

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

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

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

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

4. The Administration provided the summary and the Administration's responses on overview, communication right and the corresponding criminal liability, and copyright exceptions on 30 January 2015 (see LC Paper No. CB(4)442/14-15(01)), and the summary and the Administration's responses on safe harbour on 20 April 2015 (see LC Papers No. CB(4)829/14-15(01) and CB(4)829/14-15(02)). This paper provides the summary and the Administration's responses on civil liability and others (see Annex).

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

E. Civil liability		
E1- Civil liability for copyright infringement		
Organisations / Individuals	Summary of views	Administration's responses
<u>Copyright owners</u> 1.1	<ul style="list-style-type: none"> In outlining the statutory factors that the court should consider when determining whether "authorisation" has been given under section 22(2A), the individual factors should be read independently and disjunctively (rather than conjunctively and cumulatively). The wording "the court may take into account" should be amended as "the court must take into account". 	<ul style="list-style-type: none"> To provide more clarity as to what constitutes "authorisation", we suggest setting out the factors that the court may take into account in handling cases involving the issue of "authorisation" (i.e., the new section 22(2A)). These factors are only some of the factors for consideration. The court may give weight to various factors in accordance with the facts and circumstances of individual cases.
<u>Users</u> 1.2	<ul style="list-style-type: none"> Copyright owners claim that no civil litigation has ever been initiated against secondary creators, in order to illustrate that the right to institute civil proceedings is not threatening. However, the civil liability introduced by the Bill still makes creators worried. As users lack the financial resources to handle lawsuits, they have no alternative but to give in by closing down their websites or cancelling their performances when they receive complaints 	<ul style="list-style-type: none"> Copyright is a property right that is protected by law. The copyright owner's right to institute civil proceedings serves to ensure that the property right is protected by law. The basic principle is that in a copyright infringement case, the copyright owner bears the burden of proof to substantiate the allegation of infringement. As in other civil proceedings, generally, the plaintiff should consider the circumstances of his case before commencing the proceedings, such as considering whether the allegation can be established legally, and weighing the pros and cons in taking out the proceedings. The plaintiff has to bear the risks involved, such as the legal

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	<p>from copyright owners.</p> <ul style="list-style-type: none"> • Some consider that under the existing law, copyright owners can use public money to litigate against infringers. This makes their cost of litigation much lower than their gain. 	<p>cost of the winning party should he lose his case.</p> <ul style="list-style-type: none"> • We consider that in practice, in most of the relatively trivial cases in which copyright might have been infringed technically, the economic or other interests involved might not provide sufficient incentives for an owner to take out civil proceedings, given the litigation costs and time, legal uncertainty and the effectiveness of the remedies in question. • In addition, the court will not entertain frivolous or vexatious claims. We recall no past local incidents of copyright owners initiating proceedings against parodists. • Under the existing Copyright Ordinance (CO), the threshold for criminal infringement is much higher than that of civil infringement. Since public funds are used in initiating criminal prosecution against a suspected infringer, there must be sufficient evidence for substantiating the case. Even if the copyright owner wishes to pursue the matter further, he must provide relevant evidence to the law enforcement agency in the course of investigations. The law enforcement agency will only refer the case to the Department of Justice for consideration of whether to prosecute if there is sufficient evidence. Therefore, it is not easy for copyright owners to make use of public funds to prosecute infringers. • If during the process the copyright owner fails to provide sufficient evidence, or changes his stance and considers that there is no copyright infringement (e.g. the parties reach a settlement), the law enforcement agency will not be able to

