object to derogatory treatment of work is an independent moral right. If the author could prove that his work has been subject to derogatory treatment, notwithstanding the fair dealing exceptions in the proposed new section 39A, he could have civil recourses against the person who has treated his work derogatorily. However, as case law in overseas jurisdictions suggested, the threshold for proving derogatory treatment is relatively high as a complainant has to prove that his honour or reputation has been prejudiced on an objective standard. There have been no precedent cases in Hong Kong so far.

110. Hon Paul TSE has suggested that the Administration should consider reviewing the existing section 92(2)(b) of the CO, by replacing the phrase "or is otherwise prejudicial" with "or otherwise is prejudicial", to ensure that the element of being "prejudicial to the honour or reputation of the author or director" would qualify all derogatory acts referred to in that section.

111. The Administration has advised that under the existing section 92(2)(b), "or is otherwise prejudicial" means "or is in other ways prejudicial". The derogatory treatment of a work which is prejudicial to the honour or reputation of the author or director may take different forms, of which "prejudicial distortion" and "prejudicial mutilation" listed in section 92(2)(b) are two of them. The Administration considers that the existing provision already clearly provides that whether the treatment of a work is "prejudicial to the honour or reputation of the author or director" is the central element in constituting derogatory treatment. It is not necessary to replace "or is otherwise prejudicial" with "or otherwise is prejudicial" as suggested.

Civil liability

112. Copyright infringement attracts civil liability which is actionable by owners. The general principle behind is to right the wrong that has been done to a claimant, who must bear the burden of proof of the wrongdoing and the harm done and may seek remedies including damages. As a general rule, damages are compensatory in nature. Accordingly, the copyright owner has to

prove the loss suffered by him or her as a result of infringement. In view of the difficulties encountered by the copyright owner in proving actual loss, the CO also allows the court to award additional damages as the justice of the case may require having regard to all the circumstances, and, in particular, a number of statutory factors[11]. Given the digital challenges, the 2014 Bill, as in the 2011 Bill, proposes to introduce two additional factors for the court's assessment of damages, namely (a) the unreasonable conduct of an infringer after having been informed of the infringement, and (b) the likelihood of widespread circulation of infringing copies as a result of the infringement.

113. The Bills Committee notes the concern of some copyright users about possible abuse of civil action (e.g. through mere threatening) by copyright owners and the resulting chilling effect in cases of unauthorized use of copyright works by parodists. According to the Administration, it is not aware of any past local incidents of copyright owners taking legal actions against parodists. Moreover, copyright owners may have difficulty in proving the loss suffered by them as a result of technical infringement of their works caused by parodists. In any case, large scale piracy cases on the Internet will deserve priority attention. Frivolous or vexatious civil claims would not be entertained by the court.

114. Hon Cyd HO has expressed concern whether a parent who recorded a video of his/her children taking a dancing examination or ice-skating competition conducted with background music of a copyright work and shared the video on Internet might infringe copyright inadvertently. The Administration has advised that whether the act of the parent concerned has constituted infringement depends on actual circumstances. The existing CO has already provided for an exception for incidental inclusion of copyright material. While one could not rule out the possibility of copyright infringement in the specific case mentioned by Hon Cyd HO, in practice, in a great many trivial cases in which copyright might have been infringed technically, the economic or other interest involved might not be sufficient for a copyright owner to bring civil proceedings, given the merit considerations, legal uncertainties, litigation costs and time, etc.

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[11] Section 108(2) provides that the court may in an action for infringement of copyright having regard to all the circumstances, and in particular to -
(a) the flagrancy of the infringement;
(b) any benefit accruing to the defendant by reason of the infringement; and
(c) the completeness, accuracy and reliability of the defendant's business accounts and records,
award such additional damages as the justice of the case may require.

Long title of the Bill

115. The Bills Committee notes that according to the Drafting Legislation in Hong Kong – A Guide to Styles and Practices ("the Guide") published by DoJ, the long title should be wide enough to embrace the whole of the contents of a Bill and specific enough to give fair notice of the subject of the bill. Hon WONG Yuk-man alleges that the long title of the Bill as drafted does not cover all the provisions in the Bill. He considers that the long title as drafted is inconsistent with the styles and convention as prescribed in the Guide. Hon WONG Yuk-man proposes CSAs to the long title by referring to related and consequential amendments.

116. The Administration advises that according to Rule 50(3) of the Rules of Procedure ("RoP") of LegCo, the Bill shall be given a long title setting out the purposes of the bill in general terms. According to Rule 57(4)(a) of RoP, an amendment must be relevant to the subject matter of the Bill and to the subject matter of the clause to which it relates. The Administration refers to the LegCo President's ruling on the proposed amendments to the Communications Authority Bill dated 27 June 2011, where she stated that the long title should set out the purposes of the bill in general terms, should cover everything in the bill, and must accurately reflect its content. Taking into account the purposes of the Bill and its content, the Administration advises the Bills Committee that the long title complies with procedural requirements.

117. The Administration advises the Bills Committee that Hon WONG Yuk-man's proposals are not necessary, and that they may not comply with the requirements of Rule 58(9) of RoP as interpreted by the LegCo President's previous rulings. Rule 58(9) of RoP provides that "[i]f any amendment to the title of the bill is made necessary by an amendment to the bill, it shall be made at the conclusion of the proceedings…". The Administration explains that a clear principle has been set out in previous rulings of the LegCo President that the long title is not subject to amendment unless an amendment made to the substantive provisions in the bill makes it necessary to do so. Furthermore, the long title cannot be amended to expand the scope of a bill to allow some proposed amendments which would otherwise be outside scope to be moved. The Legal Adviser to the Bills Committee ("the Legal Adviser") concurred with the Administration on this point. The Administration added that reference should be made to LegCo President's ruling on Hon WONG Yuk-man's proposed amendments to the Special Holiday (3 September 2015) Bill dated 6 July 2015. The Administration does not consider that the CSAs proposed by Hon WONG Yuk-man are admissible under RoP.

