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Panel on Commerce and Industry

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Background brief on copyright exceptions for people with a print disability

Purpose

This paper provides background information on the copyright exceptions for persons with a print disability ("PPDs")¹ in the existing copyright regime in Hong Kong and under the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ("Marrakesh Treaty"). This paper also provides a summary of the views and concerns expressed by members on the relevant subjects in previous discussions.

Background

Copyright exceptions for persons with a print disability under the current copyright regime

2. To maintain a reasonable balance between copyright protection and the use of copyright works, the Copyright Ordinance (Cap. 528) ("the Ordinance") has over 60 provisions specifying a number of permitted acts which may be done in relation to copyright works notwithstanding the subsistence of copyright, and thus attracting neither civil nor criminal liability. As regards the

¹ Section 40A of the Copyright Ordinance (Cap. 528) ("the Ordinance") gives the definition of a person with print disability ("PPD") –

- (a) blindness;
- (b) an impairment of his visual function which cannot be improved by the use of corrective lens to a level that would normally be acceptable for reading without a special level or kind of light;
- (c) inability, through physical disability, to hold or manipulate a book; or
- (d) inability, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading.

copyright exceptions currently applicable to PPDs, sections 40A to F of the Ordinance stipulate specific copyright exceptions to cater for the needs for PPDs. Sections 38 and 41A provide for copyright exceptions for the purposes of research, private study, giving or receiving instruction (**Appendix I**). PPDs may rely on the said sections to use copyright works without attracting legal liability. One of the important copyright exceptions as permitted for PPDs was introduced in 2007. With effect from 6 July 2007, it is not a copyright infringement if a PPD and relevant welfare organizations or non-profit making schools (referred to as "specified bodies"² in the Ordinance) make copies of a copyright work in specialized format (e.g. Braille, large-print, sound recording, or electronic version) to facilitate the access to the work by PPDs.³ Yet, before making the specially adapted copies, the maker of the copies/specified body should make reasonable enquiries to satisfy himself/itself that specially adapted copies cannot be obtained at a reasonable commercial price.

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled

3. The text of the Marrakesh Treaty was adopted on 27 June 2013 in Marrakesh, Morocco and came into force on 30 September 2016. The Marrakesh Treaty is the latest addition to the body of international copyright treaties administered by World Intellectual Property Organization ("WIPO").⁴ Its main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired and otherwise print disabled ("VIPs").

4. The Marrakesh Treaty requires Contracting Parties to introduce a standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of published works in formats

² Section 40A of the Ordinance gives the definition of a "specified body" –

- (a) an educational establishment specified in section 1 of Schedule 1;
- (b) an educational establishment exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112);
- (c) an educational establishment receiving direct recurrent subvention from the Government; or
- (d) an organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of welfare for persons with a print disability.

³ It was a new permitted act introduced under the Copyright (Amendment) Bill 2006 to facilitate the production of specially adapted copies of copyright works for their use to meet the special reading needs of PPD. The Copyright (Amendment) Ordinance 2007 was subsequently enacted on 6 July 2007.

⁴ Established in 1967, World Intellectual Property Organization ("WIPO") is the global forum for intellectual property ("IP") services, policy, information and cooperation. It is a self-funding agency of the United Nations, with 189 member states, including China. WIPO's mission is to lead the development of a balanced and effective international IP system that enables innovation and creativity for the benefit of all.

designed to be accessible to VIPs, and to permit exchange of these works across borders by organizations that serve those beneficiaries. As of April 2017, the Marrakesh Treaty has a total of 27 Contracting Parties. China signed the Treaty on 28 June 2013.

5. The Marrakesh Treaty leaves Contracting Parties the freedom to implement its provisions taking into account their own legal systems and practices, including determinations on "fair practices, dealings or uses". There is no requirement to be a member of any other international copyright treaty to join the Marrakesh Treaty. A summary of the Marrakesh Treaty provided by WIPO is in **Appendix II**.

Previous discussions

6. The Bills Committee on Copyright (Amendment) Bill 2014⁵ discussed the copyright exemptions for PPDs and the Marrakesh Treaty respectively. Members of the Panel on Commerce and Industry ("the Panel") also raised related issues at the meetings on 18 October and 20 December 2016. Members' views and concerns are summarized in the ensuing paragraphs.