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		continue its investigations or proceed to prosecution.
1.3	<ul style="list-style-type: none"> Disagree with the addition of subsection 2A (i.e., in determining whether a person has authorised another person to do any of the acts restricted by the copyright in a work) in section 22 (about the acts restricted by copyright in a work) and the addition of subsection (3) (i.e., for the purpose of subsection (1)(d), in determining whether any distribution of an infringing copy of a work is made to such an extent as to affect prejudicially the owner of the copyright, the court may take into account all the circumstances of the case and in particular, a series of factors) in section 31 (about secondary infringement). Consider that the court should decide a case based on the evidence provided by the copyright owners, and should not impose any subjective judgment in making the decision. 	<ul style="list-style-type: none"> In determining whether an act constitutes an authorisation of copyright infringement, the court will take into account the overall circumstances of the case as appropriate. The existing and proposed factors are only some of the factors that might be considered by the court. Both parties can still present evidence and cite relevant authorities depending on the individual circumstances of their respective case and let the court decide whether there is an “authorisation” of copyright infringement. With respect to the factors outlining what constitutes “to such an extent as to affect prejudicially the owner of the copyright” in the Bill, they are mainly distilled from the relevant case law. The court may give weight to various factors in accordance with the facts and circumstances of individual cases. In appropriate circumstances, the court may also consider other factors which are not set out in the Bill. Instead of relying on mere subjective judgment, evidential support is required for establishing these factors.
1.4	<ul style="list-style-type: none"> In practice, it is hard to measure whether secondary creations cause any loss and the extent of such loss. Some suggest setting a ceiling for damages for non-profit-making infringing activities. 	<ul style="list-style-type: none"> As a general rule of civil law, damages are compensatory in nature. In general, the plaintiff has to prove to the court the loss he suffered and that the loss was actually caused by the infringing act. Given that the loss suffered by a plaintiff varies according to the individual circumstances of copyright infringement, it is not appropriate to set a ceiling for the

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		damages to be awarded.
E2- Factors for granting additional damages		
<p><u>Copyright owners</u></p> <p>2.1</p>	<ul style="list-style-type: none"> Support the proposed section 108(2)(e). Such a provision recognises that in today’s digital environment, even a single act of infringement may result in widespread online infringement involving a massive quantity of infringing copies, which is a factor that ought to be taken into account in determining damages. Concerned with the wording of the proposed section 108(2)(d), which focuses on acts to “destroy, conceal, or disguise evidence of the infringement”, which take place “after having been informed of the infringement by the plaintiff”. Suggest deleting the relevant wording. 	<ul style="list-style-type: none"> In deciding whether to award additional damages, the court is required under the existing law to consider various factors, such as the flagrancy of the infringement and the benefit accruing to the defendant by reason of the infringement. The Bill proposes additional factors, including “the unreasonable conduct of an infringer after having been informed of the infringement”, with a view to assisting the court in assessing the damages to be awarded for copyright infringement cases. The proposal should help alleviate the difficulty encountered by copyright owners in proving actual loss caused by copyright infringements, particularly online infringements. In determining whether to award additional damages and the amount of such damages, the court will take into account all the circumstances of the case as appropriate. Both the existing and the proposed factors are only some of the factors for consideration.
2.2	<ul style="list-style-type: none"> Suggest the introduction of statutory damages. 	<ul style="list-style-type: none"> Damages are compensatory in nature. In general, the plaintiff has to prove to the court the loss he suffered and that the loss was actually caused by the infringing act. We are not aware of any example of statutory damages for

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		<p>infringement litigation in Hong Kong. In other words, the introduction of statutory damages in Hong Kong's intellectual property rights regime will have a far-reaching effect on other civil proceedings. Moreover, it is extremely difficult to set a fair level(s) of damages for different types of infringement cases. We consider that statutory damages should not be introduced.</p>
<p><u>Users</u> 2.3</p>	<ul style="list-style-type: none"> Object to including “the likelihood of widespread circulation” as a factor to be considered in assessing additional damages. Consider that users do not have any control on the degree of circulation on the Internet. 	<ul style="list-style-type: none"> In determining whether to award additional damages and the amount of such damages, the court will take into account all the circumstances of the case as appropriate. Both the existing and proposed factors are only some of the factors for consideration. The court will also make reference to relevant precedents in assessing the amount of damages. In a civil claim of copyright infringement, the plaintiff has to prove successfully that the allegation of copyright infringement is substantiated, and then establish the loss caused by the act of infringement. The factor of “the likelihood of widespread circulation” is directly relevant to the extent of loss suffered by the copyright owner and would therefore assist the court in assessing the appropriate amount of damages.
2.4	<ul style="list-style-type: none"> The wording “unreasonable conduct” is too vague and copyright owners may use this as an excuse to threaten the commencement of litigation against creators. Copyright owners may also initiate proceedings just for saving 	<ul style="list-style-type: none"> There are some objective standards for determining whether a conduct is reasonable. The new section 108(2)(d) has also enumerated certain examples of “unreasonable conduct” as guidance. In any event, the court has the right not to entertain frivolous or vexatious proceedings and claims so as

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	face.	to prevent the abuse of judicial proceedings.
2.5	<ul style="list-style-type: none"> Consider that the court may not be capable of assessing the commercial value of copyright. Suggest adding a provision that the claimant should provide an estimate of his loss and the relevant evidence, which must have been assessed by at least three independent experts before submission to the court for consideration. 	<ul style="list-style-type: none"> It is the plaintiff's responsibility to produce evidence to show the loss suffered by him or the profit made by the infringer by reason of the infringing act. The court has adequate relevant experience and will follow the established procedure when assessing the amount of damages with regard to the circumstances of individual cases. The court may also make reference to the relevant precedents.