118. The Administration also confirms with the Bills Committee that the proposed CSAs to be proposed by the Administration are relevant to the subject matter of the Bill and to the subject matter of the clause to which the CSAs relate as required by Rule 57(4)(a) of RoP, and no amendment to the long title would be made necessary by the passage of such CSAs.

Drafting issues

119. The Bills Committee has discussed the use of conjunction "and" and "or" in the proposed sections 17(5)(a)(i) and (ii), 17(5)(b)(ii) and (iii) and 19(6)(a) and (b) in clauses 6 and 8 of the 2014 Bill. Hon WONG Yuk-man is of the view that the Administration should introduce CSAs to refine the drafting of the said provisions by replacing "and" with "or" to better reflect the legislative intent. According to the Administration, it is correct to use "and" ("及") to link up a series of paragraphs introduced by "includes" ("包括"). The word "include" in its definition indicates that the matters that follow are not exhaustive. To enhance clarity, the Administration will propose CSAs to add ", any of the following" after "work" in section 17(5)(a) and after "artistic work" in section 17(5)(b) respectively. The Administration will also propose adding "any of the following" after "includes" in section 19(6).

120. In response to the suggestion made by the Legal Adviser as to whether the Chinese equivalent of "making available to the public" should be added to the corresponding English version of the existing sections 17(5) and 19(6)of CO, the Administration has advised that it will introduce CSAs to substitute the words "making available to the public includes" in the provisions with ", ***making available to the public*** (向公眾提供) includes".

121. The Bills Committee notes that the Chinese equivalent of the term "transmission" is rendered as "信息" in the proposed section 28A(6)(b) in clause 13 of the 2014 Bill and "訊息" in section 153Q(3) of the Crimes Ordinance. In response to the Legal Adviser's suggestion, the Administration will move CSA to delete "信息" and substitute "訊息" in the proposed section 28A(6)(b) in clause 13.

122. The Bills Committee has discussed the Chinese term "東西" under the proposed section 28A(6)(a) (i.e. "what is made available" in the corresponding English provision) in clause 14 of the 2014 Bill. As advised by the Administration, the use of the term "東西" in the proposed section regarding infringement by communicating to the public refers to any concrete or abstract thing. Its use in the proposed section to cover anything that is made available in a communication is appropriate and has been used in several instances in the CO.

123. The Bills Committee has also noted that the drafting of the proposed section 39(2) in clause 19 of the 2014 Bill is based on Article 10 of the Berne Convention, which provides that "it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose". Hon WONG Yuk-man is of the view that the Administration should consider reviewing the drafting of the proposed section 39(2)(c) in view of the difficulty in defining the extent of quotation from a work which is no more than is required by the specific purpose for which it is used.

124. According to the Administration, the proposed section 39(2) does not place any limitation on the purpose for which the quotation is used, nor on the amount that may be quoted, so far as the use constitutes a fair dealing with the copyright work and the extent of the quotation does not exceed that required by the purpose for which it is used. This approach is consistent with that envisaged under Article 10 of the Berne Convention and in line with Hong Kong's international obligations in this regard. The UK has also adopted a similar formulation which requires that the use of the quotation should be fair dealing with the work and the extent of the quotation should be no more than is required by the specific purpose for which it is used. The Administration considers that the proposed section 39(2)(c) has the benefits of flexibility in its application to cater for a wide range of cases. It seeks to achieve a fair and reasonable result by taking into account the specific circumstances of each case.

125. In response to Hon WONG Yuk-man's view that the Chinese character of "導" should be replaced with "道" in the Chinese term "報導" under the proposed section 39(3) and relevant proposed sections, the Administration has advised that after studying the use of such terms, it will move CSAs to amend all the references to "報導" in clauses 18, 52, 75 and 89 of the 2014 Bill to "報道".

126. The Bills Committee has discussed the difference in meaning between the performance of the work "to the public" and the performance of the work "in public" in the proposed section 39(5)(a)(iii) in clause 18 of the 2014 Bill. Having made reference to the existing CO, the Administration will propose CSAs to replace the expression "to the public" with "in public" in the proposed section 39(5)(a)(iii). The Administration will also propose CSAs to the same effect in the proposed section 241(5)(a)(iii) and (b)(iii) in clause 75.

127. With regard to the proposed section 39(5)(b) which provides that no account is to be taken of any unauthorized act in determining whether a work has been released or communicated to the public as referred to in the proposed section 39(5), Hon WONG Yuk-man considers that the drafting of the proposed provision should be reviewed to specify who determines whether a work has

been released or communicated to the public. The Administration has advised that while the determination of whether a work has been released or communicated to the public may ultimately involve a determination by the court, the Administration considers that it is not necessarily limited to such a determination. The present drafting of the proposed section 39(5)(b) reflects its considered view.

128. The Bills Committee has discussed the use of the word "被" in the proposed section 41A(8) in clause 24 of the 2014 Bill. According to the Administration, the use of the word "被" in the phrase "被用以進行交易" can make clear the meaning of the provision as a whole and avoid confusion. After considering Members' views, the Administration will propose CSAs to replace "被用以進行交易" with "用作交易" and change the arrangement of the sentence as appropriate in the relevant provisions to achieve the same purpose.

129. Regarding the difference in meaning between "knew or ought to have been aware" in the English text and "已知道或應已知道" in the Chinese text under the proposed section 44(2) in clause 26 of the 2014 Bill, the Legal Adviser considers that there is a difference in the degree of knowledge between "know" and "aware" in the English text which cannot be reflected in the Chinese text. The Legal Adviser has suggested either amending the English text from "ought to have been aware" to "ought to have known" which is widely used in the Laws of Hong Kong, or amending the Chinese text from "已知道或應已知道" to "已知道或應已知悉".