Bills Committee on the Copyright (Amendment) Bill 2014

7. During the deliberations of the Bills Committee, a deputation proposed the fair use doctrine. Noting that more and more countries were shifting to fair use, and the Marrakesh Treaty had already recognized the fair use doctrine as one of the exemptions to be adopted in the local legislation, the deputation urged the Administration to keep an open mind and a close watch on Hong Kong's competitors so that Hong Kong would not lag behind in any aspect in the development of the copyright law regime.

8. In response to the enquiry on the application of the Marrakesh Treaty in Hong Kong, the Administration advised that the Administration would need to consider, among other things, the application of the Marrakesh Treaty, which could have significant bearing to different local stakeholders. In addition, the Administration would keep in view copyright reviews being undertaken by major overseas jurisdictions, so as to ensure that Hong Kong's copyright regime would continue to follow closely mainstream development and remain robust and competitive.

⁵ The Administration proposed a number of copyright exceptions for parody and related uses, and combined the new proposals with the legislative proposals under the Copyright (Amendment) Bill 2011 to form the Copyright (Amendment) Bill 2014. At the HC meeting on 20 June 2014, a Bills Committee was formed to study the Copyright (Amendment) Bill 2014. The Copyright (Amendment) Bill 2014 could not conclude in the 2015-2016 session.

Panel on Commerce and Industry

9. At the Panel meeting on 18 October 2016, some members suggested that the Administration should continue to deal with issues raised by stakeholders of the industry and the community during the discussion of the Copyright (Amendment) Bill 2014, such as the requests for providing copyright exceptions for digital books under the Ordinance and the need to address the specific needs of persons with disabilities and dyslexia by ways of guidelines.

10. At the Panel meeting on 20 December 2016, members further urged the Administration to implement the requirements of the Marrakesh Treaty regarding the provision of a barrier-free access to published works, such as books, literature, music and drama, etc. to PPDs under the relevant exceptions under the Ordinance.

Council question

11. At the Council meeting on 25 February 2015, Mr Charles MOK asked a written question on amending the Ordinance to make published works available in formats accessible to PPDs. In its reply, the Administration advised that regarding the possible application of the Marrakesh Treaty to Hong Kong, apart from copyright owners in general, the Administration would need to seek the views of all the important stakeholders, including the local information and communications technology industry, publishing industry, education sector and providers of social services to PPDs, on the costs, benefits and preparations needed.

Latest position

12. The Administration will brief the Panel on 16 May 2017 on the Government's plan to review copyright exceptions currently provided for PPDs. Reference will be made to the Marrakesh Treaty.

Relevant papers

13. A list of relevant papers is in **Appendix III**.

Appendix I**General****38. Research and private study**

- (1) Fair dealing with a work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement. (*Amended 15 of 2007 s. 12*)
- (2) Copying by a person other than the researcher or student himself is not fair dealing if—
 - (a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 49 would not permit to be done under section 47 or 48 (articles or parts of published works: restriction on multiple copies of same material); or
 - (b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.
- (3) In 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. (*Replaced 15 of 2007 s. 12*)

[cf. 1988 c. 48 s. 29 U.K.]

Persons with a print disability

40A. Definitions for sections 40A to 40F

In this section and in sections 40B to 40F—

“accessible copy” (便於閱讀文本), in relation to a copyright work, means a version which provides improved access to the work for a person with a print disability;

“lend” (借出), in relation to a copy, means to make it available for use, otherwise than for direct or indirect economic or commercial advantage, on terms that it will be returned;

“print disability” (閱讀殘障), in relation to a person, means—

- (a) blindness;
- (b) an impairment of his visual function which cannot be improved by the use of corrective lenses to a level that would normally be acceptable for reading without a special level or kind of light;
- (c) inability, through physical disability, to hold or manipulate a book; or
- (d) inability, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading;

“specified body” (指明團體) means a body of any of the following descriptions—

- (a) an educational establishment specified in section 1 of Schedule 1;
- (b) an educational establishment exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112);
- (c) an educational establishment receiving direct recurrent subvention from the Government; or
- (d) an organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of welfare for persons with a print disability.