F. Others		
Organisations / Individuals	Summary of views	Administration's responses
<u>Users</u> 1.1	<ul style="list-style-type: none"> The Government should promote a copyright regime that is analogous to the “creative commons” system. 	<ul style="list-style-type: none"> We have all along been encouraging copyright owners to adopt feasible measures as they may think fit to facilitate users to use their copyright works.
1.2	<ul style="list-style-type: none"> The copyright of most songs is monopolised by a small number of copyright owners. Creators have no alternative but to join the copyright firms and are forced to collect copyright fees from users of their works. Request that the Government regulate the copyright agents. Without any regulation, users and secondary creators have been subject to unfair treatment and unreasonable copyright fees. 	<ul style="list-style-type: none"> Copyright licensing bodies can register on a voluntary basis with a view to enhancing the transparency of the fees that they charge for their licensing schemes. The webpage of the Intellectual Property Department maintains a list showing the fees charged by the licensing bodies which have registered with the Copyright Licensing Bodies Registry. Any disputes between copyright licensing bodies and users can be handled by the Copyright Tribunal through the existing mechanism. Anyone who finds his licensing request unreasonably denied or considers the clauses of the licensing scheme unreasonable can refer the dispute to the Copyright Tribunal.
1.3	<ul style="list-style-type: none"> The existing jurisdiction of the Copyright Tribunal is very limited. It does not proactively monitor and police. 	
1.4	<ul style="list-style-type: none"> Suggest setting up a regulatory committee to monitor royalty collection organisations so as to ensure that the scales of royalty charges are transparent, consistent, clear and reasonable. In particular, non-commercial uses should not 	

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	<p>be subject to the same or similar scales as those for the commercial media (such as television and radio stations). The committee should be made up of members of the public and they should be responsible for handling complaints from the public, monitoring and punishing the royalty collection organisations which overcharge users.</p>	
1.5	<ul style="list-style-type: none"> Suggest setting up a licensing mechanism for regulating royalty collection organisations. 	
1.6	<ul style="list-style-type: none"> Should not give any moral rights to authors. The author can at any time initiate civil proceedings to “object to derogatory treatment of a work”, if he does not consent to any secondary creations of his work. Suggest removing the regulation with respect to some of the intangible losses in the CO, such as that on “derogatory treatment” of works, so as to prevent it from being manipulated as ideological suppressing tool. There are also opposite views which agree to give authors moral rights or rights to inhibit the communication of secondary creations which are derived from the authors’ original works so as to show respect to creativity. 	<ul style="list-style-type: none"> According to the Berne Convention for the Protection of Literary and Artistic Works, the author’s moral rights, including the right to be identified as author or director (the right of attribution) and the right to object to derogatory treatment of work should be protected. As the Berne Convention is applicable to Hong Kong, we should offer the same protection to authors in our CO. We note that while the United Kingdom (UK) Government introduced additional copyright exceptions to parody and quotation last year, no amendment was made with respect to moral rights.