130. The Administration has explained that the wording is modelled on UK's Copyright, Designs and Patents Act 1988. There is no significant difference in the meaning between "know" and "aware", and there is also no problem in the application of the relevant provisions. From the drafting point of view, it is not necessary to use different Chinese terms for different English terms (and vice versa) so long as there is legal clarity. The two expressions of "know" and "aware" are treated as equal in case law in Canada.

131. The Bills Committee has discussed the proposed new section 52A in clause 35 of the 2014 Bill regarding playing or showing by librarians, curators or archivists of sound recordings or films. Under the proposed new section 52A(1), if the exempting condition specified in subsection (2) is complied with, the librarian, curator or archivist of a specified library, museum or archive may play or show any sound recording or film held in the permanent collection to the public without infringing copyright. The proposed new section 52A(3) specifies that if the above specified institution knew or ought to have been aware of the fact of the availability of any licences under licensing schemes , the exemption provided by the proposed new section 52A would not be applicable. The Chairman is of the view that the Administration should consider reviewing

the drafting of the Chinese version of the proposed new section 52A(3) to enhance its readability. The Administration has advised that the proposed new section 52A(3) can clearly reflect the legislative intent and is consistent in terms of drafting with other similar provisions in the existing CO. There is no need for amendment.

132. Hon WONG Yuk-man is of the view that the Administration should review the different Chinese versions of the expressions "dealt with" in section 54A(2)(c) and (3) and the proposed section 54A(4) (regarding fair dealing for purposes of public administration), and "dealing in" as seen in various sections of the existing CO, including "被用以進行交易", "經營" and "經銷", to avoid confusion. He also considers that the Chinese version of "dealt with" (被用以進行交易) under relevant sections should be translated according to the usual meaning of the expression, such as "處理".

133. As advised by the Administration, the term "dealing with" in the heading of section 31 refers to the various acts specified in section 31(1)(a) to (d). The term "dealt with" is used in other sections of the CO, such as sections 40B to 40D, 41A, 41, 44, 45, 54A and 72. Under these sections, where a copy of a work is made pursuant to a permitted act is subsequently (a) possessed, exhibited or distributed, for the purpose of or in the course of trade or business by any person or organization who is not permitted to make and/or use the copy pursuant to the relevant provisions, or (b) sold or let for hire, or offered or exposed for sale or hire, the copy would be considered to have been "dealt with" (被用以進行交易) and is treated as an infringing copy. It therefore refers to subsequent dealings in the general context of trade or business otherwise than for the purposes or uses permitted by the relevant provisions.

134. As regards the term "dealing in" (經營) which appears in the existing CO, such as sections 31(2), 32(3), 95(1A), 96(6A), 109(1A) and 120(2A), the Administration has advised that it is defined under section 198(2) to mean "buying, selling, letting for hire, importing, exporting and distributing". In general, it refers to dealings in the context of trade or business or of similar effect. "Dealing in" (經銷) is defined under section 118(10) to mean "selling, letting for hire, or distributing for profit or reward" in the criminal context. The Administration considers that "經銷", as compared with "經營", can better reflect the legislative intent and illustrate the difference from other civil provisions. The terms "dealt with" and "dealing in" carry different legal meanings when they are used in different provisions. Their equivalent Chinese terms are therefore rendered differently.

135. Hon WONG Yuk-man considers that the Administration should review the Chinese version of "access" (接達) in the proposed new section 65A in clause 42 of the 2014 Bill and other relevant proposed sections, for example, by

using the more commonly used term such as "連接" or "存取". According to the Administration, the term "接達" is commonly used as the Chinese equivalent of "access" in the context of gaining access to something through the computer, the Internet or other electronic means. It has been used in existing legislation such as the definition of "access facilities" (接達設施) in section 2(1) of the Building (Planning) Regulations (Cap. 123F) and section 92(5)(b)(ii) of the Banking Ordinance (Cap. 155) etc. "接達" is also listed as the Chinese equivalent of "access" in glossaries of computer-related terms. It is also used by the information technology industry. The Administration considers that the use of "接達" in the provisions is appropriate.

136. Hon WONG Yuk-man considers that the Administration should review the drafting of the phrase "則如第(2)款所述條件獲符合" in the Chinese text of section 67(1) in clause 43 of the 2014 Bill, with reference to a similar phrase in the Chinese version of the proposed new section 76A(1) "在符合以下規定的情況下", to make it more readable. The Administration agrees with Hon WONG Yuk-man and will propose CSA to amend the Chinese version of section 67(1). Related amendments will also be made to the relevant clauses in the 2014 Bill.

137. Hon WONG Yuk-man comments that the plural expression of "standard technical measures" should be used as the English equivalent of "標準技術措施" in the proposed section 88A in clause 50 of the 2014 Bill. The Administration has advised that section 7(2) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that, words and expressions in the singular include the plural and words and expressions in the plural include the singular. Given that "measure" refers to a means of achieving a purpose, the Administration considers that the use of the singular expression of "measure" instead of the plural expression of "measures" is appropriate.

138. In the light of the comments made by Hon WONG Yuk-man regarding the drafting of the safe harbour provisions in clause 50 of the 2014 Bill, the Administration will introduce CSAs to the following provisions to enhance their readability and clarity-

Section	Proposed Amendment
88A (definition of *standard technical measure*)	In the English version, delete "widely" and substitute "generally".
88B(1)	In the Chinese version, delete everything before "服務平台" and substitute "(1) 如符合第(2)款指明的條件，某服務提供者不會只因提供有關聯線服務或為有關聯線服務操作設施，而須就在其".