(Added 15 of 2007 s. 13)

40B. Making a single accessible copy for a person with a print disability

- (1) If—
 - (a) a person with a print disability possesses a copy of the whole or part of a literary, dramatic, musical or artistic work (referred to in this section as “master copy”); and
 - (b) the master copy is not accessible to him because of the disability,it is not an infringement of copyright in the work or, in the case of a published edition, in the typographical arrangement, for one accessible copy of the master copy to be made by or on behalf of the person for his personal use.
- (2) Subsection (1) does not apply—
 - (a) if the master copy is an infringing copy;
 - (b) if the master copy is of a musical work or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of the work; or
 - (c) if the master copy is of a dramatic work or part of a dramatic work, and the making of an accessible copy would involve recording a performance of the work or part of the work.
- (3) Subsection (1) does not apply unless, at the time when the accessible copy is made by or on behalf of the person with a print disability, the maker of the copy is satisfied, after making reasonable enquiries, that copies of the relevant copyright work in a form that is accessible to the person cannot be obtained at a reasonable commercial price.
- (4) If a person makes an accessible copy on behalf of a person with a print disability under this section and charges for it, the sum charged must not exceed the cost incurred in making and supplying the copy.
- (5) Where an accessible copy which apart from this section would be an infringing copy is made or supplied in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy—
 - (a) for the purpose of that dealing; and
 - (b) if that dealing infringes copyright, for all subsequent purposes.
- (6) In subsection (5), “dealt with” (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

(Added 15 of 2007 s. 13)

40C. Making multiple accessible copies by specified bodies for persons with a print disability

- (1) If—
 - (a) a specified body possesses a copy of the whole or part of a commercial publication of a literary, dramatic, musical or artistic work (referred to in this section as “master copy”); and
 - (b) the master copy is not accessible to persons with a print disability,

it is not an infringement of copyright in the work or, in the case of a published edition, in the typographical arrangement, for the specified body to make for those persons or supply to those persons accessible copies of the master copy for their personal use.
- (2) Subsection (1) does not apply—
 - (a) if the master copy is an infringing copy;
 - (b) if the master copy is of a musical work or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of the work; or
 - (c) if the master copy is of a dramatic work or part of a dramatic work, and the making of an accessible copy would involve recording a performance of the work or part of the work.
- (3) Subsection (1) does not apply unless, at the time when the accessible copies are made, the specified body is satisfied, after making reasonable enquiries, that copies of the relevant copyright work in a form that is accessible to a person with a print disability cannot be obtained at a reasonable commercial price.
- (4) The specified body must—
 - (a) within a reasonable time before making or supplying the accessible copies, notify the relevant copyright owner of its intention to make or supply the accessible copies; or
 - (b) within a reasonable time after making or supplying the accessible copies, notify the relevant copyright owner of the fact that it has made or supplied the accessible copies.
- (5) The requirement under subsection (4) does not apply if the specified body cannot, after making reasonable enquiries, ascertain the identity and contact details of the relevant copyright owner.

- (6) If the specified body charges for making and supplying an accessible copy under this section, the sum charged must not exceed the cost incurred in making and supplying the copy.
- (7) Where an accessible copy which apart from this section would be an infringing copy is made or supplied in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy—
 - (a) for the purpose of that dealing; and
 - (b) if that dealing infringes copyright, for all subsequent purposes.
- (8) In subsection (7), “dealt with” (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

(Added 15 of 2007 s. 13)

40D. Intermediate copies

- (1) A specified body entitled to make accessible copies of a master copy under section 40C may possess an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but—
 - (a) the specified body may possess the intermediate copy only for the purpose of the production of further accessible copies; and
 - (b) the specified body must destroy the intermediate copy within 3 months after it is no longer required for that purpose.
- (2) An intermediate copy possessed otherwise than in accordance with subsection (1) is to be treated as an infringing copy.
- (3) A specified body may lend or transfer an intermediate copy possessed under subsection (1) to another specified body which is also entitled to make accessible copies of the relevant copyright work under section 40C.
- (4) The specified body must—
 - (a) within a reasonable time before lending or transferring the intermediate copy, notify the relevant copyright owner of its intention to lend or transfer the intermediate copy; or
 - (b) within a reasonable time after lending or transferring the intermediate copy, notify the relevant copyright owner of the fact that it has lent or transferred the intermediate copy.
- (5) The requirement under subsection (4) does not apply if the specified body cannot, after making reasonable enquiries, ascertain the identity and contact details of the relevant copyright owner.
- (6) If the specified body charges for lending or transferring an intermediate copy under this section, the sum charged must not exceed the cost incurred in lending or transferring the copy.
- (7) Where an intermediate copy which apart from this section would be an infringing copy is possessed, lent or transferred in accordance with this section but is subsequently dealt with, it is to be treated as an infringing copy—
 - (a) for the purpose of that dealing; and
 - (b) if that dealing infringes copyright, for all subsequent purposes.
- (8) In subsection (7), “dealt with” (被用以進行交易) means sold, let for hire, or offered or exposed for sale or hire.

