

**Bills Committee on the Copyright (Amendment) Bill 2014**

**The Administration's response to issues raised in relation to the proposed sections 39, 45 and 53 and Cap. 200**

**Purpose**

At past meetings (6 January, 24 February, 9 April and 4 May 2015), the Administration was requested to –

- (A) in relation to the proposed section 39, explain:
  - (i) the difference between “communication of a work to the public” under the proposed section 28A and “the performance, exhibition, playing or showing of the work to the public” under the proposed section 39(5)(a)(iii); and
  - (ii) the difference between “release”, “issue” and “communicate” to the public under the proposed section 39(5);
- (B) in relation to the proposed section 45, provide supplementary information on the following issues:
  - (i) whether “authorized recipients” as defined in the proposed amendments to section 45 regarding copyright exceptions to allow copying and communication of passages or extracts from published works for educational purposes included teaching staff and parents, siblings who shared reference materials and homework containing passages or extracts from published works, and private tutors using such materials and homework in conducting private tutorials;
  - (ii) whether the possession or communication of passages or extracts from published works by educational establishments on school open days or admission seminars would be covered by the exceptions provided under section 45;
  - (iii) the meaning of “takes all reasonable steps” under proposed section 45(1A)(b); and

(iv) the legal liability for contravention of proposed section 45(4)(a);

(C) in relation to the proposed section 53, provide information on whether it would constitute copyright infringement if a librarian, curator or archivist made a copy of an article of cultural or historical importance or interest which was subsequently lost to Hong Kong through sale or export to a country which did not provide copyright exception similar to that provided under section 53, or if there was a provision in the relevant sale and purchase agreement of the article which prohibited the making of such a copy; and

(D) make an undertaking that it was its intention to continue to keep the copyright regulatory regime separate from the regulatory regime for other computer crimes, and not to use section 161 of the Crimes Ordinance (Cap. 200, Laws of Hong Kong) regarding access to computer with criminal or dishonest intent for the prosecution of copyright offences in the digital environment.

2. This paper sets out the Administration's response.

**(A) *Proposed section 39***

Difference between “communication to the public” and “the performance, exhibition, playing or showing of the work to the public”

3. “Communication to the public” is a new act restricted by copyright proposed under section 28A, which refers to the electronic communication of a work to the public 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.

4. “Performance, playing or showing of work in public” are acts restricted by copyright as stipulated in section 27 of the existing Copyright Ordinance (Cap. 528, Laws of Hong Kong). Pursuant to section 27(2), “performance”, in relation to a work – (a) includes delivery in the case of lectures, addresses, speeches and sermons; and (b) 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.

5. In general, acts which fall within the description of performing, or showing or playing, a work in public under the existing section 27 are different in nature from the restricted acts of communicating the work to the public under the proposed new section 28A. The restricted acts of public performance, playing or showing in public concern with performances, playing or showing which take place in the presence of a public audience. On the other hand, the restricted act of communication to public under section 28A is concerned 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 section 28A<sup>1</sup>. It is our policy intent that the concept of “performance, exhibition, playing or showing of the work in public” should remain intact in the existing section 27, separate and distinct from the concept of “communication to the public” in the proposed section 28A. Other jurisdictions also share similar policy intent as Hong Kong and held that the communication right does not intend to cover the conventional direct representation or performance in public, such as the live presentation or performance of a work.

Difference between “release”, “issue” and “communicate” to the public under the proposed section 39(5)

6. As explained in paragraph 3 above, “communication” is a new restricted act. The proposed section 28A defines its meaning. 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 under the existing section 24 of the Copyright Ordinance: “the act of putting into

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<sup>1</sup> However, 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 which case, the acts may involve both the playing and showing of a work in public and communicating a work to the public.

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.” In other words, “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” is also one of the means that will be regarded the work as having been “released to the public”. We have explained its meaning in paragraph 5 above.

***(B) Proposed section 45***

Issue (i)

7. “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”. According to section 195(2) of the existing Copyright Ordinance, 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 as legally they may exercise various statutory rights on behalf of minors.

8. It is important to note that the purpose of the proposed section 45 is to address a specific situation in educational establishments and to provide their teachers and students 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 Copyright Ordinance 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 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 benefit from the fair dealing exception in section 38.

### Issue (ii)

9. The exception under the proposed section 45 covers copying or communication of copyright 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, it will not infringe the copyright in the works. Should an insubstantial part of a copyright work be required for illustration purposes on school open days or in admission seminars by an educational establishment, 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, Part II of the Copyright Ordinance may apply as the circumstances may warrant. For example, the new copyright exception for the purpose of quotation (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.

### Issue (iii)

10. By expanding the copyright exception for educational establishments to communicate copyright works to authorised recipients, the proposed section 45(1A)(b) requires educational establishments to take all reasonable steps to ensure that (i) only authorized recipients receive the communication; and (ii) the authorized recipients do not make any copy or further transmission of the communication. 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.

11. We do 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. We consider 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 Bill becomes obsolete or any new measure emerges in the future.

#### Issue (iv)

12. The proposed section 45 provides that copies of copyright works made pursuant to the conditions of this section will not be considered as infringing the copyright in the work. The proposed section 45(3) further provides that if such a copy “is subsequently dealt with, it is treated as an infringing copy for that dealing, and if that dealing infringes copyright, for all subsequent purposes”. Contravention of the proposed section 45(4)(a) may incur civil liability for which the copyright owner may seek reliefs from court in civil proceedings by way of injunctions, order for damages or accounts for profit against the infringer.

#### *(C) Proposed section 53*

13. Copyright protection is territorial. Acts done in Hong Kong in relation to a copyright work are subject to the provisions of the Copyright Ordinance. Where the proposed 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. It is generally immaterial whether the copyright laws of the jurisdiction which later imports the article have such an exception or not. (The same is true for legitimate acts done in Hong Kong pursuant to other copyright exceptions provided for in the Copyright Ordinance.) The principle of territoriality in copyright protection underlines the importance of individual jurisdictions in updating their copyright regimes in line with copyright treaties they have concluded (e.g. the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and WIPO Internet Treaties) and in providing for copyright exceptions in compliance with the three-step test.

14. As mentioned, where the proposed 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. In this respect, it is 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 Copyright Ordinance, 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.

**(D) Cap. 200**

15. The 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 1993. In the resumption of debate on Second Reading of the relevant bill on 21 April 1993, the then Secretary for Security said in relation to this offence –

“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.” (p. 2933 of the Official Record of Proceedings)

16. We confirm no change to the above policy intent in copyright enforcement.

**Presentation**

17. Members are invited to note the response provided in this paper.

Commerce and Economic Development Bureau  
Intellectual Property Department  
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