Section	Proposed Amendment
88B(2)(b)	In the Chinese version, delete everything before "之前沒有收取(而現時亦沒有" and substitute "不曾收取(而亦非正在".
88B(4)(a)(i)	In the Chinese version, delete "就類似聯線服務收取" and substitute "收取類似聯線服務的".
88B(4)(b)	Add "without limiting paragraph (a)," before "financial".

139. The Bills Committee has discussed the Chinese version of "a performer" (某合資格表演的表演者) under section 206(1) of the CO in relation to a qualifying performance. As advised by the Administration, there is no difference in meaning between the Chinese version (i.e. "合資格表演的表演者") and the English version (i.e. "a performer") in the existing section 206(1). It is only a matter of difference in expression between English and Chinese and hence no amendment is necessary.

140. Hon CHAN Chi-chuen has requested the Administration to review the Chinese version of the phrase "other than by communication to the public" i.e. "不包括向公眾傳播" in the proposed section 241(5)(a) and (b) in clause 75 of the 2014 Bill, for example, by using "向公眾傳播除外", to avoid ambiguity. Having considered members' view, the Administration will propose CSAs to this effect in the Chinese version of the proposed sections 39(5)(a) and 241(5)(a) and (b).

141. The Bills Committee has discussed the drafting of the Chinese version of the phrase "a member of the public", i.e. "公眾中任何人" in the proposed amendments to section 252 in clause 84 of the 2014 Bill. Some members comment that the meaning of the Chinese version of the expression "public" i.e. "公眾" can be understood to cover "any member of the public. In such circumstances, it is not necessary to use the phrase "公眾中任何人" in the Chinese version.

142. According to the Administration, the use of "公眾中任何人" in the proposed amended sections 65 and 252 is meant to clarify that the permitted act may apply to any individual member of the public. After considering Member's views, the Administration will propose CSAs to replace "公眾中任何人" with "任何公眾人士" to achieve the same purpose.

Other issues

143. The Bills Committee notes that to meet the prevailing needs of Hong Kong's economy after enactment of the 2014 Bill, the Administration will launch in earnest a new round of copyright review to address pressing concerns of different stakeholders on outstanding and new copyright issues. These include online piracy facilitated by set top boxes and link aggregate websites and remedial ideas such as judicial site blocking, longer copyright terms, updates to the Copyright (Libraries) Regulations (Chapter 528B), UGC, contract override, and orphan works. The Administration will 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, which can have significant bearing to different local stakeholders. In addition, the Administration will keep in view copyright reviews being undertaken by major overseas jurisdictions, so as to ensure that Hong Kong's copyright regime will continue to follow closely mainstream development and remain robust and competitive.

144. The Bills Committee also notes that the Government has set up a Task Force inviting representatives from the creative and broadcasting industry to exchange information and views on combating online copyright infringement, in particular, the problem of TV boxes. The Task Force will continue to be the platform for the Government and the copyright industry to put in concerted efforts to make the most of the 2014 Bill when passed and to consider what specific measures should be further considered.

145. Noting that 32 countries in Europe (including the UK) have legislation that provides for the blocking of infringing overseas websites, Hon Charles Peter MOK cautions that the idea of site blocking would have far-reaching consequences for freedom of information. The Administration has advised that any changes to the existing regime would be implemented only after the due process of thorough study and public consultation.

Commencement

146. The Bills Committee notes that the Administration's proposal for commencing the provisions in the 2014 Bill will come into operation on a day to be appointed by SCED by notice published in the Gazette. Following good practices, the Government will launch educational and promotional activities about the amendments to the CO before bringing them into operation. The commencement notice will be gazetted by SCED and is subject to the negative vetting procedure of LegCo.

Committee Stage amendments

147. A set of proposed CSAs, as elaborated in paragraphs 119, 120, 121, 125, 126, 128, 136, 140 and 142 to be moved by the Administration is in **Appendix III**.

148. At the meeting on 23 September 2015, Hon Dennis KWOK and Hon Cyd HO requested the Bills Committee to accept and move their respective proposed CSAs on contract override and UGC as discussed in paragraphs 64 to 75 and paragraphs 76 to 83. At the meeting held on 2 November 2015, Hon CHAN Chi-chuen requested the Bills Committee to accept and move his proposed CSAs on fair use as discussed in paragraphs 38 to 43. Following voting by members present at the two meetings[12], it was agreed that the proposed CSAs would be moved by the Chairman on behalf of the Bills Committee. The respective proposed CSAs are in **Appendix IV**.

149. At the meeting held on 19 October 2015, Hon WONG Yuk-man requested the Bills Committee to accept and move his proposed CSAs to the long title of the Bill as discussed in paragraph 115. The Bills Committee initially agreed that Hon WONG Yuk-man's proposed CSAs would be moved by the Chairman on behalf of the Bills Committee. However, in the light of the Administration's response on 2 November 2015 and the requirements of RoP under Rule 58(9), the Chairman decided that it would not be appropriate for him to move the proposed CSAs to the long title on behalf of the Bills Committee if they were to be ruled out of order, and members of the Bills Committee made no objection to the Chairman's decision.

150. The Bills Committee takes note that Hon WONG Yuk-man has indicated his intention to move CSAs to the 2014 Bill to improve the drafting of the Bill and the CO. According to Hon Wong, his proposed CSAs seek to bring it in line with the drafting styles and practices described in the publication (namely, *"Drafting Legislation in Hong Kong – A Guide to Styles and Practices"*) issued by the Law Drafting Division of the Department of Justice. The proposed CSAs as presented by Hon WONG Yuk-man at the Bills Committee can be accessed from the web link as follows:

http://www.legco.gov.hk/yr13-14/chinese/bc/bc106/papers/bc1061019cb4-48-2-ec.pdf.