(Added 15 of 2007 s. 13)

40E. Records to be kept by specified bodies

- (1) A specified body must make a record of any accessible copy made or supplied under section 40C as soon as practicable after it is made or supplied.
- (2) The record referred to in subsection (1) must include—
 - (a) the date on which the accessible copy is made or supplied;
 - (b) the form of the accessible copy;
 - (c) the title, publisher and edition of the relevant master copy;
 - (d) where the accessible copy is made for or supplied to a body or a class of persons, the name of the body or a description of the class of persons; and
 - (e) where more than one copy of the accessible copy is made or supplied, the total number of such copies.
- (3) A specified body must make a record of any intermediate copy lent or transferred under section 40D as soon as practicable after it is lent or transferred.
- (4) The record referred to in subsection (3) must include—
 - (a) the name of the specified body to which and the date on which the intermediate copy is lent or transferred;
 - (b) the form of the intermediate copy; and
 - (c) the title, publisher and edition of the relevant master copy.
- (5) A specified body must—
 - (a) retain any record made under subsection (1) or (3) for a period of at least 3 years after it is made; and
 - (b) allow the relevant copyright owner or a person acting for him, on giving reasonable notice, to inspect and make copies of the record at any reasonable time.

(Added 15 of 2007 s. 13)

40F. Supplementary provisions for sections 40A to 40E

- (1) This section supplements sections 40A to 40E.
- (2) A copy (other than an accessible copy made under section 40B or 40C) of a copyright work is taken to be accessible to a person with a print disability only if it is as accessible to him as it would be if he were not suffering from the disability.
- (3) An accessible copy of a copyright work may be in the form of—
 - (a) a sound recording of the work;
 - (b) a Braille, large-print or electronic version of the work; or
 - (c) any other specialized format of the work.
- (4) An accessible copy of a copyright work may include facilities for navigating around the version of the work but must not include—
 - (a) changes which are not necessary to overcome problems caused by a print disability; or
 - (b) changes which infringe the moral right of the author of the work conferred by section 92 not to have the work subjected to derogatory treatment.

(Added 15 of 2007 s. 13)

Appendix II

Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) (2013)

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) is the latest addition to the body of international copyright treaties administered by WIPO. It has a clear humanitarian and social development dimension and its main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired and otherwise print disabled (VIPs).

It requires Contracting Parties to introduce a standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of published works in formats designed to be accessible to VIPs, and to permit exchange of these works across borders by organizations that serve those beneficiaries.

The Treaty clarifies that beneficiary persons are those affected by a range of disabilities that interfere with the effective reading of printed material. The broad definition includes persons who are blind, visually impaired, or print disabled or persons with a physical disability that prevents them from holding and manipulating a book.

Works "in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media", including audio books, fall within the scope of the MVT regime.

Another important element is the role played by authorized entities, which are the organizations in charge of performing the cross-border exchange. The rather broad definition of the term encompasses many non-profit and government entities. They are either specifically authorized or "recognized" by the government as entities that provide many functions including education and information access to beneficiary persons. Authorized entities have the duty to establish and follow their own practices in several areas, including establishing that the persons they serve are beneficiary persons, providing services only to those persons, discouraging unauthorized uses of copies, and maintaining "due care" in handling copies of works.

The MVT has a clear structure and provides for specific rules regarding both domestic and cross-border limitations and exceptions.