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1.7	<ul style="list-style-type: none"> Suggest that the Government should establish a communication platform for doujinshin groups and the comics and animation industry to promote doujinshin creation and settle copyright disputes. 	<ul style="list-style-type: none"> Views noted. We encourage the communication and exchange of views between doujinshin groups and the comics and animation industry. We have previously arranged for individual interested groups to meet copyright owners from the comics and animation industry.
1.8	<ul style="list-style-type: none"> In doujinshin exchange events, physical copies of doujinshin works have to be produced to facilitate sharing and communication, which inevitably involves printing costs and rental charges for venues. Therefore, doujinshin creators would normally collect some fees to recover the costs. Doujinshin works would not substitute the original works in the market. The Government should enable a more flexible arrangement for doujinshin works, allowing creators to receive a small amount of monetary income. They will lose protection if they are treated as engaging in commercial activities. Moreover, protecting the development of doujinshin culture should also be one of the objectives of the Bill. There was also a view advocating that while the creator of a “doujinshin work” is allowed to collect income for recovering costs, the work concerned should quote the source of the original work. Moreover, no counterfeit goods should be sold and all the works should 	<ul style="list-style-type: none"> We understand that the doujinshin has over the years established a presence in Hong Kong, with the local comics industry adopting an accommodating approach to the doujinshin works (physical copies and articles) under the current copyright regime. For example, “Comic World”, an organised doujinshin event, has been held in Hong Kong since 1998 and twice a year currently. Doujinshin fans may take part in the event to share, promote and even sell their works on a small scale, subject to the house rules and, where necessary, consent from individual copyright owners (some owners would even scout for talents in such events). A certain balance has apparently been struck between the interests of the comics industry and doujinshin fans. In the event that a dispute is brought to the court in the future, the court will take into account the industry practice established over the years when assessing the fairness of the use. The new fair dealing exceptions proposed by the Bill would cover, in appropriate cases, a wide range of day-to-day Internet activities, so long as they are for the purposes of parody, satire, caricature, pastiche, commenting on current events, or quotation. The proposal can provide sufficient protection of users’ freedom of speech, expression and

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	comply with the requirements of other laws (such as the Control of Obscene and Indecent Articles Ordinance).	creation. It can also address the major concerns of many users who make use of existing copyright works for the above purposes in the digital environment.
<i>1.9</i>	<ul style="list-style-type: none"> Some suggest providing exemptions from civil and criminal liabilities for the following copyright works: works whose copyright protection has expired, works with only a broadcast version but no visual recording for sale, and news and current affairs programmes and advertisements. 	<ul style="list-style-type: none"> Using works whose copyright protection has expired does not constitute copyright infringement. In formulating any copyright exceptions, we have all along followed the principle that Hong Kong should fully comply with our international obligations (such as the “three-step test” requirement under Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization). We have adopted the same principle in formulating the copyright exceptions proposed in the Bill.
<i>1.10</i>	<ul style="list-style-type: none"> The right to archive should be protected under the copyright regime. 	<ul style="list-style-type: none"> Views noted. We will review and update the copyright regime from time to time so as to respond to technological and overseas developments.
<i>1.11</i>	<ul style="list-style-type: none"> Some views consider that “digging out personal information from the Internet” should be subject to criminal sanction under the Bill for the sake of privacy protection. 	<ul style="list-style-type: none"> The CO is not a piece of legislation for handling personal data or privacy.
<i>1.12</i>	<ul style="list-style-type: none"> Some views consider that the Bill does not allow commenting on copyright works. 	<ul style="list-style-type: none"> Section 39 of the existing CO has already provided exceptions for the review and criticism of copyright works. The relevant arrangement will remain unchanged after passage of

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		the Bill.
<i>1.13</i>	<ul style="list-style-type: none"> • Many of the detailed descriptions have been deleted from the Bill, and the wording of the Bill is more ambiguous than that in the existing provisions. Therefore, the court will find it difficult in adjudicating cases. • Some consider that the proposal of deleting the word “copies” in sections 8(1) and 9(2)(b) of the Bill is unreasonable as it is difficult to differentiate between the “original” and the “copies” of an electronic work. 	<ul style="list-style-type: none"> • In drafting the Bill, we endeavoured to make it as precise and detailed as possible, while retaining an appropriate degree of flexibility so that the court can reach a fair decision with due regard to the circumstances of individual cases. • Under the Bill, the proposed communication right include the broadcasting of a work and inclusion of a work in a cable programme service. Since new modes of electronic communication may not necessarily involve any copies of a work, there is no practical use to differentiate between the original and copy of a copyright work with express statutory provisions. Therefore, the Government has suggested deleting the word “copies” for the sake of technology-neutrality. The wording of this proposal follows the approach adopted in the relevant provision of the World Intellectual Property Organization Copyright Treaty.
<i>1.14</i>	<ul style="list-style-type: none"> • Consider that reference should be made to the example of the UK, which introduced a copyright exception for “derivative works” 	<ul style="list-style-type: none"> • According to our understanding, no specific copyright exception has been granted to “derivative works” in the UK.
<i>Others</i> <i>1.15</i>	<ul style="list-style-type: none"> • The Government should encourage copyright owners to use “creative commons” and other similar licensing platforms. It should also study how to improve the copyright 	<ul style="list-style-type: none"> • See response at F1.1.

F. Others		
	acquiescence system in order to facilitate users.	