151. The Administration appreciates the efforts made by Hon WONG Yuk-man. The Administration has reviewed the CSAs proposed by Hon WONG Yuk-man and advises that many of the CSAs proposed are editorial amendments which the Administration would make by way of a separate exercise. The

[12] For the proposed CSAs from Hon Dennis KWOK and Hon Cyd HO, no members present at the meeting raised objections. For the CSA from Hon CHAN Chi-chuen, the voting outcome was 2-1.

Administration further explains that DoJ has been making use of the editorial powers under section 2A of the Laws (Loose-leaf Publication) Ordinance 1990 (51 of 1990) to make necessary editorial amendments to the replacement pages of the Loose-leaf Edition of the Laws of Hong Kong. On the commencement of the provisions of the Bill, the Administration will prepare replacement pages for the CO and would take the opportunity to make necessary format changes including removing the double quotation marks around the defined terms concerned and printing them in italicised and bold format.

152. The Administration also notes that a considerable number of the proposed CSAs would alter the legal meanings of the original provisions and fall out of line of the policy intent, or would otherwise result in uncertainty, ambiguity, inconsistency or other unacceptable drafting in the legislation. There are also instances in which the proposed CSAs would be unnecessary, not relevant to the subject matter of the Bill or its clauses, or otherwise not agreeable for inclusion in the Administration's proposed CSAs. Moreover, the Administration further supplements that necessary format and editorial changes may be made by way of the powers given to the Secretary for Justice under section 2A of the Laws (Loose-leaf Publication) Ordinance 1990 and section 17 of the Legislation Publication Ordinance (Cap. 614)[13].

Resumption of the Second Reading debate

153. The Bills Committee supports the resumption of the Second Reading debate on the 2014 Bill at the Council meeting of 25 November 2015. At the meeting of the House Committee held on 20 November 2015, Members noted and raised no objection to the proposed arrangement that the agenda item on the resumption of the Second Reading debate on the Copyright (Amendment) Bill 2014 be deferred to the Council meeting on 9 December 2015.

Advice sought

154. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 4
Legislative Council Secretariat
3 December 2015

[13] By virtue of section 17(a), the Secretary for Justice may, by order in the Gazette, make an alteration to an Ordinance for the purpose of securing uniformity in expression within the Ordinance or with another Ordinance.

Appendix I

Bills Committee on Copyright (Amendment) Bill 2014

Membership List

Chairman	Hon CHAN Kam-lam, SBS, JP
Members	Hon Emily LAU Wai-hing, JP (up to 5 May 2015) Hon Abraham SHEK Lai-him, GBS, JP Hon Vincent FANG Kang, SBS, JP Hon Jeffrey LAM Kin-fung, GBS, JP Hon Andrew LEUNG Kwan-yuen, GBS, JP Hon WONG Ting-kwong, SBS, JP Hon Ronny TONG Ka-wah, SC (up to 30 September 2015) Hon Cyd HO Sau-lan, JP Hon Paul TSE Wai-chun, JP Hon WONG Yuk-man Hon Claudia MO Hon YIU Si-wing Hon Gary FAN Kwok-wai (up to 28 January 2015) Hon MA Fung-kwok, SBS, JP Hon Charles Peter MOK, JP Hon CHAN Chi-chuen Hon CHAN Yuen-han, SBS, JP (up to 30 April 2015) Hon Alice MAK Mei-kuen, JP (up to 15 May 2015) Hon Dennis KWOK Hon SIN Chung-kai, SBS, JP Dr Hon Elizabeth QUAT, JP Hon Martin LIAO Cheung-kong, SBS, JP Hon CHUNG Kwok-pan Hon Christopher CHUNG Shu-kun, BBS, MH, JP (Total : 20 members)
Clerk	Ms YUE Tin-po (up to 9 October 2015) Mr Daniel SIN
Legal Adviser	Miss Carrie WONG

Appendix II

Bills Committee on Copyright (Amendment) Bill 2014

Organizations/individuals which/who have given oral representation of views to the Bills Committee

1. Hong Kong and International Publishers' Alliance
2. Hong Kong Reprographic Rights Licensing Society
3. IFPI (HKG) Ltd.
4. Television Broadcasts Limited
5. Cable and Satellite Broadcasting Association of Asia
6. New People's Party
7. Mr TAM Kwok-sun
8. Internet Society Hong Kong
9. Southern District Council
10. The American Chamber of Commerce in Hong Kong
11. Federation of Hong Kong Filmmakers
12. Mr Julian KAN Chi-chung
13. Liberal Party
14. 21st Century Fox
15. IFPI Asian Regional Office
16. Hong Kong Copyright Alliance
17. Mr CHAN Chun-kit
18. Young Democratic Alliance for the Betterment and Progress of Hong Kong
19. Mr Haggen SO Hau-heng
20. Movie Producers & Distributors Association of Hong Kong Limited
21. Mouse Frontline
22. Amnesty International Hong Kong
23. Ms Euginia LAU Sze-wai
24. Mr Alan LAI

25. The Law Society of Hong Kong
26. Cable News International, Inc.
27. Turner Broadcasting System Asia Pacific, Inc.
28. Time Warner Inc.
29. Warner Bros. Entertainment Inc.
30. 中華國際出版社
31. MPA Motion Picture Association
32. Popularization Committee for VOCALOID Culture
33. International Federation of Creativity and Technology Limited
34. International Federation Against Copyright Theft (Greater China) Limited
35. Lagative Council, Be Represented for Sports, Performing Arts, Culture and Publication
36. Mr HO Ho-sum
37. The Melancholy of Creative Freedom
38. Ms LEE Tsz-kwan
39. Joint School ACG Union
40. Mr Ricky CHOI Kwok-kei
41. Mr Nigel WONG Siu-chi
42. Entertainment Software Association
43. Mr CHENG Ka-chun
44. 方少良先生
45. PCCW Media Limited
46. Mr MAK Tin-ho
47. Sky Runner of skiescomic.com
48. Hong Kong Culture Monitor
49. HKCLU
50. Ms WAN Ka-wing
51. 我每次見到梁振英就會倒抽七口涼氣大聯盟
52. JN