First, it requires Contracting Parties to have a limitation or exception to domestic copyright law for VIPs. The rights subject to such limitation or exception are the right of reproduction, the right of distribution, and the right of making available to the public. Authorized entities may, on a non-profit basis, make accessible format copies, which can be distributed by non-commercial lending or by electronic communication; the conditions for this activity include having lawful access to the work, introducing only those changes needed to make the work accessible, and supplying the copies only for use by beneficiary persons. VIPs may also make a personal use copy where

they have lawful access to an accessible format copy of a work. At the domestic level countries can confine limitations or exceptions to those works that cannot be "obtained commercially under reasonable terms for beneficiary persons in that market." Use of this possibility requires notification to the WIPO Director General.

Second, the MVT requires Contracting Parties to allow the import and export of accessible format copies under certain conditions. Regarding importation, when an accessible format copy can be made pursuant to national law, a copy may also be imported without rightholder authorization. With reference to exportation, accessible format copies made under a limitation or exception or other law can be distributed or made available by an authorized entity to a beneficiary person or authorized entity in another Contracting Party. This specific limitation or exception requires the exclusive use of the works by beneficiary persons, and the MVT also clarifies that, prior to such distribution or making available, the authorized entity must not know or have reasonable grounds to know that the accessible format copy would be used by others.

The MVT leaves Contracting Parties the freedom to implement its provisions taking into account their own legal systems and practices, including determinations on "fair practices, dealings or uses", provided they comply with their three-step test obligations under other treaties. The three-step test is a basic principle used to determine whether or not an exception or limitation is permissible under the international norms on copyright and related rights. It includes three elements; any exception or limitation: (1) shall cover only certain special cases; (2) shall not conflict with the normal exploitation of the work; and (3) shall not unreasonably prejudice the legitimate interests of the rightholder.

There is no requirement to be a member of any other international copyright treaty to join the MVT; membership is open to Member States of WIPO and to the European Union. However, Contracting Parties that receive accessible format copies and do not have obligations to comply with the three-step test under Article 9 of the Berne Convention must ensure that accessible format copies are not redistributed outside their jurisdictions. Also cross-border transfer by authorized entities is not permitted unless the Contracting Party in which the copy is made is a party to the WIPO Copyright Treaty or otherwise applies the three-step test to limitations and exceptions implementing the MVT.

The MVT requires WIPO to establish an "information access point" to allow voluntary sharing of information facilitating the identification of authorized entities. WIPO is also invited to share information about the functioning of the Treaty. In addition, Contracting Parties undertake to assist their authorized entities engaged in cross-border transfer arrangements.

The Treaty establishes an Assembly of the Contracting Parties whose main task is to address matters concerning the maintenance and development of the Treaty. It also entrusts to the Secretariat of WIPO the administrative tasks concerning the Treaty.

The Treaty text was adopted on June 27, 2013 in Marrakesh. It achieved the deposit of 20 instruments of ratification or accession by eligible parties needed for entry into force on June 30, 2016. The Treaty date of entry into force is three months later, on September 30, 2016.

List of relevant papers

Date of meeting	Meeting	Paper
27/6/2006	Council	Report of the Bills Committee on Copyright (Amendment) Bill 2006 (LC Paper No. CB(1)1980/06-07)
25/2/2015	Council	Question No. 19 on "Amending Copyright Ordinance to make published works available in formats accessible to persons with print disabilities" raised by Hon Charles MOK (Hansard) (page 7144 – 7147)
9/12/2015	Council	Report of the Bills Committee on Copyright (Amendment) Bill 2014 (LC Paper No. CB(4)299/15-16)
18/10/2016	Panel on Commerce and Industry	Minutes of meeting (LC Paper No. CB(1)70/16-17)
20/12/2016	Panel on Commerce and Industry	Administration's paper on "Proposed creation of one Permanent Directorate Post of Assistant Director of Intellectual Property in the Intellectual Property Department" (LC Paper No. CB(1)311/16-17(03)) Extract of minutes of meeting on item V "Progress of implementation of the patents reform and review of the manpower support for the implementation" held on 15 November 2016 (LC Paper No. CB(1)311/16-17(04)) Background brief on progress of implementation of the patents reform prepared by the Legislative Council Secretariat (LC Paper No. CB(1)90/16-17(06)) Minutes of meeting (LC Paper No. CB(1)462/16-17)