53. Mr CHU Kin-sun
54. Ms CHAN Sin-tung
55. Ms HAU Hiu-tung
56. Mr KAM Wai-fung
57. 同人文化推廣前自救聯盟
58. Mr LAM Chi-fai
59. Delay oh MOE
60. Mr YEUNG Tung-yuen
61. Mr CHAN Yat-hang
62. Mr LAW Kin-chung
63. 二次創作權關注組
64. Ms WONG Chun-fong
65. 蘇軾粵語填詞同好會
66. Mr KWOK C.C.
67. 版權修訂同人關注組
68. Mr LEE Hing-ming
69. Neo Democrats
70. Keyboard Frontline
71. Harcourt Road Resettlement Estate
72. Hong Kong Recording Industry Alliance Ltd.
73. Mr NG Chung-tat
74. Sunshine Production
75. 公屋被迫遷戶關注組
76. 張綺迪女士
77. Miss HO Suk-yue
78. I.B. LLC
79. 高全勇先生

Appendix III

Copyright (Amendment) Bill 2014

Committee Stage

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

Clause	Amendment Proposed
6	By adding before subclause (1)—
	"(1A) Section 17(5), in the English text— **Repeal** "making available to the public includes" **Substitute** ", ***making available to the public*** (向公眾提供) includes".
	(1B) Section 17(5)(a), after "work"— **Add** ", any of the following".".
6	By adding—
	"(2A) Section 17(5)(b), after "artistic work"— **Add** ", any of the following".".
8	By adding before subclause (1)—
	"(1A) Section 19(6)— **Repeal** "making available to the public includes" **Substitute** ", ***making available to the public*** (向公眾提供) includes any of the following".".
13	In the proposed section 28A(6)(b), in the Chinese text, by deleting "信息

” and substituting “訊息”.

18 In the proposed section 39, in the Chinese text, in the heading, by deleting “**報導**” and substituting “**報道**”.

18 In the proposed section 39(3), in the Chinese text, by deleting “報導” and substituting “報道”.

18 In the proposed section 39(5)(a), in the Chinese text, by deleting “(不包括向公眾傳播)” and substituting “(向公眾傳播除外)”.

18 In the proposed section 39(5)(a)(iii), by deleting “to the public” and substituting “in public”.

21 By renumbering the clause as clause 21(2).

21 By adding before subclause (2)—

“(1) Section 40B(5), Chinese text—
Repeal
“被用以進行”
Substitute
“用作”.”.

21(2) In the Chinese text, by deleting the proposed section 40B(6) and substituting—

“(6) 就第(5)款而言，如 —

(a) 為任何貿易或業務的目的或在任何貿易或業務的過程中，某人管有、公開陳列或分發某便於閱讀文本(根據第(1)款製作該文本的人或根據該款獲供應該文本的人除外)；或

(b) 出售或出租某便於閱讀文本、要約出售或要約出租某便於閱讀文本，或為出售或出租而展示

某便於閱讀文本，

該文本即屬用作交易。”.

22 By renumbering the clause as clause 22(2).

22 By adding before subclause (2)—

“(1) Section 40C(7), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.”.

22(2) In the Chinese text, by deleting the proposed section 40C(8) and substituting—

“(8) 就第(7)款而言，如 —

(a) 為任何貿易或業務的目的或在任何貿易或業務的過程中，某人管有、公開陳列或分發某便於閱讀文本(根據第(1)款製作該文本的指明團體或根據該款獲供應該文本的人除外)；或

(b) 出售或出租某便於閱讀文本、要約出售或要約出租某便於閱讀文本，或為出售或出租而展示某便於閱讀文本，

該文本即屬用作交易。”.

23 By renumbering the clause as clause 23(2).

23 By adding before subclause (2)—

“(1) Section 40D(7), Chinese text—

Repeal

“被用以進行”

Substitute

“用作”.”.

23(2) In the Chinese text, by deleting the proposed section 40D(8) and substituting—

“(8) 就第(7)款而言，如 —

(a) 為任何貿易或業務的目的或在任何貿易或業務的過程中，某人公開陳列或分發某中間複製品(根據第(1)款有權管有該複製品的指明團體或根據第(3)款獲借出或轉移該複製品的指明團體除外)；或

(b) 出售或出租某中間複製品、要約出售或要約出租某中間複製品，或為出售或出租而展示某中間複製品，

該複製品即屬用作交易。”.

24 By adding—

“(5A) Section 41A(6)—
Repeal
“reprographic”.

(5B) Section 41A(7), Chinese text—
Repeal
“被用以進行”
Substitute
“用作”.”.

24(6) In the Chinese text, by deleting the proposed section 41A(8) and substituting—

“(8) 就第(7)款而言，如 —

(a) 在並非為第(1)款所述的目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開陳列或分發某複製品；或

(b) 出售或出租某複製品、要約出售或要約出租某複製品，或為出售或出租而展示某複製

品，

該複製品即屬用作交易。”.

25(2) By deleting “被用以進行” and substituting “用作”.

25(3) In the Chinese text, by deleting the proposed section 41(6) and substituting—

“(6) 就第(5)款而言，如 —

(a) 在並非為教學或考試的目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開陳列或分發某複製品；

(b) 出售或出租某複製品、要約出售或要約出租某複製品，或為出售或出租而展示某複製品；或

(c) 向公眾傳播某複製品(該項傳播憑藉第(3)款不屬侵犯版權的情況除外)，

該複製品即屬用作交易。”.

26(5) By deleting “被用以進行” and substituting “用作”.

26(6) In the Chinese text, by deleting the proposed section 44(4) and substituting—

“(4) 就第(3)款而言，如 —

(a) 在並非為有關教育機構的教育目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開陳列或分發某紀錄或複製品；

(b) 出售或出租某紀錄或複製品、要約出售或要約出租某紀錄或複製品，或為出售或出租而展示某紀錄或複製品；或

(c) 向公眾傳播某紀錄或複製品(該項傳播憑藉第(1A)款不屬侵犯版權的情況除外)，

該紀錄或複製品即屬用作交易。”.

27(8) By deleting “被用以進行” and substituting “用作”.

27(9) In the Chinese text, by deleting the proposed section 45(4) and substituting—

“(4) 就第(3)款而言，如 —

(a) 在並非為有關教育機構的教育目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開陳列或分發某複製品；

(b) 出售或出租某複製品、要約出售或要約出租某複製品，或為出售或出租而展示某複製品；或

(c) 向公眾傳播某複製品(該項傳播憑藉第(1A)款不屬侵犯版權的情況除外)，

該複製品即屬用作交易。”.

30 By adding—

“(3) Section 48(1), Chinese text—
Repeal
“如訂明條件獲符合”
Substitute
“在符合訂明條件的情況下”.”.

31 By renumbering the clause as clause 31(1).

31 By adding—

“(2) Section 50(1), Chinese text—
Repeal
“如訂明條件獲符合”
Substitute
“在符合訂明條件的情況下”.”.

32(2) In the Chinese text, by deleting "的情況下，如訂明條件獲符合，則" and substituting "並符合訂明條件的情況下，".

33 In the proposed section 51A(1), in the Chinese text, by deleting "如第(2)款指明的條件獲符合" and substituting "在符合第(2)款指明的條件的情況下".

34 By adding—

"(4A) Section 52(1), Chinese text—
Repeal
"如訂明條件獲符合"
Substitute
"在符合訂明條件的情況下".".

35 In the proposed section 52A(1), in the Chinese text, by deleting "如第(2)款指明的條件獲符合" and substituting "在符合第(2)款指明的條件的情況下".

37 By renumbering the clause as clause 37(2).

37 By adding before subclause (2)—

"(1) Section 54A(3), Chinese text—
Repeal
"被用以進行"
Substitute
"用作".".

37(2) In the Chinese text, by deleting the proposed section 54A(4) and substituting—

"(4) 就第(3)款而言，如 —

(a) 在並非為第(1)款所述的目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開陳列或分發某複製品；或

(b) 出售或出租某複製品、要約出售或要約出租某複製品，或為出售或出租而展示某複製品，

該複製品即屬用作交易。”.

41(2) In the Chinese text, by deleting “公眾中任何人” and substituting “任何公眾人士”.

43 By renumbering the clause as clause 43(1).

43 By adding—

“(2) Section 67(1), Chinese text—
Repeal
“第(2)款所述條件獲符合”
Substitute
“符合第(2)款所述條件”.”.

47(3) By deleting “被用以進行” and substituting “用作”.

47(4) In the Chinese text, by deleting the proposed section 72(3) and substituting—

“(3) 就第(2)款而言，如 —

(a) 在並非為第(1)款所述的目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開陳列或分發某複製品；或

(b) 出售或出租某複製品、要約出售或要約出租某複製品，或為出售或出租而展示某複製品，

該複製品即屬用作交易。”.

50 In the proposed section 88A, in the English text, in the definition of ***standard technical measure***, by deleting “widely” and substituting “generally”.

50 In the proposed section 88B(1), in the Chinese text, by deleting everything before “服務平台” and substituting—

> “(1) 如符合第(2)款指明的條件，某服務提供者不會只因提供有關聯線服務或為有關聯線服務操作設施，而須就在其”.

50 In the proposed section 88B(2)(b), in the Chinese text, by deleting “之前沒有收取(而現時亦沒有” and substituting “不曾收取(而亦非正在”.

50 In the proposed section 88B(4)(a)(i), in the Chinese text, by deleting “就類似聯線服務收取” and substituting “收取類似聯線服務的”.

50 In the proposed section 88B(4)(b), by adding “without limiting paragraph (a),” before “financial”.

52 In the proposed section 91(4)(a), in the Chinese text, by deleting “報導” and substituting “報道”.

75 In the proposed section 241, in the Chinese text, in the heading, by deleting “**報導**” and substituting “**報道**”.

75 In the proposed section 241(3), in the Chinese text, by deleting “報導” and substituting “報道”.

75 In the proposed section 241(5)(a), in the Chinese text, by deleting "(不包括向公眾傳播)" and substituting "(向公眾傳播除外)".

75 In the proposed section 241(5)(a)(iii), by deleting "to the public" and substituting "in public".

75 In the proposed section 241(5)(b), in the Chinese text, by deleting "(不包括向公眾傳播)" and substituting "(向公眾傳播除外)".

75 In the proposed section 241(5)(b)(iii), by deleting "to the public" and substituting "in public".

78 By adding before subclause (1)—

"(1A) Section 242A(3), Chinese text—
Repeal
"被用以進行"
Substitute
"用作".".

78(6) In the Chinese text, by deleting the proposed section 242A(4A) and substituting—

"(4A) 就第(3)款而言，如 —

(a) 在並非為第(1)款所述的目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開放映、公開播放或分發某錄製品；或

(b) 出售或出租某錄製品、要約出售或要約出租某錄製品，或為出售或出租而展示某錄製品，

該錄製品即屬用作交易。".

79(2) By deleting "被用以進行" and substituting "用作".

79(3) In the Chinese text, by deleting the proposed section 243(3A) and substituting—

"(3A) 就第(3)款而言，如 —

(a) 在並非為教學或考試的目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開放映、公開播放或分發某錄製品；

(b) 出售或出租某錄製品、要約出售或要約出租某錄製品，或為出售或出租而展示某錄製品；或

(c) 向公眾傳播某錄製品(該項傳播憑藉第(2)款不屬侵犯本部所賦予的權利的情況除外)，

該錄製品即屬用作交易。".

80(5) By deleting "被用以進行" and substituting "用作".

80(6) In the Chinese text, by deleting the proposed section 245(3A) and substituting—

"(3A) 就第(3)款而言，如 —

(a) 在並非為有關教育機構的教育目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開放映、公開播放或分發某紀錄或複製品；

(b) 出售或出租某紀錄或複製品、要約出售或要約出租某紀錄或複製品，或為出售或出租而展示某紀錄或複製品；或

(c) 向公眾傳播某紀錄或複製品(該項傳播憑藉第(1A)款不屬侵犯本部所賦予的權利的情況除外)，

該紀錄或複製品即屬用作交易。".

81 In the proposed section 245A(4), in the Chinese text, by deleting "被用以進行" and substituting "用作".

81 In the Chinese text, by deleting the proposed section 245A(5) and substituting—

"(5) 就第(4)款而言，如 —

(a) 在並非為有關教育機構的教育目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開放映、公開播放或分發某複製品；

(b) 出售或出租某複製品、要約出售或要約出租某複製品，或為出售或出租而展示某複製品；或

(c) 向公眾傳播某複製品(該項傳播憑藉第(2)款不屬侵犯本部所賦予的權利的情況除外)，

該複製品即屬用作交易。".

83 By renumbering the clause as clause 83(2).

83 By adding before subclause (2) —

"(1) Section 246A(3), Chinese text—
Repeal
"被用以進行"
Substitute
"用作".".

83(2) In the Chinese text, by deleting the proposed section 246A(3A) and substituting—

"(3A) 就第(3)款而言，如 —

(a) 在並非為第(1)款所述的目的之情況下，為任何貿易或業務的目的或在任何貿易或業務的過程中，管有、公開放映、公開播放或分發某錄製品；或

(b) 出售或出租某錄製品、要約出售或要約出租某錄製品，或為出售或出租而展示某錄製品，

該錄製品即屬用作交易。”.

84(2) In the Chinese text, by deleting “公眾中任何人” and substituting “任何公眾人士”.

86 By renumbering the clause as clause 86(1).

86 By adding—

“(2) Section 253(1), Chinese text—

Repeal

“第(2)款所述條件獲符合”

Substitute

“符合第(2)款所述條件”.”.

89 In the proposed section 272D(4)(a), in the Chinese text, by deleting “報導” and substituting “報道”.

Copyright (Amendment) Bill 2014

Committee Stage

Amendments to be moved by the Honourable CHAN Kam-lam, SBS, JP

Clause	Amendment Proposed
New	Add — "**17A. Section 38 amended (Research and private study)**".
New	After section 38(3), add — "(4) A term of contract is unenforceable to the extent that it purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright.".
18	After the proposed section 39(6), add — "(7) A term of contract is unenforceable to the extent that it purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright.".
19	After the proposed section 39A(2), add — "(3) A term of contract is unenforceable to the extent that it purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright.".
24	After the proposed section 41A(8), add — "(9) A term of contract is unenforceable to the extent that it purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright.".

75 After the proposed section 241(5), add —

"(5A) A term of contract is unenforceable to the extent that it purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe any of the rights conferred by this Part.".

76 After the proposed section 241A(2), add —

"(2A) A term of contract is unenforceable to the extent that it purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe any of the rights conferred by this Part.".

78 After the proposed section 242A(4A), add —

"(4B) A term of contract is unenforceable to the extent that it purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe any of the rights conferred by this Part.".

Copyright (Amendment) Bill 2014

Committee Stage

Amendments to be moved by the Honourable CHAN Kam-lam, SBS, JP

Clause	Amendment Proposed
19	In the heading, delete "**Section 39A added**" and substitute "**Sections 39A and 39AA added**".
19	Before section 40, add —

"**39AA. User-generated content**

(1) It is not an infringement of copyright for an individual to use an existing work or other subject matter (or copy of one) which has been published or otherwise made available to the public, in the creation of a new work or other subject matter in which copyright subsists and for the individual (or, with the individual's authorization, a member of their household) to use the new work or other subject matter or to authorize an intermediary to disseminate it, if –

(a) the use of, or the authorization to disseminate, the new work or other subject matter is done predominantly for non-commercial purposes;

(b) the source (and, if given in the source, the name of the author, performer, maker or broadcaster) of the existing work or other subject matter (or copy of it) are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject matter (or copy of it) as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject matter (or copy of it) or on an existing or potential market for it, including that the new work or other subject matter is not a substitute for the existing one.

(2) For the purposes of subsection (1) –

(a) ***intermediary*** (中介人) means a person or entity who regularly provides space or means for works or other subject matter to be enjoyed by the public; and

(b) ***use*** (使用) means to do anything that by this Ordinance the owner of the copyright has the sole right to do, other than the right to authorize anything.".

Copyright (Amendment) Bill 2014

Committee Stage

Amendments to be moved by the Honourable CHAN Kam-lam, SBS, JP

Clause	Amendment Proposed
19	In the heading, delete "**Section 39A added**" and substitute "**Sections 39A and 39B added**".
19	Before section 40, add —

"**39B. Fair use**

Notwithstanding the provisions of sections 22, 89, 92 and 96, the fair use of a copyright work, including such use by reproduction or distribution in copies or communication by any other means, for purposes such as criticism, review, quotation, reporting and commenting on current events, parody, satire, caricature, pastiche, education (including multiple copies for educational establishment use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered must include –

(a) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit-making purposes;

(b) the nature of the copyright work;

(c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and

(d) the effect of the use upon the potential market for or value of the copyright work.

The fact that a work is unpublished must not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”.